DESHAWN OLETTA PRATT, Petitioner, v. ANNIE HARVEY, Warden, North Carolina Correctional Institution for Women, Respondent.

1:03CV00388

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

2004 U.S. Dist. LEXIS 26185

August 9, 2004, Decided
August 9, 2004, Filed

SUBSEQUENT HISTORY: Adopted by, Writ of habeas corpus granted *Pratt v. Harvey, 2004 U.S. Dist. LEXIS 25402 (M.D.N.C., Dec. 13, 2004)*

PRIOR HISTORY: *State v. Pratt, 354 N.C. 226, 554 S.E.2d 826, 2001 N.C. LEXIS 987 (2001)*

DISPOSITION: Recommended that writ of habeas corpus be issued and that petitioner be released from custody and relieved of her convictions herein if state fails to retry petitioner within reasonable time of any order and judgment which may adopt this Recommendation.

COUNSEL: [*1] For DESHAWN OLETTA PRATT, Petitioner: Pro Se, JOHN DAVID BRYSON, WYATT EARLY HARRIS & WHEELER, L.L.P., HIGH POINT, NC.

For ANNIE HARVEY, WARDEN, Respondent: STEVEN F. BRYANT, N. C. DEPARTMENT OF JUSTICE, EDUCATION AND CORRECTION, RALEIGH, NC, BARRY STEVEN MCNEILL, N. C. DEPARTMENT OF JUSTICE, RALEIGH, NC.

JUDGES: P. Trevor Sharp, U.S. Magistrate Judge.

OPINION BY: P. Trevor Sharp

OPINION:

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

On February 18, 1999, Petitioner Deshawn Oletta Pratt, a prisoner of the State of North Carolina, was convicted after trial by jury in the Superior Court of Guilford County on two counts of first degree murder and related charges. She was sentenced to two consecutive terms of life imprisonment without parole. On December 29, 2000, the North Carolina Court of Appeals found no error in Petitioner's trial. *State v. Pratt,* No. COA99-1287 (N.C. App. Dec. 29, 2000). The North Carolina Supreme Court denied review, *State v. Pratt, 554 S.E.2d 826 (2001)*, and the United States Supreme Court denied certiorari. *Pratt v. North Carolina, 535 U.S. 996, 152 L. Ed. 2d 482, 122 S. Ct. 1559 (2002)*. Petitioner Pratt was represented at trial and on appeal by her attorneys [*2] in this action, John Bryson and William G. Causey, Jr.

Petitioner filed a habeas corpus petition in this court on April 15, 2003. Respondent ("the State") filed answer on July 7, 2003, and moved for summary judgment. Petitioner responded in opposition to the summary judgment motion, and the petition is now before the court for a ruling. *See Rule 8, Rules Governing Section 2254 Cases.*

Claims of the Petition

In her habeas petition, Petitioner Pratt contends that: (1) her *Sixth Amendment* right to confront and cross-examine witnesses was violated where the statement of a non-testifying accomplice was introduced as evidence; and (2) her *Sixth Amendment* right to confront and cross-examine witnesses was violated where the State was allowed to repeatedly have Petitioner's co-defendant exercise his *Fifth Amendment* right to remain silent in the presence of the jury and then to use the co-defendant's assertion of his *Fifth Amendment* privilege as substantive evidence of Petitioner's guilt. These habeas claims have been fully exhausted before the state courts and are properly before this court for determination on the merits pursuant to *28 U.S.C. § 2254(d).* [*3]

Factual Background

The North Carolina Court of Appeals summarized the evidence presented at Petitioner's trial as follows:

The State's evidence tended to show

the following: On the afternoon of 26 January 1998, defendant entered a convenience store in High Point, North Carolina to purchase drinks. Defendant's vehicle was parked in front of the store and her friend, Randolph Morrison (Morrison), remained in the vehicle. Stephan Baxter (Stephan), with whom defendant was acquainted, also entered the store to purchase drinks, and left his vehicle parked out front with a passenger Seabron Grace (Seabron). Inside the store, Stephan and defendant were in close proximity to one another and Stephan began singing a rap song with lyrics that included the word "nigger." Stephan then left the store, followed by defendant who angrily asked Stephan if he had a problem with her. Stephan turned around because he was not sure if defendant was talking to him. He then asked defendant if she had a problem with him and the two began arguing. Upon Seabron's insistence to let the matter go, Stephan entered his car and drove away.

Later that evening, defendant and Morrison drove to Stephan's apartment [*4] where he resided with his parents, Brenda and Ronald Baxter (Mr. and Mrs. Baxter), along with his three siblings, Dana Baxter (Dana), Erica Baxter (Erica) and Brian Baxter (Brian). Brian was the only family member who was not at home. Mr. and Mrs. Baxter had gone to bed shortly before 8:00 p.m. Dana was doing homework in the living room when she and Stephan heard a knock on the front door. When Stephan opened the door, he and Dana observed defendant and what appeared to be a person standing behind her holding a gun. At this time, Stephan pulled defendant into the apartment, closed the door and locked it, despite defendant's efforts to keep it open. Defendant tried to convince Stephan that she did not know the man at the door with the gun, as the two struggled on the floor and defendant seemed to try to reach for something under her clothes.

Upon hearing the commotion, Mrs. Baxter entered the living room and witnessed the struggle. At this time, shots started coming through the front door from outside. Defendant screamed that she was "not with him." Mrs. Baxter motioned for her daughters to leave the living room and take refuge with her and Mr. Baxter in their bedroom. While Erica [*5] followed her mother, Dana remained in the living room and hid underneath a chair. Stephan tried to pick Dana up and get her out of the living room, but the door burst open and Morrison entered with a gun in his hand. In response to Morrison asking defendant where Stephan was, she pointed toward the bathroom where Stephan had fled. Morrison then entered the bathroom and fired shots which hit Stephan in his hand, arm and leg. During this time, Dana, who was still hiding under the chair, was able to observe that defendant was standing in the living room and appeared to be watching television. Stephan struggled with Morrison for control of the gun. During this struggle, Stephan heard other gunshots throughout the apartment, which continued after Morrison left the bathroom.

Once in the bedroom, Mrs. Baxter went into the closet to retrieve a baseball bat. As she stood in the closet, she heard the bedroom door being kicked in and shots fired. Mrs. Baxter then heard a male voice say "are you dead yet[,] nigger, are you dead yet?" Then she heard two more shots and a clicking sound, as if the gun was out of bullets. When she finally was able to emerge from the closet, she saw Erica and her [*6] husband lying still next to one another, both of whom were dead. Before defendant and Morrison left the Baxter apartment together, Morrison observed Dana under the chair and shot her in the right side of her body, which caused her paralysis.

By the time police arrived, the apartment was flooded with several inches of water due to a bullet having struck a water pipe. Police found two nine millimeter casings outside the front door, and identical casings in the living room and kitchen area.

Mr. Baxter died as a result of being shot twice, once by a .22 caliber rifle in close range to the head and by a 9 millimeter pistol to the neck. Likewise, Erica was killed by a .22 caliber rifle shot to the head fired at close range. The bullet fragment found in Stephan's leg was consistent with that of a .22 caliber rifle.

> After this event, defendant and Morrison fled to South Carolina, where defendant eventually turned herself in. Morrison was arrested several weeks later in Georgia where he confessed to police. In his confession, which was admitted at trial, Morrison stated that after defendant and Stephan had argued, he and defendant went to the Baxter residence for the purpose of killing Stephan. [*7] He further stated that once inside the Baxter residence, defendant told him where Stephan was hiding, and that he shot Stephan. Before defendant's trial, Morrison was convicted of one count of first degree murder.

State v. Pratt, No. COA99-1287, slip op. at 2-5.

The Habeas Corpus Standard of Review

Under *28 U.S.C. § 2254(d)(1)*, a writ of habeas corpus may be issued by a federal court reviewing a state conviction only if the state-court adjudication "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." *Williams v. Taylor, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000)*, interprets *§ 2254(d)(1)* as follows:

> The writ may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, [*8] a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 412-13 (O'Connor, J., delivering the opinion in part, concurring in part.)

Under the "unreasonable application" clause of *§ 2254(d)(1)*, a federal court sitting in habeas corpus "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id. at 411*.

Discussion

In her first claim for habeas relief, Petitioner Pratt contends that she was convicted of two counts of first-degree murder and related charges "based in large part upon the [*9] admission of the statement of Randolph Morrison, petitioner's non-testifying co-defendant." (Pleading No. 6, Petr's Mem. in Supp. of Pet. at 1.) Randolph Morrison had previously been tried and convicted of one count of first-degree murder with respect to the incident that gave rise to the charges against Petitioner Pratt. During a voir dire examination at Petitioner's trial, the judge determined that Morrison could refuse to testify on matters directly relating to the charges against Petitioner by validly asserting his *Fifth Amendment* right not to incriminate himself. The court determined that under North Carolina law, Morrison was therefore "unavailable" as a witness for purposes of Rule 804 of the North Carolina Rules of Evidence, and a redacted version of Morrison's hearsay out-of-court statement to police officers could be admitted as a declaration against penal interest. Petitioner objected to the introduction of the statement on the *Sixth Amendment* ground that use of Morrison's out-of-court statement violated her right to confront witnesses against her.

Morrison's redacted statement, read to the jury, is set out as Appendix A to this Recommendation. In the redacted version introduced [*10] into evidence, Morrison, in response to interrogation by police officers, said that he and Petitioner Deshawn Pratt went to a store on the day of the homicide, and Pratt went into the store. Pratt had a disagreement with a person [Stephan Baxter] about "this guy that was in a wheelchair, her friend Harold." The argument continued outside the car where Morrison was sitting (with a .22 revolver), and the man Pratt argued with threatened to beat up Morrison if he would get out of the car. Morrison did not know Stephan Baxter. Later, Pratt and Morrison "scoped the scene," saw where Baxter's car was parked (Morrison did not know what kind of car Baxter drove), went to an apartment building, and Pratt knocked on a door. The man who had earlier argued with Pratt opened the door, but tried to close it while Pratt was only halfway in. Morrison kicked the door open and went in after Pratt. Morrison said "where that mother fucker at," and Pratt

pointed to the bathroom. Morrison kicked in the door to the bathroom and fired two shots at Stephan Baxter, who was hiding in the bathroom. Morrison reported, "I thought I got him." After that, according to Morrison, Morrison and Pratt fled and went [*11] back home. On further questioning, Morrison said that a little girl was in the living room when he entered. After he and Pratt fled, they went to South Carolina. They threw "the guns" in a river on the way. Morrison didn't know whether there were other people in the apartment. He thought the man he shot was dead. He said, "God was on his side. Thank God I didn't kill him. I thought he was dead." At the time of the shooting, Morrison was mentally in a "zone," wanting to "get that dude. That's the person I wanted. That's what I wanted. I ain't give a damn about the family, you know." Morrison concluded the redacted story by saying, "and I went, and she pointed and I went in the bathroom and I shot him. And that's the truth. And what other parts of the story she's given, I don't know. I don't know." (Trial Tr. Vol. VI, at 1258-77.)

The police officer who questioned Morrison testified at Petitioner's trial that after the tape recorded part of the interview ended, Morrison asked, "do you believe me?" The officer told Morrison that she believed that Morrison was the person who shot and killed the father and daughter in the bedroom because they were both shot with a .22, and Morrison had [*12] earlier said that he was the only person who had a .22. Morrison then said, "if they were shot with a .22, then I'm the one that shot them. I'm the only one that had it. It had to be me." *Id.* at 1278.

The unredacted version of the statement given by Morrison, not read into evidence at Petitioner Pratt's trial, contained a great deal of additional information concerning Petitioner. In the full version, Morrison said that when Petitioner Pratt came back from the store, "she was mad, her rage, she was like fuck, that mother fucker he, um talking all that shit, he just don't know, he don't know me, he don't know me like that." (Pleading No. 12, State's Ex. 2, unredacted Morrison statement at 24.) Morrison told Pratt, "you know forget that . . . " *Id.* Morrison promised he would "fist fight" "the dude." Pratt responded, "fuck that, that mother fucker don't know. I'll kill his ass, you know what I'm saying, that's the way she was." *Id.* Later that day, Pratt told Morrison, "I know where he stay at . . . . " *Id.* Morrison responded, "Shit whatever, you know what I'm saying whatever you want to do, I want to do." *Id.*

According to the unredacted Morrison statement, Pratt [*13] and Morrison went to [the Baxter] apartment. Morrison had a .22 revolver, Pratt had a 9 millimeter weapon. Pratt knocked on the door and "the dude" opened it. Pratt was halfway in when "the dude" pushed back, trying to close the door. Pratt fired two shots into the door. Morrison kicked the door. Pratt entered first, and Morrison had "already heard shots fired in the house, you know, several shots" when he entered. *Id.* at 26. Morrison said, "where that mother fucker at," and Pratt pointed at the bathroom. Morrison kicked in the bathroom door and fired two shots into [Stephan Baxter]. *Id.*

When asked where Pratt got her 9 millimeter gun, Morrison said he didn't know, but she "just left and went and got the gun and came back." *Id.* at 29. Pratt never had Morrison's gun while in the apartment. Morrison guessed Pratt's gun jammed on her and that's when he began firing. Morrison didn't recall how many shots Pratt fired, but he knew he heard shots. Morrison never asked Pratt if she had shot anybody, but Morrison said that, "I see the people laying out, I already knew she shot somebody, you know she ain't had to say nothing. I already knew, I see people laying out, I already [*14] knew she shot him. I knew nobody else in the house ain't shot 'em." *Id.* at 31.

Morrison later added that "she wanted to get the dude." *Id.* at 34. Morrison repeated that he, "went in the bathroom and opened fire. That's all, I, did. I told you the truth, I ain't even knew damn, I mean the people that was laying out, I ain't even knew they was dead." *Id.* at 35. "The family wise, that what ya'll say got hurt or killed or whatever, I have no involvements with that. I guess Shawn [Pratt], ain't want to leave no witnesses." *Id.*

Turning back to the time before they arrived at the apartment, Morrison said, "She was in a rage the whole time." *Id.* at 37. He added, "And, she put me in a rage." *Id.* Morrison stated, "She was mad as hell. She said nobody don't fuck with them Pratts, some shit. Really I ain't give a damn. I don't give a fuck, what they say, you know the Pratts whatever you know. Hell I'm a Morrison. Only thing I went in to get the dude. With my shots being fired, I did let two go. I'm admitting up to that and I'm guilty to that charge. I did shoot the dude. The other people, I don't even never see her, shoot the people. I just heard shots fired. I never [*15] did see her shoot 'em. But I knew she did shot 'em when, when I got in because they was laying out. So hell, she was doing something, I said fuck that, I said where the dude at, cause I guess she was trying to, you know, it was all on her. . . . She the one wanted to damn um, blow his damn brains out." *Id.* at 40. Morrison summarized his statement:

> I went in intentionally to kill the dude. But I didn't. I thought he was dead. I thought, tell you the truth, by me looking around when I first entered, I thought she done got everybody, the dude too. When I finally got in, it was too damn late. I thought I was late. But, I seen her still fumbling with the gun so I realized it must

> be somebody else she didn't get. She pointed to the bathroom. I said yeah where that nigger at, went in there, I kicked the door down. And I opened fire. And that's it. That's all I did. That's all I did. I shot that dude. She ain't had no involvements in shooting that dude. That's one person she didn't have no involvements in shooting. That's one person she didn't have to shoot.

Id.

The North Carolina Court of Appeals found no error in the admission of the redacted Morrison statement under [*16] either state or federal law. The court of appeals reasoned as follows:

> In her first assignment of error, defendant argues that the trial court erred by allowing into evidence Morrison's confession, in violation of defendant's constitutional rights to confront and cross-examine witnesses.
>
> At the outset, we note that a violation of defendant's constitutional rights "is prejudicial unless the appellate court finds that it was harmless beyond a reasonable "doubt." *N.C. Gen. Stat. § 15A-1443(b)*(1999). Regarding statutory rights, a defendant is prejudiced "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." *N.C. Gen. Stat. § 15A-1443(a)*(1999).
>
> Rule 804(b)(3), which provides an exception for hearsay statements that are against one's interest, provides in pertinent part:
>
> > Statement Against Interest. -- A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement [*17] unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

N.C. Gen. Stat. § 8C-1, Rule 804(b)(3)(1999). In our State, a statement that falls under this exception is only admissible if: (1) the declarant is unavailable; (2) the statement is against the declarant's penal interest, thus exposing him or her to criminal liability; and (3) corroborating circumstances clearly indicate the statement's trustworthiness, which circumstances may include other evidence presented at trial. *State v. Kimble, 140 N.C. App. 153, 535 S.E.2d 882, 885-886 (2000).* In addition, the statement must not violate the *confrontation clause of the Sixth Amendment. Id. U.S. Const. amend. VI.*

We first address whether Morrison was available for purposes of Rule 804(b)(3), although defendant has not contested this issue. The definition of "unavailability" under Rule 804 for purposes of hearsay includes "situations in which the declarant . . . persists in refusing to testify concerning the subject matter of [*18] his statement despite an order of the court to do so[.]" N.C. Gen. Stat. § 8C-1, Rule 804(a)(2)(1999). Because Morrison persisted at trial in asserting his right against self-incrimination, he is unavailable for purposes of Rule 804(b)(3). *Id.; see State v. Hunt, 339 N.C. 622, 457 S.E.2d 276 (1995)* (holding that witness who asserted his constitutional right against self-incrimination was unavailable under Rule 804(b)(1)).

Second, Morrison's statement was against his penal interest at the time it was made since it subjected him to criminal liability for the shootings that took place at the Baxter home.

Third, sufficient corroborating evidence was admitted at trial to demonstrate the statement's trustworthiness. Morrison's statement is consistent with physical evidence taken from the scene of the crime, including

evidence which showed that two different guns were used during the incident, a nine millimeter gun and a .22 caliber rifle. His statement is further corroborated by the testimonies of Brenda, Stephan and Dana Baxter, all of whom were present during the incident,

Having met the Rule 804(b)(3) test of admissibility, we must still determine whether the admission [*19] of Morrison's statement violates the *confrontation clause of the United States Constitution*. The United States Supreme Court in *Lilly v. Virginia, 527 U.S. 116, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999)*, held that such statements are admissible only when: "(1) 'the evidence falls within a firmly rooted hearsay exception' or (2) it contains 'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." *Id. at 124-125, 144 L. Ed. 2d at 127*, *quoting Ohio v. Roberts, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608, 100 S. Ct. 2531 (1980)*. Since under *Lilly,* an accomplice statement is presumptively unreliable and thus not within a firmly-rooted hearsay exception, we must determine whether Morrison's statement contains "particularized guarantees of trustworthiness." *Id; see Kimble, N.C. App. at , 535 S.E.2d at 886* (holding that dual-inculpatory statements in which an accomplice inculpates himself and defendant do not fall within a firmly-rooted exception to the hearsay rule and therefore must contain "particularized guarantees of trustworthiness" to be admissible). [*20]

In *Lilly,* accomplice statements that inculpated the accomplice as well as the defendant were held to be inherently unreliable because in making such statements, the accomplice often stands to gain by inculpating another. *Lilly, 527 U.S. at 130-133, 144 L. Ed. 2d at 130-134*. In that case, a co-defendant during a police interrogation "insisted that [defendant] had instigated the carjacking and that [he] 'didn't have nothing to do with the shooting of [the victim]." *Id. at 121, 144 L. Ed. 2d at 125*. The Court found this accomplice confession to be "largely 'non-self-inculpatory,' in that the declarant minimized his own criminal responsibility and shifted blame to the defendant." *State v. Harris, 136 N.C. App. 611, 614, 525 S.E.2d 208, 210*, *cert. denied, 351 N.C. 644, 543 S.E.2d 877 (2000)*; *citing Lilly, 527 U.S. at 137-139, 144 L. Ed. 2d at 135-136*. The confession was therefore unreliable. *Lilly, 527 U.S. at 139, 144 L. Ed. 2d at 136*.

However, *Lilly* does not bar the admission of all accomplice confessions. The plurality in *Lilly* stated:

> When a [*21] court can be confident -- as in the context of hearsay falling within a firmly rooted exception -- that 'the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility,' the *Sixth Amendment's* residual 'trustworthiness' test allows the admission of the declarant's statements.

State v. Lemons, 352 N.C. 87, 94-95,530 S.E.2d 542, 546-547 (2000), *quoting Lilly, 527 U.S. at 136, 144 L. Ed. 2d at 134*.

Before admitting Morrison's statement, the trial court ordered it to be redacted to eliminate those portions which tended to inculpate defendant. The trial court then determined that Morrison's statement was trustworthy and therefore admissible in its redacted form because it was sufficiently self-inculpatory and did not "merely [attempt] to shift blame or curry favor." *Williamson v. United States, 512 U.S. 594, 603, 129 L. Ed. 2d 476, 485, 114 S. Ct. 2431 (1994)*. In making such an analysis, the statement must be examined "from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright, 497 U.S. 805, 820, 111 L. Ed. 2d 638, 655-656, 110 S. Ct. 3139 (1990)*. [*22] We have examined Morrison's statement in light of all of the evidence presented at trial, and conclude that it is sufficiently self-inculpatory to withstand

> *confrontation clause* demands. *See also State v. Barnes, 345 N.C. 184, 216, 481 S.E.2d 44, 61, cert. denied, 522 U.S. 876, 139 L. Ed. 2d 134 (1997), 523 U.S. 1024, 140 L. Ed. 2d 473 (1998)* (holding that defendant's statements to co-defendants were admissible because they "directly and obviously incriminated" the declarant and lacked "taint of 'special suspicion' reserved for those statements aimed at implicating another defendant while exonerating the declarant"). Further, the statement does not inculpate defendant and is clearly admissible to show that Morrison and defendant were together at the time of the incident, as well as their state of mind in carrying out this criminal activity.

State v. Pratt, No. COA99-1287, slip op. at 5-9.

Petitioner Pratt, in briefing to this court, contends that the North Carolina Court of Appeals unreasonably applied the teachings of *Idaho v. Wright, 497 U.S. 805, 111 L. Ed. 2d 638, 110 S. Ct. 3139 (1990)* and *Lilly v. Virginia, 527 U.S. 116, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999)* in finding [*23] no error in admission of the Morrison statement. According to Petitioner, the state court's decision is contrary to the holding in *Idaho v. Wright* that, "to be admissible under the *Confrontation Clause*, hearsay evidence . . . must possess indicia of reliability by virtue of its inherent trustworthiness, *not by reference to other evidence at trial.*" *497 U.S. at 822* (emphasis supplied by Petitioner). And, Petitioner continues, the state-court decision is an unreasonable application of the specific teaching of *Lilly v. Virginia* that an accomplice statement is presumptively unreliable, does not fit within a firmly-rooted hearsay exception, and is admissible only if it contains "particularized guarantees of trustworthiness."

On review, and for reasons set forth below, this Court does find that the North Carolina Court of Appeals applied established federal law in an unreasonable manner in concluding that the admission of Randolph Morrison's redacted statement at Petitioner's trial did not violate Petitioner's *Sixth Amendment* rights under the *Confrontation Clause*. To the contrary, admission of the Morrison statement constituted clear constitutional error in light [*24] of *Ohio v. Roberts, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980), Lee v. Illinois, 476 U.S. 530, 90 L. Ed. 2d 514, 106 S. Ct. 2056 (1986)*, and *Lilly v. Virginia, 527 U.S. 116, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999).*

In *Ohio v. Roberts,* the Supreme Court considered the relationship between the *Confrontation Clause of the Sixth Amendment* and the hearsay rule of evidence. The Court noted that the *Confrontation Clause* provides that the accused in a criminal trial has the right to be confronted by witnesses against him. Despite this literal language, however, courts have permitted the use of out-of-court declarations, hearsay, when a witness is unavailable for trial and there exists a prior recorded statement that bears "indicia of reliability." *See Mattox v. United States, 156 U.S. 237, 242-43, 39 L. Ed. 409, 15 S. Ct. 337 (1895).* Reviewing its line of precedent under the *Sixth Amendment*, the Supreme Court articulated that indicia of reliability with respect to an out-of-court statement is present "without more in a case where the evidence falls within a firmly-rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts, 448 U.S. at 66.* [*25]

In *Lee v. Illinois, 476 U.S. 530, 90 L. Ed. 2d 514, 106 S. Ct. 2056 (1986)*, the Court considered the reach of the *Confrontation Clause* in circumstances where the out-of-court confessional statement of a non-testifying accomplice was used against the defendant at trial. The Supreme Court held that the trial court's reliance upon the confession, which also inculpated the defendant, violated the defendant's *Sixth Amendment* right to confront her accusers. The Court reasoned that the right to confront and cross-examine witnesses promotes reliability in criminal trials. The Court wrote:

> In *California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935, 26 L. Ed. 2d 489 (1970)*, we identified how the mechanisms of confrontation and cross-examination advance the pursuit of truth in criminal trials. Confrontation, we noted,
>
> > (1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the [*26] defendant's fate to observe the demeanor of the witness making his

> statement, thus aiding the jury in assessing his credibility.

Our cases recognize that this truthfinding function of the *Confrontation Clause* is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. As has been noted, such a confession "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . More than this, however, the arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Bruton v. United States, 391 U.S. 123 at 141, 20 L. Ed. 2d 476, 88 S. Ct. 1620 at 1631* (WHITE, J., dissenting) (citations omitted).

Id. at 540-41 (footnote omitted)..

The *Lee* Court observed that in *Douglas v. Alabama, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965)*, it had unanimously agreed that "when one person [an accomplice] accuses another of a crime under circumstances in which [*27] the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." *Lee v. Illinois, 476 U.S. at 541*. The Court noted that since *Douglas,* it had consistently declared presumptively unreliable accomplices' confessions that incriminate defendants. *Id.* The Court recognized that the presumption of unreliability that attaches to accomplice confessions could be rebutted, but only where "particularized guarantees of truthworthiness" were shown to be present. The Court found no such particularized guarantees under the facts of *Lee,* where the accomplice had a motive to mitigate his responsibility by "spreading the blame." *Id. at 544*. The Court also discounted the fact that the statement of the accomplice "interlocked" with the defendant's statements on several points. The Court also noted the points of divergence in the statements on material points. The Court wrote, in closing its discussion of the *Confrontation Clause* as it applied to the case before it:

> We therefore hold that on the record before us, there is no occasion to depart from the time-honored [*28] teaching that a codefendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation.

Id. at 546.

The Supreme Court once again considered the relationship between the *Confrontation Clause* and hearsay rules of evidence in *Lilly v. Virginia, 527 U.S. 116, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999)*. In *Lilly,* the Supreme Court of Virginia affirmed the defendant's convictions under circumstances in which the confession of a non-testifying accomplice had been admitted into evidence at trial. The confession contained some statements that were against the accomplice's penal interest and others that inculpated the defendant. The Virginia Supreme Court concluded that the accomplice's statements were against penal interest; that the statements' reliability was established by other evidence; and that the statements fell within an exception to the Virginia hearsay rule. Reviewing the defendant's *Confrontation Clause* challenge, the Virginia court ruled that the admissibility of a statement against penal interest was a "firmly established" exception to the hearsay rule in Virginia, and [*29] therefore the defendant's *Sixth Amendment* claim should fail. *Id. at 122*.

The Supreme Court of the United States found in *Lilly* that the question of whether accomplice statements fell within a firmly rooted hearsay exception is a question of federal law. The Court observed that it had previously held that "the simple categorization of a statement as a 'declaration against penal interest' . . . defines too large a class for meaningful *Confrontation Clause* analysis." *Id. at 127* (citing *Lee v. Illinois, 476 U.S. at 544 n.5*). The decision of the plurality made explicit that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted hearsay exception. As such, they can be admissible only if they bear "particularized guarantees of trustworthiness." *Id. at 135* (citing *Ohio v. Roberts, 448 U.S. at 66*). The Court noted that it had previously squarely rejected "the notion that 'evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears particularized guarantees of trustworthiness.'" *Id. at 137-38* (citing *Idaho v. Wright, 497 U.S. at 822*). [*30] The evidence in question must bear its own indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. *Id. at 138*. The plurality decision in *Lilly* also noted that the fact that an accomplice's statement was "against penal interest" was not a sufficient indicia of reliability insofar as the statement inculpates other persons. *Id.* (citing *Williamson v. United States, 512 U.S. 594, 599, 129 L. Ed. 2d 476, 114 S. Ct. 2431 (1994)*; *accord, Lee, 476 U.S. at 545*). The plurality concluded that there was no basis for a conclusion that the accomplice's statements were so inherently reliable "that cross-examination would have been superfluous," and therefore the introduction of the statements at trial violated the defendant's rights under

the *Confrontation Clause*. *Id. at 139*.

With this overview of Supreme Court authority in mind, the Court examines the decision of the North Carolina Court of Appeals in Petitioner Pratt's case. The North Carolina Court of Appeals found no *Confrontation Clause* error in the admission of Randolph Morrison's out-of-court statement. The court recognized that under established federal law an accomplice [*31] statement is presumptively unreliable and does not fall within a firmly-rooted hearsay exception. Therefore, admission of such a statement is constitutionally permissible only if the statement contains particularized guarantees of trustworthiness. The court reasoned that, before admitting Morrison's statement, the trial court ordered a redaction "to eliminate those portions which tended to inculpate defendant." *State v. Pratt,* No. COA99-1287, slip op. at 8. The trial court then determined that the Morrison statement was trustworthy because it was sufficiently self-inculpatory and, in its redacted form, did not merely attempt to shift blame to Petitioner Pratt. The court also wrote that it had examined Morrison's statement "in light of all the evidence." *Id.* at 9. The court concluded its analysis by writing, "further, the statement does not inculpate defendant [Pratt] and is clearly admissible to show that Morrison and defendant were together at the time of the incident, as well as their state of mind in carrying out this criminal activity." *Id.*

This analysis of the North Carolina Court of Appeals is incorrect and unreasonable under established federal law under the *Confrontation* [*32] *Clause of the Sixth Amendment* for several reasons. First, the conclusion that Morrison's statement is sufficiently "self-inculpatory" to demonstrate trustworthiness is directly contrary to settled law that the mere fact that parts of an accomplice's statement are against penal interest is insufficient to show particularized guarantees of trustworthiness of the statement as a whole. As Chief Justice Rehnquist wrote in concurring in the judgment in *Lilly,* "Simply labeling a confession a 'declaration against penal interest,' however, is insufficient for purposes of *Roberts,* as this exception 'defines too large a class for meaningful *Confrontation Clause* analysis.'" *See Lilly, 527 U.S. at 145*, *quoting Lee v. Illinois, 476 U.S. at 544 n.5*. Second, the court's evaluation of the apparent trustworthiness of Morrison's statement "in light of all the evidence presented at trial," runs afoul of *Lilly's* recognition that, under established federal law, mere corroboration of the statement by other evidence in the record is insufficient to show trustworthiness. *Lilly, 527 U.S. at 137-38*.

Third, the reasoning of the court of appeals is [*33] internally flawed. The court concludes on the one hand that the redacted Morrison statement "does not inculpate defendant," but on the other hand that it shows the "state of mind [of Morrison and defendant] in carrying out this criminal activity." *State v. Pratt,* No. COA99-1287, slip op. at 9. These two conclusions are fundamentally at odds with each other. Moreover, the redacted Morrison statement clearly *does* inculpate Petitioner in several critical respects, including ascribing to her the motive for the invasion of the Baxter apartment, and describing her pointing to the bathroom when Morrison asked, "where the dude at?" (State's Ex. 2, redacted Morrison statement at 6.) Indeed the prosecutor repeated approximately twelve times in closing argument Morrison's statement that Petitioner Pratt pointed out Stephan Baxter's location to Morrison when Morrison entered the apartment, evidence said by the prosecutor to show that Petitioner acted in concert with Morrison in the shootings in the apartment.

Fourth, the manner in which the statement of Randolph Morrison was redacted during trial resulted in a "patchwork" statement that could not reasonably be found to carry a particularized [*34] guarantee of trustworthiness. The original and full statement given by Morrison was beyond doubt a calculated fabrication designed to shift the blame for all of the murders in the Baxter apartment away from Morrison and to Petitioner Pratt. In a self-serving manner, Morrison described that he fired shots at only one person, Stephan Baxter, whom he meant to kill but did not, simply because Baxter managed to survive his gunshot wounds. All of the other shooting victims, two of whom died, were shot by Petitioner, according to Morrison's full statement. She had the motive for the killings; he did not even know any of the victims; she fired the shots that gained them entrance to the apartment; she pointed out the location of Stephan Baxter; and she shot and killed the other people in the apartment to be sure there would be no witnesses. In short, the full statement by Morrison cast all responsibility for the murders on Petitioner, leaving Morrison directly responsible only for the non-fatal shooting of Stephan Baxter. The forensic evidence in the case, however, even at the earliest stage of the investigation, clearly demonstrated the major falsity of this blame-shifting statement made by [*35] Randolph Morrison. In fact, just minutes after he made the statement, he was confronted by a police officer with some of the forensic evidence that was inconsistent with his story, and he changed his story fundamentally into an admission that he must have shot the father and daughter in the bedroom. *See* Trial Tr. Vol. VI, at 1278.

Morrison's last minute revision of his story, into an admission that he must have shot the murder victims, necessarily meant that most or all of the detailed description he had just given of the events inside the Baxter apartment was utterly false. Yet despite the obvious falsity of the major premises of the statement, the trial court concluded that a redacted statement could be introduced as "trustworthy evidence "concerning the details of what Petitioner Pratt did while in this apartment and what her "state of mind" was. To this

Court, it is unreasonable to find particularized guarantees of trustworthiness in evidence pieced together in such a fashion. To the contrary, Morrison's out-of-court statement cried out for cross-examination by defense counsel, but of course, Morrison was not available at trial for such examination.

For all of the above reasons, [*36] the Court finds that decision of the North Carolina Court of Appeals that Petitioner Pratt's rights under the *Confrontation Clause* were not violated in this case is an incorrect and unreasonable application of established federal law. This case is indistinguishable from *Calvert v. Wilson, 288 F.3d 823 (6th Cir. 2002)*, wherein the court of appeals found a *Confrontation Clause* violation in the use of a non-testifying co-defendant's statement under circumstances similar to those before this Court. Finding a constitutional violation in Petitioner's conviction, the Court must determine whether the violation was prejudicial.

In federal habeas corpus review, the applicable rule regarding the need for a showing by the petitioner of *prejudicial* constitutional error was stated by the Fourth Circuit Court of Appeals in *Fullwood v. Lee, 290 F.3d 663 (4th Cir. 2002)*, *cert. denied, 537 U.S. 1120 (2003)*. There, the court of appeals wrote:

> Even if the state court's determination that there is no constitutional error was "contrary to" or "an unreasonable application of" Supreme Court precedent, we are not permitted to grant habeas relief [*37] unless we are convinced that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)* (internal quotation marks omitted). If we are in "grave doubt" as to the harmlessness of an error, the habeas petitioner must prevail. *See O'Neal v. McAninch, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995)*. "Grave doubt" exists when, in light of the entire record, the matter is so evenly balanced that the court feels itself in "virtual equipose" regarding the error's harmlessness. *Id. at 435, 115 S. Ct. 992*.

Id. at 679.

At trial, the State introduced no evidence that Petitioner Pratt shot or killed anyone in the Baxter apartment. The only evidence before the jury was that Randolph Morrison shot all four victims while he and Petitioner Pratt were in the apartment together. To this Court, the State now argues that the evidence adduced at trial, even apart from the Morrison redacted statement, unmistakably showed that Petitioner Pratt "acted in concert" with Morrison and was therefore legally culpable [*38] under all of the charges of conviction. Accordingly, the State contends that any constitutional error in the introduction of the redacted Morrison statement was harmless error under the *Brecht* standard and cannot support the issuance of a writ of habeas corpus.

Review of the evidence shows that there were several principal lines of evidence that tended to support the guilty verdicts returned against Petitioner. A first matter was the motive for the shootings. At trial, the prosecutor argued that an argument between Petitioner and Stephan Baxter provided the motive for the subsequent shootings. The State did introduce some evidence, independent of the Morrison statement, of a disagreement between the two on the morning of the crime, although the testimonies of both Frank Kennedy (the operator of the convenience store) and of Stephan Baxter described only a very minor confrontation. It was, however, the redacted statement of Randolph Morrison that permitted the prosecutor to argue forcefully during closing argument that the motive was exclusively Petitioner's, not Morrison's. On this point, the prosecutor argued:

> And another reason I can tell you and I contend to you as to why [*39] she would have been mad, is because this was her beef. Randolph Morrison didn't even know these people. Didn't know Stephan Baxter. Had never seen him before. That's what his statement is.
>
> I read part of this a while ago, but the last sentence, as you may remember, "I don't know neither one of the dudes." And I then Ms. Soban asked him where the store was at. And he says, over on the next page: "Anyway, we had went to the store. We had run into two dudes. She had went inside the store. When she had entered, when she entered the store, uh, the dude, they had a disagreement, argument about this guy that was in a wheelchair, her friend Harold." "Did you ever go in the store?" "I never go in the store. I was sitting in the car."
>
> And then on down on that page, Ms. Soban asked him: "Had you ever seen him before," referring to Stephan Baxter. Morrison: "Never seen him before."
>
> It was her argument, it was her beef.

> She was the one who had reason to get mad. She was the one, I contend to you, that acting together with Randolph Morrison wanted to go down to the Baxter apartment that night. Because Stephan tells you later on in his statement that you heard yesterday from Ms. Soban. Soban: [*40] "Was there every [sic] anybody, was there anybody else in the house that you know of other than the guy in the bathroom?" Morrison: "Uh, I ain't knew no one. I don't know none of these people."

(Trial Tr. Vol. II, at 1336-37.) Clearly, the State's evidence of motive ascribable to Petitioner Pratt was materially strengthened through the erroneous admission of the Morrison statement.

Under North Carolina law, the mere presence of a defendant at the scene of the crime, even though the defendant may be in sympathy with the criminal act and does nothing to prevent its commission, does not make the defendant guilty of the offense. To sustain a conviction, the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrator in the commission of the offense should assistance become necessary, and that such intent was communicated to the actual perpetrator. *State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975).* Without Morrison's statement, the remainder of the State's evidence establishes that Petitioner was present at the scene, but fails to unmistakably show that Petitioner [*41] either aided Morrison or intended to assist him, and communicated that intent to Morrison.

The State's evidence clearly showed that Petitioner was present while Morrison shot the four victims. There are some points of evidence that could suggest that Petitioner intended to assist Morrison, if necessary. But the relative weight of the lines of evidence is once again revealed by the prosecutor's closing argument. The prosecutor relied heavily on Morrison's statement to persuade the jury that Petitioner was acting in concert with Morrison. The prosecutor argued:

> Randolph Morrison is at the front door while DeShawn Pratt's in the living room. But Dana identifies them both as being there. Stephan Baxter identifies DeShawn Pratt, who he knew from the neighborhood, just knew her to recognize her like you do with some people, you know. You see somebody, you say, well, I know that's so-and-so. You may not socialize with them, you may not work with them or go to church with them, but you just know who they are. That's the way Stephan Baxter knew DeShawn Pratt. He knew her to know her name. He knew her apparently to know her nickname of Pudd'n. And apparently knew her well enough to know [*42] that she had some apartment, he couldn't name a specific apartment, according to Detective Bye, or it might have been Myers, but some apartment on Roberts Lane. That was the information he gave to the police. But he recognized her, and he identified her for you in court as DeShawn Pratt. So you have two witnesses putting both of them together at the door.
>
> Then you have Randolph Morrison's statement. Going down there together, with this common plan, this common purpose, with the intent of killing Stephan Baxter. Randolph Morrison says, and this is after Ms. Soban asking him if he had ever seen Stephan Baxter before, and he says no, never seen him before. And they go on talking about what occurred later on that night. And this is what Randolph Morrison said, this statement against his own interest. He says: "You know what I'm saying. We scoped the scene." You remember Ms. Soban testifying to this yesterday. "You know that I'm saying. We scoped the scene. We seen the car parked by in front. I ain't even know what kind of car he drives. We scoped the scene." They saw Stephan Baxter's car there.
>
> Now, Mr. Causey may argue to you - and I ask you to remember it's your oath and your duty [*43] to go by the evidence in the case - he may argue to you, based on Mr. Kennedy's testimony, and maybe Stephan's testimony, well, it's no secret what kind of car you drive, is it? Mr. Kennedy knows generally where the Baxters live, and he was asked on cross-examination by Mr. Causey, well, it's no secret where the Baxters live, is it? Stephan Baxter, it's no secret what kind of car you drive. And he may argue to you, and I contend to you it's asking you to speculate, that because of that, maybe Randolph Morrison acted on his own, okay? If you can believe that. There's no evidence to support that . . . That's not the evidence when you consider Dana Baxter's testimony putting them both at the front door; Stephan Baxter's testimony

> putting them both at the front door; and Randolph Morrison saying, "You know what I'm saying, we scoped the scene. We seen the car parking by in front. I ain't even know what kind of car he drives." It shows that they're acting together. "We scoped the scene. We went down there together." They got to the apartment close enough to see that his car was there. Then they go to the front door.

(Trial Tr. Vol. II, at 1340-1343.)

Undoubtedly, the most damaging [*44] portion of the State's case against Petitioner was Morrison's assertion that Petitioner assisted him in locating Stephan Baxter, who was hiding in the bathroom. There was no other evidence in the case to support this assertion other than the Morrison statement. The prosecutor's argument demonstrates the critical nature of this evidence to the State's case:

> If two or more persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty of that crime, if the other commits a crime, but she is also guilty of any other crime committed by the other in pursuance of the common purpose to commit that crime. It is not necessary that she herself do all the acts necessary to constitute the crime.
>
> She is as guilty as he is. And I contend to you that both of them are guilty of these crimes because of the acting in concern that his Honor is going to tell you about. How do you know that? Again, you have it from what I contend to you is Randolph Morrison's credible, highly credible and believable statement that he made to Ms. Soban.
>
> Morrison: "I looked to the right and I entered the door I looked to the right. I said where the dude at. So I [*45] went in the bathroom. She pointed at the bathroom. I went in the bathroom. I shot, boom, boom. I fired two shots at him. So we left, you know what I'm saying, we left the scene, we came on home, you know everything was calm and cool. Heard the ambulance, police, everything coming."
>
> How many times do you recall yesterday, and I'm not going to try to find every location in this statement, how many times do you remember Ms. Soban, in reading Randolph Morrison's statement, did he say she pointed at the bathroom? I contend to you it was probably somewhere between nine and twelve times that he said in his statement, he comes in the apartment, acting in concert together, just like the instruction says, she pointed to the bathroom. He does to the bathroom, and that's another circumstance that corroborates his statement. Because in his statement he admits to kicking the bathroom door in.

Id. at 1348-1349.

Review of the prosecutor's closing argument shows that Morrison's statement was repeatedly and continually invoked as the primary piece of evidence that Petitioner was acting in concert with Morrison. The prosecutor's closing argument covers thirty-eight (38) transcript pages, [*46] and the prosecutor referred to or quoted the Morrison statement on twenty-four (24) of those pages.

In comparing the evidence contained within the erroneously admitted Morrison statement with the other evidence against Petitioner Pratt, it is apparent that the Morrison statement was the linchpin evidence against Petitioner, as the case was actually tried. The prosecutor repeatedly invoked the statement to attempt to show Petitioner's culpability in acting in concert with Morrison. That is not to say that the other evidence against Petitioner Pratt was legally insufficient in the absence of the Morrison statement. But it is to say that the Morrison statement was given such central position at trial that this Court is convinced that the erroneous use of the statement had a "substantial and injurious effect or influence in determining the jury's verdict." *See Brecht v. Abrahamson, 507 U.S. at 637*. The prosecutor repeatedly asked the jury to give great weight to the Morrison statement on the very issue of whether or not Petitioner acted in concert with Morrison, and it is reasonable to believe that the jury was persuaded to do so.

The Court therefore finds that the constitutional [*47] error found herein was not harmless to Petitioner Pratt. The writ of habeas corpus should issue in this case.

Conclusion

For reasons set forth above, **IT IS RECOMMENDED** that the writ of habeas corpus issue and that Petitioner be released from custody and relieved of her convictions herein if the State fails to retry Petitioner within a reasonable time of any order and judgment which may adopt this Recommendation.

P. Trevor Sharp, U.S. Magistrate Judge

August 9, 2004