

No. 05-70037

IN THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH  
CIRCUIT

GREGORY EDWARD WRIGHT, Petitioner, Appellant,

V.

DOUGLAS DRETKE, DIRECTOR TEXAS  
DEPARTMENT OF  
CRIMINAL JUSTICE,  
CORRECTIONAL INSTITUTIONS  
DIVISION,  
Respondent, Appellee

On Appeal From the United States District Court  
For the Northern District of Texas  
Dallas Division

APPELLANT'S BRIEF IN SUPPORT OF APPLICATION FOR  
CERTIFICATE OF APPEALABILITY

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## **STATEMENT REGARDING ORAL ARGUMENT**

If this Court has any doubt that the admission of the Adams co-defendant statement was error and prejudiced the Appellant Gregory Edward Wright or that the State misled the District Court about the statement, or that the State withheld critical Brady information, then he asks the Court to set the case for oral argument so that he may dispel that doubt.

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**APPELLANT'S BRIEF IN SUPPORT OF APPLICATION  
FOR CERTIFICATE OF APPEALABILITY**

COMES NOW Gregory Wright, by and through his attorneys, and moves this court pursuant to 28 U.S.C. § 2253 and FED. R. APP. P. 22, for an order granting him a Certificate of Appealability ("COA") to appeal the denial of his habeas corpus petition. In support of his application, Wright will show:

## STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 2253 and FED.R.APP.P.22.

### ISSUES PRESENTED

- A. A habeas petitioner's claim is procedurally barred when the state's highest court rejects the petitioner's claim on an adequate and independent state ground that has been consistently applied by the state courts. The Texas Court of Criminal Appeals enforces the contemporaneous objection rule on a case-by-case basis, looking to the context of each case to see if the ground of the objection was apparent, although not specifically stated. Does Texas's contemporaneous objection rule bar Wright relief where his attorney alluded to the underlying legal principles of the Confrontation Clause by objecting to a co-defendant's statement as unreliable hearsay?
  
- B. Counsel's performance falls below Sixth Amendment standards when counsel's performance is deficient and counsel's deficient performance undermines confidence in the trial's outcome. Although Wright's attorneys tried to object to the introduction of Adams's statement at trial — the only evidence that supported a theory that Wright himself killed Vick- they failed to properly lodge their objection. Was counsel's failure to properly object a deficiency that undermined confidence in the outcome of Wright's trial where the jury was asked to find Wright guilty of actually killing Vick, not merely guilty as a party to the murder?
  
- C. When determining whether the state's violations of *Brady v. Maryland* caused sufficient prejudice to grant the defendant a new trial or punishment phase, the court must look to the error cumulatively to assess whether the combination of errors was sufficient to undermine confidence in the outcome of the trial. The District Court looked to evidence that was improperly withheld by the State with a Balkanized approach. Could reasonable jurists conclude that the District Court failed to properly cumulate the error as required by *Kyles v. Whitley*?

## INTRODUCTION AND STANDARD OF REVIEW

On March 27, 2004, the District Court issued a final order denying Wright's petition for habeas corpus under 28 U.S.C. § 2254. On June 24, 2005, the court entered an order denying Wright's motion to alter or amend judgment. Thereafter, on August 5, 2005, the District Court denied Wright's application for a COA. Wright desires to appeal these decisions and has filed a timely notice of appeal. To be allowed to appeal, however, Wright must receive a COA permitting substantive review of his claims. *See* FED. R. APP. P. 22 (admonishing that "the applicant cannot take an appeal unless . . . a circuit or district judge issues a certificate of appealability").

To obtain a COA, Wright must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). *See also Tennard v. Dretke*, 542 U.S. 274 (2004) (overturning Fifth Circuit's denial of COA); *Lamb v. Johnson*, 179 F.3d 352, 356 (5<sup>th</sup> Cir. 1999). Wright meets this standard when he demonstrates that his application involves issues which are debatable among reasonable jurists or that the issues presented are adequate enough to deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (overturning Fifth Circuit's denial of COA). *See also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A COA ruling is not the occasion for a ruling on the merit of petitioner's claim. *Miller-El*, 537 U.S. at

342. "[A] COA determination is a separate proceeding, one distinct from the underlying merits." *Id.* The substance of the appeal is not yet at issue. Rather, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.*

The statutory language of § 2253 apparently codifies the pre-AEDPA standard announced by the U.S. Supreme Court in *Barefoot v. Estelle*, 463 U.S. 890 (1983), in which the Court stated that to obtain a certificate of probable cause, a habeas petitioner must present a "substantial showing of the denial of a federal right." *Id.* at 893.

The Court elaborated on this standard:

In requiring a "question of some substance," or a "substantial showing of the denial of a federal right," obviously the petitioner need not show he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

*Id.* at n.4 (citations omitted). Doubts about whether a COA should issue must be resolved in favor of the applicant. *Fuller v. Johnson*, 114 F.3d 491, 495 (5 Cir. 1997). Additionally, courts are duty bound to recognize the qualitative distinction of the "severity of the [death] penalty in making [the COA] determination." *Id.*

Applying this standard to Wright's application, this court should grant a COA for the following reasons:

- 1) Reasonable jurists also could conclude that introduction of Adams's statement in Wright's trial had a substantial and injurious effect on the outcome;
- 2) Reasonable jurists could conclude that the contemporaneous objection rule is not consistently applied by Texas courts, that Wright's counsel made a proper objection to the introduction of Adams's statement, and that Wright's confrontation clause claim was not procedurally barred on adequate and independent state grounds;
- 3) Reasonable jurists also could conclude that, if no proper objection was made to Adams's statement at trial, then Wright can show a deficient performance by trial counsel and a reasonable probability that the outcome at the guilt-innocence and the punishment phases of his trial would have been different;
- 4) Reasonable jurists also could conclude that the State withheld exculpatory material of sufficient materiality to require a new trial.

### **PROCEDURAL HISTORY**

Gregory Edward Wright was indicted for capital murder alleged to have occurred on March 23, 1997. A jury trial was held and Wright was sentenced to death on December 8, 1997. He perfected a notice of appeal to the Court of Criminal Appeals. The Appeal was affirmed on June 28, 2000. A writ of certiorari was denied on January 22, 2001. Wright filed for relief under Tex.Code Crim Proc. Art 11.071 on July 22, 1999. That writ was denied on September 13, 2000. Thereafter

on January 18, 2002, Wright filed an Application for Relief Pursuant to 28 U.S.C. 2254. On March 27, 2004, the District Court issued a final order denying Wright's petition for habeas corpus under 28 U.S.C. § 2254. On June 24, 2005, the court entered an order denying Wright's motion to alter or amend judgment. Thereafter, on August 5, 2005, the District Court denied Wright's application for a COA.

### **STATEMENT OF THE FACTS**

This case involves one murder and two suspects. One suspect had a prior relationship with the victim, Mrs. Vick, while the other met Vick for the first time on the night of the murder. Those two suspects were both tried on capital murder charges in separate trials, both were convicted, and both were sentenced to death. However, the juries heard very different testimony from the State in each case.

The prosecution tried Greg Wright first and began its case with a theory - that two men were both responsible for murdering Donna Vick. (R44.76) The prosecution intended to prove that those two men, Greg Wright and John Adams, together planned and together were responsible for the murder and robbery that resulted in their death sentences. But at trial, when the State was able to introduce the blame-shifting hearsay statement of Adams against Wright, the State's theory changed. Without Adams's statement, however, the State would have found itself fighting an almost unwinnable battle at both stages of Wright's trial if the defense had

shown, or had even raised a reasonable doubt, that Adams was the primary actor and that Wright had been an aider and abetter. The State would have to prove that Wright was not merely present when Vick was killed, but that he actually anticipated that Vick's death would result. In the punishment phase the State would have to convince a jury to assess the death penalty against Wright even with all of the evidence pointing to Adams's primary role in the crime.

Adams had no relationship with Vick before the night of the murder. Vick, on the other hand, had taken Wright in, given him new clothes, taken him to church, given him work. (R45.36-37, 47, 50, 52, 62, 68, 96-98) Adams had recently been released from prison. (Statement of Adams to police, Appellant's record excerpts No. 2) He was homeless and living in the Beckley shack where some of the evidence of the crime was found. (R46.29-30) Adams left his wallet in Vick's stolen car (R46.135), giving him a reason to go to the police before the police found him. (Testimony of Adams in Adams's trial, Appellant's record excerpts, No. 3) The only murder weapon found that could be directly linked to the crime was a knife that Adams owned (R46.30,33,43-44), a knife that he buried near the crack house where he sold Vick's stolen belongings. (R46.97) The only clothing found that could be tied to the crime were a pair of jeans with a 32-inch waist. The person wearing those jeans (R48.146), the State argued, sat on top of Vick and stabbed her to death.

(R44.76) The jeans would fit Adams, who weighed 165 pounds and had a 32-inch waist at the time of the crime. (Testimony of Adams from Adams's trial, (R34.201) But the jeans would not fit Wright who was 6 ft. and weighed 190 pounds when he was arrested. (DeSoto arrest record, State's "x" Exhibits 90)

If the jury was allowed to assess punishment against Wright as merely a party to the crime, not as a sole actor, it would have also heard that Adams confessed to killing Vick, not once, but three times to three different people, never mentioning Wright's involvement in the crime. (R56, Defense Exhibit 2; R3 Exhibit 1; Appellant's record excerpts, Affidavit of Causey, Exhibit 8, Adams trial, Testimony of Causey, R32.192, Adams trial, Testimony of Jeremiah Tatum, R32.108) The jury would have heard that the bloody jeans that tied the murderer to the crime were found in the Beckley shack next to Adams's papers—papers also demonstrating his ties to a white supremacist prison gang. (R38.46; R46.29-35) The jury would have been aware that Adams had a motive to call the police and place all the blame for the crime on Wright, because all of the evidence pointed to Adams as the murderer. (Appellant's record excerpts, Exhibit 3; Adams's trial testimony)

At best, the evidence pointed to Wright only as an accessory after the fact. Wright was seen with Adams and Vick before the crime and was seen in her car with Adams at Mosley's crack house after the crime. (R45.58-65; R46.49-54) None of

the evidence presented at trial conflicts with the theory that Wright was merely an accessory after the fact. But because the State was able to introduce Adams's statement at trial, the State's theory of the case changed. When the case went to the jury, the court submitted a charge to the jury that forced the jury to convict Wright as a primary actor, not as a party to the murder. Despite the State's attempt to argue the parties' theory in closing, the trial court sustained objections to the State's arguments because the court found no evidence to support a parties' charge. In other words, the trial court was convinced that there was no evidence in the record to sustain a finding that Wright had a lesser role in the murder than as the primary actor. Under this sole actor charge, the jury was never able to weigh Wright's role in the crime as anything other than a primary actor - not in the guilt-innocence phase and certainly not in the punishment phase.

Now, the State argues that Wright was not prejudiced by the introduction of Adams's statement in the guilt-innocence phase or the punishment phase of the trial. The Magistrate's Findings agree with the State's position - that Wright was not prejudiced by the error of allowing Adams's blame-shifting hearsay statement into evidence. But to find that Wright was not prejudiced at the guilt-innocence or punishment phase of his trial, is a misreading of the record and of Texas law.

Wright was convicted as a principle - meaning Vick died at Wright's hands. In final argument, the prosecution told the jury that Wright, "acting alone killed Ms. Vick". (R51.13-16) Adams's statement is the *only* evidence that Wright acted alone. Every other piece of evidence points to Adams killing Vick and Wright merely present as an accessory after the fact. At worst, the State's evidence shows Wright and Adams participating together. But the charge did not reflect party responsibility. The charge required the jury to find that Wright was the primary actor - a fact supported in the record *only* by Adams's statement. No jury has been allowed to assess Wright's responsibility as merely a party and then set punishment accordingly.

### **SUMMARY OF ARGUMENT**

Wright advances three claims for relief. The first claim involves the adequacy of trial counsel's objection to the Adams's statement. The statement was admitted over Wright's hearsay objection, ostensibly under the rule of optional completeness. Wright maintains that Texas State courts have not traditionally applied the rule of optional completeness to trump a confrontation clause objection as was done in this case. Secondly, Texas State courts have, in similar cases, recognized Wright's hearsay objection as sufficient to preserve error. Thirdly, due to the inherently prejudicial nature of Adams's statement, reversible error would normally be found.

However, the Court of Criminal Appeals and the District Court applied an improper *Brecht* analysis because the courts have failed to consider the effect the error may reasonably have had upon the jury's decision.

Wright's second claim is that, if the court decides that no proper confrontation clause was made, then counsel's failure in that regard is a *per se* violation of the first prong of the *Strickland* test. Wright further maintains that the harm in the admission is manifest. Again, the District Court failed to properly assess the reasonable probability that the error affected the outcome of the proceedings.

Wright's third claim is that the State withheld material, exculpatory evidence in violation of *Brady v. Maryland*. The withheld evidence, three statements by Adams, the co-defendant, confessing to the murder, would undoubtedly have put the case in such a different light as to undermine confidence in the verdict. Wright maintains that the District Court did not apply the appropriate standard of review, as recently reaffirmed in *Graves v. Dretke*. Further, Wright maintains that the trial courts' failure to address the cumulative effect of the error was also unreasonable.

## ARGUMENT

- A. A habeas petitioner's claim is procedurally barred when the state's highest court rejects the petitioner's claim on an adequate and independent state ground that has been consistently applied by the state courts. The Texas Court of Criminal Appeals enforces the contemporaneous objection rule on a case-by-case basis, looking to the context of each case to see if the**

**ground of the objection was apparent, although not specifically stated. Does Texas's contemporaneous objection rule bar Wright relief where his attorney alluded to the underlying legal principles of the Confrontation Clause by objecting to a co-defendant's statement as unreliable hearsay?**

Reasonable jurists could debate whether Wright's confrontation clause claim is procedurally barred on adequate and independent state grounds because (1) Adams's statement had a substantial and injurious effect on Wright's trial at both the guilt-innocence and the punishment phases; (2) the state courts do not apply the contemporaneous objection rule consistently when trial counsel makes a global objection that includes a more narrow constitutional claim of error; and (3) given the context of Wright's attorney's objection, his objection put the prosecutor and the court on notice that the objection related to his client's right of confrontation.

1. Without Adams's statement, the average juror would have found the State's case against Wright significantly less persuasive in both phases of the trial, especially considering that the jury was never asked to assess Wright's role in the offense as a party or an accomplice.

Wright is entitled to relief if he can demonstrate that the admission of Adams's statement "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). Wright claims that the appropriate harm analysis in this case should be the standard the Supreme Court set

forth in *Chapman v. California*, 386 U.S. 18 (1967) because the state court failed to perform an independent harm analysis with respect to this claim in Wright's appeal to the Texas Court of Criminal Appeals. However, Wright also asserts that reasonable jurists could debate that he satisfactorily demonstrates sufficient harm under the *Brecht* standard.

The *Brecht* test does not say "only errors that turn acquittals into convictions are harmful." *Kyger v. Carlton*, 146 F.3d 374, 382 (6th Cir.1998). The question is not, "were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." *Brecht*, 507 U.S. at 642-43 (Stevens, J., concurring). The *Brecht* test requires an analysis which is different than simply measuring the sufficiency of the evidence after subtracting the offending item. And "it is improper in a *Brecht* inquiry to focus on the sufficiency of the untainted evidence." *Scott v. Bock*, 241 F. Supp. 2d 780, 790 (E.D. Mich. 2003).

In determining whether the error had a substantial and injurious effect, the court must determine "whether the minds of an average jury" would have found the state's case against a defendant "significantly less persuasive" had the incriminating portion of the co-defendant's statement been excluded. *Schneble v. Fla.*, 405 U.S. 427, 432 (1972). If the court is convinced that the error did not influence the jury, or

had but very slight effect, the verdict and the judgment should stand. *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995). If, on the other hand, the court is not fairly assured that there was no effect on the verdict, it must reverse. *Id.* In the "narrow circumstance" in which the court is in "grave doubt" about whether the error had substantial and injurious effect or influence in determining the jury's verdict, it must assume that the error is not harmless and petitioner must win. *Id.* at 436, 438.

While determination of substantial and injurious effect is necessarily fact intensive, the courts have traditionally looked to several standards:

- whether the testimony was material to the establishment of a critical fact or merely corroborated and cumulative, *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 2000);
- the overall strength of the prosecution's case, *Brecht*, 507 U.S. at 639;
- the extent to which the evidence was likely to influence the jury's verdict because it was particularly salient or probative of the ultimate issue, *Arizona v. Fulminante*, 499 U.S. 279, 294-98 (1991);
- the extent to which the testimony concerned an issue that was plainly critical to the jury's decision, *Hynes v. Coughlin*, 79 F.3d 285, 291 (2d Cir. 1996);
- the extent to which the testimony was emphasized by the prosecutor, *U.S. v. Ariza-Ibarra*, 605 F.2d 1216, 1223 (1<sup>st</sup> Cir. 1979); and

- the egregiousness of the error, *Kotteakos v. U.S.*, 328 U.S. 750, 772-74 (1946).

As Wright can demonstrate, the admission of Adams's statement had a substantial and injurious effect on the jury's verdict in both the guilt-innocence and punishment phases of his trial. The most damaging portions of Adams's statement were uncorroborated, and in fact, contradicted what the District Court claimed was the State's theory of the case - that both Wright and Adams killed Vick. Without Adams's statement, Wright would have been able to present a credible and persuasive argument to the jury that Adams killed Vick and that Wright was merely an accessory after the fact. Wright would also have been able to instruct the jury on party liability, requiring the jury to find that Wright actually anticipated that death would result - a conclusion supported only by Adams's statement. Finally, the State's disingenuous use of Adams's statement to "prevent a falsehood" made the error sufficiently egregious to warrant relief as a substantial and injurious error.

a. Course of trial

1. The Indictment

Wright was indicted for the offense of intentionally causing the death of the victim. Although the indictment does not specifically state that Wright was guilty as a party to the offense, Texas state procedural rules, Tex. Penal Code 7.02(b), allow

the court to submit the issue of guilt as a party to the jury in the court's charge if the evidence raises the issue that Wright was guilty only of aiding and abetting the murder. *McCuin v. State*, 505 S.W.2d 827, 830 (Tex. Crim. App.1974). Therefore, at the start of the case, the State was entitled to show that Wright was either guilty as a party or as the primary actor. In opening statement, the State argued that Wright, as well as his co-defendant Adams, killed the victim (R43.75-76), by stabbing her with knives (R43.76). Arguments and jury presentation on the special issues at the punishment phase are of a different quality and focus than those submitted when the accused is the primary actor. Had the State pursued the party theory throughout the trial, Wright, upon conviction, would have been entitled to jury instructions on whether, as a party to the offense, he actually anticipated that death would result, in accordance with *Tison v. Arizona*, 481 U.S. 137 (1987). When guilt as a primary actor is found, the third special issue, as to whether Wright anticipated that death would result is not even submitted to the jury, in effect reducing the burden of proof that the State must bear in acquiring a death penalty. See Tex Code Crim Proc sec 37.071 sec 2(2). Moreover, as noted in Wright's original petition, this court has held that liability only as a party is, itself, a mitigating factor. *Drew v. Collins*, 964 F.2d 441 (5<sup>th</sup> Cir. 1992), *Stewart v. Colling*, 978 F.2d 199 (5<sup>th</sup> Cir. 1992).

## 2. Switching Gears

Therefore, it is no surprise that when the opportunity first presented itself, the State immediately switched gears from liability as a party to liability as a primary actor. That opportunity presented itself with the introduction of Adams's statement. In retrospect, it appears that the State sought any opportunity to have Adams's statement produced to the jury in order to reduce their burden of proof. That opportunity presented itself when the lead detective Tripple took the stand, and the State immediately seized the opportunity.

## 3. The Excuse

Tripple testified generally that he spoke to Adams, and after speaking to Adams, conducted an investigation during which Tripple located the victim's car, the victim's body, and her house. (R45.196-217) Following up on the officer's testimony that he located certain evidence, defense counsel asked Tripple if Adams had admitted that the knife used in that case was his own. (R46.222) Even though the State had argued in its opening remarks that Adams had participated in the stabbing, and even though Adams's knife was, in fact, used to commit the offense, the State disingenuously claimed that the question left a false impression with the jury. (R45.222-227) The State's argument to the trial judge was that Adams's knife was used by Wright to commit the murder.

In addition to being contrary to the State's opening argument, this position was also inconsistent with the position taken by the State in Adams's own trial when the State argued that Adams was the perpetrator. As defense counsel pointed out to the judge at the time the statement was offered, no false impression had been left with the jury, and throughout the course of these proceedings neither the State's attorneys nor any reviewing court can point out any false impression conveyed by the question. The State took the position that Adams used the knife to kill Vick himself in Adams's trial. Then, desperately trying to salvage this argument in the District Court, the State advanced a speculative concern that a jury, having heard that Adams's knife was used in the murder, would deduce that Adams had confessed to the murder.<sup>1</sup> Ironically, such a deduction would have been dead-on correct. Only, the impression actually left with the jury, that Adams did not participate in killing Vick, was false. Even more ironically, the State conceded to the District Court that Wright did not use Adams's knife to commit the murder. According to the State, Wright used a serrated butcher knife (Respondent's Answer, p. 62, USCA 5, p.241) while Adams used his own folding knife. But this argument was not made by the State at trial. Instead, the State

<sup>1</sup> This impression underscores the materiality of the Adams confessions to third parties improperly withheld in violation of *Brady*. See *infra* at Section C.

relied on Adams's statement to provide the evidence needed to convict Wright as the sole actor, not merely a party to the murder.

The State's inconsistent use of Adams's statement can be best demonstrated as follows:

Who used Adams's knife in the murder?

State's argument in Wright's trial - Wright

Adams's statement - Wright

State's argument in Adams's trial - Adams

State's position in Wright's federal post-conviction proceedings - Adams.

Notwithstanding that defense counsel's question and answer pursued nothing but indisputable facts incapable of leaving a false impression, the State cried foul and suggested that Adams's statement was necessary to set the record straight because "the defendant used that knife." (R45.222-227) So, the false impression was not left by defense cross-examination, the false impression was left by the prosecution's intentional misstatement of the fact that Wright, and not Adams, used the folding knife to kill Vick. In essence, the State introduced an intentional subterfuge to the court about who used the folding knife belonging to Adams in order to introduce Adams's blame-shifting statement.

#### 4. The content of Adams's statement

Adams's statement goes well beyond a direct statement that he saw Wright murder the deceased. The statement gives a detailed and specific chronology of the events, right down to the hour and minute that the murder took place. More importantly, the statement contains a detailed and gruesome account of the murder in which the deceased screamed and hollered for help and Wright, in a cold-blooded fashion, stabbed her repeatedly and acquired a second knife in order to finish her off. The statement describes Wright coolly cleaning up after the murder and disparaging Adams for not assisting. According to Adams, the decision to pawn the property was Wright's as well, and, in fact, Wright alone loaded the car with Vick's property. Adams claims that Wright was the one who disposed of the victim's car. None of these details are corroborated elsewhere in the record and none can be inferred from the remainder of the trial record. Further, none of these details are corroborated through physical evidence or other witnesses. Finally, the statement bolsters the State's picture of Wright as a cold-blooded killer when it implicates Wright in another, unrelated murder. The additional harm of this unproven allegation magnifies the effect on the jury's view of this crime. Although not being allowed to cross-examine Adams about his past criminal record, Wright suffered from false allegations about his prior unproven acts. And courts have found that unproven prior bad acts

are often so harmful that when they come into evidence without appropriate objection, a defendant may be entitled to a new trial. *See e.g. Ex parte Varelas*, 45 S.W.2d 627, 636 (Tex. Crim. App. 2001) (overturning death sentence because trial counsel failed to request an instruction requiring the jury to find extraneous acts proven beyond a reasonable doubt before using those acts while assessing defendant's guilt).

5. The court's instructions to the jury

The State was denied a requested jury instruction that Wright could be found guilty as an accomplice to the murder. Under Texas Criminal Trial Procedure, the trial court conclusively decided that all of the evidence pointed to Wright as a direct participant and not a mere aider and abettor. In final argument, when the State attempted to suggest that Wright was *not* the perpetrator, but a mere accomplice, the trial court sustained objections to this theory. (R49.10, 11)

In closing argument at the punishment phase of trial, the State specifically argued that Wright alone killed Ms. Vick. (R51.17)

These facts must be juxtaposed against the repeated assertions by the Attorney General, and erroneously adopted by the District Court, that the State never alleged that Wright acted alone. (R1.359, n.7) Thus, the trial court, in a better position to determine the effect of the statement at the time, saw the evidence completely

differently from the District Court and the State. The trial court found no evidence that Wright acted as merely a party to the crime. If Wright was not the sole perpetrator, then he was either a co-actor, an accomplice, or a mere bystander. However, none of the latter theories are supported by Adams's statement.

Although the District Court analyzed the harm from Adams's statement under this co-actor theory, the jury was required to analyze the evidence under a much more stringent standard. In the guilt-innocence phase, the jury was required to find that Wright actually caused Vick's death by stabbing her himself. In the punishment phase, under this co-actor theory, the jury would have been required to make a finding that Wright reasonably anticipated Vick's death. These conclusions find support in the trial record *only* from Adams's statement.

b. Applying the Harm Analysis

1. The statement related to crucial trial issues

What was the harm of the introduction of Adams's statement? *Brecht* suggests that reviewing courts examine whether the statement is germane to the crucial issues at trial. If it is, the overall strength of the State's case is considered in order to assess any impact. As to the first question, the statement is so clearly germane to the main issues at trial (who committed the murder and how it was committed), that there has

been no further discussion by the Attorney General or the District Court and none is required.

## 2. Corroborative evidence

The next issue is the strength of the corroborative evidence. As the State conceded in final argument (R49.50), the evidence, aside from Adams's statement, is circumstantial. Aside from the statement, the following facts were argued by the Attorney General and wholly adopted by the District Court (USCA5 page 334) to constitute overwhelming evidence of guilt:

- (1) Petitioner was living in and arrested at a shack that contained jeans and a knife with the victim's blood on them inside and a knife with her blood outside nearby;<sup>2</sup>
- (2) Like the clothes Petitioner was wearing when arrested, the jeans with the victim's blood on them also had gold paint on them;
- (3) Petitioner had been seen with gold paint on his clothes and face;
- (4) Petitioner's blood was on the steering wheel and dashboard of the victim's car;
- (5) Petitioner was seen with the victim the night before her murder;
- (6) Petitioner was seen in the victim's car the same morning of the murder, trading her belongings for crack cocaine; and

<sup>2</sup> The knife with her blood on it, the Adams knife, was found near Mosley's home. (R46.97) No knife with Vick's blood on it was found in Wright's shack. These factual errors constitute unreasonable factual determinations in and of themselves.

- (7) A note with the question, "Do you want to do it?" was found in the victim's house near a soda bottle with Petitioner's fingerprint on it.

However, an examination of the record shows that this evidence is not overwhelming evidence of guilt that Wright was the perpetrator of the murder; it shows only that Wright was present at the scene and that Wright helped dispose of Vick's property after the fact.

a. The property in the shack

First, bloody jeans and kitchen knives (R46.29-33, 43-44) were found at the shack where Wright and Adams lived. The State claims that the murder jeans had paint flecks on them, and that since Wright sniffed paint, ergo, he wore the jeans. (R49.55-57) However, the record shows that paint was found all around the shack and that both Adams's and Wright's belongings were found nearby in the shack. All of the jeans found in the shack had paint on them as well. (R46.37-39) This assertion ultimately proves nothing. Moreover, Adams's knife, the murder knife, was not found at Wright's shack and is not linked to him.

Counsel was deprived of the opportunity to cross-examine Adams on his paint usage and to ask him what happened to his knife, the one that was smeared undisputably with Vick's blood. (R47.135-140)

The inference of guilt derived from presence of a potential murder weapon and clothes used in the murder is entirely ameliorated by the fact that Adams, the co-defendant, also lived in the same shack. Certainly, had Wright been in sole possession of a potential murder weapon or the bloody jeans, a suggestion could be made that he committed the murder. That suggestion is entirely eviscerated when the fact finder is informed that the co-defendant was in possession of those items to the same, if not a greater degree, than Wright and that the bloody jeans fit Adams and did not fit Wright.

b. Relationship to the Deceased

The second factor was that Wright's blood was found in Vick's car. (R48.136) The defense freely conceded that Wright had been staying with Vick for many days and had ridden around in her car. (R45.36-37,47, 50,95) The fact that bodily fluids were found in the vehicle might have some significance if Wright had no relationship whatsoever with Vick. However, the record clearly shows that Wright was a houseguest of Vick's. That Wright's bodily fluids were found on her possessions is hardly an indication that he committed the murder. On the other hand, Adams had never met Vick before that evening and had no prior access to her property. (Statement of Adams, Appellant's record excerpts, Exhibit 2)

c. Pawning the property

Likewise, the fact that Wright was seen with Vick the night before her murder (R45.95), that his fingerprint was found on a bottle inside her residence (R46.129, 177-178), and that he helped trade her belongings after her death (R46.49-54) showed only that he was present at or around the time of the murder and that he was an accessory after the fact in disposing of her property. None of these facts established that Wright, as opposed to Adams, actually stabbed Vick. Restated, a fact finder could just as well deduce from this very same evidence that Wright introduced Adams to the victim through his relationship with her, and that after she was murdered by Adams, Wright helped Adams dispose of her property. Accomplice after the fact -yes, murderer - no.

d. The jeans

The Magistrate also emphasized (R1.357) that Vick's blood was found on Wright's jeans. But, the Findings do not explain that the jeans in question were found at a shack belonging to both Wright and Adams. Therefore, the jeans were just as likely to belong to Adams as Wright. And the record shows that Wright was seen wearing new dark jeans on the evening of the murder. (R45.60-61) Even a cursory examination of the Umen jeans worn by the murderer gainsays that these jeans are not dark and not new. Rather, they are old and tattered. Thus, this evidence was

presented in a false light against Wright at trial. As the State argued at trial, the murderer straddled the victim and stabbed her while wearing the Umen jeans. However, as the defense pointed out in final argument, these jeans do not fit Wright at all because they are too small.<sup>3</sup> (R49.38) Therefore, when assessing whether the physical evidence, in absence of Adams's statement, corroborates the jury's finding that Wright actually cause Vick's death, the Umen jeans cannot be used to support that finding. Further, the Umen jeans point to Adams as the person who sat on Vick and stabbed her to death. If Wright had been able to effectively make that argument to the jury in the punishment phase of trial, there is a reasonable likelihood that the jury would not have assessed the death penalty against Wright.

e. The partial bloody print

The only other piece of physical evidence tying Wright to the crime scene was a partial bloody fingerprint that only one State's witness, to the exclusion of all other witnesses, including deputy sheriffs Ho well and Watson (R47.123-124), conjectured

<sup>3</sup> The Court should note that Wright has made numerous attempts to request that a simple physical examination of the Umen jeans be undertaken to determine if they could conceivably fit Wright. This request has been repeatedly denied as a "fishing expedition."(USCA 5, 314-317)To date, however, the Attorney General continues to argue that these jeans were worn by Wright and are conclusive evidence of his guilt, but the State refuses Wright the opportunity to inspect the jeans so that this factual issue can be resolved. Rather than ensure the facts and evidence match the State's theory, the State is comfortable simply keeping its verdict intact even at the cost of unreliability and the risk of executing an innocent man. This cavalier approach to the evidentiary shortcomings should not be sanctioned by this Court.

was Wright's. (R46.73-80) When Cron, the expert, was asked to demonstrate his findings for the jury, he could not. He admitted that the jury was just going to have to "accept his testimony on faith". In other words, for the one piece of physical evidence that the State used to tie Wright to the murder scene, Cron stated that the jury would "just have to take his word for it". (R47.127-128) Significantly, the District Court addressed the testimony of the expert in the context of Wright's false light claim and his claim of newly discovered evidence. In so doing, the court noted that the State's expert was thoroughly impeached on this issue, a finding that demonstrates the problem in relying on this evidence as conclusive evidence of guilt. (Magistrate's findings p. 16-17, 23-24) The testimony concerning this print, if believed, is the only real evidence that Wright may have been more than an accomplice after the fact. Yet, it does not prove that Wright was the sole knife wielder, as the statement claims, nor does it disprove Adams's involvement.

### 3. Contradictory evidence

Not only is the State's case far from overwhelming, it is overburdened by conflicting evidence that Adams was the perpetrator. Adams lived in the shack where the murder jeans and some knives were found. The Umen jeans worn by the murderer fit Adams, not Wright. Adams pawned the property. His wallet was found in the Vick's car. Adams confessed to the murder to at least two people before he was

arrested. And, by Adams's own admission, the knife used in the murder was his. This evidence contradicts the evidence offered against Wright.

#### 4. Probable effect

Both the District Court and the Attorney General are simply unwilling to concede that Adams's statement, which provided a context explaining all of the other evidence found, and which placed the blame falsely and entirely upon the Wright, resulted in any prejudice to Wright. That argument is hard to fathom. Had Adams's statement not been introduced into evidence, the State's case would have been as follows:

- (1) Several fact witnesses would have testified that Wright had been in the deceased's home for several days preceding the murder and had access to her vehicle and her property.
- (2) Based upon a statement made by Adams, detectives would have testified that they found Vick's body in her home, found items belonging to Adams in her vehicle, found her blood on the knife Adams buried, and found a pair of jeans soaked with Vick's blood at the shack where Wright and Adams both resided.
- (3) Fact witnesses would state that Wright assisted Adams in bartering the deceased's property the next day for drugs.
- (4) A partial bloody fingerprint ostensibly belonging to Wright was found on the bed nearby the deceased. This fingerprint comparison was of such questionable value and quality that only one person - literally to the exclusion of all of the other State fingerprint experts - was able to claim a match. Even he could not demonstrate the match but asked the jury to have faith in him.

Based upon that evidence alone, the State would then argue that they had conclusively proved Wright was *the* murderer. Not an accomplice to the murder, nor an accomplice after the fact to the murder, but *the* actual murderer. While the sum total of this evidence *might* allow a fact finder to reach such a conclusion, these attenuated links to the crime could easily be disparaged by competent trial counsel. If the inferences drawn from Wright's presence in the house, his pawning of the deceased's property and the presence of incriminating jeans in his shack are strong enough to convict Wright, they are equally sufficient to shift blame to Adams, because the same facts fit him as well.

In truth, the facts are more likely to lead to the conclusion that Adams was the murderer - a position the State readily embraced when it successfully tried Adams for capital murder. Even in light of a conviction, residual doubt sufficient to mitigate against imposition of the death penalty against Wright remain relatively certain. The evidence, without Adams's statement could reasonably lead a jury to find that Adams was more culpable and that Wright was less culpable — a finding crucial in not only the guilt-innocence phase where the jury had to find that Wright actually caused Vick's death - but especially in the punishment phase where the assessment of culpability is a crucial mitigating factor.

Importantly, the issue on review is not the strength of evidence alone, it is the impact the Adams's statement had on the jury. No matter how strong the fingerprint and relationship testimony is viewed, there can be no principled argument that the State's case was not significantly enhanced by the Adams statement. As noted above, Adams's statement provided a more detailed chronology. Adams's statement set the emotional tone for the trial by describing the gruesome and cold-blooded fashion in which Wright allegedly murdered the deceased. This self-serving statement that the State subsequently discounts, if not wholly abandons, in Adams's own trial, paints Wright as a careful and methodical killer who acted over the protest of Adams. Likewise, the motive for the killing set forth in this bolstering statement is attributed entirely to Wright, to the exclusion of Adams. In the absence of Adams's statement, the jury would never have heard how Vick called for help, how Wright allegedly used a second knife to finish the job, and how Wright gathered up and then sold the victim's property. When the State in final argument talked about Wright as the coldest blooded killer imaginable, the prosecutor was merely echoing Adams's improperly admitted and uncontestable statement. (R49.47-48) When the prosecution argued that it was Wright's idea to murder for crack, he was simply parroting Adams's statement. (R49.54)

## 5. Effect on Punishment

The harm caused Wright at the punishment phase of trial was equally devastating. Not only did Adams's statement allow the Court to instruct the jury on one less special issue - - whether Wright reasonably anticipated the death, but the State also was able to use portions of Adams's statement to underscore the heinous and deliberate way in which Wright allegedly committed the murder. (R51.13-14) There can be no question that portraying Wright as the sole perpetrator who "tortured" his victim cast the punishment issue in an entirely different light than would have been the case without the Adams statement. There is simply no way to deduce that Wright acted alone in the murder in the absence of the Adams statement. In weighing a death penalty, jurors are asked to consider the deliberateness of the crime and the cruel or gruesome nature of the offense. All of those considerations were supplied through the Adams statement.

## 6. Egregious error

As court's have noted, relief may be appropriate, regardless of other evidence, if the State's role is particularly egregious. Wright presents such a case. Knowing that Adams's statement was critical to a conviction, the prosecution devised a scheme to use it only against Wright, even though the State has subsequently and persistently referred to Adams's statement as false and blame-shifting. Worse, in order to use

this false statement in front of the jury, the prosecution went further and misled the court into believing that Adams did not use a knife at all, a position that the State now completely disavows. (Respondent's answer, USCA 5, p. 241) It appears, therefore, that the State cast evidence in a false light as a subterfuge to introduce a statement that was manifestly false. The State now accepts that the statement is false and unreliable, an argument it successfully made in Adams's trial. Since the statement in question went directly to the only contested issues in the case, it is hard to imagine a case involving more prejudicial results. The State's pernicious resort to false evidence and its distasteful emphasis of Adams's statement in Wright's trial, but *not* Adams's, only underscores the misconduct and palpable injury suffered by Wright due to the statement's admission. Misconduct? Yes. Prejudice? Yes. Could reasonable jurists disagree on this point? Absolutely.

2. Because Texas courts fail to consistently apply the contemporaneous objection rule, Wright's confrontation clause claim is not barred by an adequate and independent state ground.

A state's procedural rule is not entitled to respect as an adequate and independent state ground unless the rule is "strictly or regularly followed." *Wheat v. Thigpin*, 793 F.2d 621, 624-27 (5<sup>th</sup> Cir. 1986); *see Smith v. Black*, 970 F.2d 1383, 1387 (5<sup>th</sup> Cir. 1992) (reaching the merits of the federal claim when finding an inconsistent application of the contemporaneous objection rule by the Mississippi

Supreme Court). When addressing whether a state's courts strictly and regularly follow the rule, the Court must look to the rule's application to identical or similar claims. *Amos v. Scott*, 61 F.3d 333, 341 (5<sup>th</sup> Cir. 1995) (noting that whether the contemporaneous objection rule is strictly followed in Texas courts should be analyzed by looking not at the rule's broadest application but its application in similar cases).

Neither Dretke nor the District Court cites any cases from the Texas courts applying the contemporaneous objection rule in a case identical to Wright's - where a defendant's trial counsel objected to a co-conspirator's statement as hearsay and raised a confrontation clause claim on appeal. The case that comes closest to Wright's facts was decided by this Court in September 2005. *See Kittelson v. Dretke*, 426 F.3d 306 (2005). In *Kittelson*, this Court reached the merits of the petitioner, Kittelson's, confrontation clause claim despite his failure to make a confrontation clause objection at trial. *Id.* at 311-12. In that case, Kittelson was charged with indecency with a child. *Id.* at 308. The alleged victim first made allegations about the abuse in front of two other girls, one of which was Kittelson's step-daughter who was present the night of the alleged abuse. *Id.* at 309. After the victim claimed that Kittelson molested her, his step-daughter also claimed to have been sexually assaulted by Kittelson. *Id.* When the investigating officer responded, he took the alleged victim

and the step-daughter to the Children's Assessment Center so that a counselor could interview the two girls. *Id.* The step-daughter recanted her story during the interview.

*Id.*

Before trial, the court granted the State's motion in limine to prevent the defense from eliciting testimony about the step-daughter's recantation and about two former allegations of sexual abuse lodged by the victim against other perpetrators. *Id.* at 310. When the responding officer took the stand at trial, he testified that he took both the victim and the step-daughter to be interviewed by a counselor. *Id.* at 310-11. The defense then argued that the State had opened the door and that the defense could now ask the officer about the step-daughter's recantation. *Id.* at 311. Defense counsel argued, consistent with Texas's optional completeness rule, that cross-examination of the officer was necessary to prevent the false impression that the stepdaughter was also accusing Kittelson of sexual assault. *Id.* The trial court overruled the objection, and the defense counsel never raised an objection based on the confrontation clause of the Sixth Amendment. *Id.* at 312. In his appeal Kittelson also failed to raise a confrontation clause claim. *Id.* at 312. It was not until his state habeas that Kittelson first stated an objection based on the confrontation clause, and the state court denied Kittelson's habeas petition. *Id.* at 313-14. The federal District Court denied Kittelson's confrontation clause claim on the grounds that he was

procedurally barred from raising it. *Id.* at 314. This Court reversed and remanded that decision, finding that the state court unreasonably applied federal law and that the error had a "substantial and injurious influence on the jury's verdict." *Id.* at 323.

Kittelton's defense counsel objected at trial on optional completeness grounds because the trial court granted a motion in limine, and one way to circumvent that ruling was the State's "opening the door." Similarly, Wright's trial counsel objected to the introduction of Adams's statement on Texas evidentiary grounds because that was the context in which the statement was offered. The State offered the testimony under the optional completeness rule, arguing that the defense had "opened the door." Wright's counsel responded by arguing that the hearsay was an unreliable exculpatory statement by the co-conspirator. Defense counsel in *Kittelton*, like Wright's counsel, made a general objection based on optional completeness that subsumed the more specific confrontation clause issue. Kittelson raised the more specific confrontation clause claim subsequently in his habeas petition. Unlike Kittelson, Wright alerted the state courts to his confrontation clause claim in his direct appeal. Because these objections were so similarly lodged, this Court should consider them similarly preserved. Wright can think of no reason, and the District Court made no argument, for this Court to treat these two cases differently. Further, more deference should be

given Wright's claim than Kittelson's because denial of Wright's claim equates with death. *See Fuller*, 114 F.3d at 495.

In applying the contemporaneous objection rule, Texas courts often reach the same result that this Court reached in *Kittelson*. The case most similar to Wright's is *Lankston v. State*, 827 S.W.2d 907 (Tex. Crim. App. 1992). In *Lankston*, defense counsel objected to portions of a witness's statement simply as hearsay. The Texas Court of Criminal Appeals determined that from the context, both the judge and the prosecutor understood that the defense counsel was objecting that some of the testimony did not fall within the statutory exception for "outcry" witnesses under state law. *Id.* at 910. The Court of Criminal Appeals did not require defense counsel to specifically cite to Texas's outcry statute or even use the term "outcry." *Id.*

In several cases, the Texas Court of Criminal Appeals has refused to apply the contemporaneous objection rule when defense counsel made global objections at trial and later raised more specific constitutional claims on appeal. *See Samuel v. State*, 688 S.W.2d 492,494 (Tex. Crim. App. 1985) (overturning lower court's finding that defense counsel's objection to the prosecutor's "comment on the defendant's right to remain silent and his comment on his failure to make a statement at the scene" preserved appeal on only federal constitutional grounds and considering the state constitutional ground as well); *Cofield v. State*, 891 S.W.2d 952, 954 (Tex. Crim.

App. 1994) ("identifying challenged evidence as hearsay should generally be regarded as a sufficiently specific objection."); *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977) (holding that even when defense counsel lodges a general and imprecise "catchall" objection, no waiver results if the correct ground of exclusion was clear from the context); *Gabriel v. State*, 973 S.W.2d 715, 719 (Tex. App. - Waco 1998, no pet.) (holding that objection to evidence as hearsay is sufficient to preserve for appeal any contention that the state failed to show that the challenged evidence complied with the statutory requirement of art. 3 8.072 for outcry evidence); *Coleman v. State*, 644 S.W.2d 116 (Tex. App. - Austin 1982, pet. ref d) (finding defense counsel's objection sufficient to preserve a Fifth Amendment claim where the defense attorney's objection was: "I've been practicing law for seven years and I've never got to talk to a grand jury"); *see also Heidelberg v. State*, 144 S.W.3d 535 (Tex. Crim. App. 2004) (attempting to synthesize the contextual requirements under the contemporaneous objection rule).

Like trial counsel in *Samuel* and *Zillender*, Wright's counsel used the more global objection of hearsay when objecting to Adams's improper statement. The Texas courts could have followed the precedent of *Samuel* and *Zillender*, finding that the more global objection sufficed to preserve a more specific constitutional or statutory claim. And certainly, Wright's trial counsel's objection met the demands

of the *Coleman* court when that court found counsel's very vague objection citing no authority preserved error on Fifth Amendment grounds.

The District Court failed to conduct a substantive analysis of whether the contemporaneous objection rule is consistently applied in Texas state courts. And Wright has demonstrated that if this Court undertook such analysis, it would find that reasonable jurists could debate the consistency with which the Texas courts have applied the rule.

- 3 . Because Texas courts look to the context in which an objection is made to glean a more specific objection from the more global assertion of trial counsel, Wright' s confrontation clause claim is not barred by Texas 's contemporaneous objection rule.

When Wright was tried, the analysis of a confrontation clause claim was "subsumed by the evidentiary rules governing the admissibility of hearsay statements." *U.S. v. Cromer*, 389 F.3d 662, 679 (6<sup>th</sup> Cir. 2004). That analysis turned on whether the hearsay statement was a firmly rooted exception to the hearsay rules, and if not, whether it was otherwise sufficiently reliable. *Ohio v. Roberts*, 448 U.S. 56,66(1980).

A long line of cases put criminal defense lawyers, prosecutors, and judges on notice that the blame-shifting statements of co-defendants violate the confrontation clause because they are unreliable hearsay. *Lilly v. Virginia.*, 527 U.S. 1 16 (1999);

*Williamson v. U.S.*, 512 U.S. 594 (1994); *Idaho v. Wright*, 497 U.S. 805 (1990); *Lee v. Illinois*, 476 U.S. 530 (1986); *Roberts*, 448 U.S. 56; *Bruton v. U.S.*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965).

Therefore, when Wright's counsel lodged his objection to Tripple's use of Adams's statement at trial, he objected in the context of the long line of cases establishing that unreliable hearsay statements from co-defendants may not be used against defendants at trial. Taken in that context, Wright's trial counsel put the trial court adequately on notice of the underpinnings of his objection when he told the court: "Your Honor, first we would point out that the testimony that the State is trying to elicit at this point is *hearsay, and it's hearsay against the penal interest of another, not the declarant*, and that - that testimony is clearly not admissible, Your Honor." (R45.230-231) (emphasis added).

Defense counsel's objection, made in that context, preserved Wright's claim just as generalized hearsay objections have in past cases. *See, e.g., Lilly*, 527 U.S. at 123 (reaching petitioner's confrontation clause issue even though "petitioner focused on state hearsay law in his challenge to the admission of [an accomplice's] statements"); *Bruton*, 391 U.S. at 126 n.2) (noting the trial court's ruling on the accomplice's statement as "hearsay as far as the defendant... is concerned" and not mentioning the confrontation clause); *Douglas*, 380 U.S. at 423 n.4 (holding defense

counsel's objection specific enough to preserve a confrontation clause claim where counsel said: "I'd first like to object to the reading of this purported confession on the grounds that it is hearsay evidence, that it was made outside the hearing of this defendant, it was not subject to cross-examination, and we move to exclude it from the evidence"); *Hutchins v. Wainwright*, 715 F.2d 512, 517 (11<sup>th</sup> Cir. 1983) (granting relief to petitioner on confrontation clause grounds where the only objection at trial was to hearsay and both the state and federal habeas failed to mention the confrontation clause but instead generally alleged "the unconstitutional admission of hearsay testimony" as the point of error).

Wright's counsel lodged a timely hearsay objection to the introduction of Adams's statement at trial. Counsel's objection closely mirrored the objections made by defense counsel in many of the most important confrontation clause cases in our jurisprudence. Therefore, in the context of Wright's trial, reasonable jurists could, and have, concluded that the generalized objection sufficed to preserve Wright's confrontation clause claim.

**B. Counsel's performance falls below Sixth Amendment standards when counsel's performance is deficient and counsel's deficient performance undermines confidence in the trial's outcome. Although Wright's attorneys tried to object to the introduction of Adams's statement at trial - the only evidence that supported a theory that Wright himself killed Vick - they failed to properly lodge their objection. Did counsels' failure to properly object**

**constitute a deficiency that undermined confidence in the outcome of Wright's trial where the jury was asked to find Wright guilty of actually killing Vick, not merely guilty as a party to the murder?**

If this Court finds that Wright's counsel failed to preserve his confrontation clause claim by improperly objecting to Adams's statement at trial, then Wright's counsel was ineffective unless the improper objection was part of his trial strategy.

In order to obtain relief on an ineffective assistance of counsel claim, a petitioner must demonstrate that (1) counsel's performance was deficient and (2) petitioner was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A deficient performance is one that falls "below an objective standard of reasonableness." *Id.* at 688. Trial counsel's performance is not deficient if it is based on sound trial strategy. *U.S. v. Jones*, 287 F.3d 325, 331 (5<sup>th</sup> Cir. 2002) ("A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness."). A deficient performance is said to have prejudiced the petitioner when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

When the State attempted to introduce Adams's blame-shifting statement through Detective Tripple, Wright's trial counsel objected on the grounds that the statement was hearsay. As discussed in the previous section of this brief, either counsel's hearsay objection was sufficient to preserve the confrontation clause claim, or it was not. If it was not, then counsel erred, and an error of such magnitude fell below an objective standard of reasonableness.

Trial counsel's failure to appropriately object was not part of trial strategy. Counsel was attempting to keep the statement out of evidence, he simply failed to cite the appropriate constitutional provision that would have bolstered his hearsay objection. Trial counsel claims in his affidavit that he should have made the confrontation clause objection. (Appellant's record excerpts Exhibit 19, 20, Affidavits of trial counsel) He was not withholding the proper objection for any strategic purpose.

Of course, the State of Texas did not find any *Strickland* violation, but for surprising reasons.<sup>4</sup> The Court found that admission of the Adams statement did not involve a confrontation clause issue. (State's proposed findings at 99.) Under *Lilly*,

<sup>4</sup> Actually, the trial court made no findings at all. Instead, the judge entered a one-page order that simply adopted the State's proposed findings. In another one-page order, the Court of Criminal Appeals adopted the trial court's findings. The manner in which these findings were made bespeaks of a complete breakdown in the review process.

supra, the finding is erroneous because the optional completeness rule is not a firmly rooted exception and the statement otherwise lacks any indicia of reliability. The District Court ignored this state court finding by taking up only the second prong of the *Strickland test*. Therefore, reasonable jurists could conclude that the state court finding was an unreasonable application of established law. Secondly, the trial court found that the statement was necessary to correct a false impression. As set out in the "egregious error" section above, this finding is not only directly contrary to the facts, but it is at odds with the position now taken by the Attorney General as to the identity of the person using Adams's knife. This factual determination is patently unreasonable. (State's proposed findings at 106-107.) Finally, the court found that the optional completeness objection, even though utterly ineffective, was a superior objection to any confrontation clause objection. (State's proposed findings at 107-108.) This reasoning is unsound, primarily because the objections are not mutually exclusive and could have been made together. The finding ignores the fact that trial counsel attempted to make a confrontation clause objection through his hearsay objection, which gainsays any such strategy. Most significantly, once the optional completeness objection was overruled, there remained no justification for failing to make an additional confrontation clause objection. The State also made a proposed finding that the error was harmless, suggesting that the trial outcome would not have

changed. This finding, like the District Court's finding, is an unreasonable determination of the facts since it utterly fails to weigh the probable effect the Adams statement had on the jury.

The District Court did not assess whether Wright's counsel's performance was deficient. *Wright v. Dretke*, 2004 WL 438941, 23 (N.D. Tex. March 10, 2004). In fact, the District Court seemed to accept that Wright satisfied the first prong of *Strickland*. *Id.* However, the court found that the admission of Adams's statement did not prejudice Wright. *Id.* ("Given all of the other evidence presented at Petitioner's trial, it cannot be said that, had Adams's self-serving statement regarding his knife that was not relied upon by the State not been admitted into evidence, there is a reasonable probability that Petitioner would not have been convicted of capital murder.") Although the District Court briefly addressed the potential prejudicial effect of Adams's statement on the guilt-innocence phase of Wright's trial, the court *never* addressed Wright's argument that the statement prejudiced the outcome of the punishment phase as well.

Wright set forth, in detail, the harmful effect of Adams's statement at both the guilt-innocence and the punishment phase of his trial in the preceding section of this brief. Although the harm analysis is slightly different for the confrontation clause violation - whether the introduction of the statement had a substantial and injurious

effect or influence in determining the jury's verdict - than the harm analysis under *Strickland*, Wright has demonstrated prejudice sufficient to satisfy either standard. As noted above, and incorporated herein, the gruesome and exacting detail in the Adams statement is impossible to overlook. Certainly, if the statement's introduction had a substantial and injurious effect on the jury's verdict, then failing to properly object to the statement would undermine confidence in the trial's outcome.

At a minimum, reasonable jurists could debate whether Wright sustained the requisite *Strickland* prejudice at either the guilt-innocence phase or penalty phase of the trial.

**C. When determining whether the state's violations of *Brady v. Maryland* caused sufficient prejudice to grant the defendant a new trial or punishment phase, the court must look to the error cumulatively to assess whether the combination of errors was sufficient to undermine confidence in the outcome of the trial. The District Court looked to evidence that was improperly withheld by the State with a Balkanized approach. Could reasonable jurists conclude that the District Court failed to properly cumulate the error as required by *Kyles v. Whitley*?**

1. Wright presented several valid *Brady* claims that were properly before the court.

[H]abeas corpus is, at its core, an equitable remedy." *Schlup v. Delo*, 515 U.S. 298, 327 (1995). *Kyles v. Whitley* reminds reviewing courts that the "duty to search for constitutional error with painstaking care is never more exacting than it is in a

capital case." *Id.* at 422 (citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). However, the District Court failed to apply the appropriate standard of reviewing previously unrepresented claims under the *Schlup* standard. The District Court erred when it adopted the Magistrate's findings that failed to apply *Schlup*, improperly asserting that the *Schlup* standard only applies to claims based on newly discovered evidence.

Wright challenged that his trial was so infected with constitutional error that the verdict was unreliable and would result in executing an innocent man. In the alternative, Wright claimed that these same errors produced a fundamentally unfair sentence of death. When a defendant claims innocence, *Schlup's* "more likely than not" standard provides the appropriate measure of review. *See Calderon v. Thompson*, 523 U.S. 538,560 (1998). *Schlup* merely requires that Wright "show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327. It is here that the District Court failed to properly apply *Schlup* because although *Schlup* requires new evidence be presented, that evidence need not be newly discovered.

The District Court adopted findings that underplay the State's use of inconsistent trial theories: first, that Wright (who the State chose to try first) was the sole killer, and, then subsequently, that Adams had killed Vick. These two theories

are incapable of reconciliation as there were either two actors or one. Clearly the State wanted both Wright *and* Adams to be sentenced to death for killing Vick. But, the mutually inconsistent trial theories proffered at the two trials permitted the State to improperly argue at Wright's trial that (1) the knife used in the murder was Wright's, despite the State's knowledge that the knife belonged to Adams, (2) that despite Adams's previous three confessions to the murder, each emphasizing his role as the sole actor in the killing, Adams's self-serving statement was admitted to incriminate Wright as the killer; and, (3) that the evidence found at the shack, where the State knew both Wright and Adams lived, belonged solely to Wright.

In Adams's trial (Adams trial record, Appellant's record excerpt, Exhibit 4), the State quickly changed its tune by claiming that Adams was a primary actor because (1) Adams's knife was used in the killing, (2) Adams lived at the Beckley shack where the murder evidence was uncovered, and, (3) most importantly, that the damning statement made by Adams that was admitted in Wright's trial was now *unreliable* and should be excluded in Adams's own trial.

Because the excluded evidence surmounts the *Schlup* "more likely than not" standard, Wright's *Brady* claims should have received substantive review before the District Court. At a minimum, reasonable jurists could disagree on this issue and, therefore, a COA should issue.

2. Had the District Court properly cumulated the error as required by firmly established Supreme Court precedent, the District Court would have found, and reasonable jurists could disagree, that there was a reasonable probability that the net effect of the favorable evidence withheld from Wright would have produced a different result.

*Kyles v. Whitley* establishes the appropriate standard for reviewing the cumulative effect of *Brady* claims. As this Court recently observed, *Brady* establishes the starting point because "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith . . . of the prosecution." *Graves v. Dretke*, 2006 WL 515485, at 4 (5<sup>th</sup> Cir. 2006) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). Evidence is deemed "material" for *Brady* purposes if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433 (quoting *U.S. v. Bagley*, 473 U.S. 667, 682 (1985)). "*Brady* applies equally to evidence relevant to the credibility of a key witness in the state's case against a defendant." *Graves*, at 4 (citing *Giglio v. United States*, 405 U.S. 150 (1972)).

*Graves* carefully presents the four part test of materiality first announced in *Bagley* and subsumed in *Kyles*. *Id.* at 8-9. The emphasis in applying the four part materiality test focuses on the proper standard of reviewing *Brady* claims. As the

*Graves* opinion notes, "[t]he question is not whether the defendant would have received a different *verdict* with the disclosed evidence, but 'whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.'" *Id.* at 8 (*quoting Kyles*, 514 U.S. at 434)(emphasis added).

Further, "[t]he defendant *need not* demonstrate that *after* discounting the inculpatory evidence by the undisclosed evidence that there would not have been enough evidence to sustain the conviction." *Graves*, at 4 (emphasis added). Instead, the defendant need only establish that the favorable evidence withheld "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* (*citing Kyles*, 514 U.S. at 435). "Third, harmless error analysis *does not apply.*" *Id.* (emphasis added). Finally, and most importantly in this case, the "materiality to be stressed here is its definition *in terms of suppressed evidence considered collectively*, not [separately and independently] item by item." *Id.* (emphasis added).

The District Court, in adopting the Magistrate's findings, failed to apply the proper materiality standard as embraced by this court in *Graves* and mandated by the United States Supreme Court in *Kyles*. Instead, the District Court looked at each issue singularly and apart from the entirety of withheld evidence. In so doing, the District Court wholly failed to apply the requisite cumulative materiality standard.

Wright would request this Court grant his COA so that this Court may substantively review his claims utilizing the proper materiality standard. *See Graves*, at 4.

Much like *Graves*, Wright has demonstrated in his prior filings that had the improperly withheld evidence been available to him during trial, there is a reasonable probability that the outcome of the proceedings would have been different. First, the State's case has vacillated between its theory of two killers and its final theory - the theory presented to the jury via the instructions - that Wright was primarily responsible for Vick's murder. But, as soon as the withheld evidence is properly evaluated, the State's evidentiary house of cards and its hollow theory falls abruptly apart.

First, the State has allegedly "lost" the best evidence in this case about the statements made by Wright's separately tried co-defendant, the 911 tapes that recorded the call made by McGaughey. Had this evidence been available to Wright during - or, after trial for that matter - the jury would have learned that John Adams confessed in a manner underscoring that he was solely responsible for Vick's murder, stating "I murdered someone in DeSoto and I can't deal with it." (R56, Defense Exhibit 2) This evidence wholly undermines the State's theory that Wright was the primary actor in killing Vick. In fact, this evidence, much like the evidence withheld

in *Graves*, is exacerbated by the lack of physical evidence tying Wright to the murder. *See Graves*, at 4-5.

Much like the prosecution in *Graves*, the State used a co-defendant's statement it knew to be at variance with the initial statement given to try and surmount a lack of physical evidence. Unlike *Graves*, however, the District Court in Wright's habeas did not then evaluate the materiality of the statements in the context of a case (1) lacking solid, reliable physical evidence, (2) wherein the reliability of the co-defendant's statement was known to be questionable, if not disingenuous, (3) where the murder weapon was found at a place where *either* defendant could have been hiding the weapon, and (4) where the state's theory falls completely apart once the withheld evidence is considered. In both *Wright* and *Graves*, the District Court's committed error when they gave credence to the state's theory as a way of finding the evidence not to be material rather than finding the state's theory at odds with the evidence. Fortunately, this Court granted Graves review of his substantive claims so that the state's poor theory of the case could be revealed as inconsistent with the true evidence in the case.

In both the instant case and in *Graves*, the lower courts failed to evaluate the withheld evidence in isolation from the state's theory. This failure permitted the courts to improperly buttress the existing evidence without properly accounting for

how the withheld evidence would have presented a very different picture of the case and, more importantly, how the withheld evidence would have absolutely undermined the state's theory of the case. *See Graves*, at 5 (observing that the "state's case depended on the jury accepting [the chief witness's] testimony"). As *Graves* clearly demonstrates, reviewing courts should *not* look at the withheld evidence to discern whether the evidence fits the state's prosecution theory. Rather, reviewing courts must examine the evidence to assess whether the presence of this withheld evidence undermines confidence in the outcome by diffusing the state's theory.

Much like *Graves*, Wright should have been permitted to rebut Adams's improperly admitted self-serving statement with the 911 tape, testimony from Jerry Causey, and - perhaps most importantly - Adams' s initial confession to McGaughey where Adams stated he "killed someone in DeSoto." This Court, in *Graves*, granted *Graves* habeas relief because "[h]ad the defense been able to cross-examine [the witness] on the suppressed statement, this may well have swayed one or more jurors to reject [the witness's] trial version of the events." *Graves*, at 5.

In the instant case, there is one pair of blood soaked jeans, which the State *continues* to withhold from Wright and which the trial court protected from discovery in this case, a dramatic piece of evidence that points to a single killer, as does the recovery of only one knife linked to the murder. Nonetheless, the State withheld

evidence that John Adams confessed to being *the* killer when he first bared his conscience to Causey and McGaughey; that the State intentionally withheld the whereabouts of McGaughey (Affidavit of McGaughey, Appellant's record excerpts Exhibit 7); that the State "lost" the 911 tape which would have proven that John Adams confessed to being the sole killer; that John Adams also lived at the shack where the jeans were found; that Adams had confessed to two people at Mosley's house, Jerry Causey and Jeremiah Tatum, that he had "killed the bitch"(Adams trial R32.107, 192) and, that Mosley had an offer from the State that in exchange for his testimony against Wright, Mosley would not be prosecuted when, in fact, Mosley has never subsequently been prosecuted. (Adams trial transcript (R34), testimony of attorney Kent Traylor, Appellant's record excerpts, Exhibit 16, 17).

In large measure, the success of the State's case against Wright depended on the jury believing that (1) John Adams only confessed to witnessing or knowing of a murder; (2) that Wright was the primary or sole occupant of the shack where the evidence was found; (3) that the Umen jeans were worn by Wright the night of the murder; and, (4) that Mosley was a credible witness. Success also depended on keeping the jury from learning that while he was pawning the deceased's property, Adams admitted to Causey and Tatum, acquaintances (Adams trial R32.107,192) that he committed the murder (Affidavit of Jerry Causey, Appellant's record excerpts,

Exhibit 9); that Adams, in an emotionally distraught state, made an excited utterance to McGaughey, a store clerk, that he committed a murder; and Adams then told the 911 operator the same thing.<sup>5</sup> And, finally, had the truth about Mosley's offer for immunity from the State been admitted, there is little doubt that his testimony would have been sufficiently impeached to impugn his credibility and leave doubt about its reliability with the jury.

However, much like *Graves*, Wright has demonstrated that when the excluded evidence is put up against the State's prosecution theory, the State's theory is clearly inconsistent with the existing evidence. It is at this point that the State's house of cards falls abruptly apart. If Adams's first statement that he, Adams, killed a woman, the jury would have had ample reason to doubt Wright's role in the murder. Likewise, if McGaughey and Causey were to have testified in Wright's case, a clearer picture of Adams's guilt - not Wright's - would have been revealed. Additionally, had the evidence that *both* Adams and Wright lived concurrently in the shack been known to defense counsel, competent, zealous counsel would have forcefully refuted any notion that Wright was the primary assailant, much less the sole actor. Defense counsel would have noted that Wright had a warm, personal relationship with the

<sup>5</sup> After trial, Adams also admitted his guilt to a cell mate see affidavit of Charles Neely. (Appellant's record excerpts, Exhibit 10)

deceased while Adams, a white supremacist, did not. Wright lived in the deceased's home without incident until Adams arrived. The only knife tied to the murder belonged to Adams and was hidden by Adams, a strong indication of guilt. According to witnesses at the Mosely house, Adams was primarily in charge of bartering for the deceased's property for drugs, demonstrating his leadership. Adams turned himself in only when he realized that he had left his wallet in the deceased's vehicle, which shows control of the deceased's property. All of the confessions in the case were made by Adams; Wright has never acknowledged complicity in the murder. Defense counsel would have little problem in convincing the jury that the murderer was a person wearing jeans that only fit Adams and using a knife that belonged to Adams. The murderer took charge of the deceased's property and the murderer bragged about his assault. Defence counsel could credibly argue that Adams implicated Wright only to draw attention from himself. In sum, a strong defense could have been mustered for Wright.

Just like in *Graves*, "[t]he problem with the State's argument is that it analyzes the significance of the suppressed evidence against a backdrop of how the defense presented its case at trial without the suppressed statements." *Graves*, at 8. Much like *Graves*, if the evidence had been properly or timely revealed, "the defense's approach could have been much different (as set forth above) and probably highly

effective." As this Court's own jurisprudence has found under facts only slightly distinguishable from the case at bar, improper withholding of material evidence by the prosecution qualifies for habeas relief in this Circuit.

### **SUMMARY**

In the final analysis, the courts, as noted above, look to see if error has infected the entire trial. Generally, this infection is limited to a crucial piece of evidence that resonates throughout the trial transcript. In Wright's case, the infection is not limited to one crucial piece of evidence. Certainly, as noted throughout, the wrongful admission of Adams's statement changed the entire course of trial. It changed the State's theory as to Wright's role in the offense, it changed the instructions given to the jury, and it changed by reducing the State's burden of proof at the punishment phase of trial. But the infection was not limited to procedural alterations. The statement set an emotional tone for the trial that cast Wright as a calculating, cold blooded killer and made him more, rather than less, morally blameworthy. Although this infection itself is serious enough to be considered fatal, it is by no means the only infection. The State withheld exculpatory evidence of the co-defendant's admission that he, and he alone, committed the murder. By itself, such a revelation has earned other appellants post conviction relief. The State also withheld evidence that a key prosecution witness, the one required to prove that Wright had control of Vick's

property after the murder, was the recipient of an offer from the prosecution sufficient to undermine his credibility.

Wright maintains that even under this balkanized approach to review, many of the errors noted are sufficient to justify relief. However, Wright also asserts that examining each error in a vacuum, without considering the synergistic effect that the errors have on each other, is inappropriate and unprecedented. When Wright criticizes the fingerprint testimony, he is told that it does not matter because of the Mosley testimony. When Wright criticizes the Mosley testimony, he is told it does not matter because of Adams's statement. When Wright criticizes Adams's statement, he is told it does not matter because of Cron's testimony. All of Wright's efforts to *seek* fair adjudication of his complaints have been subjected to this endless logic loop. In the final analysis, each error not only matters on its own, but there is no single piece of crucial evidence introduced that was not infected by the State's misconduct in one fashion or another. Truly, it can be said that the entire body of the trial record is infected from head to toe.

**CONCLUSION**

For these reasons, and the reasons set forth in Wright's filings below, Wright respectfully requests this Court grant his Certificate of Appealability and permit him the opportunity to fully brief and develop this claim for substantive review before this Court.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14<sup>th</sup> day of March, 2006, a true and correct copy of the foregoing pleading was served upon opposing counsel by placing it in U.S. First Class Mail addressed to:

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## CERTIFICATE OF COMPLIANCE

Pursuant to 5<sup>TM</sup> CIR. R. 32.3, undersigned counsel certifies that this brief complies with the type-volume limitations of FED. R. APP. PROC. 32(A)(7)(B)(i).

1. Excluding the exempted portions in FED. R. APP. PROC. 32(a)(7)(B)(iii), the brief contains 13,613 words.
2. The brief has been prepared in proportionally spaced typeface using Word Perfect 12 in Times New Roman, 14 point as to text and 12 point as to footnotes.
3. An electronic version of the brief and the word count has been provided to the Clerk of this Court.
4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in FED. R. APP. PROC. 32(a)(7)(B)(I), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

BRUCE ANTON