IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

NICOLE HARRIS	)	
	)	
Petitioner,	)	
	)	
vs.	)	No.
	)	
SHERYL THOMPSON, Warden,	)	Case Number of State Court
Dwight Correctional Center,	)	Conviction: 05 CR 14415-01
	)	
Respondent.	)	

PETITION FOR WRIT OF *HABEAS CORPUS*

Robert R. Stauffer
Sarah Hardgrove-Koleno
Jeffrey S. Eberhard
Anwar T. Shatat
Andrew D. Kennedy
JENNER & BLOCK LLP
353 North Clark Street
Chicago, Illinois 60654-3456
Telephone: (312) 222-9350

Steven A. Drizin
Alison R. Flaum
Center on Wrongful Convictions
Bluhm Legal Clinic
Northwestern University
School of Law
357 East Chicago Avenue
Chicago, Illinois 60611-3069
Telephone: (312) 503-8576

Attorneys for Petitioner
Nicole Harris

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"*Jaquari was playing with that string and wrapping it around his neck.*" (R1164) That is how Diante Dancy described what happened the last time he saw his four-year-old brother, Jaquari, alive. Nonetheless, their mother Nicole Harris was convicted of homicide by a jury that never heard Diante say what happened. Instead, the jury heard only a videotaped "confession" by a distraught Ms. Harris obtained after a sleepless night and twenty-seven hours of repeated, aggressive questioning. The confession involved a number of circumstances that would call into question its accuracy, but the jury had no context to evaluate that confession, being denied the opportunity to hear Diante's testimony and not given the benefit of expert testimony that false confessions occur under circumstances such as those present in this case or that, as research in the field has repeatedly shown, young children can and do accidentally strangle themselves in circumstances like those present in this case. Without that evidence to support her innocence, the jury was naturally persuaded by the prosecution's arguments that Ms. Harris had to be guilty to confess to such a heinous crime and that the idea of accidental strangulation was "ridiculous." If, however, the trial court had properly protected Ms. Harris' constitutional rights by suppressing Ms. Harris' statements and admitting Diante's testimony, and she had been afforded adequate assistance of trial counsel, a different result would have been likely and an innocent woman would never have been convicted of killing her own child. As described below, Ms. Harris is entitled to relief under 28 U.S.C. § 2254. The remainder of this petition is organized as follows:

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Petitioner Nicole Harris (Reg. No. R80396, Dwight Correctional Center), by her counsel, respectfully petitions for relief by writ of *habeas corpus*, pursuant to 28 U.S.C. §2254, from her unlawful and unconstitutional confinement upon conviction for first-degree murder in the Circuit Court of Cook County, Chicago, Illinois. Ms. Harris is currently serving a sentence of thirty years in prison.

I. The parties

1. Now twenty-eight years old, petitioner Nicole Harris remains confined at the Dwight Correctional Center, serving a thirty-year sentence imposed after her conviction for first-degree murder. Ms. Harris was twenty-three and a recent graduate of Southern Illinois University in Edwardsville, Illinois when she was arrested.

2. Respondent Sheryl Thompson is the Warden of the Dwight Correctional Center, the Illinois Department of Corrections facility where Ms. Harris is presently incarcerated.

II. Procedural history

3. Ms. Harris was charged in the Circuit Court of Cook County with the offense of first-degree murder in the death of her son, Jaquari Dancy. On July 14, 2005, she entered a plea of not guilty. Following a jury trial before the Honorable Lon W. Schultz, Ms. Harris was convicted of first-degree murder on October 25, 2005, and sentenced to thirty years in prison on September 27, 2006.

4. On May 13, 2009, Ms. Harris' conviction was upheld by a divided Appellate Court of Illinois for the First Judicial Circuit. In her appeal, Ms. Harris argued that (1) the trial court erred in denying Ms. Harris' motion to suppress statements, (2) the trial court abused its discretion in finding Diante Dancy incompetent to testify, (3) the State had not adequately proven the *corpus delicti* for the crime of first-degree murder and (4) the assistance provided by

Ms. Harris' trial counsel was ineffective. The majority rejected each of those arguments. Justice Tully dissented, concluding that the trial court's decision to deny Ms. Harris' motion to suppress statements was improper.

5. On April 17, 2009, Ms. Harris filed a petition for leave to appeal with the Supreme Court of Illinois. In the petition, Ms. Harris requested relief on the same grounds outlined in her appeal before the appellate court. On September 30, 2009, the Illinois Supreme Court denied Ms. Harris' petition for leave to appeal.

6. Ms. Harris did not petition the United States Supreme Court for a writ of *certiorari*.

7. Ms. Harris did not file a post-conviction petition or any other petition with the state court.

8. Ms. Harris has not filed a previous petition for writ of *habeas corpus* in federal court.

9. This petition is the only legal proceeding pending with respect to this conviction and sentence.

10. Ms. Harris does not have any future sentence to serve following the sentence imposed by this conviction.

III. Statement of facts

11. In May 2005, Ms. Harris had recently graduated from Southern Illinois University in Edwardsville with a degree in psychology and had started a job as a psychiatric rehabilitation service coordinator. (R713-14) Ms. Harris, her five-year-old son Diante, her four-year-old son Jaquari, and the boys' father, Sta-Von Dancy, had just moved into an apartment on Chicago's West Side. (R596, R599, R713) Jaquari was a playful child who enjoyed pretending to be

superheroes. (R1329-30) Mr. Dancy worked at O'Hare Airport transporting cars from the airport to other locations throughout the state. (R594-95)

12. The boys' room contained a bunk bed, a dresser and a television set on which the children liked to play a Spiderman video game. (R598, R1310, R1324-25) Diante slept on the top bunk, and Jaquari slept on the bottom. (R599) An elastic cord had come free from one end of the fitted sheet on the top bunk and dangled down toward the bottom bunk. (R638-40) Jaquari had previously been observed wrapping the elastic cord around his neck, and had also been observed tying a rope around his neck while playing. (R643-45) Sta-von scolded Jaquari on both occasions but, instead of cutting the cord or removing the sheet from the top bunk, Sta-von merely tucked the cord back under the top bunk bed. (R639, R644)

A. <u>The events of May 14, 2005</u>

13. On May 14, 2005, Mr. Dancy arrived home at about 5:00 a.m., after working the night shift, and went to sleep. (R599) When he awoke a few hours later, he accompanied Ms. Harris to the laundromat across the street. (R600) Before leaving for the laundromat, Ms. Harris told the boys to stay in the home and not to go outside for any reason. (R721) Nonetheless, when she and Mr. Dancy returned to the apartment, the boys were playing outside. (R721) She scolded the children, causing Jaquari to cry, and sent them to their room. (R721-22) Mr. Dancy soothed Jaquari. (R602) After Jaquari stopped crying, Mr. Dancy left the boys in their room with the door open. (*Id.*) Mr. Dancy helped Ms. Harris work on a broken phone jack, then fell asleep on the couch. (R603-04) Ms. Harris roused him and helped him to the bedroom, where he fell back asleep, and she left the bedroom door open. (*Id.*) With the boys quiet in their room, Ms. Harris returned to the laundromat to dry her clothes. (R727-29)

14. What happened next is disputed. The State, relying exclusively on a controversial statement given by Ms. Harris, contended that she returned to the apartment while Mr. Dancy

was still asleep, became upset that Jaquari would not stop crying, quietly wrapped the elastic cord around his neck until he died, then returned to the laundromat as though nothing had happened. (R877-78) The defense contended that, while the children were alone in the room, Jaquari, as he had been known to do in the past, wrapped the elastic cord around his own neck. This time, however, he was unable to remove it, and he accidentally strangled himself as he struggled to get free from the cord. (R926)

15. While the State's theory was supported only by Ms. Harris' contested confession, the defense claim that Jaquari's death had been accidental was supported by both an immediate eyewitness account and by expert research in the field of accidental pediatric strangulation. Neither piece of evidence was presented, however. It was undisputed that Diante had told the authorities that, when neither of his parents were present in the boys' room, Jaquari had wrapped the cord around his own neck. (A230-31) Nonetheless, the court ruled that Diante was not competent to testify. (R1387) Expert testimony regarding numerous cases of accidental childhood strangulation in situations very similar to those at issue in this case was not presented because trial counsel never even attempted to introduce such evidence. (A320-22)

16. Both the State and the defense agreed that Ms. Harris returned to the apartment building after finishing the laundry. (R729) She rang the doorbell because she needed Mr. Dancy to help her carry the laundry into the building. (R604, R729) Mr. Dancy awoke at the sound of the doorbell and went out to help Ms. Harris. (R604) After carrying the laundry basket into the house, Mr. Dancy went to check on Jaquari and Diante while Ms. Harris parked the car. (R605, R729)

17. When Mr. Dancy entered the children's room, he could tell something was wrong with Jaquari. (R605) He saw Jaquari lying flat on his stomach on the floor, facing the doorway

with a bubble coming out of his nose, and his face was purple. (R605-06) Mr. Dancy shouted Jaquari's name, but Jaquari did not respond. (R606) Mr. Dancy saw that the elastic cord that had been loose from the fitted sheet on the upper bunk bed was tightly wrapped around Jaquari's neck. (R606-08) He unwrapped the elastic from around Jaquari's neck, started to give Jaquari CPR, then picked him up and ran outside to find Ms. Harris and look for help. (R606-610)

18. Returning from parking the car, Ms. Harris saw Mr. Dancy with a lifeless Jaquari in his hands and became hysterical. (R730) She repeatedly implored Mr. Dancy to tell her what had happened. (*Id.*) Mr. Dancy cried that he did not know. (R610) The panicked couple rushed to their car, and Mr. Dancy continued to give Jaquari mouth-to-mouth resuscitation while Ms. Harris drove. (*Id.*)

19. Having recently moved to the neighborhood, Ms. Harris and Mr. Dancy were not familiar with the area and did not know where to find the nearest hospital so they sought out someone who had a phone that they could use to call 911. (R731) They were unable to obtain help from the first person they encountered and desperately continued to look for help. (R611) When they saw another man with a cell phone, Ms. Harris was able to impart the urgency of the situation to him and they borrowed his phone to call 911. (*Id.*) An ambulance arrived and took Jaquari to the hospital. (*Id.*) While Jaquari was being taken to the hospital, Ms. Harris and Mr. Dancy returned to the apartment to retrieve Diante and then headed to the hospital. (R612-13)

20. When the family arrived at the hospital, Ms. Harris rushed in to check on Jaquari's condition while Mr. Dancy parked the car. (R735) She was told that the doctors were stopping treatment because Jaquari was dead. (R736-37) Returning from parking the car, Mr. Dancy saw Ms. Harris' reaction to the terrible news and realized that Jaquari could not be resuscitated. (R614, R736-37) Mr. Dancy and Ms. Harris were devastated. (R614, R736-37)

21. Ms. Harris went in to see Jaquari and could not control her emotions, imploring Jaquari to wake up and crying out in anguish so loudly that Mr. Dancy could hear it from the hallway. (R614) So grief-stricken that they were unable to stand, Ms. Harris and Mr. Dancy were taken in wheelchairs to the hospital chapel, where they met with a grief counselor. (R736-38) Less than an hour after Ms. Harris and Mr. Dancy learned that they had lost their son, several detectives from the Violent Crimes Division of the Chicago Police Department approached them in the chapel and asked them to come to the station. (R615, R738, R742) Ms. Harris was offered the opportunity to drive herself to the police station but she told the police that, given her emotional state, she did not feel comfortable driving. (R742-43) Ms. Harris and Mr. Dancy were then taken to the station in separate marked police cars, with Diante riding in the same car as Ms. Harris. (R651-52, R742-43)

B. <u>The events at the police station</u>

22. When they arrived at the police station at approximately 9:00 p.m., Mr. Dancy and Ms. Harris were placed in separate rooms. (R742-44) Ms. Harris and Diante were placed in an interrogation room, referred to at trial as the "quiet room" or the "butterfly room," and Ms. Harris was questioned for several hours by various detectives at different times and in different groups. (R67, R654, R745-46) At one point, Ms. Harris and Diante attempted to leave the room, but a detective promptly directed them to stay put. (R754) Around midnight, Scott Peterson, an official from the Department of Children and Family Services, arrived at the police station and asked Ms. Harris whether there was anyone who could take custody of Diante. (R748-49) Ms. Harris told Mr. Peterson that Diante's grandmother could do so, and she released Diante to his grandmother's custody. (*Id.*) Mr. Peterson took Diante away and Ms. Harris began to cry. (R748-50) What transpired next was the subject of contradictory testimony.

1. Ms. Harris' testimony regarding the events at the police station

23. Ms. Harris testified that, after Diante was taken away, she was subjected to increasingly hostile interrogation. Detective Andrew Noradin removed her from the initial interview room and placed her into a holding cell where he "shoved" her and told her "you're under arrest for murdering your F'ing son." (R750) Ms. Harris was handcuffed to a bar while Noradin and other detectives informed Ms. Harris that they were "sick of [her] BS lies," that she was "playing games" and that she could no longer "sit [t]here and say [she] didn't do it." (R750-51)

24. Ms. Harris continued crying and insisted that she was telling the truth, but her interrogators told her she was lying and accused her of not crying "real tears." (R752) She asked for an attorney and was told that she did not need an attorney, but rather needed to cooperate. (R752)

25. Eventually, the officers unhandcuffed Ms. Harris and left the room, locking the door. (R751-53) The detectives returned later, insisted again that she had been lying to them, and told her that even Mr. Dancy had suggested she might have killed Jaquari. (R755) Ms. Harris continued to maintain her innocence, even though her insistence agitated the officers further. (R755-57)

26. Hours passed without Ms. Harris being offered anything to eat or drink. (R757, R760) At one point, while still locked in the room, Ms. Harris had to use the bathroom. (R753) She pounded on the door for approximately an hour before anyone arrived to take her to use the bathroom, after which she was returned to the interrogation room. (R759-60)

27. Eventually, a detective asked if Ms. Harris would take a lie detector test. She agreed but, because of the unavailability of a polygraph examiner at that late hour, she could not be given the test until the following day. (R757, R760) She spent the entire night in the

interrogation room. (R759) She did not sleep during the night and was let out of the room only the one time to use the bathroom. (R759-60)

28. The next day, after Ms. Harris had been in custody for more than fifteen hours, she was taken from the police station to another location and given a polygraph test. (R760) Officer Robert Bartik, who administered the test, repeatedly accused Ms. Harris of lying.[1] (R763) Specifically, Ms. Harris explained that Officer Bartik told her, "you are pissing me off, I've been very patient with you, I've been very nice to you, and you are still sitting up here, you are lying to us . . . you know what, you're acting like a monster." (R763-64) She protested that she was telling the truth and again requested an attorney. (R764) Officer Bartik told her that she did not need an attorney because an attorney would tell her not to talk to the police, which would "force us to give the stuff to the state, and then they're just going to slam you." (*Id.*)

29. Another detective soon joined Officer Bartik, telling Ms. Harris that he and the other officers were "sick and tired" of her "lying," and echoing Bartik's threats to "turn this stuff over to the State" if Ms. Harris did not "cooperate" and stop acting like "a monster." (R765-66) The officers demanded to know whether Ms. Harris "want[ed to] . . . spend the rest of her life behind bars because [she refused to] cooperate" and would not provide them with the version of events that they were looking for. (R766)

30. Bartik outlined the police's theory of what happened, telling Ms. Harris that she had gotten angry and "pulled [the cord] down [from the bed sheet] and put it around Jaquari's neck" "four or five times." (R769-70) Despite this aggressive questioning, Ms. Harris

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[1] This is not the first time that Detective Bartik's interrogation techniques have been called into question. Earlier this year Detective Bartik, along with two other Chicago police officers, was found liable for framing a defendant in a capital murder case by fabricating a confession. Frank Main, *Cops Balk at Paying $110k: Owe Punitive Damages for Fabricating Confession in Murder*, Chicago Sun-Times, Aug. 26, 2010, at 24.

maintained her innocence for hours, "just crying and crying" and "shaking [her] head." (R768, R770)

31. Some 20 hours after her interrogation began, Ms. Harris, physically and emotionally drained from both the interrogation and the stress of losing her son, relented and "started agreeing" with the officers. (R770) She was then brought back to the police station where Detective Robert Cordaro arranged for her to talk with an Assistant State's Attorney (ASA) and laid out the version of events that Ms. Harris was supposed to tell the ASA. (R771-74) Pressing Ms. Harris to include details the detectives had given her previously, Cordaro urged her to "remember, [the elastic was wrapped] four or five times," and "kept going through the story over and over and over again." (R771-72)

32. Detectives Noradin and Cordaro also told Ms. Harris that her statement would allow her to secure a low bond which would enable her to get out and fight the charges from the outside, and that her statement would guarantee she would be charged with manslaughter and not first-degree murder. (R772, R775-76) By the time the assistant state's attorneys arrived to take Ms. Harris' statement, the detectives and Ms. Harris had rehearsed the version of events enough times that she could recite it back to the assistant state's attorney.

33. Ms. Harris testified that she met separately with two ASAs and told both of them that she had been mistreated by the detectives but neither ASA properly addressed her complaints. (R778-80, R784, R786-87) The first ASA to speak with Ms. Harris was ASA Kevin O'Reilly. (R777, R784) Ms. Harris informed ASA O'Reilly that she had been mistreated by the officers and had requested an attorney, which he wrote down in a notebook. (R778-80). Ms. Harris also presented to ASA O'Reilly the confession that the detectives had developed for her. (R781-84)

34. ASA O'Reilly subsequently left and ASA Andrea Grogan continued the inquiry. (R785) Ms. Harris repeated to her the same story she had gone over with Detective Cordaro and told ASA O'Reilly. (R785) Ms. Harris testified that she also told ASA Grogan that she had been mistreated. (R784, 786-87) Ms. Harris stated that, after she told ASA Grogan of her mistreatment, ASA Grogan left the room and had a discussion with the detectives, following which Detective Cordaro returned and told her that she would not have to speak with the other detectives anymore. (R787)

35. Ms. Harris then agreed to give a videotaped statement because the detectives had encouraged her to give a videotaped statement instead of a written statement as it would help her convey her emotions. (R772-74, 788)

36. Shortly after 1:00 a.m. on May 16, 2005, after nearly twenty-seven hours in police custody, Ms. Harris gave a videotaped statement in which she falsely confessed to killing Jaquari, regurgitating the details the detectives had provided to her. (R507-08, R772-74, R788)

2. <u>The State's witnesses' testimony regarding the events at the police station</u>

37. According to testimony by Detective Noradin, around 9:00 p.m., he and Detective Kelly questioned Ms. Harris in a station interview room for twenty-five to thirty minutes. (R67-68) The detectives left the room for approximately four hours and continued their investigation which consisted of verifying Ms. Harris' version of the events. (R69-70, 99) Alone in the "quiet room" for several hours, Ms. Harris and Diante attempted to leave the room but a detective promptly directed them to stay put. (R754)

38. Approximately four hours later, at midnight, Noradin decided to resume the interrogation because his investigation uncovered "inconsistencies" in Ms. Harris' story. (R69-70, R99) This time, they decided that their interrogation would be more hostile and antagonistic but would remain unwarned. But before they resumed their interrogation, an official from the

Department of Children and Family Services removed Diante from the interrogation room and Ms. Harris began to cry. (R748-50) Noradin and two new detectives then charged back into the interrogation room and began to "confront her with inconsistencies" and accuse Ms. Harris of lying at which time Ms. Harris "spontaneous[ly]" confessed that she "put a phone cord around Jaquari's neck, . . . [and then] she wrapped the elastic band from the bed sheet around Jaquari's neck to make it look like an accident." (R69-70, R99, R1246) An hour later, Ms. Harris recanted. (R1247) It is undisputed that this initial confession was false, as its details (including the use of a phone cord) are inconsistent with the other evidence in the case. However, at the time the detectives first reported this alleged confession, initial crime scene investigation had led law enforcement to believe that a loose phone cord observed in Ms. Harris' apartment could have been the murder weapon. (R577-78)

39. At 2:25 a.m., Ms. Harris agreed to take a polygraph test. (R1247-48) Because a polygraph examiner was not available at that hour, she was not given the polygraph exam until roughly 12:45 p.m. on May 15, 2005, approximately fifteen hours after she was first taken into custody. (R1248-49, R135) Noradin testified that, while they were in the polygraph unit, Ms. Harris told him that she had spanked Jaquari, grabbed the dangling elastic cord from the sheet, put it once around his neck, laid him on the top bunk, and left the room. (R1253-54) There is no dispute that this confession was also false, as it also did not match the physical evidence.

40. After the polygraph exam, Noradin and another detective again "confronted Ms. Harris" and told her it would have been impossible for Jaquari to roll off of the top bunk because of the bed rails – in essence, the police officers informed Ms. Harris that they believed her second confession was not credible because, as with her initial "phone cord" confession, the State's evolving understanding of the crime scene now rendered it physically impossible.

(R1249, R1254-55) Detective Noradin testified that finally, after having given two "confessions" that failed to conform to the physical evidence, Ms. Harris said that she wrapped the elastic cord around Jaquari's neck until she saw him bleeding from his nose, at which time she laid him down and left the room. (*Id.*) Thus, within the space of fifteen to nineteen hours, according to the State, Ms. Harris confessed to three different ways in which she killed Jaquari, only arriving at a version that somewhat conformed with the physical evidence after prolonged, overnight interrogation by a team of police officers.

41. At approximately 8:30 p.m. on May 15, 2005, Ms. Harris was interviewed by ASA O'Reilly for approximately 15 minutes, in the presence of Detectives Noradin, Cordaro, and Demosthenes Balodimas. (R77-78) At approximately 9:20 p.m., ASA Grogan, who was also accompanied by Detectives Noradin and Balodimas, advised Ms. Harris of her rights and interviewed her for about 30 minutes. (R498-99) Grogan asked the detectives to leave and she spoke with Ms. Harris alone. (R502) At midnight on May 16, 2005, Ms. Harris agreed to make a videotaped statement, and, at approximately 1:06 a.m. on May 16, 2005, more than twenty-seven hours after being taken to the station, Ms. Harris made her statement. (R80-81)

C. <u>The autopsy</u>

42. Dr. John Denton, a medical examiner with the Cook County Medical Examiner's office, performed a post-mortem examination of Jaquari Dancy on May 15, 2005. (R549) He analyzed a telephone cord from Ms. Harris' apartment as well as an elastic band from her sons' bed sheet and conclusively determined that the sheet, and not the telephone cord, had caused the injuries. (R560-61) Based on a thorough physical examination of the body and the other physical evidence as well as consultation with other doctors in his office, Dr. Denton concluded that Jaquari's death "was a tragic accident." (R568-69) He did not determine the cause of death to be inconclusive, or provide any indication of a possibility that the death was a homicide or that

he thought (as he would later testify at trial) the injuries were equally consistent with an accident or a homicide. (R579-80) Other than the ligature marks on Jaquari's neck, Dr. Denton did not observe any bruises or signs of abuse or neglect on Jaquari's body. (R592)

43. A few days later, Dr. Denton received a phone call from a detective who informed him "that there had been a change in circumstances, that the mother had basically confessed to doing something to Jaquari." (R569-70) Dr. Denton asked to review the transcript of the confession because he wanted to make sure that it was not "maybe a false confession." (R570) In evaluating the confession, however, Dr. Denton did not review anything other than the transcript of the confession. (R580-582) He did not analyze the circumstances under which the confession was made or view the videotape of the confession. (R580-81) Based on the transcript, Dr. Denton changed his conclusion and ruled Jaquari's death a homicide. (R572-73)

D. <u>The suppression motion</u>

44. On August 17, 2005, Ms. Harris' trial counsel filed a motion to suppress statements made by Ms. Harris while in police custody, including the videotaped confession, on the ground that, in interrogating Ms. Harris, the police did not follow the constitutional requirements of *Miranda* and its progeny. (C35-37, A0013-15) On September 28, trial counsel filed a separate motion to quash the arrest, suppress statements and dismiss the case in its entirety for lack of probable cause. (C39-43, A0016-17)

45. A hearing on the two motions was held on September 28, 2005. (R61-161) The trial court found the testimony of Detective Noradin and Officer Bartik to be credible, found that the officers had given Ms. Harris her *Miranda* rights, and found that Ms. Harris' unwarned inculpatory statement at 12:45 A.M. constituted a "spontaneous statement." (R152-55) Accordingly, the court denied Ms. Harris' motion to suppress, holding that the State met its burden of proof in establishing that her statements were voluntary. (R156)

46. The court did not address the motion to quash arrest. (R156-57) During the hearing on the motion to suppress statements, Ms. Harris' counsel's questioning began to venture into the facts surrounding the motion to quash the arrest. At that point, the judge stated that Ms. Harris' counsel had "indicated earlier that [he] did not wish to litigate the arrest motion at this time." (R104) He told Ms. Harris' counsel that he could litigate that motion at that time if he wanted to, but clearly did not consider the motions to be dealing with the same issues. (*Id.*) In response to the judge's inquiry, Ms. Harris' counsel did not state that he wished to litigate both motions at the same time, but instead explained why his line of questioning was pertinent to the motion to suppress statements. (*Id.*) After the motion to suppress statements was denied and without any further indication as to the likely outcome of the motion to quash arrest, Ms. Harris' trial counsel, without explanation, withdrew the motion to quash arrest. (R156-57)

E. <u>The trial proceedings</u>

1. <u>The State's evidence</u>

47. At trial, the State relied primarily on Ms. Harris' videotaped statement, which did not capture any of the interrogations, events or conditions of the twenty-seven hours that preceded it. (R499-504, R507-08) The State also relied on the testimony of Dr. Denton as to his conclusion of homicide after learning of Ms. Harris' confession, the testimony of ASA O'Reilly and Detective Noradin as to their respective roles in interrogating and eliciting the videotaped statement from Ms. Harris, and the testimony of Detective Balodimas as to items removed from the apartment, including the blue and white sheet from the bottom bunk bed, the phone cord and a belt. (R569-573, R1215-22, R1242-57, R1187-97, R1200-04) The State also called Mr. Dancy, who testified regarding the events of May 14, 2005, leading up to Jaquari's death, including his discovery of Jaquari's body, the trip to the hospital, his and Ms. Harris' experience

at the hospital, and the events at the police station. (R593-618) Nothing in Mr. Dancy's testimony implicated Ms. Harris in Jaquari's death. (*Id.*)

48. At the close of the State's case, defense counsel moved for a directed verdict on the ground that the State failed to meet its burden of proving Ms. Harris guilty beyond a reasonable doubt. (R1307) That motion was denied. (R1307-08)

2. <u>The Defense's evidence</u>

49. Defense counsel's performance started poorly, beginning with an opening statement that failed to present any theory of the case or discuss the expected evidence. (R488-91) The opening statement, which occupies only fifty-three lines of the transcript, elicited three sustained objections and three open-court admonishments by the trial court including a chastisement to not "misstate the law." (*Id.*) Defense counsel's trial performance went downhill from there.

50. The defense case relied almost entirely on Ms. Harris' testimony that her confession was false and coerced. (R712-833) The defense called Mr. Dancy, who testified about the layout of Jaquari and Diante's bedroom, the Spiderman games the children played together, and the fact that he had previously observed Jaquari playing games in which he wrapped objects around his neck. (R1308-26) The defense also presented the testimony of several family members who testified about Diante and Jaquari and about Ms. Harris as a parent. (R698-711, R1327-37) Detective Wo was called to testify about the details of the investigation. (1337-52) Officer Bartik was also called to testify as to facts supporting the defense theory that Ms. Harris' confession was coerced by the administration of the polygraph. (R682-698) The defense presented no other witnesses, and specifically did not call any expert witnesses to testify as to the ability of a child to strangle himself in a free-hanging cord or that false confessions are not uncommon and Ms. Harris was especially susceptible to interrogation techniques.

3. The competency hearing

51. The defense attempted to call Diante Dancy, the only eyewitness. (R1156) In light of Diante's age (he was then six years old), the court stated that "it will be the Defense's burden of establishing [Diante's] competency in accordance with 725 ILCS 5/115-14." (R1353-54) That statement, without dispute, was contrary to controlling law, but defense counsel did not challenge it. In Illinois, a witness is presumed competent regardless of age and the burden is on the party challenging competency to disprove competency. 725 Ill. Comp. Stat. 5/115-14 (West 2010).

52. During a *voir dire* hearing to determine Diante's competency, Diante testified that he knew how to spell his first and last names, and that he knew he lived in Chicago and, before that, in Edwardsville. (R1157-58) When asked whether he knew the difference between the truth and a lie, Diante testified that "[t]elling a lie, you might get in trouble. Telling the truth, you might get a star." (R1159-60) When asked if a star was a "good thing," Diante said "yes." (R1160)

53. Diante testified that, on the afternoon of the last day he was at his old house (he and Mr. Dancy had moved out of the apartment immediately after this tragic incident), he was with Jaquari in their bedroom. (R1162) Diante was playing his video game, and Jaquari was "playing with that string and wrapping it around his neck." (R1163-64) When asked what string he was talking about, Diante testified that he was talking about the cord from the blue sheet, the same string that Mr. Dancy found wrapped around Jaquari's neck. (R1164). Diante testified that no one else was in the room when Jaquari wrapped the string around his neck. (*Id.*)

54. Diante testified that he knew the difference between cartoons and real people, and that Scooby-Doo, and Tom and Jerry were cartoons. (R1164-65) He testified that Spiderman

was real (according to Mr. Dancy, Diante was familiar with live-action Spiderman movies[2]). (R1168, R1319) and that Scooby-Doo was not real. (R1168-69) He testified that the Hulk was "something else," and that Santa Claus was real. (R1169) Diante also testified that he saw Jaquari in "heaven."[3] (R1170-71) In response to a question by the court, Diante testified that he was testifying from memory and that no one had told him what to say. (R1177)

55. During the competency hearing, defense counsel also expressed a desire to call Ale Levy, the forensic examiner at the Child Advocacy Center who interviewed Diante on May 15, 2005, the day after Jaquari died. (R1357-60) Ms. Levy's testimony would have been relevant to Diante's ability to testify. According to police documents, Ms. Levy had concluded that Diante was competent and able to describe what happened to his brother, observing that he "knows [the] difference between truth/lies," "knows about Jaquari's death" and "saw Jaquari wrap [the] blue sheet around his neck." (C260-C266, A47-52) Although Ms. Harris' counsel said he had served Ms. Levy with a subpoena, he failed to procure her appearance at the hearing or ask that the subpoena be enforced. (R1357-60) When the judge asked Ms. Harris' counsel if he had "made any effort to procure her appearance here at this time," he responded that he had not. (R1358) The court then asked Ms. Harris' counsel to provide some explanation for why her testimony was relevant, clarifying that he was not stating it was not relevant but just that he wanted an explanation. (R1359-60) Flustered, Ms. Harris' counsel did not even attempt to explain the relevance and gave up on trying to call Ms. Levy as a witness. (R1360) She did not

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2 Diante also owned a teddy bear which he named Spiderman. (A203) It is not clear from the questioning that he was referring to the character and not the teddy bear.

3 This statement likely referred to Jaquari's funeral (where he would have seen Jaquari's body), with Diante believing that when he saw Diante's body in the church, Diante was in "heaven." (A0203-04)

testify. (R1360) Defense counsel did not call an expert on competency and called no other witnesses at the competency hearing. (R1360)

56. The State called as its only witness at the competency hearing Karen Wilson, a Child Protections Investigator with the Illinois Department of Children and Family Services. (R1361-62) Wilson testified that she interviewed Diante on May 16, 2005, the day after Ms. Levy had interviewed him, and that Diante told her that Scooby-Doo, Santa Claus and Spiderman were all real persons. (R1363-64) Significantly, Wilson also testified that Diante told her that "you can be dead if you put a sheet around your neck." (R1366)

57. The State also expressed a desire to call other witnesses to rebut a statement made by Diante that he had not spoken with any of the individuals in the courtroom. (R1369) The court refused to allow the State to call those witnesses because the court had taken judicial notice of the fact that both the State and Ms. Harris' counsel had previously indicated that they had spoken with Diante. (R1372) Ms. Harris' counsel protested that he had not spoken with Diante in relation to the case. (R1369-72) The court took issue with counsel's contention because, when Ms. Harris' counsel indicated that he planned on calling Diante, the court had asked him whether he had spoken with Diante and Ms. Harris' counsel said that he had. (R1369-71) In response to this apparent contradiction, Ms. Harris counsel said that he had met with Diante but not in relation to the case. (R1369)

58. During argument on the competency question, Ms. Harris' counsel asserted that the defense had met the burden of showing Diante was competent, a burden which it should not have been required to meet to begin with. (R1377) The State argued that Diante's testimony should be excluded because he could not differentiate between reality and fantasy and he could not tell time. (R1377-78) The court determined that Diante was not competent, based in large

part on the defense's failure to ask questions about Diante's ability to understand the duty to tell the truth. (R1382-87). Inverting the applicable legal standard, which directs a court to assume competency, regardless of age, unless and until a witness has been proven otherwise by opposing counsel, the court found that the defense had not met what the court erroneously believed was the defense's burden to prove Diante competent. (R1387) Thus the court based its ruling largely on the fact that "there were no questions at all with regard to his understanding of an obligation to be truthful either to parents or teachers or police officers. I suppose the ultimate issue before this Court." (R1382) In so ruling, the court simply dismissed Diante's testimony about the difference between a truth and a lie. (R1159-60) Similarly, although the court recognized that Diante had testified that he recalled playing Spiderman with his brother and that he had recalled the cord around his brother's neck, the court erroneously said that Diante did not remember anything else that happened on that day. (R1384) The trial court also based its finding on a conclusion that Diante lacked the ability to differentiate between reality and fantasy, given his statement that Spiderman, the tooth fairy and Santa Claus were real persons. (R1385-86)

4. <u>The court's concerns regarding the abilities of defense counsel</u>

59. Throughout the trial, the court repeatedly questioned the competency of defense counsel. The trial court's comments include, but are not limited to, the following:

- "I don't know if this is a preview of things to come, and I have been somewhat concerned about competent and effective representation, but Miss Harris seems satisfied by your efforts." (R518)

- "This is a very fundamental evidentiary issue. . . . I'm not going to allow you to attempt to convince this jury that that issue exists if it does not exist. It's unprofessional to do so." (*Id.*)

- "Counsel, is there something you don't understand about the concept of leading questions?" (R740)
- "Counsel, it appears clear to me that you don't understand what a foundation is for admission of either videotape evidence or transcription evidence." (R516)
- "I don't know if you're under some misapprehension that the courts must allow attorneys to drag their feet, to ask the same questions as many times as they'd like to ask them, but I'm not going to tolerate that in my courtroom." (R521-22)
- "If you choose through your conduct and questioning to put yourself in a position where I have to interrupt you and indicate that that question has been asked and answered, I will do so. That's going to be up to you." (R522)

60. The trial court also went "off the record" twenty-nine times during the trial. Although no transcripts of these sessions exist, the context and surrounding comments regarding a number of these instances indicate that the majority of them involved additional comments on the deficient performance of Ms. Harris' trial counsel. For example, after sustaining repeated objections during the defense counsel's examination of a witness, the trial court called an off-the-record sidebar. (R1318-19) Upon returning to the record, defense counsel resumed the examination with a statement that he was going to change the form of the question, presumably in response to the court lecturing counsel regarding his lack of understanding about the proper manner to question a witness. (R1319)

61. The trial ended the same way it began, with the court even interrupting counsel three separate times during his closing argument to chastise him. (R915, R918-19, R928)

5. The verdict

62. On October 26, 2005, after having seen Ms. Harris' videotaped confession but not having heard the exculpatory testimony of Diante or any expert testimony on childhood strangulation or false confessions, the jury found Ms. Harris guilty of first-degree murder. (R973-75)

F. New trial motions and sentencing

63. On November 28, 2005, Ms. Harris' trial counsel timely filed a motion for new trial, arguing among other things that the trial court erred when it found Diante Dancy incompetent to testify. (C83-86, A0043-46) Ms. Harris also submitted a *pro se* Motion for New Trial, arguing that her trial counsel was ineffective for failing to interview material witnesses, failing to prepare for trial, failing to conduct a proper competency hearing for Diante, failing to object to witnesses' testimony, and failing to object to the sheets being entered into evidence. (C96, A0047)

64. On April 21, 2006, after securing new *pro bono publico* counsel, Ms. Harris supplemented her new trial motion. (C107-385, A0082-129) In the new motion, Ms. Harris argued that:

(1) The trial court erred when it found Diante incompetent to testify, as it improperly placed the burden of proof on the defense and applied a competency standard that was inconsistent with the governing statute and the case law. (A0088-0096)

(2) Trial counsel was ineffective as a matter of law for failing to present expert testimony at Diante's competency hearing, including testimony of an expert on a child's psychological development. (A0096-0099) The supplemental motion included an affidavit by Dr. Robert Galatzer-Levy, a child, adolescent and adult psychiatrist, who conducted a comprehensive psychiatric evaluation, including two videotaped interviews, of Diante and

concluded that Diante was "neither incapable of expressing himself concerning the events surrounding his brother's death, nor incapable of understanding the duty of a witness to tell the truth." (C224-57, A0197-207)

(3) Trial counsel was ineffective for failing to present expert testimony on three crucial topics:

(a) That false confessions are not uncommon events in certain types of circumstances. (A101-104) In support of this argument, the supplemental motion included an affidavit by Dr. Richard Ofshe, a sociologist who has testified on the subjects of influence in police interrogation and false confession. (C268-C309, A0236-56)

(b) That Ms. Harris had a psychological profile that rendered her particularly vulnerable to giving a false confession when subjected to police interrogation**.** (A0105-07) In support of this argument, the supplemental motion included an affidavit by Dr. Bruce Frumkin, a clinical psychologist who conducted a clinical evaluation of Ms. Harris. (C311-77, A0279-90)

(c) That it is not uncommon or difficult for children of Jaquari's age to accidentally kill themselves with strings or cords, including (counter-intuitively) cords that are free at one end**.** (C107-385, A0107-10) In support of this argument, the supplemental motion included an affidavit by Dr. Ryan Stevens, an otolaryngologist who has studied the mechanisms and circumstances of accidental asphyxiation in children. (C338-60, A305-22)

(4) Trial counsel was ineffective for failing to call Ale Levy, a forensic interviewer from the Children's Advocacy Center, who conducted a victim sensitive interview of Diante Dancy on May 15, 2005, the day after Diante witnessed his brother's death and determined that Diante was competent to testify about what he witnessed. (A0099-100)

(5) Trial counsel was ineffective for withdrawing a meritorious motion to quash her arrest. (A0110-16)

(6) Trial counsel's cumulative errors deprived Ms. Harris of her right to effective counsel. (A0124-26)

(7) The State failed to meet its burden of proving Ms. Harris guilty beyond a reasonable doubt, as it failed to prove the *corpus delicti* for the offense of first-degree murder, namely that Jaquari's death was the result of criminal agency, rather than an accident. (A0116-21) The State's case relied entirely on Ms. Harris' confession. Such a case is highly suspect given the propensity of some individuals to confess falsely and the police to elicit false confessions. This is the very type of case that Illinois' rule requiring proof of *corpus delicti* through evidence independent of a confession, to prove that a crime actually occurred was meant to address.

(8) The trial court erred when it denied Ms. Harris' motion to suppress her statements. (A0121-24)

(9) Ms. Harris was deprived of her right to a fair and impartial trial when the State made repeated and improper references to her polygraph examination. (A0127-29)

65. On July 19, 2006, the trial court denied Ms. Harris' motions for new trial and alternative motion for an evidentiary hearing. (R1039) Although the court acknowledged it had applied the wrong burden of proof, it reaffirmed its ruling that Diante Dancy was incompetent.

(R1039) The court addressed Ms. Harris' ineffective assistance claims premised on defense counsel's omissions by first observing the speed with which the defense proceeded to trial. (R1027-37) The court emphasized that it had expressed concerns at the time about the defense strategy and had offered the defense more time to prepare for trial, but, after having asked Ms. Harris if she felt ready to proceed, believed Ms. Harris "acquiesce[d to]" and was "fully on board" with her retained counsel's decision to proceed quickly to trial. (R1029-30) The court gave further deference to Ms. Harris' trial counsel's decisions because he was privately retained, noting that, "it seems to me when a defendant can hire an attorney and is on board," he would be reluctant to second-guess counsel's behavior. (R1050) The court also held that it would not have admitted the proffered expert testimony even if it had been offered. (R1044-45) As to the rule of *corpus delicti*, the court stated merely that there was sufficient evidence of the body of the crime and did not otherwise address Ms. Harris' argument. (R1047)

66. On September 27, 2006, the court sentenced Ms. Harris to 30 years in the custody of the Illinois Department of Corrections. (R1149)

G. <u>Direct appeal</u>

67. On May 14, 2007, Ms. Harris' *pro bono publico* appellate counsel timely filed an appeal with the Appellate Court of Illinois for the First Judicial Circuit. In her appeal, Ms. Harris' counsel argued that:

(1) Under the rule of *corpus delicti*, as there was no evidence of a criminal act beyond Ms. Harris' confession, there was insufficient evidence to find Ms. Harris guilty beyond a reasonable doubt.

(2) The trial court had abused its discretion and deprived Ms. Harris of her Constitutional rights when it found Diante incompetent to testify based on three improper considerations:

(a) That the court had held Diante to an improper standard and ignored substantial record evidence in finding that Diante did not demonstrate an ability to express himself about the circumstances surrounding Jaquari's death.

(b) That the court had held Diante to an improper standard and ignored substantial record evidence in finding that Diante failed to demonstrate an understanding of the importance of telling the truth.

(c) That the court abused its discretion when it found Diante failed to demonstrate an ability to separate fantasy from reality.

(3) The trial court erred by refusing to grant Ms. Harris a new trial based on ineffective assistance of counsel based on four crucial issues:

(a) That Ms. Harris' trial counsel provided ineffective assistance of counsel at the competency hearing.

(b) That Ms. Harris' counsel was ineffective for failing to present expert testimony on the key issues of the case.

(c) That Ms. Harris' counsel was ineffective for withdrawing the motion to quash her arrest.

(d) That Ms. Harris' trial counsel's cumulative errors constituted ineffective assistance of counsel and render Ms. Harris' trial unreliable as a matter of law.

(4) The court erred in denying Ms. Harris' motion to suppress statements.

68. Ms. Harris was not provided with an opportunity to present oral argument. On March 13, 2009, a three-judge panel of the Appellate Court of Illinois for the First Judicial Circuit denied Ms. Harris' appeal with one judge writing a dissenting opinion.

69. On April 17, 2009, Ms. Harris filed a petition for leave to appeal with the Supreme Court of Illinois. In the petition, Ms. Harris requested relief on the same grounds outlined in her appeal before the appellate court. On September 30, 2009, the Illinois Supreme Court refused to hear the case.

70. This petition will discuss four principal grounds based on which Ms. Harris is entitled to *habeas corpus* relief. First, Ms. Harris was deprived of her Sixth Amendment rights to present witnesses in her defense and was denied Due Process when the trial court improperly prevented Diante, the most important witness to her defense, from testifying. Second, Ms. Harris' conviction is unlawful and she is being detained unjustly because the State failed to prove beyond a reasonable doubt the *corpus delicti* for the crime of first-degree murder in that the State did not introduce sufficient evidence that a crime was committed, beyond Ms. Harris' confession and, thus, failed to satisfy Illinois' *corpus delicti* requirement. Third, Ms. Harris was deprived of her Fifth Amendment rights when her confession was obtained through police coercion and an unconstitutional "question first, warn later" interrogation. Fourth, Ms. Harris was deprived of her Sixth Amendment right to effective assistance of counsel through her counsel's repeated unprofessional errors that prejudiced the outcome of the trial. Ms. Harris has preserved and exhausted each of these arguments at the state level and, consequently, they are appropriate for *habeas* review. In order to obtain *habeas corpus* relief, a petitioner must show that the state appellate court reached a decision that is contrary to or an unreasonable application of established federal law or is based on an unreasonable interpretation of the facts. This petition

demonstrates that Ms. Harris did argue these points through the use of established federal law and the appellate court either erroneously interpreted or unreasonably interpreted the law or that the appellate court unreasonably applied the facts. Consequently, she is entitled to *habeas* relief.

H. Ms. Harris is entitled to *habeas* relief

71. Ms. Harris' petition is governed by the standards established by 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA allows a federal court to grant *habeas* relief if the state court's adjudication of a federal claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2).

72. A state court decision is an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme] Court's decision but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

73. AEDPA addresses state court findings of fact and state court determinations based on those factual findings in two separate provisions. First, § 2254(e)(1) states, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Second, under § 2254(d)(2), a *habeas* court may grant relief if the state court adjudication of a federal claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

74. AEDPA does not require Ms. Harris to show that the appellate court's decision was unreasonable by clear and convincing evidence; rather, the clear and convincing standard applies only to state court findings of facts and not to the decisions based upon those factual findings. *Miller-El v. Cockrell*, 537 U.S. 322, 341-42 (2003). To prevail on her *habeas* claim based on the appellate court's unreasonable decision in light of the available facts, Ms. Harris need only demonstrate that the record does not support the court's decision at issue. *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1048 (7th Cir. 2005). As the Ninth Circuit recently emphasized, a court should not "simply parrot the findings made during the state court proceedings and call it a day." *Doody v. Schriro*, 596 F.3d 620, 636 (9th Cir. 2010) (holding that state court's determination that defendants' *Miranda* warning were effective was an unreasonable determination of the facts).

IV. Claim 1: The exclusion of the Diante Dancy's exculpatory testimony deprived Ms. Harris of her Sixth Amendment and due process rights to present witnesses in her defense.

75. The exclusion of Diante's testimony was devastating to Ms. Harris' defense. Diante was the sole eyewitness to his brother's death and would have corroborated the medical examiner's first opinion that Jaquari accidentally strangled himself. However, the trial judge deprived Ms. Harris of her right to present the most significant witness on her behalf when he found Diante incompetent to testify despite Diante's demonstrated physical and mental ability to testify to events he personally observed. The trial judge made this determination notwithstanding the statutory presumption in Illinois that every single person is presumed competent to testify regardless of age and the burden is on the party challenging a witness' competency to disprove competency. After erroneously placing the burden of proof on Ms. Harris to prove Diante's competency, the trial court based its holding on the inaccurate observation that Diante was never asked what it meant to tell the truth. (R1382) In denying Ms. Harris' motion for a new trial, the trial judge belatedly recognized that his placement of the

burden of proof on Ms. Harris was erroneous but nonetheless claimed he would have found Diante incompetent anyway. (R1039)

76. On appeal, Ms. Harris argued that the trial court misallocated the burden of proof, the trial court's findings were not supported by the record, and the exclusion of Diante's testimony violated her constitutional rights. In support of her position, Ms. Harris cited to several Illinois cases where children testifying on behalf of the prosecution exhibited less ability to recall details and express them in court, and demonstrated less ability to differentiate between truthfulness and falsehood than Diante, but were held competent to testify. However, the appellate held that it could not conclude that the trial court's determinations were unsupported by the record and found harmless the trial judge's error in misallocating the burden of proof.

77. Ms. Harris is entitled to *habeas* relief as a result of the exclusion of Diante's testimony. The Constitution affords every defendant a right to place on the stand any witness who is capable of testifying to events he personally observed, where that testimony is relevant and material. Diante satisfied this standard, and the exclusion of his critical testimony deprived Ms. Harris of her constitutional right to present witnesses on her behalf.

A. <u>The appellate court's determination that Diante was incompetent to testify was an unreasonable application of federal law and an unreasonable determination of the facts before it.</u>

78. Ms. Harris is entitled to relief under both AEDPA standards because the appellate court's affirmance of the trial court's finding that Diante was incompetent to testify was an unreasonable application of federal law as determined by the Supreme Court and an unreasonable determination of the facts before it.

79. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. The Supreme Court has maintained that this aspect of the Sixth Amendment,

which protects a defendant's right to present his own witnesses in order to establish a defense, is a "fundamental element of due process of law." *Washington v. Texas,* 388 U.S. 14, 19 (1967). In fact, "few rights are more fundamental than that of an accused to present witnesses in his own defense." *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) For this reason, the Supreme Court has consistently held that due process demands that every defendant have an opportunity to present relevant testimony to aid his defense. *See Washington*, 388 U.S. at 23 (due process violated when trial court applied state statute prohibiting co-participants in crime from testifying on behalf of each other when testimony was potentially exculpatory).

80. Specifically, a defendant has a right to place on the stand any witness who is "physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington*, 388 U.S. at 23.

81. The appellate court announced the correct Supreme Court standard, which is embodied in Illinois' witness competency statute. 725 Ill. Comp. Stat. 5/115-14 (West 2010).[4] However, the appellate court held that it could not conclude the trial court's findings that (1) Diante was not physically and mentally capable of testifying to events he personally observed, and (2) lacked ability to differentiate between truthfulness and falsehood, were unsupported by the record. *People v. Harris*, 904 N.E.2d 1094, 127 (Ill. App. Ct. 2009). On the contrary, the record does not support either of these findings. Diante satisfied the Supreme Court standard for competency.

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[4] Under Illinois' competency standard, a witness is presumed competent regardless of age and the burden is on the party challenging competency to disprove competency. *Id*. 725 Ill. Comp. Stat. 5/115-14 (West 2010). Furthermore, no witness may be disqualified from testifying unless: (1) the witness is incapable of expressing himself or herself concerning the matter to be understood; or (2) the witness is incapable of understanding the duty of a witness to tell the truth. *Id*.

82. First, the trial court erred in finding that Diante was not physically and mentally capable of testifying to events he personally observed. Diante was able to give a detailed description of the events surrounding his brother's death and would have corroborated Ms. Harris' defense. Diante described playing his Spiderman video game and playing with his toys while Jaquari "[played] with that string and [wrapped] it around his neck." (R1164) Diante described the sheet as blue in color and as the sheet on his bed on the top bunk, and recalled that Jaquari was standing on the floor. (*Id*.) Diante also described going to the hospital with Jaquari and his parents on the last day he spent in his old house, which corresponded with the date of Jaquari's death. (R1167) Accordingly, the record reveals that Diante was able to give a detailed description of the events surrounding his brother's death and easily met the standard set by the Supreme Court in *Washington*.

83. Second, the trial court erred in finding that Diante lacked the ability to differentiate between truthfulness and falsehood. Diante testified that telling a lie could get him in trouble and that telling the truth could get him a "star," which he understood to be a good thing. (R1160) To require Diante to demonstrate a more nuanced understanding of the concept of a "moral" duty to tell the truth while in a courtroom would be contrary to Supreme Court precedent.

84. In upholding the trial court's ruling that Diante lacked the ability to differentiate between truthfulness and falsehood, the appellate court noted that "the trial judge was troubled by Diante's denial that he had spoken with any of the lawyers before coming to court, when the judge had been apprised that the prosecutor and defense counsel had met with him earlier." *Harris*, 904 N.E.2d at 1094.

85. The following excerpt includes the trial court's entire examination of Diante:

> COURT: Diante, before you came to court today, did you -- anyone tell you what you should say here when you got to court?
>
> DIANTE: No.
>
> COURT: Okay. So what you're telling me today are things that you remember?
>
> DIANTE: Yes.
>
> COURT: Okay. Have you spoken before with any of the people who are here today before you came to court?
>
> DIANTE: No.
>
> COURT: When is the last time you saw your mother?
>
> DIANTE: When we was at our old house.
>
> COURT: Okay. You haven't seen her and talked to her since then?
>
> DIANTE. No.

86. The fact that Diante answered "no" to whether he had spoken to "any of the people" who were in court then "before he came to court," does not support the conclusion that he lacked the ability to appreciate his moral obligation to tell the truth, especially when he testified earlier that "telling a lie, you might get in trouble"; rather, it supports the conclusion that he misunderstood the question. Had the trial judge been more specific with his questions or asked follow-up questions, Diante might have understood the question better.

87. According to the appellate court, the trial court also had legitimate concerns about Diante's understanding of Diante's ability to differentiate between truthfulness and falsehood because Diante testified that Spiderman was "real" and that he had seen him in person, and that he had seen Jaquari in "heaven." *Harris*, 904 N.E.2d at 1094. With respect to Diante's testimony about Spiderman, according to Mr. Dancy's testimony, Diante was familiar with live-action Spiderman movies, which may well explain why he said Spiderman was "real." (R1319)

A further exploration of Diante's testimony that he had seen Spiderman in person might have revealed that he did not actually see Spiderman in person, he meant his Spiderman toy, or he meant something else. Moreover, the appellate court's conclusion ignores other critical portions of the record on the subject of fictional characters where Diante testified that he knew the difference between cartoons and real people, Scooby-Doo was a cartoon and not real, Tom & Jerry was a cartoon, and The Incredible Hulk was "something else." (R1164-65, 1168-69) Finally, with respect to Diante's testimony about seeing his brother in "heaven," further exploration of Diante's reference that he had seen his brother and his cousin in "heaven" may well have revealed that Diante was referring to Jaquari's funeral (where he would have seen Jaquari's body), with Diante believing church to be heaven.

88. Accordingly, Diante satisfied the Supreme Court's standard in that he was "physically and mentally capable of testifying to events that he had personally observed." *Washington*, 388 U.S. at 23. Any minor inconsistencies of the type emphasized by the state courts would, as to any other witness, go to credibility, not admissibility; they did not justify the wholesale exclusion of Diante's critical testimony.

B. <u>The exclusion of Diante's testimony prejudiced Ms. Harris.</u>

89. Having established constitutional errors, Ms. Harris is entitled to *habeas* relief unless those errors are proven "harmless beyond a reasonable doubt." *Ben-Yisrayl*, 431 F.3d at 1052. No such showing can be made. The exclusion of Diante's testimony crippled Ms. Harris' defense.

90. Diante was the only eye-witness to Jaquari's death. Diante testified in the competency hearing outside the jury's presence that "Jaquari was playing with that string and wrapping it around his neck." (R1163-64) He testified further that no one else was in the room with him when Jaquari was wrapping the string around his neck. (*Id*.)

91. Diante's testimony would have corroborated the medical examiner's first opinion that Jaquari's death "was a tragic accident." (R568-69)

92. Finally, Diante's testimony would have cast serious doubt on a very questionable confession.

93. The appellate court concluded that the exclusion of Diante's testimony was "harmless beyond a reasonable doubt" because Diante's testimony would have been "negated or otherwise diminished by Diante's admission to Ms. Wilson the day following the murder, that 'he was asleep when his brother got hurt.'" *Harris*, 904 N.E.2d at 1095. This conclusion is not supported by the record. For one thing, it neglects Diante's interview at the Child Advocacy Center in the immediate aftermath of Jaquari's death. Diante told Ale Levy, the State's own expert forensic child witness examiner, that he "saw Jaquari wrap [the] blue sheet around his neck" and that no one else was present when this happened. (C260-C266, A230-33) It also ignores the fact that Ms. Wilson testified that during her interview of Diante, she asked him "whether or not he saw mommy or daddy tie a sheet around Jaquari's neck," and he answered "no." (R1366) During that same interview, Ms. Wilson also testified that Diante told her "you can be dead if you put a sheet around your neck." (*Id.*) Diante consistently described what he saw, and that testimony is not inconsistent with his statement the he also fell asleep.

94. The appellate court also pointed to Ms. Harris' confession in support of its conclusion that the exclusion of Diante's testimony was harmless beyond a reasonable doubt. *Harris*, 904 N.E.2d at 1095. However, Diante's testimony coupled with the circumstances surrounding Ms. Harris' confession, would have given jurors powerful reasons for distrusting Ms. Harris' confession.

95. Accordingly, the exclusion of Diante's testimony deprived her of her right to present witnesses in her defense under the Sixth Amendment and the Due Process clause of the U.S. Constitution.

V. Claim 2: Ms. Harris' conviction violated her right to due process because the state failed to prove beyond a reasonable doubt that Jaquari died as the result of a criminal act.

96. Ms. Harris' conviction for first-degree murder violated her Due Process rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution because no rational trier of fact could have found beyond a reasonable doubt that Jaquari's death was the result of a criminal act rather than an accidental cause.

97. "The Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). A jury's verdict will withstand *Jackson* constitutional scrutiny only "if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *West v. Foster*, No.2:07-cv-0021-KJD-GWF, 2009 WL 1111175, at *2 (D. Nev. April 20, 2009) (citing *Jackson*, 443 U.S. at 319).

98. In a prosecution for first-degree murder under Illinois law, the state must prove beyond a reasonable doubt: (a) *corpus delicti*, and (b) that the crime was committed by the person charged. *People v. Ehlert*, 211 Ill. 2d 192, 202 (2004). The *corpus delicti* is an element of the offense for first-degree murder that requires the State to prove beyond a reasonable doubt both the fact of death, and, significantly, the criminal agency of another as the cause of death. *Id*. Moreover, "proof of the *corpus delicti* may not rest exclusively on a defendant's extrajudicial confession, admission or other statement. Rather, for a conviction based on a

confession to be sustained, the confession must be corroborated." *People v. Sargent*, 907 N.E.2d 410, 415 (Ill. App. Ct. 2009) (citing *People v. Furby,* 563 N.E.2d 421 (Ill. 1990); *People v. Willingham,* 432 N.E.2d 861 (Ill. 1982)). This fundamental corroboration rule in Illinois "requires not only that the independent evidence corroborate the confession, but also that it tend to establish the *corpus delicti* of the charged offense." *Id*. at 416.

99. This corroboration requirement "reflects a long-standing mistrust of extrajudicial confessions." *Sargent*, 907 N.E.2d at 415 (quoting *Furby*, 563 N.E.2d at 421). Specifically, it "stems from an attempt to assure the truthfulness of the confession and recognizes that the reliability of a confession 'may be suspect if it is extracted from one who is under the pressure of a police investigation-whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past." *Sargent*, (quoting *Willingham,* 432 N.E.2d at 861, *and Smith v. United States*, 348 U.S. 147, 153 (1954)).

100. A claim that the evidence was insufficient to satisfy the *corpus delicti* of an offense "indisputably presents a federal due process claim that is cognizable in federal *habeas* corpus." *West*, 2009 WL 1111175, at *2 (denying motion to dismiss *habeas* petition challenging absence of *corpus delicti*).

101. The evidence in this case cannot be fairly characterized as sufficient to have proven the *corpus delicti* for first-degree murder in Illinois because there is no evidence outside of the confession that (a) corroborates the confession, and (b) establishes that a crime actually occurred. The appellate court found such corroboration to be provided by the testimony of the medical examiner, Dr. Denton. *Harris*, 904 N.E.2d at 1096. However, after a thorough examination of Jaquari's body and the physical evidence of the scene, Dr. Denton initially concluded that Jaquari's death was the result of a "tragic accident." (R568-69) It was only after

a detective informed Dr. Denton "that there had been a change in circumstances that the mother had basically confessed to doing something to Jaquari." (R569-70) After reading the transcript of Ms. Harris' videotaped confession, Dr. Denton changed his conclusion and ruled Jaquari's death a homicide. (R570, 572-73). According to the appellate court, Dr. Denton's second opinion was corroborative because Dr. Denton testified that he learned that Jaquari slept on the bottom bed rather than the top bed and because he understood that Ms. Harris had earlier punished Jaquari with a belt. This testimony, however, was equally consistent with innocence and was not independent evidence corroborating the confession. *Cf. People v. Lueder*, 121 N.E.2d 743, 744 (Ill. 1954) (independent evidence of arson could not corroborate confession unless it showed that burning of building had been willful, not just that building had burned).

102. There was simply no evidence other than Ms. Harris' confession to suggest that Jaquari's death resulted from a crime rather than an accident.

VI. Claim 3: The denial of Ms. Harris' motion to suppress her confession violated the Fifth Amendment and requires the automatic reversal of her conviction.

103. The most critical evidence against Ms. Harris was her videotaped statement, which was the product of an unconstitutional "question first, warn later" interrogation in which she was subjected to an unwarned round of questioning, and then, upon confessing, *Mirandized* and re-questioned. *See Missouri v. Seibert*, 542 U.S. 600, 613-14 (2004). The trial court did not address whether a "question first, warn later" interrogation occurred. Instead, it found that Ms. Harris' unwarned confession was "spontaneous" and not the product of interrogation. (R155) The appellate court, which split two to one on this issue, proceeded down a different path. Two justices determined that the police did not "deliberately" withhold *Miranda* warnings because they never considered Ms. Harris a suspect until she confessed. *Harris*, 904 N.E.2d at 1090. The majority also concluded that Ms. Harris was not in custody when she gave her unwarned

confession and was therefore not entitled to *Miranda* warnings when she allegedly confessed. *Id.* at 1088. The dissenting justice held that Ms. Harris was in custody when she gave her unwarned statement and the police did in fact deliberately and unconstitutional withhold *Miranda* warnings. As a result, the dissenting justice held that Ms. Harris' confession should have been suppressed. *Id.* at 1100-01 (Tully, J., dissenting). As shown below, the majority's decision constituted a deprivation of Ms. Harris' Fifth Amendment rights and requires the automatic reversal of her conviction. Ms. Harris meets her burden of proving that she is entitled to *habeas* relief.

104. Ms. Harris is entitled to relief under both AEDPA provisions. Ms. Harris is entitled to relief under 28 U.S.C. § 2254(d)(1) because the majority's decision affirming the trial court's denial of Ms. Harris' motion to suppress was contrary to clearly established federal law. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000). Assuming purely for the sake of argument that the majority applied the proper Supreme Court standard, Ms. Harris is still entitled to relief under 28 U.S.C. § 2254(d)(1) because the majority applied that standard in an "unreasonable manner." *See id*. at 407. Ms. Harris is entitled to relief under 28 U.S.C. § 2254(d)(2) because the majority based its decision on an "unreasonable" determination of the facts. *See Cockrell*, 537 U.S. at 340.

A. The majority's decision affirming the denial of Ms. Harris' motion to suppress was contrary to clearly established Supreme Court precedent.

105. By applying an "intent-based" test in determining whether a "question first, warn later" interrogation occurred, the majority applied a standard that was contrary to clearly established Supreme Court precedent. A state court's decision is contrary to clearly established Supreme Court precedent if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Williams*, 529 U.S. at 405-06. Federal courts review state court

decisions *de novo* to determine "what is clearly established law as determined by the Supreme Court and whether the state court's decision is 'contrary to' that precedent." *Denny v. Gudmanson*, 252 F.3d 896, 900 (7th Cir. 2001).

106. The intent-based test announced by the majority appellate court is contrary to the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). The Supreme Court held that confessions elicited during custodial interrogations are presumptively involuntary and, thus, violate the privilege against self incrimination in the Fifth Amendment. *Id.* at 467-73, 478-79. To safeguard the uncounseled individual's Fifth Amendment privilege against self-incrimination, the Supreme Court held that suspects must be "adequately and effectively" advised of *Miranda* warnings. *Id.* at 467.

107. In *Missouri v. Seibert*, police officers negated the effect of *Miranda* warnings when they used "question first, warn later" interrogation technique. *See* 542 U.S. at 613-14. The plurality in *Seibert* recognized that where "question first, warn later" interrogation has diminished the effectiveness of the *Miranda* warning, a constitutional violation has occurred. The plurality stated:

> Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. . . . What is worse, telling a suspect that 'anything you say can and will be used against you,' without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. *Id*. at 613.

108. The *Seibert* plurality laid out the following relevant factors that bear on whether *Miranda* warnings delivered midstream could retain their meaning and effectiveness: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the

continuity of police personnel and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 615.

109. In this case, the majority failed to recite or consider any of these factors or conduct an objective analysis of whether the midstream *Miranda* warnings Ms. Harris received could have been effective. Instead, the majority erroneously focused on the subjective intent of the detectives, holding that a *Miranda* violation could only lie where "question first" interrogation had been employed as "part of a deliberate strategy to undermine the warnings." *Harris*, 904 N.E.2d at 1090. Thus, the majority attempted to apply the intent-based approach offered by Justice Kennedy who concurred in *Seibert* but took a different approach to the analysis of "question first, warn later" interrogation technique. Justice Kennedy held that constitutional violations would be found "only in the infrequent case . . . in which the two-step interrogation was used in a calculated way to undermine the *Miranda* warning." *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring). However, this intent-based approach, followed by the majority in this case, is neither the holding of *Seibert*, *see United States v. Heron*, 564 F.3d 879, 885 (7th Cir. 2009) (recognizing that the intent-based approach is not the holding of *Seibert*), nor consistent with *Miranda*, which requires that a suspect be "adequately and effectively" advised of his rights. *See Miranda*, 384 U.S. at 467. The analytical framework laid out by the plurality in *Seibert*, in contrast, is commensurate with *Miranda*. *See Seibert*, 542 U.S. at 613.

B. <u>Even if the majority applied the correct Supreme Court standard, its application of that standard was unreasonable.</u>

110. Assuming purely for the sake of argument, and contrary to *Miranda* and the plurality's analysis in *Seibert*, that the majority was correct in applying the intent-based test, the majority's application of that test was unreasonable because the majority focused *only* on the subjective intent of the detectives. *Harris*, 904 N.E.2d at 1088.

111. In determining whether the detectives deliberately withheld *Miranda* warnings, Supreme Court precedent requires consideration of not only the subjective intent of the detectives but also objective evidence that may support an inference that *Miranda* warnings were deliberately withheld. *U.S. v. Williams*, 435 F.3d 1148, 1158-59 (9th Cir. 2006) (citing *Seibert*, 542 U.S. at 616). Common sense tells us all that, as the plurality in Seibert pointed out, "the intent of the officer will rarely be candidly admitted . . . ." *Seibert*, 542 U.S. at 617. For this reason, courts must consider objective evidence such as "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." *See U.S. v. Williams*, 435 F.3d at 1159; *accord People v. Lopez*, 892 N.E.2d 1047, 1069-70 (Ill. 2008) (considering and finding objective evidence of deliberateness).

112. Contrary to this clearly established federal precedent and clearly established precedent of the Illinois Supreme Court, the majority did not consider any objective evidence in determining whether *Miranda* warnings were deliberately withheld. The majority failed to consider the "timing, setting and completeness of the prewarning interrogation, the continuity of police personnel, and the overlapping content of the pre- and postwarning statements." *U.S. v. Williams*, 435 F.3d at 1159. The majority focused on the detectives' subjective state of mind and whether they were "surprised by defendant's spontaneous admission." *Harris*, 904 N.E.2d at 1090-91. As shown in below, had the majority considered the objective evidence, it would have found clear evidence that *Miranda* warnings were deliberately withheld, just as the dissenting justice found. The majority's failure to consider any objective evidence was an unreasonable application of Justice Kennedy's intent-based approach in *Seibert*.

C. The majority's factual determinations were unreasonable in light of the evidence presented in the state court proceedings.

113. In addition to the two reasons stated above, Ms. Harris is entitled to *habeas* relief because the majority based its decision on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2).

1. The majority's factual determination that the detectives did not engage in a "question first, warn later" interrogation is not supported by the evidence.

114. The record does not support the majority's determination that the detectives did not deliberately engage in a "question first, warn later" interrogation.

115. As stated above, the relevant factors a court must consider in determining whether a "question first, warn later" interrogation occurred include: "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." *U.S. v. Williams*, 435 F.3d at 1159.

116. The objective evidence of the timing, setting and completeness of the prewarning interrogation all support a finding that Ms. Harris was deliberately and unconstitutionally subjected to a "question first, warn later" interrogation.

117. The questioning began at the hospital where Detectives Wo and Detective Kelly from the Violent Crimes Division directed a series of questions at Ms. Harris. (R615, R738) Detectives Wo and Kelly asked Ms. Harris to come down to the station for questioning, and Ms. Harris and Mr. Dancy were immediately separated after leaving the hospital. (R615, R651-52, R738, R742-43)

118. When they arrived at the police station at approximately 9:00 p.m., Ms. Harris was placed into "quiet room" with Diante and questioned by Detective Noradin and Detective Kelly for approximately twenty-five to thirty minutes. (R67-68) The detectives left the room for

approximately four hours and continued their investigation. (R69-70, R99) Alone in the "quiet room" for several hours, Ms. Harris and Diante attempted to leave the room but a detective promptly directed them to stay put. (R754)

119. Approximately four hours later, at midnight, Noradin decided to resume the interrogation because his investigation uncovered "inconsistencies" in Ms. Harris' story. (R69-70, 99) This time, however, the detectives decided that their interrogation would be more hostile and confrontational but would remain unwarned. (*Id.*) But before they resumed their interrogation, an official from the Department of Children and Family Services removed Diante from the interrogation room and Ms. Harris began to cry. (R748-50) Noradin and two new detectives then charged back into the interrogation room and began to "confront her with inconsistencies" and accuse Ms. Harris of lying. (R99) In response to repeated "confrontations" and accusations that Ms. Harris was lying, Noradin and his team got the confession they wanted. (R1246) Thus, the unwarned interrogation was "conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill." *Seibert*, 542 U.S. at 616.

120. Continuity of police personnel also supports a finding of deliberateness. Detective Noradin played lead detective at every turn — during the first round of questioning at the police station at approximately 9:00 p.m. when he questioned Ms. Harris for approximately 30 minutes (R67-68), at 12:45 a.m. when he "confront[ed]" Ms. Harris and she gave her first oral confession (R69-70, 99), at the polygraph unit where Ms. Harris allegedly confessed a second time (R1253-54), after the polygraph exam when he again "confronted" her about her false confession (R1249, R1254-55), and when she gave her third and final videotaped confession

(R80-81). The presence of Detective Noradin at every turn was not only continuous but deliberate and strategic.

121. Finally, there is no question that the overlapping content of the pre- and postwarning statements support a finding of deliberateness because the content of the pre- and postwarning statements were almost identical.

122. Additionally, after receiving midstream *Miranda* warnings, a reasonable person, in Ms. Harris' situation, would not have understood that she retained a choice about continuing to talk to police. *Seibert*, 542 U.S. at 617. The following factors are relevant in this analysis: the passage of time between the unwarned and warned statements, the location where those statements were taken, whether the same person questioned the suspect during the unwarned and warned statements, whether details obtained during the unwarned phase were used during the warned phase, and whether the suspect was advised that the unwarned statement could not be used against the suspect. *Id.*. at 615-16.

123. First, approximately 20 hours passed between Ms. Harris' unwarned and warned statements. (R70, R80-81) This lapse in time was not exceptionally long and was interceded by a polygraph test and several interrogations. (R1249, R1254-55) In fact, the circumstances were such that "it would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before." *Seibert*, 542 U.S. at 617.

124. Next, both statements were taken at the police station in interview rooms. Detective Noradin took the lead in all interrogations, often with other detectives present.

125. Finally, details obtained during the unwarned phase were clearly used during the warned phase, and Ms. Harris was never advised that her prior unwarned statement could not be used against her.

126. The only time the majority mentions any of this evidence is when it misstates the record. According to the majority, Detective Noradin was not present when Ms. Harris gave her first, unwarned statement. *Harris* 904 N.E.2d at 1091. This statement is simply wrong. Detective Noradin was present during the "question first" portion of the interrogation and admitted to "confront[ing]" Ms. Harris because she was not "telling the truth." (69-70, 99)

127. The dissenting justice considered these facts and found evidence of deliberateness. Indeed, as the dissenting justice noted, the facts in this case are similar to the facts the Illinois Supreme Court considered in *Lopez*, where the Illinois Supreme Court found that "question first, warn later" interrogation occurred, even though the subjective evidence alone did not support such a finding. *Harris*, 904 N.E.2d at 1100-01 (Tully, J., dissenting) (citing *Lopez*, 892 N.E.2d at 1100-01). The majority ignored the symmetry between the facts in Ms. Harris' case and the facts in *Lopez*.

2. <u>The majority's factual determination that Ms. Harris was not in custody when the detectives interrogated her is not supported by the evidence.</u>

128. The majority's alternate basis for affirming the denial of Ms. Harris' motion to suppress — that no *Miranda* warnings were required prior to Ms. Harris' first confession because she was not in custody — is belied by the evidence. *Harris*, 904 N.E.2d at 1089. A person is in "custody" when he is "deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444; *accord Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (a person is in custody when questioning takes place in a context where a person's "freedom to depart was restricted in any way"); *United States v. Thompson*, 496 F.3d 807, 810 (7th Cir. 2007)

("Custody implies a situation in which the suspect knows he is speaking with a government agent and does not feel free to end the conversation; the essential element of a custodial interrogation is coercion") (internal quotation marks and citation omitted). The inquiry is an objective one; the court must look into "the totality of the circumstances and consider whether a reasonable person would have believed that he or she was free to leave." *Thompson*, 496 F.3d at 810.

129. Courts consider factors such as "whether the encounter occurred in a public place; whether the suspect consented to speak with the officers whether the officers informed the individual that he was not under arrest and was free to leave; whether the individual was moved to other areas; whether there was a threatening presence of several officers and a display of weapons or physical force and whether the officers' tone of voice was such that their requests were likely to be obeyed." *Id*. at 810-811.

130. The objective evidence is overwhelmingly in favor of a finding that Ms. Harris was in custody. The same facts which support a finding that detectives deliberately withheld *Miranda* warnings also support a finding the Ms. Harris was in custody when she gave her unwarned confession. The encounter at issue occurred when Detective Noradin decided he would "confront" Ms. Harris about "inconsistencies" in her story and accuse her of lying. (R69-70, 99) No reasonable person in Ms. Harris' position would have felt free to leave under such circumstances, particularly in the absence of any indication to the contrary. Accordingly, the majority's factual determination regarding custody was unreasonable.

131. Discussion of events that preceded the antagonistic encounter where Detective Noradin accused Ms. Harris of lying occupied most of the majority's analysis. *See Harris*, 904

N.E.2d at 1088-90. However, the focal point of the custody determination logically lies in the conditions that existed just before the confession, which occurred hours later.

132. The majority also relied on the fact that the interrogation took place in a "quiet room." *Id*. at 1088. However, the purported "sensitivi[ty]" of the "quiet room" was diminished when the interrogation team isolated Ms. Harris from her son Diante and abruptly began to accuse Ms. Harris of lying. Indeed, the Supreme Court has held that a custodial interrogation can occur even in the comfort of an individual's home. *See Orozco v. Texas*, 394 U.S. 324, 326-27 (1969) (suspect was in custody even though questioning took place "on his own bed, in familiar surroundings.").

133. Finally, the majority's conclusion that Ms. Harris was never considered a suspect until she confessed is unsupported by the evidence. *Harris*, 904 N.E.2d at 1099. Between her first encounter with the Violent Crimes detectives at the hospital and her formal arrest at 1:00 a.m., Ms. Harris was questioned by at least six detectives — Detectives Noradin, Kelley, Balodimas, Landando Wo, and Day. At least three spates of questioning occurred — at the hospital, upon her arrival at the station, and at approximately 12:45 a.m. All of these interrogations focused on law enforcement demands that Ms. Harris account for her actions that day. The last interrogation was particularly antagonistic — Ms. Harris was accused of lying and "confronted" with alleged inconsistencies in her previous statements. In light of these facts, the majority's conclusion that Ms. Harris was not considered a suspect until she confessed defies common sense.

134. Even if the detectives never considered Ms. Harris a suspect until she confessed, their subjective opinion is irrelevant because the Supreme Court has held that an "officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is

irrelevant to the assessment whether the person is in custody." *Stansbury v. California*, 511 U.S. 318 (1994) (per curiam).

D. Ms. Harris indisputably suffered prejudice when her confession was introduced at trial.

135. There is no question that the admission of Ms. Harris's confession prejudiced her in the worst way. The United States Supreme Court has recognized that confession evidence is so powerful to a jury, in fact, that the introduction of a confession often "makes the other aspects of a trial in court superfluous, and the real trial, for all practical purposes occurs, when the confession is obtained." *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (quoting E. Cleary, McCormick on Evidence § 316 (2d Ed. 1972)).

136. Here, the State's entire prosecution hinged on Ms. Harris' videotaped confession. Without it, this case would not have gone to the jury. Accordingly, admission of the confession was prejudicial.

VII. Claim 4: The ineffective assistance rendered by Ms. Harris' counsel was deficient to the point that it deprived her of her right to counsel under the Sixth Amendment.

137. The state trial and appellate courts' decision to allow Ms. Harris conviction to stand despite her trial counsel's repeated prejudicial errors was an unreasonable application of clearly established federal law. *See Williams v. Taylor*, 529 U.S. 362, 406 (2000). As a result, Ms. Harris is entitled to *habeas* relief based on the ineffective assistance rendered by her trial counsel.

138. Ms. Harris was deprived of her fundamental right to effective trial counsel under the Sixth Amendment of the U.S. Constitution. The Sixth Amendment provides that "In all criminal prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established that deficiencies in counsel's performance can rise to the level of deprivation of assistance in

violation of the Sixth Amendment, holding that "[t]he right to counsel plays a crucial role in the adversarial state 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." *Id.* at 685. To prevail on a claim of ineffective assistance of counsel, a defendant must establish first that "counsel's performance fell below an objective standard of reasonableness" and, second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[5] *Id.* at 695; *see also People v. Albanese*, 473 N.E.2d 1246, 1255 (Ill. 1984) (adopting the *Strickland* standard for Illinois). Those criteria are satisfied here.

139. The repeated errors of Ms. Harris' trial counsel are not only visible in hindsight but were readily apparent to any observer, including the court, as they were occurring. The court routinely expressed concern about Ms. Harris' counsel's deficiencies, beginning with unease about the defense's decision to rush to trial, and continuing throughout every phase of the pre-trial and trial proceedings, with the court repeatedly calling into question the ability and competence of Ms. Harris' trial counsel both in and outside of the presence of the jury. For instance, at the very start of trial, the court stated that, "I don't know if this is a preview of things to come, and I have been somewhat concerned about competent and effective representation, but

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5 This does not mean that the petitioner must conclusively establish that the outcome would have different but for counsel's errors; rather, the petitioner need only show that there is a "probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 695. The second prong of *Strickland* may also be satisfied if the result was "fundamentally unfair or unreliable." *Williams v. Washington*, 59 F.3d 673, 679 (7th Cir. 1995).

Although a petitioner must overcome the presumption that the decisions of counsel were part of a "sound trial strategy," in order to constitute trial strategy, the decision must be a "strategic choice[] made after a thorough investigation of law and facts relevant to plausible options . . . ." *Strickland*, 466 U.S.. at 690-91. Furthermore, a state court's analysis that merely speculates as to trial counsel's "strategy" is objectively unreasonable "where no discernable strategy was at work[.]" *Miller v. Martin*, 481 F.3d 468, 473 (7th Cir. 2007).

Ms. Harris seems satisfied by your efforts." (R518) Moreover, Ms. Harris' trial counsel repeatedly demonstrated a fundamental lack of knowledge of the basic precepts of criminal law and trial practice. For example, Ms. Harris' trial counsel articulated the wrong burden of proof during the defense's opening argument, compelling the trial court to repeatedly interrupt counsel, which was sure to have made a very bad first impression on the jury. (R488-91, A0031a-34) Moreover, the trial court repeatedly interrupted and chastised trial counsel during counsel's closing argument, which was sure to have left a bad last impression on the jury. (R915, R918-19, R928)

140. The trial court appeared to mistakenly believe that the deficiencies in trial counsel's performance were entitled to greater deference because counsel was privately retained. (R1050) This belief was wrong, as all ineffective assistance of counsel claims are analyzed under the same standard, regardless of whether counsel is privately retained or appointed. *United States v. Weston*, 708 F.2d 302, 306 (7th Cir. 1983).

141. In addition to the general deficiencies of Ms. Harris' trial counsel that are readily apparent from the record, several specific egregious deficiencies rise to the level of ineffective assistance but were dismissed by the appellate court:

- The appellate court erred in failing to find that Ms. Harris' counsel's handling of the competency hearing for Diante Dancy was ineffective in several respects. The absence of any one of those errors likely would have resulted in Diante being deemed competent to testify, thereby creating a substantial likelihood of a different trial outcome. (Section A below.)

- The appellate court erred in failing to find that Ms. Harris' counsel was ineffective when he inexplicably withdrew a meritorious motion to quash arrest which, if granted, would have led to the only evidence against Ms. Harris being suppressed and the outcome of the trial being altered. (Section B below.)

- The appellate court erred in failing to find that Ms. Harris' trial counsel was ineffective because he made no effort to call expert witnesses concerning focal

issues in the trial for which expert testimony would have been appropriate, readily available, and likely to change the course of the trial. (Section C below.)

- Even if those errors were not in and of themselves sufficient to render Ms. Harris' counsel's assistance ineffective, the appellate court erred in failing to find Ms. Harris' trial counsel ineffective because of the cumulative effect of those errors and other repeated errors by Ms. Harris' counsel. (Section D below.)

A. <u>Ms. Harris received ineffective assistance of counsel during the competency hearing of Diante Dancy.</u>

142. There was only one eyewitness to the events immediately preceding the death of Jaquari and that witness, Diante, was ready, willing and able to testify. He would have testified that he saw Jaquari place the cord around his neck, corroborating Ms. Harris' account of what happened. However, he was not allowed to testify before the jury, in large part because Ms. Harris' trial counsel's performance during the competency hearing was woefully deficient in not one but several respects: (1) he did not meet with Diante in relation to the case even once before the trial to prepare him, familiarize himself with Diante's expected testimony, or explain to Diante what his testimony would entail; (2) when the court misplaced the burden of proof on Ms. Harris to demonstrate that Diante was competent, Ms. Harris' counsel failed to correct that basic misconception; (3) Ms. Harris' counsel failed to identify or call an expert witness who could have assisted the court in determining Diante's competency; and (4) Ms. Harris' trial counsel failed to ensure the appearance of the individual who interviewed Diante immediately after Jaquari's death, deemed him competent, and would have contradicted testimony by the State's witness who interviewed him later but came to a different conclusion. Had Ms. Harris' trial counsel corrected any of these mistakes, there is a substantial probability that the outcome of the competency hearing and, with it, the outcome of the entire trial, would have been different. These issues were presented on appeal, but the appellate court gave them short shrift, cursorily dismissing them as trial strategy or erroneously finding a lack of prejudice.

1. Ms. Harris' trial counsel was ineffective in failing to confer with Diante or otherwise prepare him for his testimony prior to the competency hearing.

143. In failing to meet with Diante before the competency hearing, aside from a brief meeting in the hallway before the hearing, Ms. Harris' trial counsel's performance was clearly below an objective standard of reasonableness.[6] Ms. Harris' counsel should have been aware of the necessity of preparing Diante to testify. He was aware that Diante was a young child who had never testified in court before and, as will be discussed in more detail below, a courtroom can be a very intimidating setting for such a witness. Furthermore, he should have confirmed the substance of Diante's testimony before calling him. Without meeting with him substantively even once before calling him as a witness, Ms. Harris' trial counsel could not have been aware of exactly what Diante would have had to say or how best to question Diante to effectively elicit his testimony. It is clearly below a reasonable level of performance to fail to meet with a child witness to prepare him for testifying.

144. There is no conceivable trial strategy that could have justified failing to meet with and prepare Diante prior to calling him as a witness.

145. While the Seventh Circuit has held on occasion that failures to prepare witnesses did not amount to ineffective assistance of counsel, it has always based that conclusion on an apparent lack of prejudice in those particular circumstances and, in doing so, recognized that such a failure may, and often does, constitute assistance below an objective standard of

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6 The court noted that it had asked Ms. Harris' counsel if he had spoken with Diante before calling him, and counsel replied that he had (R1369-70), but after Diante testified, counsel stated that in fact he had not met with Diante. (R1369) He later clarified that he had met with Diante beforehand but not "in relation to the case." (*Id.*) The court indicated that the reason it had asked whether Ms. Harris' counsel had spoken with Diante was to ascertain for what purpose counsel was going to call Diante. (R1370) Based on the interaction between the court and Ms. Harris' counsel, it appears likely that, if the court knew that Ms. Harris' counsel had not spoken with Diante, it would have directed him to do so before proceeding with the competency hearing.

reasonableness. *See Crisp v. Duckworth*, 743 F.2d 580, 584 (7th Cir. 1984) (it would have been "prudent" to interview witness beforehand, but counsel could not show that it would have changed the outcome of the trial); *U.S. ex rel. Ortiz v. Sielaff*, 542 F.2d 377, 380 (7th Cir. 1976) (failure to prepare witness was not ineffective because of "the simple nature of the case, the experience of counsel, and the absence of a showing that with more preparation the witnesses' testimony would have been substantially different . . . ."); *Renner v. U.S.*, 49 Fed. Appx. 628, 632 (7th Cir. 2002) (assistance was not ineffective because, although attorney failed to interview key witness, petitioner could not demonstrate a reasonable probability of the trial's outcome changing with more preparation).

146. In each of those opinions, the Seventh Circuit did not categorically hold that it cannot be ineffective assistance to fail to prepare a witness — only that the facts of those particular cases did not support such a claim. In fact, in each of them, the Seventh Circuit found that the behavior of the defense counsel had been deficient. As in those cases, there is little doubt that reasonably competent counsel in this case would have seen the need to meet with Diante before calling him as a witness.

147. While the petitioners in the cases cited above were unable to show that the failure to prepare witnesses had sufficiently prejudiced the outcome of their trials, there are two key distinctions between those cases and the case of Diante, the presence of which provide clear connection between Ms. Harris' counsel's error and the outcome of the proceeding and satisfy the prejudice prong of the *Strickland* test.

148. First, unlike the witnesses in the cases previously addressed by the Seventh Circuit, Diante was a child witness, whose demeanor and perceived competence can be much more readily improved through preparation. As Dr. Galatzer-Levy explained in his affidavit, the

unfamiliarity of the courtroom situation, including the presence of numerous people and the use of unmodified and formal adult language, commonly contribute to children appearing to be less capable as witnesses than they in fact are. (C224-57, A0201-04) Thus, it is essential that an attorney meet with a young child witness in preparation for his testimony in order to gain as full an understanding as possible about the language the child uses and his manner of describing events, including the details on which he focuses in recalling events. (C229, A0206) Only after gaining familiarity with the child's way of expressing himself can the attorney ask meaningful questions. By going into the competency hearing unprepared, Ms. Harris' counsel all but guaranteed that Diante, despite his inherent competence, would appear incompetent to an observer who was hearing him for the first time.

149. Second, the consequences of Ms. Harris' counsel's failure to meet with Diante were realized in a witness competency hearing as opposed to an actual trial proceeding. In such a proceeding, the essential determination is the witness' capacity to express himself. Accordingly, it would be even more incumbent on trial counsel to ensure familiarity with the witness' recollection of the events and manner of expressing that recollection.

150. Had Diante been allowed to testify, the jury would have heard corroboration for Ms. Harris' testimony. Given that the credibility of her protestation of innocence was the ultimate issue upon which the jury's decision was based, there is a substantial probability that, had Diante been prepared, the outcome of the competency hearing and, with it, the trial would have been different. The court itself discussed the substantial likelihood that Diante's testimony would have impacted the trial when it found Diante incompetent to testify, noting that it "fully understand[s] the significance of [Diante's testimony] as it relates to the very strong desire of the

Defense to call a witness who, if he were competent to testify to those, has information critical to the presentation of the defense." (R1386)

151. Contrary to the appellate court's conclusion, this argument is not inconsistent with the contention that Diante was, in fact, competent to testify. *Harris*, 904 N.E.2d at 1098. Although Diante was a competent witness, Ms. Harris' counsel's failure to confer with him ensured that he would appear less competent than he actually was. Conferring with Diante would not have made Diante any more competent, as he already was sufficiently competent, but it would have enabled his competency to be more apparent.[7]

2. Ms. Harris' trial counsel was ineffective for failing to object to the improper placement of the burden of proof on Ms. Harris to demonstrate Diante's competency.

152. The trial court reversed the burden of proof for determining competency, placing the burden on Ms. Harris' to demonstrate that Diante was competent instead of presuming him to be competent, as the statute dictates that it should do. Ms. Harris' trial counsel sat idly by without bringing this fundamental error to the court's attention. Given the crucial nature of Diante's testimony, minimally competent counsel would have familiarized himself with Illinois law on witness competency prior to the litigation of the competency hearing.

153. A decision by counsel based on a profound misunderstanding of applicable law regarding the issue being litigated may constitute ineffective assistance. *See, e.g., Odanuyi v. Scott*, 41 Fed. Appx. 854, 863 (7th Cir. 2002) (appellate counsel was ineffective when it erroneously concluded that there was not sufficient evidence to raise a basic legal claim on appeal). Illinois law is very clear that the burden of proof in a witness competency hearing lies

[7] Even if this Court agrees that this is inconsistent with that argument and, by failing to confer with Diante, counsel rendered him incompetent, that does not make both arguments fail as was alluded to by the appellate court. Ms. Harris is not prohibited from arguing in the alternative.

on the party *challenging* the prospective witness' competency. 725 Ill. Comp. Stat 5/115-14 (West 2010) ("every person, irrespective of age, is qualified to be a witness"); *see also, e.g., People v. Hoke*, 571 N.E.2d 1143, 1148 (Ill. App. Ct. 1991) (the burden of proof in a witness competency hearing is on the party challenging the witness' competency, not the party calling the witness). Nonetheless, Ms. Harris' trial counsel failed to challenge the court's improper placement of the burden on the defense and, in fact, later argued that the defense had met the burden of showing Diante was competent to testify. (R1377) There was simply no excuse for Ms. Harris' counsel's failure to recognize and challenge this misplacement of the burden.

154. Ms. Harris was prejudiced by this error because there is a reasonable probability that the court's decision on competency would have been different, and that the outcome of the trial would have changed along with it, had counsel corrected the court's misplacement of the burden of proof. The court could and did ask questions of Diante at the competency hearing. (R1177-78) Nonetheless, it based its holding on an absence of evidence, stating that Diante was never asked what it meant to tell the truth and noting that "there were no questions at all with regard to his understanding of an obligation to be truthful either to parents or teachers or police officers. I suppose the ultimate issue before this Court." (R1382) The court's remarks strongly suggest that its conclusion was predicated on the perception that Ms. Harris' counsel had failed to affirmatively establish competency.

155. In deciding on Ms. Harris' motion for a new trial, the trial court noted that "even though the Court articulated the wrong burden of proof, the outcome would not have been any different because this court determined after having heard the testimony of [Diante] that I did not believe that he satisfied those requirements to make him a competent witness to testify in this case." (R1040-41) The appellate court found this rationale persuasive, noting that "[a]lthough

the trial judge candidly acknowledged his error in denying defendant's motion for new trial, the judge nonetheless stated that he would have found Diante incompetent regardless of which side had the burden." *Harris*, 904 N.E.2d at 1092.

156. The trial court's post hoc rationalization that its decision would not have changed is not credible. *Griffin v. Pierce*, No. 09-3138, 2010 WL 3655899, at *12 (7th Cir. Sept. 22, 2010) (refusing to defer to the trial court's post hoc conclusion of what the outcome would have been had counsel provided effective assistance). Given that the court's conclusion was not based on its interpretation of contradictory testimony or arguments, but rather on the fact that an issue was not addressed, the court was left to defer to the presumption.

157. Had Diante testified, his testimony would have drastically changed the course of the trial because he would have contradicted the only evidence pointing to Ms. Harris' guilt. There is thus a reasonable probability that the outcome of the trial would have been different if he had testified.

3. <u>Trial counsel was ineffective for failing to provide expert testimony during the competency hearing of Diante Dancy.</u>

158. In light of the importance of the competency hearing to Ms. Harris' defense, and given that witness competence is often determined on the basis of expert testimony, it was inexcusable for defense counsel not to introduce expert testimony regarding Diante's competence. Diante's youth, and the trauma associated with witnessing the death of his brother and the subsequent absence of his mother, would have led reasonably competent counsel to have a qualified mental health professional evaluate Diante in order to assist the trial court during the competency hearing.

159. Expert testimony is commonly used to assist the court in determining the competency even of adults as to whom questions are raised about their mental capacity. *See*,

e.g., U.S. ex rel. Bilyew v. Franzen 842 F.2d 189, 193 (7th Cir. 1988) (recognizing that, under Illinois law, expert testimony may be appropriate in determining competency); *People v. Baldwin*, 541 N.E.2d 1315, 1321 (Ill. App. Ct. 1989) (court erred when it found defendant competent to stand trial despite the uncontradicted expert testimony to the contrary). Moreover, the Illinois Appellate Court has previously held that a child psychologist is qualified to offer an opinion on issues such as whether a child is telling the truth, particularly where, as in the competency hearing in this case, the trier of fact is the court. *People v. Smith*, 603 N.E.2d 562, 566 (Ill. App. Ct. 1992). Ms. Harris' trial counsel's failure to provide expert testimony during the competency hearing constituted ineffective assistance of counsel, as it represented a trial strategy so unsound that no meaningful adversarial testing was conducted. *See Miller v. Anderson* 255 F.3d 455, 459 (7th Cir. 2001), *order but not opinion vacated by* 268 F.3d 485 (7th Cir. 2001). Accordingly, reasonably competent counsel would have introduced expert testimony concerning competency in this case.

160. To illustrate the type of expert testimony her trial counsel could and should have presented at the competency hearing in this case, Ms. Harris' post-trial counsel proffered an affidavit by Dr. Robert Galatzer-Levy, a child, adolescent and adult psychiatrist who is often retained to conduct child witness interviews by the State of Illinois and by Cook County courts and who conducted a psychiatric evaluation of Diante. (C225-C228, A0198-201) During the course of two videotaped forensic interviews of Diante, which were provided to the appellate court as exhibits, Dr. Galatzer-Levy assessed Diante's competency using interview procedures that are standard in his area of expertise and designed to avoid suggesting answers to the interviewee. (C225-C228, A0198-201) Dr. Galatzer-Levy concluded that Diante was able to clearly articulate what he observed concerning the circumstances surrounding Jaquari's death,

and that Diante had the capacity to understand the duty of a witness to tell the truth. (C230, C233, A0203, A0206)

161. Such an expert would have assisted the trial court by providing professional guidance regarding the ability of young children to process and convey information and providing a framework with which to analyze the testimony of a child Diante's age. As the affidavit of Dr. Galatzer-Levy stated, if he, or someone similarly qualified, had been called as a witness, he would have assisted the trial court by sharing his expertise regarding how children of Diante's age perceive truth and falsity and how they express themselves regarding a recollection of traumatic events. (C229-33, A0201-05) Such an expert would also have testified that Diante's belief in characters that the trial court described as more properly belonging in "a child's world" like Santa Claus, Spiderman and the tooth fairy, did not undermine Diante's ability to discern the events he witnessed on May 14, 2005. (C230-32, A0202-04)

162. In its cursory ruling (made entirely on the pleadings, and without the benefit of an evidentiary hearing) rejecting Ms. Harris' post-conviction argument that her trial counsel was ineffective for presenting expert testimony on child witness competency, the trial court made comments that demonstrate precisely why the introduction of expert testimony on the issue of child competency was imperative in this case. Specifically, the trial court articulated a belief that Dr. Galatzer-Levy's opinions with regard to Diante were based on interviews conducted several months after Diante testified at the trial and did not give any insight into "[Diante's] condition on the date that he was called in here and questioned here." (R1042) The trial court further stated that "[children] can develop very rapidly within month to month to month where determinations might have been different months down the line as to whether or not he could satisfy these criteria to be a competent witness." (*Id.*) As Dr. Galatzer-Levy stated in his affidavit, based on

his professional experience and child development literature, "it is more likely than not that the capacities relevant to [Diante's] competence to testify are the same today as they were . . . in October of 2005." (C233, A0205) Thus, the trial court's lay assumptions with regard to child development are belied by the commonly held understanding of experts in that field, further demonstrating the importance of the introduction of such expert testimony during the hearing.

163. The state court's unfounded deference to Ms. Harris' trial counsel's "trial strategy" in not calling an expert witness is not entitled to special treatment by this Court. *Harris*, 904 N.E.2d at 1098-99. In this case, there is no possible trial strategy that would have weighed against calling an expert witness to assist with the determination of Diante's competency.

164. There is a reasonable probability that, had an expert like Dr. Galatzer-Levy testified during Diante's competency hearing, the outcome of both Diante's competency hearing and Ms. Harris' trial would have been different. Given that the court found Diante incompetent largely based on an apparent inability to distinguish the truth from a lie and that Diante's belief in fictional characters suggested his incompetence, an expert would have explained that the court misinterpreted the facts and may very well have changed the court's opinion on this issue. Thus, Ms. Harris' trial counsel's failure to call an expert on child competency prejudiced Ms. Harris as calling such a witness had a substantial likelihood of changing the outcome of the competency hearing and, with it, the trial. Consequently, the state court's denial of this argument was an unreasonable application of *Strickland*.

4. <u>Trial counsel was ineffective for failing to present the testimony of Ale Levy during the competency hearing.</u>

165. The appellate court further erred by finding that Ms. Harris' counsel was not ineffective in failing to present the testimony of Ale Levy, a forensic interviewer from the

Children's Advocacy Center. Ms. Levy interviewed Diante Dancy the day after Diante witnessed his brother's death and a day before the state's witness, Karen Wilson, interviewed him. (C260-C266, A0230-35) Ms. Harris' counsel was in possession of a police report that memorialized the interview in which Ms. Levy determined that Diante knew his age, colors, numbers and, crucial in the competency context, determined that Diante "kn[e]w[] the difference between truth/lies." (C260-C266, A0230-35) Diante also informed Ms. Levy and Detective Wo that Diante "saw Jaquari wrap [the] blue sheet around his neck." (C260-C266, A0230-35) In light of Diante's statements to Ms. Levy, as well as her qualifications as a trained child forensic interviewer and her professional affiliation with the State, Ms. Levy's observations, along with her professional opinion regarding Diante's competency, were of vital importance to Ms. Harris' case.

166. Trial counsel subpoenaed and called Ms. Levy as a witness. However, despite her importance as a witness, counsel then failed to secure her presence for the competency hearing and failed to ask the court to enforce the subpoena. (R1357-60) In determining whether to call a recess to wait for her attendance to be secured, the court asked Ms. Harris' counsel why her testimony was important, specifically noting that it was not asking because it considered her testimony to be irrelevant, just that it could not think of a reason why she was so important that it should hold up the competency hearing to wait for her, thereby prolonging the trial. (R1359-60) Rather than making any attempt to explain why he wanted to call Ms. Levy or what Ms. Levy's testimony would have added to the proceeding, Ms. Harris' counsel capitulated and chose not to call Ms. Levy or any other witnesses. (R1360) Based on the court's comments, there is a distinct possibility that, had Ms. Harris' counsel presented a compelling reason why her

testimony was necessary, the court would have relented and allowed a recess to wait for her to be brought to court.

167. The appellate court rejected the argument that failure to secure Ms. Levy's testimony demonstrated ineffective assistance because "decisions concerning which witnesses to call and which evidence to present are considered to be trial strategies or tactics and ordinarily are not reviewable in the determination of whether counsel was effective." *Harris*, 904 N.E.2d at 1098. However, the court ignored the fact that counsel did *not* make a tactical decision to decline to call Ms. Levy. To the contrary, he made the exact opposite tactical decision, deciding to call Ms. Levy; it cannot even be argued that he thought about calling her and then reconsidered based on the events of the competency hearing, because he actually did call her. (R1357-60) However, he failed to take any action to ensure that his decision had its intended outcome. Thus, again, the appellate court failed to actually consider the evidence or what actually transpired, as *Strickland* requires, but simply defaulted to the decision being a product of sound trial strategy.

168. A reasonable probability exists that the introduction of Ms. Levy's testimony would have changed the outcome of the competency hearing given the fact that Ms. Levy met with Diante *before* Ms. Wilson did and her testimony would have gone to the key issues addressed by the court. As stated above, a determination that Diante was competent would have had a substantial likelihood of impacting the outcome of the trial as it would have contradicted the principal evidence against Ms. Harris. Thus, the failure of Ms. Harris' trial counsel to secure Ms. Levy's presence for the competency hearing constituted ineffective assistance of counsel and the appellate court unreasonably applied *Strickland* in failing to recognize it.

B. Ms. Harris received ineffective assistance when her counsel withdrew a meritorious motion to quash arrest.

169. Prior to trial, Ms. Harris' counsel had filed a motion to quash arrest, alleging that she had been arrested without probable cause when the police interrogated her. However, when the time came to litigate the motion, Ms. Harris' trial counsel inexplicably withdrew the motion.

170. The motion to quash arrest was meritorious and should have been granted. The United States and Illinois Constitutions both clearly prohibit arrest or detention without probable cause. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *People v. Washington*, 842 N.E.2d 1193, 1202 (Ill. App. Ct. 2006). At the time of her questioning, there was no evidence against Ms. Harris and, according to the police and the medical examiner, Jaquari's death was considered an accident. Consequently, the police could not have had probable cause to detain Ms. Harris.

171. In spite of the fact that there was no probable cause, Ms. Harris was legally in custody prior to her confession. An individual need not be formally arrested to trigger the protection of the Fourth Amendment, but need only be placed in a position in which "a reasonable person . . . would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest." *Sornberger v. City of Knoxville, IL*, 434 F.3d 1006, 1017 (7th Cir. 2006) (internal quotation marks omitted); *see also Michigan v. Chesternut*, 486 U.S. 567, 572 (1988) (internal quotation marks omitted); *People v. Williams*, 707 N.E.2d 679, 684 (Ill. App. Ct. 1999). Specific detention factors that have been considered by Illinois courts include: (1) the time, place, length, mood, and mode of the encounter between the defendant and the police; (2) the number of police officers present; (3) any indicia of formal arrest or restraint, such as the use of handcuffs; (4) the intention of the officers; (5) the subjective belief or understanding of the defendant; (6) whether the defendant was told she could refuse to accompany the police; (7) whether the defendant was transported in

a police car; (8) whether the defendant was told she was free to leave; (9) whether the defendant was told she was under arrest; and (10) the language used by the officers. *Washington*, 842 N.E.2d at 1202; *People v. Jackson*, 810 N.E.2d 542, 552 (Ill. App. Ct. 2004). Separation from other potential suspects is also a relevant factor. *People v. Cole*, 522 N.E.2d 635, 640 (Ill. App. Ct. 1988).

172. Application of these factors to even the State's version of the facts demonstrates that Ms. Harris was under arrest well before her first alleged confession, the point at which police first developed sufficient probable cause for her arrest. Police approached Ms. Harris in the hospital chapel at 6:45 p.m., less than an hour after she learned her son had died. (R738) Two detectives questioned here there about Jaquari's death. (R1338) Ms. Harris was then taken from the chapel directly to the police station (R615) in a marked police vehicle. (R66) After leaving the hospital, she was separated from Mr. Dancy at all times. (R743, R616) She was taken to the "quiet room" between 8:00 and 9:00 p.m. (R66), and a police sergeant was seated just outside the door. (R96) Detective Noradin and Detective Kelly questioned Ms. Harris for approximately twenty-five to thirty minutes. (R67-68) The detectives left the room for approximately four hours and continued their investigation. (R69-70, R99) Alone in the "quiet room" for four to five hours, Ms. Harris and Diante attempted to leave the room but a detective promptly directed them to stay put. (R754)

173. At midnight, Noradin decided to resume the interrogation because his investigation uncovered "inconsistencies" in Ms. Harris' story. (R69-70, 99) But before they resumed their interrogation, an official from the Department of Children and Family Services removed Diante from the interrogation room and Ms. Harris began to cry. (R748-50) Noradin and two new detectives then charged back into the interrogation room and began to "confront her

with inconsistencies" and accuse Ms. Harris of lying at which time she allegedly confessed. (R99)

174. No reasonable person in Ms. Harris' position would have felt herself free to leave under such circumstances, particularly in the absence of any indication to the contrary. Consequently, if litigated, it is likely that the motion to quash arrest would have been granted.

175. The Seventh Circuit has held that the withdrawal of a meritorious motion such as this can be unreasonable and ineffective assistance of counsel. *Rodriguez v. Young*, 906 F.2d 1153, 1160-61 (7th Cir. 1990) (holding counsel ineffective for withdrawing a motion to suppress because "[c]riminal defense lawyers should not preempt judges by making their own negative rulings on close motions concerning crucial testimony."); *Cossel v. Miller*, 229 F.3d 649, 654 (7th Cir. 2000) (counsel was ineffective and prejudiced the defendant when it failed to move to suppress identification testimony that was the sole piece of evidence against the defendant); *Freeman v. Lane*, 962 F.2d 1252, 1257-58 (7th Cir. 1992) (appellate counsel was ineffective for failing to raise meritorious Fifth Amendment issue, considering that it was the best, if not the only, argument that the petitioner had); *United States ex rel. A.M. v. Butler*, No. 98 C 5625, 2002 WL 1348605, at *20 (N.D. Ill. 2002) (counsel was ineffective for failing to move to suppress a confession, the prosecution's only evidence against the defendant), *aff'd sub nom A.M. v. Butler*, 360 F.3d 787 (7th Cir. 2004).

176. There is no plausible explanation for why the motion was withdrawn. Contrary to the appellate court's reasoning, while the test for whether Ms. Harris was in custody for purposes of the motion to suppress statements may have been similar to the test for whether she was in custody for purposes of the motion to quash arrest, they are not the same. *Harris*, 904 N.E.2d at 1099; *c.f. U.S. v. Smith*, 3 F.3d 1088, 1096-97 (7th Cir. 1993) (holding, in the context of a *Terry*

stop, that in determining custody under the Fourth Amendment as opposed to the Fifth Amendment, "a completely different analysis of the circumstances is required.").

177. In deciding the motion to suppress statements, the court was analyzing whether Ms. Harris' statements were "made freely and voluntarily, without any compulsion or inducement or whether the Defendant's will was overborne at the time she confessed." (R154) In deciding on the motion to suppress statements, the court made a comment that, at the time of the statement, Ms. Harris was not a target of the investigation, but the court did not hear testimony on the distinct issue of whether Ms. Harris was under arrest for purposes of Fourth Amendment analysis. (R155)

178. Furthermore, the court repeatedly indicated that it did not believe the issues covered by the two motions to be the same. It did so on the day before the hearing, before the hearing began and in the middle of the hearing when Ms. Harris' counsel began to ask questions related to whether Ms. Harris was in custody, instructing him that he was only hearing the motion to suppress statements and that he would hear the motion to quash arrest after that. (R50, R63-64, R104) Finally, just before Ms. Harris' trial counsel withdrew the motion, the court told him that he "[had not] presented any evidence on that motion." (R157)

179. Without any reasonable basis on which to support such a conclusion, the appellate court stated that "[t]he record clearly reflects that the parties elected to proceed jointly on the motion to suppress statements as well as the motion to quash arrest." *Harris*, 904 N.E.2d at 1099. However, the record contains no indication of an agreement between the parties on how to handle these motions nor does it contain any evidence to suggest that Ms. Harris' counsel believed both motions were being argued at the same time. To the contrary, while he originally indicated that he wanted to argue the motions simultaneously, Ms. Harris' counsel acknowledged

the court's directive to not venture into areas covered by the motion to quash arrest and the court's statement that he had not presented evidence on the motion. (R50, R63-64, R104, R 157)

180. Even if Ms. Harris' counsel had believed that the issue was already decided, that in and of itself, would have been objectively unreasonable considering the fact that just moments before, he and the court had agreed that they were not litigating the issue. Furthermore, that belief would not make the decision to withdraw the motion reasonable; it would only have been reasonable to withdraw the motion if the motion was frivolous. Just because counsel *thinks* a court will not grant a motion is not a reason to withdraw what counsel deems to be a valid motion. Ms. Harris' counsel's performance was objectively unreasonable in a manner very similar to that of the attorneys in *Young* and *Cossel*. Ms. Harris' counsel's decision to withdraw the motion was not a strategic one as no tactical advantage was gained by withdrawing the motion nor would any advantage be lost by arguing the motion

181. Ms. Harris' counsel's withdrawal of the meritorious motion prejudiced the outcome of her trial. As the arrest was improper and the confession would therefore be fruit of the poisonous tree, granting of the motion would have eliminated the sole piece of evidence against Ms. Harris. *See Mapp v. Ohio*, 367 U.S. 643, 649 (1961).

C. Ms. Harris received ineffective assistance when her counsel failed to present expert witnesses on the key issues in this case.

182. The defense's theory of the case was that Jaquari's death was the result of a tragic accident and that Ms. Harris' confession was false and a product of police coercion. Yet the defense offered virtually no evidence other than Ms. Harris' testimony in support of this theory, leaving Ms. Harris utterly bereft of a defense and depriving her of meaningful adversarial testing. Again, the appellate court dismissed this claim despite the fact that it satisfied both prongs of the *Strickland* standard.

183. The Seventh Circuit has recognized that, in certain circumstances, when there is no excuse for not calling an expert witness, the failure to call such a witness may constitute ineffective assistance. *See e.g. Ellison v. Acevedo* 593 F.3d 625, 634 (7th Cir. 2010) ("Of course, even if the failure to call an expert was not due to the attorney's ignorance or the trial court's insistence on an early trial, such failure may still constitute ineffective assistance. If the need for an expert was clear and one was reasonably available, counsel should *at least consult* with one.") (emphasis added). Here, reasonably competent counsel would have recognized that the pivotal issues of the case were "beyond the ken of the average juror" and, without them, a conviction was all but a certainty. Furthermore, reasonably competent counsel would have readily identified expert witnesses to testify to both the issues of false confessions and accidental strangulation. Consequently, as shown below, reasonably competent counsel would have supported the defense theory of the case by presenting expert testimony: (1) explaining the frequency with which, and the circumstances under which, children accidentally strangle themselves, and (2) explaining the nature of false confessions, the circumstances that may give rise to such confessions, and the aspects of Ms. Harris' specific psychology that make her highly susceptible to giving a false confession.

1. <u>Ms. Harris' trial counsel was ineffective for failing to present expert testimony on accidental strangulations.</u>

184. Ms. Harris' trial counsel was ineffective for failing to introduce evidence that accidental strangulations can and do occur under the types of circumstances involved in Jaquari's death, and that accidental strangulations greatly outnumber intentional strangulations. (C341, A0307) The State argued to the jury that "it didn't make sense that [Jaquari's death] could have been an accident." (R938) The defense provided no evidence to the contrary, despite the fact that expert testimony would have proven this argument wrong — that an accidental strangulation

would make a great deal of sense. As proffered in Ms. Harris' supplemental motion for new trial and in her appellate brief, the defense could have presented the testimony of an expert, such as Dr. Ryan Stevens, an otolaryngologist who has studied the mechanisms and circumstances of accidental asphyxiation in children. (C339-41, A0305-07)

185. If an expert such as Dr. Stevens had been called, he or she would have informed the jury that: (1) asphyxia (which includes both hanging and strangulation) is the fourth leading cause of unintentional injury deaths in the United States for children between the ages of 1 and 4; (2) that data collected by the Centers for Disease Control and Prevention indicate that for all asphyxia deaths of children between the ages of one and four between 1999 and 2003, 159 proved to be accidental deaths and only 17 proved to be homicides; (3) that asphyxia can occur even when a body has not been suspended and is lying supine in bed; (4) that self-strangulation can occur with a free hanging cord and that such a cord can be difficult for the child or a third party to remove; and (5) that asphyxia occurs very rapidly, especially in children. (C339-55, A0305-22) This testimony would have been helpful to the jury in understanding that the circumstances of Jaquari's death were consistent with accidental strangulation.

186. Although the trial court said it did not believe that the fact that children commonly die of accidents was beyond the knowledge of lay jurors, the trial court failed to identify any basis for this conclusion or its conclusion that such testimony would be "unrelated to the facts in this case." (R1044) Clearly, the proffered testimony is related to the facts of this case because the defense theory of the case at trial was that Jaquari's death, consistent with the medical examiner's original opinion, was the result of a "tragic accident." Moreover, as demonstrated by Dr. Stevens' affidavit, in which he noted that accidental asphyxia is a common

cause of childhood injury and can occur in many different circumstances, testimony about accidental strangulation in children is also beyond the common knowledge of the average juror.

187. In Illinois, evidence is beyond the ken of the average juror when it involves knowledge or experience that a juror generally lacks. *Kimble v. Earle M. Jorgenson Co.*, 830 N.E.2d 814, 823 (Ill. App. Ct. 2005). In this case, expert testimony regarding accidental strangulations involves knowledge beyond that possessed by an average juror, because the average juror is unlikely to be aware of the mechanics of accidental asphyxia in children, nor will the average juror be aware of the frequency such accidents may occur with items commonly found in the household (drawstrings on clothing, free cords and even a mother's hair). (C346-53, A0311-19) The average juror was likely unaware that a child could take a free-hanging cord and wrap it so tightly around his neck that it would be difficult to remove. With such a lack of awareness, the average juror would have rejected Ms. Harris' defense as implausible, without even giving it serious consideration. Indeed, the State capitalized on its belief that such information is beyond the ken of the average juror in its closing argument, where it argued that the defense theory that Jaquari's death was an accident was "ridiculous" and "didn't make sense." (R883-84)

188. The failure to present expert testimony on accidental strangulations constituted ineffective assistance of counsel that completely deprived Ms. Harris of meaningful adversarial testing of her case. It left her claim that Jaquari's death was a tragic accident entirely unsupported and the State's claim that such an accident was impossible entirely uncontradicted. Furthermore, it could not have been a strategic decision as no tactical advantage could have been gained by neglecting to call an expert on accidental strangulation.

189. Had Ms. Harris' counsel called an expert in accidental strangulation, it is likely that the jury would have given more credence to Ms. Harris' testimony and there is a substantial likelihood that the outcome of the trial would have been different.

2. Ms. Harris' Trial counsel was ineffective for failing to present expert testimony concerning false confessions.

190. Given the key role that Ms. Harris' videotaped statement played in the State's case, attacking that confession was imperative to mounting an effective defense and counsel's failure to call an expert on false confessions fell below an objective standard of reasonableness. Nonetheless, trial counsel introduced no evidence of the falsity of the confession other than Ms. Harris' own denials. As the Supreme Court has noted, a defendant "faced with the burden of explaining or justifying" his conduct has a "vital need for access to any material witness" that will corroborate his otherwise uncorroborated claims, as the defendant herself may be discredited by the jury on the basis of her interest in the case. *Roviaro v. United States*, 353 U.S. 53, 63-64 (1957). Moreover, the false confession phenomenon is not only beyond the ken of the average jury, it is highly counter-intuitive. *See, e.g., United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996), *aff'd*, 165 F.3d 1095 (7th Cir. 1999) (properly conducted social science research often shows that commonly held beliefs regarding confessions are in error); *Miller v. Indiana*, 770 N.E.2d 763, 774 (Ind. 2002) (testimony on false confessions would assist the jury in understanding issues outside common knowledge); *Boyer v. Florida*, 825 So. 2d 418, 419-20 (Fla. Dist. Ct. App. 2002) (testimony on false confessions would provide information beyond the scope of common experience). Indeed, during its presentation to the jury, the State exploited counsel's failure to introduce evidence regarding false confessions, playing on the commonly-held belief that individuals do not confess to crimes they have not committed. (R876, R891) ("And ladies and gentlemen, you know that the defendant murdered her own son on May 14 of

2005 because she admitted that to you in her very own words from her very own mouth in her videotaped confession . . . . *[U]se your common sense*.") (emphasis added)[8] Accordingly, effective counsel would have presented the jury with scientific evidence showing "that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried." *Hall*, 93 F.3d at 1345. Such an expert could also have disabused the jury of the notion that no one would ever falsely confess to murdering a loved one — a phenomenon that has occurred numerous times in the history of false confessions. *See* John Schwartz, *Confessing to Crime, but Innocent*, The New York Times, Sept. 14, 2010, at A14; Lisa Black and Steve Mills, *Why Do People Falsely Confess?; Experts: It Happens More Than You Think*, Chicago Tribune, July 11, 2010, at C1, *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 Stan. L. Rev. 1051 (2010).

191. As examples of the types of testimony that would have been submitted by competent counsel, in her supplemental motion for new trial, Ms. Harris proffered the affidavits of two expert witnesses relative to false confessions. First, Dr. Richard Ofshe, who has testified in other cases as an expert on false confessions and the conditions under which they are likely to occur, averred that he, or a similar expert, would have testified that false confessions are counter-intuitive and would have described the ways in which police interrogation tactics such as those

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8 The State also sarcastically asked the jury "do you really think, or actually does she really think, does she really expect you to believe that she confessed to a murder she didn't commit, the murder of her own son? Not just any murder of some stranger. The murder of her own son because of a push and a poke and they said you can go home? Does that make any sense at all? Is that reasonable? After all, we are talking about an educated woman. We're talking about a woman who went to college. . . . Is this the type of person who is going to confess to a crime they didn't commit? And not just any crime. But the murder of her own child? Is this the type of person who is going to think in her own mind. 'hmm. let's see. the police say I can go home if I confess to this murder killing my child by strangling him, and they say I can go home if I do that. That sounds good. Let's do it. Let's confess.' That's not only ridiculous, ladies and gentlemen, it's offensive." (R883-84)

employed in this case can lead to false confessions. (C268-309, A0236-57) An expert would also have discussed individual characteristics that have been proven to render certain people more susceptible to false confessions and proven techniques for evaluating the reliability of a confession (*e.g.*, the nature of the interrogation that produced it and the extent to which the confession conforms to proven and previously unknown facts). (C268-309, A0236-57) This testimony, which was based on generally accepted scientific principles, would have been admissible. *See People v. Miller*, 670 N.E.2d 721, 730-31 (Ill. 1996) (trial court did not abuse its discretion in admitting expert testimony on a new technique for analyzing DNA evidence that was accepted by the general scientific community), *abrogated on other grounds by In re Commitment of Simons*, 821 N.E.2d 1184, 1189-90 (Ill. 2004); *see also United States v. Hall*, 974 F. Supp. 1198, 1205-06 (C.D.Ill. 1997) (testimony of Dr. Ofshe regarding the phenomenon of false confessions is admissible, as it is helpful to the jury and based on developed scientific methods and principles).

192. Second, in her motion for a new trial, Ms. Harris proffered the affidavit of Dr. I. Bruce Frumkin, a forensic and clinical psychologist who administered several accepted psychological tests to Ms. Harris. (C311-22, A0279-90) Based on his evaluation, he found Ms. Harris to be a humble, unassertive and accommodating personality with an extreme tendency to yield to the demands of an authority figure and to shift to different responses when pressured in an interview setting. (C321, A0289) These psychological characteristics rendered her particularly susceptible to giving a false confession. (C321, A0289) A clinical psychiatrist such as Dr. Frumkin would have been qualified to testify about Ms. Harris' mental condition and opine on how that condition might impact her reaction to the interrogation tactics employed in this case. *Hall*, 93 F.3d at 1341-43 (expert testimony may be "particularly important" in a

confession case when the defendant's personal psychological profile may have impacted his or her response to interrogation).

193. Although the trial court stated that it did not believe testimony on false confessions would be admissible or persuasive, many courts, including the Seventh Circuit, have found otherwise. (R1044-46) Implicit in the holdings of the courts that have admitted expert testimony on the phenomenon of false confessions is the idea that such information has a reasonable probability of impacting the jury's ultimate acceptance or rejection of the confession at issue. *Hall*, 93 F.3d at 1345; *Miller*, 770 N.E.2d at 774; *Boyer*, 825 So. 2d at 419. In this case, there is a reasonable probability that, as acknowledged by the courts in *Hall*, *Miller* and *Boyer*, the outcome of the trial would have been different if expert testimony had been offered. By dispelling the misconceptions that jurors hold with respect to false confessions, the testimony would have given the jury a scientific basis for why Ms. Harris would falsely confess to killing her son and there is a substantial probability that it would have led to a different outcome of the trial.

194. Contrary to the appellate court's opinion, Dr. Denton's testimony, upon which the state has previously relied in denying that Ms. Harris' counsel was ineffective for failing to call a false confession expert, did not mitigate the need for a defense expert. Rather, it exacerbated the need for one. Dr. Denton's testimony included an off-hand statement that he only changed his opinion upon reading the transcript of the confession because he had initially been concerned about the possibility of a false confession. (R570) Thus, Dr. Denton concluded upon reading the transcript that the confession was true, and he concluded that Jaquari's death was a homicide. This amounted to an improper statement of opinion (as demonstrated by the state in its reply brief when it said that Dr. Denton adequately addressed the issue of false confessions) upon

which the jury may well have relied to dismiss the argument that the confession was a false one. Despite his statement that he had received training in evaluating confessions, Dr. Denton is not an expert in false confessions and does not know the situations that give rise to them. (R581) He is not a psychologist either and does not know anything about Ms. Harris' psychological makeup and whether she is susceptible to coercive interrogation techniques. Dr. Denton did not review any materials regarding the circumstances of the confession. (*Id.*) He did not even watch the video but rather only reviewed the transcript. (*Id.*) After Dr. Denton's comment, Ms. Harris' counsel should have been keenly aware of the need to educate the jury about what factors truly need to be evaluated to ensure that a confession was not coerced.

195. There is no excuse for defense counsel's failure to call an expert on false confessions beyond ignorance or negligence. *Hall* was decided nearly ten years before this trial took place. In *Hall*, it was the testimony of Dr. Ofshe that the Seventh Circuit recognized as admissible. Thus, while a defense counsel is not necessarily ineffective for failing to identify the particular expert that appellate counsel has tracked down, in this case, the same expert would have been readily identifiable to defense counsel. If Ms. Harris' trial counsel was unaware of Dr. Ofshe, that would only mean that he was woefully unprepared having not even read one of the foremost cases on false confession testimony arising in the jurisdiction in which he practices. Again, there is no tactical advantage that can be gained by failing to call such an expert and, consequently, it cannot be a strategic trial decision. Had Ms. Harris' trial counsel called an expert on false confessions, the jury would likely have given more credence to Ms. Harris' testimony and there is a substantial probability that the outcome of the trial would have been different.

D. Trial counsel's cumulative errors constitute ineffective assistance of counsel and render Ms. Harris' trial unreliable as a matter of law.

196. While each of the critical errors detailed above establish prejudicial ineffective assistance of counsel in their own right, the cumulative effect of those and other errors also renders the outcome of her trial unreliable under *Strickland*. *Malone v. Walls* 538 F.3d 744, 762 (7th Cir. 2008) ("However, '[w]e previously have pointed out that prejudice may be based on the cumulative effect of multiple errors. Although a specific error, standing alone, may be insufficient to undermine the court's confidence in the outcome, multiple errors together may be sufficient.'")(internal citation omitted); *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000) ("Evaluated individually, [counsel's] errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence' under *Strickland* rather than the individual errors."); *Goodman v. Bertrand* 467 F.3d 1022, 1029-30 (7th Cir. 2006) ("[t]he cumulative effect of trial counsel's errors sufficiently undermines our confidence in the outcome of the proceeding. Rather than evaluating each error in isolation, as did the Wisconsin Court of Appeals, the pattern of counsel's deficiencies must be considered in their totality."); *Kubat v. Thieret*, 867 F.2d 351, 370 (7th Cir. 1989) ("The district court appropriately considered the combined effect of counsel's errors (failure to present mitigating evidence, the making of a prejudicial closing argument, and failure to object to erroneous instructions) and held that [the defendant] was prejudiced by those errors. *Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced.")

197. Ms. Harris' counsel's cumulative performance was unreasonable based not only on the errors outlined above, but also based on consistently deficient performance and ignorance of trial practice of which those errors were only a small part. The court repeatedly questioned Ms. Harris' counsel's behavior including, chastising him at least eight times in open court and

twenty-nine times in sidebar. Ms. Harris' counsel's opening and closing statements were both interrupted by sustained objections. Ms. Harris' counsel demonstrated a lack of understanding of leading questions and the necessary foundation for exhibits.

198. Ms. Harris' counsel's deficient performance resulted in his losing the confidence of both the judge and the jury. A prime example of this occurred during the defense's closing argument and the prosecution's rebuttal. Ms. Harris' counsel asserted in his closing that Ms. Harris had testified that she was handcuffed "briefly" when placed in the holding cell. (R916) This statement matched Ms. Harris' testimony that she was initially handcuffed but was unhandcuffed when the officers left the room. (R751-53). Nonetheless, the State objected, claiming that was "not the evidence." (R916) The court did not even allow Ms. Harris' counsel to argue that it was accurate, instead summarily sustaining the objection and leaving the jury to conclude that Ms. Harris had testified that she was never unhandcuffed and that her counsel was trying to deceive them. (*Id.*) When the State delivered its rebuttal argument, it contended that Ms. Harris' account of events was physically impossible because she claimed to have been handcuffed to the bar while she was banging on the door asking to go to the bathroom. (R916) This contention, not Ms. Harris' counsel's, was a misstatement of the evidence. (R751-53) Nonetheless, this defense counsel did not object to this statement, which remained in the record. (R916) [9]

199. Ms. Harris' trial counsel's cumulative errors were certainly not based on trial strategy as there is no trial strategy that would lead an attorney to be unaware of basic trial procedure. All this behavior did was aggravate the judge and, in all likelihood, the jury as well.

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9 This incident is also an example of how Ms. Harris' counsel was so beaten down by his repeated admonishments from the court that he did not see value in challenging an inaccurate objection, preferring to just move on, thus costing Ms. Harris' the opportunity to have important points presented to the jury.

The cumulative effect of counsel's errors was prejudicial because there is a substantial probability that, without them, the outcome of the trial would have been different. Without these errors, there is a substantial probability that the jury would have given more credibility to the arguments put forth by Ms. Harris and her counsel. Had Ms. Harris' counsel not been ineffective, he would have been able to continue with lines of questioning and arguments that could have been effective but were not dealt with because counsel abandoned them after being chastised by the court. Even if this Court does not deem each of the errors presented above to have prejudiced Ms. Harris on their own, in concert, they certainly prejudiced Ms. Harris. Had the jury heard the testimony of Diante as well as that of an expert on accidental strangulation and had the confession been deemed inadmissible, the jury would have likely voted to acquit. There is no doubt that there is at least a reasonable probability that the outcome of the trial would have been different if Ms. Harris had been represented by competent counsel.

VIII. Conclusion

200. Wherefore, for the foregoing reasons, Nicole Harris respectfully requests that this Court grant her petition, issue a writ of *habeas corpus* and vacate her conviction and sentence as unconstitutional or, in the alternative, remand the case to the state court for further proceedings. If this Court has any questions about the adequacy of the record, discovery should be granted and an evidentiary hearing conducted.

Dated: September 29, 2010

Respectfully submitted,

NICOLE HARRIS

s/ Robert R. Stauffer
By: One of her attorneys

Robert R. Stauffer
Sarah Hardgrove-Koleno
Jeffrey S. Eberhard
Anwar T. Shatat
Andrew D. Kennedy
JENNER & BLOCK LLP
353 N. Clark St.
Chicago, Illinois 60654-3456
Telephone: 312 222-9350
Facsimile: 312 527-0484

Steven A. Drizin
Alison R. Flaum
Center on Wrongful Convictions
Bluhm Legal Clinic
Northwestern University
School of Law
357 East Chicago Avenue
Chicago, Illinois 60611-3069
Telephone: (312) 503-8576

STATE OF ILLINOIS)
)
COUNTY OF COOK)

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Robert R. Stauffer, who upon being duly sworn by me testified as follows:

1. I am a member of the State Bar of Illinois, and I am admitted to practice in the U.S. District Court, Northern District of Illinois.

2. I am the duly authorized attorney for Nicole Harris, having the authority to prepare and to verify Ms. Harris' Petition for Writ of *Habeas Corpus*.

3. I have helped to prepare and have read the foregoing Petition for Writ of *Habeas Corpus*, and I believe all the allegations therein to be true and correct.

Robert R. Stauffer

SUBSCRIBED AND SWORN TO BEFORE ME on September 29, 2010.

Notary Public, State of Illinois

OFFICIAL SEAL
JOYCE MARBURY
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-4-2013