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

APPENDIX

Brent Evan Newton
Counsel of Record
Attorney at Law
19 Treworthy Road
Gaithersburg, MD 20878
(202) 975-9105

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
1108 East Main Street Suite 1201 Richmond Virginia 23219 (800) 847-0477

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FILED: 04/08/24

United States Court of Appeals
for the Fifth Circuit

No. 23-11251

Dephne Nguyen Wright,
Petitioner—Appellant,

versus

Bobby Lumpkin, *Director*, *Texas Department of Criminal Justice, Correctional Institutions Division*; Janet Harry-Dobbins, *Warden*,
Respondents—Appellees.

Application for Certificate of Appealability
the United States District Court
for the Northern District of Texas
USDC No. 4:23-CV-753

ORDER:

Dephne Nguyen Wright, Texas prisoner # 2346111, through retained counsel, moves this court for a certificate of appealability (COA) to challenge the district court's denial of her 28 U.S.C. § 2254 application. She contends that her appellate counsel was ineffective for failing to challenge on direct appeal the trial court's denial of her motion to

suppress. She also challenges the district court's application of deference under § 2254(d).

As Wright fails to show that jurists of reason could debate the correctness of the district court's denial of her application, her request for a COA is DENIED. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

/s/ Cory T. Wilson
United States Circuit Judge

FILED 12/04/23

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

NO. 4:23-CV-753-O

DEPHNE NGUYEN WRIGHT,
No. 2346111,
Petitioner,

V.

DIRECTOR, TDCJ-CID,
Respondent.

OPINION AND ORDER

Came on for consideration the petition of Dephne Nguyen Wright under 28 U.S.C. § 2254 for writ of habeas corpus. The Court, having considered the petition, the response, the reply, the record, and applicable authorities, concludes that the petition should be **DENIED**.

I. BACKGROUND

Petitioner is serving a life sentence imposed following her conviction under Case No. 1581714R in Criminal District Court No. 3, Tarrant County, Texas, for capital murder. ECF No. 15-38 at 7–8. Her conviction was affirmed on appeal. *Wright v. State*, No. 01-19-00781-CR, 2021 WL 3358014 (Tex. App.—Houston [1st Dist.] Aug. 3, 2021, pet. ref'd). The Court of Criminal Appeals of Texas ("CCA") refused

her petition for discretionary review. *Id.* Her state habeas application was denied without written order on findings of the trial court without hearing and on the independent review of the CCA. ECF No. 15-41 (Action Taken). The United States Supreme Court denied her petition for writ of certiorari. *Wright v. Texas*, 143 S. Ct. 2566 (2023).

II. GROUND OF THE PETITION

Petitioner urges one ground in support of her petition, alleging that she received ineffective assistance of appellate counsel. She contends that counsel should have raised the issue of the trial court's denial of her motion to suppress. ECF No. 1 at 6.

III. APPLICABLE LEGAL STANDARDS

A. Section 2254

A writ of habeas corpus on behalf of a person in custody under a state court judgment shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the petitioner shows that the prior adjudication:

> (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 the State court proceedings.

28 U.S.C. § 2254(d). A decision is contrary to clearly established federal law 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 than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000); *see also Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). A state court decision will be an unreasonable application of clearly established precedent if it correctly identifies the applicable rule but applies it objectively unreasonably to the facts of the case. *Williams*, 529 U.S. at 407–09; *see also Neal v. Puckett*, 286 F.3d 230, 236, 244–46 (5th Cir. 2002) (*en banc*) (focus should be on the ultimate legal conclusion reached by the state court and not on whether that court considered and discussed every angle of the evidence). A determination of a factual issue made by a state court is presumed to be correct. 28 U.S.C. § 2254(e)(1). The presumption of correctness applies to both express and implied factual findings. *Young v. Dretke*, 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001). Absent express findings, a federal court may infer fact findings consistent with the state court's disposition. *Marshall v. Lonberger*, 459 U.S. 422, 433 (1983). Thus, when the Texas Court of Criminal Appeals denies relief without written order, such ruling is an adjudication on the merits that is

entitled to this presumption. *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997). The petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Hill*, 210 F.3d at 486.

In making its review, the Court is limited to the record that was before the state court. 28 U.S.C. § 2254(d)(2); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

B. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, the petitioner must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Missouri v. Frye*, 566 U.S. 133, 147 (2012). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Strickland*, 466 U.S. at 697; *see also United States v. Stewart*, 207 F.3d 750, 751 (5th Cir. 2000) (*per curiam*). "The likelihood of a different result must be substantial, not just conceivable," *Harrington v. Richter*, 562 U.S. 86, 112 (2011), and a petitioner must prove that counsel's errors "so *undermined* the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Cullen*, 563 U.S. at 189 (quoting *Strickland*, 466 U.S. at 686). Judicial scrutiny of this type of claim must

be highly deferential and the petitioner must overcome a strong presumption that his counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

Appellate counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citing *Jones v. Barnes*, 463 U.S. 745 (1983)). "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome. *Id.* (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). Proving that an unraised claim is clearly stronger is generally difficult because the comparative strength of two claims is usually debatable. *Makiel v. Butler*, 782 F.3d 882, 898 (7th Cir. 2015).

Where the state court adjudicated the ineffective assistance claims on the merits, this Court must review a petitioner's claims under the "doubly deferential" standards of both *Strickland* and § 2254(d). *Cullen*, 563 U.S. at 190. In such cases, the "pivotal question" for the Court is not "whether defense counsel's performance fell below *Strickland's* standard"; it is "whether the state court's application of the *Strickland* standard was unreasonable." *Harrington*, 562 U.S. at 101, 105. In other words, the Court must afford "both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (quoting *Cullen*, 563 U.S. at 190); *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

Simply making conclusory allegations of deficient performance and prejudice is not sufficient

to meet the *Strickland* test. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000).

IV. ANALYSIS

The underlying facts of the case are long and complicated. *See Wright v. State*, 2021 WL 3358014. In June 2012, Huong Ly and Long Nguyen, an elderly couple who owned a sewing shop in Arlington, Texas, were murdered. Their son-in-law, Chau Tran, called police to conduct a welfare check on them and police found their bodies in a closet of their home. In 2015, Willie Guillory was arrested in an unrelated case and his DNA matched DNA found at the murder scene. Willie provided information that led to the unraveling of the scheme to commit the murders. In sum, the evidence showed that Petitioner advertised that she had some kind of magic or voodoo to help with business. Chau Tran and his mother-in-law, Huong Ly, hired Petitioner to help with the family's failing sewing business. Tran took cash to Petitioner at her home in Houston from time to time. Tran's son went with him and got the impression that Petitioner was involved in voodoo because there were a lot of charms and statues and things he thought were pretty weird in her home. Tran eventually owed Petitioner $280,000 for her services. Tran told Petitioner that Ly had an insurance policy that could be used to pay the debt. Petitioner solicited Willie's uncle, Bobby Guillory, and he and Willie carried out the murders. Tran paid Petitioner the insurance proceeds over time until he paid what was owed.

The crux of the petition concerns a search warrant police obtained to search Petitioner's home, where they found significant incriminating evidence.

Petitioner filed a motion to suppress the evidence, but it was overruled. Petitioner contends that counsel should have pursued the matter of the alleged invalidity of the search warrant as a ground of her appeal. The ground was presented in the state habeas application and determined to be without merit. ECF No. 15-40 at 225–29, 232– 34, 239; ECF No. 15-41 (Action Taken). Petitioner has not shown that any of the extensive fact findings is clearly erroneous.

The record reflects that Petitioner's trial counsel represented her on appeal. ECF No. 15- 40 at 222. The attorney about whom Petitioner complains is a board-certified criminal law specialist by the Texas Board of Legal Specialization. *Id.* Petitioner does not question that he was intimately familiar with the facts of the case. She simply disagrees that he picked the strongest issues to pursue on appeal. This despite the fact that she apparently could not select the strongest ground to raise in her state habeas application, where she raised two grounds, ECF No. 15-38 at 18–21, abandoning one of them in her petition for writ of certiorari, ECF No. 15-42, and pursuing one ground here. ECF No. 1. Obviously, strategy is involved. And a state court determination that counsel's conduct "was the result of a strategic and tactical decision is a question of fact" and is entitled to the presumption of correctness and clear and convincing evidence standard. *Neal v. Vannoy*, 78 F.4th 775, 786 (5th Cir. 2023). Petitioner has not met her burden of overcoming the presumption. Nor has she shown that the denial of habeas relief was not merely wrong but objectively unreasonable, i.e., "so lacking in justification that there was an error well understood and comprehended in existing law

beyond any possibility for fairminded disagreement." *White v. Woodall*, 572 U.S. 415, 420 (2014) (quoting *Harrington*, 562 U.S. at 103).

The problem for Petitioner is that she must show that there is a reasonable probability that she would have prevailed on the suppression issue had it been raised on appeal. She argues that the governing law is Section 38.23(b) of the Texas Code of Criminal Procedure. ECF No. 16 at 6. The Texas courts have already determined that she could not have prevailed under Texas law. Whether Texas courts erred in interpreting Texas law, however, is not for this Court to determine. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Perhaps for that reason Petitioner argues that hers is a Fourth Amendment claim. However, she does not want the Court to apply or recognize the "good-faith exception" to the Fourth Amendment's exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 905(1984); *Evans v. Davis*, 875 F.3d 210, 219–20 (5th Cir. 2017) ("Proof of a Fourth Amendment violation does not automatically require suppression of unconstitutionally obtained evidence."). She only wants the Court to consider the issue of staleness. ECF No. 16 at 6. Her underlying claim is either a Fourth Amendment claim or it is not. In any event, she has not cited any Supreme Court holdings that clearly establish the correctness of her staleness argument based on the facts of this case. *See, e.g.*, *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (probable cause means a fair probability that contraband or evidence of a crime will be found in a particular place); *Sgro v. United States*, 287 U.S. 206 (1932) (discussing requirements of a search warrant under a particular statute that has since been repealed). More importantly, she has not shown

that even had she prevailed on the staleness argument, 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.

In sum, Petitioner has not shown a reasonable probability that the outcome would have been different had the issue of the motion to suppress been pursued on appeal, much less that her counsel's performance fell below an objective standard of reasonableness.

V. CONCLUSION

For the reasons discussed herein, the Court **DENIES** the relief sought in the petition.

Further, pursuant to 28 U.S.C. § 2253(c), for the reasons discussed herein, a certificate of appealability is **DENIED**.

SO ORDERED this **4th day** of **December, 2023**.

/s/ Reed O'Connor
UNITED STATES DISTRICT JUDGE

Filed March 22, 2023

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

MARCH 22, 2023
WRIGHT, DEPHNE NGUYEN
Tr. Ct. No. C-3-W012179-1581714-AWR-94,531-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus on the findings of the trial court without a hearing and on the Court's independent review of the record.

Deana Williamson, Clerk

DISTRICT CLERK TARRANT COUNTY
401 W. BELKNAP
FORT WORTH, TX 76196
* DELIVERED VIA E-MAIL *

Filed July 7, 2023

C-3-W012179-1581714-A

EX PARTE	§ IN THE CRIMINAL
	§
	§ DISTRICT COURT NO. 3 OF
	§
	§ TARRANT COUNTY, TEXAS

DEPHNE NGUYEN WRIGHT

ORDER ADOPTING ACTIONS OF MAGISTRATE AND ORDER OF TRANSMITTAL

BE IT KNOWN that the Court has reviewed the actions taken by Magistrate Jacob Mitchell, sitting for this Court in the above styled and numbered cause, per a specific or standing order of referral, and has reviewed all ORDERS contained on the docket in this cause and within the papers filed in this cause and any findings entered.

IT IS HEREBY ORDERED AND DECREED that the Court specifically adopts and ratifies the actions taken by said Magistrate on behalf of this Court in compliance with Sections 54.656(a)(4) and 54.662 of the Texas Government Code, as well as Article 11.07 of the Code of Criminal Procedure as applicable.

The Court FURTHER ORDERS AND DIRECTS:

1. The Clerk of this Court to file this order and transmit it along with the Writ Transcript to the Clerk of the Court of Criminal Appeals if required by law.

2. The Clerk of this Court to furnish a copy of this order along with a copy of the Court's findings to Applicant at his currently known address, or to Applicant's counsel if Applicant is represented, and to the Post-Conviction Section of the Tarrant County Criminal District Attorney's Office.

SIGNED AND ENTERED this 27th day of January, 2023,

/s/ Douglas A. Allen
Judge Presiding

NO. C-3-W012179-1581714-A

IN THE CRIMINAL DISTRICT COURT NO. 3
OF TARRANT COUNTY, TEXAS

EX PARTE

DEPHNE NGUYEN WRIGHT

FINDINGS AND ORDER

The court, having considered Applicant's application for writ of habeas corpus, Applicant's brief, the State's response, the exhibits, trial and appellate counsel's affidavits, proposed findings submitted by the Applicant and State, the reporters record from the trial, the clerk's record, and the law applicable to the grounds alleged, the court recommends that Applicant's request for relief be **DENIED.**

In support of that recommendation, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On August 30, 2019, a jury convicted Applicant of capital murder. *See* Judgment, No. 1581714R; (11 RR 87-90).

2. The State waived the death penalty, and the court sentenced Applicant to life imprisonment without parole in the Texas Department of Criminal Justice, Institutional Division. *See* Judgment; (11 RR 91-92).

3. The First District Court of Appeals affirmed Applicant's conviction. *See Wright v. State*, No. 01-19-00781-CR, 2021 WL 3358014 (Tex. App. Houston [1st Dist.] Aug. 3, 2021, pet. ref'd) (mem. op., not designated for publication.

4. In part, the First District Court of Appeals summarized the facts of Applicant's case as follows:

> 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 Bonin-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 [Applicant]. 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.
>
> . . . .
>
> Detective B. Stewart testified about his investigation into the murders in Arlington.... 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, Guillory was engaged in a relationship with a woman named Vy Nguyen, who had lived with [Applicant] in Houston at one time. The police questioned [Applicant], and, after that, Chau quit cooperating.

Detective Stewart traveled to Houston to interview [Applicant]. In a recorded conversation, [Applicant] 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 stated that she was angry if someone named Bobby was accusing her of something, and she expressed an intention to go to Fort Hood to speak with the man she knew as James and figure out what was going on. She also acknowledged knowing Chau Tran, who she stated was a former client. 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. She testified that Chau Tran did not owe her any money currently, and she stated that she usually charges in advance. When asked, "What happens if he doesn't pay you," she responded, "I can't even tell what's going to happen. But usually, it's not going to be a nice thing to happen. I don't have to do

anything to them, things just happen on its own."

After Detective Stewart received information leading to the arrest of Bobby Guillory, he was also able to obtain a warrant to search [Applicant]'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 [Applicant]'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. Police also found "a multitude" of credit cards and "cash money."

Danny Tran, the son of Chau Tran, testified that his grandparents, the complainants, had been at his house in Arlington for a birthday celebration on June 9, 2012, the night of the murders. His grandparents left after dinner. The next morning, on June 10, his other grandmother—who was Chau Tran's mother and lived in the same

apartment complex as the complainants—called Chau to tell him that a window screen was out of place at the complainants' apartment. Danny stated that Chau and his other family members drove to the apartment complex to check the situation and that Chau ultimately called 9-1-1. Police searched the apartment and then informed his family that his grandparents had been murdered.

Danny Tran further testified that he recognized [Applicant]. He had visited her house "a couple of times" with his father, Chau Tran, on trips to Houston that occurred before his grandparents' murders. He got the impression that [Applicant] was involved in "voodoo" because there were "a lot of charms and a lot of statues" and things that he thought were "pretty weird" in her home. He knew that his father was also "superstitious" and believed in voodoo as well. Danny knew that his father was doing business of some kind with [Applicant], but he did not know the nature of their business. Danny stated that the complainants owned a sewing shop and that his dad, Chau, helped them run it.

Willie Guillory, who had also been charged with capital murder of the same complainants, testified at [Applicant]'s trial. He testified that, at the time of the murders, he lived with his uncle, Bobby Guillory, who was abusive toward him. They lived in the Houston area. Willie further testified that

Bobby would pretend to be in the military and would wear a military uniform, even though he had never served, so that he could impress women and get discounts on meals. Willie testified that around the time the murders occurred, Bobby had had an affair with Vy Nguyen, who lived with [Applicant], so Willie had visited [Applicant]'s house with Bobby on multiple occasions. Willie stated that [Applicant] was "like a mom" to him and treated him well.

On one occasion, while he was at [Applicant]'s house, Willie heard her talking on the phone to someone with a "really light" voice. [Applicant] and this person were talking about wanting two people dead, and [Applicant] said that "they owed her some money and that—that if [they] didn't pay up, [she] wanted them dead ... so they can collect insurance money." Willie testified that Bobby was in the room with [Applicant] while she had this phone conversation, and he had heard Bobby and [Applicant] discuss killing people on other occasions as well. [Applicant] told Bobby that "she wanted them to pay up or she wanted them dead." Willie further testified that he recognized Chau Tran as someone he saw one time at [Applicant]'s house, but he did not know his name or have any conversations with him.

Willie testified that he and Bobby committed the murders. He stated that [Applicant] did not want him to be involved in committing

the murders—she had told Bobby that Willie was too young and "too slow" to participate but Bobby took him anyway because he did not have anyone else to help him. He and Bobby went to the complainants' apartment twice. The second time, they entered the apartment using a key that Bobby got from [Applicant], who in turn had gotten it from the man with the "squeaky voice." Willie testified that no one else was there when they first entered the apartment, so they threw stuff around the apartment and searched for money, jewelry and "stuff that [Applicant] wanted," including a gold chain and three Louis Vuitton purses. They "staged" the apartment with the marijuana and the bandana to make it look like a gang was involved. Willie testified that, after they waited a while, Bobby got a message on one of his phones that the people were on the way home. Willie also observed that Bobby received at least one text message from Vy Nguyen while they were at the complainants' apartment. He described the murders in detail, stating that he and Bobby struck both complainants, then bound them with duct tape and put them in the closet. Willie stated that the woman, Huong Ly, did not seem to know what was happening, cried out when he struck her, and tried to kick him. Bobby called [Applicant] on the way back to Houston to let her know it was done. The next morning, he and Bobby burned the clothes they had worn during the murders and then later went to [Applicant]'s house to

give her the stuff they had taken from the apartment.

Chau Tran testified that he first contacted [Applicant] when he and Huong Ly (his mother-in-law and one of the complainants in the case) saw a newspaper advertisement that [Applicant] had "some kind of magic or voodoo to help with the business." He and Ly thought [Applicant] 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 [Applicant] to remove the curse and give them other help. Tran testified that they paid [Applicant] using a credit card issued to the sewing company and in cash for a few months. Business continued going down, and they sought additional help from [Applicant]. Tran would take cash to her in Houston from time to time, but he eventually owed her $280,000 for the services she provided over several years. Tran testified that, when they realized they could not pay [Applicant], Ly was the first one to suggest that they "let her die so we can use the [insurance] money to pay" [Applicant].

Tran stated that he then told [Applicant] about Ly's insurance policy, and [Applicant] found somebody to kill Ly "so she can die and then we can get the money." [Applicant] told him that she knew someone in the military who would do it, and he and [Applicant] spoke "several times" about the plan.

[Applicant] told him that if he agreed to pay her "a certain amount, then [she] would ... activate the plan for them to kill [Ly]." Tran testified that [Applicant] was also the person who decided that both Huong Ly and Long Nguyen needed to die, because "they live together." Tran met Bobby Guillory through [Applicant] and saw him at her house several times, but he never had any conversations with him beyond general greetings.

Chau Tran further testified that, on June 9, 2012, the day of the murders, the complainants were at his house for a birthday celebration. When they left, he telephoned [Applicant] to let her know that they were leaving. Tran testified that he made the call using a prepaid cellphone with a SIM card that would not be traced back to him. Tran testified that he told [Applicant] where to find the key for the apartment, and she told the killers where to find it. He knew when the complainants left the party that they would die when they got home, but he did not know any of the details regarding how the murders would occur.

After the murders, Chau Tran collected the insurance money and traveled to Houston to pay [Applicant] what he owed in cash. He testified that the bank did not allow him to withdraw the entire $280,000 at one time, so he "had to take like $ 50,000 here and there until we had enough" to pay what he owed [Applicant]. He lied to police when they

> questioned him after the murders because he was scared of being harmed by [Applicant]'s voodoo and he believed [Applicant] might be controlling him.
>
> . . . .
>
> . . . . The jury charge ... instructed the jury to make findings on two counts alleged in the indictment: whether [Applicant] was guilty as a party to capital murder of the two complainants in the same transaction and whether she was guilty of solicitation of capital murder. The jury found [Applicant] guilty on both counts and assessed her punishment at imprisonment for life without parole.

Id. at * 1-5.

Ground One: Ineffective Assistant of Trial Counsel

5. In ground one, Applicant claims that her trial counsel was ineffective because they did not file a motion in limine or object to testimony that Bobby Guillory had been convicted for his part in the capital murder. Applicant claims that these failures allowed Applicant's jury to conclude that Willie Guillory was telling the truth about her guilt because another jury had believed Willie in convicting Bobby Guillory. *See* Application at 6-7.

6. Applicant submitted an affidavit of Richard E. Wetzel stating that he had reviewed Applicant's case and concluded that Applicant's attorneys had

rendered ineffective assistance of trial and appellate counsel. *See* Wetzel Affidavit at 2-3.

7. Wes Ball and Pia Lederman represented Applicant at trial. *See* Judgment.

8. Ball is an attorney in good standing with the State Bar of Texas. *See* https://www.texasbar.com.

9. Since 1985, Ball has been a board-certified criminal law specialist by the Texas Board of Legal Specialization. *See* Ball Affidavit at 1.

10. Lederman is an attorney in good standing with the State Bar of Texas. *See* https://www.texasbar.com.

11. At trial, Chau Tran testified that he was sworn in as a witness at Bobby Guillory's trial, did not testify, but was informed by his attorney that Bobby Guillory had been convicted and sentenced to life without parole. (10 RR 158).

12. Applicant's trial counsel did not object to Tran's testimony that Bobby Guillory had been convicted and sentenced to life without parole. (10 RR 158).

13. The record contains no evidence that Willie Guillory testified in Bobby Guillory's trial.

14. Tran's testimony that Bobby Guillory had been convicted and sentenced to life without parole did not establish that another jury had believed Willie Guillory.

15. Prior to trial, Ball and Lederman developed a trial strategy with Applicant. *See* Ball Affidavit 2 -3; Lederman Affidavit.

16. Ball concluded that because the evidence that Bobby Guillory was guilty of capital murder was strong, taking the position that he was not guilty would have damaged the credibility of any defense for Applicant. *See* Ball Affidavit at 2.

17. Ball and Lederman's trial strategy was to shift the responsibility away from Applicant by claiming that she only knew the actual murderers and not that she was actively involved in the conspiracy to commit capital murder. *See* Ball Affidavit at 2-3; Lederman Affidavit.

18. Ball and Lederman concluded that due to the heinous nature of the murders it would be important to the jury that someone had been held responsible for the murders. *See* Ball Affidavit 2-3; Lederman Affidavit.

19. Ball's decision to not object to evidence that Bobby Guillory had been convicted and sentenced to life without parole was a strategic decision so that the jury would know that someone be held responsible for the murders. *See* Ball Affidavit 2-3; Lederman Affidavit.

20. During cross-examination of Tran, Ball elicited testimony that Tran substantially benef itted financially from his participation in the murders of his in-laws but was never charged with an offense. (10 RR 195).

21. During closing argument, Lederman argued that Willie Guillory and Tran were at fault for the murders but did not get punished enough for their participation. (11 RR 48-50).

22. During closing argument, Ball argued that Tran, Bobby Guillory, and Willie Guillory should be held responsible for the murders. (11 RR 63-66).

23. Ball and Lederman's trial strategy, developed with Applicant, was to shift the blame for the murders away from Applicant by focusing the jury's attention on the ostensibly more culpable co-conspirators. (10 RR 195; 11 RR 48-50, 63-66).

24. Ball's affidavit is credible and supported by the record.

25. Lederman's affidavit is credible and supported by the record.

26. Ball's decision to not object or file a motion in limine to prevent Tran's testimony that Bobby Guillory had been convicted and sentenced to life without parole was consistent with his trial strategy.

27. A similar trial strategy had resulted in a favorable verdict for one of Ball's previous clients. *See* Ball Affidavit at 3.

28. Given the evidence, Ball and Lederman's trial strategy was reasonable.

29. Ball's decision not to object to or file a motion in limine to prevent testimony that Bobby Guillory had

been convicted and sentenced to life without parole was the result of a reasonable trial strategy.

30. There is no evidence that the trial outcome would have been different but for Ball's decision not to keep out evidence that Bobby Guillory had been convicted and sentenced to life without parole.

Ground Two: Ineffective Assistance of Appellate Counsel

31. In ground two, Applicant claims that appellate counsel, Ball, was ineffective because he did not raise a challenge to the trial court's denial of a pretrial motion to suppress the search warrant for Applicant's residence. Applicant asserts that the affidavit not provide probable cause that the evidence would be found in her residence and that the information provided was too stale to justify issuance of the search warrant. *See* Application at 8-9.

32. In Wetzel's opinion, Ball rendered ineffective assistance of appellate counsel. *See* Wetzel Affidavit at 3.

33. On April 19, 2017, Detective Justin White of the Fort Bend County Sheriff's Office obtained a search warrant for Applicant's residence. Application, Exhibit 2; Application, Exhibit 3; (12 RR SX PT 4).

34. The search-warrant affidavit alleged that Applicant committed the offense of capital murder on or about June 10, 2012. *See* Application, Exhibit 2 at 2; (12 RR SX PT 4).

35. The search-warrant affidavit contained the following facts:

a. Applicant resided at 9122 Giana Ct, Houston, Fort Bend County, Texas. Application, Exhibit 2 at 1; (12 RR SX PT4).

b. Applicant was arrested for capital murder at 0028 hours on April 19, 2017, at 9122 Giana Ct, Houston, Fort Bend County, Texas. Application, Exhibit 2 at 3; (12 RR SX PT4).

c. Applicant did not have her cell phone when she was arrested and taken to jail. Application, Exhibit 2 at 3; (12 RR SX PT4).

d. Detective Stewart with the Arlington Police Department had interviewed Applicant in August 2016. Application, Exhibit 2 at 3; (12 RR SX PT4).

e. During the interview with Detective Stewart, Applicant said that she knew Chau Tran, a person suspected of orchestrating the murders of Nguyen and Ly. Application, Exhibit 2 at 3; (12 RR SX PT4).

f. Applicant told Detective Stewart that she had Tran's contact information in her cell phone but refused to provide the contact information to Detective Stewart or to allow him to view communications between her and Tran. Application, Exhibit 2 at 3; (12 RR SX PT4).

g. Cell phones of murder suspects often contain useful information in prosecuting a case because they store relevant communications. Application, Exhibit 2 at 3; (12 RR SX PT4).

h. "[P]eople tend to keep contact information and communication for others stored in their cellular telephones rather than memorizing them." Application, Exhibit 2 at 3; (12 RR SX PT4).

36. The search warrant affidavit incorporated by reference Applicant's arrest warrant affidavit. Application, Exhibit 2 at 3; Application, Exhibit 4; (12 RR SX PT4).

37. Applicant's arrest-warrant affidavit contained the following facts:

a. Bobby Guillory confessed to his involvement in the murders of Nguyen and Ly. Application, Exhibit 4 at 3; (12 RR SX PT4).

b. Bobby Guillory said that Applicant was the person who approached him about killing the victims. Application, Exhibit 4 at 3; (12 RR SX PT4).

c. Bobby Guillory said that Applicant gave him the key to the victims' apartment so that he could carry out the murders. Application, Exhibit 4 at 3; (12 RR SX PT4).

d. Willie Guillory said that Bobby Guillory told him that killing the victims was the only way for

them to keep their home. Application, Exhibit 4 at 3; (12 RR SX PT4).

e. During an interview with Detective Stewart, Applicant said that Tran was one of her clients. Application, Exhibit 4 at 3; (12 RR SX PT4).

f. Applicant told Detective Stewart that she "has a gift of removing curses from people and businesses." Application, Exhibit 4 at 3; (12 RR SX PT4).

g. Applicant told Detective Stewart that Tran had come to the Houston area, and they had met up. Application, Exhibit 4 at 4; (12 RR SX PT4).

h. Applicant told Detective Stewart that Tran had paid her for removing a curse on his business. Application, Exhibit 4 at 3; (12 RR SX PT4).

i. Applicant told Detective Stewart that Tran called her and told her about the victims' death. Application, Exhibit 4 at 4; (12 RR SX PT4).

j. Applicant told Detective Stewart that she did not know Bobby Guillory but knew a white male named James who used to date her cousin, Vy Nguyen. Application, Exhibit 4 at 3; (12 RR SX PT4).

38. The search warrant was sought to obtain evidence of Applicant's commission of capital murder, particularly evidence connecting her with the coconspirators in the offense, such as Applicant's

cell phone and client ledgers. Application, Exhibit 2 at 2; Application, Exhibit 3 at 1-2; (12 RR SX PT4).

39. Prior to trial, the court conducted a suppression hearing at which the court admitted the search-warrant affidavit, search warrant, search-warrant return, and Applicant's arrest warrant. (3 RR 30; 12 RR SX PT4).

40. The court denied Applicant's motion to suppress. (3 RR 39).

41. It is reasonable to infer that if Applicant admitted to having Tran's contact information on her phone in August 2016, it would still be on a phone in her possession in April 2017.

42. It is reasonable to infer that if Applicant communicated with Tran after the murders in 2012, evidence of the communication would still be on a phone in her possession in April 2017.

43. It is reasonable to conclude that information on a cell phone is not consumed or destroyed with simply the passage of time.

44. Records associated with a person's business are a type of record that a person will retain for an extended period.

45. 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.

46. It is reasonable to infer that if Applicant was arrested at her residence and her cell phone was not on her person, that her cell phone would be located inside her residence.

47. Pursuant to the search warrant, officers obtained two cell phones, a computer, and many documents related to Applicant's business. Application, Exhibit 5 at 1-2; (12 RR SX PT4).

48. Applicant moved to suppress the evidence obtained from her residence pursuant to the search warrant on the grounds that the information in the search-warrant affidavit was stale and therefore insufficient to create probable cause that evidence of the murders was in Applicant's home. (3 RR 31-33).

49. Applicant's cell phones obtained pursuant to the search warrant were not admitted as evidence in Applicant's trial.

50. The record contains no evidence of the contents of Applicant's cell phones obtained pursuant to the search warrant.

51. The evidence of Applicant's communication with her co-conspirators came through the phone records obtained by the State with a subpoena, not with evidence obtained pursuant to the challenged search warrant. (9 RR 31-76; 12 RR SX 210, 211, 215, 216, 218, 219, 220, 221, 222, 223, 224, 225, 226, 228, 229, 230).

52. Ball represented Applicant on appeal. *See* Ball Affidavit at 1.

53. Ball did not claim on appeal that the trial court erred in denying Applicant's motion to suppress. *See Wright v. State*, No. 01-19-00781-CR, 2021 WL 3358014 (Tex. App.—Houston [1st Dist.] Aug. 3, 2021, pet. ref'd) (mem. op., not designated for publication); Ball Affidavit at 5-6.

54. On appeal, Ball considered raising an issue challenging the denial of Applicant's motion to suppress the search warrant. *See* Ball Affidavit at 4.

55. 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.

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.

56. Ball's affidavit is credible and supported by the record.

57. Ball's decision not to raise a suppression issue on appeal was based on reasonable appellate strategy.

58. 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.

CONCLUSIONS OF LAW

1. "The burden of proof in a writ of habeas corpus is on the applicant to prove by a preponderance of the evidence his factual allegations." *Ex parte Thomas*, 906 S.W.2d 22, 24 (Tex. Crim. App. 1995).

2. The applicant must "allege and prove facts which, if true, entitle him to relief." *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

3. Relief may be denied if the applicant states only conclusions, and not specific facts. *See Ex parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000).

4. "[I]n all habeas cases, sworn pleadings are an inadequate basis upon which to grant relief[.]" *State v. Guerrero*, 400 S.W.3d 576, 583 (Tex. Crim. App. 2013).

Ground One: Ineffective Assistance of Trial Counsel

5. To prevail on a claim of ineffective assistance of counsel, an applicant must show counsel's representation fell below an objective standard of reasonableness, and t here i s a r easonable p robability t he r esults of the proceedings would have been different but for counsel's unprofessional errors. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

6. In other words, to prevail on an ineffective-assistance-of-counsel claim, an applicant must show "deficient performance and prejudice." *Miller v. State*, 548 S.W.3d 497, 499 (Tex. Crim. App. 2018).

7. The court "must presume that counsel is better positioned than the [reviewing] court to judge the pragmatism of the particular case, and that he made all significant decision in the exercise of reasonable professional judgment." *State v. Morales*, 253 S.W.3d

686, 697 (Tex. Crim. App. 2008) (quoting *Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992)).

8. "Review of counsel's representation is highly deferential, and the reviewing court indulges a strong presumption that counsel's conduct fell within a wide range of reasonable representation." *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005); *See Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986) (a habeas petitioner must "overcome [a] strong presumption of attorney competence established by *Strickland*.").

9. "The proper standard of review for claims of ineffective assistance of counsel is whether, considering the totality of the representation, the counsel's performance was ineffective." *Ex parte LaHood*, 401 S.W.3d 45, 49 (Tex. Crim. App. 2013).

10. "[The] Court will not second-guess through hindsight the strategy of counsel at trial nor will the fact that another attorney might have pursued a different course support a finding of ineffectiveness." *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979).

11. Support for Applicant's claim of ineffective assistance of counsel must be firmly grounded in the record and "'the record must affirmatively demonstrate' the meritorious nature of the claim." *Menefield v. State*, 363 S.W.3d 591, 592 (Tex. Crim. App. 2012) (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005).

12. "Deficient performance means that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Ex parse Napper*, 322 S.W.3d 202, 246 (Tex. Crim. App. 2010) (quoting *Strickland*, 466 U.S. at 687).

13. "[E]ach case must be judged on its own unique facts." *Davis v. State*, 278 S.W.3d 346, 353 (Tex. Crim. App. 2009).

14. "Under *Strickland*, the defendant must prove, by a preponderance of the evidence, that there is, in fact, no plausible professional reason for a specific act or omission." *Bone v. State*, 7 7 S .W.3d 8 28, 8 36 (Tex. Crim. App. 2002).

15. Applicant has failed to prove that counsel's decision not to object to testimony that Bobby Guillory had been convicted of capital murder and sentenced to life without parole was not based on a reasonable trial strategy.

16. Applicant has failed to prove that counsel's decision not to object to testimony that Bobby Guillory had been convicted of capital murder and sentenced to life without parole constitute deficient performance.

17. Applicant has failed to prove a reasonable likelihood exists that but for counsel's decision not to object to testimony that Bobby Guillory had been convicted of capital murder and sentenced to life without parole, the result of the trial proceeding would have been different.

18. Applicant has failed to prove that he received ineffective assistance of trial counsel.

19. This court recommends that Applicant's first ground for relief be **DENIED**.

Ground Two: Ineffective Assistance of Appellate Counsel

20. An applicant must meet the *Strickland v. Washington* standard to show that appellate counsel was ineffective for failing to raise a point on appeal. *Ex parte Santana*, 227 S.W.3d 700, 704 (Tex. Crim. App. 2007).

21. "To show that appellate counsel was constitutionally ineffective for failing to assert a particular point of error on appeal, an applicant must prove that (1) 'counsel's decision not to raise a particular point of error was objectively unreasonable,' and (2) there is a reasonable probability that, but for counsel's failure to raise that particular issue, he would have prevailed on appeal. An attorney 'need not advance every argument, regardless of merit, urged by the appellant.' However, if appellate counsel fails to raise a claim that has indisputable merit under well-settled law and would necessarily result in reversible error, appellate counsel is ineffective for failing to raise it." *Ex parte Miller*, 330 S.W.3d 610, 623-24 (Tex. Crim. App. 2009) (citations omitted).

22. Search-warrant affidavits "are to be read 'realistically and with common sense,' and reasonable inferences may be drawn from the facts

and circumstances set out within the four corners of the affidavit." *Crider v. State*, 352 S.W.3d 704, 707 (Tex. Crim. App. 2011) (citations omitted).

23. The "proper method to determine whether the facts supporting a search warrant have become stale is to examine, in light of the type of criminal activity involved, the time elapsing between the occurrence of the events set out in the affidavit and the time the search warrant was issued." *Id.* (quoting *McKissick v. State*, 209 S.W.3d 205, 214 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd)).

24. "The amount of delay that will make information stale for search warrant purposes depends upon the particular facts of a case, including the nature of criminal activity and the type of evidence sought. Mechanical count of days is of little assistance in this determination, but, rather, common sense and reasonableness must prevail, with considerable deference to be given to the magistrate's judgment based on the facts before him, absent arbitrariness." *Ellis v. State*, 722 S.W.2d 192, 196-97 (Tex. App.—Dallas 1986, no pet.) (citing *United States v. Freeman*, 685 F.2d 942 (5th Cir. 1928)).

25. "Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *Jones v. State*, .364 S.W.3d 854, 860-61

(Tex. Crim. App. 2012) (quoting *United State v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972)).

26. 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.

27. Applicant has failed to prove that the magistrate's determination that probable cause existed was unreasonable.

28. Applicant has failed to prove that Ball's decision not to raise a suppression issue on appeal was an unreasonable appellate strategy.

29. Applicant has failed to prove that Ball's decision not to raise a suppression issue on appeal constitutes deficient performance.

30. Applicant has failed to prove that had the court granted the motion to suppress, there is insufficient evidence to corroborate the accomplice testimony.

31. Applicant has failed to prove that the result of the appellate proceeding would have been different but for Ball's decision not to raise a suppression issue on appeal.

32. Applicant has failed to prove that she received ineffective assistance of appellate counsel.

33. This Court recommends that Applicant's second ground for relief be **DENIED**.

The court orders and directs the Clerk of this Court to furnish a copy of the court's findings and conclusion to Applicant, Ms. Dephne Nguyen Wright, by and through her attorney of record, Randy Schaffer, noguilt@schafferfirm.com, 2021 Main, Suite 1440, Houston, Texas 77002, and to the post-conviction section of the Tarrant County Criminal District Attorney's Office.

SIGNED AND ENTERED this 27th of January 2023.

/s/ Jacob Mitchell
JACOB MITCHELL
CRIMINAL LAW MAGISTRATE
TARRANT COUNTY, TEXAS

Filed August 3, 2021

COURT OF APPEALS OF TEXAS,
HOUSTON, FIRST DISTRICT

DEPHNE NGUYEN WRIGHT,
Appellant

v.

THE STATE OF TEXAS,
Appellee.

NO. 01-19-00781-CR

Opinion issued August 3, 2021

Discretionary Review Refused November 3, 2021

On Appeal from Criminal District Court No. 3,
Tarrant County, Texas, Trial Court Case No.
1581714R

MEMORANDUM OPINION

Richard Hightower, Justice

***1** A jury convicted appellant, Dephne Nguyen Wright, of capital murder and assessed her punishment at imprisonment for life without the possibility of parole. In to corroborate accomplice-witness testimony and that the evidence was insufficient to support her conviction for capital murder.

We affirm.

Background

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.[1] 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 complainant's 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 lead the

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[1] Pursuant to its docket equalization authority, the Supreme Court of Texas transferred this appeal to this Court from the Court of Appeals for the Second District of Texas. *See* Misc. Docket No. 19–9091 (Tex. Oct. 1, 2019); *see also* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases).

police to other people involved in the murders of Huong Ly and Long Nguyen.

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, 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. 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 stated that she was angry if someone named Bobby was accusing her of something, and she expressed an intention to go to Fort Hood to speak with the man she knew as James and figure out what was going on. She also acknowledged knowing Chau Tran, who she stated was a former client. 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. She testified that Chau Tran did not owe her any money currently, and she stated that she usually charges in advance. When asked, "What happens if he doesn't pay you," she responded, "I can't even tell what's going to happen. But usually, it's not going to be a nice thing to happen. I don't have to do anything to them, things just happen on its own."

***2** After Detective Stewart received information leading to the arrest of Bobby Guillory, 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.[2] Police also found "a multitude" of credit cards and "cash money."

Danny Tran, the son of Chau Tran, testified that his grandparents, the complainants, had been at his house in Arlington for a birthday celebration on June 9, 2012, the night of the murders. His grandparents left after dinner. The next morning, on June 10, his other grandmother—who was Chau

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[2] A sample of the documents recovered are included in an appendix to this opinion.

Tran's mother and lived in the same apartment complex as the complainants—called Chau to tell him that a window screen was out of place at the complainants' apartment. Danny stated that Chau and his other family members drove to the apartment complex to check the situation and that Chau ultimately called 9-1-1. Police searched the apartment and then informed his family that his grandparents had been murdered.

Danny Tran further testified that he recognized Wright. He had visited her house "a couple of times" with his father, Chau Tran, on trips to Houston that occurred before his grandparents' murders. He got the impression that Wright was involved in "voodoo" because there were "a lot of charms and a lot of statues" and things that he thought were "pretty weird" in her home. He knew that his father was also "superstitious" and believed in voodoo as well. Danny knew that his father was doing business of some kind with Wright, but he did not know the nature of their business. Danny stated that the complainants owned a sewing shop and that his dad, Chau, helped them run it.

Willie Guillory, who had also been charged with capital murder of the same complainants, testified at Wright's trial.[3] He testified that, at the time of the murders, he lived with his uncle, Bobby Guillory, who was abusive toward him. They lived in the Houston area. Willie further testified that Bobby

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[3] Willie Guillory, who was 16 years old at the time these murders occurred, was certified to stand trial as an adult. He waived his Fifth Amendment right not to testify in exchange for the State's agreeing not to pursue capital murder charges against him and instead to prosecute him for first-degree aggravated robbery.

would pretend to be in the military and would wear a military uniform, even though he had never served, so that he could impress women and get discounts on meals. Willie testified that around the time the murders occurred, Bobby had had an affair with Vy Nguyen, who lived with Wright, so Willie had visited Wright's house with Bobby on multiple occasions. Willie stated that Wright was "like a mom" to him and treated him well.

On one occasion, while he was at Wright's house, Willie heard her talking on the phone to someone with a "really light" voice. Wright and this person were talking about wanting two people dead, and Wright said that "they owed her some money and that—that if [they] didn't pay up, [she] wanted them dead ... so they can collect insurance money." Willie testified that Bobby was in the room with Wright while she had this phone conversation, and he had heard Bobby and Wright discuss killing people on other occasions as well. Wright told Bobby that "she wanted them to pay up or she wanted them dead." Willie further testified that he recognized Chau Tran as someone he saw one time at Wright's house, but he did not know his name or have any conversations with him.

***3** Willie testified that he and Bobby committed the murders.[4] He stated that Wright did not want him to be involved in committing the murders—she had told Bobby that Willie was too young and "too slow" to participate—but Bobby took him anyway because he did not have anyone else to help him. He and Bobby went to the complainants' apartment

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[4] The record indicated that Bobby Guillory had been tried separately for the murders and had been convicted. He was not called to testify in Wright's case.

twice. The second time, they entered the apartment using a key that Bobby got from Wright, who in turn had gotten it from the man with the "squeaky voice." Willie testified that no one else was there when they first entered the apartment, so they threw stuff around the apartment and searched for money, jewelry and "stuff that [Wright] wanted," including a gold chain and three Louis Vuitton purses. They "staged" the apartment with the marijuana and the bandana to make it look like a gang was involved. Willie testified that, after they waited a while, Bobby got a message on one of his phones that the people were on the way home. Willie also observed that Bobby received at least one text message from Vy Nguyen while they were at the complainants' apartment. He described the murders in detail, stating that he and Bobby struck both complainants, then bound them with duct tape and put them in the closet. Willie stated that the woman, Huong Ly, did not seem to know what was happening, cried out when he struck her, and tried to kick him. Bobby called Wright on the way back to he and Bobby burned the clothes they had worn during the murders and then later went to Wright's house to give her the stuff they had taken from the apartment.

Chau Tran testified[5] that he first contacted Wright when he and Huong Ly (his mother-in-law

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[5] The State filed a "Motion to Grant Use Immunity to Witness Chau Tran," stating that the State "hereby agrees and requests the court to order that [Chau Tran] be granted use immunity and that any evidence and testimony adduced through this witness or information derived therefrom may not be used against this witness in any adjudicatory proceeding" except for prosecution for perjury or for contempt of court. The trial court granted the motion.

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. Business continued going down, and they sought additional help from Wright. Tran would take cash to her in Houston from time to time, but he eventually owed her $280,000 for the services she provided over several years. Tran testified that, when they realized they could not pay Wright, Ly was the first one to suggest that they "let her die so we can use the [insurance] money to pay" Wright.

Tran stated that he then told Wright about Ly's insurance policy, and Wright found somebody to kill Ly "so she can die and then we can get the money." Wright told him that she knew someone in the military who would do it, and he and Wright spoke "several times" about the plan. Wright told him that if he agreed to pay her "a certain amount, then [she] would ... activate the plan for them to kill [Ly]." Tran testified that Wright was also the person who decided that both Huong Ly and Long Nguyen needed to die, because "they live together." Tran met Bobby Guillory through Wright and saw him at her house several times, but he never had any conversations with him beyond general greetings.

Chau Tran further testified that, on June 9, 2012, the day of the murders, the complainants were at his house for a birthday celebration. When they

left, he telephoned Wright to let her know that they were leaving. Tran testified that he made the call using a prepaid cellphone with a SIM card that would not be traced back to him. Tran testified that he told Wright where to find the key for the apartment, and she told the killers where to find it. He knew when the complainants left the party that they would die when they got home, but he did not know any of the details regarding how the murders would occur.

After the murders, Chau Tran collected the insurance money and traveled to Houston to pay Wright what he owed in cash. He testified that the bank did not allow him to withdraw the entire $280,000 at one time, so he "had to take like $50,000 here and there until we had enough" to pay what he owed Wright. He lied to police when they questioned him after the murders because he was scared of being harmed by Wright's voodoo and he believed Wright might be controlling him.

***4** The State also presented some documentary evidence. District attorney investigator M. Brown testified about various sets of phone records, stating that the pattern of communication between Wright and both Chau Tran and Bobby Guillory tended to connect her to the parties involved at the time of the murders. He stated that he gathered phone numbers based on police interviews with various witnesses, school records, and other transactions, but the process of procuring all of the records was difficult because several years had passed. For example, Brown testified that Bobby Guillory purchased two new vehicles in the months after the murders, and Brown was able to track down the records for the phone number associated with the financing

documents for that purchase. Brown provided a summary of his findings, indicating that Wright had been in regular contact with Bobby Guillory and with Chau Tran around the time of the offense. There was no direct contact between Chau Tran and Bobby Guillory. There was likewise no contact between the complainants and Wright or between the complainants and Guillory. Specifically, the phone records demonstrated that Wright made multiple phone contacts to Vy Nguyen and to someone in the Arlington area on June 9, 2012, the day the murders occurred. Some of the contacts between Wright and the Arlington number occurred around 5:00 pm and then around 9:00 pm, which, according to Brown, corresponded with the four-hour travel time between Guillory's home in the Houston area and the Arlington/ Fort Worth area where the murders occurred. Chau Tran's phone records showed that he contacted Wright twice on the morning of June 10, 2012—the morning that the complainants' bodies were discovered—and that they had phone contact several more times throughout the day. There were also phone calls or texts between Wright and Bobby Guillory the day the bodies were discovered and over the next few days.

Brown also testified that he noticed the pattern of the calls shifted around the time of the murders. He testified that Bobby Guillory and Vy Nguyen called or texted each other numerous times per day leading up to the day before the murders. But on the day of the murders, there was no phone contact between the two on their regular numbers, and normal phone contact between the two did not resume until the evening of the day after the murders. This led him to conclude that, if they called

or texted one another, they used different phone numbers to do so. The regular phone contact then picked up again after the murders. There was a similarly unusual pattern of calls originating from a number that he could not identify, ending "713-261-0000," that made repeated contact with Wright through her business line only around the time of the murders. Some of the calls between the "713-261-0000" number and Wright's business line occurred at the same time Chau Tran's phone records showed that he was calling Wright on her cell.[6]

Justin Driscoll, a forensic accountant for the prosecution, testified about the financial records. The records for the sewing business's account had some modest income from clients but that business dropped off in the months leading up to the murders. Instead, the majority of the payments made from the account went toward premiums on life insurance policies. Driscoll also testified that records showed that Bobby Guillory put $500 in cash down payments to purchase two brand new vehicles. One vehicle was purchased the month after the life insurance policies paid out to Chau Tran. The other was purchased five months later, again with a cash down payment. These two purchases committed Guillory to payments for approximately $53,000 worth of vehicles. Driscoll testified, however, that the cashflow in Bobby Guillory's accounts did not support such a purchase, and Driscoll did not believe that Guillory could have saved the money for the down payments, nor could he have covered the

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[6] Brown testified, "So on Chau Tran's records, it would show Chau Tran calling DMC [Wright's business number]. But oddly enough on this [record of DMC's phone call history] it's showing as a different number."

monthly payments, based on what his bank records showed. Driscoll also testified that three different insurance policies made payments to Tran's wife's account over several months, totaling approximately $800,000. The records show that large amounts of money were likewise withdrawn from the account into which the insurance payments had been deposited.

***5** The jury was given an accomplice-witness instruction with regard to two accomplice witnesses—Willie Guillory and Chau Tran—instructing that Wright could not be convicted based upon Guillory's or Tran's testimony unless the jury found the testimony true and unless their testimony "is corroborated by other evidence tending to connect [Wright] with the offense charged." The jury charge further instructed the jury to make findings on two counts alleged in the indictment: whether Wright was guilty as a party to capital murder of the two complainants in the same transaction and whether she was guilty of solicitation of capital murder. The jury found Wright guilty on both counts and assessed her punishment at imprisonment for life without parole. This appeal followed.

Accomplice-Witness Testimony

In her first issue, Wright argues that the State failed to present any evidence to corroborate the accomplice-witness testimony of Chau Tran and Willie Guillory. She argued that while there was some evidence connecting her to the accomplices, there was no evidence connecting her to the murders themselves.

A. Standard of Review and Relevant Law

An accomplice is a person who participates with a defendant in the charged offense before, during, or after its commission with the requisite mental state. *Smith v. State*, 332 S.W.3d 425, 439 (Tex. Crim. App. 2011). "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." TEX. CODE CRIM. PROC. art. 38.14.

"When evaluating the sufficiency of corroboration evidence under the accomplice-witness rule, we 'eliminate the accomplice testimony from consideration and then examine the remaining portions of the record to see if there is any evidence that tends to connect the accused with the commission of the crime.' " *Malone v. State*, 253 S.W.3d 253, 257 (Tex. Crim. App. 2008) (quoting *Solomon v. State*, 49 S.W.3d 356, 361 (Tex. Crim. App. 2001)). We view corroborating evidence in the light most favorable to the jury's verdict. *Brown v. State*, 270 S.W.3d 564, 567 (Tex. Crim. App. 2008). If there are two views of the evidence, one tending to connect the accused to the offense and the other not, we defer to the jury's view. *Smith*, 332 S.W.3d at 442. "[I]t is not appropriate for appellate courts to independently construe the non-accomplice evidence." *Id.*

"[T]he corroborating evidence need not prove the defendant's guilt beyond a reasonable doubt by itself." *Malone*, 253 S.W.3d at 257. Nor is it necessary "that the corroborating evidence directly connect the defendant to the crime[.]" *Cathey v.*

State, 992 S.W.2d 460, 462 (Tex. Crim. App. 1999). Instead, the corroborating evidence must only link the defendant in some way to the commission of the crime and show that "rational jurors could conclude that this evidence sufficiently tended to connect [the accused] to the offense." *Malone*, 253 S.W.3d at 257 (quoting *Hernandez v. State*, 939 S.W.2d 173, 179 (Tex. Crim. App. 1997)). The corroborating evidence need only "connect the defendant to the crime, not to every element of the crime." *Joubert v. State*, 235 S.W.3d 729, 731 (Tex. Crim. App. 2007); *see State v. Ambrose*, 487 S.W.3d 587, 598 (Tex. Crim. App. 2016) ("The corroboration requirement in Article 38.14 does not apply separately to each element of the offense charged or to each aspect of the accomplice's testimony.").

Although a defendant's mere presence at the scene of the crime, by itself, is not sufficient to corroborate accomplice testimony, such evidence "when coupled with other suspicious circumstances, may tend to connect the accused to the crime so as to furnish sufficient corroboration to support a conviction." *Malone*, 253 S.W.3d at 257 (quoting *Brown v. State*, 672 S.W.2d 487, 489 (Tex. Crim. App. 1984)). The corroborating evidence may be direct or circumstantial. *See Smith*, 332 S.W.3d at 442. "If the combined weight of the non-accomplice evidence tends to connect the defendant to the offense, the requirement of Article 38.14 has been fulfilled." *Cathey*, 992 S.W.2d at 462.

B. Analysis

***6** Wright argues that "the only evidence presented at trial was the testimony of two

[accomplice] witnesses" and that the State presented no corroborating evidence tending to connect her to the offense. This misrepresents the record. Excluding the testimony of the two accomplices, we are left with the following evidence:

Police found the complainants murdered in their apartment in Arlington after receiving a call from their son-in-law, Chau Tran. There was no indication that any of the family members, including Chau Tran, had been present in the apartment at the time of the murder. However, the police recovered a marijuana cigarette from the murder scene that had Willie Guillory's DNA. According to the testimony of Detective Stewart, his investigation into Willie Guillory led police to also investigate Willie's uncle, Bobby James Guillory, both of whom lived in Houston at the time of the murders. Detective Stewart also interviewed Wright and executed a search warrant at her home in Houston. In her interview, Wright acknowledged knowing someone named James, and she also admitted that Chau Tran had been one of her customers. She testified that he had hired her for a problem with his business, which Danny Tran testified was owned by the complainants. She testified that Chau Tran did not owe her any money, but she also made threatening statements when asked what would happen if someone owed her money: "I can't even tell what's going to happen. But usually, it's not going to be a nice thing to happen. I don't have to do anything to them, things just happen on its own." Wright told Detective Stewart that the last time she spoke to Chau Tran was around the time of the complainants' death, but her address book contained an address that was much more recent. Similarly,

her book contained several different references to Bobby Guillory.

Danny Tran likewise confirmed that Wright and Chau Tran knew each other, were conducting some kind of business together, and that he had been in Wright's house multiple times. Danny Tran testified that he saw "a lot of charms and a lot of statues" and things that he thought were "pretty weird" in Wright's home, and he testified that his father, Chau Tran, was similarly superstitious and believed in voodoo. In Wright's 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.

Finally, the State presented evidence that Chau Tran and his wife received the insurance payout on several policies, the premiums for which had been paid through the sewing business owned by the complainants and run by Chau Tran. The State also presented phone records indicating that Wright had regular communications with both Chau Tran and Bobby Guillory, but there were no connections directly between Tran and Guillory or between the complainants and Guillory. Furthermore, the phone records demonstrated a pattern of calls between Wright and Chau and Guillory around the time the murders occurred.

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. *See Malone*, 253 S.W.3d at 257; *see also Smith v. State*, 436 S.W.3d 353, 369–70 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). 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 Chau in her office, and she was in phone contact with both of them at the time the murders occurred.

***7** Wright argues that this evidence "did nothing more than corroborate that [she] was connected to the genuine murderers," but this disregards the nature of the evidence. She was not merely connected to either Bobby Guillory or Chau Tran; she was the person who knew both Guillory and Tran, and she was the person in regular contact with both at the time the murders occurred. *See Smith*, 436 S.W.3d at 370 (holding that sufficient corroboration was shown, in part, by appellant's presence in accomplice's company at or near place of crime). She also complains that the financial records "only show that accomplice Chau Tran acquired approximately $850,000," but "[n]one of the records show any funds being provided to [Wright], not even a cent." We conclude, however, that the State was not required to provide corroboration of every detail or elements of the offense. *See Ambrose*, 487 S.W.3d at 598 ("The corroboration requirement in Article 38.14 does not apply separately to each element of the offense charged or to each aspect of the accomplice's testimony."); *Malone*, 253 S.W.3d at 257 (corroborating evidence need not prove defendant's guilt beyond reasonable doubt by itself); *Cathey*, 992 S.W.2d at 462 (corroborating evidence need not directly connect defendant to crime).

Wright further argues that there was no evidence that Bobby Guillory received any of the insurance money for his role in the crime because the two vehicles he purchased after the fact were financed with very small down payments. And Wright asserts that the phone records are not sufficient because it was undisputed that Guillory was having an affair with Vy Nguyen, who lived with Wright at the time, and thus the phones at Wright's residence could have been used by someone other than Wright. We are mindful, however, that if there are two views of the evidence, one tending to connect the accused to the offense and the other not, we defer to the jury's view. *See Smith*, 332 S.W.3d at 442 ("[I]t is not appropriate for appellate courts to independently construe the non-accomplice evidence.").

We conclude that Wright's connection to Bobby Guillory and Chau Tran, other "suspicious circumstances" like the timing and nature of her phone contacts with Guillory and Tran, and the direct and circumstantial evidence gathered at the murder scene and from her office, support the jury's determination that the combined weight of this evidence tended to connect her to the offense. *See Smith*, 332 S.W.3d at 442; *Malone*, 253 S.W.3d at 257; *Cathey*, 992 S.W.2d at 462; *see also Trevino v. State*, 991 S.W.2d 849, 852 (Tex. Crim. App. 1999) ("Even apparently insignificant incriminating circumstances may sometimes afford satisfactory evidence of corroboration.") (quoting *Dowthitt v. State*, 931 S.W.2d 244, 249 (Tex. Crim. App. 1996)).

We hold that, because a rational factfinder could have concluded that the combined force of the non-accomplice evidence tended to connect Wright to the

offense, the State presented sufficient evidence to corroborate the accomplice testimony. *See Malone*, 253 S.W.3d at 257.

We overrule Wright's first issue.

Sufficiency of the Evidence

In her second issue, Wright argues that the evidence was insufficient to support her conviction for capital murder because the State failed to provide sufficient corroboration of the accomplice-witness testimony of Willie Guillory and Chau Tran. *See, e.g.*, TEX. CODE CRIM. PROC. art. 38.17; *Munoz v. State*, 853 S.W.2d 558, 560 (Tex. Crim. App. 1993) (holding that if non-accomplice evidence does not connect appellant to offense, evidence to support conviction is insufficient resulting in acquittal); *Snyder v. State*, 68 S.W.3d 671, 677 (Tex. App.—El Paso 2000, pet. ref'd) (holding same). Because we have concluded that the evidence supported the jury's conclusion that the non-accomplice testimony and evidence tended to connect Wright to the offense, we likewise find this argument unavailing.

To the extent that Wright argues that the evidence, including the accomplice witness testimony of Willie Guillory and Chau Tran, was insufficient to support her conviction, we disagree. We review the sufficiency of the evidence to support a conviction by considering all of the record evidence in the light most favorable to the verdict and determining whether any rational fact-finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Adames v.*

State, 353 S.W.3d 854, 859–60 (Tex. Crim. App. 2011). We presume that the fact-finder resolved any conflicting inferences in favor of the verdict, and we defer to that resolution. *See Jackson*, 443 U.S. at 326; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). A person commits the offense of capital murder if "the person murders more than one person during the same criminal transaction." TEX. PENAL CODE § 19.03(a)(7)(A); *id.* § 19.02(b)(1) (providing that person commits offense of murder if she intentionally or knowingly causes death of individual). Wright's conviction can be upheld if there was sufficient evidence that a capital murder was committed by a principal actor other than Wright, and that Wright solicited, encouraged, directed, aided, or attempted to aid that principal actor with the intent to promote or assist in the commission of the capital murder. *See id.* § 7.02(a)(2).

***8** In addition to the non-accomplice evidence set out in our analysis above, the State presented the testimony of Willie Guillory and Chau Tran. Their testimony indicated that Wright found Guillory to commit the murders so that Tran could collect the insurance money. They both testified that she directed and aided in the commission of the murders by making plans, providing communication between Tran and Guillory, and otherwise encouraging the commission of the crime. Wright argues that the character of the accomplices discredits their testimony and undermines the sufficiency of the evidence to support her conviction. She points to Willie Guillory's other criminal history and his repeated lies during the course of the police investigation; to aspects of Chau Tran's testimony

that seemed "ludicrous"; and to Bobby Guillory's actions impersonating a military officer. The issues, however, go to the weight and credibility of Willie Guillory's and Chau Tran's testimony. We defer to the jury's credibility and weight determinations because jurors are the sole judges of the witnesses' credibility and the weight their testimony is to be afforded. *Winfrey v. State*, 393 S.W.3d 763, 768 (Tex. Crim. App. 2013). Furthermore, we must presume that the jury resolved any conflicts in the evidence in favor of the verdict, and we defer to that resolution. *See Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778.

We thus conclude that the evidence was sufficient, in light of all the evidence, that the jury rationally could have found each essential element of the offense of capital murder beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319.

We overrule Wright's second issue.

Conclusion

We affirm the judgment of the trial court.

All Citations

Not Reported in S.W. Rptr., 2021 WL 3358014

Appendix

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defen[s]e."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "No State shall … deprive any person of … liberty … without due process of law …."

Sections 2253(c)(1) & (2) of Title 28, United States Code, provide in pertinent part:

> (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.