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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

AT DALLAS

3:01CV-0472-X

GREGORY EDWARD WRIGHT Applicant

VS.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice, Institutional Division,
Respondent

APPLICANT'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
WITH BRIEF IN SUPPORT

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INTRODUCTION

Gregory Edward Wright awaits execution on Texas' death row. He has claimed throughout all proceedings against him that he is innocent of the murder of Donna Vick. Mr. Wright respectfully requests a hearing before this Court to establish, as a matter of law, his claims of factual innocence.

Mr. Wright has steadfastly alleged he is not guilty of the murder of Donna Vick. Instead, John Adams, another man on death row, is responsible for the murder of Ms. Vick. Indeed, John Adams has confessed to several people that he murdered Ms. Vick has been convicted of capital murder for her death. However, the State of Texas now claims that both Mr. Wright and Mr. Adams murdered Ms. Vick as co-actors in the crime. This is a completely new theory of the crime, embraced after the conviction of Mr. Wright. Rather, during Mr. Wright's trial, the State of Texas argued that Mr. Wright

murdered Ms. Vick and that John Adams was merely caught at the scene by happenstance.

In addition to his factual innocence, Mr. Wright further alleges that the State of Texas withheld material, exculpatory evidence that would have allowed Mr. Wright to establish his claims of innocence. This omitted and withheld evidence would have convinced a jury that Mr. Adams acted alone in murdering Ms. Vick. Nonetheless, in violation of both the letter and the spirit of the United States Constitution, the State of Texas did not disclose the exculpatory evidence in its possession that would have established Mr. Wright's claim that Mr. Adams, not Mr. Wright, was responsible for murdering Ms. Vick. As set forth in Mr. Wright's application for habeas relief, much

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of this evidence has still not been provided to Mr. Wright or his counsel. The State continues to subvert Mr. Wright's attempts to prove his actual innocence.

The State of Texas, in its continued pursuit of executions, is playing a procedural shell game, with this Court to prevent Mr. Wright from raising any of his constitutional claims challenging the State's misconduct and the trial court's errors in his capital murder trial. First, the State withheld evidence material to the defense and at trial knowingly misrepresented evidence. More specifically, the State withheld witnesses favorable to the defense at trial - witnesses that were known to the State and available to testify at trial. The State also manufactured fingerprint evidence against Mr. Wright at trial. The State continues to withhold some of this evidence, claiming it is either lost or misplaced.

The State of Texas represented throughout its evidence and argument at trial that Mr. Wright acted alone in murdering Ms. Vick - continually asserting that Mr. Adams was merely a bystander or victim of circumstance. The State's approach to this murder case, however, changed radically once Mr. Wright was convicted and sentenced to death and Mr. Adams stood accused of the same crime in a subsequent, separate trial.

The State of Texas now represents to this Court that Mr. Wright and Mr. Adams were, in fact, co-actors in the murder. Through its actions, the State of Texas has knowingly deprived Mr. Wright of crucial exculpatory evidence he needed to support his claims of factual innocence. These actions, are violations of the Brady doctrine and rise to the level of prosecutorial misconduct. The

In fact, the State was able to introduce into evidence, over the objection of the defense, the statement of John Adams, placing all the blame for the murder on Mr. Wright and painting Mr. Adams as a mere bystander. The State's argument for the admission of the statement was that it was necessary to prevent the jury from coming to the erroneous conclusion that Mr. Adams actually participated in the murder of Ms. Vick.

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prosecution's misconduct prevented Mr. Wright from demonstrating

that Mr. Wright, if guilty at all, was merely a bystander with a lesser role in the crime. Such state-sponsored behavior should not be condoned in any case - let alone one where the accused asserts his innocence and is facing a penalty of death. The State of Texas has sentenced two men to death for the murder of Donna Vick - neither conviction supported by the same story or evidence.[2] Mr. Wright has continued to maintain his innocence and can present a convincing case of factual innocence and a constitutionally deficient trial. Therefore, Mr. Wright must be afforded the opportunity and the forum in which to inspect and present the evidence which establishes his innocence - our federal constitution demands such protections. Although the State of Texas may routinely rubber stamp constitutionally infirm capital murder trials, the federal courts act as the protector of a defendant's constitutional rights and serve at the last bastion of justice. When a state has failed to afford a defendant the core protections of our constitutional system, the federal judiciary must step in. Here, Mr. Wright's trial and subsequent pleas to the Texas courts failed to avail him of the minimal protections guaranteed under the United States Constitution. Mr. Wright is consequently entitled to habeas corpus relief in this action.

I. THE STATE DID NOT DISCLOSE MATERIAL IMPEACHMENT EVIDENCE OF THE KEY WITNESS IN THE CASE, LLEWELYN MOSLEY, IN DIRECT VIOLATION OF GIGLIO V. UNITED STATES AND BRADY V. MARYLAND.

The State presented only one witness at trial, Llewelyn Mosley, to testify about the events that transpired the night of Ms. Vick's murder. Mr. Mosley had a significant criminal background.

[2] An argument can be made that the use of inconsistent theories in this fashion is itself a violation of the applicant's right to due process of law. See *Thompson v. Calderon*, 120 F.3d 1045,1058 (9th Cir. 1997) reversed on other grounds. 523 U.S. 538 (1998) *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000).

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He ran and operated a crack house less than a block away from a high school. He was also arrested in connection with the events that transpired the night of Ms. Vick's murder. If convicted of the crimes to which he confessed during Mr. Wright's trial, Morely would have resulted in a minimum sentence of twenty-five (25) years in prison. Mr. Mosley consequently had every reason to lie to , please the State. He was facing the notion of spending the rest of his life in prison if convicted.

In reward for his testimony in Mr. Wright's case, Mr. Mosley was never charged with an offense despite his stunning admission of criminal activity. The State made him an offer - not to charge him with a crime in return for his crucial testimony. Mr. Mosley therefore testified in the manner the State requested and was rewarded by the State. He was never prosecuted for his crimes. The evidence thus establishes that Mr. Mosley had a deal with the prosecution. The State may quibble semantically regarding the offer and acceptance between Mr. Mosley and the State. However, Mr. Mosley's offer so closely resembles the witness' offer in *United States v. Giglio*, that there can be no question but that the State was constitutionally obligated to disclose the details of the offer of immunity .

The State nonetheless never disclosed the details of its admitted offer to Mr. Mosley. Instead, the State disingenuously denies the existence of a "deal." The facts and evidence belie the State's denials. Mr. Mosley had an enormous incentive to lie.[3] Mr. Mosley was given this incentive by the State - in exchange for his testimony. If the jury had been aware of this bargained-for exchange, it would have stripped Mr. Mosley of credibility. Because Mr. Mosley was the State's only live

[3] In fact, and contrary to respondent's assertion on page 23, as demonstrated at trial, Mosley's testimony regarding Wright's role in disposing of the property changed dramatically. Trial Transcript Volume 45, page 125, 169-178.

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witness against Mr. Wright, Mr. Mosley was crucial to the State's case against Mr. Wright in both the guilt/innocence phase and the punishment phase.

At the very least, Mr. Wright is entitled to a hearing to determine the substance of the proffered carrot to Mr. Mosley regardless of its designation as an offer, arrangement, deal, agreement, or contract. Mr. Wright's attorneys attempted to illicit this information during trial but were shut down by the trial court's claim who claimed that any testimony regarding the arrangement between Mr. Mosley and the State would violate attorney client privilege. Such a contention possesses no legal validity. Mr. Wright requests an evidentiary hearing where he may subpoena the requisite testimony regarding the Mosley offer to support his claim of factual innocence.

II.

THE STATE SUPPRESSED EVIDENCE OF A MATERIAL EXCULPATORY WITNESS, JERRY CAUSEY, IN VIOLATION OF BRADY v. MARYLAND.

Mr. Adams is the one and only person to have confessed to the murder of Ms. Vick. He confessed on multiple occasions and to different people. And, he admitted acting alone in the murder, without the aid or assistance of Mr. Wright. Most importantly, he confessed to Daniel McGaughey, a video store clerk. The State of Texas was aware of this confession, had this confession in its possession, and yet provided this confession to the defense prior to trial.

Additionally, Mr. Adams most likely confessed to the murder in a 911 call. The tapes of this 911 call have likewise never been provided to the defense. Mr. Adams further confessed to Charles Neeley, another inmate, during his stay in the Dallas County Jail (evidence discovered after Mr. Wright's trial). And, Mr. Adams confessed to Jerry Causey.

Mr. Wright., on the other hand, has never confessed to murdering Ms. Vick. He has instead consistently and continually maintained his innocence. Jerry Causey could have established that Mr.

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Adams murdered Donna Vick. At the very least, Mr. Causey's testimony would have established that Mr. Adams, not Mr. Wright, was the "ring

leader" - something the jury would certainly have assessed in the punishment phase. Mr. Wright was unable to provide the testimony establishing Mr. Adams's admitted guilt, however, because the State withheld the existence of Mr. Causey and what his testimony would have established.

It is nevertheless clear that the State spoke to Mr. Causey prior to Mr. Wright's trial- this fact is undisputed and set forth in Mr. Causey's affidavit.[4] The State then called Jerry Causey as a key witness against Mr. Adams when the State tried Mr. Adams for the murder of Ms. Vick. The State obviously found Mr. Causey's testimony highly relevant to establish the guilt of Mr. Adams in the murder of Ms. Vick. The testimony of Mr. Causey was, therefore, highly relevant, material exculpatory evidence Mr. Wright was entitled to under the principles of Brady v. Maryland.

III.

THE STATE SUPPRESSED MATERIAL EXCULPATORY EVIDENCE OF DANIEL MCGAUGHEY'S STATEMENT TO THE POLICE IN VIOLATION OF BRADY V. MARYLAND.

Daniel McGaughey would have been a crucial witness for the defense in Mr. Wright's trial. Mr. McGaughey worked at a video rental store. He was approached by Adams one day after the murder of Ms. Vick. Adams asked McGaughey to call 911. The remainder of this vital conversation was never completely revealed to the defense until Mr. Wright's trial was well under way.

The State claims to have lost the 911 tapes which would serve as the best evidence of the substance of this conversation. Furthermore, the State suppressed, until the trial had begun,

[4] The State used the record in the Adams's trial to establish that Mr. Davis, the prosecutor had not spoken with Mr. Causey. This fact does not contradict that someone from the DA's office spoke with Mr. Causey prior to Mr. Wright's trial.

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McGaughey's first statement detailing the substance of regarding the conversation between McGaughey and Adams. The defense would have certainly secured McGaughey's testimony if the prosecution had complied with the mandates of Brady in revealing McGaughey's original statement to police that: "I murdered someone in DeSoto and I can't deal with it. I want to turn myself in."

The State, however, failed to turn over McGaughey's original statement given to the police investigator on the scene.

In withholding this statement, the State made its own value judgment about the relevancy of this testimony - something Brady clearly forbids. The State is under a continuing obligation to supply potentially exculpatory evidence in its possession, to not assess the value of such evidence for the defense. Recognizing the inherent conflict between such State evaluations of evidentiary value for the defense, Brady mandates the prosecution supply the evidence to the defense for its own analysis. This did not occur in Mr. Wright's case. Rather in discovery, prior to the trial, the State gave the defense a statement attributed to Daniel McGaughey that read: "[Mr. Adams] told me there was a murder and he wanted to turn himself in." There is a stark and monumental distinction between the ideas and information these two statements convey. Only the State had both statements.

The statement which the State provided merely suggested that a

murder took place. That isolated statement supported the State's theory of the case that Mr. Wright murdered Ms. Vick in the presence of Mr. Adams and that Mr. Adams was merely a bystander caught in a bad situation. McGaughey's first statement, however, completely contradicts the State's theory of the case, and so, this first statement was not provided to the defense until trial. In that suppressed statement, McGaughey told the police that Mr. Adams admitted he murdered Ms. Vick alone. Nowhere in the

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suppressed statement did Mr. Adams shift the blame to Mr. Wright or suggest a lessened role in the offense. Mr. Adams, in the suppressed statement, unequivocally confessed to murdering Ms. Vick. Nothing can be more exculpatory to a defendant on trial for his life than an unequivocal confession, proffered by a co-defendant.

When the defense team finally saw the McGaughey statement, it sent an investigator to find McGaughey and requested a continuance to secure his testimony. With practically no time to locate McGaughey and no contact information for him, the defense was unable to locate McGaughey for trial. Although the State had been in contact with McGaughey - because the State wanted to use his testimony in Adams' trial- the State would not reveal his whereabouts. The intentional suppression of McGaughey's contact information is, in no uncertain terms, prosecutorial misconduct. Restated, the State compounded the damage done by concealing exculpatory evidence, and further sealed Mr. Wright's fate by concealing an equally important piece of information, McGaughey's location.

Due to the State's delayed revelation of a second statement and based on the importance of McGaughey's testimony, Mr. Wright asked for a continuance that was summarily denied. The State's intentional denial or access to McGaughey's testimony both before and at trial prevented the defense from admitting highly exculpatory evidence, material to the jury's determination of both guilt and punishment. This intentional behavior by the State circumvents Mr. Wright's constitutional guarantees and violates Brady v. Maryland.

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IV.

THE STATE SUPPRESSED MATERIAL EXCULPATORY EVIDENCE OF THE 911 TAPES OF ADAMS' CALL TO POLICE AND DANIEL MCGAUGHEY'S CALL TO THE POLICE IN VIOLATION OF BRADY ~ MARYLAND.

The best evidence corroborating McGaughey's suppressed statement was also withheld and/or destroyed by the State. Specifically, a contemporaneous 911 tape recording was made when McGaughey called the police. The contents of this tape would further support Mr. Wright's claims of innocence. Mr. Wright's defense counsel had continually sought access to this vital evidence.

The State, conveniently, claims to have lost this best evidence of Mr. Wright's innocence.

Defendant respectfully requests a hearing before this court to ascertain the fate of the tapes and whether the contents of the

tapes can be determined. The State should not be permitted such carelessness in a capital murder trial. Nor should such carelessness be ignored or sanctioned.

Defendant deserves a forum in which to conduct discovery into the nature of the tapes' disappearance - whether they were carelessly lost or intentionally destroyed.

v.

THE STATE SUPPRESSED MATERIAL EXCULPATORY EVIDENCE OF THE CONTENTS OF THE BECKLEY SHACK IN VIOLATION OF BRADY V. MARYLAND.

After Mr. Adams initially spoke with police about the murder of Ms. Vick, placing all of the blame for the murder on Mr. Wright, he led police to the implements used to commit the murder evidence the State later used to bolster its case against Mr. Wright. Mr. Adams led the police to the knife used to kill Ms. Vick which he had buried in a field. He further led them to Mr. Mosley's crack house where Ms. Vick's property was exchanged for drugs. And finally, Mr. Adams led them to the Beckley shack, where police found evidence linked to the murder, including plates from Ms.

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Vick's house, knives from Ms. Vick's house, and jeans[5] soaked in the victim's blood. At the Beckley shack, police also found Mr. Wright. It was the State's contention throughout Mr. Wright's trial that Wright was obviously the perpetrator of the murder because the evidence linking him to the murder was found in his shack, the Beckley shack. It was crucial for the State's theory in Wright's case that the blame for the murder fall squarely on Mr. Wright and that the Beckley shack was under Mr. Wright's control, not under Mr. Adams' control. If the defense could prove that Adams resided at the shack and kept his belongings there, the defense could have directly countered the State's case by shifting the blame for the murder to Mr. Adams - the person on whom it belonged.

The state failed to produce to the defense crucial exculpatory evidence that Mr. Adams actually lived in the Beckley shack, and more importantly, kept all of his property there. The State knew Mr. Adams kept his belongings in the shack - investigators uncovered a stack of papers addressed to Mr. Adams, papers such as tax information from the IRS and letters sent to Mr. Adams while he was incarcerated. Those papers were located in the shack near the crucial evidence in the case - the size 32 inch bloody Umen jeans. It was crucial to the defense to establish that the jeans worn by the murderer were not only too small to fit Mr. Wright, but they were also found in the same place where Mr. Adams stored all of his important property. The presence of Mr. Adam's property

[5] The bloody Umen jeans almost conclusively establish that the person wearing the jeans sat on top of Ms. Vick while stabbing her to death. The Umen jeans measured 32 inches in the waist - clearly too small to fit Mr. Wright who was 6' tall and weighed 190 pounds when he was arrested for the murder. Indeed, at that time Mr. Wright wore jeans that measure 36 inches in the waist. The jeans most likely belonged to Mr. Adams who weighed 25 pounds less than Mr. Wright and wore size 32 jeans at the time of his arrest. Habeas counsel has continually requested to inspect the Umen jeans for evidence of Mr. Wright's innocence. The State has continually denied those requests.

at the Beckley shack coupled with the State's intentional failure to turn this property over to the defense suggests the State knew the exculpatory nature of these items. Had Mr. Wright been granted access to these materials, defense counsel could have effectively and convincingly mounted a defense of actual innocence at trial. Instead, only when pressed on the issue of Mr. Adams' property by the defense at trial [6] did the State relent and provide Mr. Wright with the property found in the shack - property that clearly and unmistakably belonged to Mr. Adams. Of course, these materials were given to the defense during its case-in-chief, too late to use them effectively. The intentional withholding of evidence and delayed compliance with constitutional mandates deprived Mr. Wright of any opportunity to mount his defense. Mr. Wright asserted his innocence but the State of Texas intentionally deprived Mr. Wright of the exculpatory evidence which would have proved his assertion. The failure of the State to proffer the exculpatory evidence in its possession prejudiced Mr. Wright's trial and tainted it with the indicia of unreliability. Brady v. Maryland stands as an unfortunate testament that criminal defendants cannot rely on the state to fairly proffer exculpatory evidence in its possession to defendants. Brady v. Maryland forewarns courts that states may, in their zealous quest for law enforcement, place prosecutions above the rights of criminal defendants. Brady thus underscores the fact that the state is not a reliable censor of evidence that may be considered relevant to a criminal defendant. As a result, Brady unequivocally places the task of sifting through exculpatory evidence to assess its usefulness to those most interested in the reliability

[6] The defense pressed the issue of the discovery of any of Mr. Adams' things found in the shack after Detective Pothen misled the jury while on the witness stand, saying he did not know whose property was found at the Beckley shack.

of the evidence - defendants. Because the State of Texas knowingly and intentionally withheld exculpatory evidence from Mr. Wright, Mr. Wright prays that this Court will grant him habeas relief . so that a jury could credibly weigh all the evidence to assess whether Mr. Wright played any role in the murder of Ms. Vick.

VI.

THE STATE KNOWINGLY PRESENTED EVIDENCE IN A FALSE LIGHT IN VIOLATION OF NAPUE V. ILLINOIS WHEN DETECTIVE POTHEN TESTIFIED REGARDING THE CONTENTS OF THE BECKLEY SHACK.

The State, instead of arguing throughout the trial that both Wright and Adams murdered Ms. Vick together, tried to place the blame entirely on Wright. In furtherance of this theory, the State presented false and misleading testimony regarding the discovery of the evidence in the Beckley

shack. During trial, after the State rested its case against Mr. Wright, the State provided the defense with a large pile of

documents belonging to Adams. They contained Adams' name and other identifying information, such as Adams' prison number. These documents, and other property, were found by the State at the Beckley shack. Prior to turning over these documents, however, Detective Pothen testified before the jury that he did not know whose property was found at the shack. When asked directly if the contents of the shack could have been Adams' property, Detective Pothen falsely testified, "I don't know." Defense counsel's questions to Pothen regarding ownership of the items found at the shack came from their client's insistence that Adams inhabited the shack. Mr. Wright knew Adams kept his things there - including papers and a chest of clothing. Prompted by their client, defense counsel tried to elicit this information from Pothen, who was in charge of the investigation of the Beckley shack. Pothen misled the jury because he had found materials clearly marked and addressed to John

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Adams but falsely testified otherwise. The State, which had possession of Adams' documents that were recovered from the Beckley shack, knew Pothen's testimony was false but failed to correct the false impression he had left.

After Pothen testified, counsel for defense demanded that the State turn over all property found in the Beckley shack. After Pothen's testimony and on the day the defense began its case-in-chief, the State provided the defense with the papers from the Beckley shack that were clearly marked with Adams' identifying information. Of course, the items were given to the defense after Pothen testified, too late for the defense to use them to cross-examine Pothen on the ownership and control of the Beckley shack. In permitting Detective Pothen to provide evidence known to be false at the time of its submission, the State violated *Napue v. Illinois*.

VII.

IN DIRECT CONTRAVENTION OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT, THE COURT ADMITTED INTO EVIDENCE THE BLAME SHIFTING "CONFESSION" OF MR. WRIGHT'S CO-DEFENDANT, JOHN ADAMS.

The two lynchpins on which the State relied to make its case against Wright were Mosley's testimony and Adams' statement placing all blame for the murder of Ms. Vick on Wright and painting Adams as an innocent bystander. Mosley's testimony could have been undermined by the defense if the State had disclosed the offer made to Mosley for his testimony. Adams' statement would have then become the central focus of the State's case against Wright. Adams' statement offered a motive, a contemporaneous eyewitness, and the thread that wove the State's entire theory of the case against Wright together.

Adams' statement was nevertheless unreliable hearsay. According to a long parade of Supreme Court cases, Adams' statement was the unreliable, inadmissible "confession" of a co

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defendant, shifting all blame on the other defendant in the case. The only reliable part of Adams' statement, according to the Supreme

Court, was the part in which Adams gave police inculpatory evidence - such as, the fact that the knife used to murder Ms. Vick belonged to Adams and that Adams buried the knife.

On cross-examination, the defense questioned the State's witness regarding Adams' statement that his knife was used to murder Ms. Vick and that Adams buried the knife after the murder. Under well established Supreme Court precedent, these statements are statements against Adams' penal interest and admissible as well-founded exceptions to the hearsay rule. After the defense elicited testimony that Adams confessed to owning and burying the murder weapon, the State attempted to extract the rest of Adams' self-serving statement from its own witness. The defense strongly objected to the admission of Adams' statement because the statement was unreliable hearsay. The State responded that the statement should come into evidence, not as an exception to the hearsay rule, but under Texas' optional completeness rule. The State argued that allowing the jury to hear the perfectly admissible statement as to ownership and disposal of the murder weapon would give the jury the false impression that Adams actually used the knife and murdered Ms. Vick himself. The trial court allowed the rest of Adams' blame shifting statement into evidence under the optional completeness rule, not as an exception to the hearsay rule. Later when the State tried Adams for the murder of Ms. Vick, the State vigorously objected to the admissibility of the same statement by Adams to the police. The State argued, much like the defense argued in Wright's trial, that the statement was unreliable self-serving hearsay. The same

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trial judge who allowed the statement into evidence in Wright's trial, denied its admission in Adams' trial. The Texas Court of Criminal Appeals upheld Wright's conviction without a hearing. In its opinion, the court reasoned that the trial court correctly allowed the introduction of Adams' statement in Wright's trial under Texas' optional completeness rule. The State now argues that Wright is precluded from challenging the admission of Adams' statement because the state court relied on the adequate and independent state law grounds of the contemporaneous objection rule. However, in Wright's trial his attorneys timely and adamantly objected to the admission of Adams' hearsay statement. The independent state law ground the Court of Criminal Appeals relied upon was the rule of optional completeness. However, this Court cannot allow the rule of optional completeness to trump Wright's Sixth Amendment right to confront the witnesses against him. The only exceptions to the Sixth Amendment right of confrontation, as set forth by the Supreme Court, are those hearsay exceptions that are firmly rooted in this nation's jurisprudence. The unique rule of optional completeness which is not followed by even a significant minority of states, cannot trump the Sixth Amendment to the Constitution. The trial court's admission of a blame shifting statement of a co-defendant flies in the face of a long history of Sixth Amendment jurisprudence.

VIII.

MR. WRIGHT'S TRIAL COUNSEL FAILED TO PROVIDE ADEQUATE ASSISTANCE OF COUNSEL.

A.

Confrontation Clause Objection

As noted above, the Adams' Statement was the cornerstone of the prosecution's case.

Notwithstanding trial objections, the trial court admitted the statement. This decision was the subject of appellate error as well as a ground for post-conviction relief in the State courts. The respondent

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does not deny that this issue has been preserved for review. Rather, respondent's contention is that the basis for the court's decision has been determined and further inquiry is thus foreclosed. The entire basis for the claim that the decision was reasonable is the trial court's speculative finding that trial counsel had made a strategic decision not to object on confrontation clause grounds. This argument is specious. Counsel attempted a variety of objections which gainsays any strategy to allow admission of the statement. No reasonable reading of the record permits an inference that the defense sought to permit Adams' statement before the jury. Moreover, the argument overlooks the affidavits attached to the instant application wherein trial counsel admit that they simply failed to make proper objection by mistake and error and had no intention to allow the statement into evidence. Therefore, the determination by the State court regarding reasonableness and strategy are clearly now exposed as baseless speculation contrary to the factual record. If further evidence is necessary, a hearing on the matter can establish once and for all that applicant has demonstrated a deficient performance in this regard.

The respondent then goes on to argue that admission of the statement was harmless because the State did not need Adams' statement to tie applicant to the crime:

The mercurial nature of the respondent's position can best be demonstrated by juxtaposing two portions of the answer, to wit: 'Citing DNA evidence, fingerprint testimony, eyewitness accounts and corroborative physical evidence. As set forth throughout the application, none of this evidence reveals any role applicant Wright may have had in the offense save the ridiculous fingerprint comparison of Mr. Cron.

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"By having detective Tripped testify to Adams' statement about his knife out of context, the defense was able to elicit incomplete and therefore misleading , testimony (that Adams' knife was used in the killing) in front of the jury..." Response page 57

"... Wright cannot demonstrate that he was prejudiced by the admission of Adams' selfserving comment that Wright used Adams' knife to kill Vick, particularly when the State refuted the same allegation and did not need to link Adams' knife to obtain a conviction." Response page 66

Either Adams used Adams' knife, Adams and Wright both participated in the murder, the cross-examination of Detective Tripped did not leave a false impression regarding Adams' use of the knife and

Adams' statement was therefore inadmissible, or Wright acted alone. It cannot be both ways. Aside from a brief statement in opening argument and a statement in closing argument (that was the subject of objection), the State relied upon the theory that Wright was the sole actor. Indeed, the respondent concedes that the State's theory of the case as demonstrated in the Adams' confession, was that Wright stabbed Vick while Adams merely watched, although Adams helped dispose of her property. Response at-page 55.8 The rest of the State's case, aside from Cron's fingerprint testimony, merely demonstrates that Wright was living in the victim's home, and Wright helped dispose of the victim's property. Adams' statement was the cornerstone of the State's case, was the only explanation of Wright' s role in the offense, and thus, was inherently harmful. Even the respondent now concedes that applicant was merely a co-actor in the homicide, not the sole actor. 8 Even this characterization by the respondent is not fully accurate. Adams denies even assisting in loading the property, putting all the blame on Wright.

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Response at page 28.

Courts have held that one's role in the offense is important mitigating evidence to be considered at punishment. See Rape v. Wood, 93 F.3d 1434-1441 (9th Cir. 1996).

B.

Failure to Locate McGaughey

As respondent concedes, the issue of trial counsel's failure to locate McGaughey has been preserved for review. The issues are whether counsel was diligent in attempting to locate McGaughey and whether McGaughey's testimony was material.

As to the first issue, the respondent relies upon the trial court's finding that the efforts made to locate McGaughey after the trial commenced constituted due diligence. This finding of fact is manifestly unreasonable. As noted above, Adams apparently made a 911 call in which he confessed to the murder.[9] In the absence of the 911 tape, which the State claims to have lost, McGaughey's account of the confession is the best evidence of Adams' culpability.

Evidence that someone other than applicant Wright committed the murder is indisputably material, as it goes to both actual innocence and applicant Wright's role in the offense. However, the defense team did nothing to locate McGaughey until after the trial had commenced. Even though McGaughey was in town and available to testify, he was not discovered. The trial court's finding of due diligence is premised upon the assumption that, given the discovery materials provided the defense, a reasonable attorney could not have discerned the necessity for procuring McGaughey's presence. As previously noted, if that assumption is correct, it underscores appellant's contention that the State's failure to provide necessary discovery materials concerning McGaughey's statement constitute a Brady violation. Once again, the respondent is caught riding two horses simultaneously, to wit:

[9] The fact that Adams may have made a 911 call, and not merely McGaughey, was not disclosed until trial.

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"...the defense had ample notice and time to investigate McGaughey as a potential culpatory witness. The State filed a written statement from McGaughey with the court on September 29, 1997-2 months before Wright's trial. McGaughey's statement detailed that Adams had told McGaughey that there was a murder and he wanted to turn himself in." Response at page 30.

"Finding 357: The Court...finds (and the record reflects) that once the defense became aware of the possible significance of McGaughey's testimony, defense counsel responded diligently by immediately sending out an investigator.... As the State court findings reflect, defense counsel did attempt to locate McGaughey. Thus, defense counsel's failure to present McGaughey as a witness was not due to a failure to investigate..." Response at page 69.

Either the defense knew about McGaughey two months in advance of trial and did nothing, which is not diligent by the standard of even the laziest of attorneys, or the State hid McGaughey's significance until trial had commenced. Plainly, the trial court's finding of diligence is patently unreasonable.

The response then goes on to argue that McGaughey's testimony was not material primarily because both Adams and Wright committed the murder. As noted above, and throughout this application and response, the State's theory of prosecution was that Wright was the sole actor. Since the respondent's assertion of harmlessness is contrary to the theory of prosecution, it should be wholly disregarded. Harm is manifest if Adams was the perpetrator and that evidence was not adduced at trial. Harm is also established by denying the jury the opportunity to correctly assess applicant Wright's role in the offense.

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C.

The Umen Jeans

At the State level counsel complained of the defense teams' failure to prepare and present evidence. The primary failing is that the defense failed to establish that the blood soaked Umen jeans had to have been worn by Adams because they were too small for applicant Wright. The respondent contends that, because Adams was arrested wearing a different set of jeans, and because several of the jeans had gold paint on them, the jeans must have belonged to Wright. That response is a prototypical "straw man" fallacy. Contrary to respondent's position, the "fit of the jeans" is not a matter of relative credibility, it's an objective fact. Either the jeans could fit applicant Wright or they couldn't. Either the jeans fit Adams alone or fit both he and applicant Wright. It doesn't matter that someone in the shack owned additional pants- - obviously more than two pair were found. It also doesn't matter that gold flecks were found on pairs of dirty pants found in a burned-out shack. If Wright could not fit into the jeans, he wasn't the person who wore them to commit the murder. The respondent does not refute this contention, choosing to argue around it.

Having established materiality, the sole remaining issue is the existence of a valid strategy for not demonstrating who fit the jeans. As noted by respondent, the defense attempted to utilize the

strategy of showing that the jeans were too small for applicant Wright by arguing that assertion to the jury. Unfortunately, since no evidence in support of that argument was adduced at trial, the argument served only to confuse the jury. The notes sent by the jury in deliberation now establish that 1) "who wore the jeans" was an essential trial issue and; 2) that the lack of evidence caused the jury to find against applicant Wright, thus underscoring the inadequacy of the defense presentation.

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Further, the affidavit from defense counsel establishes his belief that the jeans did not fit Wright. In fact, had the defense been aware, prior to the near conclusion of the trial, that Adams had property in the Beckley shack, the defense would have pursued that theory.

There is no reasonable explanation, aside from inadequate investigation and discovery, to fail to make the appropriate demonstration for the jury. Counsel's performance was deficient and these findings can be buttressed at a further hearing.

D.

Failure to present mitigation evidence.

As with other contentions regarding applicant's claims of ineffectiveness, this issue was addressed in the State habeas proceedings and thus is preserved for review. The respondent does not take issue with the general notion that failure to present mitigating evidence in the punishment phase of a death penalty trial is an inexcusable trial strategy. Nor does the respondent take issue with the overwhelming authority that the failure to prepare and investigate possible mitigating evidence is a necessary pre-requisite to an informed decision about the type and quantity of mitigating evidence to present at trial.

Instead, the response is limited to a contention that the type of mitigating evidence available is not of record. While the trial court made findings that counsel had contacted and interviewed witnesses, the trial court's findings are primarily anchored in a belief that a punishment investigation had been conducted. These findings are patently unreasonable. As set out at length in the original application, trial counsel made the court painfully aware that there had been no review of any of the punishment material and no attempt to interview the State's witnesses until moments before the sentencing phase of trial was to commence. Now, trial counsel's affidavits conclusively establish that they had not reviewed any of the police reports prior to trial, had

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interviewed none of the witnesses and in fact had not anticipated that any such evidence would be presented.

Since trial counsel was admittedly unaware of the types of mitigating evidence available, the decision not to present any is not reasonable and is clearly contrary to well-established precedent. Therefore, the trial court's findings are patently unreasonable.

Further, this response entirely ignores the punishment affidavits

and arguments set out in applicant's motion, pages 100-103. Substance abuse, positive character attributes, work history, all provide a context to applicant's life in contrast to the vacuum at trial. But most importantly, and as noted throughout, the jury was deprived of the most significant mitigation evidence available that applicant's role in the offense was not that of sole or primary actor. As noted above, this mitigation evidence alone would preclude imposition of the death penalty by a reasonable finder of fact.

E.

Fingerprint testimony

The only physical evidence that arguably ties the applicant to the commission of the murder, as opposed to his mere presence in the house before and after the event, is the dubious print comparison testimony given by Detective Cron.[10] Contrary to the apparent contention of respondent that the applicant is attacking fingerprint testimony generally, applicant's contention is that Cron's testimony is not competent evidence from a fingerprint expert. Cron's conclusions are fanciful and incapable of corroboration by other experts. Contrary to the respondent's contention, Daubert stands for the proposition that certain minimal scientific standards must be met before expert testimony can be presented. The fact that Cron was subjected to cross-examination begs the question

[10] Cron was able to compare a partial fingerprint found on a pillowcase. Although the response indicates that a comparable palm print was found (page 23) that assertion is untrue.

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- - his opinions should never have made it through the gate to begin with. The response is notably silent in addressing the validity of Cron's opinion.

Cron's testimony also serves as the basis for applicant's claim of false light testimony under Napue. The respondent claims that Cron's testimony is not false, just impeachable. However, as stated above, that opinion completely ignores applicant's Daubert argument that the opinion is so incredible as to constitute junk science. To the extent that the respondent faults applicant for not demonstrating further the falsity of the evidence, a hearing is required. At the hearing, and in accordance with the affidavits in support of the application, the baselessness of Cron's opinion will be proven to the satisfaction of all.

As to the issue of harm, again the respondent plays a shell game. In addressing Adams' statement and its impact on the defense, the respondent says in effect "we don't need it, we have Cron's testimony". Response at page 66. Now in addressing Cron's testimony, the respondent notes "we don't need it, we have the other evidence (Adams' statement)." Response at page 38. The truth of the matter is that the applicant was convicted on Adams' statement, as supported by Cron's absurd opinion. In the absence of either, the prosecution's case is effectively dismantled. In the absence of both, it withers away to nothing at all.

IX.

Cumulative Error.

The State's procedural shell game and its continual switch of theories is intended to further one purpose - to obscure the fact that Mr. Wright is innocent of capital murder. The State has

previously shut down Mr. Wright at every opportunity he has had to present evidence of his factual innocence. Pre-trial, the State withheld significant and material exculpatory evidence: (1) evidence

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that Mosley was offered immunity in exchange for his testimony in Wright's case; (2) evidence of the existence of a witness, Jerry Causey, who would testify that Adams confessed to murdering "some bitch in DeSoto" as he exchanged her property for crack; (3) evidence of the existence of a confession by Adams to Daniel McGaughey in which Adams said, "I murdered someone in DeSoto and I can't deal with it. I want to turn myself in;" and (4) evidence that the jeans which had to have been worn by the person who murdered Ms. Vick were found next to Adams' important papers in the Beckley shack. At trial the State (1) withheld information regarding the location of McGaughey; (2) introduced Adams' statement shifting all the blame for the murder on Mr. Wright - evidence the State knew was unreliable and subsequently objected to in Adams' case; and (3) attempted to tie Wright to the crime scene by the use of a "fingerprint" expert who found a comparison that no other specialist could confirm.

Unfortunately, Wright's own trial counsel was complicit in the denial of due process. Trial counsel did not investigate the crime scene evidence from the Beckley shack. This lack of preparation caused the defense to initially pursue the self-defeating strategy that all the physical evidence belonged to Wright alone, a strategy which was not only abandoned but reversed mid-trial.

The defense failed to properly object to the fingerprint evidence, which allowed the prosecution to invent a crime-scene tie-in out of whole cloth. This fingerprint comparison is the only physical evidence tying Wright to the commission of the murder. Worst, it appears that the assailant wore a pair of jeans much too small for Wright to don, yet this most crucial evidence was belatedly mentioned only in final argument and without evidentiary support, because the defense had never inspected the physical evidence before trial. Certainly, the prosecution hid evidence, as stated above,

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but the defense also failed to follow up on leads presented in police reports, leads which might have still led to the discovery of witness McGaughey and the missing 911 tape.

Finally, the defense apparently decided to ignore the punishment phase of trial altogether. The defense interviewed no prosecution punishment witnesses at all and did not even read the punishment evidence until the commencement of that phase of the trial. The defense called no witnesses and put on no mitigation evidence whatsoever. The result was inevitable and predictable--the jury was given no alternative to the death penalty.

Now, in consideration of post conviction relief, the respondent engages in a smoke and mirrors analysis worthy of Penn and Teller, piece-mealing the evidence and trial errors--always insisting that each error is insignificant by itself. If the focus is on Mosley's store-bought testimony, the respondent brings up "other evidence"--

the Adams' statement, the Cron fingerprint comparison and the bloody jeans. If the focus is on the Adams' statement, the reader is asked to consider instead the Mosley's account, Cron and the jeans. If the focus is on Cron and his lack of science, its "look at Adams, Mosley, and the jeans." Instead of addressing the merits of the fact that the jeans don't fit Wright and thus exculpate him, Adams, Mosley, and Cron are substituted. Only by taking the evidence as a whole, examined in light of the complete lack to effective trial strategy and presentation, each deficient piece leaning weakly on the others, is the reviewing court able to ascertain that the cumulative effect of the evidence was to convict someone with a strong claim of factual innocence. Worse, the totality of the record shows that Wright was given the death sentence as for a role even the state concedes he did not have, that of sole actor.

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If the jeans do not fit Wright (and they don't) and if the fingerprint is not his (and no honest person can say that it is), if Mosley was paid to implicate Wright (and he clearly was) and if Adams' statement is a self-serving blame-shifting attempt to save his own neck at Wright's expense (which the State maintained it was at Adams' trial) than no one can have confidence in a verdict that Wright committed the homicide. Even if these circumstances coalesce to cast some blame on Wright, no rational finder of fact, given what the record now shows concerning the merits of the evidence against Wright, would ever impose the death penalty .

This case now appears to be a classic miscarriage of justice. Wright was framed by Adams, in conjunction with law enforcement, put to trial by ambush, and provided with attorneys who did not prepare. They gave him a self-defeating strategy at the first phase of trial and no strategy at all in the second phase. In general, the Respondent is not contending that Wright received a fair trial. Instead, the Respondent maintains that since his attorneys at trial did not make an effective presentation and since his state writ attorney made a travesty of the post-conviction writ process, it should be okay to execute Wright. The Respondent seems to acknowledge that Wright had valid arguments, he just didn't have any attorney who could present them properly. But let's not take that out on Wright. Schlup stands for the proposition that, when the record as a whole raises substantial issues of innocence, procedural bars must give way to justice. All of Wright's claims merit consideration.

PRAYER

Wherefore, premises considered, applicant respectfully prays that this court conduct an evidentiary hearing on the disputed matters of fact raised in the writ including, but not limited to, the

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State's use of inconsistent theories of prosecution, the failure to disclose Brady evidence, including witnesses Causey and McGaughey, the factual basis, if any, for Cron's fingerprint testimony,

whether applicant is capable of wearing the jeans worn by the murderer, the existence and circumstances surrounding the offer made to witness Mosley in return for his testimony, the disposition of the original 911 tape, defense counsel's effort to investigate ownership of the shack and its contents, and defense counsel's efforts to investigate and present mitigating evidence. After hearing, applicant prays that this writ be in all things granted and that the underlying conviction be set aside.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of Applicant's Response to Respondent's Motion for Summary Judgment was forwarded by certified mail to Deni S. Garcia, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548, on this 11 day of February, 2003..

BRUCE ANTON

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