No. _____

In The Supreme Court of the United States

DEPHNE NGUYEN WRIGHT,

Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR, Texas Department of Criminal Justice, Correctional Institute Division; JANET HARRY-DOBBINS, Warden,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the U.S. Court of Appeals for the Fifth Circuit and district court applied too demanding of a standard governing issuance of a certificate of appealability (COA) to petitioner's substantial claim of ineffective assistance of appellate counsel, which turns on a substantial Fourth Amendment claim omitted from the brief filed on petitioner's direct appeal.

II.

Whether this Court should grant certiorari in order to provide guidance to, and resolve the division among, the lower federal courts concerning the proper application of the COA standard.

III.

Whether police officers' execution of a search warrant at petitioner's home in 2017 was invalid under the Fourth Amendment because the warrant application contained no information supporting an officer's belief that petitioner's business records created *in 2012* (later offered at petitioner's trial and also considered by the state appellate court to find sufficient evidence of petitioner's conviction) would be inside her home *in 2017*.

IV.

Whether petitioner's direct appeal counsel deprived her of the effective assistance of counsel by failing to raise the Fourth Amendment "staleness" claim, which was preserved at petitioner's trial, particularly in view of (1) the Texas courts' refusal, as a matter of Texas law, to apply this Court's good-faith exception to the Fourth Amendment exclusionary rule to claims that a search warrant was not supported by probable cause and (2) the fact that the Fourth Amendment violation clearly was not harmless beyond a reasonable doubt.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dephne Nguyen Wright (Wright) petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit denying her application for a certificate of appealability (COA).

OPINIONS BELOW

The Fifth Circuit's order denying a COA (App. A1) is unpublished. The federal district court's opinion denying habeas corpus relief and also denying a COA (App. A3-A11) is unpublished but is available at 2023 WL 8369477. The Texas Court of Criminal Appeals' order denying state habeas corpus relief (App. A12) is unreported. The state magistrate's findings of fact and conclusions of law (App. A15-A42) are unreported. The state district court's order adopting the magistrate judge's findings and conclusions (App. A13-A14) is unreported. The Texas Court of Appeals' unpublished opinion affirming petitioner's convictions on her direct appeal (App. A43-A63) is available at 2021 WL 3358014.

JURISDICTION

The Fifth Circuit denied petitioner's application for a COA on April 8, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See Hohn v.*

United States, 524 U.S. 236 (1998) (finding jurisdiction under § 1254(1) to review single-judge order denying COA).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant parts of the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution and 28 U.S.C. § 2253(c) are set forth in the appendix (App. A64-A65).

STATEMENT OF THE CASE

I. Prior Proceedings

A state grand jury in Tarrant County, Texas, charged Petitioner Wright with the capital murders of Huong Ly and Long Nguyen, and also with solicitation of capital murder. At Wright's jury trial, the jury convicted her of both charges, and the district court assessed punishment at life without parole on Wright's conviction of the capital murder charge. ROA.437-38.[1]

[1] "ROA" is the Fifth Circuit's record on appeal. After the jury convicted Wright of capital murder, the prosecution waived further proceedings on the jury's conviction of Wright of the solicitation charge. The trial court thus imposed sentence solely on the capital murder conviction. ROA.441.

The Texas Court of Appeals affirmed Wright's conviction on August 3, 2021, and the Texas Court of Criminal Appeals (TCCA) refused discretionary review on November 3, 2021. App. A43. No petition for writ of certiorari was filed with this Court on direct appeal.

On August 2, 2022, Wright filed a timely application for state habeas corpus relief. A state magistrate entered "Findings of Fact" and "Conclusion of Law," which recommended that state habeas corpus relief be denied. App. A15. The magistrate's findings and conclusions were adopted by the state district court as its own, App. A13, and forwarded to TCCA. On March 22, 2023, the TCCA, in summarily denying habeas relief, adopted the lower court's "findings" but did not adopt its "conclusions." App. A12. This Court denied Wright's petition for writ of certiorari on May 30, 2023. *Wright v. Texas*, 143 S. Ct. 2566 (2023).

On July 20, 2023, Wright filed a timely federal petition for writ of habeas corpus. ROA.5, 20, 21. On December 4, 2023, the federal district court denied the petition, and also denied a COA. App. A3. On April 8, 2024, in a single-judge order, the Fifth Circuit also denied a COA. App. A1.

II. Statement of the Facts

The relevant facts in this case concern (1) Wright's original trial counsel's pretrial motion to suppress evidence under the Fourth Amendment and (2) the failure of Wright's direct appeal counsel, Wes Ball, to raise that preserved Fourth Amendment issue on Wright's direct appeal.

A. Police Officers' Search of Wright's Home in 2017 Pursuant to a Warrant Based on "Stale" Information

In 2017, an application for a warrant to search Wright's home was submitted by Deputy Sheriff Justin White of Fort Bend County, Texas, to Fort Bend County Associate District Judge Stuti Patel, who granted it on April 19, 2017 – nearly five years after the June 2012 murders charged in the indictment. ROA.94. Deputy White's search warrant application incorporated a prior application for an arrest warrant for Wright, which had been submitted the day before by a different officer, Detective B.P. Stewart. ROA.88.

Deputy White's search warrant application stated that Detective Stewart had requested Deputy White to assist Stewart in locating "the cellular telephone associated with" Wright. Deputy White noted that, when Wright was arrested the day before, she did not possess a cellular phone but had admitted to Detective Stewart that her phone had a "contact" for Chau Tran, the complainants' son-in-law (whom police considered a suspect in the murders by that point). Wright had refused to provide that contact information in her phone to Detective Stewart. Deputy White then stated in his search warrant application that: "Affiant knows from training and experience [that] suspects in Capital Murder investigations frequently communicate using cellular telephones and such communications can assist in successful prosecution of said suspects. Affiant knows from training and experience that people tend to keep contact information and

communication [with] others stored in their cellular telephones rather than memorizing them." ROA.96.

Deputy White applied for a warrant to search Wright's home located at 9122 Gianna Court in Fort Bend County, Texas. His application specifically requested the right to search and seize not only Wright's cellular telephone but also a wide variety of other evidence unrelated to her cellular phone, including:

- "Any and all evidence, including forensic evidence, which may constitute the offense of Capital Murder."

- "Any and all medical documentation found within the residence pertaining to the victim, the victim's siblings, or the suspects."

- "Any record(s), document(s), or item(s) that either directly or indirectly, identify or tend to identify owner(s), occupant(s), or person(s) having custody and control of the premises to be searched[.]"

- "Any records or ledgers, be it written or electronic, used to facilitate the commission of the offense of CAPITAL MURDER, including but not limited to client logs related to Dephne Nguyen Wright's business or referencing Chau Tran[.]"

- "Any property or items, inclusive of writings and/or personal chattel used in the commission of and/or planning of the offense of CAPITAL MURDER as referenced herein, constituting

> evidence of an offense or constituting evidence tending to show that a particular person committed an offense[.]"
>
> ROA.95.

As noted, Deputy White's search warrant application expressly incorporated Detective Stewart's arrest warrant application submitted the prior day. Detective Stewart's incorporated application provided the following additional information about Wright's alleged role in the murders:

> • DNA evidence was recovered from the murder scene in Arlington, Texas, in 2012 but it did not match anyone until over three years later, on October 12, 2015, when it was linked to a man named Willie Guillory.
>
> • After police officers arrested Willie Guillory, they interrogated him on November 15, 2015. He confessed to being involved with his uncle, Bobby Guillory, in the murders of the two victims in Arlington in 2012. Willie further stated that Bobby had been "given instructions by a female from the Houston area," who also gave them a key to the victims' apartment.
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> • On August 31, 2016, Detective Stewart traveled to Houston, where he interviewed Wright about the murders. Wright told him that she knew the victims' son-in-law, Chau Tran, and that he had met with Wright "as a client of her business" in Houston at an unspecified time in the past before the victims were murdered. Wright described the services that she had

> provided to Tran and others as removing voodoo "curses" from people and their businesses. Wright stated that she had been successful in removing a curse from Chau's business and that he had compensated her for her services. Wright told Detective Stewart that, on an unspecified date, Tran had telephoned her and told her that his in-laws had been murdered. Wright also told Detective Stewart that her cousin, Vy Nguyen, formerly dated a man who fit the description of Bobby Guillory, whom she knew by the name James (Bobby Guillory's middle name).[2]
>
> • On February 14, 2017, after officers in Arlington arrested Bobby Guillory on capital murder charges, Detective Stewart interviewed him. Bobby Guillory confessed to murdering the victims. Bobby identified Wright as the female who gave him a key to the victims' apartment in 2012 as Wright. Bobby also stated that Wright had been the person who had recruited him to kill the victims. Bobby told Detective Stewart that he formerly had dated Vy Nguyen, Wright's cousin.
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> ROA.88-91.

During police officers' search of Wright's home in April 2017, pursuant to the search warrant, the officers seized not only two cellular telephones but also many documents associated with Wright's

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[2] Detective Stewart's application also stated that he had interviewed Vy Nguyen, who confirmed that she had dated Bobby Guillory but knew him by the name James.

"curse-removal business."[3] App. A33 (Finding of Fact #47); *see also* ROA.1708-10, 1712-16, 1720-23 (portions of trial when seized documents were introduced); ROA.7970-8064 (copies of seized documents introduced at trial). As discussed below, although the cellular phones seized from Wright's home were not admitted as evidence at Wright's trial, the trial court did admit, over Wright's objection, the extensive documentary evidence associated with Wright's curse-removal business.

B. Wright's Original Trial Counsel's Motion to Suppress

Wright's original trial counsel, David Singer, filed a pretrial motion to suppress all evidence seized from Wright's home pursuant to the search warrant. The motion contended that the information set forth in Deputy White's search warrant application –

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[3] Wright's curse-removal business was described by Chau Tran, who testified for the prosecution at trial:

> [Tran] testified that he first contacted Wright when he and Huong Ly (his mother-in-law and one of the complainants in the case) saw a newspaper advertisement that Wright had "some kind of magic or voodoo to help with the business." He and Ly thought Wright could help with the family's failing sewing business, which Ly owned and Tran ran. They believed that the business might have been cursed, and they paid Wright to remove the curse and give them other help. Tran testified that they paid Wright using a credit card issued to the sewing company and in cash for a few months.

App. A49-A50.

submitted nearly five years after the murders – failed to establish probable cause to believe that any incriminating evidence would be inside Wright's home in April 2017. Singer argued that the application did not provide any reason to believe that the various evidence set forth in the application still existed as of April 2017, much less explain why it would be in Wright's *home* nearly five years after the murders. Therefore, Singer contended, Deputy White's application for the search warrant was based on "stale" information and the subsequent search pursuant to the warrant violated the Fourth Amendment. ROA.602-12. The trial court orally denied the motion to suppress in a summary manner. ROA.612.

The Texas Court of Appeals' opinion on direct appeal recounted much of the facts related to the acquisition and execution of a warrant authorizing a search of Wright's home nearly five years after the victims' murders:

> The complainants in this case were Huong Ly and Long Nguyen, an elderly married couple who owned a sewing shop in Arlington, Texas, where they lived. On June 10, 2012, their son-in-law, Chau Tran, called police to conduct a welfare check on them, and their bodies were found in the closet. They had been bound, beaten in the head, and had their faces taped with duct tape so that they ultimately died of suffocation. Police developed an individual named Willie Guillory as a suspect in the murders, and subsequent investigation eventually led them to Wright. She was indicted for the

murders based on allegations that she and Chau Tran planned to get the complainants' life insurance payout by paying Willie Guillory's uncle, Bobby Guillory, to commit the murders.

At Wright's trial, the responding police officer testified that, when officers arrived on the scene to do a welfare check, they discovered the complainants' bodies in a closet. The complainants' hands had been duct-taped, as had their mouths and head. The apartment had been ransacked, and police found a marijuana cigarette and beer bottle wrapped in a blue bandana at the scene. Investigators found DNA on the marijuana cigarette, but they did not find a DNA match until several years later when, in 2015, Willie Guillory was arrested in an unrelated case. He provided a statement that in turn led the police to other people involved in the murders of Huong Ly and Long Nguyen.

[Arlington, Texas Police Department] Detective B. Stewart testified about his investigation into the murders in Arlington. He questioned Chau Tran and other members of the family at the time of the murders in 2012. Chau Tran initially cooperated with the investigation, but he did not provide the police with any information or leads regarding who could have murdered the complainants. Detective Stewart initially did not have any suspicions that Tran may have been involved in the

murders. After police traced the DNA from the scene to Willie Guillory, Willie Guillory gave a statement that led police to investigate his uncle, Bobby Guillory, also referred to at times as Bobby James Guillory. Around the time of the murders in 2012, [Bobby] Guillory was engaged in a relationship with a woman named Vy Nguyen, who had lived with Wright in Houston at one time. The police questioned Wright, and, after that, Chau quit cooperating.

Detective Stewart traveled to Houston to interview Wright [on August 31, 2016]. In a recorded conversation, Wright denied knowing anyone named Bobby Guillory, but she testified that she knew a man named James who told her he was a colonel in the military and that he worked at Fort Hood. . . . She also acknowledged knowing Chau Tran, who she stated was a former client [in her curse-removal business]. She stated that she met Chau Tran in 2005 or 2006, and the last time she talked to him was when he experienced his family tragedy. He stopped being her client at that time. . . .

After Detective Stewart received information leading to the arrest of Bobby Guillory [in February 2017], he was also able to obtain a warrant to search Wright's home. During that search, which was executed more than four years after the murders occurred, police found a ledger or address book with a label stating "all customers sign in" on the cover.

> It listed Chau Tran's name and address as a customer, and the same book included a list of names and birthdays, including those of Bobby Guillory and Vy Nguyen. The address listed for Chau Tran was for a home he had moved into four or five years after the murders. In Wright's office, police also found copies of Bobby Guillory's driver's license and concealed handgun permit, a photo collage that had multiple images of Chau Tran, and pages covered in cropped photos and symbols that included Tran's and Guillory's images and names on the same pages. . . .
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> App. A44-A46.

C. Seized Evidence Offered at Wright's Jury Trial

The evidence seized pursuant to the search warrant was a significant part of the prosecution's case at Wright's jury trial. Under Texas law, a jury cannot convict a defendant based solely on the testimony of an accomplice witness (even multiple accomplice witnesses); sufficient independent corroboration of accomplice-witness testimony is required.[4] Wright's jury was specifically instructed that, in order to convict her, it had to find sufficient corroboration of the accomplice-witness testimony of

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[4] TEX. CODE CRIM. PRO. Art. 38.14. The testimony of one accomplice witness cannot corroborate the testimony of another accomplice witness. *See Moron v. State*, 779 S.W.2d 399, 401 (Tex. Crim. App. 1985).

Willie Guillory and Chan Tran. ROA.432-33. At trial, the prosecutor offered the curse-removal business records and related "voodoo" evidence[5] seized from Wright's home pursuant to the search warrant to corroborate the accomplice-witness testimony of Tran and Guillory, the two key prosecution witnesses.[6] The prosecutor specifically contended during his closing argument that the evidence of the "strange hieroglyphics" – related to Wright's "voodoo" – seized from her home corroborated the accomplice-witness testimony of Guillory and Tran. ROA.1982-83.

The jury sent the trial court three different notes during its deliberations (which lasted a total of 4.5 hours, *see* ROA.1994). Two of the notes specifically requested to see the evidence seized from Wright's home – including the client ledger/address book (that listed Chau Tran and Bobby Guillory) and a notebook containing photographs (including of Chau Tran) and voodoo symbols (what the prosecutor had

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[5] The trial court admitted the following: the guest book that Tran had signed that contained his recent address; a ledger that contained Bobby Guillory's and Vy Nguyen's names and dates of birth; photos of Bobby and copies of his driver's license and concealed handgun permit; a collage containing photos of Tran; and cropped photos and voodoo symbols on pages that contained the names and images of Bobby and Tran. ROA.1708-10, 1712-16, 1720-23, 7970-8064.

[6] Willie Guillory testified pursuant to a plea bargain with the State (whereby he pleaded guilty to a lesser offense, aggravated robbery, in exchange for his cooperation with the prosecution). Chau Tran testified under a grant of immunity from prosecution. He was not charged with any offense for his role in the murders. ROA.62.

called "strange hieroglyphics"). ROA.425-26. The jury convicted Wright less than an hour after receiving those items. ROA.427, 1994 (evidence given to jury at 4:21 p.m., and guilty verdict returned at 5:14 p.m.).

In response to Wright's argument on direct appeal that there was insufficient evidence to corroborate the accomplice-witness testimony of Willie Guillory and Chau Tran, the Texas Court of Appeals mentioned the curse-removal evidence and related evidence seized from Wright home as corroboration:

> . . . . In Wright's [home] office, police found unusual drawings covered in writing, symbols, and cropped photos that combined the names and images of Chau Tran and Bobby Guillory. They also found copies of Bobby Guillory's concealed handgun license and driver's license.

App. A58. The court's opinion even offered "[a] sample of the documents recovered" during the execution of the search warrant – images of the "voodoo" evidence embedded into the court's opinion. App. A46 & n.2, A63.

D. Wright's Appellate Counsel's Failure to Raise the Fourth Amendment Issue on Direct Appeal

Wright's counsel on direct appeal, Wes Ball, did not raise in his brief the Fourth Amendment issue

that Wright's original trial counsel had raised in the pretrial motion to suppress. ROA.100-08. In two closely related claims, Ball's brief solely contended that the evidence at trial was insufficient to support the jury's guilty verdicts under Texas' accomplice-witness corroboration rule. *Id.* The Texas Court of Appeals rejected those claims as entirely lacking merit based on the evidence offered by the prosecution at trial that clearly corroborated the accomplice-witness testimony of Willie Guillory and Chau Tran – *including the evidence of Wright's curse-removal business and related evidence seized by police officers from her home in 2017.* App. A58-A59 ("Considering this non-accomplice evidence, we conclude that the State presented sufficient evidence that tends to connect Wright to the charged offense of capital murder. . . . The State presented evidence that Wright was the connection between Guillory – who directly committed the murders – and Chau Tran – who received the insurance proceeds following the complainants' deaths. *She had drawings, pictures, and other documents linking Guillory and [Tran] in her office*, and she was in phone contact with both of them at the time the murders occurred.") (emphasis added).

E. Texas Courts' Ruling on Wright's Ineffective-Assistance-of-Counsel Claim

Wright's state habeas corpus application contended that Ball had provided her ineffective assistance of counsel by failing to raise the Fourth Amendment issue in his brief filed with the Texas Court of Appeals. Without conducting an evidentiary hearing and instead relying solely on

Ball's affidavit, a state magistrate, Jacob Mitchell, entered "Findings of Fact" and "Conclusions of Law" that recommended that relief be denied on that claim; those findings and conclusions were adopted in full by the state district court. App. A13-A42.

The TCCA, in summarily denying habeas relief, adopted only the "findings" – but conspicuously did *not* adopt the "conclusions of law."[7] App. A12. In view of the TCCA's refusal to adopt the conclusions of law, when given the opportunity to do so, federal courts on habeas corpus review may not presume that the TCCA implicitly adopted the conclusions (as opposed to the findings of fact, which were expressly adopted by the TCCA).[8]

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[7] The TCCA has adopted both a trial judge's "findings" ***and*** "conclusions" in countless other state habeas corpus cases. *See, e.g.*, *Ex parte Curry*, No. WR-86,192-01, 2022 WL 3642154, at *3 (Tex. Crim. App. Aug. 24, 2022) ("We agree with the habeas court's recommendation and adopt the court's fact findings ***and*** legal conclusions. Based on those findings *and* conclusions and our independent review of the record, we deny relief.") (emphasis added); *Ex parte Draeger*, No. WR–86,734–01, 2018 WL 2715035, at *1 (Tex. Crim. App. June 6, 2018) ("We adopt the habeas court's findings ***and*** conclusions except for finding 6 . . . , finding 18 . . . , conclusion 3 . . . , and conclusion 9 . . . . Concluding that the balance of the findings and conclusions that we do adopt supports denying relief, we deny relief.") (emphasis added); *Ex parte Harris*, No. WR-80,471-01, 2013 WL 6212246, at *1 (Tex. Crim. App. Nov. 27, 2013) ("We adopt the trial court's findings of fact ***and*** conclusions of law, with the exception of finding of fact #1.") (emphasis added).

[8] It is not as if the TCCA simply issued an unreasoned order denying relief. Instead, it specifically adopted only *a portion* of the lower court's order – i.e., only the findings of fact. *Cf. Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991).

The relevant findings adopted by the TCCA are set forth in Findings of Fact #31 through #58. They include the following key findings:

> • "Records associated with a person's business are a type of record that a person will retain for an extended period. . . . It is reasonable to infer that if Applicant had conducted business transactions with Tran on or before June 2012, she was likely to have records of those business transaction in her home in April 2017." (Finding of Fact #44)
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> • "On appeal, Ball considered raising an issue challenging the denial of Applicant's motion to suppress the search warrant. See Ball Affidavit at 4." (Finding of Fact #54)
>
> • "After reviewing the record and law, Ball concluded:
>
> > a. Although some of the information in the search warrant could have been considered stale because of the length of time between the offense and Applicant's arrest, the information regarding evidence in Applicant's phone was not stale. *See* Ball Affidavit at 4-5.
> >
> > b. Because there was probable cause provided in the arrest-warrant affidavit to believe that Applicant possessed business records establishing her connection to Tran, the warrant was not solely based on stale information. *See* Ball Affidavit at 5.

> c. The fact that Applicant verbally admitted to knowing Tran did not restrict the State from seeking further evidence of that connection by obtaining her cell phone and business records. *See* Ball Affidavit at 5.
>
> d. The search-warrant affidavit contained sufficient probable cause. The more recent information regarding an interview of Applicant and her arrest without a cell phone at her residence rendered the information in the search-warrant affidavit not stale. *See* Ball Affidavit at 6.
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> e. The suppression issue was not strong and was not likely to be successful on appeal. *See* Ball Affidavit at 5-6.
>
> f. The issue that had the strongest chance of success on appeal was whether there was enough evidence corroborating the accomplice-witness testimony against Applicant to sustain a conviction. See Ball Affidavit at 5-6" (Finding of Fact #55).

• "Ball's affidavit is credible and supported by the record." (Finding of Fact #56).

• "Ball's decision not to raise a suppression issue on appeal was based on reasonable appellate strategy." (Finding of Fact #57).

• "There is no evidence that but for Ball's decision to not raise a suppression issue on appeal, the appellate court would have reversed Applicant's sentence." (Finding of Fact #58).

App. A32-A35.

F. Lower Federal Courts' Rulings

The federal district court denied Wright's habeas petition on several alternative grounds – all of which were affected by the court's erroneous application of 28 U.S.C. § 2254(d) & (e) and some of which were affected by the court's misunderstanding of this Court's precedent, App. A3-A11 – which will be discussed below. The district court also summarily denied a certificate of appealability (COA) without offering any analysis or even mentioning the applicable legal standard. App. A11.

In a one-judge order, the Fifth Circuit denied a COA without offering any meaningful discussion of the issues raised in Wright's appellate brief. App. A1-A2.

REASONS FOR GRANTING CERTIORARI

For the reasons set forth *infra* in Part III, petitioner's Sixth Amendment ineffective-assistance claim – including its underlying Fourth Amendment "staleness" issue – is substantial and, indeed, meritorious and warrants federal habeas relief under 28 U.S.C. § 2254. At a minimum, it is debatable among reasonable jurists and deserves plenary consideration on appeal by a three-judge panel. As discussed *infra* in Part I, this Court repeatedly has faulted the Fifth Circuit for improperly applying an overly demanding COA standard. Despite several reversals of its COA denials, the Fifth Circuit continues to be "too demanding in assessing whether reasonable jurists could debate" a district court's denial of habeas corpus relief. *Jordan v. Fisher*, 576 U.S. 1071, 135

S. Ct. 2647, 2651 (2015) (Sotomayor, J., dissenting from denial of certiorari, joined by Ginsburg & Kagan, JJ.).

In addition, as explained *infra* in Part II, the Fifth Circuit's overly demanding COA standard conflicts with "low" standard applied by other lower federal courts. *See, e.g.*, *Frost v. Gilbert*, 835 F.3d 883, 888 (9th Cir. 2016) ("The standard for granting a certificate of appealability is low."). This Court's review is required to provide needed guidance for the lower federal courts.

I. The Fifth Circuit's Repeated Misapplication of the COA Standard

A federal habeas petitioner who does not prevail in the district court is entitled to a COA if he makes a "substantial showing of the denial of a constitutional right." *Buck v. Davis*, 580 U.S. 100, 115 (2017). A "substantial showing" means that at least one issue raised on appeal is "debatable" among reasonable jurists, that another court could resolve the issues in a different manner than the district court, or that the issues are adequate to deserve encouragement to proceed further. *Id.* A petitioner need not show that his appeal will succeed on the merits. Indeed, "a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). This Court does "not require [a] petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the

COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

During the past two decades, the Fifth Circuit *routinely* has denied COAs to habeas corpus petitioners who did not prevail in the district court, despite their claims being clearly debatable among reasonable jurists. In several cases, the Fifth Circuit denied a COA when this Court subsequently clearly disagreed with that threshold determination by granting certiorari (which unquestionably is an indication that "reasonable jurists" could disagree with the district court)[9] – including in six cases in which this Court ultimately held that those petitioners were entitled to habeas corpus relief.[10]

Petitioner's case is just the latest example of the Fifth Circuit's misapplication of the COA standard, as discussed *infra* in Part III.

II. The Lower Federal Courts' Inconsistent Approaches Concerning the COA Standard

Petitioner's case presents this Court with an excellent vehicle not only to correct the Fifth Circuit's chronic misapplication of the COA standard

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[9] *See, e.g.*, *Edwards v. Vannoy*, 593 U.S. 255, 261-62 (2021); *Davila v. Davis*, 582 U.S. 521, 527 (2017); *Haynes v. Thayler*, 569 U.S. 1015 (2013); *Webster v. Cooper*, 558 U.S. 1039 (2009).

[10] *See Buck v. Davis*, 580 U.S. 100 (2017); *Jimenez v. Quarterman*, 555 U.S. 113 (2009); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Banks v. Cockrell*, 540 U.S. 668 (2004); *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *later proceeding*, 545 U.S. 231 (2005); *Penry v. Johnson*, 532 U.S. 782 (2001).

but also to provide guidance to the lower federal courts across the country, which inconsistently apply this Court's COA standard. Such inconsistency exists not only among the federal circuits but within them. *See, e.g.*, Julia Udell, *Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study* (2020)[11] (noting the Eleventh Circuit's COA grant rate in noncapital cases in 2018-19 period was 8.44 percent, which was nearly twice as low as the First Circuit's rate of 14.29%; also noting that individual circuit judges in the Eleventh Circuit voted to grant COAs at significantly different rates, ranging from 2.33% to 25.81%); *see also Moody v. United States*, 958 F.3d 485, 488 (6th Cir. 2020) (Thapar, J.) (stating that there is a "'disturbing lack of uniformity'" in the application of the COA standard within the Sixth Circuit) (quoting *Portfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001)).

Several lower courts, including the Ninth Circuit, in accord with this Court's decisions such as *Miller-El* and *Buck*, describe the COA standard as presenting a "low" hurdle for a federal habeas petitioner. *See, e.g.*, *Frost v. Gilbert*, 835 F.3d 883, 888 (9th Cir. 2016) ("The standard for granting a certificate of appealability is low."); *Lambright v. Stewart*, 220 F.3d 1022, 1025 (9th Cir. 2000) ("We will resolve any doubt about whether the petitioner has met the [COA] standard in his favor."); *Burnham v. Evangelidis*, 411 F.Supp.3d 126, 129 (D. Mass. 2019) (referring to the COA standard as "a low bar"); *Morales v. United States*, 25 F. Supp.2d 246,

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[11] Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506320

256 (E.D.N.Y. 1998) ("Given the low threshold for doing so, the Court grants a certificate of appealability. . . .").

In contrast to these courts, the Fifth Circuit has been joined by several other circuit courts (the Sixth, Eighth, Tenth, and Eleventh) in applying an overly strict COA standard – as reflected in several split decisions by three-judge panels denying a COA in each of those circuits (which is compelling evidence of misapplication of the "reasonable jurist" standard). *See, e.g.*, *Wellborn v. Berghuis*, No. 17-2076, 2018 U.S. App. LEXIS 22931 (6th Cir. Aug. 6, 2018) (2-1 denial of COA); *Williams v. Kelley*, 858 F.3d 464, 475-80 (8th Cir. 2017) (same); *United States v. Ellis*, 779 Fed. App'x 570, 572 (10th Cir. 2019) (same); *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 123 (11th Cir. 2015) (same). Similarly, the Fifth Circuit repeatedly has denied a COA when a member of a three-judge panel has voted to grant a COA in a reasoned dissent. *See, e.g.*, *Crutsinger v. Davis*, 936 F.3d 265, 273 (5th Cir. 2019) (2-1 denial of COA); *Jordan v. Epps*, 756 F.3d 395, 413 (5th Cir. 2014) (same).

III. The District Court's Erroneous Rulings in Denying Federal Habeas Relief

The district court erred in several respects in denying petitioner relief. At the very least the court's rulings are debatable among reasonable jurists, thus entitling petitioner to a COA.

A. The Federal District Court Erred by Relying on the State Habeas Trial Court's "Conclusions of Law."

The district court first erred in its analysis of Wright's Sixth Amendment ineffective-assistance claim by assuming that the TCCA had adopted the state habeas trial court's "Conclusions of Law" in addition to its "Findings of Fact." App. A9 (in denying federal habeas corpus relief, relying on "ECF No. 15-40 at 225-29, ***232-34***, 239") (emphasis added). ECF 15-40, at 225-29, are the "Findings of Fact" related to Wright's Sixth Amendment ineffective-assistance claim, while ECF-15-40, at 232-34, are the "Conclusion of Law" related to Wright's Sixth Amendment claim. ROA.3, 67, 81.

As discussed above, the TCCA did *not* adopt the conclusions of law – only the finding of fact. In the district court, Wright even pointed out that the respondents did "not dispute that the TCCA solely adopted the state trial court's 'Findings of Fact' and did not also adopt the state trial court's 'Conclusions of Law.'" ROA.157 (citing Respondents' Answer, at 16, *see* ROA.143). Inexplicably, the district court nevertheless assumed that the TCCA had adopted the "Conclusions of Law." Most significantly, the district court erred by stating that, "[t]he Texas courts have already determined that [Wright] could not have prevailed under Texas law" on a Fourth Amendment claim raised on direct appeal. App. A10. Although "Conclusions of Law" rejected Wright's

Fourth Amendment claim on the merits,[12] the TCCA did not adopt those legal conclusions.

Instead, the TCCA, by solely adopting the state habeas trial court's "Findings of Fact," concluded that:

> (1) "Ball's decision not to raise a suppression issue on appeal was based on a reasonable appellate strategy" because Ball believed that (a) the "suppression issue was not strong and was not likely to be successful on appeal" and (b) "[t]he issue that had the strongest chance of success on appeal was whether there was enough evidence corroborating the accomplice witness testimony against Applicant to sustain a conviction"; and
>
> (2) "There is no evidence that but for Ball's decision to not raise a suppression issue on appeal, the appellate court would have reversed Applicant's sentence."

App. A34-A35 (Findings of Fact # 55-58).

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[12] In particular, two "Conclusions of Law" – (1) "Applicant has failed to prove that the information provided in the search-warrant affidavit was too stale to establish probable cause that the type of evidence sought would be in applicant's residence"; and (2) "Applicant has failed to prove the magistrate's determination that probable cause existed was unreasonable" – appeared to adjudicate Wright's subsidiary Fourth Amendment claim on the merits. App. A41.

As explained below, those purported "factual" findings are actually legal conclusions and are objectively unreasonable in view of clearly established Supreme Court precedent.

B. The TCCA's Ruling that Wright's Direct Appeal Counsel Engaged in a "Reasonable Appellate Strategy" (and Thus Was Not "Deficient") Constitutes an Objectively Unreasonable Application of Supreme Court Precedent.

The district court held that, based on what it perceived as predicate factual findings and related legal conclusions, the TCCA's rejection of Wright's ineffective-assistance claim (on the ground that Wes Ball did not perform "deficiently" by failing to raise the Fourth Amendment issue on direct appeal) was not objectively unreasonable under 28 U.S.C. § 2254(d)(1). App. A4-A10. The district court erred.

As an initial matter, the district court erred by deferring under 28 U.S.C. § 2254(e)(1) to purported "factual findings" addressing whether Ball performed deficiently. App. A9. How a state court labels a component of its ruling on a criminal defendant's federal constitutional claim – as a "finding of fact" or a "conclusion of law" – is not dispositive. What matters is the essence of the "finding" or "conclusion." A genuine factual finding is analyzed under § 2254(e)(1), while a legal conclusion, regardless of its label, is analyzed under § 2254(d). *See Vasquez v. Bradshaw*, 345 Fed. App'x 104, 113 (6th Cir. 2009). Despite being included in the state habeas trial court's "Findings of Fact,"

Findings of Fact #55 to #58 (App. A34-A35) are not "factual" findings and, instead, are legal conclusions.

To the extent that the federal district court was referring to Findings of Fact #55 to #58, the court erred by holding that "Petitioner has not shown any of the extensive fact findings is clearly erroneous." App. A9. In particular, the district court wrongly afforded deference under § 2254(e)(1) to the purported "finding of fact" that Ball engaged in a "reasonable appellate strategy" by raising the insufficient-evidence issue at the expense of the Fourth Amendment issue. App. A9. Although the antecedent question of whether an attorney made a "strategic" or "tactical" choice is a factual finding, the ultimate question of whether that strategy or tactic was objectively "unreasonable" – and, thus, qualifies as deficient performance – is a legal conclusion subject to analysis under § 2254(d). *See Wood v. Allen*, 558 U.S. 290, 303 n.3, 304 (2010).

The TCCA's *legal* conclusion that Ball was objectively reasonable by choosing not to raise the Fourth Amendment claim on direct appeal is contrary to, and an unreasonable application of, *Smith v. Robbins*, 528 U.S. 259, 287-88 (2000). This Court in *Smith* held that an appellate attorney performs deficiently when he omits a claim that is "clearly stronger than those presented." *Id.* at 288.

Because it wrongly applied *factual* deference to a *legal* conclusion, the district court did not discuss the relative strength of the insufficient-evidence claims that Ball actually raised compared to the Fourth Amendment claim that he intentionally omitted. A careful analysis of the relative strengths of those claims demonstrates that the Fourth Amendment

claim was clearly *much stronger* than the insufficient-evidence claims. The insufficient-evidence claims that Ball raised were utterly without merit – in part because the evidence of Wright's curse-removal "business records" seized by law enforcement officers from her home in 2017 provided ample corroboration of the accomplice-witness testimony at her trial, as the Texas Court of Appeals' opinion reflects. App. A60. Indeed, that court felt so strongly about this point that it even offered some of those "business records" as an appendix to its opinion. App. A46, A63.

Conversely, as discussed below, Wright's Fourth Amendment claim had merit under this Court's precedent. At the very least, it had a "reasonable probability" of prevailing if it had been raised on direct appeal. *See Smith*, 528 U.S. at 285. There are several decisions of this Court that have held that "stale" information cannot supply probable cause for a warrant. *See United States v. Grubbs*, 547 U.S. 90, 95 & n.2 (2006); *Andresen v. Maryland*, 427 U.S. 463, 478 n.9 (1976); *United States v. Harris*, 403 U.S. 573, 579 n.* (1971); *Sgro v. United States*, 287 U.S. 206, 210-211 (1932); *see also United States v. Evers*, 552 F.2d 1119, 1121-22 (5th Cir. 1977) (stating that "[i]n *Sgro* . . ., the Supreme Court provided th[e] standard for evaluating the staleness of information supporting a warrant" and also citing *Harris*, *supra*). The very same Texas appellate court that heard Wright's direct appeal also has cited that line of this Court's cases as governing the "staleness" issue. *See,*

e.g., *Manuel v. State,* 481 S.W.3d 278, 288 (Tex. App.—Hou. [1st Dist.] 2015).[13]

As explained above in the Statement of the Case, there was no factual basis whatsoever to support issuance of the search warrant concerning the "business records" in Wright's home *in 2017*. Not only had nearly five years passed since the murders but also there was *no evidence* of any of the following: (1) Wright had conducted her curse-removal business in 2012 *in her home*; (2) she had lived in the same home in 2012 that she did in 2017; (3) she continued to engage in her curse-removal business after the murders occurred in 2012; and (4) she possessed 2012 business records *in her home in 2017*. In particular, there was absolutely no evidence of an *ongoing* business by Wright or *ongoing* criminal activity by Wright (after the

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[13] The federal district court erroneously concluded that Wright "has not cited any Supreme Court holdings that clearly establish the correctness of her staleness argument based on the facts of this case." App. A10. The above-cited Supreme Court Fourth Amendment cases beginning with *Sgro* – which were cited by Wright in the district court, ROA.52, 163 – do "clearly" establish the correctness of her Fourth Amendment staleness argument. In addition, the district court erred by assuming that Wright was required to cite Supreme Court Fourth Amendment precedent that addressed the precise set of facts of her case. Instead, Wright only has to prove that Supreme Court precedent (and lower court precedent, such as *Manuel, supra*) in existence at the time of her direct appeal to the Texas Court of Appeals offered sufficient support to the Fourth Amendment claim to make Wes Ball's decision to omit the Fourth Amendment claim objectively unreasonable. The "clearly established" law that governs this case under 28 U.S.C. § 2254(d) is this Court's Sixth Amendment decision in *Smith v. Robbins*, *supra,* not this Court's Fourth Amendment precedent.

murders in 2012). Contrast this Court's decision in *Harris*, 403 U.S. at 579 n.* ("The informant reported having purchased whiskey from respondent 'within the past 2 weeks,' which could well include purchases up to the date of the affidavit. *Moreover, these recent purchases were part of a history of purchases over a two-year period.* It was certainly reasonable for a magistrate, concerned only with a balancing of probabilities, to conclude that there was a reasonable basis for a search.") (emphasis added). Therefore, the search warrant clearly was based on "stale" information that failed to establish probable cause that the curse-removal business records would be in Wright's home in 2017.

In sum, there clearly were strong legal and factual bases supporting the Fourth Amendment claim – definitely much stronger than the factual and legal bases for the utterly meritless insufficient-evidence claims that Ball actually raised on direct appeal.

In addition, the TCCA's legal conclusion that Ball made a "reasonable" decision not to raise the Fourth Amendment issue on appeal is not entitled to deference under § 2254(d)(1) and (d)(2). Significantly, the state courts credited Ball's affidavit (*see* Finding of Fact #56), App. A35, that admitted that "some of the information in the search warrant could have been considered stale because of the length of time between the offense [in 2012] and [petitioner's] arrest" in 2017. App. A34 (Finding of Fact #55a). Yet the state courts also credited Ball's belief that "[b]ecause there was probable cause provided in the arrest-warrant affidavit [incorporated in the search-warrant affidavit] to

believe that [petitioner] possessed business records establishing her connection to Tran, the [search] warrant was not solely based on stale information." App. A34 (Finding of Fact #55b). These beliefs by Ball led him to conclude that "[t]he [Fourth Amendment] suppression issue was not strong and was not likely to be successful on appeal," App. A35 (Finding of Fact #55e), and that "[t]he issue that had the strongest chance of success on appeal was whether there was enough evidence corroborating the accomplice-witness testimony against [petitioner] to sustain a conviction." App. A35 (Finding of Fact #55f). These predicate factual findings were the basis of the legal conclusion in purported Finding of Fact #57 that "Ball's decision not to raise a suppression issue on appeal was based on a reasonable appellate strategy." App. A35 (Finding of Fact #57).

That legal conclusion in Finding of Fact #57 warrants no deference under either § 2254(d)(1) or § 2254(d)(2). It warrants no deference under § 2254(d)(1) in view of (1) Ball's admission that there was some factual support for a "staleness" claim (Finding of Fact #55a) combined with (2) Ball's objectively erroneous belief that "there was probable cause provided in the arrest-warrant affidavit [incorporated in the search-warrant affidavit] to believe that [petitioner] possessed business records establishing her connection to Tran in her home in 2017 – and, thus, the [search] warrant was not solely based on stale information." App. A34 (Finding of Fact #55b).

As an objective matter, nothing in Detective Stewart's arrest-warrant affidavit provided any

information anywhere close to probable cause "to believe that [petitioner] possessed business records establishing her connection to Tran" *in petitioner's residence in 2017*. Therefore, Finding of Fact #55b – which is actually a legal conclusion – resulted from "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" and warrants no deference. 28 U.S.C. § 2254(d)(2). The only partially reasonable factual finding is Ball's admission that there was "some" stale information (presumably concerning the business records as he stated that there was no stale information concerning petitioner's cell phones). App. A34 (Finding of Fact #55a).

Finally, the district court erred in affording deference to Findings of Fact #44 and #45 (App. A32) under § 2254(e)(1). First, they are not actually "factual findings" within the meaning of § 2254(e)(1). They are instead "legislative facts" (as opposed to "adjudicative facts"). FED. R. EVID. 702, 1972 Advisory Committee Notes ("Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle *or ruling by a judge or* court or in the enactment of a legislative body.") (emphasis added). Findings of Fact #44 and #45 – that business people keep records "for an extended period" and thus, for that reason, it is "reasonable to infer" that petitioner "was likely" to have possessed 2012 business records "in her home in April 2017" – were not based on any evidence offered in the state court proceedings. Instead, they were simply *ipse dixit* – not the type of "facts" that fall within the constraints of § 2254(e)(1).

Cf. Lockhart v. McCree, 476 U.S. 162, 168 n.3 (1986) ("We are far from persuaded, however, that the 'clearly erroneous' standard of Rule 52(a) applies to the kind of 'legislative' facts at issue here."). Alternatively, even if they were "adjudicatory" facts, absolutely no evidence in the state court proceedings supported them, which disqualifies them from receiving any deference and renders any legal conclusions based on them unreasonable under 28 U.S.C. § 2254(d)(2).

Therefore, for all of these reasons, Ball clearly performed deficiently. The TCCA's contrary conclusion was objectively unreasonable, both legally and factually, and warrants no deference under 28 U.S.C. § 2254(d). At the very least, reasonable jurists could debate these points.

C. The District Court Erred by Concluding that, even if the Search Warrant Was Based on "Stale" Information, There Is Not a Reasonable Probability that Wright Would Have Prevailed on Direct Appeal.

In addressing the "prejudice" issue under *Smith v. Robbins*, the district court committed three different reversible errors: (1) it wrongly relied on the state habeas trial court's "Conclusions of Law" that the Fourth Amendment claim would not have prevailed on direct appeal "under Texas law"; (2) it applied the "good-faith exception" to the Fourth Amendment exclusionary rule (something that, as a matter of state law, the Texas Court of Appeals would not have done if Ball had raised the Fourth Amendment claim on direct appeal); and (3) it

erroneously confused appellate harmless-error review with appellate review of the sufficiency of the evidence supporting a conviction.

1. No Deference Is Due to the State Courts' Legal Conclusion that Wright's Fourth Amendment Claim Would Not Have Prevailed on Direct Appeal.

As discussed *supra*, the TCCA did not adopt any of the "Conclusions of Law" – including the ones that stated that the search warrant was based on probable cause that the curse-removal business records would be present in Wright's home in 2017 (and, thus, that the Fourth Amendment claim would not have prevailed on appeal). Yet the federal district court appeared to have relied on those conclusions of law in stating that "[t]he Texas courts have already determined that [Wright] could not have prevailed under Texas law." App. A10.[14]

Rather than adopt any "Conclusions of Law" concerning Wright's Fourth Amendment claim, the TCCA instead relied on Finding of Fact # 58 (which actually is a legal conclusion): "There is no evidence that but for Ball's decision not to raise a suppression issue on appeal, the appellate court would have reversed [Wright's] sentence." App. A35. Yet that conclusion warrants no deference under 28 U.S.C. § 2254(d) for three different reasons. First and

[14] The district court's reference "under Texas law" is confusing (if the district court was referring to non-constitutional Texas law as opposed to the Fourth Amendment). Nothing in the state trial court's "Findings of Fact" or "Conclusions of Law" made any reference to such non-constitutional "Texas law."

foremost, it failed to apply the proper constitutional standard governing "prejudice" determinations regarding claims of ineffective assistance. Second, it inexplicably referred to the effect of Ball's performance on Wright's "sentence" (as opposed to her *conviction*) – and, thus, is inapposite. And, third, even assuming *arguendo* it applies to Wright's conviction (and not merely her sentence), that legal conclusion is clearly unreasonable in view of the relative strength of Wright's Fourth Amendment claim (compared to the insufficient-evidence claims that Ball actually raised).

Regarding the first reason, a state court's legal conclusion that imposes a "but for" standard (which is equivalent to a preponderance standard) in assessing "prejudice" – as opposed to a lesser "reasonable probability" standard[15] – warrants no deference under 28 U.S.C. § 2254(d)(1). *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Therefore, no deference is due to the Texas courts' finding that "[t]here is no evidence that but for Ball's decision not to raise a suppression issue on appeal, the appellate court would have reversed [Wright's] sentence." The federal courts on habeas review thus must engage in *de novo* review of the "prejudice" issue. *See id.*

When a court determines whether deficient performance by a defendant's appellate counsel "prejudiced" the defendant, the court must ask counterfactually whether there is a "reasonable probability" that, if an omitted claim had been raised

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[15] A "reasonable probability" is *less* than a showing by a preponderance of the evidence that the result would have been different. *United States v. Dominguez Benitez*, 542 U.S. 74, 82 n.9 (2004).

on appeal, the appellate court would have reversed the defendant's conviction or sentence. *Smith*, 528 U.S. at 285-86, 288 & n.16. For the reasons set forth above, there is at least a "reasonable probability" that the Texas Court of Appeals would have concluded that the "stale" information in the search warrant application resulted in a Fourth Amendment violation and thus reversed Wright's conviction.

2. The District Court Erred by Applying *Leon*'s Good-Faith Exception.

Accepting the invitation of respondents – who raised the issue for the first time on their answer to the federal habeas corpus petition[16] – the district court alternatively ruled that, even if there were a Fourth Amendment violation, Wright's claim would not have prevailed on direct appeal in view of the "good-faith exception" to the Fourth Amendment's exclusionary rule. App. A10 (citing, *inter alia*, *United States v. Leon*, 468 U.S. 897, 905 (1984)).

The district court (and respondents-appellees) erred by invoking the good-faith exception. Under Texas Code of Criminal Procedure 38.23(b) and authoritative Texas case law interpreting it – which Wright cited in the district court (ROA.162) – Texas courts, as a matter of state law, do not apply the federal good-faith exception created in *Leon* to a Fourth Amendment claim that a warrant was not supported by probable cause. *See Curry v. State*, 808 S.W.2d 481, 482 (Tex. Crim. App. 1991); *McClintock*

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[16] ROA.147-49. The Texas courts in petitioner's state habeas case did not address the good-faith exception.

v. State, 541 S.W.3d 63, 67 (Tex. Crim. App. 2017). Therefore, the federal good-faith exception is entirely irrelevant to the Sixth Amendment issue of whether Ball provided ineffective assistance of counsel by failing to raise the Fourth Amendment issue on direct appeal to the Texas Court of Appeals (which would have been required to follow Article 38.23(b) instead of *Leon*).

3. The District Court Confused Harmless-Error Review with Review of Whether the Prosecution's Evidence at Trial Was Sufficient to Support the Jury's Conviction.

Finally, the district court erred in another fundamental way when it alternatively concluded that:

> [Wright] has not shown that even had she prevailed on the staleness argument [on appeal to the Texas Court of Appeals], the outcome of the appeal would have been different. After all, the appellate court determined that the evidence was sufficient to corroborate the accomplice-witness testimony and to support the conviction for capital murder. *Wright v. State*, 2021 WL 3358014. In other words, the suppression issue was not dispositive.

App. A10-A11.

The district court clearly failed to understand the difference between harmless-error review of a

constitutional violation and appellate review of the sufficiency of the evidence. *See Satterwhite v. Texas*, 486 U.S. 249, 258-59 (1988) (noting that the proper harmless-error inquiry is not whether legally admitted evidence is sufficient to support the jury's verdict, but instead "whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained'") (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

As Wright explained in the district court:

> The Fourth Amendment violation at petitioner's trial was not harmless [and, thus, would have prevailed on appeal if it had been raised]. As discussed above, the prosecutor's closing argument at trial focused on the unconstitutionally-seized evidence as corroboration of the accomplice-witness testimony of Willie Guillory and Chau Tran. And the jury sent two different notes asking to see that unconstitutionally obtained evidence [before returning a guilty verdict]. Therefore, because it is clear from the record that the jury did in fact consider the unconstitutionally obtained evidence in reaching its guilty verdicts, the Fourth Amendment violation was not harmless beyond a reasonable doubt. . . . Moreover, as the Texas Court of Appeals' opinion reflects, the insufficient-evidence issues raised by Ball on direct appeal entirely lacked merit – in part because of the so-called "business records" from petitioner's curse-removal business that were introduced

> as corroboration of the accomplice-witnesses' testimony. . . . The Texas Court of Appeals even offered some of the "business" records seized during the search as an appendix to the court's opinion.

ROA.55-56.

Therefore, because the Fourth Amendment violation could not have been deemed harmless beyond a reasonable doubt under *Chapman* if it had been raised by Ball on direct appeal, Wright has shown "prejudice" resulting from Ball's deficient performance.

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For the foregoing reasons, at the very least, Wright has met the "low" COA standard and is entitled to plenary consideration by a three-judge panel of the Fifth Circuit.

CONCLUSION

The Court should grant the petition for a writ of certiorari, reverse the judgment of the Fifth Circuit, and remand with instructions to grant a COA and afford plenary consideration to her appeal by a three-judge panel.

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