NO. 937134-A

EX PARTE SUSAN LUCILLE WRIGHT, APPLICANT

Application for Writ of Habeas Corpus
from the 263rd District Court
of Harris County, Texas

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JIM WALLACE, PRESIDING JUDGE:

COMES NOW **SUSAN LUCILLE WRIGHT**, Applicant, by Counsel of Record, **BRIAN W. WICE**, and files this Memorandum of Law in Support of her Application for Writ of Habeas Corpus:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Applicant was convicted of murder and the jury found against her on the issue of sudden passion, rejected her application for community supervision and assessed her punishment at 25 years in prison. Applicant's conviction was affirmed by the court of appeals on November 17, 2005. **Wright v. State**, 178 S.W.3d 905 (Tex.App.–Houston [14th Dist.], 2005). The Court of Criminal Appeals denied discretionary review on June 7, 2007. **Wright v. State**, PD-No. 1837-05 (Tex.Crim.App.–June 6, 2006)(*unpub.*). The court of appeals' mandate of affirmance was issued on July 21, 2006.

Applicant was represented at trial by Neal Davis and Todd Ward, and on

direct appeal and discretionary review by Brian W. Wice. Applicant is represented on this post-conviction writ by Brian W. Wice.

GROUNDS FOR HABEAS CORPUS RELIEF

1. APPLICANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT-INNOCENCE STAGE OF HER TRIAL.

2. APPLICANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE PUNISHMENT STAGE OF HER TRIAL.

3. APPLICANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN CONNECTION WITH THE FILING OF HER MOTION FOR NEW TRIAL.

EXECUTIVE SUMMARY

"Susan Wright acted to protect herself and her family. She was a battered wife." So said Wright's attorney, Neal Davis, to the *Houston Chronicle* on January 20, 2003, within hours after being hired to represent in connection with the murder of Jeffrey Wright, her husband.[1] But no expert on Battered Woman's Syndrome was ever called to testify at her trial. "She's been in a terrible mental state. She's just way too fragile psychologically to talk to [the detectives]." So said Davis to the *Chronicle* four days later while his client was being treated in a psychiatric facility under the care of Dr. Jerome Brown. But Dr. Brown was never called to testify. "Jeffrey Wright abused her for years," Davis told the *Chronicle* the next day. But a former girl friend of Jeff Wright, Misty McMichael, was never called to testify, even though Davis knew well in advance of trial that she would have corroborated his repeated claims of Jeffrey's long-standing physical and emotional abuse of Susan.

[1] A copy of Davis' fee agreement signed by the parties on January 18, 2003 is attached as Exhibit 3.

It was against this backdrop that Davis, who had never defended a murder case involving a battered woman, and his co-counsel, Todd Ward, who had never defended a murder case at all, were pitted against veteran prosecutor Kelly Siegler, one of the top trial lawyers in the Harris County District Attorney's Office. It was, simply put, a mismatch of epic proportions. Siegler, described by *People Magazine* as a "Drama Queen" whose trials are "one-half soap opera and one-half *Law & Order*, with just enough Jerry Springer sprinkled in to keep things exciting," lived up to her reputation by staging an in-court re-enactment of the crime ripped from the second reel of "*Basic Instinct*" that made national headlines. But Siegler did not stop there. She took advantage of the defense's failure to call Dr. Brown, Misty McMichael, and an expert in the area of Battered Women's Syndrome [BWS] to assail Wright's claim of self-defense in the guilt-innocence stage of trial and sudden passion in the punishment stage. If that wasn't enough, Siegler put her thumb on the scales of justice, taking advantage of Davis and Ward's inability or unwillingness to make critical objections at virtually every stage of trial to make her case significantly more persuasive and the defense's significantly less so.

This case presents in compelling terms a breakdown in the adversarial system of justice that occurred when a talented but over-the-top prosecutor steam rolled a pair of well-meaning, but overmatched defense lawyers who were beaten long before the first witness was ever called. Had Davis and Ward engaged in the type of pre-trial investigation into the law and the facts that the Sixth Amendment

requires, had they presented the testimony of Dr. Brown, Misty McMichael, and Shelby Moore and Toby Myers, two noted experts in the area of BWS, and had they made the correct objections to rein in Sigeler, there is a reasonable probability that the outcome of this trial at either stage would have been different.

Susan Wright, well into the fourth year of her 25-year-prison term for murder, need show no more for this Court to recommend a new trial or a new punishment hearing.

APPLICANT'S FIRST GROUND FOR RELIEF

APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT-INNOCENCE STAGE OF HER TRIAL.

STATEMENT OF FACTS

A. Trial Counsel's Challenged Conduct

1. Trial counsel's failure to interview and call Misty McMichael, who had been the victim of an aggravated assault at the hands of the decedent, to corroborate Applicant's claim of self-defense, was based on his objectively unreasonable investigation.

2. Trial counsel's failure to call Dr. Jerome Brown, a psychiatrist who had examined Applicant in the wake of this offense, and had been retained by trial counsel as an expert witness, as a witness to corroborate Applicant's claim of self-defense, was based on his objectively unreasonable investigation.

3. Trial counsel's failure to consult with, and call an expert in the field of Battered Women's Syndrome, as a witness to, *inter alia*, corroborate Applicant's claim of self-defense, and assist trial counsel in posing questions to the venire on this critical issue, was based on his objectively unreasonable investigation.

4. Trial counsel failed to object to ten different improper comments during the prosecutor's opening statement.

5. Trial counsel failed to preserve multiple instances of improper argument during the prosecutor's final argument by either making no objections, imprecise objections, or

failing to ask for curative instructions and/or motions for mistrial.

6. Trial counsel failed to object to 21 different instances of improper cross-examination by the prosecutor during her cross-examination of Applicant.

7. Trial counsel failed to advise Applicant that his status as a fact witness during the guilt-innocence stage of the trial created a conflict of interest precluding him from representing Applicant.

B. Additional Facts

Additional facts pertinent to the discussion of this claim are set out as part of the ***Argument and Authorities*** section, ***infra***.

ARGUMENT AND AUTHORITIES

A. The Standard of Review for Ineffective Assistance of Counsel Claims

A defendant in a criminal case is entitled to the reasonably effective assistance of counsel. **Wilkerson v. State**, 726 S.W.2d 542, 548 (Tex.Crim.App. 1986). Under the standard set out by the Supreme Court in **Strickland v. Washington**, 466 U.S. 668, 698 (1984), a defendant seeking relief as a result of trial counsel's inept performance must first show that counsel's performance was deficient and then demonstrate that this deficient performance prejudiced the defense. **Miniel v. State**, 831 S.W.2d 310, 323 (Tex.Crim.App. 1992). The **Strickland** test is applicable to ineffective assistance claims at the guilt-innocence stage of both capital and non-capital trials. **Craig v. State**, 825 S.W.2d 128, 129 (Tex.Crim.App. 1992). For an error on counsel's part to reach this level, there must be a reasonable probability, a probability sufficient to undermine confidence in the outcome of the trial, that, but for counsel's unprofessional errors, the

outcome of the proceeding would have been different. Ex parte Zepeda, 819 S.W.2d 874, 876 (Tex.Crim.App. 1991). The defendant must prove ineffective assistance of counsel by a preponderance of the evidence. Cannon v. State, 668 S.W.2d 401, 403 (Tex.Crim.App. 1984).

The Supreme Court has held that counsel's performance is measured against an "objective standard of reasonableness," Strickland v. Washington, 466 U.S. at 688, "under prevailing professional norms." Id. "Prevailing norms of practice as reflected in the American Bar Association standards and the like ... are guides to what is reasonable." Wiggins v. Smith, 539 U.S. 510, 527 (2003); see also Rompilla v. Beard, 545 U.S. 374, 387 (2005)("[W]e have long referred [to these ABA Standards] as guides to determining what is reasonable."); 1 ABA STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, Sec. 4-4. ("Defense counsel should conduct a prompt investigation of the circumstances of the case and *explore all avenues leading to facts relevant to the merits of the case* and the penalty in the event of conviction.")(emphasis added). In assessing the reasonableness of trial counsel's investigation, a reviewing court must consider not only the quantum of evidence known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Wiggins v. Smith, 539 U.S. at 527.

The Supreme Court has held, however, that a defendant need not show that counsel's deficient performance more likely than not altered the outcome in the case:

The result of a proceeding can be rendered unreliable, and hence, the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome...

In every case the court should be concerned with whether ... the result of the proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 694-696.

While the adequacy of counsel's performance is gauged by the totality of the representation afforded the accused, "[S]ometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard." Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979). As one appellate court has noted:

To ignore a grievous error simply because it is single, while granting relief where multiple errors cumulatively reach the same magnitude, would be contrary to the reasons that caused the creation of the doctrine of ineffective assistance of counsel.

Cooper v. State, 769 S.W.2d 301, 305 (Tex.App.--Houston [1st Dist.]. 1989); **see also Ex parte Felton**, 815 S.W.2d 733, 736 (Tex.Crim.App. 1991)(single error was of sufficient magnitude to render trial counsel's performance ineffective).

Trial counsel had a professional duty to "present all available evidence and arguments to support the defense of his client." **Jackson v. State**, 857 S.W.2d 678, 683 (Tex.App.--Houston [14th Dist.], 1993); **State v. Thomas**, 768 S.W.2d 335, 336 (Tex.App.–Houston [14th Dist.], 1989)(*same*). As the Fifth Circuit has noted, "The sixth amendment does not require counsel to invent a defense or act in an unethical manner. *It does, however, require counsel to put the prosecution's case to the test through vigorous partisan advocacy."* **Haynes v. Cain**, 272 F.3d 757, 764 (5th Cir. 2001) (emphasis added). This professional responsibility encompasses the duty to seek out and interview potential witnesses and the failure to do so constitutes ineffective assistance of counsel. **Ex parte Welborn**, 785 S.W.2d 391, 395 (Tex.Crim.App. 1991); **Milburn v. State**, 15 S.W.3d 267, 270 (Tex.App.--Houston [14th Dist.], 2000); **Shanklin v. State**, 190 S.W.3d 154, 165-166 (Tex.App.–Houston [1st Dist.], 2005). The failure to interview and call witnesses who are available to testify and whose testimony would have been beneficial to the defendant is not strategic because counsel can only make a

reasonable decision to forego calling such witnesses after evaluating their testimony and determining that it would not be helpful. **Milburn v. State**, 15 S.W.3d at 270; **Chambers v. Armentrout**, 907 F.2d 825, 828 (8th Cir. 1990)("a decision to interview a potential witness is not a decision related to trial strategy; rather, it is a decision related to adequate preparation for trial.").

B. Counsel's Claim of "Trial Strategy" is not Insulated from Review by this Court

While Applicant has the burden to overcome the "strong presumption" that trial counsel's challenged conduct "might be considered sound trial strategy," **Bell v. Cone**, 535 U.S. 685, 698 (2000), this does not mean that counsel may insulate his challenged conduct from appellate review merely by claiming that his conduct was "strategic." Whether trial counsel's conduct was in the first instance a matter of strategy is a question of fact, but whether it was *objectively reasonable* is a question of law, **Collier v. Turpin**, 155 F.3d 1277, 1290 (11th Cir. 1998), to which this Court owes no deference. **Strickland v. Washington**, 466 U.S. at 698 (issue of ineffective assistance of counsel is not a question of "basic, primary, or historical fact," and "both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact"); **Westley v. Johnson**, 83 F.3d 714, 720 (5th Cir. 1996)("But **Strickland** makes it clear that determinations of ineffectiveness of counsel are not factual findings of this nature which call for federal court deference ...").

The Supreme Court has stressed that strategic choices are entitled to deference only to the extent they are based on *informed* decisions. **Strickland v. Washington**, 466 U.S. at 690-691. A reviewing court's "principal concern" is not whether as counsel may claim, his conduct was strategic, "but rather whether the investigation supporting counsel's decision ... *was itself reasonable*... **Strickland** does not establish that a cursory investigation automatically justifies a tactical

decision..." **Wiggins v. Smith**, 539 U.S. at 522-523 (emphasis in original). As the Fifth Circuit has observed, "It is axiomatic -- particularly since **Wiggins** -- *that such a decision cannot be credited as calculated tactics or strategy unless it is grounded in sufficient facts,* resulting in turn from an investigation that is at least adequate for that purpose." **Lewis v. Dretke**, 355 F.3d 364, 368 (5th Cir. 2003) (emphasis added); **see also Horton v. Zant**, 941 F.2d 1449, 1462 (11th Cir. 1991)("case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.").

Because there is a "crucial distinction between strategic judgments and plain omissions," **Loyd v. Whitley**, 977 F.2d 149, 158 (5th Cir. 1992), a strategy based on counsel's misunderstanding of the law or a failure to fully investigate the facts is not objectively reasonable. **Moore v. Johnson**, 194 F.3d 586, 610 (5th Cir. 1999). A reviewing court is "not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all." **Id**. at 604. The Fifth Circuit is far from alone in adhering to the bedrock sentiment that, "The mere incantation of 'strategy' does not insulate attorney behavior from review." **Hardwick v. Crosby**, 320 F.3d 1127, 1186 (11th Cir. 2003). **See e.g.**, **Martin v. Rose**, 744 F.2d 1245, 1249 (6th Cir. 1984)("even deliberate trial tactics may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance"); **Washington v. Hofbauer**, 228 F.3d 689, 704

(6th Cir. 2000)("the label 'strategy' is not a blanket justification for conduct which otherwise amounts to ineffective assistance of counsel"). See also **Profitt v. Waldron**, 831 F.2d 1245, 1248 (5th Cir. 1987)("This measure of deference [to counsel's claims of trial strategy] must not be watered down into a disguised form of acquiescence.").

C. Trial Counsel's Challenged Conduct was Objectively Deficient

1. Failure to Interview and Call Misty McMichael

On April 6, 2003, some ten months before trial, Detective Charles Leithner of the Harris County Sheriff's Department, traveled to the small South Texas town of Tivoli, where, after a 2 ½ hour interview, he took a sworn statement from Misty Dale McMichael. As set out in Exhibit 4, McMichael described her relationship with Jeff Wright in a way eerily similar to the way Applicant would later describe her relationship with Jeff during her trial:

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In 1989 or 1990, she met Jeff when she was working as a stripper at the Colorado Bar and Grill in Houston. She described Jeff as a "big time spender" who bought her champagne and dances. She began dating him soon thereafter.

$ She did not know where he got his money until they were coming back from a trip to Mexico and he told her he had 25 pounds of marihuana in the car. Even though she refused to go on any other Mexico trips with him, Jeff got arrested in Mexico for marihuana smuggling and she drove down to bail him out with $2,500 that she never got back. She also recounted that in addition to buying and selling marihuana, Jeff also was "doing some type of pills."

$ Once Jeff moved into her apartment in Houston, she found out that he had "two sides to him." When Jeff was "sober he was really sweet and he wanted to go to church and pray a lot [but] when he was drinking he was mean and abusive towards me."

$ Jeff took her to meet his parents in La Grange and when they moved to Austin, Misty and Jeff moved there as well. While Jeff stayed with his parents, Misty lived in a small one-bedroom apartment above their business with no windows. When Jeff would leave her at night, he would lock both of the doors to the apartment, locking her inside the apartment all night. Jeff would come see her and accuse her of cheating on him, something Misty found absurd because she was always locked inside the apartment when he was gone.

$ During the first part of their relationship, Jeff's abuse "was mostly mental by [sic] his yelling at me and accusing me of doing things" while he "would run around with my girlfriends" while she was locked up inside the apartment. But as their

relationship grew, Misty said that Jeff "was becoming more and more physical with me" including a time when they got into a fight at the apartment and Jeff "grabbed me and threw me down the spiral staircase." When she got up and threw the ring he had bought her back at him, Jeff "ran down the stairs and backhanded me across the face." Although Misty called the police to report the incident, Jeff told the police she had hit him first to avoid arrest.

$ On another occasion, they got into an argument at a bar in Austin and when Jeff attempted to "back hand me again," he managed to hit some glasses on the table. A piece of glass cut Misty's chin and began to bleed "really bad." The police were called and Jeff was arrested for aggravated assault while Misty was taken to the hospital by ambulance but declined treatment. Fearing that Jeff would be angrier with her when he got out of jail, Misty called the police and told them it was an accident.

$ On every occasion when she and Jeff would fight, he would become physically abusive and "always cause injury to my face and neck" although "never on the arms" other than grabbing her on her upper arms.

$ Although she did not recall when it was, Misty decided she had suffered enough abuse from Jeff and was able to escape her locked apartment on a night when he forgot to lock the doors. Misty moved to Houston, later learning that Jeff had followed her back to Houston. Misty kept in touch with Jeff via mutual friends and he did not attempt to bother her after that.

$ Misty described Jeff at that time as someone who "would keep a tight grip on you when you were with him but after you [got] out from under his hold he would not bother you anymore." Although Misty

"had talks with [Jeff's family] regarding his behavior ... they would never seem to listen to what I was saying."

Although McMichael's statement was turned over to the defense, the only indication the defense ever attempted to contact her to testify at trial was in a motion, attached as Exhibit 5, filed on February 4, requesting her attendance. During the hearing on this motion, which the trial court granted on February 5, 2003, Neal Davis told the trial court that "it took [the State] quite a while to find her,"[2] that he told Siegler that "he knew this witness," and once he became aware of her statement, he "immediately tr[ied] to contact her.' (4 RR at 4). Davis claimed that his investigator tracked her to Chicago where several messages he left for her on an answering machine were never returned. (4 RR at 4). Davis argued that McMichael's testimony was material because:

[2] Unfortunately for Davis, his assertion was simply incorrect. Contrary to his claim, it took investigators less than three months from the date of this incident to locate McMichael.

She has given a detailed statement of abuse, physical and emotional, that she suffered at the hands of the deceased. And she has also filed a complaint against the deceased for aggravated assault.

As the Court is aware, we've already long ago filed a notice we'd be claiming self-defense and defense of others as I set out in our request for this certificate.

Prior incident [sic] involving this particular witness ... Those are admissible to show that he was aggressive and to show the kind of person he was in terms of physical violence. And that's why she is really material and necessary.

So since she's in Chicago, asking [sic] the Court to issue a certificate, we can then contact someone in Chicago and have a subpoena served to her so she can be present.[3]

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[3] In this exchange which is part of Exhibit 5, Siegler noted that she did not "have anything to add" to Davis' proffer. (4 RR at 5).

(4 RR at 4-5)(emphasis added).

The trial court expressed its concern that Davis had presented his motion "less than two weeks away from starting the trial" and pointed out without contradiction from Davis that "[o]bviously, you've known of [McMichael] for a while." (4 RR at 6). The trial court granted the motion to secure McMichael's appearance with the proviso that Davis "must prepare cert."[4] After commenting that, "Whatever I need to sign to get her," we'll do that," the trial court warned Davis that it would not delay the trial for McMichael. (4 RR at 6). Davis told the trial court that, "We can take up [sic] if there is a problem, if we need to move for a continuance." (4 RR at 7).

Davis never prepared the certificate required to secure McMicheal's attendance pursuant to ART. 24.28, Section 4(a). In spite of what he told the trial court, Davis did not seek a continuance to secure McMichael's attendance at trial.

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[4] Pursuant to ART. 24.28, Section 4(a), TEX.CODE CRIM.PROC.ANN., the party requesting the attendance of an out-of-state witness must prepare a certificate to be issued by the trial court to a judge of record in the county where the out-of-state witness is to be found. The failure to comply with the requirements of ART. 24.28, Section 4(a) waives any appellate claim that the failure of the trial court to secure the attendance of the witness was an abuse of discretion. **Johnson v. State**, 746 S.W.2d 791, 794 (Tex.App.–Corpus Christi, 1987).

Davis' failure to secure McMichael's attendance at trial, given the monumental materiality of her testimony, was objectively deficient conduct. **Ex parte Welborn**, 785 S.W.2d at 395; **Milburn v. State**, 15 S.W.3d at 270; **Shanklin v. State**, 190 S.W.3d at 165-166. If Davis were to claim that his failure to secure her attendance was tactical, this rejoinder is devoid of merit because "a decision to interview a potential witness is not a decision related to trial strategy; rather, it is a decision related to adequate preparation for trial." **Chambers v. Armentrout**, 907 F.2d at 828. Because Davis, by his own admission, never interviewed McMichael, any tactical decision he might have made not to call her could not, as a matter of law, be objectively reasonable. **Milburn v. State**, 15 S.W.3d at 270; **Smith v. State**, 894 S.W.2d 876, 880 (Tex.App.–Amarillo, 1995)("Trial counsel's abdication of his basic threshold responsibility to ascertain the facts and seek out and interview potential witnesses is the antithesis of sound trial strategy."). Davis' failure to interview and contact McMichael even though he admitted he knew she had given detectives a statement that immeasurably bolstered the defense, his conduct in waiting until the eleventh hour to ask the trial court to secure her attendance, his failure to prepare the certificate required of ART. 24.28, Section 4(a) to secure her attendance, and his failure to seek a continuance to either obtain her testimony or preserve this claim for appeal was

objectively deficient conduct.[5] See Ex parte Gonzales, 204 S.W.3d 391, 396-397 (Tex.Crim.App. 2006); Ex parte Briggs, 187 S.W.3d 458, 469 (Tex.Crim.App. 2005).

2. Failure to Call Dr. Jerome Brown

As set out in his affidavit attached as Exhibit 6, Dr. Jerome Brown, a Ph.D., was contacted by Neal Davis shortly after Applicant killed her husband on the evening of January 12, 2003. Davis hired Brown to evaluate Applicant to assist him with the preparation of her defense because she appeared mentally unstable and was a patient at the Harris County Psychiatric Center. Brown visited Applicant at the hospital for the primary purpose of determining her current state of mind as well as her state of mind at the time the alleged offense occurred. Because Brown's purpose was to develop a clinical picture of Applicant's mental functioning and not to determine the strict facts and details of what she had done and what had happened, he did not push her for details nor require her to fill in any missing portions or pieces. It was Brown's intention to obtain enough information to make a clinical diagnosis, not to determine actual facts or statements from Applicant about what happened that would be used at her trial. Brown believed that he obtained sufficient information for this purpose, even though Applicant was clearly disturbed, heavily medicated, and not in full possession of her faculties.

Brown recounted that when he first saw Applicant, she was

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[5] The conclusion that Davis' conduct was objectively deficient is fortified by the affidavit of Shelby Moore, attached as Exhibit 1. Moore, a law professor at South Texas College of Law since 1992, a former prosecutor, and an expert in the area of domestic violence, reviewed a wealth of material, including the trial record, McMichael's statement, and material from Davis' file.

functioning in an extreme state of fear and dissociation. Her fear centered around the belief that her husband (already deceased by this time) would somehow find her and kill her or the children. In her state of dissociation, which Brown described as “psychological defense mechanism which essentially “removes” the person from their immediate situation,” Applicant responded to his questions with extremely poor concentration, no eye contact, flat affect (emotional unresponsiveness), staring off to the side, frequent sighing and tearfulness. Applicant’s overall presentation had a distinctly dreamy, drifting, unfocused quality that clearly suggested that she was “somewhere else,” and that her contact with reality was extremely tenuous. Brown quickly determined that Applicant could tolerate no pressure and would not be able to provide him with anything but limited details, that the details Applicant did provide were only those that she could psychologically tolerate to remember at that time, and that recalling and reciting more horrific details would not be possible for her. Brown believed that she was suffering from a post-traumatic stress disorder (battered wife syndrome) and depression, diagnoses that are similarly reflected in the staff opinions from Applicant’s hospital records.

In her disturbed state of mind, Applicant provided Brown with some limited comments concerning the stabbing episode during which she went into the kitchen and obtained a knife, then returned to stab her husband with it. Applicant did not report the initial stabbing episode during which she was attacked by her husband with another knife kept in a bedside drawer and which she later testified about at trial. In the interview at Brown's office on February 10, 2003, Applicant essentially repeated the same events without reporting the initial stabbing episode. The apparent discrepancies occur because of this omission in Applicant's statements to him. However, considering that Applicant was suffering from a post-traumatic stress disorder and battered wife syndrome, Brown believed that reasonable psychological probability would accommodate such a discrepancy because of the dissociative process that accompanies a seriously traumatic event such as that which occurred to Applicant.[6] In his expert opinion Brown

[6] Brown's opinion has been echoed by commentators in the area of the defense of battered women. "[M]any victims experience dissociative or amnesic states surrounding violent incidents, causing them to be unable to remember the events or their sequence." WRIGHT, *Defending Battered Women: A Manual for*

believed that Applicant's mind was unable to recall these events because they were too horrific and traumatic to accept at that time, and were suppressed until a later time when some healing had occurred and some distance was placed between her and the trauma. As more details became available to Applicant, Brown believed that she was able to share these with her attorney as she became more capable and competent to participate in her defense.

In his expert opinion, Brown had no doubt that a dissociative process was occurring to Applicant at the time the incident took place and for some time after. Brown noted that Applicant clearly described the emergency of dissociative process as she was forced to cope with the trauma that occurred at the hands of her husband even prior to the incident, such as being raped on multiple occasions during which she would "go away" in her mind in order to cope with what was happening to her. Brown was of the expert opinion that this dissociative process was significantly impairing Applicant's memory functioning and could have easily produced "holes" in the stream of recall that would be lost until some later time. One such example is that victims of severe sexual abuse as a child

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sometimes recover memories of the abuse only many years later as an adult. Therefore, Brown believed that Applicant's inability to produce the details of everything that happened on the night in question would not be surprising to him, and was actually considered a common event for those suffering from the traumatic disorder Applicant exhibited during the times that he met with her.

Although the defense designated Brown as an expert on January 21, 2004, as Exhibit 12 reflects, Brown was never called as a witness at either stage of trial by the defense. On June 20, 2003, as reflected in Exhibit 13, Neal Davis sent Applicant's mother a letter stating that she needed to pay an outstanding balance owed to Brown because there was no money left in expense money and because Brown "will likely be an expert at trial."

In Exhibit 9, a memorandum to his file on February 22, 2004, Neal Davis sought to defend his decision not to call Dr. Brown as an expert to testify for the defense that Applicant had suffered from Battered Wife Syndrome [BWS] or Post Traumatic Stress Disorder [PTSD]. Without going into details, Davis wrote that his decision was based on his belief that Brown's notes "reflect a theory that is inconsistent with our theory of self-

defense” even though Davis felt that Applicant was “in a state of utter trauma, shock, and fear when she spoke with Dr. Brown.” Davis concluded his memorandum by noting that:

Based on my conversations with Dick[7] and Todd,[8] I decided not to call Dr. Brown. I think that the MHMRA records,[9] along with

[7] Dick DeGuerin, veteran criminal lawyer and Davis' boss.

[8] Todd Ward, Davis' second chair, whose participation in Applicant's murder trial would be his first as a criminal lawyer.

[9] Unfortunately for Davis, when he sought to introduce Defense Exhibit 24, the "rest of the MHMRA records," the State blocked their admission with a hearsay objection. (10 RR at 270). Outside of the jury's presence, the trial court rejected Davis' claim that the records were exempt from the hearsay rule as "statements for medical diagnosis," agreeing with the prosecutor's argument that "these notes are hearsay to [Dotson]." (10 RR at 271). The prosecutor did concede that if Davis "wants to put a doctor on the stand from MHMRA" to introduce them, she would have no objection. (10 RR at 271-273). Not surprisingly, Davis

and/or Loretta Dotson's testimony,[10] will never put a doctor on the stand from MHMRA, and this exhibit was never admitted in evidence.

[10] Dotson, a social worker at the Neuropsychiatric Center, a part of Mental Health Mental Retardation Authority of Harris County, who interviewed Applicant, testified for the defense that she had only observed "a few battered wife situations" but that Applicant's was her "first in terms of seeing the classic symptoms"of BWS. (10 RR at 254-255). Defense Exhibit 23, Dotson's one page of notes from her interview with Applicant, was introduced without objection. (10 RR at 255). On cross-examination, Dotson admitted that Applicant never told her that Jeff Wright pulled a knife on her, raped her, or any other physical abuse she suffered at Jeff Wright's hands. (10 RR at 262).

sufficiently convey to the jury that [Applicant] was clearly not her normal self after the alleged offense. I also spoke with Todd and decided not to call another expert because it would appear that we were "shopping for experts."

In Exhibit 10, a transcript of the phone call on February 22, 2004 between Davis and Dr. Brown referred to by Davis in his memorandum, Davis tells Brown that the version of events Applicant described to him is not the same as the version she has told Davis and Ward. Brown tries to tell Davis why the two versions are different, as he did in much greater detail in his affidavit, Exhibit No. 6. Although Brown tells Davis he's "assuming that you're going to go with some kind of battered wife syndrome," Davis responds, "Yeah, but it's going to have to be self defense. I mean there has to be imminent harm for us to get a [self-defense] instruction." What is curious is that while Brown had interviewed Applicant over a year before, in January of 2002, Davis says that, " *I wish I had [Brown's] notes*[11] *before* [because] I didn't realize you took such detailed

[11] A review of Dr. Brown's handwritten notes of his interview with Applicant and her family, attached as Exhibit 17, readily reveals that, with all due respect to the good doctor, they are essentially illegible and pose a virtually impossible task for the untrained eye to decipher. It was not until December 21, 2004, as Exhibit 17 reveals, that Dr. Brown transcribed his handwritten notes into the typewritten appearing in this exhibit that was, in fact, understandable.

notes." Indeed, Davis's rueful response sounds as if he was only looking at Brown's "detailed notes" on the eve of trial, a year after he had first received them.

After Davis expressed concern that even if he called Brown to "talk generally about" BWS and PTSD, the State would still get to see his notes, Brown responded, "That's too bad because I think [Jeff Wright] really did a number on her." After Davis tells Brown that, "I'd hate to have to not call you," Brown suggests that Davis "see what [the State] is going to try to do and then you can call me if you get in a bind." Davis agrees with Brown, but then says, without irony, "[W]e've got the MHMRA reports. Those are strong. Those show PTSD.[12] We've got

[12] In spite of the critical role that PTSD played in Applicant's defense at both stages of this trial, Davis asked the jury panel but three questions on it in voir dire. (6 RR at 184-185)("Let's talk about another topic briefly, it's called post-traumatic stress disorder. Anyone know about that?" ... Does everyone here understand that going through something so traumatic can lead to a break in reality?" ... "Anyone not understand that or not believe in that at all?"). It speaks volumes about Davis' lack of preparation to discuss this critical issue that not only did he not discuss PTSD in the

[Dotson] whose going to say that ... [Applicant] was bat-shit crazy..." Without attempting to question Brown in any detail as to how the two versions that trouble Davis can be reconciled, Davis says that this difference he is not interested in reconciling is "going to be a deal breaker."

Davis' decision not to call Dr. Brown to testify was objectively deficient because it was informed by an unreasonable investigation. The Supreme Court has stressed that strategic choices are entitled to deference only to the extent they are based on *informed* decisions. **Strickland v. Washington**, 466 U.S. at 690-691. A reviewing court's "principal concern" is not whether as counsel may claim, his conduct was strategic, "but rather whether the investigation supporting counsel's decision ... *was itself reasonable."* **Wiggins v. Smith**, 539 U.S. at 522-523 (emphasis in original). As the Fifth Circuit has observed, "It is axiomatic -- particularly since **Wiggins** -- *that such a decision cannot be credited as calculated tactics or strategy unless it is grounded in sufficient facts,* resulting in turn from an investigation that is at least adequate for that purpose." **Lewis v. Dretke**, 355 F.3d at 368 (5th Cir. 2003)(emphasis added);

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context of battered women, opting instead to limit it to war movies, he did not attempt to follow up on the response of the one potential juror who apparently knew more about PTSD than Davis did. (6 RR at 184-185).

see also Horton v. Zant, 941 F.2d at 1462 ("case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."). Viewed through this prism, Davis' failure to call Dr. Brown was objectively deficient conduct.[13] **See In re R.D.B.**, 20 S.W.3d 255, 261 (Tex.App.–Texarkna, 2000(failure to seek assistance of mental health professional to investigate whether juvenile's lobe brain injury produced his anti-social behavior was objectively deficient conduct); **Freeman v. State**, 167 S.W.3d 114, 119 (Tex.App.– Waco, 2005)(failure to fully investigate defendant's mental health history could not be viewed as tactical where it was based on an inadequate investigation).

3. Failure to Consult with and Call an Expert on Battered Women's Syndrome

[13] That Davis' conduct was objectively deficient is fortified by the affidavit of Shelby Moore, attached as Exhibit 1. Moore, a law professor at South Texas College of Law since 1992, a former prosecutor, and expert in the area of domestic violence, reviewed a wealth of material, including the trial record, Brown's affidavit, and the material from Davis' file alluded to above.

Shortly after Applicant was arrested and charged with her husband's murder, Shelby Moore, a professor at South Texas of Law since 1992, former prosecutor, and expert in the area of domestic violence, and occasional legal analyst, gave an interview to a Houston television station discussing Applicant's case. As set forth in Exhibit 8, Moore's affidavit dated March 21, 2007, she spoke with Mac Miller, a law clerk for Neal Davis' firm, and a law student at South Texas. Miller told Moore that the lawyers at Davis' firm had seen her interview and would be calling her "possibly to serve as an expert in the case" given Moore's expertise in the area of domestic violence. Although Miller indicated to her on several occasions that Moore would be contacted by lawyers from Davis' office, they never did. Over a year later, as Applicant's trial was slated to begin, Moore once again asked Miller why his firm had never contacted her to assist them with their trial strategy in the area of domestic violence. Miller responded that Applicant had run out of funds and could not afford to hire Moore as an expert.[14] Moore told Miller that she would have served without a fee had she been contacted, especially given her knowledge that women who are victims of domestic violence oftentimes do not have the funds to hire an expert.

ART. 38.36(b), TEX.CODE CRIM.PROC.ANN., provides that in a murder

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[14] Moore's affidavit is corroborated by Exhibit 7, the affidavit of Stanley Schneider, dated March 22, 2007. Schneider, who served as co-counsel on the direct appeal of Applicant's conviction along with lead counsel and habeas counsel, Brian Wice, recounted that he and Wice visited Davis in the latter's office on December 2, 2004 to obtain Davis' file. When Davis was asked why he had not hired an expert to testify about Battered Women's Syndrome and to explain its dynamics to the jury at Applicant's trial, Davis said that by the time of trial, Applicant's family had "run out of money for experts," and that Davis "had to choose which experts to present."

prosecution where the defendant raises a claim of self-defense, in order to establish the defendant's reasonable belief that use of force or deadly force was immediately necessary, the defendant shall be permitted to offer:

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relevant evidence that the defendant had been the victim of family violence committed by the deceased; and

- relevant expert testimony regarding the condition of the mind of the defendant at the time of the offense, including those relevant facts and circumstances relating to family violence that are the basis of the expert's opinion.

Even before the advent of Art. 38.36, the Court of Criminal Appeals recognized that evidence of battering and BWS was relevant in a murder prosecution to establish the defendant's reasonable belief that use of force or deadly force was immediately necessary.[15] In **Fielder v. State**, 756 S.W.2d 309, 321

[15] Courts and commentators have come to recognize that evidence of battering and BWS is not offered to replace a claim of self-defense or sudden passion, but rather to support it. **See** Arenella, "*Demystifying the Abuse Excuse: Is There One?*"19 Harv.J.L. & Pub.Pol., 703, 704 (1996)("[T]he critics are attacking a strawman, because the criminal law has not endorsed abuse excuse defenses that absolve victims from blame for their criminal acts ... There is no such thing as an 'abuse excuse'

(Tex.Crim.App. 1988), the court held that the testimony of an expert with a Ph.D who had undergone physical and emotional abuse and worked at a shelter for battered women was admissible where it "established [that] the average lay person has no basis for understanding the conduct of a woman who endures an abusive relationship" and because "the expert could explain the endurance [of a pattern of abuse by] the hypothetical woman in a way that the jury could infer ... is consistent with a claim of fear of the abuser." The court went to point out that the expert:

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defense in the substantive criminal law.").

concluded by explaining that it is a recognized phenomenon in the profession that most people would have a tendency to believe that they would not personally endure such a situation; that all the average person can see is that the abused woman returns to her abuser without really understanding the reasons; that *lay people who have not experienced abuse do not really have any frame of reference to fully understand why a woman would stay with a man who abused her ...* that family violence 'has been a very well-kept secret in our society because that of views that our culture has had in the past of a woman belonging to a man and a man having the right to beat a woman.

Id. at 316 (emphasis added). **See also** WRIGHT, *Defending Battered Women: A Manual for Criminal Defense Lawyers*, p. 2 (expert testimony about BWS "typically useful in breaking down misguided stereotypes by judges and juries and explaining the coping mechanisms that may appear to be dysfunctional behavior by victims in these cases."); **Scugoza v. State**, 949 S.W.2d 360, 363 (Tex.App.–San Antonio, 1997)(testimony of program director at battered woman's shelter regarding the emotional and behavioral patters on BWS and the cycle of violence in family violence situations was admissible under Rule 702 because it involved "a topic with which the average lay person could not expected to be familiar").

The critical role that a BWS expert serves in cases such as Applicant's has been succinctly stated by the author of a definitive manual on defending battered women:

Testifying before a jury, the expert serves to re-educate, to recount, and to model a detached but sympathetic response to the defendant's situation. Persons serving on juries come from the general population which in varying circumstances and degrees have had some exposure to conflict and violence within the family. Their ideas and impressions are likely to include, to some extent, inaccurate stereotypes of batterers and victims as well as common misunderstandings about the dynamics of violent relationships and the roles of the parties involved. *The first purpose of the expert, particularly during testimony about domestic violence generally, is to re-educate the jury about intimate violence, dispelling the misunderstandings and stereotypes*. Such "re-education" requires a fairly thorough knowledge of recent empirical studies and other literature regarding the subject matter, and also a hand-on, working knowledge of the effects of battering on victims.

WRIGHT, *Defending Battered Women: A Manual for Criminal Defense Lawyers*, p. 17. (emphasis added). And, in cases such as Applicant's, where a claim of self-defense is raised, an expert in the area of BWS*:*

- may review the particular cues that the batterer gave to the defendant, which interpreted in light of her history of abuse, made her able to determine that the threatened force at the time of the offense was deadly, or that the defendant's force was otherwise proportional to the threatened force;

- may opine as to how the defendant's history of abuse informed her understanding of the immediacy of her danger at the time of the offense and how the timing of the events affected the defendant's perception of danger, for instance how a period of anticipation may have heightened her fear in light of her knowledge that harm was inevitable based on past abuse; and

- may address the objective reasonableness of the defendant's subjective belief that deadly force was immediately necessary for self-defense by presenting the situation from the defendant's perspective.

Id. at 14.

Across the United States, appellate courts have consistently held that testimony from an expert in the area of BWS and its effects is necessary to defend battered women who kill because it dispels misconceptions about battered women, explains the dynamics of this "unique and almost mysterious area of human response and behavior," and supports the honesty and reasonableness of the battered woman's belief that she was in imminent danger. **See e.g.**, Smith v. State, 486 S.E..2d 819, 822 (Ga. 1997)*;* Dunn v. Roberts, 963 F.2d 308, 313 (10th Cir. 1992)("The mystery in this case, as in all battered woman cases, is why Petitioner remained with Daniel Remeta despite repeated abuse. An expert could have explained to the jury the nature of battered woman's syndrome and given an opinion on whether Petitioner suffered from the syndrome. This is an area where expert opinion is particularly useful and oftentimes necessary to interpret for the jury a situation beyond average experience and common understanding. The effect of the expert testimony would be to explain why a defendant suffering from battered woman syndrome wouldn't leave her batterer. ... Such evidence is introduced to help the jury understand why a battered woman is psychologically unable to leave the battering relationship and why she lives in high anxiety of fear of the batterer."); State v. Kelly, 478 A.2d 364, 377-378 (N.J. 1984)(expert testimony on BWS is admissible because it is designed to explain aspects of battered women's experiences and the dynamics of domestic violence about which jurors might have misconceptions, some of them so commonly held as to constitute "conventional wisdom," that otherwise could cause jurors to misunderstand the defendant's state of mind or her conduct, or both. Expert testimony on BWS "is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge..."); Hernandez v. Ashcroft, 345 F.3d 824, 836 (9th Cir. 2003)(noting that under the Violence Against Women Act of 2000, "Congress recognized that lay understandings of domestic violence are frequently comprised of 'myths, misconceptions, and victim blaming attitudes' and that background information regarding domestic violence may be crucial in order to understand its essential characteristics and manifestations."); Comm. v. Stonehouse, 555 A.2d 772, 784-785 (Pa. 1989)(citations and footnote omitted)("Expert testimony would reveal that battered women view batterers 'as omnipotent in terms of their ability to survey their women's activities,' and that there are reasons for battered women's reluctance to seek help from others, such as fear, embarrassment, and the inability of police to respond in ways that are helpful to the battered woman...On the basis of such expert testimony, the jury could have found that appellant herein was a

battered woman and that, like most battered women, appellant was isolated and justifiably believed that no one could help her solve her predicament except herself... There was no reasonable basis for trial counsel not to call an expert witness to counter the erroneous battered women myths upon which the Commonwealth built its case. Thus, trial counsel was ineffective, and the absence of such expert testimony was prejudicial to appellant in that the jury was permitted, on the basis of unfounded myths, to assess appellant's claim that she had a reasonable belief that she faced a life-threatening situation when she fired her gun at [the batterer-decedent]."); United States v. Marenghi, 893 F.Supp. 85, 96 (D.Me. 1995)("Courts permit [evidence on battering and its effects] to be admitted to expand the common sense and general knowledge that all jurors are presumed to being with them into the jury room ... Without an understanding of how battered woman syndrome instills in an abused person a continuing sense of being trapped and of constant fear, the juror's review of a defendant's allegations that she was in fear of immediate bodily injury will be incomplete and irrelevant to the reality of the situation. In effect, bringing the discussion and understanding of intrafamily violence out into the open places a scenario long considered a closely-guarded 'private family matter' on the same footing as other forms of violence leading to criminal acts..."); Paine v. Massie, 339 F.3d 1194, 1201-1204 (10th Cir. 2003)("counsel's failure to offer expert BWS testimony to provide context for the jury on the reasonableness of Ms. Paine's subjective fear amounts to objectively unreasonable performance. ... Without expert testimony about how a BWS sufferer views the world, a complete disconnect existed that prevented the jury from assessing the reasonableness of Ms. Paine's conduct based on the 'circumstances and viewpoint of the defendant' as Oklahoma law requires. .. Simply put, counsel failed to do something that the [Oklahoma courts] said was *necessary* to mount an effective self-defense claim given the jury's likely misconceptions about BWS. ... [W]e have little trouble concluding that counsel's performance fell short of the professional standard and was objectively unreasonable."); Dando v. Yukins, 461 F.3d 791. 799 (6th Cir. 2006)(trial counsel's failure to enlist the aid of an expert on BWS to help jurors understand duress defense and defendant's mental state was objectively deficient).

Viewed against this backdrop of controlling legal authority, Davis' failure to consult with, and call an expert witness in the area of BWS was objectively deficient conduct that could not have been the result of a reasoned trial strategy. First, given the fact that Moore and Schneider, as officers of the court, are telling the truth, and Davis' decision not to consult with and call a BWS expert was informed by

Applicant's lack of funds, his decision, as the Court of Criminal Appeals has made clear in a similar situation, could not have been objectively reasonable.[16] **See Ex parte Briggs**, 187 S.W.3d 458, 469 (Tex.Crim.App. 2005)("the failure by applicant's attorney to take any steps to subpoena the treating doctors, withdraw from the case because applicant's indigency prevented him from providing constitutionally effective assistance of counsel, or to request state-funded expert assistance under **Ake**[17] constituted deficient performance.").

Moreover, even if Davis had hired Brown to testify as an expert in the area of BWS but had opted not to call him for those reasons alluded to above, there was simply no impediment to calling another BWS expert. While Davis will no doubt claim that his tactical decision was informed by his belief that the MHMRA records and Dotson's testimony was sufficient to deal with this critical issue, a review of

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[16] If Davis now claims that money was not an issue, where was the money to hire an expert on BWS going to come from? Indeed, the multiple letters Davis sent to Applicant and her family telling them well in advance of trial that there was no more money for expenses, and reminding them to pay a myriad of vendors even after the trial was over are the best evidence that Davis' rejoinder that "money was not an issue" in his decision not to call a BWS expert is wholly without merit.

[17] **Ake v. Oklahoma**, 470 U.S. 68, 77 (1985).

this record reveals otherwise. Without a BWS expert to assist Davis at every stage of this trial, especially given the fact that he had never defended a murder case involving a battered woman, Davis was stuck at the starting gate. From his cursory voir dire on this critical issue,[18] through Siegler's repeated and altogether successful attempts at relying on the vary misconceptions and stereotypes about battered women at every stage of the trial, from her cross-examination of Applicant through final argument at both stages, the absence of a BWS expert loomed large in this case. Indeed, the ten-page affidavit of Toby Myers, a nationally-recognized expert in the area of BWS, as set out in Exhibit 2, reveals in painstaking detail what she, or any other BWS expert could have done to assist Davis at both stages of Applicant's trial.[19] In the absence of expert testimony, the jury was left with only one possible logical inference to draw – that Applicant was lying. The expert testimony trial counsel failed to investigate and present on BWS would have provided jurors with an alternate explanation. Indeed, because the prosecutor went

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[18] Davis' *entire* voir dire on this issue consisted of but two unremarkable questions: (1) "Anyone ever hear of battered wife syndrome here?"; (2) "Do people understand that when you're a battered spouse, that divorce is not a realistic solution sometimes?" (6 RR at 182-183).

[19] Myers' affidavit is also corroborated by the affidavit of Shelby Moore in Exhibit 1.

to great lengths to paint a picture of Applicant as anything but the stereotypical passive and helpless wife, expert testimony on BWS was absolutely essential to rebutting this stereotyping.

Informed as it was by the lack of funds, not to mention an investigation into other consulting with other BWS experts that was simply non-existent, Davis' failure to consult with and hire a BWS expert was objectively deficient conduct that could not have been the product of a reasoned trial strategy. **See Ex parte Briggs**, 187 S.W.3d at 469; **People v. Romero**, 26 Cal.App. 4th 315, 327 (Cal.App. 5 Dist. 1992), *rev'd on other grounds*, 883 P.2d 388 (Cal. 1994)(trial counsel's "tactical" decision not to present expert testimony on BWS was objectively unreasonable where it was premised on unfounded assumptions and inadequate investigation; expert could have provided explanation for defendant's "apparently inconsistent behavior" after arrest); **People v. Day**, 2 Cal. App. 4th 405, 419-420 (Ca. 1992)(expert on BWS could have explained to jury why a battered woman who kills her batterer "often suffers some memory loss for a time period that may extend from the moment she picks up the weapon until she realizes that the man has been seriously hurt. ... Such gaps often lead to inconsistencies in the women's stories when they attempt to give statements to the police."); **see also** **Smith v. Oklahoma**, 144 P.2d 159 (Okla.Crim.App. 2006)(failure to interview and call BWS expert objectively deficient); **Comm. v. Miller**, 634 A.2d 614 (Pa. 1993)(same); **State v. Zimmerman**, 823 S.W.2d 220 (Tenn.Ct.App. 1991)(same).

4. Failure to Object to Improper Opening Statement

Davis failed to object to any of the following instances of improper argument during Siegler's opening statement:

- “You’re never going to understand all of it, because you’re never going to understand her.” (7 RR at 17).

- “Self-defense? How about defenseless?” (7 RR at 19).

- “Do you think a knife just magically appeared in her hand?” (7 RR at 20).

  “Do you think someone who is acting in self-

$defense has time to nick at a man's penis? That's anger, not fear." (7 RR at 20).

$ "The anger that lies beneath that beautiful blond facade is unfathomable. You're never going to understand where all her anger came from. You will never understand it. So don't try to understand it, because you can't." (7 RR at 21-22).

$ "Self-defense, they want you to think. Really? Self-defense would have been once she got him tied up, running out the door for all she was worth with her and her babies to get away from that bad man Jeffrey. That would have been showing she was scared of him. Problem was, nobody would have believed that. Problem was, she wasn't acting in self-defense." (7 RR at 22).

$ "Trying so hard to pretend like Jeffrey had just walked out on her, on her and her children. Such a bad man that he was, you know." (7 RR at 25).

$ "They want to tell you Posttraumatic Stress Syndrome. How about cover your tail syndrome?' (7 RR at 26).

$ "To justify the unjustifiable, the defense wants you to think that Jeffrey was this horrible person. He's not here to defend himself, you know. The only thing that defends Jeffrey Wright right now is this Judge, following the rules of criminal evidence." (7 RR at 26-27).

$ "Jeff's not here to defend himself. Was Jeffrey Wright the perfect husband, the perfect father? No. Who in the world is. Was Susan Wright the perfect wife, the

perfect mother? Well, you think the perfect mother takes half of her babies' life away by executing their father? Do you think the perfect wife takes away the life of her 34 year old husband? Do you think the perfect wife and mother scars her babies forever and leaves a family in grief to raise those children forever? Is that what a perfect wife and perfect mother does? You know better. This case is not about self-defense. This case is about selfishness." (7 RR at 27-28).

Simply put, those portions of Siegler's opening statement recounted above, were a textbook example of a prosecutor improperly hijacking an opening statement and turning it into a final argument.[20] Without regard to what the evidence would show, and with but one defense objection in twelve pages,[21] Siegler's over-the-top histrionics and flat-out jury argument flies in the face of what the United States Supreme Court made clear over three decades ago: "An opening statement has a narrow purpose and scope. It is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; *it is not an occasion for argument. To make statements which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct.*" United States v. Nimitz,

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[20] Siegler's antics should come as no surprise to those who know her. As one of her former mentors describes her: "A trial with Kelly is one-half soap opera and one-half *Law & Order* – with just enough Jerry Springer sprinkled in to keep things exciting." Former Criminal District Court Judge and Now Congressman Ted Poe (R. Texas), quoted in "Drama Queen," **PEOPLE**, December 13, 2004 at page 129.

[21] By contrast, Siegler interrupted Davis's opening statement some eight times, objecting that the latter's opening statement was argument. (7 RR at 30-43).

424 U.S. 600, 612 (1976)(Burger, C.J., *concurring*)(emphasis added).

Davis' failure to object to the multiple instances of what was clearly argument during her opening statement was objectively deficient conduct. Because any claim that this "tactical" decision not to object to a stunning violation of the most basic rules of opening statement was informed by a misunderstanding of the law in **Nimitz** and its progeny, and because it produced no conceivable benefit to the defense, it could not have been a reasoned trial strategy. **See United States v. Drones**, 218 F.3d 496, 500 (5th Cir. 2000)("**Strickland** does not require us to defer to decisions that are uninformed by an adequate investigation into the controlling facts and law."); **Moore v. Johnson**, 194 F.3d at 611 (rejecting claim that counsel's tactical decision was reasonable where it prejudiced defendant and produced no conceivable benefit for defense).

5. Failure to Object and/or Preserve Error to Improper Final Argument

Prologue: The Rules of Proper Prosecutorial Final Argument per Kelly Siegler[22]

"*Four Areas of Permissible Argument:*

I. To sum up the evidence.

II. Reasonable deductions from the evidence.

III. To answer the defense arguments.

IV. Plea for law enforcement.

BUT DON'T YOU DARE STOP THERE!

[22] Siegler's complete article is attached as Exhibit 11.

Never say, 'What I say is not evidence.'"

SIEGLER, "*Final Argument,"* pp. 6-7, presented at Texas District & County Attorney's Association's Prosecutor Trial Skills Course, July 14-19, 2002, Austin, Texas.

True to her word,, Siegler did not "stop there" and never said, "what [she had to] say is not evidence." As recounted below, Davis either failed to object and/or preserve error by making timely and specific objections or by obtaining adverse rulings to any of the following instances of improper argument during Siegler's final argument:

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Argument that Applicant taught her son, Bradley, what to say. (12 RR at 173-174).

$ Argument that Applicant was crying when jury not present. (12 RR at 206).

$ Argument referring to theory developed after trial counsel, Neal Davis, was hired to represent Applicant. (12 RR at 211).

$ Argument referring to the decedent trying to grab the knife. (12 RR at 214).

$ Argument that Applicant could change her lies that fast. (12 RR at 215).

$ Argument referring to the Robert Durst acquittal verdict in his murder trial in Galveston and Harris County jurors being a laughingstock. (12 RR at 217).

$ Argument inviting jurors to place themselves in the shoes of the decedent. (12 RR at 180).

a. Applicant taught her son what to say

Appellate courts have shown a special concern for prosecutorial final argument that improperly invites the jury to speculate about or consider matters not in evidence. **See Johnson v. State**, 662 S.W.2d 368, 370 (Tex.Crim.App. 1984). Indeed, some forms of prosecutorial argument outside the record can so infect the trial with unfairness as to be a denial of due process. **See Thompson v. State**, 89 S.W.3d 843, 852 (Tex.App.--Houston [1st Dist.], 2002)(State's invitation to jurors in final argument to speculate on matters outside record in assessing punishment was so unfair as to constitute denial of due process). References by the prosecutor to matters outside of or unsupported by the record are ordinarily designed to arouse the passion of the jury and are highly inappropriate. **Jordan v. State, 646 S.W.2d 946, 948 (Tex.Crim.App. 1983)Berryhill v. State, 501 S.W.2d 86, 87 (Tex.Crim.App. 1973) TA \c 1 \s "" \l "[23]**

[23] While it might well be a sound trial strategy not to object to final argument that is proper, there can be no sound trial strategy in making the wrong objection, an imprecise objection, or in not taking those steps necessary to preserve error once an objection is sustained. **See Raney v. State**, 958 S.W.2d 867, 878 (Tex.App.–Waco, 1997)(counsel's failure to preserve error was objectively deficient conduct). **See also Bernard v. State**, No. 12-01-002-CR, *slip op.* at 4 (2-20-02)(*op. not design. for pub*.)(rejecting claim that trial counsel could have had a tactical reason for not objecting to improper final argument where he objected to the fourth of six improper comments on his client's failure to testify).

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[24] Rule 503(b)(1) provides that, "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.'

[25] "[B]y the way, no one's ever gotten to ask you questions at all except your lawyer – until today?" (12 RR at 24).

[26] Given what Siegler teaches young prosecutors, her conduct during her cross-examination of Applicant should not come as any great surprise. See SIEGLER, *"Final Argument,"* p. 3. ("YOU Are in Charge! You are the accuser. Act like it! Point at the defendant. Glare at the defendant. Crouch down next to the defendant. This is what you've been waiting for...").

[27] Even a cursory review of Myers' resume reveals she is the gold standard in this area. As she succinctly stated in her affidavit, "I have been in the field of domestic violence before it was a field."

[28] Davis' failure of trial counsel to call Dr. Brown, and to consult with and call an expert in the field of BWS was both deficient and prejudicial, even when viewed through the highly deferential standard of review imposed by the federal courts on

federal habeas review that mandates that a federal court may not grant habeas relief unless the state court decision is contrary to, or involved an unreasonable application of, clearly established [f]ederal law." **Anderson v. Johnson**, 338 F.3d 382, 381 (5th Cir. 2003). **See Miller v. Dretke**, 420 F.3d 356 (5th Cir. 2005)(failure to conduct adequate investigation into defendant's mental disabilities by not contacting defendant's treating physicians and calling them as witnesses); **Draughon v. Dretke**, 427 F.3d 286, 296 (5th Cir. 2005)(failure to investigate and present evidence of ballistics through defense's expert); **Anderson v. Johnson**, 338 F.3d 382, 392 (failure to investigate and present mitigating evidence); **Lewis v. Dretke**, 355 F.3d 364, 368 (same); **Lockett v. Anderson**, 230 F.3d 695, 714 (5th Cir. 2000)(same).

[29] **See Berger v. United States**, 295 U.S. 78, 88 (1935)(while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones"); **Houston v. Estelle**, 569 F.2d 372, 384 (5th Cir. 1978)("A public prosecutor wields the sword of justice. It is his duty to recall that this sword, though forged in the flame-heat of zeal is alloyed with the iron of restraint. The prosecutor in this case forgot this fundamental truth. The trial judge did not adequately remind him of it.").

[30] While it might well be a sound trial strategy not to object to final argument that is proper, there can be no sound trial strategy in making the wrong objection, an imprecise objection, or in not taking those steps necessary to preserve error once an objection is sustained. **See Raney v. State**, 958 S.W.2d 867, 878 (Tex.App.–Waco, 1997)(counsel's failure to preserve error was objectively deficient conduct). **See also Bernard v. State**, No. 12-01-002-CR, *slip op.* at 4 (2-20-02)(*op. not design. for pub*.)(rejecting claim that trial counsel could have had a tactical reason for not objecting to improper final argument where he objected to the fourth of six improper comments on his client's failure to testify).

[31] SECTION 19.02(a)(2) of the Texas Penal Code defines "sudden passion" as "passion directly caused by and arising out of provocation by the individual killed ... which passion arises at the time of the offense and is not solely the result of former provocation."

[32] SECTION 19.02(a)(1) of the Texas Penal Code defines "adequate cause" as "cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection."

[33] The Fifth Circuit and other Circuits have rejected the claim that particularly brutal facts in and of themselves warrant a finding that trial counsel's deficient conduct was not prejudicial. **See e.g., Lockett v. Anderson**, 230 F.3d 695, 715-716 (5th Cir. 2000)(rejecting claim that counsel's deficient conduct in punishment stage did not prejudice defendant given "gravity, cruelty and deliberateness of the crimes that Lockett committed: a calculated double-murder -- involving an ambush, multiple shootings, kidnaping and execution -- of an innocent couple"); **Battenfield v. Gibson**, 236 F.3d 1215, 1235 (10th Cir. 2001)(rejecting claim that counsel's deficient conduct in punishment stage was not prejudicial in spite of "calloused nature of [the] murder"); **Carter v. Bell**, 218 F.3d 581, 599-600 (6th Cir. 2000)(rejecting claim that counsel's deficient conduct in punishment stage was not prejudicial given overwhelming evidence that defendant shot and killed 72-year-old man four times at point blank range); **Skaggs v. Parker**, 235 F.3d 261, 270-274 (6th Cir. 2000) (rejecting State's claim that counsel's deficient conduct in punishment stage was not prejudicial in spite of overwhelming evidence that defendant shot and killed elderly couple in their own home).

[34] Neal Davis attached two DVDs, (CR at 795), to the motion

for new trial that he obtained from taped coverage from Court TV, the broadcast entity responsible for the pool coverage of Applicant's trial. Davis converted the taped portion of Siegler's in-court re-enactment of her theory of the case htat was shot from two different camera angles onto two DVDS. The trial court denied the motion for new trial without a hearing the day after it was filed. (CR at 790).