**IN THE TWENTY-SEVENTH
JUDICIAL CIRCUIT COURT OF ALABAMA
MARSHALL COUNTY CIRCUIT COURT**

LARRY R. SMITH, Petitioner v. STATE OF ALABAMA, Respondent.	No. CC 95-200104

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner Larry R. Smith was convicted of capital murder on August 12, 1995 and sentenced to death on August 25, 1995. Following the completion of his direct appeals, Mr. Smith filed a Rule 32 Petition seeking relief in the form of a new trial based on, among other grounds, alleged ineffective assistance of counsel.[1] A hearing on Mr. Smith's Petition was held before this Court on November 6, 7 and 8, 2006 (the "November 2006 hearing"), where the

[1] Because the Court grants Petitioner's request for a new trial based on his claim of ineffective assistance of counsel, the Court need not and does not address Petitioner's other claims at this time.

Court heard live testimony from thirteen witnesses, including Mr. Smith's trial counsel.

The Court has considered the evidence submitted by the parties, made determinations as to its admissibility, relevancy and materiality; assessed the credibility of the testimony of the witnesses; and ascertained the probative significance of the evidence presented. Accordingly, upon the record before it, the Court finds the facts set forth below to have been proved by a preponderance of the evidence, and, based on those facts, reaches the conclusions of law that follow.

FINDINGS OF FACT

Background

1. On October 11, 1994, Petitioner Larry R. Smith was arrested for the murder of Dennis Harris. *Smith v. State*, 727 So.2d 147, 154 (Ala. Crim. App. 1998). Mr. Harris was last seen on September 23, 1994. *Id.* at 152. He was reported missing on September 29 and his body was discovered on October 3. *Id.*

2. In the days following Mr. Harris's disappearance, and continuing after the discovery of his body, investigators from the Marshall County Sheriff's Office (Mike Whitten) and the Albertville Police Department (Andy Whitten, Mike's brother) interviewed a series of individuals about the case. *Smith*, 757 So.2d at 153. These interviews were all recorded and the transcripts of the

interviews are contained in the Sheriff's investigative file, which is part of the underlying record in this case. (*See* Trial Record, Vol. 1, pp.25-143).

3. Mike and Andy Whitten and another police officer arrested Mr. Smith and his wife, Tanya Smith (who at the time was only 16 years old), for the Harris murder on October 11, 1994. (Trial Tr. 1077:15-17; 1375:7-11).[2] According to Mr. Smith's trial testimony, as he was being led to the police car, one of the officers said to him "We're going to fry your ass and we're going to give your wife 20 to 30 years." (*Id.* at 1375:11-13).

4. Following the arrest and once Mr. Smith and Tanya Smith had arrived at the Sheriff's Office, the Whittens conducted two separate interrogations of Mr. Smith. (Trial Tr. 1077:21-1078:2).

5. The first interrogation of Mr. Smith took place at some point between 2:20 PM (the time of Mr. Smith's approximate arrival at the police station according to his wife's Miranda waiver) and 5:45 PM (the time the second interrogation began). (Trial Tr. 1091:21-24). The first interrogation was never transcribed; according to testimony at trial, a tape recording was made but it was lost before Mr. Smith's trial and no record of its contents exists. (*Id.* at 1092:1-4). The second interrogation, which took place at 5:45 PM and which lasted less than

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[2] Citations to the 1995 trial transcript are indicated by "Trial Tr. _____." Citations to the transcript of the November 2006 hearing are indicated by "Hrg. Tr. _____."

ten minutes, was recorded and transcribed and contains Mr. Smith's alleged confession to the Harris murder. (Ex. 2).

6. Sometime after the second interrogation of Mr. Smith, Tanya Smith was released without being charged.

7. Mr. Smith was tried for the Harris murder in August 1995. The State's case against Mr. Smith is summarized by the Court of Criminal Appeals' opinion affirming Mr. Smith's conviction. *See Smith*, 727 So.2d at 152-154. This Court has reviewed that opinion and the underlying trial transcript.

8. The State's case against Mr. Smith was largely circumstantial. The State offered no eye-witness testimony, and no physical evidence that linked Mr. Smith to the Harris murder.[3] The State's case against Mr. Smith turned on

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[3] At the November 2006 hearing, the State's sole witness, Jack Daniel, testified on direct examination as follows:

> . . . [The State] couldn't produce a gun. Nobody knew where the gun was. They didn't have any forensics; any ballistics tying a bullet to a gun because they had no gun; they went out and tried to grasp at straws trying to get shell casings off a .22 in Pleasant Grove. And like I testified earlier, they went to Madison County to Ditto Landing and picked up some shell casings, which proved nothing. Even the forensic experts that they brought in after the ballistics expert, who examined the body and the placement of the body, said that the body was in such a state of decomposition, at the time that they went out there, they couldn't ascertain how long the body had been out there or what the cause of death was. So they don't even know what the cause of death was by a gun shot. They found a skull with a bullet hole in it, but they could not -- they could not pin down and I remember asking, I forget the guy's name, he was one of the experts, I tried to pin him down on whether or not he could tell us what the cause of death was and they couldn't tell us what the

(continued. . .)

the testimony of three individuals: First, Carl Cooper, an acquaintance of Mr. Smith and Mr. Harris, claimed Mr. Smith approached him with a plan to rob Mr. Harris of cash. *Smith*, 727 So.2d at 153. Mr. Cooper also claimed that he had seen Mr. Smith with a small-caliber pistol, which, he claimed, Mr. Smith had stolen. *Id.* Second, Kevin Harville testified that he had seen Mr. Smith and Mr. Harris together at Mr. Harris's residence on a Friday in September 1994. *Id.* The State inferred from Mr. Harville's testimony and asserted to the jury -- incorrectly, it turns out -- that he had seen the men together on Friday, September 23, 1994 -- the date Mr. Harris disappeared. (Trial Tr. 1471:19-21). Third, Mike Whitten, described the statement his brother Andy had taken from Mr. Smith in the second interrogation in which Mr. Smith allegedly confessed to the Harris murder. *Smith*, 727 So.2d at 154. Mr. Smith's counsel had sought to suppress the confession prior to trial, but that motion was denied. *Id.* at 162. Ultimately, the audio recording of the alleged confession was played for the jury at Mr. Smith's trial. (Trial Tr. 1416:17-19).

(. . . continued)

> cause of death was. They couldn't tell us how the bullet got into Dennis Harris's skull. They couldn't tell us who pulled the trigger because they couldn't find the gun. The only thing they had in this case was a flimsy, flimsy at best, illegally obtained confession that was obtained without benefit of Mirandas; it was obtained on the basis of complete coercion.

(Hrg. Tr. 419:24-421:1).

9. Mr. Smith was represented at trial by Jack Daniel, an attorney from Huntsville, Alabama. (Hrg. Tr. 393:11-14; 394:10-11).

10. Mr. Daniel was retained by Mr. Smith's aunt, Ruby Burkett, on February 24, 1995, nearly six months before the start of Mr. Smith's trial. (Hrg. Tr. 393:11-14; State's Ex. 1).[4]

11. To secure his services, Ms. Burkett agreed to pay Mr. Daniel a $25,000 minimum retainer -- the largest retainer Mr. Daniel had ever charged a client in a criminal case (Hrg. Tr. 486:1-13) -- plus $125 per hour if the time involved exceeded the retainer amount. (*Id.* at 443:17-444:9). In addition to his retainer fee, Mr. Daniel billed Ms. Burkett for paralegal expenses ($378 for 12.6 hours of time) and investigative expenses ($209 for five hours of time and related expenses). (Ex. 11). He also billed Ms. Burkett for copying costs ($187.76), long-distance telephone charges ($59.45) and other out-of-pocket expenses he says he incurred defending Mr. Smith. (Exs. 10, 11).

12. Pursuant to his agreement with Ms. Burkett, Mr. Daniel agreed to represent Mr. Smith "to the best of his professional ability." (State's Ex. 1).

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[4] The State introduced only a single exhibit at the November 2006 hearing and it is referred to herein as "State's Ex. 1." All other exhibits were introduced by Petitioner and are cited simply as "Ex. __."

13. According to Mr. Daniel's accounting, he did not receive payments from Ms. Burkett in a timely manner (Hrg. Tr. 450:1-8), and he became disturbed that Ms. Burkett was falling into arrears (*id.* at 455:1-4). Mr. Daniel expressed his unhappiness in a series of letters to Ms. Burkett, including one dated August 4, 1995, less than one week before the start of Mr. Smith's trial, which read in part as follows: "I cannot afford to bankroll this case. I do not need to face the next week worrying about your failure to reimburse me for these expenses rather than concentrating on the final preparation and actual presentation of Larry's trial." (*Id.* at 453:22-455:12; Ex. 11).

14. In his testimony before the Court during the November 2006 hearing, Mr. Daniel made a series of claims about his efforts to locate and talk to witnesses to aid Mr. Smith's defense against the State's charges. "We had a whole list of people," he said. "We were trying to find anybody and everybody who could tell us as much as they could about [the Harris murder]." (Hrg. Tr. 407:20-23). "[W]e undertook an investigation. We talked to a lot of people." (*Id.* 512:8-9). "[W]e talked to a lot of people, a lot of people. [Q:] And how many would you say a lot is? [A:] I can't even begin to give a number. It was a lot. I mean, we talked to everybody we could talk to save that boy's life." (*Id.* at 514:3-7). For the following reasons, the Court finds that Mr. Daniel's sweeping claims about his and others' efforts to find and talk to witnesses are not supported by the evidence.

a) Efforts by Mr. Daniel

15. None of the witnesses Mr. Smith called to testify at the November 2006 hearing -- with the exception of Mr. Smith's mother -- recalled meeting with or speaking to Mr. Daniel or any person in his employ, although they all indicated they were available and would have been willing to discuss the case in the months prior to the trial had they been approached. (Hrg. Tr. 297:23-298:6 (Sarah Johnson); 308:11-17 (Kevin Harville); 323:22-324:6 (Carrie Butler); 349:21-350:4 (Wanda Chambers); 369:9-370:1 (Ralph Willingham); 385:17-386:1 (Amber Steele); 557:7-558:12 (Roger Edgeworth)).

16. To rebut the evidence that Mr. Daniel conducted little or no pretrial investigation, the State called Mr. Daniel himself to testify. In his testimony, Mr. Daniel described his efforts on Mr. Smith's behalf only in the broadest generalities. When asked repeatedly, both in direct and on cross-examination, to identify the persons he spoke with, Mr. Daniel could provide neither the names of the persons he claims he spoke to nor any details about those conversations. (Hrg. Tr. 403:20-24; 512:6-10). Mr. Daniel produced neither copies of any lists of prospective witnesses nor interview notes from meetings with any witnesses from his files to support his sweeping, general claims. Mr. Daniel claimed such notes would have been taken during witness interviews and, if they existed, would have resided in his file. (*Id.* at 464:3-12).

17. Mr. Daniel initially said that he tried to "discover or investigate" "about 20" people as part of his pretrial investigation. (Hrg. Tr. 408:7-9). But later he equivocated, saying that while he thought he gave his investigator, Walter Spain, 20 names, "I don't know what we gave him." (*Id.* at 507:15-18). Mr. Daniel said initially: "We tried to talk to several people during that time. . . . A lot of these people tried to make themselves scarce. . . . They didn't want to talk to us." (*Id.* at 407:14-17). Later, when asked: "Did you ever have someone tell you they weren't going to talk to you about the case?" Mr. Daniel replied: "Not so much that we weren't going to talk, but, you know, they were just -- they were just real evasive." (*Id.* at 415:23-416:2).

18. At one point, Mr. Daniel admitted on cross examination that his investigation, if there was one, was quite limited:

> Q: Because of that confession, you didn't really believe there was much need to investigate other issues related to [Mr. Smith's] guilt, did you?
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> A: The way it looked on the face of it and through everything that we got, I mean, that was the case, I mean, you take a case apart and look at the ballistics. They didn't have any ballistics; forensic science end of it; the body; the way everything was --
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> Q: -- Just so we can keep the record clear, I take it that means that your focus in the investigation was on the confession?
>
> A: Right.
>
> Q: And not on other matters?

A: Right.

(Hrg. Tr. 460:23-461:11).

19. When Mr. Daniel did say he remembered speaking to a particular person, or investigating a particular fact, what he remembered was trial testimony -- not anything that occurred in his purported pretrial investigation. For example, when asked "Do you remember speaking with anyone named Amanda Elkins?" Mr. Daniel answered: "Yeah, she was on cross-examination, but I can't remember -- really remember what the gist of her testimony was." (Hrg. Tr. 417:12-16) (emphasis added). When asked "Do you remember speaking to [Ray Thomas]?" Mr. Daniel answered: "Yeah, and I believe that was -- there was some strange testimony in that case and I think he was one of the ones that he tried to insinuate that there was some kind of homosexual relationship going on between Mr. Harris and my client, which I thought was totally ridiculous." (*Id.* at 417:17-24) (emphasis added).[5] And when asked "Did you ever investigate the fact that someone may have loaned Larry money the day the victim disappeared to make a car payment?" Mr. Daniel answered: "There was some testimony about that, but I forgot who it was -- who gave that testimony." (*Id.* 418:18-23) (emphasis added). In each case, Mr. Daniel did not remember -- and his

[5] The testimony Mr. Daniel refers to was given by Kevin Harville, not Ray Thomas. (Trial Tr. 1038:23-1039:3). His mistake, however, does not alter the point, which is that he is referring to his memories of trial testimony, and not interviews or other efforts from any pretrial investigation.

testimony did not reflect -- that he conducted any pretrial investigation. He remembered only what happened at the trial itself.

20. The Court notes that one reason Mr. Daniel may have confused his purported pretrial investigation with the actual trial testimony of witnesses may be that he treated them as one and the same. As noted, the only witness to testify before this Court at the November 2006 hearing who had ever spoken to Mr. Daniel was Mr. Smith's mother, Sherry Miller. She was the first witness Mr. Daniel called during the defense case at the guilt-phase of Mr. Smith's trial. (Trial Tr. 1247:23-1248:2). Yet Mr. Daniel never met nor spoke with Ms. Miller until the morning that Mr. Smith's trial started. (Hrg. Tr. 529:12-22). And he spent no time preparing her for her testimony. (*Id.* at 530:2-6).

b) Efforts by people employed by Mr. Daniel

21. Mr. Daniel also claimed that he employed others to assist with the investigation and preparation of this case. The only persons employed by Mr. Daniel, however, were Jan Wilburn, Bridgette Browning, Angela Smith and Walter Spain. Of these, only Mr. Spain was involved in any pretrial investigative work. (Hrg. Tr. 456:10-22; 457:1-14; 476:2-477:3).

22. Jan Wilburn is Mr. Daniel's ex-wife. (Hrg. Tr. 476:7-8). According to Mr. Daniel, "[s]he handled the accounts, bookkeeping, some of the typing. Basically, she was the office manager at the time." (*Id.* at 476:10-12). Mr. Daniel conceded that Ms. Wilburn was not an investigator (*id.* at 476:13-14),

and the Court finds that she did not make any effort to locate or speak to any witnesses to prepare Mr. Smith's case.

23. Bridgette Browning worked as a legal assistant in Mr. Daniel's office. (Hrg. Tr. 476:15-16). Mr. Daniel described her as someone who "basically assisted me with the trial, she was hunting some people down." (*Id.* at 408:18-20). "Her main duty," he said, "was organizing the file trying to, you know, get potential witness prospects lined up, finding them; making phone calls and getting this -- helping get this case ready to go to court." (*Id.* at 410:6-10). That work, however, was performed at the trial itself -- it was not part of any pretrial investigation. (*Id.* at 464:21-24). The closest thing to an investigative function that Mr. Daniel suggested for Ms. Browning was looking into criminal backgrounds of witnesses, though no such background checks in this case were identified. (*Id.* at 476:20-477:3). Thus, as with Jan Wilburn, the Court finds that Ms. Browning did not make any effort to locate or speak to any witnesses to prepare Mr. Smith's case.

24. Angela Smith was a paralegal. (Hrg. Tr. 410:21-24). Her billing statement indicates she spent 12.6 hours working on Mr. Smith's case. (Ex. 11). That time was spent drafting pleadings and researching case law. (*Id.*) Ms. Smith's billing records do not indicate she spent any time investigating the facts and circumstances of this case and Mr. Daniel did not describe any efforts she made to do so. (*Id.*) Accordingly, the Court finds that Ms. Smith did not

make any effort to locate or speak to any witnesses to prepare Mr. Smith's case either.

c) Efforts by Walter Spain

25. The only investigator Mr. Daniel retained to work on Mr. Smith's case was Walter Spain. (Hrg. Tr. 459:9-11). Mr. Smith called Mr. Spain and the Court heard his testimony at the November 2006 hearing.

26. Mr. Spain had no meaningful investigative experience. He had never before investigated a criminal case, let alone a murder case. (Hrg. Tr. 34:20-22). His only prior law enforcement experience was as a patrolman in Homewood, Alabama for three months in 1962 -- over thirty years before his involvement in Mr. Smith's defense. (*Id.* at 35:4-14). He received no formal training for that position and never performed any investigative work. (*Id.* at 35:20-36:3). He described his duties simply as "patrol traffic, direct traffic, make tickets." (*Id.* at 35:17).

27. While working as an office assistant for Mr. Daniel, Mr. Spain founded the Eagle Eye Detective Agency. (Hrg. Tr. 38:3-8). Mr. Spain was Eagle Eye's only employee (*id.* at 38:9-11), and its principal business was as a process server in divorce actions for Mr. Daniel and other attorneys in Huntsville. (*Id.* at 38:6-8) Other than the work Mr. Spain did for Mr. Smith's case, he never performed any investigative work in any criminal matters. (*Id.* at 38:12-14).

28. Mr. Spain did not begin his investigation into the facts and circumstances of Mr. Smith's case until August 1, 1995 -- the week before the start of Mr. Smith's trial and five months after Mr. Daniel was retained as counsel. (Hrg. Tr. 42:9-11; Ex. 1). Some days prior to August 1, Mr. Daniel gave Mr. Spain a list of four to five persons to investigate, although neither Mr. Daniel nor Mr. Spain remember whose names were on that list. (*Id.* at 39:21-23; 42:17-18; 45:13-17; 46:18-23). According to Mr. Spain, Mr. Daniel expressly advised him not "to spend a lot of time on it." (*Id.* at 45:16-17).

29. On August 1, 1995, Mr. Spain spent one hour "on phone investigation to find out whether Ray Thomas was still at Barnett's Auto Repair and info on Overlook Motel & Apartments about owner, manager & other information." (Hrg. Tr. 41:24-42:4; Ex. 1). On August 3, 1995, Mr. Spain "spent 4 hours on trip to Guntersville and Albertville to interview Ray Thomas and owner of Overlook." (Hrg. Tr. 43:4-9; Ex. 1). The round trip driving distance was 112 miles and took approximately two of the four hours Mr. Spain spent working on Mr. Smith's case on August 3, 1995. (Hrg. Tr. 43:16-22). Accordingly, between August 1 and 3, 1995, Mr. Spain spent only approximately three hours total investigating for Mr. Smith's defense.

30. At no time did Mr. Spain ever speak to Mr. Smith about the case. (Hrg. Tr. 39:11-16). His work was limited to the approximately three hours he spent on August 1 and August 3, 1995, because Mr. Daniel told him "that's all

he needed." (*Id.* at 47:5). Mr. Spain submitted only the single bill (Ex. 1) for his work on Mr. Smith's case (*Id.* at 40:13-18; 41:17-20), and he said that if something was not reflected in that bill, then he did not do it. (*Id.* at 44:2-10).

31. The Court finds that the three hours plus driving time Mr. Spain spent investigating the facts and circumstances of this case represent the totality of Mr. Daniel's pretrial investigation.

d) Court assistance

32. Even though Mr. Smith was an indigent defendant who was having difficulty paying Mr. Daniel's bills, Mr. Daniel never sought money from the Court to pay for a professional investigator. He asserted (Hrg. Tr. 427:5-7) that the Court would not have granted such assistance because, he says, it capped the funds it was willing to make available for an investigator or other experts at $3,500, which Mr. Daniel spent on a jury expert.

33. Mr. Daniel later testified that he did not recall if he ever asked the Court for additional funds, but he said "If I did, it would be in the record." (Hrg. Tr. 519:15-16). There is nothing in the record of this case that such a request was made. Thus, this Court finds that Mr. Daniel made no effort to obtain additional funds from the Court. The Court further finds that Mr. Daniel's assertion that additional funds would not have been made available is not supported by the evidence..

2. The ABA and EJI guidelines for pretrial investigations to counsel in capital cases

34. In 1989, the American Bar Association adopted the GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (the "ABA Guidelines"). The Guidelines were intended to amplify "[ABA] positions on effective assistance of counsel in capital cases . . . [and] enumerate the minimal resources and practices necessary to provide effective assistance of counsel." (ABA Guidelines, Introduction).

35. The ABA Guidelines set forth an accepted standard of practice for the defense of capital cases. They are often cited by the U.S. Supreme Court and other courts as evidence of what constitutes effective assistance of counsel. *See e.g. Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (relying on 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982), a precursor to the ABA Guidelines); *Florida v. Nixon*, 543 U.S. 175, 191 (2004) (relying on the 2003 ABA Guidelines); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) ("Counsel's conduct . . . fell short of the standards for capital defense work articulated by the [ABA] standards to which we long have referred as guides for determining what is reasonable."); *Harris v. State*, No. CR-01-1748, 2004 WL 2418073, *42 (Ala. Crim. App. Oct. 29, 2004) (relying on 1989 ABA Guidelines), *overruled on other grounds by Ex parte Jenkins*, No. 1031313, 2005 WL 796809 (Ala. Apr. 8, 2005).

36. The ABA Guidelines emphasize the importance of a pretrial investigation when preparing a capital case. (*See* ABA Guidelines § 11.4.1). They recommend that, in conducting an investigation in a capital representation, counsel should look to the charging documents, potential witnesses, the police and prosecution, physical evidence, the crime scene and expert assistance. (*Id.*) They further instruct that counsel should conduct a pretrial investigation regardless of any admission or statement by the client concerning facts constituting guilt. (*Id.* at § 11.4.1(C))

37. The Equal Justice Initiative of Alabama ("EJI") also provides resources to attorneys representing capital defendants. Mr. Daniel received such resources from EJI, and claims to have relied on them. (Hrg. Tr. 433: 14-23).

38. EJI publishes a manual that serves as a comprehensive guide for attorneys representing capital defendants. The second edition of this manual, published in 1992, was the most current edition available at the time of Mr. Smith's trial. *See* ALA. CAPITAL REPRESENTATION RESOURCE CTR.,[6] ALABAMA CAPITAL DEFENSE TRIAL MANUAL (1992) (the "EJI Manual"). Like the ABA Guidelines, the EJI Manual stressed the importance of the pretrial investigation: "[E]xtensive pretrial investigation is absolutely crucial in a capital case." (*Id.* at 27). "[M]any a defense lawyer has failed in establishing that his client

[6] Prior to 1995, EJI was known as the Alabama Capital Representation Resource Center.

was not guilty of a capital crime by failing to investigate the state's case or develop a defense strategy." (*Id.*) "[I]t is the obligation of every lawyer to find out as much as possible about a case as soon as possible. . . . Counsel can never gather too many details concerning the facts and circumstances of each case." (*Id.* at 28). Moreover, the EJI Manual provided a sample motion to the court requesting funds for investigative expenses. (*Id.* at 112-119).

B. A Complete Pretrial Investigation Would Have Allowed Mr. Daniel to Examine Fully and Utilize Witnesses Who Did Testify and Also to Identify Additional Fact Witnesses Who Would Have Testified in Mr. Smith's Defense

39. Had Mr. Daniel conducted a reasonable pretrial investigation, the Court finds that he would have more fully examined witnesses, such as Kevin Harville and Sherry Miller, who testified at trial. The Court also finds that he would have located additional fact witnesses, such as Sarah Johnson and Roger Edgeworth, who would have aided Mr. Smith's defense. Each of these witnesses was available and willing to talk to Mr. Daniel in 1995 and, if necessary, would have testified at Mr. Smith's trial.

1. Kevin Harville

40. At trial, Mr. Smith presented evidence supporting an alibi defense. He described his activities on Friday, September 23, 1994, the day Mr. Harris disappeared, which included cashing his paycheck. paying on his rings, paying on a drug test, seeing his probation officer, and helping his mother-in-law

move. (Trial Tr. 1359:16-1368:2). He says he did not see Mr. Harris that day and had not seen him since at least the week before. (*Id.* at 1368:9-12).

41. Kevin Harville, testifying for the State at trial, said that he had seen Mr. Smith and Mr. Harris at Mr. Harris's residence at the Overlook Motel. (Trial Tr. 1033:3-7). But Mr. Harville did not remember on what date he had seen Mr. Smith with Mr. Harris; he knew only that it was on a Friday in September 1994. (*Id.* at 1036:16-18; Hrg. Tr. 305:1-4).

42. Mr. Harville knew Mr. Harris because Mr. Harris and Mr. Harville's wife were involved in an automobile accident in which Mr. Harville's truck was totaled. (Trial Tr. 1030:25-1031:3; Hrg. Tr. 300:9-13). Following the accident, Mr. Harris and Mr. Harville entered into an agreement by which Mr. Harris agreed to pay Mr. Harville $50 every week until the value of the truck was repaid. (Trial Tr. 1031:10-16).

43. Mr. Harville knew that he had seen Mr. Smith with Mr. Harris on a Friday because he knew Mr. Harris received his paycheck on Fridays and so that was the day of the week Mr. Harville would always go to collect money for his truck. (Trial Tr. 1031:17-1032:1; Hrg. Tr. 301:3-10).

44. Neither Mr. Daniel, Mr. Spain nor anyone working on Mr. Smith's behalf spoke to Mr. Harville prior to Mr. Smith's trial. (Hrg. Tr. 308:4-13). If they had tried to, Mr. Harville would have been willing to speak with them about the case (*id.* at 308:14-17) and he would have told them the following:

45. First, Mr. Harville would have said that on two successive Fridays after the day Mr. Harville saw Mr. Smith and Mr. Harris together at the Overlook Motel, Mr. Harville went to collect payments from Mr. Harris. (Hrg. Tr. 306:3-5). On both occasions, Mr. Harris did not answer his door and thus Mr. Harville could not collect his payment. (*Id.*)

46. Second, Mr. Harville would have said that a few days after his second failed attempt to collect payment from Mr. Harris, Mr. Harville learned that Mr. Harris was dead. (Hrg. Tr. 306:13-16). At about that same time, on October 5, 1994, Mr. Harville was questioned by police regarding Mr. Harris's death. (*Id.* at 301:24-302:1).

47. Third, if shown a calendar, Mr. Harville could have confirmed that the two successive Fridays prior to October 5, 1994 were September 30, 1994 and September 23, 1994. (Hrg. Tr. 307:11-25). The date that Mr. Harville saw Mr. Smith and Mr. Harris together was September 16, 1994, the Friday before his first failed attempt to collect payment from Mr. Harris. (*Id.* at 308:1-3). Mr. Harville did not see Mr. Smith or Mr. Harris on September 23, 1994.

48. Although it was not his testimony, at Mr. Smith's trial the prosecutor incorrectly asserted to the jury that Mr. Harville had seen Mr. Smith and Mr. Harris together at the Overlook Motel on September 23, 1994, the date on which Mr. Harris disappeared. (Trial Tr. 1471:19-21). Mr. Daniel did not object to the prosecutor's incorrect assertion or make any attempt to clarify

Mr. Harville's testimony at trial. No other evidence at trial suggested that Mr. Smith was with Mr. Harris on September 23.

2. Witnesses with knowledge undercutting the State's motive theory

49. Mr. Smith was charged with capital murder and, to meet its burden, the State had to show both intentional murder and robbery in the first degree. (Trial Tr. 1510:19-21). To make out the robbery element, the State argued that Mr. Smith robbed Mr. Harris of less than $200 in order to make a car payment. (*Id.* at 1467:7-10). Mr. Daniel made no effort to challenge the State's motive theory for the robbery and murder, although Mr. Smith had denied he had any reason to steal money from Mr. Harris. (*Id.* at 1376:14-1377:18). Had he done so, witnesses were available that put the State's motive theory into question.

a) Ralph Willingham

50. Ralph Willingham lived in the same apartment complex with Mr. Smith and his mother in September 1994. (Hrg. Tr. 356:12-13, 23-24). Mr. Willingham and Mr. Smith were friends and Mr. Willingham occasionally employed Mr. Smith in his welding business. (*Id.* at 356:20-21; 357:7-14).

51. Mr. Willingham was never contacted by Mr. Daniel or anyone in his employ. (Hrg. Tr. 369:9-370:1). If Mr. Daniel had tried to contact him, Mr. Willingham would have been willing to discuss the facts and circumstances of the case and to testify at trial. (*Id.* at 370:2-4).

52. In particular, Mr. Willingham would have said that he trusted Mr. Smith with a key to his apartment (Hrg. Tr. 358:2-14); that he kept $100-$200 on hand in his apartment, which he used to acquire materials for his welding business (*id.* at 364:22-365:6); and that Mr. Smith knew that Mr. Willingham kept this money, knew where it was located, and could have borrowed from it whenever he needed to, including around the time Dennis Harris disappeared. (*Id.* at 365:10-366:6).

b) Amber Steele

53. Amber Steele also lived in the same apartment complex with Mr. Smith in September 1994. (Hrg. Tr. 376:18-20). Although Ms. Steele knew Mr. Smith, they were not friends. (*Id.* at 384:20-25).

54. Ms. Steele also was never contacted by Mr. Daniel or anyone in his employ. (Hrg. Tr. 385:20-386:1). If he had tried to contact her, she would have been willing to discuss the facts and circumstances of the case and to testify at trial. (*Id.* at 386:18-22).

55. In particular, Ms. Steele would have said that in September 1994 her husband lost his wallet. (Hrg. Tr. 383:16). The wallet held $800, which Ms. Steele and her husband had just collected from their tax refund and which they intended to use as a down-payment on a car. (*Id.* at 383:18-384:2). Mr. Smith found the wallet and returned it to Ms. Steele and her husband with all of the money still in it. (*Id.* at 383:16-19). And although Ms. Steele and her

husband offered Mr. Smith a $50-$100 cash reward to thank him for returning the wallet, Mr. Smith declined their offer. (*Id.* at 383:19-21).

3. Witnesses with knowledge pointing to third-party guilt

56. Mr. Daniel believed that someone other than Mr. Smith was responsible for the Harris murder. He thought the most likely alternative suspect was Carl Cooper. (Hrg. Tr. 405:3-9).

57. In his testimony, Mr. Daniel expressed his desire to investigate Carl Cooper. For example, asked whether he conducted "an investigation into Carl Cooper's criminal background," Mr. Daniel said "I believe we tried to look into it." (Hrg. Tr. 474:6-9) (emphasis added). He claimed that he "wanted [Walter Spain] to go out and find as much as he could about the relationship between Carl Cooper and Dennis Harris." (*Id.* at 409:2-4) (emphasis added). And he asserted that he "thinks we tried" but he could not say whether he or his investigator had been able to get in touch with Mr. Cooper's ex-wife, Sarah Johnson. (*Id.* at 407:12-20) (emphasis added). As noted (FF ¶ 15), Ms. Johnson testified at the November 2006 hearing that she was never contacted by Mr. Daniel or anyone working for him.

58. Whatever Mr. Daniel's hopes and despite his suspicions, the Court finds that he did not make a meaningful effort to investigate Carl Cooper's -- or any other third party's -- likely involvement in the Harris murder. No records from his files of any criminal background checks of Mr. Cooper were ever

introduced. Mr. Spain's billing records reflect no effort to investigate Mr. Cooper (Ex. 1), and Mr. Spain himself had no memory of trying to do so (Hrg. Tr. 39:17-19). Further, as detailed below, Sarah Johnson and other witnesses with knowledge of evidence implicating Mr. Cooper and another potential suspect, Brian Fox, were available to talk to Mr. Daniel in the summer of 1995 and would have been willing to do so, but they were never contacted.

59. Instead, it appears that Mr. Daniel intended to rely on Mr. Smith's 16 year old wife to testify and to implicate Carl Cooper. Mr. Daniel provided no details about what knowledge he thought Tanya Smith had implicating Mr. Cooper. He simply professed "hope" that "she would help me point the finger [at Mr. Cooper] because I still to this day don't think Larry Smith committed that murder." (Hrg. Tr. 412:18-20). Mr. Daniel continued: "[Tanya Smith] was present when [Mr. Cooper] said certain things and I can't remember right now what exactly they were. . . . But they would have been of an incriminating nature and would not have been hearsay. . . . It concerned Dennis Harris and, you know, basically going over and holding him up, I believe is what it was about." (*Id.* at 413:2-14). The jury never heard anything about this possible defense, however, because, according to Mr. Daniel, Tanya Smith refused to testify at the trial (*id.* at 414:18-19), and Mr. Daniel had not located any other witness who might testify to Mr. Cooper's involvement in the Harris murder.

a) Sarah (Cooper) Johnson

60. Sarah Johnson was a known witness in the case, and Mr. Daniel says he tried to contact her, though the record suggests otherwise. (FF ¶ 57). At the time of Mr. Harris's murder, she was married to Carl Cooper. (Hrg. Tr. 241:4-5). Through her husband, she was an acquaintance of Mr. Smith and his wife Tanya. (*Id.* at 241:25-242:1). And she had given a statement to Mike Whitten during the Sheriff's Office's original investigation into the Harris murder. (Ex. 6).

61. Had Ms. Johnson been approached by Mr. Daniel or someone in his employ during the summer of 1995, she would have been willing to discuss with him the facts and circumstances of the case. (Hrg. Tr. 297:23-298:6). In particular, she would have told him the following:

62. First, Ms. Johnson would have said that in September 1994, she and her husband were having severe money problems. (Hrg. Tr. 250:1-10). Ms. Johnson would have also said that, at about that same time, in a conversation at her house between Carl Cooper, herself and Larry and Tanya Smith, Mr. Cooper proposed the idea of robbing Dennis Harris. (*Id.* at 249:5-14). Mr. Smith was dismissive of the idea because "he didn't have to do anything [to] Dennis to receive money from him, because he was [a] good friend and he would help [Mr. Smith] out at any time." (*Id.* at 249:15-22). (The Court notes that this

matches the description of the conversation Mr. Daniel says Tanya Smith had described to him. (FF ¶ 59).)

63. Second, Ms. Johnson would have said that in July 1994, Carl Cooper bought a small handgun from a pawnshop. (Hrg. Tr. 251:18-19, 252:9-17).

64. Third, Ms. Johnson would have said that Carl Cooper was unusually interested in the newspaper coverage of the discovery of Dennis Harris's body. (Hrg. Tr. 253:6-11).

65. Fourth, Ms. Johnson would have said that after reading about the Harris murder in the newspaper, Carl Cooper called the Sheriff's Office and spoke to Mike Whitten (Hrg. Tr. 254:21-24) and that Mike Whitten came to their home and took Mr. Cooper and Ms. Johnson to the Sheriff's Office for an interview (*id.* at 255:1-10). Before Mike Whitten arrived at their home, however, Ms. Johnson says Mr. Cooper threatened her, telling her that "if [she] ever went against him that he would kill her parents and then kill her." (*Id.* at 256:23-24).

66. Fifth, Ms. Johnson would have said that at the Sheriff's Office Mike Whitten spoke to both Carl Cooper and her together -- he did not separate them to take their statements. Mr. Cooper gave his statement first, while Ms. Johnson sat next to him and listened (Hrg Tr. 259:19-24); and Ms. Johnson gave her statement second, with Mr. Cooper seated directly behind her, listening (*id.* at 260:4-8).

67. Sixth, Ms. Johnson would have said that because of the threats Carl Cooper made against her and her family, and because he was seated immediately behind her while she was being interviewed by Mike Whitten, she did not answer Mike Whitten's questions truthfully. (Hrg. Tr. 262:4-6). Instead she gave the answers she thought Mr. Cooper wanted her to give. (*Id.* at 262:8-9).

68. Seventh, Ms. Johnson would have said that she based her statement to Mike Whitten on what Carl Cooper had told him immediately before she gave her statement and that in places where she implicated Mr. Smith, she was substituting his name for her husband's. (Hrg. Tr. 261:19-21).

69. Eighth, Ms. Johnson testified, credibly, in the Court's view, that had she testified at trial, she would have corrected her earlier statement to the police by offering the following truthful information: (A) She never heard Mr. Smith suggest robbing Dennis Harris (*id.* at 263:15-264:3; 266:4-267:11); the only person she heard make that suggestion was Carl Cooper (*id.* at 261:20-21; 266:8-9). (B) She never saw Mr. Smith with a gun (*id.* at 264:6-18); rather, the gun and holster she had described in her statement belonged to Mr. Cooper. (C) She never heard Mr. Smith say he stole a gun from Larry Moffett (*id.* at 265:22-266:1), rather, she was simply parroting what Mr. Cooper had said in his statement.

70. Ninth, Ms. Johnson would have said that on Friday, September 23, 1994, the day that Dennis Harris disappeared, Carl Cooper was gone from their apartment for much of the afternoon and evening. (Hrg. Tr. at

271:4-9). When he arrived home, Mr. Cooper was wet and muddy; his pants were torn at the knee and his sweatshirt was torn at the shoulder. (*Id.* at 273:10-17; 274:18-275:7). Mr. Cooper's only explanation for his appearance was that he had been attacked by a pack of dogs. (*Id.* at 276:13-15). After returning home, he took off his torn and muddy clothes and put them in a bag, which he took out of their apartment. (*Id.* at 276:22-277:4).

71. Although Ms. Johnson felt threatened by Carl Cooper and had been afraid for her and her family's lives when she gave what she says was an untruthful statement to police in October 1994, she testified that by the summer of 1995 she would have been willing to tell the truth to investigators and at trial. (Hrg. Tr. 279:10-20). That is because in February 1995, Ms. Johnson left Mr. Cooper after he had broken their one-month-old daughter's arm. (*Id.* at 279:16-17). Ms. Johnson promptly filed charges against Mr. Cooper for child abuse and domestic abuse (*id.* at 295:9-18) and secured her divorce by April 1995. (*Id.* at 294:6-10).[7] She had no other contact with Mr. Cooper after that point. (*Id.* at 278:12-13). The Court finds Ms. Johnson's testimony concerning her availability and willingness to cooperate with the defense, had she been approached, to be credible.

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[7] Mr. Daniel knew that Carl Cooper had broken his daughter's arm and either knew or suspected that his testimony in Mr. Smith's case hinged on a deal he had struck to avoid prosecution for child abuse. (Hrg. Tr. 405:17-406:7).

b) Carrie Butler

72. Mr. Daniel also could have found Carrie Butler. Ms. Butler never spoke with Mr. Daniel or anyone in his employ. If Mr. Daniel had tried to speak to Ms. Butler, she would have been willing to discuss the facts and circumstances of Mr. Smith's case. (Hrg. Tr. 323:22-324:6).

73. Ms. Butler would have confirmed the close relationship between Brian Fox and Carl Cooper. The two men visited her house seven to ten times in 1993 (Hrg. Tr. 316:1). Brian Fox was one of the last three people known to have been seen with Mr. Harris prior to his disappearance. (*Id.* at 68:19-69:6; 481:12-18).

74. Ms. Butler was a close friend of Dennis Harris's. (Hrg. Tr. 309:20-22; 310:17-18). She would have told Mr. Daniel that, on two occasions, she had observed Brian Fox and Carl Cooper hanging out outside Mr. Harris's residence at the Overlook Motel while she was there with Mr. Harris. (*Id.* at 317:16-318:5). On the latter of those two occasions, she said that Mr. Harris appeared "agitated and nervous" upon seeing Mr. Fox and Mr. Cooper. (*Id.* at 322:11-15).

c) Wanda Chambers

75. Another witness Mr. Daniel could have found was Wanda Chambers. In the summer of 1995, Ms. Chambers was married to Chris Kimblee (Hrg. Tr. 334:7-9), one of the last three people known to be with Mr. Harris on

the night before he disappeared. Ms. Chambers also knew Brian Fox, who worked with Mr. Harris and Mr. Kimblee (*Id.* at 333:21-22; 334:12-13) and who was also one of the last three people known to be with Mr. Harris on the night before he disappeared. Through Mr. Fox, Ms. Chambers was briefly introduced to Carl Cooper by his nickname "Skip". (*Id.* at 338:10-22).

76. Ms. Chambers never spoke with Mr. Daniel or anyone in his employ. (Hrg. Tr. 349:21-350:4). If Mr. Daniel had tried to speak to Ms. Chambers, she would have been willing to discuss the facts and circumstances of Mr. Smith's case. (*Id.*)

77. Proximate in time to Dennis Harris's murder, Ms. Chambers claims that she overheard a telephone conversation between Brian Fox and a second man. She identified the second man as Carl Cooper because she heard Mr. Fox refer to him in the conversation as "Skip". (Hrg. Tr. 346:5-7). As she listened, she says she overheard the two men discuss framing Smith and Kimblee for a crime. (*Id.* at 344:15-345:12).

78. The Court finds that Ms. Chambers' recollection of the telephone call she overheard is too equivocal; her recollection of the conversation does not clearly implicate Carl Cooper or Brian Fox and does not clearly exculpate Mr. Smith. Accordingly, the Court accepts her testimony only to the extent it might have spurred additional follow-up work into Mr. Cooper's or Mr. Fox's involvement in the Harris murder as part of a reasonable investigation.

This follow-up work may well have included meeting with one or more of the other witnesses presented by Mr. Smith at the evidentiary hearing.

d) Sherry Miller

79. Mr. Daniel did call Mr. Smith's mother, Sherry Miller (then Sherry Hovies), as a witness at the trial. (Trial Tr. 1248:14-15). As noted previously, however, he spent no time preparing her (Hrg. Tr. 530:2-6), and did not even meet her until the morning the trial started. (*Id.* at 529:12-13).

80. At Mr. Smith's trial, Ms. Miller testified that Carl Cooper had come to her home on the evening of September 23, 1994. (Trial Tr. 1253:8-9). She described him as "out of breath . . . like he had been running" and nervous. (*Id.* at 1253:12-14, 1254:18-22).

81. If Mr. Daniel had spent time preparing Ms. Miller, she would have provided him greater detail about her meeting with Carl Cooper that night that is consistent with the testimony Sarah Johnson would have given. (*See* FF ¶ 70). Ms. Miller would have told him, for example, that, in addition to being "out of breath," Mr. Cooper was "soaking wet and his feet were muddy." (Hrg. Tr. 540:15-19).

C. A Complete Pretrial Investigation Would Have Allowed Mr. Daniel to Identify Appropriate Expert Witnesses Who Would Have Aided Mr. Smith's Defense

82. Mr. Daniel recognized that the key piece of evidence against Mr. Smith was the alleged confession. In his words, "That was [the State's] entire

case. They had nothing else. They had absolutely nothing. They had no forensic evidence whatsoever. I mean they were grasping at straws. . . ." (Hrg. Tr. 399:13-16). He later added: "The only thing they had in this case was a flimsy, flimsy at best, illegally obtained confession that was obtained without benefit of Mirandas; it was obtained on the basis of complete coercion." (*Id.* at 420:22-421:1). "It became blatantly clear that if you -- if the confession was gone, the case was gone." (*Id.* at 434:4-5).

83. Mr. Daniel believed the alleged confession was coerced and should have been excluded. (Hrg. Tr. 398:19-399:3). He thought the police scared Mr. Smith into making a statement that was untrue. (*Id.* at 421:1-15) (*see also* FF ¶ 3).[8]

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[8] Mr. Daniel explained his belief as follows:

> [The police] scared [Mr. Smith] into making a statement and as long as I live I will remember one thing. If I don't remember anything about another case that I've ever tried, the Friday we tried that case, we were back in a room and I looked at Larry and I said, "You know, they're probably going to offer manslaughter on this thing, but you're going to have to go out there and you're going to say that you went out there with Dennis and he said something bad about Tanya an you just lost it an you shot him and I said, well you know I could ask for manslaughter, but you'd probably get six years." He looked at me right in the eye and he had tears in his eyes and he said, "They may put me in the electric chair, but I'm not going to go out there and tell those people that I killed somebody I didn't kill." . . . And he wasn't lying.

(Hrg. Tr. 421:1-17).

84. Mr. Daniel had moved for the exclusion of the alleged confession on various grounds, but those motions were denied. *Smith*, 727 So.2d at 162. The admissibility of the confession is not at issue here and the Court makes no findings, factual or legal, concerning its admissibility. The Court, however, finds that once it was determined that the alleged confession was admissible and would be heard by the jury, there were avenues available by which Mr. Daniel could nonetheless have challenged the alleged confession's credibility before the jury.

85. As a prime example, Mr. Daniel appears to have neglected entirely the issues raised by the absence of any record of the first interrogation of Mr. Smith after Mr. Smith's arrest (FF ¶ 5), and the flaws in the second interrogation of Mr. Smith that constituted the alleged confession. (*Id.*) Testimony at the November 2006 hearing established that this was fertile ground to plow, through the testimony of a qualified expert in police procedures.

86. Prevailing professional norms in 1995 encouraged the use of appropriate experts by defense counsel in capital cases. According to the 1992 EJI Manual, for example, "[i]t is critical that trial counsel creatively utilize defense experts in preparing and presenting the defense. In addition to using experts for rebuttal testimony or for presenting an affirmative defense, consulting with specialists can reveal new and imaginative theories of a case." (EJI Manual, p.83). The ABA Guidelines similarly urge counsel to "secure the assistance of experts

where it is necessary or appropriate for: (A) preparation of the defense; (B) adequate understanding of the prosecution's case; (C) rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial; [and] (D) presentation of mitigation." (ABA Guidelines § 11.4.1(C)(7)).

1. W.T. Gaut: Expert on police investigative procedures

87. At the November 2006 hearing, Mr. Smith offered the expert testimony of W.T. Gaut (Hrg. Tr. 97:16-17), who the Court admitted as an expert witness on police officer training and practices, as proscribed by the Alabama Minimum Standards and Training Act. (*Id.* at 141:1-5). Mr. Daniel did not present Mr. Gaut or any similar expert at Mr. Smith's trial. (*Id.* at 496:17-24).

88. The Alabama Minimum Standards and Training Act (the "Standards Act") provides that "officers who are hired in the State of Alabama are all required by statute to go to a specified type of training school where the police subjects are standardized in the sense that certain subject matter is covered." (Hrg. Tr. 99:5-9). The Standards Act assures that training "is uniform for all police officers throughout the state of Alabama." (*Id.* at 99:11-12). The standards apply to officer training throughout the state of Alabama, including in Marshall County. (*Id.* at 101:1-17). They have been in place since at least 1975. (*Id.* at 101:20-21).

89. Mr. Gaut is an expert on the standards in the field of police interrogation procedures and how officers working in Alabama in 1994 and 1995

were trained under those standards. (Hrg. Tr. 141:1-5). In 1971, Mr. Gaut served on a committee charged with "formulating the standards for training for police officers within the State of Alabama." (*Id.* at 100:15-25).

90. In addition to his work on the standards, Mr. Gaut has fourteen years experience as a police detective in Birmingham, Alabama, during which time he investigated approximately 250-300 murder cases. (Hrg. Tr. 102:15-103:4). He spent one year as the Chief of Detectives in Birmingham during which time he oversaw the investigation of approximately 130 murder cases. (*Id.* at 109:6-9). Mr. Gaut also has 33 years experience as an instructor of police investigative procedure in Alabama. (*Id.* at 112:13-16). The State did not dispute the accuracy of Mr. Gaut's *curriculum vitae*. (Ex. 4) (Hrg. Tr. 205:1-9).

91. Mr. Gaut explained that officers in Alabama are trained always to interview witnesses separately. (Hrg. Tr. 125:5-15). Officers are trained to do this to protect the reliability of statements taken from witnesses, by ensuring that witness statements reflect the independent observation of witnesses and are not influenced by other witnesses or individuals. (*Id.* at 126:6-20).

92. The officers investigating the Harris murder did not practice this procedure when they interviewed Carl Cooper and his wife Sarah Johnson together. (Hrg. Tr. 259:22-260:8). Ms. Johnson said that her statement to police was inaccurate because she had been threatened in advance by Mr. Cooper not to contradict him. (*Id.* at 256:23-24; 262:7-9). As a result, she listened as Mr. Cooper

gave his statement. (*Id.* at 259:19-24). She said she then largely repeated what Mr. Cooper had said in her own statement, which she gave as Mr. Cooper sat behind her making coughing and other noises at points where Ms. Johnson understood he expected her to make sure her story was consistent with his. (*Id.* at 260:4-20). Mr. Gaut cited intimidation as a principal concern and a reason why officers are trained to question witnesses separately. (*Id.* at 126:15-17).

93. Mr. Gaut next explained that officers in Alabama are trained to ask non-leading questions when interviewing or interrogating witnesses or suspects. (Hrg. Tr. 132:1-14). This is to ensure that witness statements accurately reflect the recollection of the individual giving the statement rather than the views of the officer asking the questions. (*Id.* at 131:24-132:21). Leading questions suggest the answers to questions and merely require a witness or suspect to agree. Thus, they can render the statement susceptible to inaccuracies. (*Id.* at 132:15-21).

94. Mr. Gaut cited several examples where leading questions were used in the second interrogation of Mr. Smith. For example, Mr. Gaut noted that Mr. Smith, in the alleged confession, provided no detail about the shooting of Mr. Harris, but instead only answered affirmatively to a series of leading questions posed by Andy Whitten. (Hrg. Tr. 143:21-144:2 (referring to Ex. 2 at 2)). Mr. Gaut noted that Mr. Smith had trouble describing the location of the murder and was cut off by the interviewing officer when his description was deemed "close enough." (*Id.* at 207:16-19). Mr. Gaut also noted that Mr. Smith did not

know what time of day the murder occurred and instead responded only to leading questions: "Was it before lunch? Was it daylight?" (*Id.* at 213:3-12 (referring to Ex. 2 at 6)).

95. Mr. Gaut further explained that officers in Alabama are trained to record interviews and interrogations of witnesses and suspects. (Hrg. Tr. 212:9-15). They are taught this to ensure "the credibility and reliability" of those interviews and interrogations, "and to eliminate the appearance of deception." (*Id.* at 233:16-17). Police work is frequently subject to judicial scrutiny and thus transcriptions are important to facilitate review. Mr. Gaut himself testified as to an incident when he failed to record an entire interview with a witness, leading to the statement's suppression by a court. (*Id.* at 220-24, discussing *Rincher v. State*, 632 So.2d 37 (Ala. Crim. App. 1993)).

96. While interviews and interrogations of witnesses in this case were generally recorded by the investigating officers, Mr. Gaut noted that the absence of a transcription of the first interrogation of Mr. Smith (FF ¶ 5) was a glaring departure from procedure. (Hrg. Tr. 211:6-17).

97. Since at least 1985, Mr. Gaut has provided expert advice and testimony to trial attorneys, including prosecutors, in criminal matters. (Hrg. Tr. 111:22-112:4). In 1994 and 1995, Mr. Gaut was dividing his time between Denver, North Carolina and Warrior, Alabama. (*Id.* at 215:13-17). Although not working in law enforcement at that time, Mr. Gaut continued to provide expert

advice in criminal matters. (*Id.* at 215:20-23). He was listed in the National Directory of Expert Witnesses and maintained a web site. (*Id.* at 216:5-19). Given these facts and his former position with the Birmingham police department, the Court is confident that Mr. Gaut was known in the state to EJI and to experienced lawyers and law enforcement officials, and that he could have been located.

98. The Court finds that at the time of Mr. Smith's trial, Mr. Gaut was available in order to provide information and testimony that would have allowed Mr. Daniel to undermine to the jury the credibility of Mr. Smith's alleged confession. (Hrg. Tr. 113:1-12). His testimony would also have been valuable in showing that the original statement to the police by Carl Cooper's former wife, Sarah Johnson, was taken in a highly flawed manner that led to it being deceptive. Had Mr. Daniel interviewed Ms. Johnson and had her testify at trial, this testimony from Mr. Gaut would have been extremely important.

99. Mr. Daniel was not an expert on police procedures (Hrg. Tr. 496:10-16), and he did not retain experts on police procedures to assist in the defense of Mr. Smith. (*Id.* at 496:17-20). Although Mr. Daniel claimed he was "knowledgeable" about police procedures (*id.* at 524:6-10), the trial record fails to show that Mr. Daniel challenged the State's failure to preserve a recording or transcript of Mr. Smith's first post-arrest interrogation. Mr. Daniel also failed to make any effort or offer any argument that this breach in police procedure, which

Mr. Gaut testified was highly unusual (*id.* at 211:6-13), severely undermined the credibility of Mr. Smith's alleged confession taken in the second post-arrest police interrogation.

2. Richard Leo: Expert on false confessions

100. There were other avenues beyond the procedural aspects open to Mr. Daniel to call into question Mr. Smith's alleged confession. A reasonably competent capital murder defense attorney would also have presented expert testimony to suggest that Mr. Smith's confession was false.

101. The subject of false confessions has been studied from the early part of the 1900s, and in the 1980s became a prominent field of study among psychologists, sociologists and others interested in the field of criminal law. (Hrg. Tr. 166:21-167:5). The EJI Manual, which Mr. Daniel says he relied on, specifically identifies available resources on the subject. (EJI Manual, p.627) (referencing the text Criminal Interrogation and Confessions by Fred E. Inbau, John E. Reid, Joseph P. Buckley (3rd ed. 1986)).[9] Despite this, Mr. Daniel seemed unfamiliar with this topic and the existence of possible expert witnesses in this area. (Hrg. Tr. 421:19-25). When asked if he knew whether there were experts available to testify in 1995 about false confessions, Mr. Daniel said "I don't recall.

[9] Dr. Leo also testified about a textbook entitled The Psychology of Interrogations, Confessions, and Testimony. (Hrg. Tr. 167:20-23). Since this book was published in 1992, it too would have been available to Mr. Daniel at the time of the trial. This textbook contained a bibliography of 800 to 1000 entries identifying other authors (and potential experts) available on this subject. (*Id.*).

I don't believe so." (*Id.* at 498:19-23; *see also id.* at 497:17-20). Mr. Daniel had never before tried to prove that a confession in a case was false. (*Id.* at 498:16-18).

102. At the November 2006 hearing, Mr. Smith offered the testimony of Dr. Richard Leo who is an expert in the social scientific study of false confessions. The Court accepts Dr. Leo as an expert in this field of study and finds that he could have so qualified in August 1995.

103. Dr. Leo has published numerous peer-reviewed articles concerning the social scientific study of false confessions, including articles published before Mr. Smith's trial in August 1995. (Hrg. Tr. 165:14-166:12). Dr. Leo also was familiar with the work of other scholars discussing the phenomenon of false confessions, both as that field exists currently and as it existed at the time of Mr. Smith's trial in August 1995. (*Id.* at 166:13-167:23). Dr. Leo has taught university-level courses concerning the social scientific study of false confessions, including courses before Mr. Smith's trial in August 1995. (*Id.* at 167:24-168:9). The State did not dispute the accuracy of Dr. Leo's *curriculum vitae*. (Ex. 3) (Hrg. Tr. 164:1-3).

104. Dr. Leo has testified as an expert witness on more than 130 occasions. Of those 130 occasions, approximately 80 to 85 included testimony on the subject of false confessions. (Hrg. Tr. 168:10-169:9). Dr. Leo has testified in the State of Alabama on three occasions. (*Id.* at 169:10-13). The first occasion

was in 1999, in a matter pending in military court entitled *United States v. Stephanie R. Traum.* (*Id.* at 169:16-19; 170:1-5). The second occasion was in January 2003, in the Choctaw County Circuit Court, in a case entitled *State of Alabama v. Medel Banks.* (*Id.* at 169:19-21; 170:6-8). The third occasion was in March 2004, in the Fifteenth Judicial Circuit in Montgomery, in a case entitled *State of Alabama v. William Bush.* (*Id.* at 169:21-23; 179:9-11). In both the *Traum* and *Banks* cases Dr. Leo proffered expert opinions concerning the phenomenon of false confessions. (*Id.* at 170:12-17).

105. At the time of Mr. Smith's trial in August 1995, Dr. Leo could have proffered the following four expert opinions:

106. First, the phenomenon of false confessions exists, including in capital prosecutions (Hrg. Tr. 173:15-19), as documented in verifiably false confessions (*id.* at 174:12-14; 177:3-6). A verifiable false confession is a confession that is provably false either because it was impossible that the confessor committed the crime, scientific evidence, such as DNA establishes the confessor did not commit the crime, the crime never occurred, or the true perpetrator comes forward. (*Id.* at 175:21-176:16).

107. Second, by an empirical examination of verifiably false confessions, an expert working in the field may identify common earmarks and patterns in the facts underlying false confessions. Those earmarks and patterns had been so identified by August 1995. (Hrg. Tr. 178:3-8; 179:22-181:8).

108. Third, Dr. Leo testified that at least three of these earmarks and patterns were present in Mr. Smith's alleged confession: (1) threats and/or implied promises (a possible motive for Mr. Smith to give a false confession was to save his wife from potential criminal liability) (Hrg. Tr. 183:25-184:12) (*see also* FF ¶ 3); (2) absence of knowledge/leading questions during the interrogation (on several occasions during the second interrogation the police questioned Mr. Smith in a manner that suggested the desired answer, such as questions about how many times the victim was shot (Ex. 2 at 2) and when the crime occurred (Ex. 2 at 6); this method of questioning did not establish Mr. Smith's independent knowledge of the events) (Hrg. Tr. 184:14-23) (*see also* FF ¶¶ 93, 94); and (3) lack of a full recording of both interrogations (Mr. Smith was at the police station for over three hours, yet only the second, nine minute interrogation containing his alleged confession was transcribed) (Hrg. Tr. 186:12-187:5) (*see also* FF ¶ 5, 95, 96).

109. Fourth, Dr. Leo explained that confession evidence has a very significant impact on a jury. (Hrg. Tr. 187:24-188:25).

110. Dr. Leo emphasized that his analysis of Mr. Smith's alleged confession was limited by the fact that Mr. Smith's first interrogation after his arrest was not recorded or transcribed. (Hrg. Tr. 186:8-13; *see also* FF ¶¶ 5, 95, 96). Dr. Leo explained that a recording or transcript of the interrogation would show whether the suspect supplied the factual information supporting his guilt, or

whether the factual information originated with others and was fed to the suspect through leading questions in an interrogation. (Hrg. Tr. 186:14-187:5).

111. In light of Mr. Daniel's belief (FF ¶ 82), which the record of the trial supports, that Mr. Smith's alleged confession was by far the most important evidence leading to his conviction, testimony by Dr. Leo or an equivalent expert could have offered would have been vitally important to Mr. Smith's defense.

112. At the time of Mr. Smith's trial, Dr. Leo could have testified to the above information. (Hrg. Tr. 189:1-6). Dr. Leo also was able to identify several other social scientists working in the field who would have been similarly qualified to proffer expert opinions on false confessions at the time of Mr. Smith's trial in August 1995. (*Id.* at 189:7-25). Dr. Leo testified that at least two of these other potential experts had testified as expert witnesses in this field before August 1995. (*Id.* at 190:1-16).

D. A Complete Pretrial Investigation Would Have Allowed Mr. Daniel to Identify Additional Mitigation Witnesses Who Would Have Testified in Mr. Smith's Defense

113. The sentencing phase of a capital murder case "must be approached as a major trial, not an afterthought. It may very well be the only trial at which your client has a chance to prevail. Defense counsel must thus work hard to turn the penalty phase into a significant event and must resist any efforts by the court or prosecution to encourage a shallow or perfunctory presentation

on behalf of the person whose life is at stake." (EJI Manual, p.537). Mr. Daniel failed to follow this practice in at least the following ways:

114. First, Mr. Daniel failed to conduct an adequate investigation for the penalty phase. The EJI Manual notes that the investigation for the penalty phase "is extremely time consuming" and "cannot be done in the last few weeks before trial." (EJI Manual, p.538) The EJI Manual also says that the investigation should include "in-depth interviews with the client and all of the people in his life." (*Id.*) However, Mr. Daniel's investigator, Mr. Spain, never interviewed Mr. Smith (FF ¶ 30), and neither Mr. Daniel nor Mr. Spain prepare Mr. Smith's mother prior to the start of the trial. (Hrg. Tr. 530:21-24).

115. Second, Mr. Daniel failed to present key mitigation evidence. The EJI Manual says that "defense counsel must meticulously investigate, document, and present at the penalty phase all circumstances of the offense and all facts about the client's background and character that are mitigating." (EJI Manual, p.540) (emphasis added) Mr. Daniel failed to fully educate the jury about the physical and emotional abuse (described below at ¶¶ 119-123) that Mr. Smith endured.

116. In short, Mr. Daniel failed to present an adequate mitigation case. More could have been done, including offering additional testimony from witnesses such as Sherry Miller and Rodger Edgeworth.

117. At the November 2006 hearing, the State offered evidence from Mr. Daniel that suggested that he made a strategic choice to put on a very short case at the sentencing phase, which included little in the way of mitigating evidence. Mr. Daniel testified that anyone who has ever tried a number of jury trials knows that once you get your point across to jury, you should stop with your presentation of evidence to avoid alienating the jury. (Hrg. Tr. 430:24-431:25). Hence, he said, he made a judgment call to present only three witnesses, whose testimony together, including cross examination, took up only 22 pages of trial transcript. (*Id.*)

118. Mr. Daniel had never before tried a capital murder case (Hrg. Tr. 484:23-25), so his "judgment" was not based on experience with such cases. And while said he had read EJI's recommendations of how to handle the sentencing phase of a capital murder case, and claimed he tried to follow these recommendations (*id.* at 521:10-24), the evidence, described above (FF ¶¶ 113-115), suggests otherwise.

1. Sherry Miller

119. Sherry Miller, as noted (FF ¶ 79), is Mr. Smith's mother. Although she testified at both the guilt and penalty phases of Mr. Smith's trial, Mr. Daniel spent no time with her preparing for her testimony. (Hrg. Tr. 530:2-6). In particular, during the penalty phase, he made no effort to explain to Ms. Miller, who is not an attorney, the significance of the penalty phase in a

capital trial, or of the type of evidence that is appropriately given in that phase of the trial. (*Id.* at 537:3-7). Accordingly, Ms. Miller had no appreciation that certain information she could supply was relevant or would have been helpful to Mr. Smith's defense and she never shared it with the jury. (*Id.*)

120. Had Ms. Miller been prepared to testify during the penalty phase, she could have provided additional details about the abuse Mr. Smith suffered at the hands of his step father, Junior Hovies. For example, Ms. Miller would have said that on multiple occasions in his childhood, Mr. Smith witnessed Junior Hovies beating Ms. Miller. (Hrg. Tr. 535:20-23). She would have also described instances where she literally had to barricade Mr. Smith and his brother into a room to protect them from Junior Hovies's violent outbursts. (*Id.* at 536:4-15). Such testimony would not have excused the crime of murder, but it could have influenced the jury's conclusions concerning the appropriate sentence.

2. Roger Edgeworth

121. Roger Edgeworth is Mr. Smith's first cousin and lived near his home during their childhood. (Hrg. Tr. 550:17-18). Neither Mr. Daniel nor anyone in his employ spoke with Mr. Edgeworth prior to Mr. Smith's trial. (*Id.* at 558:1-3). Had they done so, Mr. Edgeworth would have been available and willing to discuss the facts and circumstances of Mr. Smith's life, and to provide information that would have been useful to present to the jury during the sentencing phase of the trial. (*Id.* at 558:6-12).

122. Mr. Edgeworth would have described several episodes of psychological abuse Mr. Smith suffered at the hands of his step-father, Junior Hovies, that were never presented at trial. For example, Mr. Edgeworth would have described an episode in which Junior Hovies berated Mr. Smith for not using his bare hands to clean out a blocked sewage line. (Hrg. Tr. 556:11-23). Mr. Edgeworth also would have described a demeaning episode in which Junior Hovies made Mr. Smith and his brother comb the dandruff out of Junior Hovies's hair. (*Id.* at 557:6-11).

123. Mr. Edgeworth also would have described additional examples of physical abuse that Mr. Smith suffered at the hands of Junior Hovies, including situations in which Junior Hovies hit Mr. Smith with a stick, belt and switches. (Hrg. Tr. 556:1-10). Again, such testimony would not have excused the crime of murder, but it could have influenced the jury's conclusions concerning the appropriate sentence.

E. Mr. Daniel Did Not Meet the Minimum ABA Standards for Lead Counsel in a Capital Murder Case

124. The litany of problems the Court has observed with Mr. Daniel's representation of Mr. Smith are unfortunate, but perhaps not surprising. When Mr. Daniel accepted Mr. Smith's representation, he was ill-prepared for the demands of defending a capital murder case.

125. The ABA Guidelines set forth minimum eligibility standards for lead counsel in a capital murder case, and it is clear that Mr. Daniel fell well short of those standards. (*See generally* ABA Guidelines § 5.1).

126. According to the Guidelines, lead trial counsel should:

> have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and an additional five were felony jury trials.

(ABA Guidelines § 5.1(1)(A)(iii)).

127. Before the trial of Mr. Smith, Mr. Daniel had never (a) tried to completion before a jury, as lead counsel or co-counsel, any case in which the prosecution sought the death penalty; or (b) tried to completion before a jury any case in which the defendant was charged with murder or aggravated murder. (Hrg. Tr. 484:21-485:5; 486:14-21).

128. The ABA Guidelines set forth other minimum requirements as well. For example, lead counsel in a capital case should also "be familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence." (ABA Guidelines § 5.1(1)(A)(v)). Lead counsel should "have attended or successfully completed,

within a year of their appointment, a training or educational program on criminal advocacy which focused on the trial of cases in which the death penalty is sought." (*Id.* at § 5.1(1)(A)(vi)). And lead counsel should "have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases." (*Id.* at § 5.1(1)(A)(1)(vii)).

129. It is apparent from testimony at the November 2006 hearing that Mr. Daniel fell short of all of these requirements. For example, he had neither attended nor completed any training or educational program on criminal advocacy focusing on the trial of cases in which the death penalty is sought. (Hrg. Tr. 501:14-16). Further, he was neither familiar with nor experienced in the use of experts. As noted above, he was unaware of experts in the area of false confessions. (FF ¶ 101). He did not retain an expert on police interrogations and other procedures. (Hrg. Tr. 496:17-21). He said that "We tried to find every conceivable expert we could and we tried to look into experts for confessions, I couldn't find any. That's not saying I might have missed something, I don't know." (*Id.* at 422:23-423:2). The Court simply does not accept the statement that expert assistance could not have been located by an effective counsel in a capital murder case in 1995 had counsel sought to find such experts.

130. The foregoing findings of fact demonstrate that Mr. Daniel lacked the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

CONCLUSIONS OF LAW

Introduction

131. In his testimony at the November 2006 hearing, Mr. Daniel equated a criminal jury trial to "a crap shoot." "You got a 50-50 chance," he said "'cause you never know what they are going to do." (Hrg. Tr. 435:15-18).

132. Fundamental to our system of justice is the right to a fair trial. "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (internal quotation marks omitted).

133. When counsel abdicates his obligation to investigate the State's case or develop a defense strategy, a defendant is, as Mr. Daniel suggests, left to rely solely on chance. The Sixth Amendment right to counsel, however, exists precisely to eliminate chance and to give the accused the opportunity to present a meaningful defense. As the Supreme Court explained in *Strickland*, "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an

attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." 466 U.S. at 685.

134. While counsel cannot be held responsible for securing his client's acquittal, it is counsel's responsibility, especially in a capital murder case, to ensure a fair trial by presenting a defense that is prepared and based on adequate investigation. The Court finds that Mr. Daniel's actions, and more importantly his inactions, denied Mr. Smith that right in this case.

The Applicable Legal Standard

135. The Petitioner has the burden of proving by a preponderance of the evidence those facts necessary to establish his claim of ineffective assistance of counsel. *See* Ala. R. Crim. P. 32.3; *Hamm v. State*, 913 So.2d 460, 481 (Ala. Crim. App. 2002). In particular, the Petitioner "must establish (1) that his counsel's performance was deficient, and (2) that he was prejudiced by the deficient performance." *State v. Hamlet*, 913 So.2d 493, 497 (Ala. Crim. App. 2005) (citing *Strickland*, 466 U.S. at 687).

136. "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Hamlet*, 913 So.2d at 497 (quoting *Strickland*, 466 U.S. at 690). The proper measure of whether attorney performance was objectively "reasonable" is guided by "prevailing professional norms." *Strickland*, 466 U.S. at 688. *See also Hamlet*, 913 So.2d at 497 ("The

performance component outlined in *Strickland* is an objective one: that is, whether counsel's assistance, judged under prevailing professional norms, was reasonable considering all the circumstances.") (internal quotation marks omitted). Courts may look to a variety of sources to determine the "prevailing professional norms" applicable in a particular case.

137. In death penalty cases, courts in Alabama and all the way up to the U.S. Supreme Court have "made clear that ABA standards for counsel . . . provide the guiding rules and standards to be used in defining the prevailing professional norms in ineffective assistance cases." *Davis v. State*, No. CR-03-2086, 2006 WL 510508, at *9 (Ala. Crim. App. Mar. 3, 2006) (internal quotation marks omitted). *See also Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (relying on the 1989 ABA Guidelines to determine that counsel failed to meet prevailing professional norms for adequate investigation of mitigation evidence in a 1989 murder case); *Strickland*, 466 U.S. at 688 ("Prevailing norms of practices as reflected in [ABA] standards and the like are guides to determining what is reasonable.").

138. This Court has considered the ABA Guidelines that were in place at the time of Mr. Smith's trial. (FF ¶¶ 34, 35, 36). This Court has also considered the practice guidelines promulgated by EJI, which trial counsel claimed he relied on in preparing for trial in this case. (FF ¶¶ 37, 38).

139. On several occasions at the November 2006 hearing, counsel for the State argued that a unique standard applied to counsel in Marshall County. (Hrg. Tr. 153:25-154:9; 601:23-602:2). The Court rejects that argument. The Court is mindful that "a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. However, counsel everywhere "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," *id.* at 688, including "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. The standard set forth herein is drawn from the Sixth Amendment to the U.S. Constitution. Thus, in any venue -- including this one -- "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690.

140. Once trial counsel's ineffectiveness is established, Petitioner also bears the burden of showing prejudice. "The prejudice component requires proof that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Hamlet*, 913 So.2d at 495 (citing *Strickland*, 466 U.S. at 687). "An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality

concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." *Id.* at 497. Accordingly, the defendant must show only that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 497-98 (quoting *Strickland*, 466 U.S. at 694) (emphasis in original).

I. Mr. Daniel Failed to Provide Effective Assistance of Counsel Because He Failed to Conduct a Meaningful Pretrial Investigation into the Charges Against Mr. Smith

141. "Counsel has a duty to make reasonable investigations" into the lines of defense available to his client. *Strickland*, 466 U.S. at 691. *See also Baty v. Balkcom*, 661 F.2d 391, 394 (5th Cir. 1981) ("Inadequate preparation of counsel is one ground for finding a violation of the Sixth Amendment right to effective counsel."); *Hamlet*, 913 So.2d at 495 (affirming grant of new trial based on finding that trial counsel's "conduct of pressing forward without any discovery or investigation [fell] below the duty owed to the petitioner"). "In assessing counsel's investigation, [this Court] must conduct an objective review of [his] performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins*, 539 U.S. at 523 (internal quotations and citations omitted).

142. When Mr. Daniel assumed responsibility for Mr. Smith's defense in February 1995, he knew from the circumstances of the case that several plausible lines of defense were open to Mr. Smith, including that Mr. Smith had an alibi, that Mr. Smith disputed the State's motive theory, that a third party likely committed the crime, and that the alleged confession was falsely given. (FF ¶ 40, 49, 56, 83).

143. As explained in greater detail in Part II below, evidence supporting each of these plausible lines of defense was available and could have been developed and presented at trial, but the Court finds that Mr. Daniel made no meaningful effort to investigate any of them. (FF ¶¶ 44, 49, 58, 85).

144. The Court is mindful that "scrutiny of counsel's performance must be highly deferential" because "of the diverse methodologies employed by defense counsel and the broad range of opinion about how to best address a particular situation." *Ex Parte Womack*, 541 So.2d 47, 66-67 (Ala. 1988). However, no reasonable strategy would omit, as Mr. Daniel did here, investigating evidence supporting plausible lines of defense. Applicable ABA guidelines in 1995 advised that independent investigations into the guilt and penalty phases of the trial are absolutely essential and should begin immediately and expeditiously upon counsel's entry into the case. (*See* 1989 ABA Guidelines § 11.4.1(A)). EJI's 1992 Manual, which Mr. Daniel says he relied on (FF ¶ 37), similarly advised counsel that "extensive pretrial investigation is absolutely crucial in a capital case."

(FF ¶ 38). EJI's Manual also urges counsel to "creatively utilize defense experts in preparing and presenting the defense." (FF ¶ 86).

145. Further, the Sixth Amendment requires counsel to conduct a "substantial investigation" into each of the plausible lines of defense, or at least make reasonable strategic decision that such lines are unnecessary. *Strickland*, 466 U.S. at 681 (emphasis added). This requirement applies regardless of any admission or statement by the client concerning facts constituting guilt. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (citing 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.), a predecessor to the 1989 ABA Guidelines). "A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made." *Ex Parte Womack*, 541 So.2d at 71 (emphasis added).

146. Here, Mr. Daniel failed in his obligation to conduct a reasonable pretrial investigation. First, his claims that he talked to "a lot" of witnesses simply are not born out by the evidence (FF ¶¶ 14, 16), the fact that virtually every witness who testified at the November 2006 hearing stated that they had never been contacted by him or anyone working for him (FF ¶ 15), and the fact that he did not talk to a witness as important and obvious as Mr. Smith's mother until the morning the trial started (FF ¶ 79). He made no effort to talk to witnesses such as Kevin Harville, whose testimony the prosecution mischaracterized to place Mr. Smith with Mr. Harris on the day Mr. Harris

disappeared. (FF ¶ 44). Mr. Harville's testimony appeared to undercut Mr. Smith's alibi, but, with investigation, Mr. Daniel could have made it clear to the jury that this was not so. Mr. Daniel also made no effort to locate or talk to witnesses such as Ralph Willingham and Amber Steele who could have rebutted the State's motive theory. (FF ¶ 49). He made no effort to locate or talk to witnesses such as Sarah Johnson, Carrie Barnes and Wanda Chambers who could have supported a claim of third party guilt. (FF ¶ 58). And he made no effort to locate or talk to available experts such as W.T. Gaut and Richard Leo who could have aided a challenge to the reliability of the alleged confession. (FF ¶ 84).

147. Mr. Daniel also made no effort to prepare a meaningful mitigation defense. He did not adequately prepare witnesses he did call, such as Sherry Miller (FF ¶ 119), and he did not speak at all with other available witnesses, such as Roger Edgeworth (FF ¶ 121). *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (failure to uncover mitigation evidence was an unreasonable failure of counsel's duty to investigate under the practice prong of *Strickland*).

148. To the extent the State claims Mr. Daniel relied on others in his office to conduct a pretrial investigation, the Court rejects that argument. First, the Court finds by a preponderance of the evidence that neither Jan Wilburn, Bridgette Browning nor Angela Davis conducted any investigation into the facts and circumstances of this case. (FF ¶¶ 21-24). Second, the Court finds that none of these individuals had the skills or guidance necessary from counsel to

conduct a proper investigation. (FF ¶¶ 22, 23, 24). Simply put, it would be unreasonable for trial counsel to rely on untrained office staff to, at their own initiative, pursue investigation of a capital murder defense.

149. The Court also finds that Walter Spain's investigation cannot be called a "substantial investigation into each of the plausible lines of defense." Mr. Spain's investigation consisted of only five hours of work and two of these hours were spent in transit. (FF ¶¶ 29, 31). It included no examination at all of the alibi defense, the robbery motive, Carl Cooper's possible involvement, or bases for challenging the reliability of the alleged confession. (FF ¶¶ 29, 30, 31). No reasonable attorney practicing in Marshall County in 1995 would have considered three hours an "extensive pretrial investigation," adequate to develop "a defense strategy," sufficient to meet the lawyer's responsibility to learn "as much as possible about a case," or, quoting Mr. Daniel's own contract, acting "to the best of his professional ability." (FF ¶ 12).

150. The Court further finds that it was unreasonable for Mr. Daniel to rely on Mr. Spain to conduct an investigation. Mr. Spain lacked the experience and skills necessary to conduct an investigation in a capital murder case (FF ¶ 26); he was not given adequate guidance by counsel (FF ¶ 28); and he was not given adequate time meaningfully to investigate each of the lines of defense available (*id.*).

151. Finally, the Court finds that Mr. Daniel's failure to conduct a pretrial investigation that examined the available alibi defense, the State's robbery theory, the evidence of third party guilt against Carl Cooper and others, or bases for challenging the credibility of the alleged confession was not the product of a reasonable and informed decision by counsel. *See Ex parte Womack*, 541 So.2d at 72 (holding that the failure to investigate possible exculpatory evidence and introduce relevant impeachment evidence, when the State's primary evidence was a recorded confession and the testimony of two witnesses who testified to defendant's involvement in the crime, was not a reasonable strategic decision and constituted "a serious breach of the duty of loyalty to the client and to the duty to investigate"). Such an informed decision to forgo an investigation would require at least a preliminary examination of the evidence, but since Mr. Daniel did not conduct even a minimal investigation into these defenses, the Court cannot excuse this omission as the result of strategy. *See Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) ("our case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them"). *See also Whitehead v. State*, No. CR-04-2251, 2006 WL 1793735, *22 (Ala. Crim. App. June 30, 2006) (same).

152. For the foregoing reasons, the Court finds that Mr. Daniel's efforts at a pretrial investigation fell below the minimum standard of effective assistance of counsel guaranteed by the Sixth Amendment as defined by the

prevailing professional norms that should have guided effective counsel trying this case.

II. Mr. Daniel's Failure to Conduct an Adequate Pretrial Investigation Prejudiced Mr. Smith's Defense

153. Having found that Mr. Daniel was ineffective for failing to conduct a proper pretrial investigation, the Court must now consider whether Mr. Smith suffered prejudice from that failure. *Hamlet*, 913 So.2d at 497 (citing *Strickland*, 466 U.S. at 687).

A. Mr. Daniel's failure to talk to Kevin Harville prejudiced Mr. Smith's defense

154. A reasonable pretrial investigation for evidence relating to Mr. Smith's alibi defense would have included an interview with Kevin Harville.

155. Mr. Harville was a known witness in this case -- he had been interviewed by the Sheriff's Office during its investigation of the Harris murder and had given a statement indicating that he had seen Mr. Harris and Mr. Smith together at Mr. Harris's residence. (FF ¶ 41). *See also Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (pretrial investigation should have included "efforts to secure information in the possession of the prosecution and law enforcement authorities"). He was readily available, as evidenced by the fact he was named a witness by the State and called to testify at Mr. Smith's trial. (FF ¶ 41). And he was willing to talk to Mr. Daniel or his representatives had they approached him. (FF ¶ 44).

156. Had Mr. Daniel spoken to Mr. Harville prior to trial, Mr. Harville would have told him -- as he would later testify -- that he had seen Mr. Smith and Mr. Harris together on a Friday in September 1994. But Mr. Harville also would have told Mr. Daniel that on successive Fridays after that date he made two more trips to Mr. Harris's residence. On both of those occasions Mr. Harris was not home. (FF ¶ 45). Mr. Harville would have further explained that these additional trips occurred on the two Fridays before Mr. Harris's body was discovered (FF ¶¶ 46, 47), and thus, at the latest, the date on which Mr. Harville saw Mr. Smith and Mr. Harris together was September 16, 1994. (FF ¶ 47).

157. That Mr. Daniel did not interview Mr. Harville prior to trial and learn this information was highly prejudicial to Mr. Smith. All that came out at trial during the examination of Mr. Harville was that he had seen Mr. Harris and Mr. Smith together on a Friday in September, but that he could not remember the exact date. (FF ¶ 41). This testimony, on its own, was damaging to the defense because the jury could have inferred that Mr. Harville had seen Mr. Harris with Mr. Smith on September 23, 1994. The testimony was made worse when, in its closing argument to the jury, the State drew the conclusion that Mr. Harville saw Mr. Harris together with Mr. Smith on the date Mr. Harris disappeared: "Well, if you remember, Kevin Harville, a witness that testified that on the morning of September the 23rd. . . . That was the morning of the 23rd

that Kevin Harville went [to Mr. Harris's residence], collected the $50 from Dennis and . . . [w]hen he knocked on the door, who came out? Not only did Dennis Wheeler Harris come out, but also Larry Randall Smith. This is around 11:30 on the 23rd. Larry Randall Smith comes out with Dennis. They're seen together." (Trial Tr. 1471:1-3, 19-24). The State went on to assert that Kevin Harville "identified [Larry Smith] as the person that was last seen with Dennis Harris alive." (*Id.* at 1472:1-3).

158. Had the complete story of Mr. Harville's interactions with Mr. Harris been explained during cross-examination, the State could not have made its inaccurate and highly prejudicial argument, nor could the jury reasonably have concluded that Mr. Smith was the last person seen with Mr. Harris. Instead, Mr. Daniel could have shown that the event Mr. Harville observed took place a full week before Mr. Harris disappeared. There would have been no evidence at all placing Mr. Smith and Mr. Harris together on the day it is believed that Mr. Harris was murdered. Had Mr. Daniel presented this testimony, it is unlikely the jury would have accepted the State's misleading characterization of Mr. Harville's testimony, and the jury may well have concluded that Mr. Harville's testimony corroborated Mr. Smith's own testimony about his whereabouts on the date Mr. Harris disappeared.

B. Mr. Daniel's failure to develop evidence countering the State's motive theory prejudiced Mr. Smith

159. A second plausible line of defense Mr. Daniel could have pursued would have been to challenge the State's theory that Mr. Smith was strapped for cash and in need of money to make a car payment. Mr. Smith maintains he had no need to rob Mr. Harris because he was not in need of cash and, in any event, Mr. Harris and others would have loaned him money had he needed it. (FF ¶¶ 52, 62). A reasonable pretrial investigation into this defense would have led to persons who knew Mr. Smith, such as Ralph Willingham and Amber Steele, both neighbors of Mr. Smith in his mother's apartment complex. (FF ¶¶ 50, 53).

160. Mr. Smith was prejudiced by Mr. Daniel's failure to investigate this line of defense because Mr. Daniel was unable to present any witnesses or evidence to corroborate Mr. Smith's claim that he had no need to rob Mr. Harris. If called, Mr. Willingham and Ms. Steele could have testified that in September 1994, around the time of the Harris murder, Mr. Smith had other sources for cash if he needed it. (FF ¶¶ 52, 55). Specifically, Mr. Smith had ready access to between $100 and $200 in cash in Mr. Willingham's apartment and returned a wallet with $800 in it to Ms. Steele and her husband in the same month during which, by the State's theory, Mr. Smith robbed and killed Mr. Harris for much less money.

161. Had the State's case against Mr. Smith been stronger, this line of defense might have had less power, but as Mr. Daniel recognized (FF ¶ 82), the State's case against Mr. Smith was very thin. Thus, evidence undermining any part of the State's case -- including the alleged motive for the crime -- would have added potency.

162. This evidence also was especially important to the defense because without the statutory aggravating factor that the murder of Mr. Harris occurred during a robbery, capital murder could not have been charged and Mr. Smith could not have faced a death sentence. *See* Ala. Code §§ 13A-5-45(f); 13A-5-49 (2006).

C. Mr. Daniel's failure to develop third-party guilt evidence prejudiced Mr. Smith

163. A third plausible line of defense -- which Mr. Daniel had identified -- was that a third party, likely Carl Cooper, was responsible for Mr. Harris's murder. (FF ¶ 56). But Mr. Daniel made no effort to develop that defense. In light of what Mr. Daniel knew about Mr. Cooper and the evidence pointing to his likely involvement in the Harris murder (FF ¶¶ 57, 59, 80), that omission was unreasonable.

164. Mr. Daniel was suspicious of Carl Cooper. He knew of Mr. Cooper's reputation for violence. (FF ¶ 71, n.7). He knew or suspected that Mr. Cooper had a strong incentive to mislead the police. (*Id.*) And Mr. Daniel

knew or should have known that Mr. Cooper's whereabouts, appearance and actions on the evening of September 23, 1994 -- the night that Mr. Harris disappeared -- pointed to his involvement in the murder. (FF ¶ 80).

165. Most glaring among Mr. Daniel's omissions concerning evidence relating to Carl Cooper was his failure to speak to Sarah Johnson, who was married to Mr. Cooper at the time of Mr. Harris's murder in September 1994. (FF ¶ 60). Ms. Johnson was known to Mr. Daniel -- she had provided a statement to police that was in the Sheriff's Office's investigative file. (FF ¶ 60). By the time Mr. Daniel was retained to represent Mr. Smith, Ms. Johnson had separated from Mr. Cooper. (FF ¶ 71). And if Mr. Daniel or someone in his employ had approached Ms. Johnson, she would have likely been willing to discuss the case with him. (*Id.*)

166. The U.S. Supreme Court has recently reaffirmed a defendant's right to advance his defense by introducing evidence that a third party committed the crime for which he is charged. *See Holmes v. South Carolina*, 126 S.Ct. 1727 (2006). Alabama law has long recognized the validity of this line of defense: "The United States Supreme Court has held that a defendant has a right to put on a defense and that that right includes the opportunity to present evidence proving that another person committed the offense for which he has been charged." *Ex parte Griffin*, 790 So.2d 351, 353 (Ala. 2000). *See also Lowrey v. State*, 155 So. 313, 315 (Ala. Ct. App. 1934) (allowing the admission of evidence of third-party guilt).

167. To determine whether the evidence of a third party's culpability is properly admissible the Court must "weigh the defendant's 'strong interest in presenting exculpatory evidence' against the state's interest 'in promoting reliable trials, particularly in preventing the injection of collateral issues into the trial through unsupported speculation about the guilt of another party.'" *Ex parte Griffin*, 790 So.2d at 353 (quoting *United States v. Johnson*, 904 F. Supp. 1303, 1311 (M.D. Ala. 1995)). "In weighing those interests, the federal courts have required the defendant to show that the evidence he is offering is probative and not merely speculation that would confuse the jury. . . ." *Id.* (citing *Johnson*, 904 F. Supp. at 1311).

168. The Supreme Court of Alabama "has set out a test intended to ensure that any evidence offered [for the purpose of proving third party guilt] is admissible only when it is probative and not merely speculative. Three elements must exist before this evidence can be ruled admissible: (1) the evidence must relate to the *res gestae* of the crime; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence would have to be admissible if the third party was on trial." *Id.* at 354 (citations omitted).

169. A defendant may present circumstantial evidence of third party guilt. *See, e.g.*, *Lowrey*, 155 So. at 315. In addition, a defendant's right to present evidence of third-party guilt may supersede the hearsay rule. *Ex parte Griffin*, 790 So.2d at 354-55.

170. Ms. Johnson's testimony pointing to Mr. Cooper's involvement in the Harris murder would have been admissible at trial as evidence of third-party guilt. (Hrg Tr. 597:22-23). Her testimony related to the *res gestae* of the crime, excluded Mr. Smith as a perpetrator, and would have been admissible against Carl Cooper if he were on trial for murdering Mr. Harris. Specifically, Ms. Johnson would have testified that (i) Mr. Cooper tried to convince Mr. Smith to rob Mr. Harris, but that Mr. Smith refused; (ii) Mr. Cooper obtained a small handgun in the weeks prior to Mr. Harris's murder; and (iii) Mr. Cooper was missing on the date of Mr. Harris's disappearance, came home that evening in a suspicious condition and disposed of his clothing. Ms. Johnson also would have testified that, in response to Mr. Cooper's suggestion to rob Mr. Harris, Mr. Smith said "he didn't have to do anything [to] Dennis to receive money from him, because he was [a] good friend and he would help [Mr. Smith] out at any time." (FF ¶ 62).

171. The Court finds that, Ms. Johnson would have possessed the credibility necessary to testify at Mr. Smith's trial her prior inconsistent statement under oath notwithstanding, her prior inconsistent statement under oath notwithstanding. The Court well understands that battered, fearful wives sometimes will lie in the presence of their abusive husbands, and that those same women, freed from the abusive relationship, may possess the credibility necessary to testify in a manner contrary to prior statements. Having observed

Ms. Johnson's testimony in person, the Court finds that Ms. Johnson possesses sufficient credibility for her testimony to have been proffered to the jury at Mr. Smith's trial.

172. Ms. Johnson's testimony could also have been offered to impeach Carl Cooper's testimony. For example, at trial, Mr. Cooper testified that Mr. Smith suggested the idea of robbing Dennis Harris. (Trial Tr. 975:7-13). Ms. Johnson, however, says that it was Mr. Cooper who suggested it. (FF ¶ 62). Mr. Cooper testified that he did not take the suggestion to rob Mr. Harris seriously. (Trial Tr. 975:17-18). Ms. Johnson, however, says that it was Mr. Smith who was dismissive. (FF ¶ 62). And Mr. Cooper testified that Mr. Smith had stolen a small-caliber handgun. (FF ¶ 8). Ms. Johnson, however, says she never saw Mr. Smith with a gun, but Mr. Cooper had acquired his own small handgun in July 1994, just a few months prior to the murder. (FF ¶ 63).

173. Other witnesses could have provided additional evidence against Carl Cooper that Mr. Daniel could have either presented at trial or used to further his own investigation into the facts and circumstances of this case. For example, if Mr. Daniel had spent time preparing Mr. Smith's mother, Sherry Miller, he would have learned that she could have provided more incriminating details about her meeting with Mr. Cooper on the night of September 23, 1994. (FF ¶ 81).

174. If Mr. Daniel had spoken to Carrie Butler, he would have learned that Mr. Cooper was seen with Brian Fox at the Overlook Motel where Dennis Harris lived and that their presence made Mr. Harris nervous.[10] (FF ¶ 74).

175. The testimony of Ms. Miller and Ms. Barnes also would have been admissible, together with that of Ms. Johnson, as part of a case of circumstantial evidence of third-party guilt. Ms. Miller's testimony corroborates that of Ms. Johnson concerning Carl Cooper's appearance on the evening that Mr. Harris disappeared. Ms. Barnes's testimony puts Mr. Cooper at Mr. Harris's home in the presence of Brian Fox. While this testimony, standing on its own, might not satisfy the standards articulated in *Ex parte Griffin*, when paired with the testimony of Ms. Johnson, it is admissible as circumstantial evidence of third party guilt.

176. Given what Mr. Daniel knew about Carl Cooper, it was unreasonable for him not to have made any effort to investigate Mr. Cooper's whereabouts on September 23, 1994, or to try to develop evidence of his likely involvement in the Harris murder.

177. Mr. Daniel's hope that Tanya Smith "would help me point the finger [at Carl Cooper]" (FF ¶ 59) was also unreasonable. Ms. Smith, at the time,

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[10] The Court does not find that Carrie Barnes's testimony that Mr. Harris was nervous when he saw Mr. Cooper near his apartment would have been admissible at a trial, however, it would nonetheless be relevant to a pretrial investigation.

was only 16 years old. It is not clear from Mr. Daniel's testimony just what he thought she knew about Mr. Cooper. At best, he may have thought she could testify about the conversation between Mr. Cooper, Sarah Johnson, Mr. Smith and herself. (FF ¶ 62). If so, it was unreasonable for Mr. Daniel not to have talked to other available adult witnesses who were party to that conversation, namely Ms. Johnson.

178. Mr. Daniel's failure to conduct any investigation into Carl Cooper's likely involvement in the Harris murder was highly prejudicial to Mr. Smith. Sarah Johnson's testimony in particular would have bolstered Mr. Smith's claim that someone else, likely Mr. Cooper, was responsible for the Harris murder.

D. Mr. Daniel's failure to procure necessary expert assistance prejudiced Mr. Smith

179. Mr. Daniel recognized that the key piece of evidence against his client was the alleged confession. (FF ¶ 82). He also believed that the alleged confession was falsely given. (FF ¶ 83). Yet he made no meaningful effort to try to counter that evidence at the trial.

180. Although Mr. Daniel made some arguments that the alleged confession was inadmissible, the trial court rejected those arguments and determined that the confession was admissible. *Smith*, 727 So.2d 162. Whether that decision was correct is not at issue here. What is at issue is Mr. Daniel's

actions preparing for the actual trial, knowing that the confession would be admitted. Having lost the motion to exclude, Mr. Daniel seems to have done nothing to try to counter the weight of the alleged confession. Mr. Daniel appears not to have recognized the distinction between challenging the admissibility of a confession, on the one hand, and introducing testimony to challenge the reliability of a confession that has been admitted, on the other. (Hrg. Tr. 497:21-498:18 (noting only what he describes as the "usual way" to exclude a confession, which, he says, is a motion to suppress, in response to questions asking whether he had ever tried to prove that a confession was false)). Instead, Mr. Daniel appears to have thrown in the towel concerning the confession when the trial court ruled that it was admissible and, in so doing, abdicated his responsibilities to his client.

181. The Court need not and does not find whether the alleged confession was in fact falsely given. That is a question for a jury. The Court does, however, find that there were issues with the confession that could have been pointed out to the jury that might have caused the jury to question the reliability of the alleged confession and that undermine the Court's confidence in the jury's verdict. Mr. Daniel made no effort to investigate these issues, however, or to find a witness who could explain them to the jury.

182. In light of the fact that the alleged confession was the critical piece of evidence inculpating Mr. Smith in the crime, and further the fact that Mr. Daniel believed the alleged confession was falsely given, it was unreasonable

for Mr. Daniel to do nothing to try to challenge the reliability of the alleged confession at trial. There were many options open to him had he made any effort.

183. First, Mr. Daniel could have challenged the police tactics in the taking of the alleged confession during his cross-examination of Mike Whitten. He also could have highlighted the absence of any recording or transcript of the first post-arrest interrogation of Mr. Smith, a violation of basic police procedures and a suspicious omission since that interrogation was followed immediately by a tightly constructed interrogation comprised of leading questions that constituted the alleged confession. Further, that second interrogation was followed by Tanya Smith's release from jail.

184. Second, Mr. Daniel could have called an expert on police procedure who could have offered the opinions proffered at the November 2006 hearing by Mr. Gaut who was himself available to testify at the time of trial. The Court rules that those opinions would have been admissible at Mr. Smith's trial. These opinions would have allowed Mr. Daniel to make arguments to the jury that the confession was of doubtful credibility because of highly questionable and improper police procedures.

185. Third, Mr. Daniel could have called an expert to explain (i) that verifiably false confessions exist, including in capital murder cases; (ii) that the scientific study of verifiably false confessions has revealed certain earmarks

and patterns that characterize false confessions; and (iii) that certain of those earmarks and patterns are present in Mr. Smith's alleged confession. (FF ¶¶ 100, 106, 107, 108). The Court rules that such expert testimony would have been admissible at the time of Mr. Smith's trial.

186. In August 1995, Alabama Courts followed the standard set forth in *Frye v. United States* for the admissibility of scientific expert testimony: "In order to satisfy the *Frye* test for general admissibility, a scientific principle or discovery, or evidence produced therefrom, 'must be sufficiently established to have gained general acceptance in the particular field in which it belongs.'" *Perry v. State*, 586 So.2d 236, 239 (Ala. Ct. Crim. App. 1990) (quoting *Frye*, 293 F. 1013 (D.C. 1923)).

187. Dr. Leo's testimony that (i) verifiably false confessions existed at the time of Mr. Smith's trial, and (ii) earmarks or patterns in such confessions had been identified by social scientific examination of those false confessions and this research was generally accepted at the time of Mr. Smith's trial is credible and consistent with the evidence introduced during his testimony, including the textbook discussing the subject. Accordingly, Dr. Leo's testimony, or similar testimony by another of the qualified experts identified by Dr. Leo as being available in 1995 to testify on this subject, would have been admissible in August 1995 under the *Frye* standard.

188. The presence of a confession in this case does not lessen the prejudice caused by Mr. Daniel's ineffectiveness. Courts have found the *Strickland* prejudice prong to be satisfied in cases where there was a confession. *See, e.g., Ex parte Womack*, 541 So.2d at 67-78. Furthermore, in *Crane v. Kentucky*, 476 U.S. 683 (1986), a case decided nine years before Mr. Smith's trial, the U.S. Supreme Court acknowledged the danger that a jury might view a confession as irrefutable evidence of guilt: "[c]onfessions, even those that have been found to be voluntary, are not conclusive of guilt." *Id.* at 689. Because of this danger, the Court held that a defendant must be allowed to challenge a confession by critiquing the circumstances in which it was given:

> . . . [S]tripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? . . . [E]ntirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

Id.

189. The above passage from *Crane* clearly illustrates the prejudice that resulted when Mr. Daniel failed to introduce testimony concerning the credibility of the alleged confession. By Mr. Daniel's own admission, the confession was the crux of the prosecution's case. (FF ¶ 82). Competent counsel

would have presented evidence to show that the alleged confession was unreliable (*e.g.*, an untranscribed interrogation, leading questions by the police). Mr. Daniel's failure to challenge the alleged confession severely prejudiced Mr. Smith. Specifically, Mr. Daniel should have challenged the alleged confession by asking appropriate questions underscoring problems in the police procedure and by introducing expert testimony, such as that proffered by Mr. Gaut and Dr. Leo.

E. Mr. Daniel's failure to properly investigate and develop mitigation evidence prejudiced Mr. Smith

190. Mr. Daniel also failed to adequately investigate and uncover mitigation evidence critical to Mr. Smith's penalty phase defense. Counsel has an "obligation to conduct a thorough investigation of the defendant's background" when preparing for the penalty phase of a capital murder trial. *Williams*, 529 U.S. at 396. Mr. Daniel's preparations for the penalty phase in this case, which appear to have involved nothing more than a few minutes with his chosen witnesses immediately before they took the stand (FF ¶¶ 20, 119), does not begin to meet this high standard. *See Wiggins*, 539 U.S. at 522 ("counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not 'fulfilled their obligation to conduct a thorough investigation of the defendant's background'") (quoting *Williams*, 529 U.S. at 396).

191. The testimony at Mr. Smith's mitigation-phase trial runs just 22 pages in the transcript. Mr. Daniel put on some evidence of physical abuse Mr. Smith suffered as a child at the hands of his stepfather, Junior Hovies. But that evidence was incomplete and was but one part of the abuse Mr. Smith suffered. (FF ¶¶ 120, 122, 123). Junior Hovies also inflicted serious psychological abuse on Mr. Smith. (FF ¶ 122). Further, the meager evidence elicited as to the physical abuse was inadequate to present the jury with a proper depiction of Mr. Smith's childhood, as elaborated upon by Ms. Miller and Mr. Edgeworth. (FF ¶¶ 120, 122, 123).

192. The Court finds unpersuasive Mr. Daniel's testimony that the modest sentencing phase case he presented was purposeful and designed to avoid alienating the jury. (FF ¶¶ 117, 118). Mr. Daniel's shows that he failed to conduct any meaningful investigation into evidence that could have been presented at the sentencing phase, and that the modest case he presented resulted from lack of preparation and investigation rather than an informed strategic choice. *See Jackson*, 42 F.3d at 1367 ("our case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them").

III. Mr. Daniel's Failure Adequately to Perform the Basic Duties of Counsel in Preparation for Both the Guilt and Penalty Phases of Trial Deprived Mr. Smith of His Right to Effective Assistance of Counsel and Rendered the Trial Fundamentally Unfair

193. It is not the Court's role in this proceeding to determine whether Mr. Smith is or is not guilty of the charges against him. Instead, the Court's role at this stage is to determine whether the process by which Mr. Smith's conviction was reached in August 1995 was fair and whether confidence can be had in its outcome. *See Strickland*, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

194. Our legal system operates as an adversarial process and "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. "The guarantee of 'counsel' under the Sixth Amendment envisions a reasonably competent attorney who will fulfill his role of advocate in the judicial process." *Ex parte Womack*, 541 So.2d at 72. Therefore, to have confidence in the outcomes of our legal system, that adversarial process must work.

195. The Court concludes that the adversarial process broke down in this case. Mr. Daniel made no meaningful effort at any pretrial investigation. There is no credible evidence that he personally undertook to locate or speak with

any fact or expert witnesses who might have been helpful to Mr. Smith's defense. There is some evidence that he modestly delegated investigative tasks to one other person, Walter Spain, but Mr. Spain did not have either the ability, time, resources or experience necessary to conduct a meaningful pretrial investigation into a case of this magnitude. The Court cannot conceive of a capital murder case that could be adequately investigated in three hours, excluding transit time, which is all the time Mr. Spain spent on this case. Certainly, there was much more to be discovered, as evidenced by Mr. Smith's presentation at the November 2006 hearing.

196. Had counsel effectively represented Mr. Smith, the case presented to the jury would have looked very different. There would have been no evidence and no basis to argue that Mr. Smith was with Mr. Harris on the day Mr. Harris disappeared, thus depriving the State of a critical component of its circumstantial case against Mr. Smith. The jury would have had reason to doubt Mr. Smith's alleged motive or even that a robbery occurred, which was an essential element of the capital murder charge. The jury would have had reason to doubt Carl Cooper's credibility, in particular his allegations that robbing Mr. Harris was Mr. Smith's idea and that Mr. Smith had stolen a gun in furtherance of that plan. To the contrary, the jury would have had reason to believe, based on the testimony of Sarah Johnson, that Mr. Cooper himself may have robbed and murdered Mr. Harris. The jury also would have had a basis to

question the reliability of the alleged confession. This critical piece of evidence stood virtually unchallenged at trial. Testimony such as that provided by Mr. Gaut would have identified troubling problems with the alleged confession. Similarly, testimony, such as that provided by Dr. Leo, would have provided reason for the jury to conclude that because of the coercive threats involving his wife, Mr. Smith may well have felt he had to falsely confess in order to protect her from a long jail sentence.

197. Whether individually or cumulatively, the effect of these omissions was overwhelming and the Court finds a reasonable probability exists that but for the ineffective assistance of Mr. Smith's counsel, the outcome of Mr. Smith's a trial might well have been different. The Court finds that Mr. Daniel wanted to do a good job and believed his client to be not guilty, but that his performance in effectuating his desire and belief was woefully inadequate to the point of constituting ineffective assistance of counsel.

Conclusion

For the forgoing reasons, the Court hereby GRANTS Petitioner's Rule 32 motion for post-conviction relief and orders that a new trial concerning Mr. Smith's guilt be conducted without delay.

SO ORDERED, this 12TH day of January, 2007.

DAVID J. EVANS, JR.
CIRCUIT COURT JUDGE
27TH JUDICIAL CIRCUIT