

No. 05-70037

IN THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GREGORY EDWARD WRIGHT,  
Petitioner-Appellant, v

DOUG 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

**RESPONSE IN OPPOSITION TO APPLICATION FOR CERTIFICATE  
OF APPEALABILITY**

Petitioner Gregory Edward Wright is a Texas death-sentenced inmate challenging the district court's denial of his federal habeas corpus application. *See Wright v. Dretke*, No. 3:01-CV-0472-K {N.D. Tex. March 28,2005). Wright seeks a certificate of appealability ("COA") on three grounds discussed below. This Court should deny a COA because the district court rejected Wright's petition in a combination of procedural and substantive rulings each supported by well-established law. 28 U.S.C. § 2253.

**STATEMENT OF THE ISSUES**

Wright seeks a COA on the following issues:

1. Whether reasonable jurists could debate that the district court properly rejected Wright's Confrontation Clause claim based on the contemporaneous objection rule because Wright objected to the admission of a co-defendant's statement at trial on hearsay grounds only?
2. Whether reasonable jurists could debate that the district court properly agreed with the state court's conclusion that Wright could not demonstrate prejudice on his claim that counsel failed to raise a Confrontation Clause objection to the admission of a co-defendant's out-of-court statement due to ample additional evidence of Wright's guilt?

3. Whether reasonable jurists could debate that the district court properly rejected Wright's unexhausted *Brady* claims on the merits, both individually and in the aggregate, under the appropriate legal standard?

*See* Application for COA at 2-3.

As discussed below, this Court should deny Wright's request for a COA because in light of well-established federal law reasonable jurists would not debate that the district court's rejection of Wright's underlying claims. Further, because the district court rejected each claim on the basis of controlling law, the issues raised do not deserve further review.

#### **STATEMENT OF THE ISSUES**

On December 8, 1997, a Dallas County jury found Wright guilty of the March 23, 1997, capital murder of Donna Duncan Vick. 1 Tr264.<sup>1</sup> Following a punishment hearing, Wright was sentenced to death on December 10, 1997. 1 Tr 336. The Court of Criminal Appeals affirmed the conviction and sentence on June 28, 2000. *Wright v Slate*, 28 S.W.3d 526 (Tex. Crim. App. 2000). Wright did not file a petition for certiorari review with the United States Supreme Court.

During the pendency of his direct appeal, Wright filed a state application for writ of habeas corpus with the trial court on July 22, 1999 SHTTr 1. The trial court entered findings of fact and conclusions of law recommending the denial of habeas relief. On September 13, 2000, the Court of Criminal Appeals adopted the trial court's findings and conclusions and denied relief. *Ex parte Wright*, No. 46,451-01 (Tex Crim. App Sept. 13, 2000) (per curium) (unpublished order).

Wright timely initiated federal habeas corpus proceedings in the court below. Following review by the federal magistrate judge, the court below issued a memorandum order adopting the magistrate's recommendations and denying habeas

<sup>1</sup> "Tr" refers to the transcript of pleadings and documents filed with the court during trial, preceded by volume number and followed by page numbers. "RR" refers to the state record of transcribed trial proceedings, preceded by volume number and followed by page numbers. "SHTTr" refers to the state habeas record followed by page number.

relief and a COA. *See Wright v. Dretke*, No.3:01-CV-0472-K, 2004 WL 438941 (N.D. Tex., Mar. 10, 2004) (findings, conclusions, and recommendation of the U.S. Magistrate Judge); Docket Entry 70 (order adopting Magistrate's findings); Docket Entry 77 (order denying COA). Wright filed the instant application for COA on March 14, 2006. This opposition follows.

## **STATEMENT OF FACTS**

### **I. Facts of the Crime**

On March 22, 1997, John Wade Adams placed an emergency 911 call to the Dallas Police Department stating that he had witnessed a murder the night before. 45 RR 191-92. Adams subsequently led the authorities to an abandoned white Chrysler New Yorker registered to Donna Duncan Vick. 45 RR 193-94. This led to the discovery of Ms. Vick, found murdered in the master bedroom of her home with a pillow covering her face and lying in a pool of blood. 45RR206,209-12. The lack of evidence to demonstrate a struggle elsewhere in the room indicated that the attack occurred on Ms. Vick's bed with her assailant straddling her on the bed during the murder. 45 RR 211-15; 18 RR 28-34. Ms. Vick sustained multiple stab wounds, bruises, and cuts to her face, neck, chin, hands, and throat area. 45 RR 211-12.

Ms. Vick, a fifty-two-year-old widow known for ministering to and aiding the homeless, had invited Gregory Wright, a homeless person and panhandler, to reside in her house in exchange for doing yard work. 44 RR 127-34. Wright had been staying there as a guest for about one week prior to the night of the killing. 44 RR 127-32. On the day before the killing, Wright and Ms. Vick drove in her car to a house in north Oak Cliff belonging to Llewelyn Mosley where Wright purchased and used crack cocaine before leaving with Ms. Vick. Later that evening Wright and Ms. Vick returned to Mosley's house, where they met up with Adams. 45RR131. The three left together in Ms. Vick's car. *Id.* The evidence reflects that they all went to the VFW lodge around midnight where they stayed until 2:00 a.m. The three men returned to Ms. Vick's home, where Ms. Vick cooked some food for Adams and Wright. 45 RR 234. Ms. Vick then went to bed. *Id.* At some point thereafter, Wright held up a paper towel toward Adams with the words "Do you want to do it?" written on it. *Id.* The two men, armed with Adams' pocketknife and a butcher knife from Ms. Vick's kitchen, went back to her bedroom where they proceeded to stab Ms. Vick repeatedly to her death. *Id.*

Wright and Adams then gathered up items in the house belonging to Ms. Vick, including her microwave, portable CD player, TV, VCR, computer equipment, and newly purchased weed eater and placed them in her car where they transported them to the crack house to trade for drugs.<sup>2</sup> 45 RR 234-35; 45 RR 152-53.

<sup>2</sup> *Adams was convicted of capital murder in a separate trial six months following Wright's conviction.*

Evidence linking Wright to the crime included oral statements from Adams to Detective Trippel detailing the actual offense; testimony by the owner of the crack house, Llewelyn Mosley, corroborating the events before and after Vick's death; Wright's blood, as established through DNA evidence found on a towel in Vick's house and from the steering wheel and glove compartment of Vick's car; Vick's blood, as established through DNA evidence found on the butcher knife and a pair of jeans retrieved from the shack where Wright was arrested; Wright's fingerprint found imprinted on Ms. Vick's bloody pillowcase; and other physical evidence corroborating details of the trial testimony recovered in Vick's car, at Mosley's house, and at Wright's shack.

During the punishment phase of trial, the State presented several witnesses who testified to prior offenses by Wright indicating a pattern of increasingly violent behavior. 50 RR 7-116. The offenses included the alleged rape of a homeless woman that was ultimately reduced to an assault charge. There was also testimony regarding violent and abusive behavior toward Wright's former wife that involved physical threats to the officer who was called to intervene. Moreover, Wright was repeatedly arrested for sniffing spray paint.

## **II. Facts Relating to the Issues Presented**

Because this Court's review assesses the debatability of the district court's adjudication, it is important to review the procedural posture of the claims at issue and the district court's treatment of those claims. In his federal petition, Wright raised fourteen substantive grounds for relief and a fifteenth claim alleging actual innocence as the gateway to overcome default on his procedurally barred claims.<sup>3</sup>

<sup>3</sup> Wright raised the following claims in his district court petition:

1&2. In violation of the Due Process Clause, the State knowingly created a false impression that a State's witness was not offered immunity in exchange for testimony at Wright's trial depriving the defense of material impeachment evidence.

3. The State violated due process by suppressing the existence of witness Jerry Causey, who could have provided material exculpatory information.

4. The State violated due process by suppressing an initial statement by witness Daniel McGaughey, who could have provided material exculpatory information.

5. The State violated due process by suppressing 911 tapes, depriving the defense of material exculpatory information.

6. The State violated due process by knowingly providing false evidence through the testimony of its expert fingerprint witness.

7. The State violated due process by knowingly creating a false impression regarding Wright's control of the shack where evidence was found.

8. The State violated due process by suppressing documents belonging to Wright's co-indictee found in the shack where Wright resided.

9. The cumulative effect of the State's misconduct deprived Wright of a [continues below]

*In approaching Wright's petition, the district court noted—and Wright did not dispute—that all but his twelfth and a portion of his thirteenth claims were procedurally barred. Specifically, claims one through nine, eleven, and a part of his thirteenth claims were unexhausted; and claim ten was barred on the basis of an independent and adequate state law ground. See Wright v. Dretke, 2004 WL 438941, at \*5-7. While the court found Wright's unexhausted claims to be procedurally barred, it nonetheless addressed them on the merits under § 2254(b). The court did not review the merits of the Confrontation Clause claim since it was barred on independent and adequate state law grounds, discussed in detail in section II below.*

fundamentally fair trial.

10. The trial court violated the Confrontation Clause by allowing a State's witness to testify regarding a conversation he had with Wright's co-indictee.

11. The State violated due process by knowingly creating a false impression

12-14. Wright was deprived of the effective assistance of counsel because:

- a. trial counsel failed raise a Confrontation Clause objection;
- b. trial counsel failed to investigate in preparation for the guilt-innocence
- c. trial counsel failed to request a *Daubert* hearing regarding expert fingerprint testimony.

15. Wright's claims should not be considered procedurally barred because he is actually innocent and the failure to review his claims will result in the miscarriage of justice.

The court found Wright's remaining claims twelve, part of thirteen, and fourteen exhausted and not otherwise procedurally barred and addressed them accordingly under § 2254(d), including the Sixth Amendment ineffective assistance of counsel claim at issue here in section UI below. *See id* at\*21-23.

## **ARGUMENT**

### **I. Standard of Review**

Because Wright filed the instant appeal after April 24,1996, Wright's right to appeal is governed by the COA requirements of § 2253(c). *Slack v. McDaniel*, 529 U.S. 473,478 (2000). However, there is no automatic entitlement to appeal. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Rather, "[b]efore an appeal may be entertained, [Wright] must first seek and obtain a COA" as a jurisdictional prerequisite. *Id* A COA will only issue if Wright makes a substantial showing of the denial of a constitutional right, which requires a showing that "reasonable jurists could debate whether (or, for that matter, agree that)" the court below should have resolved the claims in a different manner or that Wright should be encouraged to litigate his claims further. *Id.* (quoting *Slack*, 529 U.S. at 483-84); *Dowthitt v. Johnson*, 230 F.3d 733, 740 (5th Cir. 2000). This determination "requires an overview of the claims in the habeas petition and a general assessment of their merits" but not "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El*, 537 U.S. at 327; *Hendonon v. Cockreli*, 333 F.3d 592, 604 (5th Cir. 2003), *cert. denied*, 540 U.S. 1163 (2004).

Moreover, where the lower court denied Wright's claims on procedural grounds, a COA should issue only if Wright demonstrates that "jurists of reason would find it debatable whether the petition slates a valid claim of a denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484 (emphasis added); *Beazley v.*

*Johnson*, 242 F.3d 248, 263 (5th Cir. 2001).

Wright does not meet the standard for obtaining a COA. As discussed below, in light of controlling and well-established Supreme Court and Fifth Circuit precedent, reasonable jurists could not find it debatable that the court below was correct in its procedural and substantive rulings. Further, because applicable controlling precedent adequately resolves Wright's complaints, the issues raised do not deserve further development. Accordingly, COA should be denied.

**II. Reasonable Jurists Could Not Debate that the Court Below Properly Applied an Adequate and Independent Procedural Bar to Dismiss Wright's Confrontation Clause Claim.**

In his first ground for COA, Wright alleges that the court below improperly applied a procedural bar to reject his Confrontation Clause claim. Specifically, Wright argues that the state's contemporaneous objection rule is not an adequate and independent state law ground for denying relief because it is not strictly and regularly applied; and alternatively, he argues that under state law, a hearsay objection is good enough to put the trial court on notice of a constitutional objection under the Confrontation Clause. *See* Application for COA at 33; 39.

**A. The underlying facts**

At trial, Detective Trippel of the Dallas Police Department testified for the State about a 911 phone call he had received from Adams that ultimately led to the discovery of Ms. Vick's car and to her dead body. 45 RR 193-97. His direct examination testimony essentially described the condition and contents of both the car and the apartment, including his description of the crime scene. 45 RR 191 -221. On cross-examination, the defense began by questioning Trippel about his conversation with Adams. Specifically, the defense asked, "Okay. Now, did Mr. Adams tell you that the knife that was used in this offense was, in fact, his own knife?," to which Trippel answered affirmatively. 45 RR 222. On re-direct, the State countered,

Q. "So the question Mr. Johnson asked you about whether he said his knife had been used, that certainly was not the only part of that conversation, was it?"

A. That's right.

Q. Now I'd like to go to the remainder of that conversation that you had with

him. In addition to telling you, Det. Trippel, that his knife had been used during the murder, what else did he say?

---

45 RR 226. At this point the defense objected to Trippel's testimony as being hearsay. 45 RR 226. The trial court held a bench conference where the State argued that the defense had opened the door to Adams' conversation by eliciting a statement by Adams out of context that could have left a false impression with the jury-i.e. Adams had confessed to the murder, or that Adams had acted alone. 45 RR 231. Under Rule 107 of the Texas Rules of Criminal Evidence,<sup>4</sup> the trial court agreed and allowed the State to elicit the remainder of the conversation. See *Wright v State*, 28 S.W.3d at 535-36. The defense did not raise a challenge under the Confrontation Clause. 45 RR 233.

By the time Wright raised a Confrontation Clause claim on direct appeal, the state court correctly determined that Wright's failure to lodge a specific trial objection procedurally barred his claim. See *Wright v. State*, 28 S.W.3d at 536. As the state [continues below]

<sup>4</sup> *The Rule of Optional Completeness states:*

*When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, as when a letter is read, all letters on the same subject between (he same parties may be given. When a detailed act, declaration, conversation, writing or recorded statement is given in evidence, any other act, declaration writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence. "Writing or recorded statement" includes depositions.*

court noted, "At trial, [Wright] objected only on hearsay and Rule 107 grounds. Because he did not object to error under the Confrontation Clause, [Wright] waives this argument on appeal." *Id.*

In assessing Wright's claim on federal habeas review, the court below noted that, though exhausted, the state court dismissed Wright's Confrontation Clause claim under an independent and adequate state law ground. *Id.* at \* 10 n.4; see also *Wright v. Slate*, 28 S.W.3d at 536. In addressing the independence and adequacy of the state court's dismissal, the court looked to state and federal law:

To satisfy the independent and adequate requirements, the dismissal a claim must “clearly and expressly” indicate that it rests on state grounds which bar relief, *and* the bar must be strictly and regularly followed by state courts and applied to the majority of similar claims. *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001), *citing Amos v. Scott*, 61 F.3d 333, 338-39 (5th Cir. 1995). The Fifth Circuit has held that the Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a claim. *Jackson v. Johnson*, 194 F.3d641, 652 (5th Cir. 1999). The Court of Criminal Appeals has also ruled that an objection at trial is need[ed] to preserve even constitutional errors for appellate review. *See Allridge v. Slate*, 850 S.W.2d 471 (1991). *Wright*, 2004 WL 438941, \*6. Accordingly, the court below correctly did not address the claim on its merits, *id* at \* 10 n.4; although, in its discussion of Wright's related ineffective assistance of counsel claim, the court did note that even if a Confrontation Clause objection had been preserved, any possible constitutional error would have been harmless given the other evidence supporting Wright's conviction. *Id.* At \*23 n.7 (citing *Lilly v Virginia*, 527 U.S. 116, 139-40(1999)).

**B. The contemporaneous objection rule is an independent and adequate bar to federal habeas review.**

Under the procedural default doctrine, a federal habeas court may not consider a federal habeas claim when a state court judgment plainly rests on an independent and adequate state ground. *See Harris v. Reed*, 489 U.S. 255, 262 (1989); *Coleman v. Thompson*. 501 U.S. 722, 729(1991); *see also Granviel v. Stale*, 552 S.W.2d 107, 121-22 (Tex. Grim. App. 1976). In addition to being independent of the merits of the claim, the procedural bar must be adequate, *i.e.*, the procedural rule must be strictly or regularly applied by the state to the vast majority of similar claims. *See Ford v. Georgia*, 498 U.S. 411, 424 (1991); *Amos*, 61 F.3d at 349; *Finley*, 243 F.3d at 218.

**1. The state court strictly and regularly applies the contemporaneous objection rule.**

The Fifth Circuit has long held that the contemporaneous objection rule constitutes an independent and adequate basis for a federal court's refusal to address the merits of a claim. *Hogue v. Johnson*, 131 F.3d 466,487 (5th Cir. 1997) (holding the rule was already well established 35 years ago and recognized as an adequate state procedural barrier to federal habeas review at least twenty years ago); *Rogers v. Scott*,

70 F.3d 340, 342 (5th Cir. 1995); *Amos v. Scott*, 61 F.3d at 343-44; *Dowthitt v. Johnson*, 230 F.3d at 752 (citing *Conrin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998), and noting that the state rule "is strictly or regularly applied evenhandedly to the vast majority of similar claims . . . ." ); *Jackson v. Johnson*, 194 F.3d at 652; *Livingston v. Johnson*, 107 F.3d 297,311 -12 (5thCir. 1997); *Nichols v. Scott*, 69F.3d 1255, 1278n-44(5<sup>th</sup> Cir. 1995).

With respect to the adequacy of the bar as applied to the Confirmation Clause specifically, in Wright's case the state court cited to its established precedent enveloping the Confrontation Clause into the broader category of constitutional claims subject to the contemporaneous objection rule. *Wright v. State*, 28 S.WJd at 536 (citing *Dewberry v. Slate*, 4 S.W.3d 735, 752 & n. 16 (Tex.Crim.App.1999); *Briggs v. State*, 789 S.W.2d 918, 924 (Tex.CrimApp.1990) (stating that even constitutional error may be waived); and *Ex parte Crispen*, 777 S.W.2d 103, 105 (Tex.Crim.App.1989)).

The Fifth Circuit as well has specifically noted the contemporaneous objection rule's applicability in the Confrontation Clause context. Specifically, in *Gochicoa v. Johnson*, 118 F.3d 440, 445 (5th Cir. 1997), this Court noted that the petitioner's failure to object at trial waived a Confrontation Clause objection under Texas's contemporaneous objection rule).<sup>5</sup>

Under the COA standard of review, "jurists of reason would not find it debatable that the district court was correct in its procedural ruling" based on this precedent. *Slack*, 529 U.S. at 484.

## **2. A hearsay objection does not broadly encompass a constitutional objection under the Confrontation Clause.**

Wright alternatively argues that a hearsay objection globally subsumes a constitutional objection under the Confrontation Clause because the two concepts are related. *See* Application for COA at 39. This assertion is foreclosed under *Idaho v. Wright*, 497 U.S. 805,813(1990); *see also Gochicoa, supra*. In *Gochicoa*, reversing the district court's grant of habeas corpus relief under an alleged Confrontation Clause violation, this Court noted:

Although the protections of the Confrontation Clause and the hearsay rule overlap, they are not coextensive; "the [Confrontation] Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the

admission of such statements might be thought to violate the literal terms of the Clause." *Idaho v. Wright*, 497 U.S. [at 813].

118 F.3d at 446; *see also Baldwin v. Reese*, 541 U.S. 27,31-32 (2004) (holding in the appellate context that federal-state comity would be undermined with respect to [continues below]

<sup>5</sup> *The Gochicoa court nonetheless considered the Confrontation Clause claim at issue because the State did not raise a procedural objection based on the contemporaneous objection rule on appeal. 118 F.3d at 445.*

exhaustion principles if a petitioner were not required to fairly present the federal law basis of a claim).

Because the state court on direct appeal expressly found that Wright had not preserved constitutional error, it is evident that the Texas contemporaneous objection rule does not contemplate an expansive interpretive application of hearsay objections to encompass constitutional claims.

**C. Reasonable jurists would not find it debatable that Wright would not be entitled to relief under the Confrontation Clause, notwithstanding the procedural bar.**

Finally, though the court below did not address the merits of Wright's Confrontation Clause claim, in the court's discussion of Wright's ineffective assistance of counsel claim, the court noted in footnote seven that Wright could not demonstrate entitlement to relief even if the constitutional objection had been preserved because the State did not rely on the objectionable portions of Adam's statements and because Wright's capital murder conviction was supported by substantial evidence. *Wright v. Dretke*, 2004 WL 438941, at \*23.

The wrongful admission of hearsay evidence violates the Confrontation Clause only when the evidence was a "crucial, critical or highly significant factor in the framework of the whole trial." *Cupit v. Whitley*, 28 F.3d 532, 537 (5th Cir. 1994); *also Dutton v. Evans*, 400 U.S. 74, 87 (1970) (asking *inter alia* whether the hearsay evidence was "crucial" or "devastating."); *Gocichaa*, 118 F.3d at 446,447 n. 5 (citing *United States v. Bernards.*, 795 F.2d 749, 754n.6{9thCir. 1986) and explaining that "a showing that the hearsay evidence was not crucial can lead to a finding that the

Confrontation Clause was not violated)). As discussed in *Gocichoa*, the determination of whether the evidence is 'crucial' or 'devastating' is essentially redundant of the harmless error rule. *Id* at 447 (citing *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1103 n. 6 (5th Cir. 1981)).

Accordingly, with respect to the district court's dismissal of this claim, although the court noted that Adams' out-of-court statements are not sufficiently reliable under Supreme Court law to be admissible under the Confrontation Clause,<sup>6</sup> *see Wright v. Dretke*, 2004 WL 438941, \*22 (citing *Lilly v. Virginia*, 527 U.S. at 133), the court's determination that any alleged error was harmless equates to a finding that the Confrontation Clause was not violated.

Indeed, as noted by the court below, Adam's statement was not critical to the State's case against Wright. The extensive, multi-faceted circumstantial evidence fully pointed to Wright as an active participant in the capital offense. For example, [continues below]

<sup>6</sup> *In Lilly v. Virginia*, 527 U.S. 116, 127 (1999), the Supreme Court noted that "evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant" does not fall within a firmly rooted hearsay exception.

Wright had been living at Ms. Vick's apartment the week of her murder and was with her the day and evening of her murder. Immediately following her murder, Wright was driving her car loaded with her property that he traded for crack. Wright's blood was found in Ms. Vick's car on the steering wheel and glove compartment. And Wright's bloody fingerprint was found on the pillowcase of Ms. Vick's bed where she was found at Wright's shack along with a pair of jeans containing the victim's DNA. On these facts, it is irrelevant to Wright's conviction whether Adams' statement shifted Wright's role to that of primary actor, rather than being just a participant; the State's case throughout trial alleged that Adams was an active participant in the murder, despite Adams' statements to the contrary the day he turned himself in. The absence of direct, eyewitness evidence of the actual killing could not have had a substantial and injurious effect or influence on the jury's verdict,<sup>7</sup> particularly since the State did not rely on Adams' statement that Wright acted alone in killing Vick as indicated by the

State's closing argument at guilt-innocence:

(A]s we talked about in voir dire, this is a circumstantial evidence case, you see, because that eyewitness that was killed out there. Donna Vick, unfortunately, we can't bring her back from the grave, can we? So [continues under]

<sup>7</sup> *Under Brechl v. Abrahamson, 507 U.S. 619, 637-3B (1993), federal habeas relief may not be granted for trial error that, although of constitutional magnitude, did not have a “substantial and injurious effect or influence in determining the jury's verdict.”*

we've got to rely upon circumstantial evidence, and there's one thing about circumstantial evidence, make no mistake about it. You see, you can't wash it away. Slate's Exhibit 33 is the testimony to that.

49 RR 49-50.

In sum, because of the consistency of the holdings among the state and federal courts that the Texas contemporaneous objection rule applies in the Confrontation Clause context, reasonable jurists could not find debatable that the court below properly found Wright's Confrontation Clause claim procedurally barred; moreover, because the admitted out-of-court statements were not crucial or critical to the outcome of Wright's case, reasonable jurists could not find debatable that Wright would be entitled to relief under the Confrontation Clause. Accordingly, a COA should be denied as to this claim.

**III. Reasonable Jurists Could Not Debate That the District Court Properly Concluded That Wright Could Not Demonstrate Prejudice, Defeating His Ineffective Assistance of Counsel Claim in Full Accord with *Strickland*.**

In his second ground for COA, Wright alleges that his counsel's failure to raise a Confrontation Clause objection at trial fell below prevailing professional norms under *Strickland v. Washington*, 466 U.S. 668,687 (1984). The court below rejected this claim on the basis that Wright could not demonstrate prejudice given the wealth of other evidence implicating him as the primary actor in the capital murder. Because failure to meet either prong of *Strickland* defeats an ineffective assistance of counsel claim, reasonable jurists could not debate that the court below rejected Wright's claim in accord with federal law.

### A. The *Strickland* standard

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of satisfying the two-pronged test set forth in *Strickland* requiring a defendant to show both (1) that counsel rendered deficient performance, and (2) that counsel's actions resulted in actual prejudice. *Id.*; *Clark v. Johnson*, 227 F.3d 273, 282 (5th Cir. 2000). Failure to meet either element of the *Strickland* test will defeat an ineffective assistance of counsel claim, making it unnecessary to examine the other prong. *Strickland*, 466 U.S. at 687, *Clark*, 227 F.3d at 284; *Amos*, 61 F.3d at 348. To establish deficient performance under *Strickland*, a petitioner must show that, in light of all the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," i.e., "prevailing professional norms." 466 U.S. at 688-90; *see also Nix v. Whiteside*, 475 U.S. 157, 165 (1986). The Supreme Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effect of hindsight." *Strickland*, 466 U.S. at 689-90. Accordingly, there is a "strong presumption" that the challenged conduct "falls within the wide range of reasonable professional assistance," and the petitioner is required to overcome the presumption that counsel's actions "might be considered sound trial strategy." *Id.* 466 U.S. at 689. "Thus, '[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.' *Kitchens v. Johnson*, 190 F.3d 698, 701 (5th Cir. 1999) (quoting *Green v. Johnson* 116F.3d 1115, 1122 (5th Cir. 1997)).

Even if counsel's representation was deficient, the petitioner must also affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. To meet this requirement he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* 466 U.S. at 694; *see also Williams*, 529 U.S. at 393-95. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 46 U.S. at 694. The mere possibility of a different outcome is insufficient to prevail on [continues below]

<sup>8</sup> *Where counsel is allegedly ineffective at the guilt/innocence phase, the inquiry is whether there is a reasonable probability that, absent the alleged errors, the jury would*

*have had a reasonable doubt about guilt. Strickland, 466 U.S. at 695. With respect to errors at the sentencing phase of a death penalty trial, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently re-weighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id., 466 U.S. at 695.*

the prejudice prong- *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999); *Ransom v. Johnson*, 126F.3d716, 721 (5th Cir. 1997).

**B. Wright's failure to raise a Confrontation Clause objection is foreclosed by the reasonable state court conclusion that Wright could not demonstrate prejudice.**

As discussed above, over the defense's hearsay objection, the trial court permitted State's witness Detective Trippel to testify on re-direct regarding a conversation he had with Adams following the defense's cross-examination of the same witness wherein the defense elicited a partial conversation between Trippel and Adams. The State argued that the complete conversation between Trippel and Adams should be permitted under the rule of optional completeness. With limitations, the trial court allowed the testimony.

On direct appeal, Wright challenged the trial court's decision to admit the conversation on the basis of the Confrontation Clause. The Court of Criminal Appeals rejected Wright's claim on procedural grounds, noting that he had failed to preserve error by not objecting at trial on that basis. *See Wrighi v. State*, 28 S.W.3d at 536. Then, on collateral review, Wright alleged that his trial counsel was ineffective for failing to object at trial on Confrontation Clause grounds. SHTr 70.

The state habeas court, emphasizing the Confrontation Clause's underlying policy of reliability, found that Wright had made a reasonable strategic decision not to object because Wright elicited Adams' statements first in an attempt to point to Adams as the killer instead of Wright. SHTr 213-14. Further, the state habeas court found that subsequent evidence offered by the State regarding Adams' knife served to inculcate Adams, consistent with the defense's strategy (and the State's theory of the case). SHTr 213-14. Accordingly, the state habeas court determined that Adams' self-serving statement that Wright alone killed Ms. Vick could not have misled the jury. SHTr

213-14. Addressing *Strickland*, the state court concluded that "trial counsel were not ineffective for failing to object that the challenged testimony violated the confrontation clause," SHTr 214, and that Wright "was not prejudiced by the fact that his trial counsel did not object. . . ." SHTr 215.

On federal review, the court below found credence in Wright's claim that objection under established cases casting doubt on the reliability of accomplice witness statements- *See Wright*, 2004 WL 438941, \*22-23 (citing *Lilly v. Virginia*, 527 U.S. at 133). Without addressing the deficiency prong, however, the court below determined that Wright could not satisfy the prejudice prong because, first, the strength of the evidence supported Wright's capital murder conviction; and second, the State did not rely on Adams' insinuation that only Wright participated in killing Ms. Vick. *Id.*

Given the fact that the circumstantial evidence against Wright was multi-faceted and strong, including DNA evidence, expert fingerprint testimony, eyewitness accounts preceding and following the murder, and corroborative physical evidence, Wright cannot demonstrate he was prejudiced by the admission of Adams' self-serving comment that Wright used Adams' knife to kill Ms. Vick. particularly when the State refuted the same allegation and did not need to link Adams' knife to Wright to obtain a conviction, having found the second murder weapon in Wright's possession at the shack. As noted by the court below:

[T]he State did not argue that [Wright] acted alone. In both the opening and closing statements made by the State at [Wright's] trial, while prosecutors concentrated their arguments on [Wright's] culpability, they never contended that [Wright] was the only person who stabbed the victim. Instead, in his opening statement, prosecutor Greg Davis stated that the evidence would show that the two men acted together to murder the victim. [44 RR 76}. And in his closing statement, Davis stated that the evidence showed that [Wright] and Adams committed murder together and later stated that Adams would have his day in court for his action. [49 RR 48,59]. Given all of the evidence presented at [Wright's] trial, it cannot be said that, had Adams' 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 [Wright] would not have been convicted of capital murder. [] The state court's conclusion was not contrary to federal law, and this claim is without **merit**.

*Wright v. Dretke*, 2004 WL 438941, at \*23.

Under the focus and validity of this determination, Wright's attack on the underlying state court findings regarding the deficiency prong is irrelevant to assessing the debatability of the district court's prejudice determination. In any event, under § 2254, a federal court is charged with reviewing the state court's ultimate conclusions, not the underlying reasoning. *See Neat v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) ("[A] federal habeas court is authorized by [§] 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision"; *see also Santellan v. Cockrell*, 271 F.3d 190, 193-94 (5th Cir.2001) (holding that, under the AEDPA, federal courts review only the state courts' ultimate decision, "not every jot of its reasoning").

Because reasonable jurists could not find the prejudice determination debatable, Wright is not entitled to a COA on this claim.

#### **IV. Reasonable Jurists Could Not Debate That The District Court Rejected Wright's *Brady* Claims Substantively, Procedurally, Individually, and in the Aggregate in Accordance With Established Law.**

##### **A. The court below first found Wright's *Brady* claims to be unexhausted and procedurally barred.**

Finally, Wright argues that the district court did not appropriately address his unexhausted *Brady* claims cumulatively as raised in his ninth claim for relief. *See* Application for COA at 46. As a preliminary matter, because Wright's *Brady* claims were unexhausted, the court below first determined that Wright could not meet the state's successive filing requirements under Article 11.071 § 5 of the Texas Code of Criminal Procedure. The court next addressed whether Wright could establish cause and prejudice to excuse the exhaustion requirement as a means of avoiding federal default and determined that he could not. Finally, the court below addressed Wright's actual innocence claim, raised in his fifteenth ground as the gateway to overcoming procedural default. *Wright*, 2004 WL 438941, at \*6-7.

The court below correctly identified *Skylup v. Delo*, 513 U.S. 298,327 (1995), as the applicable law, noting:

a habeas petitioner can overcome a procedural bar to reach the consideration of the

merits of his constitutional claims via the fundamental miscarriage of justice exception if he establishes that a constitutional violation has probably resulted in the conviction of one who is actually innocent. And, in order to prove such an actual innocence claim, a petitioner must present new, reliable evidence not presented at trial that establishes that, more likely than not, no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. [*Schlup*, 513 U.S. at 327]. Examples of such new evidence that may establish factual innocence are exculpatory scientific evidence, trustworthy eye witness accounts, credible declarations of guilt by another, and critical physical evidence not presented at trial. *Id* at 324; *Fairman v. Anderson*, 188 F.3d 635, 644 (5th Cir. 1999).

*Wright v. Drette*, 2004 WL 438491, at \*7.

The court below next reviewed **Wright's** evidence, noting his allegation that the cumulative effect of his evidence meets the *Schlup* standard. *Id*. In a lengthy review, the court below assessed Wright's evidence and determined that most of it was not new because the evidence either had been presented at trial, or was known by the defense at the time of trial. *Id*. at \*8.

For example, Wright's example of exculpatory scientific evidence regarding the bloody fingerprint consisted of an affidavit by Wright's non-testifying fingerprint expert at trial, who has alleged nothing new that wasn't already adversarially tested in the State expert's cross-examination. Wright's new evidence falling within the trustworthy-eyewitness-accounts category consists of affidavits by his trial attorneys alleging that the Umen jeans were too small to fit Wright, which was already aggressively argued in the defense's guilt-innocence closing argument, and for that reason cannot be deemed new. Wright's new evidence surrounding Daniel McGaughey alleges nothing exculpatory toward Wright, nor does it alter the content of his previous affidavit testimony from trial. Similarly, Wright's new evidence regarding Jerry Causey, who testified at Adams' trial but not at Wright's, alleges nothing exculpatory toward Wright, and indeed, actually serves to further corroborate details of Llewelyn Mosley's testimony. And finally, Wright's claim regarding an alleged immunity deal with Llewelyn Mosley, the owner of the crack house, remains as speculative as the allegation was at the time of trial. Moreover, the existence of a deal was not material to Mosley's impeachment, or to **Wright's** guilt.

In sum, Wright's proffered evidence primarily relies on allegations of prosecutorial misconduct that, even if proven to be true, do nothing to establish actual innocence.

Such evidence is insufficient to support the miscarriage of justice exception under the terms of *Schlup*. Accordingly, the court correctly determined that Wright "failed to overcome the procedural bar to all but his [exhausted] claims." *Id.* at\*9.

**B. Notwithstanding (he procedural bar, pursuant to § 2254(b), the court below addressed each of Wright's *Brady* claims individually and cumulatively under controlling standards.**

Notwithstanding the procedural bar, the court below independently addressed and rejected each of Wright's unexhausted claims on the merits. *Id.* at \*10-20 (delineating Wright's *Brady* claims at pages \* 16-20). And finally, the court below addressed Wright's cumulative error claim under *Derden v McNeel*, 978 F.2d 1453 (5th Cir. 1992), which holds, as stated by the court below:

[I]n order for a federal habeas petitioner to prevail on a claim of cumulative error at a state trial, he must establish that 1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; 2) the errors were not procedurally defaulted for habeas purposes; and 3) the constitutional errors so infected the entire trial that the resulting conviction violates due process. *Id.* at 1458.

*Wright v. Drelke*, 2004 WL 438941, at \*20. The court below noted that Wright could not prevail on his cumulative error claim because his claims were procedurally defaulted and he could not overcome the procedural bar with a credible actual innocence claim. *Id.*

**C. Wright's improper attempt to import the *Brady* materiality standard to assess his unexhausted cumulative error claim ignores the fact that the court below did not find suppression calling for a materiality inquiry.**

Wright argues that the court below should have addressed his cumulative error claim under *Kyles v. Whitley*, 514 U.S. 419 (1995). *Kyles* held that the *Brady* materiality inquiry must be addressed "collectively, not item-by-item." *Id.* at 436. The Court emphasized that it is within the discretion of the prosecutor to decide what evidence is producible under *Brady* and when the evidence should be produced. *Id.* At 436-37,439; see also *United States v. Garrett*, 238 F.3d 293, 304 n.4 (5<sup>th</sup> Cir. 2000) (Fish, J. concurring). The fact that the prosecution knows of favorable evidence unknown to the defense does not, in itself, violate *Brady*. See *Garrett*, 238 F.3d at 304 n.4 (citing *Kyles*). Disclosure must be made only at the point when it can be determined that the information is favorable, which turns both on the context of the

record and when the point of reasonable probability of a different outcome is reached.  
*Id.*

In this claim, Wright points to five instances where the State allegedly violated *Brady* (1) the failure to provide timely notice of the evidence found at the Beckley shack belonging to Adams; (2) the failure to disclose an alleged offer not to prosecute Llewelyn Mosley; (3) the failure to timely **disclose** an investigator's note relating to statements Adams made to Daniel McGaughey; (4) the failure to produce 911 tapes that allegedly contained a confession by Adams; and (5) the failure to notify the defense about the existence of Jerry Causey, to whom Adams allegedly confessed.

As discussed by the court below, Wright failed to establish that the State suppressed favorable evidence on any of the above claims. *Wright v. Dretke*, 2004 WL 438941, at \*16-20. Accordingly, for purposes of collectively determining materiality, It is evident that reasonable jurists could not debate that the court below properly did not apply the *Kyles* materiality inquiry due to lack of suppression. Accordingly, Wright is not entitled to a COA on this claim. **CONCLUSION**

In the interests of comity and finality, the Director respectfully requests that Wright's application for a certificate of appealability be denied. Respectfully submitted,

GREG ABBOT Attorney General  
of Texas

BARRY R. MCBEE

First Assistant Attorney General

DON CLEMMER Deputy Attorney General for Criminal Justice

GENA BUNN

ChAssistant Attorney General

Chief, Postconviction Litigation Division

DENI S. GARCIA\* Assistant Attorney General State Bar No. 24027175

P. O. Box 12548, Capitol Static Austin, Texas 78711 (512)936-1600 (512) 320-8132 (FAX) [deni.garcia@oag.siatc.tx.us](mailto:deni.garcia@oag.siatc.tx.us)

ATTORNEYS FOR RESPONDENT-APPELLEE

**CERTIFICATE OF SERVICE**

I certify that two copies of **Respondent-Appellee's Response in Oppositin to Application for Certificate of Appealability** have been served by overnight mail postage prepaid, on May 12, 2006, addressed to:

Bruce Anton and Carrie Sperling

Sorrels, Udashen & Anton

2301 Cedar Springs, Suite 400

Dallas,

Texas

75201 214-468-8100

214-468-8104 fax

COUNSEL FOR PETITIONER

DENI S. GARCIA

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

I do hereby certify thai this brief complies with FED. R. APP. PROC. 32(a)(7)(c) in that it contains 7,227 words. Corel Word Perfect 12, Times New Roman, 14 points.

DENI S. GARCIA