NO.____________________

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2007

GREGORY WRIGHT,
Petitioner

V.

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent

MOTION TO PROCEED *IN FORMA PAUPERIS*

Petitioner Gregory Wright, an indigent, asks this Court for leave to file the attached Petition for Writ of Certiorari without costs and to proceed *in forma pauperis* in this Court. Petitioner has been granted leave to so proceed in both the United States District Court and the United States Court of Appeals. Counsel for Petitioner was appointed by the district court under 21 U.S.C. §848(q)(4)(b).

Respectfully Submitted,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

1. **Whether the Fifth Circuit Court of Appeals correctly denied Wright's petition for a certificate of appealability where Wright made a substantial showing of the denial of a constitutional right and the Court of Appeals erroneously assessed Wright's claims on the merits rather than under the deferential screening requirements of 28 U.S.C. §2253.**

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TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner Gregory Edward Wright asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINIONS BELOW

The recommendations of the State district court judge for the Criminal District Court No. 3 of Dallas County, Texas are attached, in pertinent part to this petition as Appendix A. The order adopting these findings by the Court of Criminal Appeals is attached hereto as Appendix B. The findings, conclusions and recommendations of the United States Magistrate Judge are attached, in pertinent part, as Appendix C. The opinion of the district court adopting the findings of the magistrate judge is attached hereto as Appendix D. The opinion of the District Court denying Wright's Application for Certificate of Appealability is attached as Appendix E. The opinion denying Wright's Application for Certificate of Appealability is attached as Appendix F. The order denying panel rehearing is attached hereto as Appendix G.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion on November 17, 2006. The Court of Appeals denied Mr. Wright's timely petition for panel rehearing on December 19, 2006. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1254, Mr. Wright having asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

LEGAL AUTHORITY

1. This case involves the proper application of 28 U.S.C.A. § 2253 which provides in pertinent part:

> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; . . .
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

2. The underlying claim for relief is based upon U.S. CONST. Amend VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

WHY THIS CASE IS AN IDEAL VEHICLE TO ENSURE THE FIFTH CIRCUIT'S COMPLIANCE WITH THE STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY PURSUANT TO *MILLER-EL VS. COCKRELL*

Daniel Quarterman was named director of the Texas Department of Criminal Justice in approximately June 2006. Since that time, of the twenty-six (26) requests that death row litigants have made for certificates of appealability, only four (4) have been granted according to the Fifth Circuit's website. Since *Miller-El vs. Cockrell*,

the Fifth Circuit continues to resolve certificates of appealability on the merits of the claims presented instead of the deferential screening requirements this Court has mandated. Applicant Gregory Wright's case is a text book example of the results of this inappropriately heightened review.

STATEMENT OF THE CASE

Overview

Applicant, Gregory Edward Wright, was convicted of capital murder for the death of Donna Duncan Vick while in the course of robbing her. The majority of the evidence used to single out Wright as her assailant is circumstantial, as set out below. This circumstantial evidence is not sufficiently compelling to justify either a verdict of "guilty" or the imposition of the death penalty. Instead, the foundation of the death penalty prosecution was the statement of his co-defendant John Wade Adams. The State tried Wright and Adams separately. Wright was tried and convicted first. Adams was later convicted of Vick's murder and also assessed a death sentence, but on an altogether different theory of complicity. In Wright's trial, Adams's custodial statement, which placed full blame on Wright, was erroneously admitted solely because Wright's counsel failed to make a timely and proper objection. The deficiency of trial counsel in this regard is not seriously contested. Rather, the issue is the extent of prejudice to Wright's conviction, as well as his sentence, caused by

the wrongful admission of his co-defendant's out-of-court hearsay statement. Wright strenuously asserts that no reviewing court has correctly characterized the prosecution's theory presented at trial, nor the evidence mustered to support that theory. Wright further claims that an inappropriate harsh standard of review was used to deny Wright an appeal. A detailed discussion of the facts presented at trial is necessary to evaluate these claims.

Wright's Relationship to Vick

Ms. Vick and Wright had a friendly relationship prior to her death. (R45.52, 96-98) Vick, a "street minister," often ministered to the homeless in the Dallas area. (R43.134, 144) In the week prior to her death, Vick invited Wright to stay in her home. (R45.98) Wright performed household duties and yard work in return for room and board. (R45.62, 98) On the night Vick was murdered, Wright was seen with Vick at the VFW club, (R45. 58-65, 95) where they had drinks and socialized. (R45.58-65)

Enter John Adams

Wright also associated with a man named John Adams. They met on the street in Dallas shortly after Adams was paroled from the penitentiary. Adams had not met Vick before that evening and had no prior access to her property. (Statement of

Adams, Appellant's record excerpts, Exhibit 2) Although accounts differ, at some point on March 20, 1997, Wright met with Adams and took him to Vick's home.

The Murder

Vick was murdered that evening. She was found in her bed, lying face up on her back. (R45.206) She had stab wounds to her upper body and her throat was slit. (R45.93, 109) She bled to death as a result of approximately eight (8) stab wounds to her neck and torso. Forensic expert Tom Bevel opined that all eight wounds on Vick's body were consistent with a *single* individual straddling her and attacking her with a knife. (R48.32-33)

The Murder is Reported

At approximately 7:30 P.M. the next day, Saturday, March 22, 1997, Adams contacted the police and informed them that he had been involved in a murder, that he could not live with himself, and that he wanted to turn himself in. (R53. Defendant's Ex. 2)

Evidence Uncovered as a Result of Adams's Statements

A. Vick's Car

Adams led the police to the abandoned car, a white Chrysler New Yorker registered to Vick. (R45.193-94) When the car was inventoried, detectives found Adams's wallet, prison identification, and parole papers. (R46.135) Adams's

fingerprints were found on the exterior side of the driver's window. (46.171) A cigarette containing Adams's DNA was found on the driver's side floorboard of the car. Vick's purse, wallet, checkbook, and a check dated March 20, 1997, were found inside the car's trunk. (R46.137) Investigators also found two drops of blood in the car, one on the steering wheel and one on the glove compartment. (R48.136)

B. Vick's House

After inspecting the car, the police inspected Vick's residence. (R45.194-96) Investigators found a gym bag filled with clothes and toiletries and a cardboard sign used for panhandling. (R46.121-23) Wright's fingerprint was found on a Dr. Pepper bottle in the kitchen and a drop of Wright's blood was found on a small hand towel from the bathroom. (R46.129, 177-78)

C. Fingerprint

One of only two pieces of physical evidence allegedly tying Wright to Vick's body was a partial bloody fingerprint found on a pillowcase that covered Vick's body. (R47.80) The blood was Vick's blood. One State's witness, to the exclusion of all other experts, conjectured that the print was Wright's. (R46.73-80) Two other experts - Dallas County Sheriff's deputies who worked with him - denied that the print was sufficiently detailed to provide a basis for any comparison. (R47.76-78)

D. The Beckley Shack

The Police then searched the shack where Adams and Wright stayed. (R46.29-30) The police uncovered several pairs of jeans. (R46.29) Two pairs of the jeans had traces of blood that could be linked to Adams. The jeans were found in a trunk inside the filthy, dirty shack. (R47. 25,26) Paint cans were everywhere. (R47.89) All of the jeans found in the shack had paint on them. (46.37-39) The State also found knives and a knife block that belonged to Vick in the shack and just outside the shack. (R46.30, 33, 43-44) One of the knives had traces of Vick's blood under its handle. (R48.13)

E. The Umen Jeans

One pair of jeans found in the shack - the Umen jeans - had blood-soaked stains on the crotch and leg area. (R48.30-32) These jeans were the linchpin of the prosecution. These were the jeans that the assailant wore as he straddled Vick and delivered the fatal wounds. Through DNA testing, specifically RFLP testing (R47.137, 146), the blood on the Umen jeans, Exhibit 33, was determined to belong to Vick. (R47.148)[1]

---

[1] As of this writing, the jeans were not otherwise subjected to testing. (R48.136)

The person wearing those jeans (R48.146), the State argued, sat on top of Vick and stabbed her to death. (R44.76) Although the police could not say to whom the jeans belonged (R.46.51), the State claimed that the Umen jeans had paint flecks on them, and that since Wright sniffed paint, the jeans were his. (R49.55-57)

F. Evidence found at Llewelyn Mosley's house

Adams finally led police to a reputed "crack house" in Dallas, the home of Llewelyn Mosley. (R46.47) On Mosley's property, Adams led the police to a knife that belonged to him (R46.97) that contained Vick's blood. The police found Vick's property inside the home. (R46.49-54) Several witnesses observed Wright with Adams in Vick's car at the home after the murder. (R45.113-114)

Adams's Statement

As set out above, the evidence that Wright was the assailant is highly problematic. Indeed, as the State conceded in final argument, (R49.50) the evidence aside from Adams's statement is circumstantial. While Wright was undisputedly linked to Vick and Adams, the evidence is mostly probative of party or accessory guilt, not guilt as the sole assailant as the State argued. Adams's statement is not so ambiguous. It goes well beyond a direct statement that he saw Wright murder the deceased. Rather, it gives a detailed and specific chronology. It details a gruesome account in which Vick screamed and hollered for help while Wright repeatedly

stabbed her and then acquired a second knife to finish her off. The statement suggests that Wright dispassionately ordered Adams to aid him and also that Adams took no part in the planning or execution of the murder. The economic motive for the murder was strictly Wright's. (R45.234)

None of these details are corroborated elsewhere directly or by inference. Nor are they corroborated through physical evidence or other witnesses.

REASON THE WRIT SHOULD BE GRANTED

The Fifth Circuit Court of Appeals incorrectly denied Wright's petition for a certificate of appealability where Wright made a substantial showing of the denial of a constitutional right and the Court of Appeals erroneously assessed Wright's claims on the merits rather than under the deferential screening requirements of 28 U.S.C. §2253.

Wright's claim for relief, (claim 6b in his state writ) was that he received ineffective assistance of trial counsel when trial counsel failed to properly object to the admission and subsequent use of Adams's out-of-court statement.

How the Issue was Decided Below

The state habeas court findings, adopted by the Court of Criminal Appeals and appended hereto, consist of forty-seven (47) findings that the failure to object did not constitute deficient performance under *Strickland v. Washington* 466 U.S. 668 (1984). A single finding addressed the prejudice prong - finding 312: "Similarly, the Court concludes that Applicant was not prejudiced by the fact that his trial counsel did not

object that the testimony of Officers Rivera and Quinn and Detective Trippel violated the confrontation clause." (Clerk's R1.215)

The federal magistrate judge found that Appellant's argument concerning the statement's inadmissibility possessed credence and cited *Lilly v. Virgina* 527 U.S. 116(1999). The magistrate did not refer to or otherwise adopt the state court findings on the first prong of *Strickland.* Instead, the magistrate found that prejudice could not be shown because of other evidence in the record establishing Wright's guilt including:

(1) Wright was living in and arrested at a shack that contained jeans and a knife with Vick's blood on them inside and a knife with her blood outside nearby;

(2) Like the clothes Wright was wearing when arrested, the jeans with Vick's blood on them also had gold paint on them;

(3) Wright's blood was on the steering wheel and dashboard of Vick's car;

(4) Wright was seen in Vick's car the same morning of the murder, trading her belongings for crack cocaine; and

(5) Wright's bloody fingerprint was found near Vick's body.

The magistrate emphasized that the prosecutor argued that Adams and Wright acted together in the murder. (Magistrate's opinion at 41-42)

The district court adopted the magistrate's findings *in toto*, and denied Wright's request for a COA for the reasons set out in the magistrate's findings. The Fifth Circuit Court of Appeals also denied Wright's request for a COA. The Court of Appeals noted that the district court's denial of relief related only to the second prong of the *Strickland* test. In finding that Wright had not even met the less rigorous standard for granting a COA, the Fifth Circuit cited the "overwhelming" evidence of Wright's guilt, including:

(1) Wright's bloody fingerprint was found near Vick's body;

(2) Wright's blood was found on a towel in Vick's home;

(3) Wright was seen in Vick's car the same morning of the murder, trading her belongings for crack cocaine;

(4) Wright's blood was on the steering wheel and dashboard of Vick's car;

(5) Like the clothes Wright was wearing when arrested, the jeans with Vick's blood on them also had gold paint on them;

(6) Wright was living in and arrested at a shack that contained jeans and a knife with Vick's blood on them inside and a knife with her blood outside nearby; and

(7) Wright was known to inhale paint.

The Fifth Circuit also emphasized that the prosecution did not rely on Adams's statement in final argument.

Certificate of Appealability –The Legal Standard

To obtain a certificate of appealability, a habeas petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253. This is an apparent codification of the standard previously announced in *Barefoot v. Estelle*, 463 U.S. 890, 893 (1983). In *Barefoot*, this Court stated that to obtain an appeal under the former statute, a petitioner must present a substantial showing of the denial of a federal right. The Court elaborated further:

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

Id. at n.4 (citations omitted). This pre-AEDPA language was reiterated and reinforced in *Slack v. McDaniel*, 529 U.S. 473 (2000), and, more recently, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). In *Slack*, this Court reiterated that "[w]here a district court has rejected the [habeas petitioner's] constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that

reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484.

Thus, the role of a reviewing court during the certificate of appealability process is *not* to assess the claim's merits. Rather, the court of appeals *should limit its examination to a threshold inquiry* into the underlying merits of his claim. *Miller-El*, 537 U.S. at 327 (emphasis added). This Court expounded on the screening role of a court under §2253 as follows:

> The COA determination under §2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether the resolution was debatable amongst 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 of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.*

Id. at 336 (emphasis added).

In this fashion, the screening function of section 2253's prohibits an appellate court from considering, and ruling on, the merits of a habeas petition when the petition is presented as a COA. *Id.* at 342 (reminding that the COA determination is a separate proceeding, one distinct from the underlying merits).

Furthermore, doubts about whether to issue a COA should be resolved in favor of the appellant. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997); *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir.), *cert. denied*, 498 U.S. 1128 (1991). In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate. *Barefoot,* 463 U.S. at 893.

Wright has made a substantial showing that he was deprived of the effective assistance of counsel under the Sixth Amendment because Adams' statement was prejudicial to both the verdict that Wright was the sole perpetrator and to the assessment of the death penalty.

Contrary to the opinions below, Wright was not prosecuted as murdering Vick in conjunction with Adams, he was tried as the sole assailant. Further, the evidence marshaled by the reviewing courts does not unmistakably point to Wright as the sole assailant. To the contrary, the cited factors demonstrate Wright's role as an accessory, a theory not permitted by the court's charge.

The Prosecution Theory–Wright was the Lone Assailant

A. The Indictment

Wright was indicted for the offense of intentionally causing the death of the Vick. Although the indictment does not specifically state that Wright was guilty as a party to the offense, Texas state procedural rules, TEX. PENAL CODE § 7.02(b), allow the court to submit the issue of guilt as a party to the jury in the court's charge if the

evidence raises the issue that a defendant was guilty only of aiding and abetting the murder. *McCuin v. State*, 505 S.W.2d 827, 830 (Tex. Crim. App.1974).

B. The Jury Instructions

At the conclusion of the guilt/innocence phase of trial, the jury was instructed that Wright was allegedly the *sole perpetrator*. A parties charge which would have allowed the jury to convict Wright as an aider or abettor was denied. The jury was, however, instructed that Adams was to be considered an accomplice. (Clerk's R1.259) Despite the State's attempt to argue the parties theory in closing, (R49.10, 11) the trial court sustained objections to the State's arguments because the court found no evidence to support a parties charge. That is, the trial court was convinced that there was no evidence in the record to sustain a finding that Wright had a lesser role in the murder than as the principle. Under this sole actor charge, the jury was never able to weigh Wright's role in the crime as anything other than a primary actor - in either phase.

C. The Arguments

Referencing the forensic expert's testimony, the State argued that Wright was the *sole perpetrator*. Not just a principal, Wright was portrayed in final summation as the wearer of the Umen jeans - the *one person* who straddled Vick and delivered all eight fatal wounds. The theme that Wright alone did the stabbing was repeated

throughout the State's closing arguments. (R49.57) That theme belies the Fifth Circuit's opinion assertion that the prosecution did not rely on Adams's statement in its summation.

When the State in final argument talked about Wright as the coldest blooded killer imaginable, the prosecutor was merely echoing Adams's improperly admitted and incontestable statement. (R49.47-48) When the State argued that it was Wright's idea to murder for crack, he was simply parroting Adams's statement. (R49.54) "We've got to prove to you that this individual right over here, Gregory Edward Wright, is the individual who committed the murder. ... This individual got on the bed and literally straddled that woman ... [and] repeatedly stabbed and stabbed and stabbed again." (R49.52) The prosecution went on to argue that Wright alone was the person that Vick struggled with. (R49.52) The prosecution incorrectly asserted that the property was found in a shack controlled by Wright alone (R49.54) and that Wright was the one who wielded the knife. (R49.55) In short, the State's final arguments at guilt/innocence left no suggestion that Adams helped perpetrate the murder. Blame was placed solely and exclusively upon the Wright.

The arguments cited by the magistrate are not to the contrary. The State argued that Wright chose "to commit murder" with Adams and that the State intended to try

Adams for his role, statements which necessarily include party liability and do not cast Adams as a principal, a knife wielder. (R49.48,57)

In sum, Wright was tried as the sole knife wielder with Adams playing an accessory role. The State never argued that Adams wielded a knife.

The evidence that Wright is the sole perpetrator is not overwhelming.

As noted above, the reviewing courts referred to a constellation of factors that, allegedly, prove Wright was the knife-wielder. The detail paid in refusing Wright's claim butresses Wright's contention that, instead of assessing whether Wright has made an argument sufficient to show a debatable issue, the Fifth Circuit has adjudicated the merits of Wright's prejudice claim. Moreover, the factual determinations made underscore the debatable nature of the evidence.

The fact that Wright participated in the disposal of the victim's property ties him to the offense as an accessory after the fact, as it does Adams, who also sold Vick's property.(R45.113-114) Likewise, the recovery of bloodstained items and weapons from the shack that Wright shared with his co-defendant, John Wade Adams, ties both Wright and Adams to the victim's property. Neither of these factors makes it probable that Wright was the sole assailant. Previous courts erroneously termed the shack the "Wright Shack" when the evidence confirms that both Adams and Wright lived and stored property there. (R46.29-30)

The most damning pieces of evidence suggesting that Wright actually participated in the stabbing are threefold. First, is the partial bloody fingerprint. This evidence, based upon the opinion of Cron, was thoroughly impeached. Two other experts denied that the print was sufficiently detailed to be the basis of any comparison. (R47.76-78) While a rational finder of fact could have used Cron's opinion as the basis for finding liability, this evidence was far from indisputable.

The second piece of crucial evidence is the Umen jeans. As the court noted in footnote 10, trial counsel argued to the jury that these jeans were too small to fit Wright. The jeans were found in a trunk inside a filthy shack (R46. 25,26). Cans of gold paint were everywhere. (R47.87) Adams had property in close proximity to the jeans. (R48.36-37) The police could not say to whom the jeans belonged. (R.46.51) Indeed, the record shows that Wright was seen wearing new dark jeans on the evening of the murder. (R45.60-61)

The Umen jeans would fit Adams, who weighed 165 pounds and had a 32 inch waist at the time of the crime. (Testimony of Adams from Adams's trial, (R34.201)) But the jeans would not fit Wright who was 6 ft. and weighed 190 pounds when he was arrested. (DeSoto arrest record, State's "x" Exhibits 90). Gold flecks of paint found on jeans in a shack in which such paint was prevalent and where both Wright and Adams stored belongings merely connects the jeans to the environment where

both resided. A further inference that Wright, not Adams, wore the jeans is hardly conclusive, particularly in light of the unrebutted contention that the jeans did not fit Wright. Again, while a rational juror could use this evidence to support Wright's guilt, the link is extremely attenuated.

Finally, the State argues that Wright's blood found in Vick's car circumstantially suggests that she caused his injury during the struggle. The argument must follow the reasoning that the victim, in her struggles, either hurt her assailant and he bled, or that the knife-wielder cut himself. Obviously, a rational juror could conclude that the assailant in a vicious assault might have sustained an injury. While this might be an inference that a reasonable juror could make, the connection on this record is fairly weak.

Wright lived with the victim from March sixteenth to March twenty-second. (R44.174) He was seen in her car on several previous occasions. When arrested, Wright had no visible cuts (R46.87,89), while Adams had a band-aid on his hand. (R46.59,60) Indeed, in final argument the State attempted to speculate that Wright must have been punched in the mouth, and it was this blood that was found on the steering wheel and the glove box. (R49.53) Given that the only injury to Wright was a small scratch on his back, the blood did not come from a knife wound or scratch

from Vick. If Vick had inflicted an injury on her perpetrator, it is important to point out that Adams had the only noticeable injury.

In sum, the characterization of the circumstantial evidence as "overwhelming" is misleading. The evidence is overwhelming that Wright stayed in Vick's home, rode in her car, was present around the time of the murder, and helped dispose of Vick's property. The evidence is also clear that a murder weapon and blood-stained clothing were present in a shack both shared. The evidence is not overwhelming that Wright alone stabbed Vick. The facts mustered by the reviewing court's equally inculpate Adams.

Prejudice in assessment of the death penalty

What is apparent from the record synopsis above is that *no court* at any level, in any finding, has discussed the impact that Adams's statement undoubtedly had on the assessment of the death penalty. This is true even though Wright filed a motion for rehearing emphasizing this astonishing omission.

There is no plain reference to punishment prejudice in the State court findings. Where the State court has failed to make a finding, the court is instructed to review the possible prejudice *de novo*. Since there is no State finding entitled to deference concerning the possible prejudicial effect on the punishment phase of Wright's trial, a de novo review should have been conducted. *Rompilla v. Beard*, 545U.S. 374, 390,

(2005) (holding that *de novo* review of the prejudice prong of *Strickland* was required where the State courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice); *Wiggins v. Smith,* 539 U.S. 510, 534 (2003) (same); *Solis v. Cockrell,* 342 F.3d 392, 394 n.2 (5th Cir.2003) (holding the AEDPA's deferential standard of review inapplicable when a claim has not been adjudicated on the merits in state court), *cert. denied,* 540 U.S. 1151 (2004). Wright's claim would be strengthened by such a review, given the attenuated links to Vick's death.

Even if the denial of relief is based on implicit findings, *see Marshall v. Lonberger,* 459 U.S. 422, 433-41 (1983); *Self v. Collins,* 973 F.2d 1198, 1214 (5th Cir.1992), *cert. denied,* 507 U.S. 996 (1993), these findings are based upon an incorrect assessment of Wright's role in the offense. The theme that Wright acted alone, a theory drawn from Adams's statement, continued unabated into the punishment phase of Wright's trial.

The State argued that "he matted her body straddling her ... he tortured her with that knife puncturing her time and time again." (R51.13) Vick, "fought him off the best that she could but he hit her. He tortured her and slit her throat. ... She couldn't fight off this man's advances." (R51.15) "There's only one person to blame here ... he grabbed that butcher knife and plunged it into the heart and throat of Donna

Duncan Vick." (R51.36) "... he has no regard for human life. ... He'll stab you, he'll kill you if necessary if it's his desire." (R51.38) The jury was asked to assess an appropriate penalty on the theory that Wright alone stabbed Vick. The jury and subsequent reviewing courts have all viewed Wright's role through the prism of Adams's characterization of him as a vicious attacker who needed two knives to kill her– and a cold-blooded methodical betrayer who oversaw the theft of Vicks's belongings and their exchange for drugs. Wright has made a substantial showing of prejudice at the punishment phase as well.

Summary

Gregory Wright was convicted of capital murder and assessed the death penalty because his trial attorneys failed to object to a clearly inadmissible and unreliable out-of-court statement made by his co-defendant John Adams. Unfortunately, the lower courts have denied Wright a proper review. The denial stems from a misconception that Wright was convicted as a co-actor in the murder, when, in fact, the Court's charge and the prosecution's arguments cast him as the sole perpetrator. The denial also stems from a misapprehension of the evidence. The reviewing courts have consistently held that all of the evidence in the case points to Wright and not to Adams. However, absent the admission of Adams's statement, which provides a framework around which all the other evidence can be reconciled, the evidence of

Wright's guilt is admittedly circumstantial and ambiguous. Wright has made a sufficient showing of prejudice under the *Strickland* standard to merit consideration on appeal. Nonetheless, the Fifth Circuit denied Wright a certificate of appealability as the circuit customarily does in death penalty litigation. Instead of perusing Wright's claim in accordance with the screening process envisioned by *Miller-El,* the Fifth Circuit reviewed Wright's prejudice claim on the merits without affording Wright a fair opportunity to prosecute a full appeal of his claim. This Court should grant relief to Wright and by so doing reinforce the vitality of the *Miller-El* decision in the Fifth Circuit.

Respectfully submitted

BRUCE ANTON
State Bar No. 01274700

Sorrels, Udashen & Anton
2301 Cedar Springs #400
Dallas, Texas 75201
214/468-8100
214/468-8104

COUNSEL FOR GREGORY WRIGHT

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of March, 2007, a true and correct copy of the foregoing Petition and accompanying appendices were served upon opposing counsel by placing it in U.S. Postal Service depository affixed with proper postage and mailed First Class Mail addressed to:

Ms. Deni Smith Garcia
Office of the Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548

BRUCE ANTON

APPENDIX

RECOMMENDATIONS OF THE STATE DISTRICT COURT JUDGE ...... A

ORDER OF THE COURT OF CRIMINAL APPEALS
ADOPTING FINDINGS OF THE STATE COURT .... B

FINDINGS , CONCLUSIONS AND RECOMMENDATIONS OF
U.S. MAGSTRATE JUDGE C

DISTRICT JUDGE'S ORDER ADOPTING FINDINGS, CONCLUSIONS AND
RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE .... D

U.S. DISTRICT COURT'S ORDER DENYING CERTIFICATE
OF APPEALABILITY ....E

FIFTH CIRCUIT DENIAL OF CERTIFICATE OF APPEALABILITY .... F

FIFTH CIRCUIT DENIAL OF REHEARING .... G

APPENDIX A

RECOMMENDATIONS OF THE STATE DISTRICT COURT JUDGE

ORDER

The Court hereby adopts and incorporates herein the above proposed findings of fact and conclusions of law submitted by the State in *Ex parte Gregory ~~Anthony~~ Edward Wright*.

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause number W97-01215-J(A) and transmit same to the Court of Criminal Appeals as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. Applicant's "Application for Writ of Habeas Corpus" filed in cause number W97-01215-J(A), including any exhibits;

2. The "Respondent's Original Answer" filed in cause number W97-01215-J(A) including any exhibits;

3. Both parties' proposed findings of fact and conclusions of law;

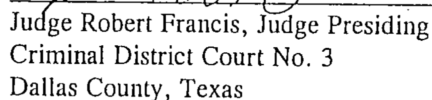
4. This Court's findings of fact and conclusions of law, and order;

5. This Court's "Order Finding No Controverted, Previously Unresolved Factual Issues Requiring a Hearing and Setting Deadlines For Filing Proposed Findings and Conclusions"dated June 8, 2000.

6. The indictment, judgment, sentence, docket sheet, and appellate record in cause number W95-75680-M, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of this Court's findings of fact and conclusions of law, including its order, to Applicant's counsel, Toby C. Wilkinson, Attorney for Applicant, P.O. Box 324, 2815 Wesley Street, Greenville, TX 75403-0324, and to counsel for the State.

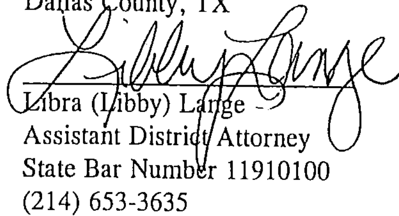
SIGNED this 24 th day of July, 2000



Judge Robert Francis, Judge Presiding
Criminal District Court No. 3
Dallas County, Texas

Service has been accomplished by sending a copy of this instrument to Toby C. Wilkinson, Attorney for Applicant, P.O. Box 324, 2815 Wesley Street, Greenville, TX 75403-0324, on July 17, 2000.

Respectfully Submitted,
Bill Hill - Criminal District Attorney
Dallas County, TX



Libra (Libby) Lange
Assistant District Attorney
State Bar Number 11910100
(214) 653-3635

264. This Court recommends that Applicant's request for relief under section 6A of his writ application should be denied.

Section 6B of Applicant's Writ Application

In section 6B of his writ application, Applicant asserts that his trial counsel were ineffective for failing to: (1) object under the Confrontation Clause to the alleged hearsay testimony of Detective Dan Trippel, Officer Ted Quinn, and Officer Marvin Rivera; (2) "properly" object to hearsay testimony about Applicant's paint sniffing habit; (3) "properly" ask for a jury shuffle; (4) request that the lesser included offenses of murder and robbery be included in the guilt phase jury charge; and (5) investigate and prepare for trial.

I. Standard of Review.

265. The Court recognizes that the Sixth Amendment of the United States Constitution guarantees in "all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense,"U.S. CONST. amend VI; *Cantu v. State*, 930 S.W.2d 594, 605 (Tex. Crim. App. 1996) (Baird, J., concurring), and that the Sixth Amendment right to counsel includes the right to effective assistance of counsel. *Ex parte Davis*, 947 S.W.2d 216, 230 (Tex. Crim. App. 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

266. The Court additionally recognizes that the right to reasonably effective assistance of counsel does not guarantee errorless counsel, or counsel whose competency

is to be judged by hindsight. *Kunkle v. State*, 852 S.W.2d 499, 852 (Tex. Crim. App. 1993). Rather, the right to effective assistance of counsel means counsel reasonably likely to render reasonably effective assistance of counsel. *Kunkle*, 852 S.W.2d at 505.

267. The Court notes that the standard of review for effectiveness of counsel is gauged by the totality of the representation of the accused. *Rodriguez v. State*, 899 S.W.2d 658, 665 (Tex. Crim. App. 1995).

268. The Court further notes that, in determining whether ineffective assistance of counsel has been shown, the Court of Criminal Appeals will presume that trial counsel "made all significant decisions in the exercise of reasonable professional judgment." *Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992); *see Cantu*, 930 S.W.2d at 605 (Baird, J., concurring) ("A member of the bar is presumed to possess the skills necessary to 'fulfill the role in the adversary process that the [Sixth] Amendment envisions'").

269. The Court is aware that, to prove ineffective assistance, Applicant must: (1) demonstrate that his counsel's performance was deficient, in that counsel made such serious errors that he was not functioning effectively as counsel; and (2) show that this deficient performance prejudiced the defense to such a degree that the defendant was deprived of a fair trial. *Strickland*, 466 U.S. at 687.

II. Applicant's Trial Counsel's Performance.

270. The Court takes judicial notice of–and personally recollects–the extensive experience and background in criminal law of Applicant's trial counsel, the Honorable William "Karo" Johnson and the Honorable Paul Brauchle.

271. The Court notes, that at the conclusion of the jury selection, the following dialogue occurred:

> THE COURT: All right. Mr. Wright, you've heard everything that's gone on to this point. So far, are you satisfied with your attorneys, including the way they have handled voir dire selection?
>
> DEFENDANT: I am, Your Honor.

(R. 42:6).

272. The Court further notes that, after both sides had presented their closing arguments in the guilt phase of the trial, the following dialogue occurred:

> THE COURT: Mr. Wright, I just want to confirm that now that we've concluded this portion of the trial and argument, that you're satisfied with the way the case has proceeded and the way that your attorneys have handled your case at this point?
>
> DEFENDANT: I am.

(R. 49:60).

273. Additionally, the Court notes that, immediately following the punishment phase of his trial, this Court asked Applicant if he was satisfied with the way his attorneys handled his case so far, and Applicant responded affirmatively. (R. 50:118-19).

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III. Applicant's Specific Ineffective Assistance at Trial Claims.

6B(1)

In his first ineffective assistance claim, Applicant asserts that his trial counsel rendered ineffective assistance by failing to object under the Confrontation Clause of the United States Constitution to alleged hearsay testimony by Detective Dan Trippel, Officer Ted Quinn, and Officer Marvin Rivera. (Writ Application at 69).

274. The Court is aware that the United States Supreme Court has recently addressed the tension between the admission of hearsay statements, where the State relies upon an exception to the hearsay rule, and a defendant's Sixth Amendment right to confrontation. *Lilly v. Virginia*, 527 U.S. ___,119 S. Ct. 1887, 144 L.Ed.2d 117 (1999); *see* U.S. CONST. amend. VI (which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .").

275. The Court recognizes that in *Lilly v. Virginia*, the Supreme Court reaffirmed the general framework set forth in *Ohio v. Roberts*, 448 U.S. 6 (1980) that the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when: (1) "the evidence falls within a firmly rooted hearsay exception," or (2) it contains "particularized guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability. *Lilly*, 119 S. Ct. at 1894, 144 L.Ed.2d at 127.

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276. The Court finds (and the record reflects) that in the punishment phase, Nashville, Tennessee police officer Marvin Rivera testified that on July 22, 1989, at approximately 7:00 a.m., he responded to a rape call (R. 50:79-80); that upon arrival, he was met by the victim, a female named Vickie Warmus (R. 50:80-81); and that Warmus was upset and crying, her clothes were disarranged, and her pantyhose and shorts were hanging from only one leg (R. 50:81). Officer Rivera further testified:

> [STATE]: Q. And while she was still in the condition that you've told us about, did she relate some information to you?
>
> [RIVERA]: A. Yes, she did.
>
> Q. She told me that she had just been raped, and that the subject –
>
>> DEFENSE COUNSEL: Your Honor, we would object to hearsay.
>>
>> THE COURT: Overruled.
>
> Q. Okay. Go ahead and tell us what was said.
>
> A. She told me that she had just been raped and that the subjects went under the bridge.
>
> Q. Did she say how many subjects?
>
> A. She said it was three subjects involved.
>
> Q. And did she then give you descriptions of white male, black males? What did she say to you?
>
> A. They were three male whites, homeless, and the actual –

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> DEFENSE COUNSEL: Your Honor, once again we object to hearsay.
>
> THE COURT: Overruled.
>
> A. — the actual perpetrator was male white, wearing red shorts and a red and white T-shirt.
>
> DEFENSE COUNSEL: Your Honor, may we have a running objection to the hearsay?
>
> THE COURT: You may.

(R. 50:81-82).

277. The Court finds that Officer Rivera's testimony regarding what Warmus told him was an excited utterance under TEX. R. EVID. 803(2), and the Court concludes that this utterance was admissible under the "excited utterance" exception to the hearsay rule. *See* Findings and Conclusions Numbers 93 through 95 and 105 through 109.

278. The Court notes that the "excited utterance" exception to the hearsay rule is "old and firmly rooted." *Penry v. State*, 903 S.W.2d 715, 751 (Tex. Crim. App. 1995), *cert. denied*, 116 S. Ct. 480 (1996); *see Lilly*, 119 S. Ct. at 1894, 144 L.Ed.2d at 127; *Huff v. State*, 897 S.W.2d 829, 839 (Tex. App. - Dallas 1995, pet. ref'd).

279. The Court concludes that Officer Rivera's testimony was admissible under Rule 803(2) and did not violate the confrontation clause.

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280. The Court finds that Applicant has failed to prove by a preponderance of the evidence that his trial counsel were obligated to lodge an objection in this instance based on the confrontation clause.

281. Similarly, the Court concludes that Applicant's trial counsel were not obligated to lodge an objection in this instance based on the confrontation clause.

282. The Court finds that Applicant has failed to prove by a preponderance of the evidence that the outcome of his trial would have been different but for his trial counsel's decision not to object under the Confrontation Clause to Officer Rivera's alleged hearsay testimony regarding Vickie Warmus' July 1989 statements to him.

283. Likewise, the Court concludes that Applicant was not prejudiced by his trial counsel's decision not to object under the Confrontation Clause to Officer Rivera's alleged hearsay testimony regarding Vickie Warmus' July 1989 statements to him because it would not have been a successful objection.

02115

Officer Ted Quinn's Testimony

284. The Court finds that during the punishment phase, Memphis, Tennessee police officer Ted Quinn testified that on August 4, 1988, he responded to a disturbance call at an apartment. The following dialogue then occurred:

> [STATE]: Q. All right. And when you got to the scene of that disturbance, what was the situation?
>
> [QUINN]: A. Well, I was met by a female, and she had – she was upset, she was crying. And she had obviously been beaten, and although I tried to remember what the extent and the nature of her injuries were, I can't remember. I just remember that she had obviously been assaulted. She said that her husband was responsible for the assault.
>
>> DEFENSE COUNSEL: Your Honor, we would object to hearsay.
>>
>> THE COURT: Overruled.

(R. 50:46-47).

285. The Court finds that Officer Quinn's testimony regarding what Applicant's wife told him was an excited utterance under Rule 803(2), and the Court concludes that this utterance was admissible under the "excited utterance" exception to the hearsay rule. TEX. R. EVID. 803(2). *See* Findings and Conclusions Numbers 93 through 99.

286. The Court notes that the "excited utterance" exception to the hearsay rule is "old and firmly rooted." *Penry v. State*, 903 S.W.2d 715, 751 (Tex. Crim. App. 1995), *cert. denied*, 116 S. Ct. 480 (1996); *see Lilly*, 119 S. Ct. at 1894, 144 L.Ed.2d at 127; *Huff v. State*, 897 S.W.2d 829, 839 (Tex. App. – Dallas 1995, pet. ref'd).

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287. The Court is aware that "[a] statement that qualifies for admission under a 'firmly rooted' hearsay exception is so trustworthy that adversarial testimony can be expected to add little to its reliability." *Dewberry v. State*, 4 S.W.2d 735, 753 (Tex. Crim. App. 1999) (citing *White v. Illinois*, 502 U.S. 346 (1992)).

288. The Court concludes that Officer Rivera's testimony was admissible under Rule 803(2) and did not violate the confrontation clause.

289. The Court finds that Applicant has failed to prove by a preponderance of the evidence that his trial counsel were obligated in this instance to lodge an objection based on the Confrontation Clause.

290. Similarly, the Court concludes that Applicant's trial counsel were not obligated in this instance to lodge an objection based on the Confrontation Clause.

291. The Court finds that Applicant has failed to prove by a preponderance of the evidence that the outcome of his trial would have been different but for his trial counsel's decision not to object under the Confrontation Clause to Officer Quinn's alleged hearsay testimony regarding Applicant's wife's August 1988 statements to him.

292. Likewise, the Court concludes that Applicant was not prejudiced by his trial counsel's decision not to object under the Confrontation Clause to Officer Quinn's alleged hearsay testimony regarding Applicant's wife's August 1988 statements to him because it would not have been a successful objection.

Detective Dan Trippel's Testimony

293. The Court finds that, in the guilt phase on direct examination, Dallas Police Department Detective Trippel testified that on Saturday, March 22, 1997, he received a 911 call, and as a result of that call he and his partner met Applicant's codefendant John Adams. (R. 45: 190-92). Detective Trippel then testified that Adams directed Detective Trippel and his partner to a white Chrysler New Yorker outside a condominium complex, and after running the vehicle registration number, the detectives went to the victim's home, where they found her dead. (R. 45:193-200).

On cross-examination, the defense asked Detective Trippel, "Now, did Mr. Adams tell you that the knife that was used in this offense was, in fact, his own knife?" And Detective Trippel responded, "Yes, sir." (R. 45:222). Defense counsel also asked Detective Trippel, "When Mr. Adams told you that it was his knife that was used in this offense, did he describe that knife to you? Did he tell you it was a lock-blade knife, do you recall?" (R. 45:224). To which the detective answered "no."

On redirect by the State, the following dialogue occurred:

> [STATE]: Q. So the question Mr. Johnson asked you about whether he said his knife had been used, that certainly was not the only part of that conversation, was it?
>
> [TRIPPEL]: A. That's right.
>
> Q. Now I'd like to go to the remainder of that conversation that you had with him.

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

DEFENSE COUNSEL: Your Honor, we will object to this as being hearsay.

THE COURT: All right. Would y'all approach the bench for a minute?

(R. 45:226). At that point, this Court conducted a hearing outside the presence of the jury regarding the testimony the State wanted to elicit from Detective Trippel. Trippel testified in the hearing to Adams' oral statements to him about Applicant killing the victim with Adams' knife. (R. 45:227-29). The prosecutor then argued to the Court:

[J]ust looking at Rule 107 there, I think it's clear that the intent of the 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 this 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. So I think clearly under Rule 107, that we're allowed to go to complete that conversation so that a false impression is not left with this jury.

(R. 45:230). The defense then made the following objection:

[U]nder Rule 107, Your Honor, it talks about in terms of optional completeness when it is a situation that my - that may ultimately leave a false impression with the jury.

Now, clearly the State knows that the testimony in this case is going to be that this knife was Mr. Adams' knife, and that Mr. Adams is the one that led them to the knife, and I'm sure the State, before they can ever get this knife into the record, is going to have to prove up that Mr. Adams led them to this knife in question and told them that it was his knife. So there is not

> – there is not going to be any false impression left with the jury. So we would object on the grounds that, basically, the exception against hearsay will tru[mp] and overrule this – the rule of optional completeness in this situation.

(R. 45:231). This Court overruled the defense objections, and allowed Detective Trippel to testify to Adams' statements pursuant to Rule 107 of the Texas Rules of Evidence, the rule of optional completeness. TEX. R. EVID. 107.[21]

294. The Court notes that in his first point of error in his direct appeal brief, Applicant asserted that the trial court erred by admitting into evidence the testimony of Detective Dan Trippel detailing his conversation with his accomplice John Adams, who did not testify. *See* Applicant's Direct Appeal Brief at pages 26-36.

295. The Court further notes that, in overruling Applicant's first point of error, the Court of Criminal Appeals held:

> By the plain language of [Rule 107], when part of a conversation is placed into evidence by one party, the other party can put the remainder of the conversation into evidence to explain the prior comments or otherwise

---

[21] Rule 107 provides:

> When part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, . . . When a detailed act, declaration, conversation, writing or recorded statement is given in evidence, any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence . . . .

TEX. R. CRIM. EVID. 107. Rule 107 is one of admissibility and permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter "opened up" by the adverse party. *Parr v. State*, 557 S.W.2d 99, 102 (Tex. Crim. App. 1977); *Credille v. State*, 925 S.W.2d 112, 116 (Tex. App.-Houston [14th Dist.] 1996, pet. ref'd).

> make them fully understood. TEX. R. CRIM. EVID. 107; *Washington v. State*, 856 S.W.2d 184, 196 (Tex. Crim. App. 1993). *See also Kipp v. State*, 876 S.W.2d 330, 340 n. 11 (Tex. Crim. App. 1994). Given the circumstances in the instant case that John Adams' admission of ownership of the knife could have misled the jury about who was responsible for the killing, the trial court was within its discretion in determining that the evidence was admissible.

Wright v. State, No. 73,004, slip op. at 15 (Tex. Crim. App. June 28, 2000).

296. The Court notes that the purpose of the confrontation clause is to ensure the reliability of the evidence by subjecting the testimony to rigorous testing in the context of an adversary proceeding before the trier of fact. *Kesterson v. State*, 997 S.W.2d 290, 293 (Tex. App.-Dallas 1999, no pet.); *Roberts v. State*, 963 S.W.2d 894, 900 (Tex. App.-Texarkana 1998, no pet.).

297. Similarly, the Court notes that the purpose of Rule 107 is to promote the reliability of the evidence by permitting the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter "opened up" by the adverse party. *Parr v. State*, 557 S.W2.d 99, 102 (Tex. Crim. App. 1977); *Credille v. State*, 925 S.W.2d 112, 116 (Tex. App.-Houston [14th Dist.] 1996, pet. ref'd).

298. Thus, the Court is aware that the confrontation clause and the rule of optional completeness serve the same basic policy of enhancing the reliability of the trial jury's verdict.

299. The Court recognizes that the right of confrontation exists for the State as well as for criminal defendants. *See Pointer v. Texas*, 380 U.S. 400, 405 (1965).

300. The Court finds that, by having Detective Trippel testify to Adams' statements about the knife, the defense was able to elicit incomplete, and therefore misleading, testimony (that Adams' knife was used in the killing) in front of the jury without having to put Applicant on the stand and without the State being able to cross-examine Adams, and any attempt by the defense to use the confrontation clause to keep Adams' statements about the knife out of evidence would have undermined the purpose of both the confrontation clause and the rule of optional completeness.

301. The Court further finds that, by eliciting Adams' statements through Detective Trippel, the defense was necessarily vouching for the reliability of Adams' statements, and it would be disingenuous for the defense to then object that the statements were unreliable and violated the confrontation clause when the State attempted to place Adams' statement in context.

302. The Court concludes that the defense implicitly waived any confrontation clause claim regarding Adams' statements about his knife by opening the door and asking Detective Trippel about Adams' out-of-court statements.

303. And the Court therefore concludes that the confrontation clause should not prevent Rule 107 from operating when the defense first offers an out-of-court statement that is taken out of context. *Credille v. State*, 925 S.W.2d 112, 116 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd) (holding that although complainant's videotaped interview may not have been admissible under the confrontation clause, the interview became

admissible under Rule 107 because defendant opened the door with his cross-examination of the officer conducting the interview).

304. The Court finds that it is reasonable to speculate—and Applicant has not proven otherwise—that the defense realized that they could not vouch for the reliability of the statements and then object to the introduction of the remainder of the statements under the confrontation clause; so, instead, the defense objected that Rule 107 did not apply in this situation because Detective Trippel's testimony had not left a false impression with the jurors.

305. The Court finds that defense counsel's decision to make the Rule 107 objection is supported by the fact that after Detective Trippel testified, the State introduced the knife into evidence by having Officer Sullivan testify that Adams led him to a vacant field, pointed to the ground, and told Sullivan that there was a knife there, which was subsequently found in that very location. (R. 46:97). And additional evidence showed that Adams' knife was used in the killing.

306. The Court finds, therefore, that it was reasonable—if not persuasive—for defense counsel to argue to the Court that Detective Trippel's testimony about Adams' statements about the knife did not create a misleading impression.

307. Thus, the Court concludes that a Rule 107 objection was as effective, if not better, than a confrontation clause objection. *See Allridge v. State*, 762 S.W.2d 146, 153 (Tex. Crim. App. 1988) (holding that the defendant's self-serving hearsay confession was

not admissible under Rule 107 because the State had offered a later confession which "did not mislead the jury or leave the jury with only a partial or incomplete version of the facts").

308. The Court finds that Applicant has failed to prove by a preponderance of the evidence that his counsel's objection was based on anything less than sound trial tactics and professional judgment. *See* R. 45:230 (where the record demonstrates that after the prosecutor argued to the Court why the remainder of Adams' statements should be introduced into evidence through Detective Trippel, the defense stated, "Your Honor, can we have a minute to make our response?" And the Court replied, "You may," and an off-the-record bench conference was had).

Confrontation Clause - Conclusion

309. The Court finds that Applicant has failed to prove by a preponderance of the evidence that his trial counsel were ineffective for failing to object that the challenged testimony violated the confrontation clause.

310. Likewise, the Court concludes that Applicant's trial counsel were not ineffective for failing to object that the challenged testimony violated the confrontation clause.

311. The Court further finds that Applicant has failed to prove by a preponderance of the evidence that there is a reasonable probability that the outcome of his trial would

have been different if his trial counsel had objected that the testimony of Officers Rivera and Quinn and Detective Trippel violated the confrontation clause.

312. Similarly, the Court concludes that Applicant was not prejudiced by the fact that his trial counsel did not object that the testimony of Officers Rivera and Quinn and Detective Trippel violated the confrontation clause.

6B(2)

In his second ineffective assistance claim (Writ Application at 71), Applicant refers this Court back to his third ineffective assistance on appeal claim where he contends that his appellate counsel was ineffective for failing to assert in a point of error that the trial court improperly allowed the State to introduce hearsay punishment evidence that Applicant had a habit of sniffing paint. (Writ Application at 41). Applicant argues that, if this Court finds that Applicant's appellate counsel was precluded from raising the issue on appeal because trial counsel did not "properly object to [the] hearsay testimony" (and therefore, failed to preserve error on appeal), then trial counsel was ineffective. (Writ Application at 71).

313. The Court relies on its findings of fact and conclusions of law as set out previously at numbers 74 through 78 and 89 through 92.

314. The Court concludes that, because no hearsay problem exists with the challenged testimony, Applicant's trial counsel did not need to object, *McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992) (holding that failure of trial counsel to

object to admissible evidence does not constitute ineffective assistance), and Applicant's appellate counsel did not need to raise the issue on appeal. *Penson v. Ohio*, 488 U.S. 75, 83-84 (1988) (holding that a defendant's right to effective assistance of counsel on appeal does not include the right to have an attorney urge frivolous or unmeritorious claims).

315. The Court finds that Applicant has failed to prove by a preponderance of the evidence that his trial counsel performed deficiently by failing to object to the paint sniffing testimony.

316. Similarly, the Court concludes that Applicant's trial counsel did not perform deficiently by failing to object to the paint sniffing testimony.

317. The Court finds that Applicant has failed to prove by a preponderance of the evidence that if his trial counsel would have "properly objected," then his appellate counsel could have successfully raised the issue on appeal.

318. The Court concludes that Applicant was not prejudiced by his trial counsel's decision not to object to the paint sniffing testimony.

6B(3).

In his third ineffective assistance claim, Applicant asserts that his trial counsel were ineffective when they failed to "properly" ask for a jury shuffle. (Writ Application at 72).

319. The Court finds (and the record reflects) that prior to jury selection, Applicant's trial counsel requested that a special venire be empaneled pursuant to Article

APPENDIX B

ORDER OF THE COURT OF CRIMINAL APPEALS ADOPTING FINDINGS OF THE STATE COURT

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 46,451-01

EX PARTE GREGORY EDWARD WRIGHT

ON APPLICATION FOR WRIT OF HABEAS CORPUS FROM DALLAS COUNTY

The order was delivered per curiam.

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, TEX. CODE CRIM. PROC.

On December 10, 1997, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, TEX. CODE CRIM. PROC., and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Wright v. State*, No. 73,004 (Tex. Crim. App. June 28, 2000)(not yet reported).

Applicant presents twenty-three allegations and sub-allegations in his application in which he challenges the validity of his conviction and resulting sentence. Although an evidentiary hearing was not held, the trial judge entered findings of fact and conclusions of law. The trial judge recommended relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review, the relief sought is denied.

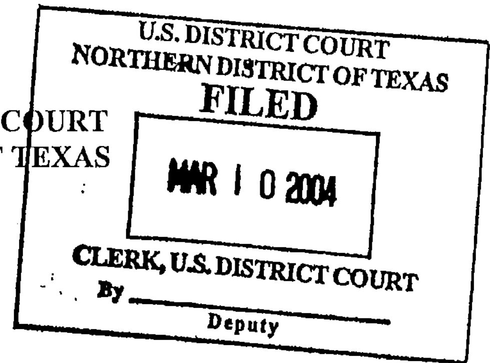
IT IS SO ORDERED THIS THE 13th DAY OF September, 2000.

Do Not Publish

APPENDIX C

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

ORIGINAL



IN THE UNITED STATES DISTRICT COURT
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.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of Title 28, United States Code, Section 636 (b), implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions, and Recommendation of the United States Magistrate Judge follow:

FINDINGS AND CONCLUSIONS

I. NATURE OF THE CASE

A state prison inmate has filed a petition for writ of habeas corpus pursuant to Title 28, United States Code, Section 2254.

II. PARTIES

Petitioner, Gregory Edward Wright, is an inmate in the custody of the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ-ID). Respondent is the Director of TDCJ-ID.

III. PROCEDURAL HISTORY

A jury convicted Petitioner of capital murder, and his punishment was assessed at death by lethal injection. *State v. Wright*, F97-01215-RJ (Criminal District Court No. 3 of Dallas County, Tex. December 10, 1997). The case was appealed to the Texas Court of Criminal Appeals, and the Court of Criminal Appeals affirmed the conviction and death sentence in a published opinion. *Wright v. State*, 28 S.W.3d 526 (Tex. Crim. App. 2000), *cert. denied*, 531 U.S. 1128 (2001). Petitioner filed a state application for writ of habeas corpus on July 28, 1999. The Court of Criminal Appeals denied relief in an unpublished order. *Ex parte Wright*, No. 46,451-01 (Tex. Crim. App. September 13, 2000).

Petitioner filed his federal petition for writ of habeas corpus on January 18, 2002, Respondent filed an answer on September 3, 2002, and furnished the state court records, and Petitioner filed a reply on February 18, 2003.

IV. RULE 5 STATEMENT

Respondent states that Petitioner has failed to exhausted his state court remedies with respect to his first through ninth, his eleventh, a portion of his thirteenth, and his fourteenth grounds for relief. Respondent asserts that Petitioner did not address these claims either on direct appeal or in his state writ of habeas corpus. Nonetheless, Respondent asserts that these claims should also be denied on their merits pursuant to 28 U.S.C. § 2254(b)(2).[1].

---

[1] An application for a writ of habeas corpus may be denied on its merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254(b)(2) (West 2001).

V. ISSUES

Petitioner raises the following eleven issues in fourteen claims for relief:

A. The State violated *Napue v. Illinois* by creating the false impression that state witness Llewellyn Mosley did not have any assurances from the State that he would not be prosecuted if he testified at trial (ground one);

B. The State violated Petitioner's due process rights by suppressing evidence of the deal made with Mr. Mosley by the State in exchange for his testimony against Petitioner (ground two);

C. The State violated Petitioner's due process rights when it suppressed the existence of Jerry Causey and his statement that John Adams had confessed to the murder for which Petitioner was convicted (ground three);

D. The State violated Petitioner's due process rights by suppressing a statement and a 911 call made by Daniel McGaughey (grounds four and five);

E. The State violated *Napue v. Illinois* by knowingly presenting false testimony by its fingerprint expert, James Cron (ground six);

F. The State violated *Napue v. Illinois* by knowingly presenting evidence in a false light regarding the shack where Petitioner lived (ground seven);

G. The State violated Petitioner's due process rights by suppressing materials belonging to John Adams found in the shack (ground eight);

H. The cumulative effect of the prior eight claims deprived Petitioner of his due process rights and his right to a fair trial (ground nine);

I. Petitioner's constitutional right under the Sixth Amendment to confront witnesses was violated when the trial court permitted the State to admit into evidence a statement given by John Adams inculpating Petitioner in the murder (ground ten);

J. The State violated *Napue v. Illinois* by knowingly creating a false impression by introducing Petitioner's co-defendant's written statement into evidence (ground eleven); and

K. Petitioner was denied effective assistance of counsel in various respects at both the guilt and the punishment phases of his trial (grounds twelve through fourteen).

Petitioner also contends in a fifteenth ground for relief that none of his claims should be considered procedurally barred because, pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995), he has established that, because of the asserted constitutional violations, he was convicted of capital murder even though he is probably actually innocent. Finally, Petitioner contends that he is entitled to an evidentiary hearing.

VI. STANDARD OF REVIEW

The pertinent terms of the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA), 28 U.S.C. § 2254, provide:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

28 U.S.C. § 2254(d) (2000).

Section 2254(d)(1) concerns pure questions of law as well as mixed questions of law and fact. *Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001). Under the "contrary to" clause, a federal habeas court may grant the writ of habeas corpus if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-3 (2000). With respect to the "unreasonable application" clause, a federal court may grant a writ of habeas corpus if the

state court identifies the correct governing legal principle from the United States Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 413. Under *Williams*, a state court unreasonably applies Supreme Court precedent if it "unreasonably extends a legal precedent from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.

Section 2254(d)(2) concerns questions of fact. *Moore v. Johnson*, 225 F.3d 495 (5th Cir. 2000), *cert. denied*, 532 U.S. 949 (2001). Under § 2254(d)(2), federal courts "give deference to the state court's findings unless they were "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir.) (as modified on denial of rehearing), *cert. denied*, 531 U.S. 1002 (2000). The resolution of factual issues by the state court is presumptively correct and will not be disturbed unless the state prisoner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

This statute applies to all federal habeas corpus petitions which, as with the instant case, were filed after April 24, 1996, provided that they were adjudicated on the merits in state court. *Lindh v. Murphy*, 521 U.S. 320, 326 (1997). Resolution on the merits in the habeas corpus context is a term of art that refers to the state court's disposition of the case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997).

VII. FACTUAL BACKGROUND

The evidence presented at trial established that sometime during the early morning hours of March 21, 1997, the victim Donna Vick was stabbed to death in her DeSoto, Texas home. Vick was found lying on her back in her bed, covered with a bedspread with pillows covering her head. (R.

45:209-10). The autopsy revealed that she had seven major stab wounds and one major cut on her left shoulder, chest, and throat. Vick also had several defensive wounds to her arms and hands. (R. 44:90-3, 100-04, 110). The medical examiner testified at trial that Vick could have been stabbed and cut by one or more knives. (R. 44:116, 118). A fingerprint found in blood on one of the pillowcases was identified as belonging to Petitioner. (R. 47:98-99). Lying on top in a trash can in the kitchen, near an empty Dr. Pepper bottle with Petitioner's fingerprint on it, the police found a note written on a paper towel in black marker that read "Do you want to do it?" (R. 46:127-30, 161).

On March 22, 1997, John Adams turned himself in to police and, along with directing the police to Vick's house, he assisted the police in recovering Vick's automobile, which had been abandoned in Lancaster, Texas, with the spare tire on one of the wheels. (R. 45:192-94). Adams' fingerprints were found on the outside driver's door of the car and, from that automobile, police retrieved a computer printer that was identified as belonging to Vick, a plate and glass that were the same types as those found in Vick's house, and Adams' wallet. (R. 46:131, 132-34, 135-36, 157, 171-72, 193-94, 198). Moreover, blood found on the steering wheel and the dashboard was consistent with Petitioner's blood and inconsistent with both Adams and Vick. (R. 46: 171-72; 47:136-37).

Adams also directed the police towards a shack located in DeSoto, behind a Kmart store, where Petitioner was located and arrested. (R. 45:22). The police seized five pairs of jeans from inside of the shack, along with two knives from inside the shack, one of which was found on the floor and one that was found inside a Bible with Petitioner's name in it. (R. 46:29, 32-6). The police also retrieved a butcher block with knives in it found in the field about twenty feet away from the shack. The knife found on the floor of the shack fit into an empty slot in the butcher block. (R.

46:43-4, 46). Adams also led the police to a knife found sticking in the ground on the creek bed about twenty feet from the butcher block. (R. 46:97).

DNA testing on the knife found in the field revealed that blood on the knife was consistent with Vick's blood and inconsistent with either Petitioner or Adams. (R. 47:140). DNA testing performed on blood found underneath the handle of the knife from the floor of the shack excluded both Petitioner and Adams as contributors, but did not exclude Vick. (R. 48:9-14). One of the pairs of jeans seized from the shack, with the brand name Umen, had substantial blood stains in the crotch area and on the tops and middle areas of both legs, while other jeans had some blood on them. (R: 47:31-2, 53-6). DNA testing was conducted on the jeans seized from the shack, as well as the clothing that both Adams and Petitioner were wearing when arrested. The blue sweatpants worn by Adams when he was arrested, as well as one of the pairs of jeans found in the shack, had blood on them that matched Adams' DNA and did not match either Petitioner or Vick,. The blood found on the Umen jeans was consistent with Vick's blood and inconsistent with either Petitioner or Adams. (R. 47:146). The shack also contained numerous empty cans of gold spray paint and a plastic bag with gold paint in it. Also, several of the pairs of jeans, including the Umen jeans, had gold paint on them. (R. 46:37, 38-9, 142-43, 155-56). The blue jeans that Petitioner was wearing when arrested had gold paint at the bottom of the two legs, but Adams' clothing had no gold paint on it. (R. 46:151-55). One of the investigating police officers testified that he had known people who had inhaled paint in order to get high by spraying paint into a bag, placing the bag by their face, and inhaling from the bag. (R. 46:149-50).

A friend of Petitioner named Donald Cole testified at trial that he saw Petitioner and Vick together at a VFW lodge at around 10:00 or 11:00 p.m. on March 20, 1997. Cole knew Petitioner

because Petitioner would panhandle near a Texaco where Cole worked and would occasionally help Cole clean-up after work. Petitioner had told Cole in the past that he had a "hooch" where he lived in a wooded area by the Kmart store. (R. 45:55-6, 58-9). At the lodge that evening, Petitioner was wearing dark colored jeans that looked new, unlike the jeans he usually wore. Cole spoke with Vick about the fact that Petitioner, who was normally homeless, was staying at her house at that point and doing work around the house, and Vick and Petitioner talked about picking up Petitioner's friend "Zig." (R. 45:58-9, 60-3). Cole also testified that he had seen gold paint on Petitioner's clothes and face before. (R. 45:82).

Sylvia Parson testified that she knew Petitioner because he associated with her brother, who was also homeless. Parsons also testified that Petitioner had stayed at her house in the past, that he received his mail at her house, and had brought a man nicknamed ZigZag to her house one time. Petitioner also told her that he was living in a shack by Kmart. (R. 45:29-45, 46, 49). Parsons further testified that Petitioner called her when he was in jail and asked her to get his clothes from the shack behind the Kmart, which she did not do. (R. 47:68).

Llewellyn Mosley testified that he was acquainted with both Petitioner and Adams, he knew them by the names "Maverick" and "ZigZag," and he had met them because they were part of a group of homeless men that he would let stay at his house occasionally. (R. 45:104-05). Mosley testified that Petitioner and a white woman came to his house at around 5:00 p.m. on March 20, 1997, in a white Chrysler, Petitioner bought some crack cocaine from Mosley's neighbor JT, and Petitioner and Mosley smoked the cocaine. (R. 45:103-08, 130). He further testified that the two returned later that evening at around 10:30 or 11:00, picked up "ZigZag,"and Petitioner and Adams returned at around 4:00 a.m., with Petitioner driving the Chrysler, which at that point had a flat tire.

(R. 45:131-34). The two told Mosley that they wanted to "get rid of" some stuff, things that Petitioner said were from a woman in DeSoto, and they opened the trunk, which contained a television, a weed eater, a rifle, a color printer, and a microwave. (R. 45:148-49). Mosley also testified that Petitioner and Adams traded some of the items in the trunk to his neighbor JT in exchange for crack cocaine, which they then smoked at Mosley's house. (R. 45:153, 156). Mosley put the spare tire on the car while the two men took the things into his house. The rifle, computer printer, and microwave were identified at trial as belonging to Vick, and a flat tire and wheel found by the police in an empty lot next to Mosley's house were the same brand and type as those on Vick's car. A weed eater identified as belonging to Vick was retrieved from Mosley's house when he was arrested. (R. 44:135-36; 45:189-90; R. 46:52-4; 138-39).

The jury convicted Petitioner of committing a murder during the course of committing or attempting to commit a robbery. (Transcript at 260, 264). The jury was instructed that John Adams was an accomplice as a matter of law, but the jury was required to find beyond a reasonable doubt that Petitioner killed the victim, and the jury was not permitted to convict Petitioner as a party to the crime. (Tr.:259-61).

VIII. PROCEDURAL ISSUES

Respondent asserts that Petitioner is procedurally barred from raising all but his twelfth and part of his thirteenth claims in federal court. Specifically, Respondent contends that Petitioner is procedurally barred from raising his first through ninth, his eleventh, a portion of his thirteenth, and his fourteenth claims because they were not exhausted at the state level. Respondent further contends that Petitioner is procedurally barred from raising his tenth claim because it was denied at the state level on an independent and adequate state law ground. Petitioner does not appear to

contest that most of his claims were not raised on the state level or that his tenth claim was denied on direct appeal on an independent and adequate state law ground. Instead, Petitioner asserts that he has overcome any procedural bar to these claims. Specifically, in his fifteenth ground for relief, Petitioner contends that these claims are not procedurally barred because he has presented new evidence establishing his actual innocence as required under *Schlup v. Delo*, 513 U.S. 298 (1995).

A review of the records in this case reveals that Petitioner did not raise his first through ninth, his eleventh, a portion of his thirteenth, and his fourteenth claims at the state level. Procedural default occurs when a petitioner fails to exhaust all available state remedies *and* the state court to which he would be required to petition would now find that the claim is procedurally defaulted. *Bledsoe v. Johnson*, 188 F.3d 250, 254 (5th Cir. 1999). And indeed, were petitioner's unexhausted claims now brought in a subsequent state writ of habeas corpus, the Court of Criminal Appeals would consider these claims to be procedurally defaulted under Article 11.071 § 5 of the Texas Code of Criminal Procedure, which prohibits a claim from being raised in a subsequent habeas application unless: 1) it could not have been raised in the previous application because the factual or legal basis was unavailable at the time; or 2) the claim contains sufficient facts establishing that, but for a violation of the United States Constitution, no rational juror would have found petitioner guilty or would have answered the punishment issues in the State's favor. *See* TEX. CODE CRIM. PROC. ANN. art 11.071 § 5(a) (Vernon Supp. 1999). The legal and factual claims presented in the grounds for relief that Petitioner failed to exhaust on the state level appear to have been available to him at the time he filed his state habeas application, and Petitioner does not argue otherwise. And, Petitioner has made no attempt to allege, much less prove, that his unexhausted claims contain sufficient facts

establishing that, but for a federal constitutional violation, *no* rational juror would have found him guilty or sentenced him to death.

With regard to his tenth claim ground for relief, alleging that Petitioner's constitutional right under the Sixth Amendment to confront witnesses was violated when the trial court permitted the State to admit into evidence a statement given by co-defendant John Adams inculpating Petitioner in the murder, the Court of Criminal Appeals denied this claim when it was raised on direct appeal on the basis that the defense had failed to raise an objection on this basis at trial and had thus waived the argument on appeal. *Wright*, 28 S.W.3d at 536. The Supreme Court has held that, when a state prisoner has defaulted his federal claim when he raised it in state court pursuant to an independent and adequate state procedural rule, federal habeas review is barred unless the prisoner can establish either cause for the default as well as actual prejudice as a result of the alleged violation of federal law *or* that failure to consider the claims would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To satisfy the independent and adequate requirements, the dismissal of a claim must "clearly and expressly" indicate that it rests on state grounds which bar relief, *and* the bar must be strictly and regularly followed by state courts and applied to the majority of similar claims. *Finley v. Johnson*, 243 F.3d 215, 218 (5th Cir. 2001), *citing Amos v. Scott*, 61 F.3d 333, 338-39 (5th Cir. 1995). The Fifth Circuit has held that the Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a claim. *Jackson v. Johnson*, 194 F.3d 641, 652 (5th Cir. 1999). The Court of Criminal Appeals has also ruled that an objection at trial is need to preserve even constitutional errors for appellate review. *See Allridge v. State*, 850 S.W.2d 471 (1991).

Petitioner's tenth ground for relief was therefore denied at the state level on the basis of an independent and adequate state ground.

Accordingly, Petitioner is procedurally barred from raising all but his twelfth and a portion of his thirteenth grounds for relief in a federal petition for writ of habeas corpus unless he can establish either cause and prejudice for the failure to raise these unexhausted claims at the state level or that the failure to consider the claims on the merits would result in a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722 (1991); *Jones v. Johnson*, 171 F.3d 270, 277 (5th Cir. 1999). Petitioner asserts that should this Court fail to consider these claims on their merits, it would result in a fundamental miscarriage of justice.

In *Schlup v. Delo*, 513 U.S. 298, 327 (1995), the Supreme Court held that a habeas petitioner can overcome a procedural bar to reach the consideration of the merits of his constitutional claims via the fundamental miscarriage of justice exception if he establishes that a constitutional violation has probably resulted in the conviction of one who is actually innocent. And, in order to prove such an actual innocence claim, a petitioner must present new, reliable evidence not presented at trial that establishes that, more likely than not, no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. *Id* at 327. Examples of such new evidence that may establish factual innocence are exculpatory scientific evidence, trustworthy eyewitness accounts, credible declarations of guilt by another, and critical physical evidence not presented at trial. *Id.* at 324; *Fairman v. Anderson*, 188 F.3d 635, 644 (5th Cir. 1999).

Petitioner contends that he is able to establish an actual innocence claim sufficient to overcome the procedural bar to all of these claims. Petitioner asserts that his new evidence of his actual innocence consists of: 1) exculpatory scientific evidence regarding the bloody fingerprint

found at the crime scene; 2) affidavits from Petitioner's two defense attorneys averring that the jeans that the State contended that Petitioner wore when he murdered the victim were in actuality too small for him; 3) an affidavit from Daniel McGaughey, who was "hidden" from the defense; 4) an affidavit from Jerry Causey, a man to whom co-defendant Adams allegedly confessed; 5) an affidavit from another inmate to whom Adams allegedly confessed; and 6) testimony from Adams' subsequent capital murder trial which undermines the testimony of State's witness Llewellyn Mosley. (Petition at 15, 111-12). Petitioner alleges that the cumulative effect of this evidence meets the actual innocence standard set forth in *Schlup v. Delo* such that it would be a fundamental miscarriage of justice not to consider his barred claims on their merits.

Some of the evidence alleged to be new evidence of Petitioner's innocence is not new. Specifically, the two affidavits from Petitioner's trial attorneys Karo Johnson and Paul Brauchle stating their belief that the brand name Umen jeans found in the shack where Petitioner was arrested were too small to fit Petitioner is not new evidence. (*See* Petitioner's Exhibits #19, 20). To the contrary, defense counsel argued in summation that the Umen jeans, which had several large blood stains on them, were too small for Petitioner but were the same size as the jeans found in the shack that most likely belonged to his co-defendant Adams because they had Adams' blood on them. (R. 49:38-9).[2]

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In contrast, the State argued in closing that the Umen jeans belonged to Petitioner because: 1) they looked newer than the other jeans in the shack and Donald Cole testified that he saw Petitioner in new or newer jeans; 2) they had gold paint on them; 3) the jeans which Petitioner was wearing when arrested had gold spray paint on them; 3) there were numerous empty cans of gold paint in the shack where Petitioner was arrested; 4) Donald Cole testified that he had seen gold paint on Petitioner's clothes before; 5) the clothes that Adams wore when he was arrested had no paint on them; and 6) Petitioner had called Sylvia Parsons from jailed and asked her to remove *his* clothes from the shack. (R. 49:55-7).

Other of this new evidence is not, in essence, new because it does not differ substantially from that evidence that was either presented at trial or was already known by the defense at the time of trial. In that regard, the affidavit from Daniel McGaughey that has been submitted as an exhibit by Petitioner does not differ substantially from the statement McGaughey gave to the police. During Petitioner's trial, a hearing was held regarding a police report the defense received during trial from the State regarding Daniel McGaughey, the man who called 911 on Adams' behalf. (R. 46:71). In an affidavit submitted as an exhibit with Petitioner's federal petition, McGaughey states that, in March of 1997, a man came into the video store where he worked on Industrial Boulevard and asked him to call the police. When McGaughey asked why, the man stated that there had been a murder in DeSoto and he could not live with himself anymore. (Petitioner's Exhibit #7). In his original signed statement to the police, McGaughey gave essentially this same information, stating that on the evening of March 22nd, a man asked him to call the police, saying that a murder had taken place in DeSoto and he could not live with himself anymore. (Exhibit #6). McGaughey's new affidavit, signed by McGaughey in December of 2001, is not new evidence that establishes Petitioner's innocence.[3]

Likewise, the new evidence regarding Llewellyn Mosley is not, in fact, new. Petitioner asserts that there is new evidence that Mosley had a deal with the State that he would not be prosecuted for any crimes if he testified for the State. At Petitioner's trial, after consulting with an attorney, Mosley represented to the trial court that he wished to testify without such an agreement.

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Notes taken by the police after speaking to McGaughey purportedly documenting what McGaughey told the police do differ from McGaughey's statement and affidavit, in that these notes indicate that McGaughey told the police that Adams had told him that *he* had murdered someone in DeSoto and wanted to turn himself in. (Petitioner's Exhibit #5). However, defense counsel were aware of these notes at the time of Petitioner's trial, so they are also not new evidence. (R. 46:81).

(R. 45:139-41). Petitioner has submitted testimony given by Kent Traylor, Mosley's attorney, at John Adams' subsequent trial as evidence that there was such a deal, suggesting that this information would have effectively impeached Mosley's testimony at Petitioner's trial. (Petitioner's Exhibit #17). This excerpt from Adams' trial reflects, however, that Mosley's attorney testified that there was *no* express or implied deal between Mosley and the State, only at most an offer from the State. (Exhibit #17). Accordingly, this evidence is not new evidence that helps to establish Petitioner's innocence.

The affidavits from two people whom Adams allegedly confessed to and the affidavit from a fingerprint expert regarding the bloody fingerprint found at the murder scene *is* new evidence that was not presented at Petitioner's trial. In his affidavit, Charles Nealy states that he was in a holding cell in the Dallas County jail with Adams in December of 1998. Nealy further states that Adams admitted to him that Petitioner was innocent and that Adams killed the victim by himself while Petitioner was eating in the other room of the house. (Petitioner's Exhibit #10). In his affidavit, Jerry Causey states that in March of 1997 Adams came to his house. Causey further states that Adams told him that the car that Adams was driving was belonged to the "bitch" that he killed. Causey also states that he heard Adams tell a third person that he had killed before and would kill again. (Exhibit #8). Finally, in his affidavit, Tom Ekis, a forensic scientist, states that he was retained by defense counsel at the time of Petitioner's trial and reviewed the bloody fingerprint that the State's fingerprint expert identified as belonging to Petitioner. Ekis further states that he attended the trial during the testimony of the State's fingerprint expert, discussed with the State's expert, James Cron, his findings in the case, and consulted with defense counsel. Finally, Ekis states in his affidavit that, had he been called as a witness, he would have testified that, in his opinion, the

bloody print lacked sufficient clarity to be identifiable to Petitioner or any other person and that James Cron's testimony regarding the points of comparison between the two prints was incorrect. (Petitioner's Exhibit #14).

Considering all of this new evidence aggregately, it is not sufficient to establish that, more likely than not, no reasonable juror would have found the petitioner guilty beyond a reasonable doubt had this evidence been presented at trial. First, with regard to Jerry Causey's affidavit, in which he states that Adams confessed to killing a woman, this evidence is not inconsistent with Petitioner's guilt. In fact, the State argued at trial that Petitioner and Adams killed the victim together. (R. 49:48). Second, with regard to Charles Nealy's affidavit, while in this affidavit Nealy states that Adams told him that Petitioner did not murder the victim, this alleged jailhouse confession, in hearsay form, is not a credible admission of guilt by another that would establish Petitioner's factual innocence. *See Dowhitt v. Johnson*, 230 F.3d 733, 742 (5th Cir. 2000)(holding that hearsay affidavits, which are considered particularly suspect, regarding a confession allegedly made by a co-defendant were not strong enough evidence to support a claim of innocence under *Schlup v. Delo*). And finally, with regard to Tom Ekis' affidavit, while this is evidence from a fingerprint expert disagreeing with testimony given at Petitioner's trial, it has not been shown that even had Ekis testified at Petitioner's trial, it is more likely than not that no reasonable juror would have convicted Petitioner. In that regard, James Cron was cross-examined at Petitioner's trial by defense counsel about shortcomings in his identification, including: the fact that two sheriff deputies had previously testified that they did not consider the bloody print to be a comparable print; Cron's inability to illustrate the points of comparison he identified in the print because the print could not be enlarged; and that fact that the print could not be entered into the national fingerprint system

because it was not of sufficient quality. (R. 47:114-28). Furthermore, even considering all of this new evidence, there was substantial evidence presented at trial supporting Petitioner's guilt, including: 1) Petitioner was living in and arrested at a shack that contained jeans and a knife with the victim's blood on them inside and a knife with her blood outside nearby; 2) Like the clothes Petitioner was wearing when arrested, the jeans with the victim's blood on them also had gold paint on them; 3) Petitioner had been seen with gold paint on his clothes and face; 4) Petitioner's blood was on the steering wheel and dashboard of the victim's car; 5) Petitioner was seen with the victim the night before her murder; 6) Petitioner was seen in the victim's car the same morning of the murder, trading her belongings for crack cocaine; and 7) a note with the question "Do you want to do it?" was found in the victim's house near a soda bottle with Petitioner's fingerprint on it. All of this evidence supports the jury's verdict that Petitioner murdered the victim and, even considering the new evidence presented with his federal petition, Petitioner has failed to show that, had this new evidence been known at trial, it is more likely than not that no reasonable juror would have convicted him of capital murder. Petitioner has failed to overcome the procedural bar to all but his twelfth and a portion of his thirteenth grounds for relief.

Nevertheless, under 28 U.S.C. § 2254(b)(2), a federal petition for a writ of habeas corpus may be denied on its merits, notwithstanding the petitioner's failure to exhaust state court remedies. *See* 28 U.S.C. § 2254(b)(2). Accordingly, as this Court has determined that petitioner is not entitled to relief on any of his unexhausted claims, this Court will address all of the unexhausted claims on their merits.[4]

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[4] This Court will not, however, address Petitioner's tenth ground for relief on its merits, as it was exhausted on the state level, but was denied on an independent and adequate state law basis.

IX. EXAMINATION OF THE GROUNDS FOR RELIEF

A. *Napue v. Illinois* Claims

In his first, sixth, seventh, and eleventh claims for relief, Petitioner contends that the government violated *Napue v. Illinois*, 360 U.S. 264, 269 (1959), because the State knowingly presented false testimony at trial. Specifically, Petitioner asserts that the State violated *Napue* by creating the false impression at trial that State's witness Llewellyn Mosley did not have a prosecution immunity deal, by knowingly presenting false testimony from a fingerprint expert, by knowingly presenting evidence regarding the shack where Petitioner lived in a false light, and by knowingly presenting evidence in a false light when it introduced co-defendant Adams' statement into evidence. As noted earlier, Respondent contends initially that these claims are procedurally barred, and Respondent further asserts that the claims are without merit.

Applicable Law

The Supreme Court has held that the presentation of false evidence at trial, as well as the admission into evidence at trial of false evidence that, although not solicited, is not corrected, violates a criminal defendant's due process rights, if the reliability of a given witness may be determinative of guilt or innocence. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935). This is true whether the nondisclosure was intentional or through negligence. *Giglio v. United States*, 405 U.S. 150, 154 (1972). In order to prevail on a claim that his constitutional rights were violated by the presentation of false testimony, a petitioner must establish not only that the testimony was actually false, but also that it was material and that the prosecution knew it was false. *Napue v. Illinois*, 360 U.S. at 271. And the Supreme Court has also

stated that a new trial is dictated only when the false testimony could, in any reasonable likelihood, have affected the judgment of the jury. *Id.*

Analysis

1. Mosley's testimony

Petitioner asserts that the prosecution violated *Napue* when it gave the false impression at trial that state witness Llewellyn Mosley did not have an agreement with the State that he would not be prosecuted if he testified against Petitioner. As support for this claim, Petitioner points to testimony given at John Adams' capital murder trial, several months after Petitioner was convicted and sentenced to death, by Llewellyn Mosley's attorney, Kent Traylor.

Traylor testified at Adams' trial that he and Mosley spoke at Petitioner's trial for between twenty and twenty-five minutes in a witness room at the back of the courtroom. Traylor further testified that he also had a conversation with a member of the Dallas District Attorney's office that day about Mosley, but that there was neither an express nor an implied deal between Mosley and the State that Mosley would not be prosecuted for any crimes he had committed if he testified at Petitioner's trial. During a hearing outside of the jury's presence at Adams' trial, Traylor stated that there was an offer from the State, but he did not elaborate on this statement. (Exhibit #17, Adams Trial, vol 34, pp.122-26, 133, 136-38).

At Petitioner's trial, Mosley testified on direct appeal that he had a 1988 burglary conviction and a 1990 drug possession conviction. (R. 45:101-02). He also acknowledged that he smoked crack with Petitioner and John Adams during the early morning hours of March 21, 1997, after the two men obtained crack from Mosley's neighbor JT. (R. 45:156). At a hearing outside of the presence of the jury and after speaking to Kent Traylor, Mosley testified that he understood that the State

could possibly charge him with some crime, and he could seek a deal with the State not to prosecute, but that he wanted to go ahead and continue testifying. (R. 45:139-41). During further direct examination, the State asked Mosley whether he had received any deal from the State, and he answered that he had not. The trial court, however, sustained a bolstering objection by the defense to this line of questioning and instructed the jury not to consider Mosley's answer. (R. 45:160-61). Mosley then admitted on cross-examination that he had been to the penitentiary, he hoped that the State would not prosecute him for anything, and he believed at the time that the items that Petitioner and Adams brought to his house were stolen. (R. 45:163-64).

Petitioner asserts that the State knowingly created a false impression that Mosley did not receive any offer or assurance from the State that he would not be prosecuted if he testified against Petitioner. Petitioner further asserts that Kent Traylor's testimony at Adams' trial is evidence that Mosley agreed to testify against Petitioner in exchange for an offer of immunity made by the State not to prosecute him for several crimes that he committed, that Mosley accepted this offer by testifying against Petitioner, and that the State fulfilled its promise by not prosecuting Mosley. Petitioner contends that this false impression was material because, had the jury known that Mosley had accepted an offer of non-prosecution from the State, there is a reasonable likelihood that Petitioner would not have been convicted because Mosley's testimony, especially where it differed from his previous written statement, would not have been believed by the jury.

In the first instance, the record with regard to this claim is difficult to decipher because much of Mr. Traylor's testimony at Adams' trial was constricted because of attorney/client privilege. Moreover, while Mosley did testify at Petitioner's trial that he had accepted no deal from the State for his testimony, his testimony on this issue was successfully objected to by the defense and the

trial court instructed the jury not to consider it. Assuming, however, that Mosley's stricken testimony that he had accepted no non-prosecution deal from the State for his testimony was indeed testimony at Petitioner's trial, Petitioner has failed to establish either that this testimony was false or that, even if false, it was material. Mosley testified at Petitioner's trial that he had accepted no deal, and Kent Traylor testified at Adams' trial that there was neither an express nor an implied deal between the State and Mosley. The 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.

Moreover, Petitioner has failed to show any reasonable likelihood that, were this testimony false, it would have affected the verdict of the jury. In that regard, during his testimony Mosley acknowledged his prior criminal convictions, he admitted that he smoked crack cocaine with Petitioner and Adams, he admitted that he suspected at the time that the property Petitioner and Adams brought to his house was stolen, and he admitted that he hoped that the State did not prosecute him. Thus, Mosley hardly presented an unvarnished character to the jury. Furthermore, his testimony was corroborated by the wheel and tire matching the victim's car that were found in the lot next to Mosley's house, the spare tire that was on the victim's car when it was located, and the weed eater that belonged to Vick that was found in his house when he was arrested. *See Knox v. Johnson*, 224 F.3d 470, 478 (5th Cir. 2000) (holding that any alleged perjured testimony by witness was not material because, in part, the witness' relevant testimony was corroborated by other

witnesses' testimony). And, any differences between his testimony at trial and his prior written statement were fully explored on cross-examination by defense counsel. (R. 45:169-74, 184-88). Finally, Mosley did not testify regarding the murder of Vick, but instead testified about the circumstances surrounding Petitioner's visits to his house before and after the murder, including the fact that he saw property in Vick's car that was subsequently traded for crack cocaine, and Petitioner's and Adams' demeanor at the time. Accordingly, whatever impeachment value the alleged non-prosecution agreement between the State and Mosley would have had, Petitioner has not shown a reasonable likelihood that this further impeachment evidence would have impeached Mosley's partially corroborated testimony such that Petitioner would not have been convicted of capital murder. Petitioner's first ground for relief is without merit, and it is recommended that it be denied.

2. Fingerprint testimony

In his sixth ground for relief, Petitioner contends that the State knowingly presented false testimony from its fingerprint expert, James Cron, regarding a fingerprint found at the scene. Specifically, Petitioner asserts that Cron's testimony that the fingerprint found in a blood stain on one of the pillowcases was Petitioner's fingerprint was incorrect because two people he formerly supervised were unable to compare the fingerprint and because Petitioner's own expert, Tom Ekis, asserts that the fingerprint is not of comparable quality.

James Cron testified as a fingerprint expert for the State. With regard to his qualifications as a fingerprint expert, James Cron testified at the trial that he had retired from the Dallas County Sheriff's Office and, at the time of Petitioner's trial, he was working on a consultant basis with regard to crime scene matters. Cron further testified that, when he retired from the Sheriff's

Department, he retired as head of the physical evidence section, a section he had headed for twenty-one of his twenty-nine years with the department. He also testified that, prior to working for the Sheriff's office, he had worked for the Dallas Police Department for six years as a civilian employee in the crime scene section, where he concentrated on fingerprint work. (R. 47:86-8). Cron also testified regarding the numerous fingerprint schools he had attended and the numerous classes he had instructed on fingerprint identification. (R. 47:88-9).

Cron was asked by the State to examine several fingerprints obtained at the scene of the murder, including two prints found on two pillowcases on the victim's bed and a print found on a soap dispenser in a bathroom. Cron testified that he could not identify the print found on the dispenser or a palm print on one of the pillow cases because they were not of comparable quality. (R. 47:91-2, 118). He further testified, however, that the print found in blood on the other pillowcase was a print that could be compared to the fingerprints of the known suspects because it had sufficient points of comparison. Cron testified that this print was not Adams' print or Donna Vick's print, but it did match Petitioner's left little finger at ten points of comparison. (R. 47:96, 98, 106, 117).

On cross-examination Cron acknowledged that he could not enlarge the photograph he had taken of the print because, due to the cloth weave of the pillowcase, too much detail was lost when the photograph was enlarged. He further acknowledged that, because the photo was not enlarged, he could only verbally describe the points of comparison to the jury and could not note those points on any enlarged exhibit. (R. 47:114-15, 127-28). And he admitted that he could not classify the print because it was missing its delta and he could not, for that same reason, submit it to the national Automated Fingerprint Identification System (AFIS). (R. 47:111-12, 120). Finally, Cron stated that

he was aware that two members of the Sheriff's department, Detectives Jumper and Howell, whom he used to supervise, had earlier testified at Petitioner's trial that they were unable to compare the bloody print to any known prints and that he would have thought that Howell would have been able to do so. (R. 47:123-24).

Petitioner contends that the State knowingly presented false testimony because Cron identified the fingerprint as belonging to Petitioner when his former co-workers whom he supervised were not able to do so, because Cron used only a photograph and did not produce an exhibit or a draft of his findings, and because Cron's opinion is contradicted by the defense expert's opinion. As support for this claim, Petitioner has included as an exhibit an affidavit from Tom Ekis, who was the defense fingerprint expert at Petitioner's trial. In his affidavit Ekis states his own expert opinion that the fingerprint found in blood at the scene was not comparable and that Cron was instead "teasing" out points of comparison between Petitioner's print and the print found at the scene that were not actually there. (Petitioner's Exhibit #14).

Petitioner does not, however, offer any support for his contention that James Cron's testimony about the fingerprint was, in fact, false, much less that the State knew that it was false. Instead, Petitioner points to weaknesses in Cron's testimony that were fully explored by defense counsel when he was cross-examined at trial and to the opinion of another in the field. None of this, however, is evidence that Cron's testimony was false or that the State knew it was false. Moreover, Petitioner fails to acknowledge that, at trial, this same expert was present during Cron's testimony and consulted with defense counsel, presumably aiding them in the cross-examination of Cron. (Exhibit #14; R. 47:100). In summary, Petitioner has pointed to expert testimony that he does not believe to be true and supports his belief with the opinion of another expert. Petitioner has failed

to establish either the falsity of Cron's testimony or the State's knowledge that the testimony was false. *See Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990) (holding that conflicting testimony does not prove perjury but instead establishes a credibility question for the jury); *Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir.) (holding that the fact that expert testimony is challenged by another witness is not sufficient to establish that the State either knows or believes the testimony to be false), *cert. denied*, 536 U.S. 978 (2002). Petitioner's sixth ground for relief is without merit, and it is recommended that it be denied.

3. Testimony regarding shack

In his seventh ground for relief, Petitioner asserts that the State knowingly presented evidence in a false light regarding the shack where Petitioner lived. Specifically, Petitioner contends that the State presented the evidence found in and around the shack in a false light when it attempted to link all of the evidence found in the shack to Petitioner through the testimony of Lieutenant Pothen when, in fact, there were documents found in the shack that belonged to Adams.

Lieutenant Paul Pothen of the DeSoto Police Department testified as a witness for the State. A portion of his testimony concerned the arrest of Petitioner at the shack on Beckley Avenue in DeSoto, Texas. Pothen testified that the shack where Petitioner was found and arrested had no windows or doors and no real rooms, was very dirty inside, and there were numerous items strewn on the floor inside of the shack, including several pairs of jeans, several dozen empty cans of gold spray paint, and several papers. (R. 46:25-6, 29-40). Papers belonging to Petitioner regarding his tax return found in the shack were admitted into evidence. (R. 46:41). On cross-examination, Pothen stated that he had no personal knowledge regarding whose jeans were at the shack, he had no personal knowledge as to how many people lived at the shack, and the only items found at the shack

that definitely belonged to Petitioner were the tax documents and a Bible with his name in it. (R. 46:60-3). Later in the trial, after being questioned by defense counsel about the existence of papers belonging to Adams, lead prosecutor Greg Davis gave defense counsel copies of documents found in the shack that belonged to Adams, including Adams' parole papers, and these documents were admitted into evidence at trial as documents belonging to Adams found at the shack. (R. 48:35-53).

Petitioner asserts that Lieutenant Pothen's testimony gave the false impression that everything found in the shack belonged to Petitioner when, in fact, the State knew that documents belonging to Adams were found at the shack. Petitioner further asserts that this false testimony linked Petitioner to the crime and that there is a reasonable likelihood that, had the jury been made aware of Adams' "control over the Beckley shack," Petitioner would not have been convicted. (Petition at 50).

First, as noted by Petitioner, Adams' papers were later admitted into evidence at trial and were acknowledged by the State to have been found in the shack. This allowed defense counsel Karo Johnson to argue at closing that Adams' papers were evidence that not everything in the shack belonged to Petitioner. (R. 49:42-3). Therefore, the jury was not unaware of the papers and therefore was not unaware that Adams kept belongings at the shack. Second, Pothen was not the only witness who testified regarding Petitioner and his control over the shack. Both Donald Cole and Sylvia Parsons, two people who were on friendly terms with Petitioner, testified that Petitioner had told them that he lived in the shack. Accordingly, 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. In summary, even if Pothen's testimony that he had no

personal knowledge as to who owned the property was false testimony given that papers owned by Adams were found in the shack, there is no reasonable likelihood that the outcome of the trial would have been different had this testimony not been given. Moreover, defense counsel was able to use Adams' papers to argue that the evidence did not establish that the clothing found in the shack, including the Umen jeans, belonged to Petitioner. Petitioner's seventh ground for relief is without merit and should be denied.

4. Co-defendant's statement

Finally, in his eleventh ground for relief, Petitioner asserts that the State knowingly presented evidence in a false light when it introduced Adams' written statement into evidence at trial. Specifically, Petitioner asserts that the State introduced Adams' statement, in which Adams claimed that Petitioner alone killed the victim, using both Adams' knife and another knife, when the State knew that this was an incorrect statement by Adams. As support for this claim, Petitioner points to Adams' trial, at which the prosecution argued that Adams' statement should not be admitted into evidence because it was hearsay and at which the State's theory of the crime was that Adams used his own knife to stab Vick. (Petition at 73-4). In essence, Petitioner asserts that the State presented false testimony at Petitioner's trial by presenting inconsistent theories at the two trials of Petitioner and Adams.

At Petitioner's trial, defense counsel questioned Detective Tripple on cross-examination about a conversation he had with Adams. Tripple testified that Adams told him that his knife was used in the offense. On re-direct examination, the State successfully argued that the rest of Adams statement regarding the knife should be admitted into evidence under the Texas rule of optional completeness. The prosecutor then elicited from Tripple that Adams told Tripple that Petitioner first

used Adams' knife to stab Vick and then, after it broke, he retrieved another knife from the kitchen and used that knife to murder Vick. (R. 45:234).

Petitioner alleges that this portion of Adams' statement was false testimony and that the State knew it was false because the State subsequently argued at Adams' trial that it was Adams who used his own knife to stab Vick. Petitioner then cites cases, albeit not from this Circuit, that hold that the State cannot pursue inconsistent theories at the trials of co-defendants. Putting aside whether Petitioner has actually presented evidence that Adams' statement was false or whether the State can or cannot pursue inconsistent theories against co-defendants, Petitioner has not shown either that the State knew the statement by Adams was false or that the State pursued inconsistent theories with respect to Petitioner and Adams.

Undoubtedly, at Petitioner's trial the State emphasized Petitioner's role in Vick's murder. However, other than the fact that Adams' statement was admitted into evidence, the State never pursued a theory at Petitioner's trial that Petitioner used both knives that were found to have Vick's blood on them to kill Vick by himself. To the contrary, in his opening statement, lead prosecutor Greg Davis argued that the evidence would show that Petitioner and Adams were armed with knives, one a pocketknife and one a butcher knife, and they entered the victim's bedroom as she laid in her bed and killed her. (R. 43:76). And, as noted by Respondent, in his closing argument, Davis argued that the evidence had shown that Petitioner had used a serrated butcher knife to murder Vick and he did *not* argue that Petitioner used the pocketknife that was owned by Adams. (R. 49:54-5). And he also stated that Adams would have his day in court, but that Petitioner's trial was about Petitioner. (R. 49:59). Thus, 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.[5] The record therefore does not support Petitioner's claim that there were inconsistent theories pursued at the two trials.

Furthermore, Petitioner has failed to prove that, if Adams' self-serving statement regarding the two knives was false, the State *knew* that it was false. From the portion of Adams' trial quoted by Petitioner, it is clear that the State did not *believe* that Adams' statement regarding the two knives trial was admissible as substantive evidence because the statement was self-serving and exculpatory, rather than inculpatory. (Petition at 73). But this does not establish that it was a statement that the State knew to be false. *See Kutzner v. Cockrell*, 303 F.3d 333, 337 (5th Cir. 2002) (holding that the fact that false or perjured testimony is challenged by other evidence presented at trial or is inconsistent with prior statements does not establish that the prosecution knew or believed that testimony to be false). Without such a showing, Petitioner cannot prevail on this claim. Petitioner's eleventh ground for relief is without merit, and it is recommended that it be denied.

B. Brady Claims

In his second, third, fourth, fifth, and eighth grounds for relief, Petitioner asserts that his due process rights were violated because the State suppressed material exculpatory and impeachment evidence from the defense. Specifically, Petitioner asserts that the State violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by: 1) suppressing the deal made between Llewellyn Mosley and the State; 2) suppressing the existence of a witness to whom Adams had confessed; 3) suppressing the statement and 911 call made by Daniel McGaughey; and 4)

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One reason the State may have wanted all of Adams' statement regarding the knives admitted into evidence was to insure that there was not a false impression left with the jury that Adams confessed to killing Vick using his own knife by himself.

suppressing the materials belonging to Adams that were found in the shack. Respondent asserts in response that these claims are procedurally barred and that, in any event, they are without merit.

Standard of Review

Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the suppression of evidence favorable to the accused and material to either guilt or punishment by the State violates a defendant's due process rights under the federal constitutional. And under *Brady*, the prosecution has the duty to turn over to the defense both exculpatory and impeachment evidence, whether or not it was requested by the defense. *United States v. Bagley*, 473 U.S. 667, 682, 685 (1985). Such evidence is material if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. A reasonable probability of a different result is shown when the suppression of evidence undermines confidence in the verdict. *Bagley*, 473 U.S. at 678; *Gibbs v. Johnson*, 154 F.3d 253, 256 (5th Cir. 1998).

Analysis

1. Mosley deal

In his second ground for relief, Petitioner argues that the State violated his due process rights under *Brady* by failing to disclose to the defense that State's witness Llewellyn Mosley had a non-prosecution deal with the State in exchange for his testimony. As support for this claim, Petitioner points to testimony given by Mosley's attorney in co-defendant Adams' subsequent capital murder trial.

An agreement made with a State's witness for leniency in return for his testimony is *Brady* evidence because it is evidence that is relevant to the credibility of such a witness. *See Giglio v. United States*, 405 U.S. 150, 154-5 (1972). However, in addressing Petitioner's first ground for

relief, *supra*, 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. Accordingly, Petitioner has failed to establish that there was any non-prosecution deal between Mosley and the State.

Furthermore, Petitioner has failed to prove that, even were there such an agreement, the suppression of the agreement was material. In that regard, as noted earlier, Mosley testified about his prior criminal record, his drug use, his knowledge that the items he received from Petitioner and Adams were probably stolen, his desire not to be prosecuted by the State, and the inconsistencies between his prior written statement and his testimony. Moreover, in closing, defense counsel argued that Mosley's testimony should not be believed because the evidence showed that he ran a crack house and because Mosley expected something from the State for his testimony, given the felony offenses he had admitted committing during his testimony. (R. 49:28-9).[6] Accordingly, Mosley's testimony was effectively impeached in other ways.

Moreover, as this Court discussed earlier, Mosley's testimony was corroborated by other evidence admitted at trial. Specifically, Vick's weed eater was found in Mosley's house, and the tire and wheel from Vick's car were found in an empty field next to Mosley's house. When withheld evidence seriously impeaches a key witness's testimony on an essential issue, a federal habeas court looks to whether the testimony was strongly corroborated by other evidence. *Kopycinski v. Scott*, 64 F.3d 223, 226 (5th Cir. 1995). Mosley's testimony that Petitioner and Adams came to his house in Vick's car, Mosley changed a flat tire, and Petitioner and Adams had in their

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The Fifth Circuit has held, however, that a unilateral hope for leniency from the State is not *Brady* material that must be disclosed to the defense. *Knox v. Johnson*, 224 F.3d 470, 482 (5th Cir. 2000).

possession the belongings of a woman from DeSoto was substantially corroborated elsewhere at trial. Petitioner has failed to prove either that the State suppressed a deal with Mosley or that, if such information was suppressed, it was material to Petitioner's conviction. Petitioner's second ground for relief is without merit and should be denied.

2 Jerry Causey statement

In his third ground for relief, Petitioner argues that the State suppressed the existence of a witness, Jerry Causey, to whom co-defendant Adams confessed. Petitioner further asserts that the State knew about Causey's existence at the time of Petitioner's trial and that, had the defense known about the confession and called Causey as a witness, there is a reasonable probability that Petitioner would not have been convicted of capital murder.

As support for this claim, Petitioner points to Jerry Causey's testimony at John Adams' trial in July of 1998 and an affidavit signed by Causey in December of 2001. At Adams' trial, Causey testified that he knew Adams in March of 1997 and that, on March 21, 1997, Adams drove to his house in a white automobile. When Causey asked him whose car it was, Adams told him that it was the "bitch's" car. Adams later told Causey that he "already done killed one bitch and I'll kill another one." Finally, Causey testified that he was never interviewed by the DeSoto police about this information, had never given a written statement, and first met and spoke to the prosecutor Greg Davis at the Hutchins state jail, where he was an inmate, about a month to six weeks before he testified at Adams' trial. (Petitioner's Exhibit #9, Adams' trial, vol. 32, pp. 188-93). In his affidavit, Causey gives the same information about his conversation with Adams in March of 1997, but he states in his affidavit that he was called by the District Attorney's office from the Lew Sterrett jail,

where he was an inmate, in approximately November of 1997 to discuss the information. (Petitioner's Exhibit #8).

First, with regard to the State's knowledge of Jerry Causey's existence at the time of Petitioner's trial, Causey's affidavit appears to conflict with his testimony at Adams' trial. In his affidavit, he asserts that he spoke to the State about this information in November of 1997, shortly before Petitioner's trial began. At Adams' trial, Causey testified that he did not speak to the prosecutor until May or June of 1998. This apparent conflict does not establish that the State knew about the information that Causey had at the time of Petitioner's trial.

More importantly, however, Petitioner has failed to show that Adams' confession to Causey is material to Petitioner's conviction for capital murder. A defendant must show that the withheld evidence could reasonably be taken to put the case in a different light so as to undermine confidence in the verdict. *Gibbs v. Johnson*, 154 F.3d 253, 256 (5th Cir. 1998). As this Court has discussed earlier, and contrary to Petitioner's assertions, the State argued at Petitioner's trial that Petitioner and Adams both killed the victim. Moreover, Mosley testified at Petitioner's trial that, while Petitioner was the one driving the car when they arrived at his house in the middle of the night, both Petitioner and Adams would take turns driving the car away and coming back. (R. 45:155). Accordingly, a confession given by Adams to a third party while driving the victim's car does not exculpate Petitioner. Petitioner's third ground for relief is without merit, and it is recommended that it be denied.

3. <u>Daniel McGaughey's statement and 911 call</u>

In his fourth and fifth grounds for relief, Petitioner contends that the State suppressed the existence of a statement that Daniel McGaughey made to the police until after Petitioner's trial

began and that the State suppressed the 911 tapes because they were misplaced and therefore not provided to the defense. Petitioner further asserts that, had the defense been provided the statement McGaughey made to the police earlier and been provided the 911 tapes, there is a reasonable probability that he would not have been convicted of capital murder.

Notes taken by a police officer who spoke to McGaughey after he called 911 on Adams' behalf quote McGaughey as saying that Adams confessed to him that he had murdered someone. (Petitioner's Exhibit #5). The police notes differ from McGaughey's written statement to the police, in which he states that Adams told him there had been a murder and he wanted to turn himself in. (Exhibit #6). Defense counsel were aware of McGaughey's written statement prior to trial, but were not informed of the police notes until December 1, 1997, the first day of testimony at Petitioner's trial. (R. 46:71, 80-1). The prosecution also informed defense counsel during Petitioner's trial that the District Attorney's office did not have a tape of McGaughey's call to 911, even though the police officers had stated to the prosecutors that the tape had been dropped off at the prosecution's reception area. (R. 46:83-4).

With regard to the 911 tape, as Respondent notes, even were the record before this Court that the State affirmatively destroyed these tapes, which it is not, in order to establish a constitutional violation, Petitioner must prove that the State destroyed the tape with knowledge of its exculpatory value. *Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998), *citing Arizona v. Youngblood*, 488 U.S. 51 (1988). This, Petitioner has not done, as the State represented at trial that the tape was lost, not destroyed. But more importantly, Petitioner has failed to establish that he has been prejudiced by the fact that he did not know of the police notes until trial or that he has never heard McGaughey's 911 call. In that regard, McGaughey has recently signed an affidavit in which he states, not that

Adams confessed to him, but that Adams told him that there had been a murder. (Petitioner's Exhibit #7). Therefore, McGaughey's written statement, not the hearsay notes of a police officer, is the best and most accurate evidence of what Adams said to McGaughey. And, Petitioner has not shown that the 911 tape would have contained any different information than that already provided to this Court by Mr. McGaughey. Moreover, the materiality of *Brady* evidence is dependant on the value of the evidence relative to the other evidence presented by the State at trial. *Spence v. Johnson*, 80 F.3d 989, 995(5th Cir. 1996). As previously discussed by this Court, a confession by Adams would not have been exculpatory evidence for Petitioner because the State argued at trial, and the evidence reflected, that both men murdered the victim. Petitioner's fourth and fifth grounds for relief are without merit and should be denied.

4. Adams' papers

In his eighth ground for relief, Petitioner claims that the State suppressed the existence of papers belonging to John Adams that were discovered in the shack where Petitioner was arrested until the middle of Petitioner's trial. Petitioner further claims that this suppression prevented defense counsel from having a coherent trial strategy and from effectively cross-examining Lieutenant Pothen about the contents of the shack.

As set forth earlier, on the last day of testimony by State's witnesses, and upon the request of defense counsel Karo Johnson, the State provided to the defense papers belonging to Adams that were found in the shack, these papers were admitted into evidence before the jury, and Mr. Johnson argued at closing that the papers belonging to Adams that were found in the shack was evidence that other evidence found in the shack, such as the bloody jeans, might have also belonged to Adams. Petitioner contends, however, that it would have been more effective for defense counsel to cross-

examine Lieutenant Paul Pothen about the contents of the shack earlier in the trial. Petitioner further asserts that, had defense counsel been able to do this, there is a reasonable probability that he either would not have been convicted or would not have been sentenced to death.

Initially, this Court notes that the record from the trial indicates that all of the evidence that was seized from the Beckley shack was at the DeSoto police department and was available for the defense to examine, and defense counsel had been informed of this. (R. 48:37). *Brady* does not require the State to furnish a defendant with exculpatory evidence that is available to the defendant through the exercise of due diligence. *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir.), *cert. denied*, 536 U.S. 978 (2002); *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997). Moreover, even if the State did suppress the Adams' papers until the end of its case, the Fifth Circuit has stated that, even if there has been a *Brady* violation, a reversal is not required if the defendant was not prejudiced by the nondisclosure or late disclosure and could prepare his defense in an adequate manner. *United States v. Johnston*, 127 F.3d 380 (5th Cir. 1997); *United States v. Ellender*, 947 F.2d 748, 757 (5th Cir. 1991). In the case at hand, the jury was made aware of the existence of the documents, they were placed into evidence and could therefore be examined by the jury, and defense counsel was able to incorporate their existence into his closing statement. The record reflects that the jury considered all of the evidence found in the shack and its relevance to the case, as the jury sent notes during deliberations requesting to look at all of the jeans and pants in evidence, the knives found at the shack, and the DNA testimony from the trial, and this evidence was provided to them. (R. 49:61-4). Petitioner has not shown that cross-examination on this issue would have rendered better results. Petitioner has failed to establish a *Brady* claim, and it is recommended that his eighth ground for relief be denied.

C. Cumulative Error Claim

In his ninth ground for relief, Petitioner contends that the cumulative effect of the suppression of evidence by the prosecution and the presentation of false evidence by the prosecution deprived him of his due process rights and his right to a fair trial.

In *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992), the Fifth Circuit held that in order for a federal habeas petitioner to prevail on a claim of cumulative error at a state trial, he must establish that: 1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; 2) the errors were not procedurally defaulted for habeas purposes; and 3) the constitutional errors so infected the entire trial that the resulting conviction violates due process. *Id.* at 1458.

As this Court has held, all of Petitioner's *Napue* and *Brady* claims are procedurally defaulted claims because Petitioner did not raise any of these claims at the state level and has not overcome the procedural bar with a credible actual innocence claim. Accordingly, Petitioner's cumulative error claim cannot prevail. Furthermore, even were these claims not procedurally defaulted, none of Petitioner's claims, either individually or aggregately, indicate that his trial was so infected with constitutional errors that the resulting conviction is suspect or violates due process. Rather, Petitioner's conviction for capital murder was based on admissible and credible evidence. Petitioner's ninth ground for relief is without merit, and he is not entitled to relief on this basis. Accordingly, it is recommended that it be denied.

D. Ineffective Assistance of Counsel at Trial

In his twelfth, thirteenth, and fourteenth grounds for relief, Petitioner asserts that his trial counsel were ineffective in several ways. Specifically, Petitioner contends that his trial counsel were

ineffective for: 1) failing to object to the admission of John Adams' statement into evidence on Confrontation Clause grounds; 2) failing to conduct an adequate investigation in preparation for both the guilt and the punishment phases of the trial; and 3) failing to request a hearing on the admissibility of expert fingerprint testimony at trial.

Standard of Review

The Sixth Amendment to the United States Constitution guarantees a defendant in a criminal case reasonably effective assistance of counsel. *Cuyler v. Sullivan,* 446 U.S. 335, 344-45 (1980). In order to obtain federal habeas relief due to ineffective assistance of counsel, a petitioner must satisfy the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, in order to prove that his counsel was ineffective, a defendant must prove by a preponderance of the evidence both that counsel's performance was deficient and that this deficient performance prejudiced his defense. *Id.* at 687. Courts, however, should "indulge a strong presumption" that counsel's conduct falls within the range of reasonable assistance, and a defendant must overcome the presumption that an action is sound trial strategy. *Id.* at 689. And prejudice results when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 2068. *See also Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (habeas petitioner must show that trial result was unreliable or proceeding fundamentally unfair due to deficient performance of counsel).

Analysis

1. Co-defendant's statement

In his twelfth ground for relief, Petitioner asserts that his trial counsel were ineffective for failing to object to the admission into evidence of John Adams' statement on the appropriate

grounds. Specifically, Petitioner should have objected that the admission of this statement violated Petitioner's rights under the Confrontation Clause of the Sixth Amendment. Respondent concedes that this claim was exhausted at the state level, but contends that it is without merit.

Applicable Facts

During Petitioner's trial, Detective Dan Trippel of the Dallas Police Department testified regarding the 911 call he responded to on March 22, 1997, his meeting with John Adams as a result of this call, and his subsequent visits with Adams to the crime scene and the location where Donna Vick's car was abandoned. (R. 45:191-215). On cross-examination, defense attorney Karo Johnson asked Trippel, among other things, whether Adams had told him that it was his knife that was used in the offense. Trippel responded that Adams had told him that. (R. 45:222). Johnson also asked whether Adams had described his knife and Trippel responded that Adams described it as a lock-blade knife. (R. 45:224).

On re-direct examination, the prosecutor elicited from Detective Trippel the fact that Adams told Trippel that it was Petitioner who used Adams' knife to attempt to kill the victim, and when it broke he used a kitchen knife. (R. 45:234). This testimony was elicited under Texas Rule of Evidence 107, Texas' rule of optional completeness. Defense counsel objected that this was hearsay testimony that was inadmissible and that it did not fall under Rule 107 because the testimony elicited by defense counsel did not create any false impression. These objections were overruled. (R. 45:231-32). On direct appeal, the Court of Criminal Appeals ruled that the trial court did not err in admitting this testimony because Adams' admission of ownership of the knife could have misled the jury about who was actually responsible for the killing. *Wright*, 28 S.W.3d at 536. That court

declined, however, to consider a claim that the testimony was inadmissible under the Confrontation Clause because this claim had not been preserved at trial. *Id.*

At the state habeas level, Petitioner asserted that his trial counsel were ineffective for failing to make an objection based on the Confrontation Clause, thereby failing to preserve error. The state habeas court concluded that trial counsel were not ineffective for failing to make a Confrontation Clause objection and concluded that Petitioner had failed to establish prejudice for the failure to make this objection. (SHTr.:213-15).

Analysis

The state court's conclusions do not result in a decision that is contrary to federal law. Under the Confrontation Clause of the Sixth Amendment, a criminal defendant is guaranteed the right to physically face those who testify against him and the right to conduct cross-examination. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). And, generally speaking, the Confrontation Clause guarantees the *opportunity* for effective cross-examination. *Delaware v. Fensterer*, 474 U.S. 15, 19-20 (1985) (*per curiam*). In *Lilly v. Virginia,* 527 U.S. 116 (1999), the Supreme Court discussed the admission of hearsay statements into evidence in the context of the Confrontation Clause. In *Lilly*, the Court restated the rule that, in order for a hearsay statement to be admissible at a criminal trial without violating the Confrontation Clause, the evidence must fall within a "firmly rooted" hearsay exception, and it must contain guarantees of trustworthiness such that subjecting it to adversarial testing would add little to its reliability. *Id.* at 124-24. While the Supreme Court in *Lilly* was not addressing the optional completeness rule as a rule permitting the admission of hearsay evidence, the Supreme Court did state in *Lilly* that its history of cases has consistently viewed accomplices' statements that shift or spread blame to the defendant as failing to have the guarantees of

trustworthiness necessary for such statements to pass constitutional muster under the Confrontation Clause. *Id.* at 133. Therefore, the opinion in *Lilly* gives credence to Petitioner's claim that the portion of Adams' statement in which he alleged that it was Petitioner alone who killed the victim was not admissible under the Confrontation Clause.

But, while an objection based on the Confrontation Clause might have indeed prevailed had defense counsel made such an objection at trial, Petitioner has failed to establish any prejudice because he has failed to show that, even had the statement from Adams that Petitioner used Adams' knife to kill the victim not been admitted into evidence, there is a reasonable probability that Petitioner would not have been convicted. In that regard, two knives with Donna Vick's blood on them were found at and around the shack where Petitioner was arrested, along with a pair of jeans with both Vick's blood and Petitioner's gold paint on them. Moreover, Petitioner's blood was visible on the steering wheel and dashboard of Vick's car, Llewellyn Mosley testified that he saw Petitioner and Adams trade items belonging to Vick for crack cocaine shortly after the murder, and Petitioner's fingerprint was found in blood at the crime scene. While Petitioner attacks the State's contention that the jeans with Vick's blood on them were his, and attacks the credibility of the testimony given by Mosley and James Cron, the fingerprint expert, as this Court noted earlier, this evidence was admissible evidence presented to the jury at Petitioner's trial.

Furthermore, while Petitioner contends that the State used the hearsay statement by Adams to prove that Petitioner alone stabbed and cut Donna Vick, in fact the State did not argue that Petitioner acted alone. In both the opening and closing statements made by the State at Petitioner's trial, while prosecutors concentrated their arguments on Petitioner's culpability, they never contended that Petitioner was the only person who stabbed the victim. Instead, in his opening

statement, prosecutor Greg Davis stated that the evidence would show that the two men acted together to murder the victim. (R. 44:76). And in his closing statement, Davis stated that the evidence showed that Petitioner and Adams committed murder together and later stated that Adams would have his day in court for his actions. (R. 49:48, 59). Given all of the other evidence presented at Petitioner's trial, it cannot be said that, had Adams' self-serving statement regarding his knife that was not relied upon by the State *not* been admitted into evidence, there is a reasonable probability that Petitioner would not have been convicted of capital murder.[7] The state court's conclusion was not contrary to federal law, and this claim is without merit.

2. Mitigating Evidence

In his thirteenth ground for relief, Petitioner contends that his trial attorneys were ineffective for failing to investigate the potential witness Daniel McGaughey and the 911 call he made for potential exculpatory evidence; for failing to investigate the ownership of the Umen jeans that were found in the shack; and for failing to investigate the evidence presented by the State at the punishment phase of the trial and failing to present mitigating evidence on Wright's behalf. Respondent asserts in reply that the portion of the claim regarding the Umen jeans is unexhausted and procedurally barred and that, in any event, all of these claims are without merit.

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It also cannot be shown that, had Adams' statement been admitted into evidence, his conviction would have been overturned on appeal if defense counsel had preserved error on the Confrontation Clause error. Indeed, in *Lilly*, the Supreme Court specifically stated that the erroneous admission of an accomplice's statement in violation of the Confrontation Clause is an error subject to a harmless error analysis. *Lilly*, 527 U.S. at 139-40. And again, given the other evidence admitted into evidence supporting Petitioner's conviction, along with the fact that the State never alleged that Petitioner acted alone in killing Donna Vick, Petitioner has not shown that his conviction would have been reversed even had the Court of Criminal Appeals found error.

a. Witness McGaughey

Petitioner first alleges that his defense counsel were ineffective in their representation with respect to potential witness Daniel McGaughey and the 911 call he made at Adams' request. Specifically, Petitioner asserts that his defense counsel were ineffective for failing to investigate McGaughey's whereabouts before they actually did. Petitioner contends that, had McGaughey been located, he could have been called as a witness and provided exculpatory evidence for Petitioner.

As noted earlier, Detective Trippel testified at trial that he responded to a 911 call on March 22, 1997, and as a result of that call met with John Adams. (R. 45:192). During the trial, a hearing was held regarding police notes the defense received during trial from the State regarding Daniel McGaughey, the man who called 911 on Adams' behalf. (R. 46:71). The defense had previously received a written statement given to the police by McGaughey. At this hearing, both the prosecution and the defense stated that they had attempted to locate McGaughey during the trial, but had not located him at the business where he worked from where he placed the 911 call or at his previous residence. The defense investigator also testified that he attempted to locate McGaughey at his mother-in-law's home by telephone, but there was no answer. The defense requested a continuance from the trial court in order to locate him, but the request was denied. (R. 46:74-81).

Petitioner asserts that his attorneys were ineffective in not locating McGaughey earlier and presenting him as a witness at trial. Petitioner further asserts that, had McGaughey testified at trial, he would have testified that John Adams confessed to him. As support for this claim, Petitioner points to an affidavit from McGaughey submitted to this Court as an exhibit, notes taken by a police officer after the police spoke to McGaughey, and a written statement provided to the police by McGaughey on March 25, 1997.

In his affidavit, McGaughey states that, while he had possibly moved out of the motel where he had been living by the time of Petitioner's trial, he was then living with his mother-in-law and had provided her address and telephone number as his contact information. McGaughey also states that in 1998 he was visited at his mother-in-law's home by people from the district attorney's office regarding Adams' upcoming trial. And, as outlined earlier by this Court, he further states in his affidavit that in March of 1997, a man came into the video store where he worked on Industrial Boulevard and asked him to call the police. When McGaughey asked why, the man stated that there had been a murder in DeSoto and he could not live with himself anymore. (Petitioner's Exhibit #7). In his original signed statement to the police, McGaughey gave essentially the same information. (Exhibit #6). However, in notes taken by a police officer who interviewed McGaughey, McGaughey is quoted as saying that Adams told him "I murdered someone in DeSoto and I can't deal with it." (Exhibit #5).

At the state habeas level, without the benefit of the new affidavit from McGaughey, the state habeas court denied relief, concluding that: 1) trial counsel were not ineffective for failing to investigate McGaughey earlier because they did not receive the police notes quoting McGaughey as stating that Adams had confessed to the murder until trial; 2) trial counsel were not ineffective because it was unlikely that McGaughey could have been located; and 3) prejudice had not been shown because McGaughey's signed statement was more reliable and because the notes did not establish Petitioner's innocence because the State argued that Adams also participated in the murder. (SHTr.:231-35). These conclusions do not result in a decision contrary to federal aw as outlined in *Strickland.*

Putting aside the issue of whether defense counsel should have been able to locate McGaughey at the time of Petitioner's trial, Petitioner has failed to establish any prejudice. In that regard, the Fifth Circuit has recognized that the materiality prong of the *Brady* standard is identical to the prejudice prong of the *Strickland* standard. *Martin v. Cain*, 246 F.3d 471 (5th Cir.), *cert. denied*, 534 U.S. 885 (2001); *Johnson v. Scott*, 68 F.3d 106, 109-10 (5th Cir. 1995). This Court has previously determined that the new affidavit does not present any information material to Petitioner's trial under the *Brady* material. The new affidavit from Daniel McGaughey indicates that his recollection of events is nearly identical to what he recounted in his written statement given several years ago. That is, Adams approached him, told him in a general manner that "there had been a murder" and "he couldn't deal with it." This affidavit does not support the hearsay notes from a police officer suggesting that Adams directly confessed to McGaughey. Accordingly, Petitioner has failed to establish that, had McGaughey been located and called as a witness, he would have testified that Adams confessed to the murder. Moreover, as the state habeas court found, the record reflects that, while the prosecution argued that Petitioner was the primary actor in the murder, the prosecution argued that both men participated in the murder of Vick. Accordingly, even had Adams confessed to the murder, this would not have exculpated Petitioner. Therefore, Petitioner has failed to establish by a reasonable probability that, had Daniel McGaughey testified at trial, he would not have been convicted. This claim is without merit.

b. Umen jeans

With regard to the ownership of the Umen jeans, Petitioner asserts that his defense attorneys were ineffective for failing to obtain co-defendant Adams' papers that were seized from the Beckley shack earlier than they did. Petitioner argues that, had these papers been retrieved earlier from the

DeSoto police department, the defense could have used their existence to impeach the testimony of Lieutenant Paul Pothen, who testified about the contents of the Beckley shack. Had this been done, the defense could then have created a reasonable doubt regarding the State's claim that the Umen jeans, which had Donna Vick's blood on them, were Petitioner's jeans.

Lieutenant Paul Pothen of the DeSoto Police Department testified at trial about, among other things, items that were retrieved from the shack where Petitioner was arrested. On cross-examination, Pothen testified that he had no personal knowledge regarding who lived in the shack and further testified that only a few of the items, those being a Bible and some tax forms, could positively identified as belonging to Petitioner. (R. 46:62-3). Later in the trial, outside of the presence of the jury, lead prosecutor gave the defense documents found in the shack that all belonged to John Adams. At that time, defense counsel contended that this was Brady material that should have been disclosed earlier. Davis responded that all of the items were at the DeSoto Police Department, and he had previously informed defense counsel that everything seized from the shack was at the police department. Davis also stated that defense attorney Karo Johnson had asked him about these specific documents belonging to Adams that morning, even though Davis had never mentioned them to defense counsel. (R. 48:35-40). These papers, which were Adams' parole papers, were admitted into evidence by the defense, and the prosecution stipulated before the jury that all of the documents were found in the shack. (R. 48:46, 51-3). The defense then argued in closing arguments that the documents were evidence, along with the size of the Umen jeans, that the Umen jeans belonged to Adams, not Petitioner, and that the jeans, along with Adams' knife with Vick's blood on it that Adams directed the police to find, showed that Adams and not Petitioner was the person who killed Vick. (R. 49:31-33, 35-8, 42-4).

Petitioner contends that, had defense counsel gone to the DeSoto police department and retrieved Adams' documents earlier, these could have been used in the cross-examination of Lieutenant Pothen, who testified that he did not know who owned the property in the shack and that it could have belonged to Adams. This could have then have tied Adams to the Umen jeans. However, regardless of whether defense counsel could have obtained these documents earlier and questioned Pothen about them, Petitioner has failed to establish prejudice. In that regard, Pothen conceded that he did not know who owned the numerous items in the shack and that the shack appeared to be used by transients. Furthermore, the documents belonging to Adams were admitted into evidence at trial, the prosecution stipulated on the record that they were found in the shack, and the defense was able to argue at closing that there was reasonable doubt as to whether the Umen jeans belonged to Petitioner because they were both too small for him and because they could also have belonged to Adams, who kept some items at the shack. While Pothen would have presumably acknowledged on cross-examination that Adams' documents were found at the shack, Petitioner has not shown that this would have provided any greater weight to the arguments made by defense counsel at the conclusion of the guilt phase of the trial, arguments ultimately rejected by the jury. This claim is without merit.

c. Punishment evidence

Petitioner also contends that his defense attorneys were ineffective for failing to adequately investigate the evidence presented by the State at the punishment phase of the trial and for failing to investigate and present mitigating evidence on Petitioner's behalf. Specifically, Petitioner asserts that defense counsel were ineffective in failing to investigate extraneous offenses that were admitted into evidence at trial and were ineffective for failing to investigate and present mitigating evidence

on Petitioner's behalf. Petitioner asserts that, had defense counsel investigated the extraneous offenses, they would have discovered that Petitioner sustained serious injuries at the hands of the police after leading the police on a long chase on January 13, 1988, an extraneous offense admitted into evidence, and that this beating explained why Petitioner again ran from the police and violently resisted arrest on August 4, 1988, another offense placed into evidence at trial. Petitioner also asserts that defense counsel should have further investigated a rape charge, as further investigation would have revealed that no rape occurred. And, Petitioner asserts that defense counsel should have presented testimony from family members and other witnesses in mitigation of punishment. (Petition at 101-02). As support for these claims, Petitioner has submitted a videotape of Petitioner from January 13, 1988, as well as affidavits from Petitioner's father and a former co-worker.

At the state level, the state habeas court addressed two of these three specific claims on their merits, although neither the videotape nor the two affidavits were presented to that court. The state habeas court concluded that defense counsel were not ineffective for failing to call witnesses on Petitioner's behalf, as the record revealed that members of Petitioner's family were present at trial and were prepared to testify but Petitioner, in consultation with his attorneys, opted not to call them as witnesses as they would be subject to questions about his prior extraneous offenses. Accordingly, the state habeas court concluded that defense counsel made a reasonable tactical decision not to call these witnesses. The state habeas further concluded that defense counsel were not ineffective for failing to investigate the rape charge, as the officer who investigated that charge was effectively cross-examined on the issue, and defense counsel effectively argued during closing arguments that there was no evidence of a rape, but the record instead showed that Petitioner was convicted of an

aggravated assault. (SHTr.:239-43). The state habeas also concluded that Petitioner had failed to establish prejudice under *Strickland.* (SHTr.:244). Relief was therefore denied

These conclusions do not result in a decision contrary to federal law. With regard to Petitioner's claim that his attorneys were ineffective for failing to present witnesses on his behalf, in his affidavit, submitted as an exhibit with Petitioner's petition, defense attorney Karo Johnson states that he spoke to Petitioner's mother, father, and brother about testifying on Petitioner's behalf at the punishment phase of the trial. Petitioner's mother was unavailable to testify because of a family illness. However, Petitioner himself instructed Mr. Johnson not to call either his brother or his father to the stand after Mr. Johnson explained to Petitioner that they would be cross-examined regarding their knowledge of Petitioner's previous extraneous offenses. (Petitioner's Exhibit #20).[8] In *Strickland,* the Supreme Court stated that:

> [t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.

466 U.S. at 691. The Court also noted in *Strickland* that a fair assessment of an attorney's performance requires one "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. The Fifth Circuit has also recognized that "[g]reat deference must be given to choices which are made under the explicit

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This statement is supported by the record of the trial. After the State presented its case at the punishment of the phase of the trial, and outside of the presence of the jury, defense attorney Karo Johnson questioned Petitioner about their prior discussions on this issue. Petitioner agreed that his father and his brother were present and willing to testify and that other witnesses were available to testify, but that Petitioner, after some discussion with Johnson, decided not to call any witnesses at that phase of the trial. (R. 50:117-18).

direction of the client." *United States v. Masat*, 896 F.3d 88, 92 (5th Cir. 1990), *citing Mulligan v. Kemp*, 771 F.2d 1436, 1441 (11th Cir. 1985), *cert. denied*, 480 U.S. 911 (1987). While Petitioner's father has submitted an affidavit stating that he was willing to testify at the trial and would testify that he had no problems with Petitioner when he lived with him (Exhibit #21), the evidence before this Court is that Petitioner, after being informed that his relatives would be subject to cross-examination about their knowledge of his past, chose not to call them to the stand. Accordingly, defense counsel cannot be deemed ineffective for failing to call Petitioner's father and brother as witnesses. *See Barrientes v. Johnson*, 221 F.3d 741, 774 (5th Cir. 2000) (stating that a tactical decision not to present character evidence at the punishment phase of a capital murder trial because it would open the door to incidents of prior misconduct on the defendant's part is not deficient performance); *Williams v. Cain*, 125 F.3d 269, 278 (5th Cir. 1997) (noting that a failure to present evidence at trial does not constitute "deficient performance" under the *Strickland* standard if counsel could have concluded, for tactical reasons, that presenting such evidence would be unwise).

Moreover, Petitioner has failed to establish that, had these witnesses been called, there is a reasonable probability that he would not have been sentenced to death. Petitioner has submitted affidavits from his father and a former co-worker who state, in essence, that they never had any problems with him and never saw him act violently. (Petitioner's Exhibits #21, 22). The jury, however, had not only convicted him of stabbing a woman to death, but had also heard testimony at the punishment phase that: 1) Petitioner had on one occasion driven away from the police, resulting in a police chase, in which Petitioner crashed into three vehicles and almost ran over an officer (R. 50:17-43); 2) Petitioner's wife had called the police after a domestic dispute where she was beaten by Petitioner, at which time Petitioner hit one officer, busting his lip and chipping a

tooth, ran from the officers, and fought with another officer, resulting in that officer breaking a bone in his hand (R. 50:46-68); 3) A homeless woman had reported to the police that Petitioner and two other homeless men had raped her (R. 50:78-89); 4) Petitioner was arrested another time for fighting and possessing a weapon (R. 50:92-100); and 5) Petitioner received a three-year sentence for aggravated assault on the homeless woman, as well as an additional year for escaping from custody. (R. 55:State's Exhibit #90). Given all of this other evidence supporting the jury's decision that Petitioner was a future danger to society (Tr.: 332), Petitioner has not shown a reasonable probability that, had Petitioner's father and former co-worker testified at trial, he would not have received a death sentence.

With regard to Petitioner's claims regarding the rape charge, Petitioner asserts that, had his attorneys traveled to Tennessee and investigated this extraneous offense, they would have determined that no rape in fact occurred. Further, had defense counsel presented evidence that no rape occurred, Petitioner would not have been sentenced to dearth.

Officer Marvin Rivera of the Nashville, Tennessee police department testified at the punishment phase of the trial that he responded to a call in the early morning on July 22, 1989, from a homeless woman, looking upset and bedraggled, who stated that three homeless men had raped her. She pointed out their location under a bridge to the officer, and they were subsequently taken into custody. Petitioner was one of these men. (R. 50:78-86). On cross-examination, Rivera acknowledged that he was never called to court with regard to this case and that the last time he saw the complainant was that morning. Court papers were admitted into evidence that reflect that Petitioner pled guilty to aggravated assault as a result of this charge and received a three-year

sentence. (R. 55, State's Exhibit #90). In his closing argument defense attorney Paul Brauchle argued that the record showed that it was not, in fact, a rape (R. 51:27).

Petitioner asserts that, had defense counsel further investigated this issue, they could have presented evidence that Petitioner did not rape this woman. Other than the reports made by Officer Rivera, about which he was cross-examined, Petitioner has not pointed to any further evidence that he asserts should have been produced at trial that would have actually proved that no rape occurred. While Petitioner could have testified regarding this incident himself, he made the decision not to testify at trial. (R. 50:117-18). Defense counsel instead cross-examined the police officer who responded to the call and highlighted during closing arguments the fact that Petitioner was not convicted of a sexual assault, but instead was convicted of an aggravated assault. Moreover, Petitioner has not shown that this failure to investigate prejudiced Petitioner. In that regard, Petitioner did plead guilty to aggravated assault as a result of the incident on July 22, 1989. Petitioner has failed to show that, had some sort of evidence been produced clearly establishing that Petitioner did not rape the woman, but instead was guilty of *only* an aggravated assault, there is a reasonable probability that he would not have received the death penalty.

Finally, Petitioner asserts that, had his defense attorneys done further investigation, they would have discovered that Petitioner had suffered a beating by the police after a police chase that occurred in Memphis, Tennessee on January 13, 1988. Petitioner further asserts that, had the defense presented this evidence, it would have been mitigating evidence because it would have explained why Petitioner once again ran from the police on August 4, 1988 when they attempted to arrest him after a domestic dispute with his wife.

At the punishment phase of Petitioner's trial, the State presented testimony from two police officers from Memphis that, on January 13, 1988, after being approached outside a Wendy's restaurant while he was sitting in his car, Petitioner drove away from the police, huffing paint out of a plastic bag, leading the police on a car chase that resulted in Petitioner driving the wrong way on a busy street, driving on a sidewalk, hitting two civilian cars, purposely ramming a patrol car, and almost running a police officer over with his car. The officers also testified that, after Petitioner was stopped once again, he fought with the officers, refusing to exit his car, and had to be dragged out of the car and beaten with batons in order to be arrested. He was subsequently taken to the hospital as a result of his injuries. (R. 50:17-43). The State also presented testimony from two other Memphis police officers that, on August 4, 1988, after the police responded to a domestic disturbance call from Petitioner's wife, Petitioner hit one officer in the mouth, cutting his lip and chipping a tooth, ran from the two police officers, and was apprehended by the officer, who broke his hand in the ensuing struggle. (R. 50:46-68).

Petitioner contends that, had the defense conducted further investigation, evidence that Petitioner was severely beaten by the police after the car chase could have been admitted at trial, and this evidence would have explained why he struggle with the police the second time. As evidence that Petitioner was beaten after he was finally apprehended, Petitioner has submitted a videotape of a news report about the car chase that aired in Memphis the day after. (Petitioner's Exhibit #23). In this news report, Petitioner was interviewed from jail. In this interview, Petitioner stated that he was beaten by six or seven police batons from all sides and as a result of the beating he had twenty-five stitches in his head, several stitches on his hands because of the broken glass on the ground, and cut wrists from the handcuffs. Two witnesses were also interviewed, who were present at the

Wendy's. One stated that Petitioner was held upside down and kicked in the head by a female police officer, and the other witness stated that five police officers continued to hit Petitioner after he was down on the ground. The reported also reported that the police department believed that Petitioner was arrested, that Petitioner was reportedly intoxicated on paint fumes, that Petitioner ran into several cars, that Petitioner reportedly came at officers with a hammer, and that three officers received minor injuries. (Exhibit #23).

Petitioner has failed to establish either deficient performance or prejudice with regards to this claim. While Petitioner asserts that his attorneys should have discovered this news report through further investigation, Petitioner could have also called in to their attention, since he knew of the report, having been interviewed for the report. Defense counsel cannot be deemed deficient for failing to uncover information that was known to their client but that he does not reveal to them. *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (recognizing that the reasonableness of an attorney's investigation may "critically depend" on information provided by the defendant and on the defendant's own "strategic decisions" about the representation). Furthermore, Petitioner has failed to establish that, had this videotape been shown to the jury, the result of the trial would have been different. Both officers involved acknowledged during their testimony at trial that they beat Petitioner with police batons, dragged him from his car, and took him to the hospital afterwards so that his injuries could be addressed. (R. 50:25-7, 29, 37, 43). While the videotape would have been further evidence of Petitioner's injuries, given Petitioner's behavior in evading the police and endangering police and civilian lives by running red lights and stop lights, driving the wrong way on streets, and crashing into cars, Petitioner has failed to show that further evidence of the injuries

he sustained while resisting arrest would have resulted in a life rather than a death sentence. Petitioner has therefore failed to present sufficient evidence to support this claim of ineffectiveness.

3. Daubert hearing

In his fourteenth ground for relief, Petitioner asserts that his trial counsel were ineffective for not requesting that a hearing be conducted regarding the admissibility of James Cron's fingerprint testimony. Specifically, Petitioner asserts that his defense attorneys should have requested a hearing regarding the admissibility of the fingerprint testimony because two Sheriff's deputies could not match the fingerprint to Petitioner's finger and because Petitioner's fingerprint expert, Tom Ekis, has submitted an affidavit in which he states that he looked at the fingerprint at the time of Petitioner's trial, he determined that it lacked sufficient clarity to be comparable to any known fingerprints, and he believed that Cron was "teasing out" points of comparison in the print that were not there. (Petitioner's Exhibit #14). Respondent responds that this claim is procedurally barred but is, in any even, without merit.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court established a two-prong test to determine whether expert testimony merits admission into evidence at trial under Rule 702 of the Federal Rules of Evidence. The testimony must: 1) be based on scientific knowledge, and 2) assist the trier of fact in understanding or determining a fact in issue. *Id.* at 592. In *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992), the Court of Criminal Appeals outlined several factors in determining the admissibility of expert testimony under its analogous Rule 702, including: 1) the extent to which the underlying theory and technique are accepted as valid by the scientific community; 2) the qualifications of the testifying expert; 3) the existence of literature either supporting or rejecting the theory and technique; 4) the potential rate

of error of the technique; 5) the availability of other experts to test and evaluate the technique; 6) the clarity with which it can be explained to the court; and 7) the experience and skill of the person who applied the technique in the applicable case.

In the case at hand, James Cron testified for the State as a fingerprint expert. Fingerprint testimony has been presented in cases for many years, as has thus been accepted as valid scientific evidence. *See United States v. Havvard*, 260 F.3d 597 (7th Cir. 2001). During his testimony, Cron outlined his many years of experience in the field of fingerprinting, the numerous classes he both attended and taught, and the time he spent supervising other fingerprint technicians. This testimony established both his qualifications and his experience in the field. As noted earlier, there was a defense fingerprint expert present at trial. Therefore, there was an expert available to test and evaluate the fingerprint comparison made by Cron.

Given James Cron's experience as a fingerprint expert and the prevalence of fingerprint testing in courtrooms throughout this country, the relevant federal and state precedents demonstrate that Cron's testimony was reliable expert testimony. Hence, a decision not to request a hearing to determine the reliability of such testimony was not ineffective assistance of counsel. With regard to the two deputy sheriffs who could not identify the fingerprint and the defense expert who did not believe it was of comparable value, as Respondent notes, these are subjects for cross-examination and do not affect the admissibility of testimony regarding fingerprint identification.[9] Accordingly, defense counsel were not ineffective for failing to request a hearing on the admissibility of Cron's expert testimony. *See Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) (noting that the Fifth Circuit

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And indeed, defense counsel cross-examined Cron about, among other things, the fact that two sheriff's deputies could not identify the print. (R. 47:124).

has consistently held that counsel is not ineffective for failing to make futile motions or objections). Nor has Petitioner established any prejudice from the failure to request such a hearing as Petitioner has failed to show that, had request for such a hearing been requested, admissible fingerprint testimony would have been excluded. This claim is without merit. Petitioner's twelfth through fourteenth grounds for relief are without merit, and it is recommended that they be denied.

X. REQUEST FOR EVIDENTIARY HEARING

Petitioner has also requested an evidentiary hearing in this Court. Under the AEDPA, a federal habeas court cannot grant a request for an evidentiary hearing if a petitioner failed to develop his factual claims at the state level. *See* 28 U.S.C. § 2254(e)(2). The factual bases for Petitioner's first through ninth claims, as well as his eleventh, a portion of his thirteenth, and his fourteenth grounds were not developed at the state level because these claims were not presented at the state level.

Moreover, a petitioner is not entitled to a federal evidentiary hearing even on fully developed claims. Rather, to be entitled to such a hearing, a habeas petitioner must show either a factual dispute which, if resolved in his favor, would entitle him to relief *or* a factual dispute that would require development in order to assess the claim. *Murphy v. Johnson*, 205 F.3d 809, 815 (5th Cir.), *cert. denied*, 531 U.S. 951 (2000); *Robison v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998). Petitioner has not alleged any factual dispute that would require development in order to assess the merits of the claim. This Court has accepted all of Petitioner's non-record evidence in considering Petitioner's claims, regardless of whether this evidence was presented to the state courts, and ruled on these claims accordingly, assuming all of Petitioner's non-record evidence to be accurate. Petitioner is not entitled to a hearing, and it is recommended that his request be denied.

RECOMMENDATION

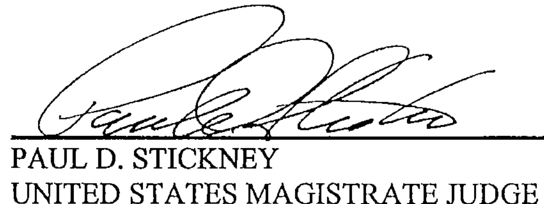
Petitioner has failed to make a substantial showing of the denial of a federal right. Moreover, the state court adjudication on the merits on the claims presented to the state court neither resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Petitioner's petition for a writ of habeas corpus should be DENIED, except for his tenth ground for relief, which should be DISMISSED on procedural grounds.

Signed this 10 day of March, 2004.

PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a true copy of these findings, conclusions and recommendation on the parties. Pursuant to Title 28, United States Code, Section 636(b)(1), any party who desires to object to these findings, conclusions and recommendation must serve and file written objections within ten days after being served with a copy. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. A party's failure to file such written objections to these proposed findings, conclusions and recommendation shall bar that party from a *de novo* determination by the District Court. *See Thomas v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 472 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation within ten days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc).

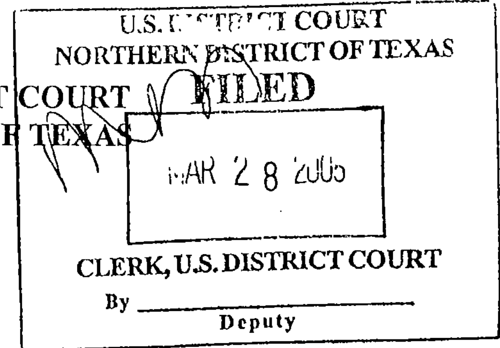


PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

DISTRICT JUDGE'S ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE U.S. MAGISTRATE JUDGE

ORIGINAL



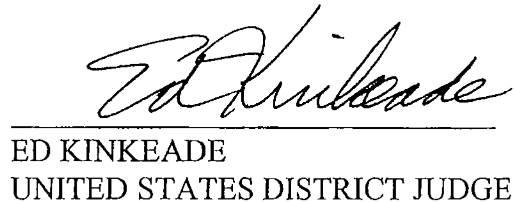
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

After making an independent review of the pleadings, files and records in this case, and the findings, conclusions and recommendation of the United States Magistrate Judge, the Court finds that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court. Petitioner's objections to the findings and conclusions of the Magistrate Judge are overruled.

Signed this 27th day of March 2004.



ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX D

APPENDIX E

U.S. DISTRICT COURT'S ORDER DENYING CERTIFICATE OF APPEALABILITY

ORIGINAL

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

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG - 5 2005
CLERK, U.S. DISTRICT COURT
By ______ Deputy

GREGORY EDWARD WRIGHT, Petitioner,	§	
	§	
VS.	§	**3:01-CV-0472-K**
	§	
DOUGLAS DRETKE, Director TDCJ, Respondent.	§	

CERTIFICATE AS TO APPEALABILITY

Considering the record in this case, pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), the Court hereby finds and orders:

IFP STATUS:

(X) the party appealing is GRANTED *in forma pauperis* status on appeal.
( ) the party appealing is DENIED *in forma pauperis* status on appeal for the following reasons:

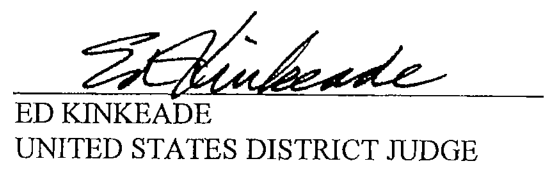
( ) the Court certifies, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. § 1915 (a)(3), that the appeal is not taken in good faith.
( ) the person appealing is not a pauper because he has paid the appellate filing fee;
( ) the person appealing has not complied with the requirements of Rule 24 of the Federal Rules of Appellate Procedure and /or 28 U.S.C. § 1915(a)(1) as ordered by the Court. (See Notice of Deficiency and Order entered on ________).

COA:

( ) a Certificate of Appealability is GRANTED on the following issues: ________________

(X) a Certificate of Appealability is DENIED. The Court hereby incorporates by reference the Findings, Conclusions, and Recommendation of the United States Magistrate Judge dated March 10, 2004, the order adopting these findings dated March 28, 2005, and the Order Denying the Motion to Alter or Amend the Judgment dated June 24, 2005, in support of its finding that Petitioner has failed to make a substantial showing of the denial of a federal constitutional right. *See Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

SIGNED this 5th day of August, 2005.



ED KINKEADE
UNITED STATES DISTRICT JUDGE

APPENDIX E

APPENDIX F

FIFTH CIRCUIT DENIAL OF CERTIFICATE OF APPEALABILITY

United States Court of Appeals
Fifth Circuit
F I L E D
November 17, 2006
Charles R. Fulbruge III
Clerk

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 05-70037

GREGORY EDWARD WRIGHT,

Petitioner - Appellant,

versus

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee.

Appeal from the United States District Court
For the Northern District of Texas

Before SMITH, GARZA, and PRADO, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Gregory Edward Wright moves for a certificate of appealability ("COA") to appeal the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He argues that reasonable jurists would find debatable whether: 1) his Confrontation Clause claim is procedurally barred; 2) he received ineffective assistance of counsel at trial; and 3) the state suppressed evidence in violation of the Fourteenth Amendment and *Brady v. Maryland*, 373 U.S. 83

(1963).

I

The evidence at trial established that Donna Vick was stabbed to death in her home in DeSoto, Texas, in the early hours of March 21, 1997. Wright, who had been staying with Vick in her home, was seen with her at a VFW lodge on the night before the murder. Around 4:00 a.m. the next morning, Wright and his friend, John Adams, drove Vick's car to purchase crack cocaine from a drug dealer who was staying at Llewelyn Mosley's home. Mosley testified that Adams and Wright arrived at his house on the night of the murder and told him that they had some things from a woman in DeSoto that they wanted to get rid of, including a television, a weed eater, a rifle, a color printer, and a microwave. Several of these items were later identified as belonging to Vick. Wright negotiated with the dealer. After exchanging some of the items, Wright and Adams appeared cheerful and exchanged "high fives."

The next day, Adams asked Daniel McGaughey, an employee at a video store, to call the police because he wanted to turn himself in. Adams directed the police to Vick's house and assisted in recovering her car. DNA testing revealed that blood found on the steering wheel belonged to Wright. At the house, the police found Vick's body on her bed and Wright's bloody fingerprint on her pillowcase. In a trash can, the police found a handwritten note reading, "Do you want to do it?"

Adams also led the police to a shack that Wright sometimes stayed in, where they arrested Wright and seized a bloody and gold-paint splattered pair of blue jeans. Outside the shack, the police found a bloody knife. DNA evidence established that the blood on the knife and jeans was Vick's. Several cans of gold spray paint were found in Wright's home, and witnesses testified that Wright had previously been seen with gold paint on his face and clothes. A police officer testified that he had

known people to inhale spray paint to get high. The police also found mail addressed to Adams at the shack. After Wright was arrested, he phoned a friend from jail and asked her to remove any of his clothing from the shack.

Adams also led the police to a knife in a vacant lot near Mosley's home. DNA testing revealed that the knife had Vick's blood on it. A medical examiner testified that Vick could have been stabbed by more than one knife.

At trial, the prosecution argued that both Adams and Wright attacked Vick.[1] The court instructed the jury that it could convict Wright only in the event that it found that he actually attacked Vick. The court did not instruct the jury on a law of the parties theory of liability.[2] The jury found Wright guilty, and he was sentenced to death.

Wright's conviction was affirmed on direct appeal to the Texas Court of Criminal Appeals ("TCCA"). *Wright v. State*, 28 S.W.3d 526 (Tex. Crim. App. 2000). He petitioned the state court for a writ of habeas corpus. The state trial judge adopted the State's proposed findings of fact and conclusions of law in their entirety and recommended that relief be denied. The TCCA adopted the trial court's findings of fact and conclusions of law and denied relief.

Wright petitioned the United States District Court for the Northern District of Texas for a federal writ of habeas corpus. A magistrate judge recommended denying relief on all of Wright's

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[1] (R. 44, 76.) Wright contends that during the sentencing phase of the proceeding, the prosecution argued that he acted alone. But the portion of the transcript he cites in support of that proposition, (R. 51, 17.), is his own attorney's argument. The prosecution did submit testimony relaying Adams's statement to police that Wright alone killed Vick, but the prosecution did not argue that this portion of Adams's statement was credible. We therefore find no support in the record for Wright's contention that the prosecution argued that Wright alone committed the offense.

[2] During closing arguments, the prosecutor repeatedly attempted to argue that Wright could be found guilty as an accomplice. Wright's counsel objected each time, and the court sustained the objection. In his closing argument, Wright's attorney argued to the jury that the charge did not permit conviction merely based on a finding that "[Wright] is a party to this."

claims. *Wright v. Dretke*, 3:01-CV-0472, 2004 WL 438941 (N.D. Tex. Mar. 10, 2004). The district court judge adopted the magistrate judge's recommendation and denied the petition.

II

We issue a certificate of appealability only when the movant has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires him to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). At this stage, we are not permitted to give full consideration of the factual or legal bases in support of the claim. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Instead, we merely conduct an overview of the claims and a general assessment of their merits. *Id.*

The movant's arguments "must be assessed under the deferential standard required by 28 U.S.C. § 2254(d)(1)." *Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *see Miller-El*, 537 U.S. at 348-50 (Scalia, J., concurring) (arguing that a court must consider 28 U.S.C. § 2254(d)'s deferential standard of review when ruling on motion for COA). A federal court may not issue a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings" unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). A state court's decision is contrary to clearly established federal law if the court either: 1) arrived at a conclusion of law opposite that reached by the Supreme Court; or 2) arrived at a result opposite that of the Supreme Court on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court's decision is an unreasonable application of clearly established federal law if the state court derives the correct legal principle from Supreme Court decisions but applies that

principle in an objectively unreasonable manner. *Id.* at 409.

A

Wright argues that his Sixth Amendment right to confront witnesses against him was violated when the trial court admitted into evidence the testimony of Detective Dan Trippel. On direct examination by the prosecution, Trippel described a conversation he had with Adams, who did not testify. Trippel testified that he discovered Vick's body after meeting with Adams. On cross examination, Wright elicited testimony from Trippel that Adams claimed that he owned one of the knives used in the murder. On redirect, Trippel testified that Adams told him that Wright used Adams's knife to stab Vick. Wright made a hearsay objection. The prosecution responded that the testimony was admissible under the rule of optional completeness. *See* TEX. R. EVID. 107 ("When part of a . . . conversation . . . is given in evidence by one party, the whole on the same subject may be inquired into by the other . . . ."). Under the rule of optional completeness, hearsay is admissible when it serves to clarify other hearsay evidence elicited by the opposing party. *Bunton v. State*, 136 S.W.3d 355, 367 (Tex. App.—Austin 2004, pet. ref'd). The prosecution argued that if the jury only heard that Adams admitted that he owned one of the murder weapons, it might be left with the mistaken impression that Adams confessed to Trippel that he had killed Vick. Wright responded that the rule was inapplicable because the jury had not been given a false impression. Wright did not argue to the trial court that the Sixth Amendment prohibited admission of this testimony.

On direct appeal, Wright argued that the admission of Trippel's testimony violated Texas evidentiary rules[3] and the Confrontation Clause. The TCCA deemed Wright's Confrontation Clause

[3] To the extent that Wright now argues that the Texas courts misapplied the rule of optional completeness, we note that violations of state law are generally not cognizable on habeas review unless they render the trial fundamentally unfair. *Hughes v. Dretke*, 412 F.3d 582, 591 (5th Cir. 2005).

argument waived because his objection based on hearsay did not alert the trial court to the federal nature of his claim. *Wright*, 28 S.W.3d at 536; *see* TEX. R. APP. P. 33.1(a)(1)(A) (stating that to preserve error for appeal, appellant must have objected with sufficient specificity to make trial court "aware of the complaint, unless the specific grounds were apparent from the context"). On subsequent habeas review, the district court consequently deemed Wright's Confrontation Clause claim procedurally defaulted. *Wright*, 2004 WL 438941, at *6.

A federal court may not grant a petition for a writ of habeas corpus where the state court expressly denied the claim based on an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).[4] To be adequate, a state rule must be "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991); *see Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 295-301 (1964). It is the petitioner's burden to demonstrate that the procedural bar is not regularly applied, *Stokes v. Anderson*, 123 F.3d 858, 860 (5th Cir. 1997), or that the rule was exorbitantly applied under the circumstances of the case, *Lee v. Kemna*, 534 U.S. 362, 376 (2002). We review the adequacy of a state law used to preclude federal habeas review *de novo*. *Rosales v. Dretke*, 444 F.3d 703, 707 (5th Cir. 2006). Wright argues that his objection based on a Texas state evidentiary rule was sufficient under Texas law to preserve his Confrontation Clause claim and that the TCCA's decision is therefore not an adequate procedural bar.

Wright's argument is contrary to Texas law, which generally requires a defendant to make

[4] An exception to this doctrine exists where the petitioner demonstrates either cause for the default and actual prejudice as a result of the alleged violation of federal law or that failing to consider his claim will yield a fundamental "miscarriage of justice." *Coleman*, 501 U.S. at 750. Wright has not attempted to make such a showing in his brief in this court, and any such argument is now considered waived. *Nixon v. Epps*, 405 F.3d 318, 323 (5th Cir. 2005) (citations omitted).

a specific Confrontation Clause objection to preserve such an error. In support of its ruling that a hearsay objection does not generally preserve a Confrontation Clause claim, the TCCA relied on *Dewberry v. State*, 4 S.W.3d 735, 752 n.16 (Tex. Crim. App. 1999). *Wright*, 28 S.W.3d at 536. Although *Dewberry* was decided after Wright's 1997 trial, the TCCA had applied the same rule as early as 1991 in *Holland v. State*, 802 S.W.2d 696 (Tex. Crim. App. 1991). Holland objected to the admission of testimony concerning an out-of-court statement on the ground of hearsay. *Id.* at 700. He did not object that admission of the evidence violated the Confrontation Clause. *Id.* The TCCA held that the federal constitutional claim was not preserved for review. *Id.* Texas courts have frequently held, both before[5] and after[6] Wright's trial, that where it is not clear from the context of the trial that the defendant was raising a Confrontation Clause claim, a hearsay objection does not preserve the federal constitutional error.

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[5] *See Cantu v. State*, 939 S.W.2d 627, 634 (Tex. Crim. App. 1997); *Fultz v. State*, 940 S.W.2d 758, 760-61 (Tex. App.—Texarkana 1997, pet. ref'd); *Judd v. State*, 923 S.W.2d 135, 139 (Tex. App.—Fort Worth 1996, pet. ref'd); *Tapia v. State*, 933 S.W.2d 631, 633 (Tex. App.—Dallas 1996, pet. ref'd); *Ward v. State*, 910 S.W.2d 1, 4 (Tex. App.—Tyler 1995, pet. ref'd); *Cofield v. State*, 857 S.W.2d 798, 804 (Tex. App.—Corpus Christi 1993), *aff'd*, 891 S.W.2d 952 (Tex. Crim. App. 1994); *Garza v. State*, 828 S.W.2d 432, 435 (Tex. App.—Austin 1992, pet. ref'd); *Rodriguez v. State*, 10-96-00713-CR, 1997 WL 666949, at *2 (Tex. App.—Houston [1st Dist.] Oct. 9, 1997, no pet.); *In Matter of M.G.*, 04-95-00752-CV, 1996 WL 721951, at *2 n.2 (Tex. App.—San Antonio Dec. 11, 1996, no pet.).

[6] *See Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005); *Paredes v. State*, 129 S.W.3d 530, 535 (Tex. Crim. App. 2004); *Eustis v. State*, 191 S.W.3d 879, 885-86 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *Neal v. State*, 186 S.W.3d 690, 692 (Tex. App.—Dallas 2006, no pet.);*Campos v. State*, 186 S.W.3d 93, 98 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Tatum v. State*, 166 S.W.3d 362, 364 (Tex.App.—Fort Worth 2005, pet. ref'd); *Bunton*, 136 S.W.3d at 368; *Thacker v. State*, 999 S.W.2d 56, 61 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); *Thornton v. State*, 994 S.W.2d 845, 853-54 (Tex. App.—Fort Worth 1999, pet. ref'd); *McCleod v. State*, 05-04-01331-CR, 2005 WL 3369150, at *4 (Tex. App.—Dallas Dec. 12, 2005, no pet.); *Rios v. State*, –S.W.3d–, 2005 WL 3077220, at *2-*3 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd, untimely filed); *Guillory v. State*, 01-05-00076-CR, 2005 WL 2670938, at *5 (Tex. App.—Houston [1st Dist.] Oct. 20, 2005, pet. ref'd); *Cox v. State*, 12-03-00384-CR, 2005 WL 2035863, at *2 (Tex. App.—Tyler Aug. 24, 2005, no pet.); *Gray v. State*, 05-04-01269-CR, 2005 WL 1670715, at *8 (Tex. App.—Dallas July 19, 2005, no pet.); *Cantrell v. State*, 2-04-029-CR, 2005 WL 1542663, at *1-3 (Tex. App.—Fort Worth June 30, 2005, pet. ref'd); *Blay v. State*, 2-04-346-CR, 2005 WL 1186293, at *1 (Tex. App.—Fort Worth May 19, 2005, no pet.); *Hughes v. State*, 14-03-00636-CR, 2004 WL 2108288, at *4 (Tex. App.—Houston [14th Dist.] Sept. 23, 2004, no pet.); *Cooke v. State*, 12-03-00183-CR, 2004 WL 1253306, at *2 (Tex. App.—Tyler June 9, 2004, no pet.); *Davila v. State*, 05-03-00689-CR, 2004 WL 1173395, at *5 (Tex. App.—Dallas May 27, 2004, no pet.).

The cases Wright cites are not to the contrary. None addresses the specific question of under what circumstances a hearsay objection is sufficient to preserve a Confrontation Clause claim. Wright primarily relies on *Kittelson v. Dretke*, 426 F.3d 306 (5th Cir. 2005), in which we held that the petitioner's Confrontation Clause claim was exhausted when it had been fairly presented in a state petition for a writ of habeas corpus. Because no state court held that Kittelson's claim was barred by a state procedural rule, *id.* at 316 (noting that state court did not rely on procedural rule in disposing of Kittelson's claim), we did not address whether Texas courts consistently held that hearsay objections generally did not preserve Confrontation Clause claims. *Kittelson*, therefore, does not control this case.[7]

Wright also cites several cases applying Texas's statutory exception to the hearsay rule for statements made by child abuse victims. *See* TEX. CODE CRIM. PROC. ART. 38.072. In *Lankston v. State*, 827 S.W.2d 907 (Tex. Crim. App. 1992) (Benavides, J.), for example, the defendant lodged a hearsay objection to the testimony of an adult to whom the alleged child victim of sexual assault had reported the crime. Such testimony is admissible under the statute so long as the prosecution provided the defendant with a written summary of the statement prior to trial. *Id.* at 909; *see* TEX. CODE CRIM. PROC. ART. 38.072, § 2(b). The TCCA held that a hearsay objection is sufficient to preserve a claim that the proffered testimony fell outside the written summary where it is clear from the transcript that the trial court understood the basis for the objection. *Lankston*, 827 S.W.2d at 910-11; *see Heidelberg v. State*, 144 S.W.3d 535, 539 (Tex. Crim. App. 2004) (distinguishing *Lankston* on the ground that the record "clearly showed that all parties knew the nature of the

[7]*Hutchins v. Wainwright*, 715 F.2d 512, 518 (11th Cir. 1983), upon which Wright also relies, similarly concerns whether a claim was presented to the state court for purposes of exhaustion.

objection"). The TCCA did not consider in what context a hearsay objection was sufficient to preserve a Confrontation Clause claim.

Similarly, in *Gabriel v. State*, 973 S.W.2d 715, 719 (Tex. App.—Waco 1998, no pet.), the prosecution presented testimony under the same statutory exception to the hearsay rule. The defendant made a hearsay objection on the ground that the prosecution failed to provide notice of its intent to introduce certain testimony concerning a child victim's outcry statements. *Id.* at 718. The court of appeals held that the objection was sufficient to preserve the error because "after a hearsay objection is made, the State has the burden to show it has complied with all the requirements" of the statute. *Id.* at 719. Because Wright's trial did not concern application of Texas's statutory child-victim outcry exception to the hearsay rule, *Gabriel* is not contrary to the TCCA's decision in Wright's case.[8]

We therefore conclude it is not debatable amongst jurists of reason that the Texas court's application of the contemporaneous objection rule constitutes an adequate and independent procedural bar to Wright's Confrontation Clause claim.

B

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[8] The remaining state court cases Wright cites are not on point. *Cofield v. State*, 891 S.W.2d 952, 954 (Tex. Crim. App. 1994), stands for the proposition that a hearsay objection is sufficient to preserve a claim that an exception to the hearsay prohibition did not apply. *Samuel v. State*, 688 S.W.2d 492, 495-96 (Tex. Crim. App. 1985), holds that an objection to the introduction of "statements made after [the defendant] was under arrest" preserves a claim under Texas state law prohibiting the introduction of statements made by a defendant while he was being detained by non-state actors. *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1977), holds that an objection that evidence of a prior conviction was improper because it was not yet final preserves the issue of whether the probationary period of the prior conviction had expired. *Coleman v. State*, 644 S.W.2d 116, 119 (Tex. App.—Austin 1982, pet. ref'd), concerns the adequacy of an objection to the prosecution's comment on the defendant's post-arrest silence where the context of the objection made clear the nature of the objection. *See Heidelberg*, 144 S.W.3d at 540 (distinguishing *Coleman* on the ground that the basis for Coleman's objection was clear).

Finally, the federal cases Wright cites do not apply Texas's procedural rules and instead concern: 1) whether a claim was presented to a state court for purposes of Supreme Court appellate jurisdiction, *Lilly v. Virginia*, 527 U.S. 116, 123 (1999); or 2) whether a state court's clearly erroneous ruling that no objection whatsoever had been made is an adequate bar to federal review, *Douglas v. State of Alabama*, 380 U.S. 415, 422-23 (1965).

Wright argues that he received ineffective assistance of trial counsel. We evaluate such claims under the two-prong test established by *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner must establish that his counsel's performance was deficient and that he suffered prejudice as a result. *Id.* at 687. Prejudice results when there is a reasonable probability that the result of the proceeding would have been different absent the error. *Id.* at 695.

Wright claims that his trial counsel was ineffective for failing to make a Confrontation Clause objection to the admission of Adams's hearsay statement. As noted, that statement was in sum that Wright used Adams's knife to kill Vick. Wright argues that Adams's hearsay statement was critical because the jury was not instructed on a law of the parties theory of liability. The jury therefore had to find that Wright personally attacked Vick. Wright argues that Adams's hearsay statement that he gave his knife to Wright therefore substantially bolstered the prosecution's case.

The Texas habeas court held that the decision not to make a Confrontation Clause objection was the result of a considered trial strategy on the part of Wright's trial counsel. The court held that it was "reasonable to speculate" that defense counsel "realized that they could not vouch for the reliability of the statements [that Adams owned the murder weapon] and then object to the introduction of the remainder of the statements under the confrontation clause."

The district court did not address this ground for the Texas court's decision.[9] The district court instead reasoned that the state court could reasonably have concluded that Wright could not establish that he was prejudiced by his counsel's failure to make a Confrontation Clause objection due to the overwhelming evidence establishing that Wright murdered Vick. *Wright*, 2004 WL 438941,

[9] In applying the "unreasonable application" test of 28 U.S.C. § 2254(d), a federal court reviews only the state court's ultimate decision that the petitioner is not entitled to relief, not the state court's reasoning. *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc).

at *23.

In light of AEDPA's deferential standard of review, we decline to grant a COA on this issue because, assuming *arguendo* that the objection would have been sustained and the testimony excluded, it is not debatable amongst jurists of reason that the state court could have reasonably concluded that Wright cannot demonstrate that he was prejudiced by his counsel's failure to object. First, in its closing statement, the prosecution did not rely on Adams's hearsay statement that he gave one of the murder weapons to Wright. Second, and more significantly, there was overwhelming evidence establishing that Wright personally, and most likely in conjunction with Adams, attacked Vick. At the scene of the crime, the police found Wright's bloody fingerprint next to the body and his blood on a towel. Immediately following Vick's death, Wright was seen driving Vick's car and trading her belongings for drugs. His blood was found on the steering wheel. At Wright's shack, the police recovered a pair of blue jeans with gold paint[10] and Vick's bloodstains in Wright's shack. Wright was a known inhaler of gold spray paint. Finally, the police recovered two knives with Vick's blood, one from near Wright's shack.

C

Finally, Wright argues that the prosecution suppressed the following evidence in violation of the Fourteenth Amendment and *Brady v. Maryland*: 1) that the State had agreed not to prosecute Llewellyn Mosley in exchange for his testimony; 2) that Adams had confessed to the murder to Jerry Causey at Mosley's house; 3) the tape of the 911 call Daniel McGaughey made reporting that Adams

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[10] Wright submitted an affidavit to the district court from his state trial attorney, which states that the jeans were too small for Wright. Wright's attorney used the jeans for demonstrative purposes while presenting this argument to the jury. The jury could infer, however, that the gold spray paint sufficiently linked the jeans to Wright, a known user of spray paint as an inhalant.

wanted to turn himself in; 4) police notes recording a statement by Daniel McGaughey to the police concerning Adams; and 5) evidence that the police found papers belonging to Adams in the shack.

The district court rejected each of these claims on several grounds. The court first noted that Wright had procedurally defaulted his *Brady* claims. *Wright*, 2004 WL 438941, at *6. Despite holding that these claims were procedurally defaulted, the district court proceeded to consider and reject them on their merits. *Id.* at *16-*20. The district court held that Wright failed to establish that the prosecution suppressed any agreement with Mosley, Adams's confession to Causey, the 911 tape, or Adams's papers. *Id.* In the alternative, the court held that none of this evidence was material. *Id.*

1

Wright does not dispute that his *Brady* claims are procedurally defaulted. He argues, however, that we should nevertheless consider the merits of these claims because he is actually innocent of the crime. *See House v. Bell*, 126 S.Ct. 2064 (2006); *Schlup v. Delo*, 513 U.S. 298 (1995).

To establish actual innocence under *Schlup*, Wright must demonstrate that in light of all the evidence, including that "tenably claimed to have been wrongly excluded or to have become available only after trial," *id.* at 328, "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt," *id.* at 327.

The district court summarized Wright's evidence of actual innocence as follows:

> 1) exculpatory scientific evidence regarding the bloody fingerprint found at the crime scene; 2) affidavits from Petitioner's two defense attorneys averring that the jeans that the State contended that Petitioner wore when he murdered the victim were in actuality too small for him; 3) an affidavit from Daniel McGaughey, who was 'hidden' from the defense; 4) an affidavit from Jerry Causey, a man to whom co-defendant Adams allegedly confessed; 5) an affidavit from another inmate to whom Adams allegedly confessed; and 6) testimony from Adams' subsequent capital murder trial which undermines the testimony of State's witness Llewellyn Mosley.

Wright, 2004 WL 438941, at *7.

The district court held that this evidence did not satisfy the *Schlup* standard. *Id.* at *9. In particular, it noted that although much of this evidence was "newly presented," most of it was available at the time of trial. *Id. at* *7-*8. The affidavits from Wright's defense attorneys regarding the size of the bloody jeans was not new because those attorneys had made the same argument to the jury in their closing statements. *Id.* at *7. The affidavit of Daniel McGaughey, who called 911 on Adams's behalf, did not differ from statements McGaughey made to the police that were disclosed. *Id.* at *8. And there was simply no evidence, new or old, that undermined Mosley's testimony. *Id.* The district court found the remaining evidence insufficiently persuasive to meet the *Schlup* standard. *Id.* at *9.

In this motion, Wright argues that the district court erred in requiring him to present "new" evidence. The courts of appeals disagree as to whether *Schlup* requires "newly discovered" evidence or merely "newly presented" evidence. *Compare Osborne v. Purkett*, 411 F.3d 911, 920 (8th Cir. 2005) ("Evidence is only new if it was 'not available at trial and could not have been discovered earlier through the exercise of due diligence.' " (quoting *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001)), *and Hubbard v. Pinchak*, 378 F.3d 333, 340 (3d Cir. 2004) (requiring new evidence that was not available at the time of trial), *with Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003) ("All *Schlup* requires is that the new evidence is reliable and that it was not presented at trial."), *and Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003) (requiring "newly presented," not newly available evidence). Neither party cites controlling case law from this court. We, however, need not address this circuit split or determine whether Wright has established actual innocence because he has not demonstrated that jurists of reason would find the merits of his *Brady* claims debatable. *Cf.*

Lucas v. Johnson, 132 F.3d 1069, 1078 (5th Cir. 1998) (assuming arguendo that petitioner had satisfied *Schlup* and considering claim on the merits)

2

The suppression of evidence favorable to the accused violates due process where that evidence is material to guilt or punishment. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). This duty to disclose extends to both impeachment and exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is suppressed when the prosecution fails to disclose it even when it is known only to police investigators but not the prosecutor. *Kyles*, 514 U.S. at 438. Evidence is "material" when its suppression creates a reasonable probability of a different result. *Id.* at 433. The materiality of all suppressed evidence must be considered cumulatively. *Id.* at 437.

Assuming Wright's *Brady* claims are not procedurally defaulted, a federal court must apply a *de novo* standard of review. *Solis v. Cockrell,* 342 F.3d 392, 394 (5th Cir. 2003) (holding that review is *de novo* where there has been no adjudication on the merits in state court); *Henderson v. Cockrell*, 333 F.3d 592, 598 (5th Cir. 2003) (same); *Johnson v. Cain*, 215 F.3d 489, 494 (5th Cir. 2000) (same); *Miller v. Johnson*, 200 F.3d 274, 281 n.4 (5th Cir. 2000) (same).

The district court held that Wright had failed to establish that the State suppressed evidence of an agreement not to prosecute Mosley, that Adams confessed to Jerry Causey, that the police found letters addressed to Adams in the shack, or the tape of the 911 call by Daniel McGaughey reporting Adams's desire to turn himself in. Wright does not argue that the district court's findings or conclusions of law with respect to whether the State suppressed this evidence are in error. He has therefore failed to establish that the district court's resolution of these claims is reasonably debatable.

Wright does argue that the prosecution failed to disclose timely a police note made during an

interview with Daniel McGaughey. McGaughey was working at a video store when Adams informed him that he wanted to turn himself in. According to the police note, McGaughey told police that Adams stated, "I murdered someone in DeSoto and I can't deal with it." The prosecution did not disclose this note until after Wright's trial began.[11] Although the prosecution's disclosure of this note was delayed, Wright conceded in his petition for habeas corpus that he was timely provided with the following nearly identical written statement by McGaughey:

> At about 7:00 pm on Saturday March 22nd, a man came and asked me to call the police. I asked why and he told me there was a murder and he wanted to turn himself in. I asked him where this murder took place and he got real angry. He told me it took place in DeSoto and and [sic] could not live with himself any longer to call the police give them his description and he would be out by the curb.

The district court held that the suppressed note was not material. *Wright*, 2004 WL 438941, at *19. We hold that this conclusion is not reasonably debatable. The allegedly suppressed note is merely an abbreviated version of the more complete and lengthy account of Adams's confession that Wright timely received. Wright fails to explain what additional use he could have made of a second document containing the same statement McGaughey gave to the police.

III

For the foregoing reasons, we DENY Wright's motion for a COA.

[11] So long as the defendant receives the evidence in time for its effective use at trial, the Due Process Clause is not violated. *United States v. Walters*, 351 F.3d 159, 169 (5th Cir. 2003) (collecting cases). Although Wright received this evidence during the course of the trial and appears to have had the opportunity to put it to use, the State does not dispute that the evidence was suppressed.

APPENDIX G

FIFTH CIRCUIT DENIAL OF REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 05-70037

U.S. COURT OF APPEALS
FILED
DEC 19 2006
CHARLES R. FULBRUGE III
CLERK

GREGORY EDWARD WRIGHT

Petitioner - Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent - Appellee

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

Before SMITH, GARZA, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

United States Circuit Judge