

URT
OF TEXAS JUL 25 2005

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GREGORY EDWARD WRIGHT,	§	
PETITIONER,	§	
	§	
v.	§	No. 3:01-CV-0472-K
	§	
DOUGLAS DRETKE, DIRECTOR	§	
TEXAS DEPARTMENT OF	§	
CRIMINAL JUSTICE,	§	
CORRECTIONAL INSTITUTIONS	§	
DIVISION,	§	
RESPONDENT.		

CERTIFICATE OF APPEALABILITY PURSUANT TO 28 U.S.C. § 2253

Nearly eight years ago, a Dallas County jury heard the State of Texas present a compelling case that Gregory Wright killed Donna Vick by stabbing her with a knife he borrowed from John Adams. The State's case was compelling because the circumstantial evidence the State presented against Mr. Wright aligned neatly with a statement given to the police by Mr. Adams, a man now on death row for the same murder. However, according to the evidence that surfaced *after* Wright's trial, the State's case against Wright rested on a circumstantial house of cards. The State's house of cards

stands only because the jury had no opportunity to consider the compelling evidence pointing to Adams as the killer.

Despite constitutional mandate, the State withheld evidence from Wright's trial counsel that would have contradicted its theory that Wright was the sole actor, responsible for murdering Vick and stealing her belongings. Further, the trial court, despite constitutional mandate, allowed the State to present a clearly untrustworthy and inadmissible statement from Adams to the jury, despite

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the fact that the State would later oppose the same statement's introduction in Adams's trial. Had the jury heard the evidence later presented *against* Adams and had the trial court properly excluded Adams's statement, there was a reasonable likelihood of a different outcome for Gregory Wright. The State's case against Greg Wright unquestionably tied him to the victim, Donna Vick. Vick had taken the homeless Wright into her home a week before the murder. She purchased new shoes and clothes for him, and she was taking him to church. He, in return, was working for her doing odd jobs around the house. On the night of the murder, Vick was seen with Wright and Adams at the VFW. Wright, Adams and Vick left the VFW together that night.

Vick was stabbed to death in her bed that night, and her car and many of her belongings were taken from her home. The day after the murder, police were contacted by John Adams. Adams gave the police a statement implicating Greg Wright in the murder and theft of Vick's belongings.

According to Adams, Wright borrowed Adams's knife and went into Vick's bedroom. He began stabbing her, but the knife broke and he had to return to the kitchen to get another knife to finish the job. Adams also said that Wright ordered him to start taking her things and loading them into the trunk of her car. Adams claimed he was afraid of Wright, so he complied.

After the belongings were loaded, Adams claimed they drove to Llewellyn Mosley's house to exchange Vick's property for crack cocaine. Mosley helped them change a flat tire on Vick's car, and the car was later abandoned.

Mosley testified that Wright and Adams arrived at his house in the early morning. He helped them change the flat tire and allowed them to take the property from the trunk of the car into his house. He confirmed that Adams and Wright sold the property for crack. He also testified that

Adams and Wright were in a good mood, giving each other high fives.

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The physical evidence presented against Wright included a fingerprint on a Dr. Pepper bottle in Vick's kitchen, a drop of Wright's blood on a towel in the bathroom, a drop of Wright's blood on the steering wheel and dashboard of Vick's car, and a bloody fingerprint on a pillowcase near Vick's head. The State also presented evidence recovered from a shack the State claimed Wright was using as a home at the time of the murder. In the shack the police found a small pair of jeans soaked with Vick's blood. They also found some knives and plates that belonged to Vick.

The State used Adams's self-serving statement, Mosley's unreliable testimony and the equivocal physical evidence to argue that Wright had murdered Vick, not merely acting as an accomplice to Adams, the individual the State subsequently claimed murdered Vick. The jury found Wright guilty as a sole actor and sentenced him to death after a punishment phase in which Wright's trial counsel failed to call *any* witnesses. The State then completely reversed field in Adams's trial, claiming that Adams was a willing participant in the murder. At Adams's trial, the State was able to secure a conviction and death sentence against Adams based on evidence never presented in Wright's trial and never disclosed to Wright's trial counsel. Had the evidence the State used against Adams been available and provided to Wright, Wright's trial would have looked very different.

Further, without the many constitutional errors infecting Wright's trial, more likely than not, the outcome of Wright's trial would have been different. Had the jury been presented with *all* the evidence in the State's possession and had Wright's attorney's effectively presented a case on his behalf, the State's house of cards would have tumbled. Wright's jury more likely than not, would have walked out of deliberations with a not-guilty verdict, or at the very least, a life sentence.

Absent these many constitutional errors, Wright's trial would have presented a very different picture to the jury. As with many capital murder cases, this case involves two potential killers, both

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claiming the other actually killed the victim. Without the constitutional errors, Wright's jury would have seen a case in which the evidence that Adams killed Vick substantially outweighed any evidence that Wright committed the murder.

The prosecution failed to disclose to Wright's trial counsel several key pieces of exculpatory evidence. First, the prosecution never disclosed to trial counsel the existence of a key witness, Jerry Causey. Jerry Causey testified in Adams's trial that Adams sold Vick's property to him the morning of the murder. When Causey asked Adams where he got the property, Adams confessed that he got it from "the bitch I killed in DeSoto." Wright's counsel did not know of Causey. Had Wright's counsel known, they could have called Causey to the stand to clearly implicate Adams in the murder.

Next, the prosecution failed to disclose a statement to the defense in which a video store clerk, Daniel McGaughey told police that Adams confessed to a murder. McGaughey's first statement to police was that Adams said he, Adams, "murdered someone in DeSoto and I can't live with myself." Instead, the prosecution gave the defense a statement subsequently given by McGaughey that matched its theory of the trial in Wright's case. The watered-down statement given to defense counsel read, "I know of a murder in DeSoto." Although the State tries to equate these two statements, the one not disclosed is clearly a confession by Adams, and the statement actually disclosed to the defense before trial supported the State's theory of the case - that Wright murdered Vick while Adams stood by helplessly. Of course, the best evidence of what McGaughey or Adams initially said to the police would be contained on the 911 tape recordings of their calls to the police the day after the murder. The prosecution has continually failed to produce these 911 tapes to Wright.

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The prosecution also secured, through an offer of leniency, the testimony of a twice-convicted felon, Llewellyn Mosley. Mosley's testimony was crucial to the State's case against Wright. He placed Wright with Adams after the murder, selling Vick's property for crack and celebrating by giving each other high fives. What the State did not disclose to Wright's trial counsel or to the jury was that Mosley had received an offer from the State in return for his testimony. The State still has not disclosed the substance of the offer even though the evidence established that one existed.

The fact that Mosley testified pursuant to that offer should have been disclosed to trial counsel and to the jury.

In building its case against Wright, the prosecution misrepresented important key facts to the jury. In attempting to lessen Adams's role in the crime and strengthen Wright's role, the prosecution emphasized the fact that police collected evidence of the murder from *Wright's* shack. The prosecution elicited testimony it knew to be false from the detective in charge of the investigation that Wright was the only person who kept his belongings in that shack. The prosecution knew all along, as became evident in Adams's trial, that Adams also kept all of his important belongs at the shack. The prosecution never attempted to clear up this false impression it left with the jury.

Further, the prosecution relied on a bloody fingerprint found on a pillow near Vick's head. The fingerprint was not comparable according to all of the experts working for Dallas County. The prosecution secured a hired gun to testify that the fingerprint that was otherwise of uncomparable quality could be positively matched to Wright. The hired expert gave no scientific basis for his conclusion and Wright's counsel made no *Daubert* objection - an objection that under current law and based on the expert's lack of any professional norms, would have been sustained.

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Although the prosecution also relied on the blood-soaked jeans found at the shack to tie Wright to the murder, the jury was never made aware that the jeans could not have been worn by Wright; they were too small. But the jeans would fit Adams. Unfortunately, Wright's trial counsel failed to test this very crucial piece of evidence in the case - if the blood soaked jeans did not fit Wright but did fit Adams, Wright could not have been the sole actor responsible for Vick's death.

Finally, the trial court erroneously allowed the State to read the self-serving statement of John Adams, in its entirety, to the jury. The statement was a blame shifting hearsay statement given to the police in an investigation - a statement clearly forbidden by the Confrontation Clause. Wright's counsel objected to the use of the statement, but objected on hearsay grounds rather than that the introduction of the statement violated the Confrontation Clause. The prosecution read the statement to the jury as if it were further reliable evidence of Wright's role in the murder. Unfortunately, the jury was not allowed to consider the fact that the State found the statement so

unreliable it objected to the statement's introduction in Adams's trial. In fact, the State did not believe the statement painted an accurate picture of Wright's role, and the State sought the death penalty against Adams as a willing participant in the murder, alleging that he stabbed Vick, causing her death.

When looking at the constitutional errors cumulatively, as required by Supreme Court precedent, reasonable jurists would find debatable whether Wright has demonstrated constitutional error and the requisite harm entitling him to a new trial. Without the constitutional errors, the State's case against Wright as the sole actor fails. First, the jury would have been aware that Adams lived in and kept his belongings in the shack where the evidence of the murder was found. Second, the jury would have heard that Adams confessed to killing "the bitch" whose car he was driving.

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And the jury would have heard that Adams confessed to murdering "a woman in DeSoto" to a video store clerk later that day saying he could no longer live with himself. Third, competent trial counsel would have shown that the jeans worn by the murderer fit Adams, not Wright. Fourth, the jury would have found out that the knife used to stab Vick to death belonged to Adams, not Wright.

In conjunction with the compelling evidence against Adams, the jury would not have heard evidence of a bloody fingerprint near Vick's head. And the jury would never have heard the completely unreliable statement from Adams, outlining Wright's role as the sole perpetrator of the crime. Wright's trial counsel, armed with such a compelling case against Adams, would have been able to discredit Mosley's testimony by exposing the jury to his clear interest in cooperating with the prosecution based on an offer held out to him by attorneys in the District Attorney's Office.

The only evidence left implicating Wright was the evidence that he was, indeed, living with Vick at the time of the murder. He left a drop of blood on a small towel in the bathroom, a fingerprint on a Dr. Pepper bottle in the kitchen and a drop of blood on the steering wheel and dashboard of her car. However, given the compelling case against Adams, this evidence merely bolsters Wright's claim of innocence. He had befriended Vick, and she was helping him. Why would he ruin his good fortune by murdering a woman who had taken him in? The conclusion that Adams was the murderer would have also supported some of the evidence the State could not explain at trial, such as the fact that Wright was wearing new, dark jeans the night of the murder and the

jeans soaked in Vick's blood were neither new nor dark. Without the constitutional errors in Wright's trial, the State's house of cards tumbles.

However, this Court missed the significance of all the evidence tending to show that Adams murdered Vick. The Magistrate's Findings continually refer to the notion that Wright and Adams

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committed the murder together. However, the Findings seemingly overlook the evidence in Wright's trial. The prosecutor mentioned in his opening statement that Adams took part in the murder, but the State never produced any evidence during Wright's trial to support that contention. In fact, in closing when the prosecutor referred to Adams as a party to the murder, the trial court sustained an objection to the prosecutor's argument because there was no evidence in the record to support the prosecutor's argument. Further, the jury was not given a parties instruction in which the jurors could find that Adams and Wright participated as parties to the murder. Instead, the jury was required to find Wright guilty as a sole actor, meaning that the jury had to find that Wright caused Vick's death, not that he was merely present when she died. According to the jury's charge, evidence tending to show Adams - not Wright - caused Vick's death was crucial. In Wright's trial the jury could not find that either Adams or Wright caused Vick's death. The jury had to find, beyond a reasonable doubt, that Wright actually caused Vick's death. Therefore, with the evidence presented to this Court, Wright has shown that there is a reasonable likelihood that absent constitutional error, Wright would have prevailed in convincing the jury that he was not responsible as a sole actor or that he did not deserve the death penalty for his role in the crime.

When the District Court makes a determination under Section 2253(c) that the Petitioner may proceed with an appeal, the assessment "requires an overview of the claims in the habeas petition and a general assessment of their merits."¹ The District Court must, "ask whether the resolution was debatable among jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court ... sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of

¹*Miller-El v. Cockrell*, 537 U.S. 322 (2003).

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COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."² In short, to grant a COA, this Court should not simply reassert its Findings but evaluate Wright's claims based on the facts and law, determining whether reasonable jurists could find Wright's claims debatable.

I. *Napue v. Illinois* Claims

In order to prevail on a *Napue v. Illinois*³ claim, Petitioner must show that the State allowed false testimony at trial to go uncorrected, that the testimony was actually false or misleading, and that false testimony could, in any reasonable likelihood, have affected the judgment of the jury.⁴

A. Claim 1 - The Mosley Offer. When the State presents false evidence or fails to correct the admission of false or misleading evidence at trial, it violates a defendant's constitutional right to due process. Could reasonable jurists debate whether the State's failure to disclose an offer made to a key prosecution witness, Llewellyn Mosley, left the jury with the impression that no offer was made, violating Wright's constitutional right to due process?

Reasonable jurists could find debatable the Magistrate's Findings, adopted by this Court, that the testimony Mosley gave concerning a deal with the prosecution was misleading. In denying Wright relief on Claim 1 of his habeas petition, the Magistrate's Findings grasp at two red herrings. First, the Court focuses not on whether the prosecution enticed Mosley's testimony through an

²*Id.*

³360 U.S. 264(1959).

⁴*Id. at 271.*

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"offer," but whether the prosecution secured a "deal" with Mosley before or during Mosley's testimony. As the Supreme Court has established in *United States v. Bagley*,⁵ it is not the formality of the inducement that matters. If the State made *any* inducement to Mosley for his testimony, the State must disclose that inducement to the defense.⁶ Second, the Court erroneously accepted the State's

argument that the contents of the offer cannot be disclosed to the defense because the offer is protected by the attorney-client privilege. However, the attorney-client privilege does not apply to the Mosley offer. The attorney-client privilege does not attach to information exchanged between a client and a third party, even if attorneys are present. The attorney-client privilege is reserved for conversations exclusively between an attorney and *his* client. Therefore, anything communicated to Mosley by the State is not subject to attorney-client privilege. *Johnson v. United States*, 542 F.2d 941 (5th Cir. 1976); *United States v. Blackburn*, 446 F.2d 1089 (5th Cir. 1971); *Johnson v. State*, 174 S.W.2d 1047 (Tex.Crim.App. 1915); *Clark v. State*, 261 S.W.2d 339 (Tex.Crim.App. 1953).

Wright has established through sworn testimony that the State made Mosley an offer. The State has not contradicted this fact. The State never came forward with any evidence to the contrary. Further, Mosley misled the jury through the assistance of the prosecutor. At trial Mosley testified that he received no inducements from the State for his testimony. Not only did the State fail to correct this misstatement, the prosecutor argued in closing that the State did not conspire with Mosley. In fact, the prosecutor clearly demonstrated the importance Mosley's credibility had on the verdict in the case by stating, "Let me make this very clear to you. If there's one of you on this jury, even one of you who believes the State of Texas, anyone at this table right over here, myself

⁵473 U.S. 667 (1985).

⁶*Id.* at 2459.

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included, that any of us conspired with Llewellyn Mosley,... I don't even want you to go back and even look at the facts of guilt innocence. I want you to simply go back there as a group in unison and say not guilty."⁷

Certainly, on the record before this Court, reasonable jurists could debate whether Mosley and the State presented misleading evidence to the jury - evidence that Mosley had not been induced to testify nor received an offer from the State. And further, based on the prosecutor's closing argument, reasonable jurists could find debatable this Court's conclusion denying Wright relief on this claim. Reasonable jurists could disagree about whether this Court used the appropriate standard - requiring the State to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained⁸ - in denying Wright his relief.

Even though Wright pointed out the appropriate harm analysis to the Court in his habeas petition, a standard much more favorable to Wright than the *Strickland* or *Brady* harm analysis, this Court avoided the appropriate harm analysis in denying relief. Further, the Court took issue with the quality of evidence Wright presented on this claim, stating that "[t]he most that Petitioner has established is that there was an 'offer' from some member of the Dallas District Attorney's office. Petitioner has not shown, contrary to his assertions, that this offer was communicated to Mosley, much less accepted. Moreover, the particulars of the offer have not been shown. Without any showing that Mosley had actually accepted any offer from the State, it has not been shown that he lied when he stated that he had no such deal."⁹ The Court required evidence from Wright that was

⁷Tr. Vol. 49, p. 49.

⁸*Bagley*, 473 U.S. at 679 n. 9.

⁹Magistrate's Findings and Conclusions, p. 21.

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not in his possession while at the same time denying him the discovery he requested to gather the specific evidence the Court required. Reasonable jurists, under these circumstances, would find the Court's denial of relief on Claim 1 debatable.

B. Claim 7 - Detective Pothen's testimony.

When the State presents false evidence or fails to correct the admission of false or misleading evidence at trial, it violates a defendant's constitutional right to due process. Could reasonable jurists find debatable whether the State violated Wright's constitutional right to due process when it solicited and allowed to go uncorrected testimony from Pothen that he knew of no person other than Wright who kept his belongings in the Beckley shack?

From the trial record, there is no doubt that Pothen gave false testimony concerning whose belongings were found in the Beckley shack. Pothen knew some things belonging to Adams were found in the shack; he was in charge of the investigation. The prosecution knew that Adams's things were found in the shack, even though it failed to provide the defense with these items prior to Pothen's testimony. When pressed by the defense, the prosecution finally turned over to the defense items found in the shack that belonged to Adams. However, when Pothen testified in Wright's trial, he

denied knowing anything about property belonging to Adams found in the shack. Pothen was asked at trial:

Q: Okay. And you don't have any personal knowledge of how many different people resided in this shack, do you?

A: No, sir.

Q: You don't know whose property any of this is, do you?

A: No.

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Q: Okay. It could just as easily be John Adams's property, couldn't it?

A: I don't know.¹⁰

Pothen feigned ignorance and denied knowing that some of the property in the shack certainly belonged to Adams when he and the prosecution knew otherwise.

The Magistrate's Findings fail to properly analyze the significance of this false testimony. The Findings state, "Lieutenant Pothen's testimony was not the only testimony at trial that indicated that it was Petitioner, and not Adams, who exercised primary control over the shack, because the testimony by Cole and Parsons was evidence before the jury that Petitioner actually lived in the shack."¹¹ The Magistrate's findings demonstrate clearly the problem with Pothen's testimony. There was no evidence in the record that Wright exercised "primary control" over the shack. And the prosecution wanted to leave the jury with the impression that it was Wright who exercised primary control, thereby tying all of the evidence found at the shack to Wright instead of Adams. And simply handing a stack of letters and other documents that belonged to Adams over to the jury could not adequately clear up the misrepresentation the State wanted the jury to believe - that the shack was Wright's exclusively - when instead the shack was inhabited by Adams as well. Reasonable jurists could debate whether the State's false impression, that Wright exercised primary or exclusive control over the shack, contributed to the jury's verdict against Wright.

C. Claim 11 - Adams's statement.

When the State presents false evidence or fails to correct the admission of false or misleading evidence at trial, it violates a defendant's constitutional right to due process.

Could reasonable

¹⁰Tr. Vol. 46, pp. 62-63.

¹¹Magistrate's Findings at p. 26.

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jurists debate whether the State's use of a statement it believed to be false made by Wright's co-indictee violated Wright's constitutional right to due process?

In dispensing with Wright's eleventh claim for habeas relief, the Magistrate's Findings essentially ignore the record that exists in both Wright's trial and Adams's trial. The State pursued inconsistent theories in the trials against Wright and Adams. In Wright's trial, after a question about the ownership of the knife used to kill Vick, the prosecutor argued that Adams's statement should be read to the jury because without it the jury would be misled as to who actually used the knife to kill Vick. When urging the trial court to allow Adams's statement to be read to the jury, the prosecutor reasoned: "Your Honor, that would be the conversation that I would intend to offer in front of this jury, and, again, just looking at Rule 107 there, I think it's clear the intent of that Rule is to allow the other side to certainly go in to complete that conversation so that a false impression would not be left with the jury. And as it is right now, we just have a statement that - that John Adams' knife was used. Now, as we listen to the remainder of the conversation, we find that, yes, it was, **but it was used by the defendant [Greg Wright].**"¹² Of course, after the State convicted Wright of the murder, it quickly reversed field and argued in Adams's trial that Adams's statement was completely unreliable and that it was Adams who used the knife to assist in Vick's murder.

Reasonable jurists could disagree, based on the record of these two trials, with the Magistrate's Findings. Specifically, the Findings ignore the fact that the prosecutor took the position in Wright's trial that Wright used Adams's knife to kill Vick - that was the reason given by the prosecutor to overcome a hearsay objection and to introduce Adams's statement in Wright's trial. The Findings turn a blind eye to the prosecution's stated motive - to set the record straight that

¹²Tr. Vol. 45, p. 230 (emphasis added).

the knife "was used by the defendant [Greg Wright]." Instead, the Findings state that "while the State's motive in wanting all of Adams' statement about the knives placed into evidence is not known, it evidently was not so that the State could use that statement to prove that Petitioner used both knives to kill Vick." Reasonable jurists could disagree with this Court's assessment of the record. Reasonable jurists could find support in the record for Wright's contention that the State introduced Adams's statement against Wright to support its theory that Wright used Adams's knife to kill Vick. Then after getting a death sentence against Wright, the State opposed the same statement in Adams's trial as unreliable.

Further, the Magistrate's Findings fail to recognize that a due process violation occurs when the State uses inconsistent theories to obtain a death sentence against two men for the same murder. The Supreme Court recently recognized in *Bradshaw v. Stumpf*¹³ that the prosecution's inconsistent theories in two capital cases may have had a direct effect on the defendant's sentencing. Certainly reasonable jurists could debate the effects that the State's introduction of Adams's statement had on the outcome of the trial - both during the guilt-innocence phase and the punishment phase. Adams's statement painted Wright as the mastermind and sole perpetrator of the murder. Reasonable jurists could certainly debate the effect of Adams's statement on the outcome of the guilt-innocence phase, and most certainly the outcome in the punishment phase of the trial. **II. Brady Claims**

- A. Reasonable jurists could disagree with the Court's finding that Wright's *Brady* claims are unexhausted where Wright can establish cause for the default.

¹³125 S. Ct. 2398 (2005).

A petitioner shows cause for failing to raise unexhausted claims in the state court when "the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence."¹⁴ Therefore, in *Williams v. Taylor*, the Supreme Court rejected the Fourth Circuit's reasoning that state habeas counsel defaulted a petitioner's claim of prosecutorial

misconduct because he failed to check the public records to find evidence of the misconduct.¹⁵ Instead the Court reasoned that because the prosecutor concealed the juror's deception, diligent counsel had no reason to investigate through checking the public record.¹⁶ Further, the Court found in *Strickler v. Greene*¹⁷ that state habeas counsel's failure to discover evidence of a Brady claim was excusable because where the State impedes the discovery of the violation, the Court will recognize the existence of cause for the procedural default.¹⁸

Wright can demonstrate cause for failure to raise his *Brady* claims in his state habeas. First, the State still has not provided, and the Court has denied discovery into, the contents of the offer the State made to Mosley prior to his testimony in Wright's case. Second, the information about Jerry Causey and Daniel McGaughey's significance did not come to light until John Adams's trial. And as the Court noted in *Strickler*, state-habeas counsel is not obligated to scour the public record for

¹⁴Banks v. Dretke, 124 S. Ct. 1256, 1272 (2004).

¹⁵529 U.S. 420,443 (2000).

¹⁶*Id.*

¹⁷521 U.S. 263(1999).

¹⁸ at 283-84.

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evidence of prosecutorial misconduct.¹⁹ The duty to disclose exculpatory evidence remains with the State.

B. Claim 2 - The Mosley Offer.

The State's suppression of evidence favorable to the accused and material to either guilt or punishment violates a defendant's constitutional right to due process. Could reasonable jurists debate whether Wright's constitutional rights were violated when the State suppressed evidence that it made Llewellyn Mosley, a key witness in the case, an offer in exchange for his testimony?

In denying Wright relief on his *Brady* claim, the Magistrate's Findings state, "this Court found that the record before it does not establish that there was a deal between Mosley and the State that he would not be prosecuted if he testified at Petitioner's trial."²⁰ However, in seeking definitive proof of a "deal" between Mosley and the State, the Court misses the point of *Brady*. *Brady* sets forth no

requirement that a petitioner prove that the State made a "deal" with a witness, merely that the State provided some form of inducement. An offer is an inducement. In denying relief, the Findings cite a Fifth Circuit case for the proposition that "a unilateral hope for leniency from the State is not *Brady* material."²¹ Of course, Wright produced evidence that Mosley did not have a unilateral hope of leniency, he had an offer from someone in the District Attorney's office.

Finally, the Findings discount the effect of Mosley's testimony, claiming that his testimony was corroborated by other evidence, such as the spare tire on the car and the weed eater found in Mosley's house. However, there is no corroboration to some of the very damaging portions of

¹⁹*Id.*

²⁰Magistrate's Findings at p. 31.

²¹*Id.* (citing *Knox v. Johnson*, 224 F.3d 470,482 (5th Cir. 2000)).

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Mosley's testimony. Mosley testified, uncorroborated by any other source, that Wright had an active role in trading Vick's property for crack. He also gave extremely damaging testimony about Wright's demeanor after the murder, testimony that was likely to affect the outcome of the trial - both the guilt-innocence portion and certainly the punishment phase.

Reasonable jurists could debate whether, based on the evidence provided by Wright, the State violated Wright's constitutional right to due process and whether that violation more likely than not undermined the confidence in the outcome in either phase of Wright's trial.

C. Claim 3 - Jerry Causey.

The State's suppression of evidence favorable to the accused and material to either guilt or punishment violates a defendant's constitutional right to due process. Could reasonable jurists debate whether Wright's constitutional rights were violated when the State suppressed the existence of a witness who heard Adams confess to killing Vick on the morning of the murder?

As the Magistrate's Findings point out, Jerry Causey testified in Adams's trial that he first spoke to a prosecutor about the Vick case in May or June of 1998, after Wright's trial. However, Causey later changed his story and now claims that the State spoke with him about the Vick case just before Wright's trial in November 1997. The Magistrate, however, made a cursory finding that this "apparent conflict [in dates] does not establish that the State knew about information that Causey had at the time of Petitioner's trial."²²

At the very least, the two conflicting statements create a fact issue that demands further discovery. The Court, however, denied Wright the opportunity to conduct any further discovery into the prosecutor's files to find evidence that would corroborate Causey's affidavit. Further, the

²²*Id.* at p. 33.

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Findings make light of the harm that Adams's confession to Causey would have had in Wright's trial. But where two men stand accused of the same murder, who actually pulled the trigger or stabbed the victim is always relevant to punishment.²³ Furthermore, in this case the State tried Wright as the sole actor in Vick's murder. The State had to show that Wright was the one that caused Vick's death. It was not enough for the State to simply show that Wright was there when Adams carried out the murder.

Reasonable jurists could debate whether, on these facts, Wright has sustained a claim under the Due Process Clause of the Constitution.

D. Claim 4 - McGaughey's Statement.

The State's suppression of evidence favorable to the accused and material to either guilt or punishment violates a defendant's constitutional right to due process. Could reasonable jurists debate whether Wright's constitutional rights were violated when the State suppressed evidence of a statement given to police by Daniel McGaughey that Adams confessed to *murdering* someone in DeSoto on the day after the murder?

There is no dispute that the State failed to give Wright's counsel the notes of a police officer who took McGaughey's statement shortly after the time Adams urged McGaughey to call 911 on his behalf. McGaughey told police that Adams said, "I murdered someone in DeSoto and I can't deal with it. I want to turn myself in." No doubt, the statement was exculpatory as to Wright and should have been disclosed to the defense prior to trial. However, the Magistrate's Findings conclude that the statement was not material to the defense in that "a confession by Adams would

²³See *Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005).

not have been exculpatory evidence for Petitioner because the State argued at trial, and the evidence reflected, that both men murdered the victim."²⁴

The Magistrate's Findings fail to take into account that the State tried Wright as the sole actor responsible for Vick's murder, not merely as an accessory. It was not enough that the State convinced the jury that Wright was there during the murder or that he aided Adams after the murder. The Magistrate's Findings make sense only if the jury was given a parties instruction. Of course, the jury was not given a parties instruction and the trial court sustained a defense objection to the prosecutor's reference in closing argument to Adams acting as a party to the murder because there was no evidence in the record that Adams *was* a party to the murder. Essentially, the Magistrate's finding, that Adams acted as a party to the murder along with Wright, created evidence that even the trial court ruled did not exist anywhere in the record. The State had to convince the jury beyond a reasonable doubt that Wright caused Vick's murder. Further, any assessment of Wright's punishment must necessarily weigh his role in the crime. Just as the Supreme Court remanded *Bradshaw v. Stumpffor* reassessment of punishment in light of the State's alternative theories of who actually shot the victim, Wright is entitled at the very least to a new sentencing in which all the evidence pointing to Adams's role in the murder is presented to the jury.

Based on the evidence presented to the Court on Wright's fourth claim, reasonable jurists could find debatable the Court's ruling that McGaughey's first statement to police was not exculpatory or material.

²⁴*Id.* at p. 35.

E. Claim 8 - Items in the Beckley Shack.

The State's suppression of evidence favorable to the accused and material to either guilt or punishment violates a defendant's constitutional right to due process. Could reasonable jurists

debate whether Wright's constitutional rights were violated when the State suppressed evidence, namely papers clearly belonging to Adams, that Adams inhabited the Beckley shack?

In denying Wright's eighth claim for relief, the Magistrate's Findings first conclude that the State made the evidence seized from the shack available to the defense prior to trial. However, the support for this factual conclusion is a cite to a portion of the record where the prosecution merely claims that the evidence was available prior to trial. The State has not provided any credible evidence that all items seized from the shack were in fact available to Wright's counsel prior to trial.

The Magistrate's Findings further conclude that earlier disclosure of the items from the shack would not have affected the outcome of the trial because Adams's papers were placed into evidence by Wright's counsel at trial prior to the jury's deliberations. However, this conclusion ignores the importance of the disclosure of exculpatory evidence prior to trial. If Wright's counsel had known of the evidence showing that the shack was as much under Adams's control as Wright's, counsel could have formed a more effective strategy. Counsel could have been prepared for the State's efforts to show that the shack was exclusively under Wright's control. Counsel certainly could have undermined Detective Pothens's credibility, thus calling into question much of the investigation.

Given this evidence, reasonable jurists could disagree with the conclusion that the undisclosed evidence did not affect the outcome of the trial - either guilt-innocence or punishment.

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HI. *Strickland* Claims

In order to prevail on a claim under *Strickland v. Washington*²⁵ a petitioner must prove by a preponderance of the evidence that counsel's performance was deficient and that counsel's deficient performance prejudiced his defense.²⁶

A. Claim 12 - Failure to properly object to Adams's statement.

The Confrontation Clause forbids the use of a co-defendant's blame-shifting testimonial statement against the defendant. Because these statements are highly unreliable and highly prejudicial, the constitution requires that these statements be subject to cross-examination. Could reasonable jurists debate whether Wright's counsel, who failed to properly object to the introduction of

Adams's statement, was ineffective and that his ineffectiveness prejudiced Wright's trial in either the guilt-innocence phase or the punishment phase?

In denying Wright's twelfth claim, the Magistrate's Findings concede that the introduction of Adams's statement violated the Confrontation Clause. Competent counsel would have properly objected to the statement. However, the Findings conclude that Wright could show no prejudice resulting from the introduction of the statement. As Wright set forth previously in this brief, Adams's statement was crucial to the State's case against Wright. Without Adams's statement the State could not carry its burden to prove to the jury beyond a reasonable doubt that Wright, not Adams, was responsible for causing Vick's death. And conspicuously absent from the Findings is any analysis of whether the introduction of Adams's statement prejudiced Wright in the punishment phase. Certainly reasonable jurists could debate whether the statement affected the jury's assessment

²⁵466 U.S. 668(1984)

²⁶*Id.* at 687.

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of the death penalty. Had the jury been aware of all the evidence tending to show Adams as the confessed killer and had the jury never heard Adams self-serving explanation of his involvement, the jury certainly could have found that Wright was less blameworthy than Adams and not worthy of the death penalty.

B. Claim 13 - Failure to investigate.

Counsel is ineffective if he fails to investigate a claim, fails to take simple investigative steps that would have revealed helpful information, or if he merely overlooked some critical fact. Could reasonable jurists debate whether Wright has established a claim of ineffective assistance of counsel where his trial counsel failed to interview a witness to whom Adams confessed, failed to inspect the items found in the Beckley shack, including the jeans worn by the person who sat on Vick as she was being stabbed, failed to review evidence the State presented prior to any of the punishment, and failed to investigate or proffer any mitigating evidence in the punishment phase of his trial?

1. Daniel McGaughey

In dispensing with Wright's ineffectiveness claim regarding trial counsel's failure to interview McGaughey, the Magistrate's Findings create an internally inconsistent dichotomy.

First, when addressing Wright's *Brady* claim regarding the State's failure to turn over McGaughey's first statement to police, the Findings claim that the first statement to police is not materially different from the statement the State provided to trial counsel. If so, then trial counsel should have been keenly aware that McGaughey would make a very damaging witness to the State's case against Wright because McGaughey would testify that Adams confessed to the killing. And from the parade of capital cases preceding this one, it is clear that in both guilt-innocence and in the punishment phase, it is highly relevant to the jury that one person may have been the actual killer and another

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may have merely been present at the scene, playing a lesser role in the crime.²⁷ The Magistrate's Findings ignore the significance of the jury being exposed to evidence that Adams murdered Vick, not merely acted as an accomplice after the fact, and the effect that evidence would have had on guilt-innocence and, undeniably, on the punishment phase of Wright's trial. Therefore, reasonable jurists could disagree with this Court's finding that McGaughey's testimony was not material to Wright's trial.

2. Evidence obtained from the Beckley shack.

Reasonable jurists could debate whether trial counsels' failure to inspect the evidence found in the Beckley shack constituted ineffective assistance of counsel under *Strickland*. Although the State carries the burden of disclosing evidence in its possession that tends to exculpate the defendant, defense counsel also have a duty to independently investigate the case. Certainly, competent counsel would inspect the evidence found at the scene of the arrest prior to trial in a capital murder trial. And the duty to inspect those items is even stronger when the items include the jeans allegedly worn by the killer and the knives used to stab the victim. The fact that trial counsel never inspected the evidence from the Beckley shack means that trial counsel was unable to form a trial strategy that focused on Adams as the perpetrator of the murder. Instead trial counsel was left at the end of the trial with no real theme, merely handing Adams's papers over to the jurors to make their own conclusions about their significance. Because trial counsel seemed surprised by all of the evidence from the Beckley shack, counsel could not effectively use the evidence to argue that Adams was the sole perpetrator rather than Wright.

²⁷*Bradshaw v. Stumpf*, 125 S. Ct. 2398 (2005).

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4, Failure to make a *Daubert* objection to the bloody fingerprint.

John Cron's testimony regarding the bloody fingerprint found on a pillow near Vick's head was a standardless "take my word for it" presentation. As the Magistrate's Findings reflect, Cron did have appropriate experience and expertise to testify as an expert on fingerprint comparison. But that is only half the equation. Cron's technique must also comply with the standards set forth in *Kelly v. State*.³⁰ The technique must be accepted as valid in the scientific community, must be supported by the literature in the scientific community, must have a potential error rate, and there must be other experts who can test or evaluate the technique.³¹ Under the *Kelly* standard, Cron's testimony would have been excluded given an appropriate objection from trial counsel.

Cron gave no minimum points of comparison. He could not provide an error rate for his comparison; in fact, according to his testimony, there was no error rate. Further, he did not subject his technique to other experts in the field. Instead he testified that although other fingerprint experts that had looked at the print found it to be uncomparable, he explained their opinions (that the print was of insufficient quality to make a comparison) away by claiming that he (Cron) just had more experience. He did not challenge the other experts' scientific techniques. He simply testified that he knows a match when he sees it. Cron's testimony could not survive a *Daubert* objection. Further, trial counsel claimed that the lack of an objection was a mere oversight. Looking back, trial counsel would have made the objection.

Of course, the testimony was devastating to Wright's case. It was the only physical evidence that would place Wright in a position to have committed the murder. All the other evidence merely

³⁰824 S.W.2d 568, 573 (Tex. Crim. App. 1992).

³¹*Id.*

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placed Wright with the victim before the murder, in her house, or in the shack where some of the evidence of the murder was found. But no evidence supported Wright's role as the primary actor in the murder rather than a mere accessory. And according to the trial court's charge, the jury had to convict Wright as the sole actor, not as a party to the crime. Therefore, reasonable jurists could

disagree with the Magistrate's Findings that Cron's testimony did not likely alter the outcome of the trial, both the guilt-innocence portion and the punishment.

IV. Cumulative Error Claim

In considering whether a petitioner has demonstrated prejudice, a reviewing court must consider the claims of constitutional error cumulatively. Could reasonable jurists debate whether, absent all *Brady* and *Strickland* errors, a reasonable probability existed that the result of Wright's trial (guilt-innocence and punishment) would have been different?

To properly examine the materiality of illegally suppressed exculpatory evidence requires inquiry into the effect of the "disclosure of the suppressed evidence to *competent counsel* on the result of the trial.³² Therefore, in assessing cumulative error, the court should consider *Strickland* and *Brady* errors together to determine whether petitioner has demonstrated prejudice and materiality.³³

When the Court looks at the evidence against Wright, ignoring the evidence presented to the jury through constitutional error and considering all the of the evidence that should have been presented to the jury absent constitutional error, Wright can overcome the prejudice prong of

³²*Kyles v. Whitley*, 514 U.S. 419,441 (1995).

³³*Gonzales v. McKune*, 247 F.3d 1066 (10th Cir. 2001), *vacated in part*, 2002 WL 182118 (2002) (*en bane*); *Phillips v. Woodford*, 267 F.3d 966 (9th Cir. 2001).

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Strickland and *Brady* and can make a cognizable claim of fundamental miscarriage of justice under *Schlup*.

Minus constitutional error, the facts presented against Wright include: 1) he was seen on the night of the murder in new, dark jeans with Vick and Adams at the VFW; 2) he was in Vick's car and home as an invited guest sometime before or after the murder (fingerprint on soda bottle and tiny drops of blood on a bathroom towel and car dash); 3) he was arrested at a shack where items from Vick's home were found. Couple that circumstantial evidence with facts that should have been provided to the jury: 1) Adams confessed to McGaughey on the day after the murder, "I killed someone in DeSoto"; 2) Adams confessed to Causey that the car he was driving the morning after the

murder was "the bitch's car," "the bitch I killed"; 3) the shack where evidence from the murder was found was inhabited by Adams, as well as Wright; 4) the jeans worn by the killer who straddled Vick were too small to fit Wright but not too small to fit Adams; 5) Adams's knife was definitively used to kill Vick; 6) Adams left his wallet in Vick's car, giving Adams a reason to go to the police and then turn on someone else.

Perhaps one could look at the evidence cumulatively and find Wright guilty as an accessory or an accomplice. But the State of Texas charged Wright as a sole actor. Under Texas law the jury had to find that Wright was the primary actor, not merely a participant after the fact or a mere abettor. Under the charge submitted to the jury, the State had to prove beyond a reasonable doubt that Wright actually stabbed the victim causing her death, not that he helped put Adams into a position to murder or that he stood by while the murder took place or that he helped dispose of property after the fact. Had there been any evidence that Adams was partially responsible for the murder, the charge would have contained a parties instruction allowing the jury to convict Wright

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The Magistrate's Findings discount the benefit that such a strategy would have had on Wright's trial. The Findings conclude that because the prosecution mentioned Adams as an accomplice, trial counsel's failure to focus in on Adams as the perpetrator did not prejudice Wright's defense. However, again, the Findings misapply state law regarding sole actor and accomplice status. Further, the Findings ignore the effect that proof of Adams straddling the victim and stabbing her to death would have had on the punishment phase of Wright's trial. Therefore, reasonable jurists could debate whether Wright could be encouraged to proceed further with this ineffectiveness claim. 3. Punishment evidence.

In a performance far inferior to counsel's performance in *Rompilla v. Beard*,²⁸ counsel treated the punishment phase of Wright's capital murder case as a mere afterthought. Trial counsel did no investigation of the prior convictions the State presented against Wright. In fact, trial counsel did not even read the files of these priors until after trial began. Certainly *Rompilla* demands from counsel the duty to at least read the files of the prior convictions the State intends to present at the punishment phase.²⁹ Further, trial counsel failed to illicit any mitigation from Wright's family. The Magistrate's Findings give deference to trial counsel's "strategy" of keeping Wright's family off the witness stand because they could be questioned about Wright's priors.

However, trial counsel knew that the State would present the priors anyway. Therefore, calling no mitigation witnesses could not be seen as a strategic choice, but merely a failure of investigation and preparation. Reasonable jurists could, based on this record, debate whether Wright's ineffectiveness claim should be encouraged to proceed further.

²⁸125 S. Ct. 2456 (2005).

²⁹*Id* at

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as either a sole actor or one of several actors guilty of the murder. Looking at the errors cumulatively, there is a reasonable likelihood that absent the constitutional errors, pursuant to the State's sole actor charge, the outcome of the trial would have been different. And certainly without any evidence linking Wright to the actual stabbing of Vick, but evidence linking Adams to the stabbing, Wright's punishment verdict more likely than not would have been different. When looking at the constitutional errors cumulatively, reasonable jurists could disagree whether Wright has established prejudice sufficient to warrant a new guilt-innocence or punishment trial.

V. Confrontation Clause Claim

The Magistrate's Findings denied Wright's confrontation clause claim, holding that the claim was procedurally barred on an adequate and independent state ground - the contemporaneous objection rule. However, reasonable jurists could debate whether Texas's contemporaneous objection rule is applied in a consistent enough fashion to bar review in the federal courts. Further, this Court alluded in its order denying Wright's Motion to Alter or Amend the Judgment that Wright's confrontation clause claim may be barred because *Crawford v. Washington* may announce a new rule inapplicable to Wright's habeas relief. However, Wright claims that his confrontation clause argument succeeds according to the long-established precedent prior to *Crawford*. Adams's statement was never introduced as a firmly-rooted exception to the hearsay rule. Therefore, even before *Crawford*, Adams's statement did not pass muster under the Constitution's Confrontation Clause.

VI. The *Schlup v. Delo* Standard

Reasonable jurists not only could, but are currently debating the standards by which a petitioner must satisfy a fundamental miscarriage of justice claim under *Schlup v. Delo*, 513 U.S. 298 (1995). In *House v. Bell*³⁴ the Supreme Court granted cert on a case that seeks guidance on the application of the *Schlup* standard precisely because reasonable jurists in the circuit courts of appeal disagree. Therefore, Wright should be granted a COA on his *Schlup* claim.

VII. Discovery Claims

Wright sought discovery from this Court to gather the evidence needed to support his claims of prosecutorial misconduct and his claim of actual innocence. This Court denied those claims. Wright should have been allowed discovery into evidence that tended to support the proposition that Adams murdered Vick. For the reasons set forth throughout, Adams's role in the murder was essential to the jury's verdict in both the guilt-innocence phase and the punishment phase of his trial. First, Wright's jury was asked to find Wright guilty as the sole actor, not as a party or accomplice. Second, if Wright had a lesser role in the murder, the jury would have been instructed to consider that fact in assessing punishment.³⁵ Therefore, all evidence tending to support Wright's claim that Adams actually murdered Vick is relevant and material to Wright's habeas claims.

For these reasons Wright requests a Certificate of Appealability on all of the claims raised in his original application for post-conviction relief.

³⁴*House v. Bell*, 386 F.3d 668, 2004 Fed.App. 0345P (cert, granted June 28, 2005).

³⁵See Tex Code Crim. Proc. Art. 37.07 1(3)(e).

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Certificate of Appealability Pursuant to 28 U.S.C. § 2253 was forwarded to Ms. Deni Garcia, Assistant Attorney General, State of Texas, Capital Litigation, P.O. Box 12548, Austin, TX 78711-2548, on this the 25th day of July 2005, by regular mail.

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