23-6072

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES RICHARDS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ~~EIGHTH~~ CIRCUT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JAMES RICHARDS (REG# 26365-009)
(Your Name)

FCI Greenville
(Address)

PO Box 5000, Greenville, IL 62246
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

I ask that this Court review the Petitioner's Trial Court Transcript Record on April 21, 2021, and all appeals. Counsel Arkie Byrd was so ineffective for failing to properly argue & preserve, and prevent the testimonial video of a deceased witness. It was used in this matter, but is barred under Crawford v. Washington, 541 US 36, 50-51, 124 S.Ct. 1354, 158 L Ed 2d 177 (2004).

The Crawford violation arose only at trial, and only after District Court Judge James M. Moody Jr. allowed the testimonial video statement of the deceased witness Boyd. During Trial, the Defense Counsel Arkie Bryd made no objection or complaint on the Trial Court Transcript Record of this Constitutional violation. The admission of this video as evidence is a violation of my Sixth Amendment Confrontation clause. See attatched sheets in support of Constitutional violations by Counsel Arkie Byrd and Judge James Moody Jr.

The United States Court of Appeals for the Eighth Circut, Case No. 21-3344, Order opinion filed June 14,2023, page 15, Appendix A, states the Counsel Arkie Byrd was so ineffective in their assistance, that Counsel intentionally abandoned the Petitioner's Confrontation Clause Right by not objecting to the admission of videos and certain screenshots taken from videos (R. Doc 529 at 99, 101,103,and 110) of a deceased witness.

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

District Court Judge James M. Moody Jr.

U.S. Attorney Mr. Chris Givens

U.S. Attorney Ms. Julie Peters

Defense Attorney Ms. Arkie Byrd

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[✓] reported at Case No. 21-3344; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is Case No. 4-23-CV-00743-JM

[✓] reported at Case No. 4:18-CR-00357-JM-02; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the N/A court appears at Appendix N/A to the petition and is

[ ] reported at N/A; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was June 14, 2023 Appendix A

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 18, 2023, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was N/A
A copy of that decision appears at Appendix N/A.

[ ] A timely petition for rehearing was thereafter denied on the following date N/A, and a copy of the order denying rehearing appears at Appendix N/A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on N/A (date) in Application No. A N/A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL

Sixth Amendment of the Constitution

Fourth Amendment of the Constitution

STATUTORY PROVISIONS

Crawford v. Washington, 541 U.S. 96 50-51, 124 S.Ct. 1354, 158 L Ed 2d 177 (2004)

Thomas, 2010 U.S. Dist LEXIS 140706 [Lexis page 8] (8th Dist)

Carrter, 477 U.S. 478 (1986)

Bousley, 523 U.S. 614, 620-22 (1998)

Washington, 843 F. 2d 319 [Lexis page 19] (9th Cir 1987)

Alderman, 423 F. Supp. 847 [Lexis page 7] (4th Dist 1976)

28 U.S.C. §2255

STATEMENT OF THE CASE

On April 7, 2021, the Grand Jury for the Eastern District of Arkansas returned a second superceding indictment charging Richards with Conspiracy to Distribute and Possess with Intent to Distribute five kilograms or more of cocaine, and alleging that Richards was responsible for twenty-eight grams or more of cocaine. In addition, Richards was charged individually with one count of Distribution of five hundred grams or less of a mixture or substance containing a detectable amount of cocaine (count 2), and five counts of use of a communication facility to facilitate a conspiracy to possess with intent to distribute a controlled substance (count 3-7).

Factual Procedural Background

November 19, 2019, Petitioner's Counsel filed the following pre-trial motions: Motion to Rucuse, Motion to Suppress video surveillance, Motion for Severance, Motion to Dismiss Indictment, Motion to Suppress wiretap recording. The Court for the Eastern District of Arkansas denied all pre-trial motions.

Nature of the case

On April 21, 2021, a jury found the Petitioner guilty of all charges. Counts 1-7

Decision Appealed

Petitioner appeals the Judgement of Conviction and Sentence entered against him on October 7, 2021 in the Eastern District of Arkansas Case No. 4:18-00357-02-JM

STATEMENT OF THE CASE

Decision Appealed

Petitioner's Counsel filed a timely notice of Appeal in the Court of Appeals for the Eighth Circuit on October 18,2021, Case No. 21-3344, from the Judgement formally entered Oct 7, 2021.

Decision Appealed

The U.S. Court of Appeals for the Eighth Circuit denied the Petitioner's Direct Appeal on June 14, 2023. **Appendix A**

Decision Appealed

The U.S. Court of Appeals for the Eighth Circuit denied the Petitioner's Rehearing on September 18th, 2023. **Appendix C**

Decision Appealed

The U.S. District Court, Eastern District of Arkansas denied the Petitioner's motion under 28 U.S.C. §2255 on August 15,2023. **Appendix B**

Decision Appealed

The U.S. Court of Appeals for the Eighth Circuit denied the Petitioner's motion under 28 U.S.C. §2255 on October 24, 2023. **Appendix D**

STATEMENT OF THE CASE

Trial

On April 21, 2021, Petitioner preceeded to jury trial. Defense Counsel Arkie Byrd failed to object to the admission of the videos after questioning from the District Court. Counsel expressly stated that Richards had no objection to admitting both the videos and certain screenshots taken from the video (R.Doc. 509 at 99,101,103, and 110). Thus, this claim was no inadvertently left unassented, it was intentionally abandoned. This is and Appeal admission that Counsel, not the Petitioner, abandoned the **Crawford** issue of the Sixth Amendment Confrontation Clause. However, the Crawford Confrontation issue was not raised prior, or even during Trial by Counsel. While Counsel did in fact raise a Fourth Amendment privacy argument about the video, Counsel could not in her Suppression hearing have legally challenged a Crawford violation. 1) The Decedant was not dead at the time, and 2) A Crawford violation only occurs at Trial when the District Court Judge James M. Moody Jr. Permitted testimonial evidence from a deceased party may be allowed if the party was (A) once cross examined prior to trial, and Boyd was not. (B) If the party's demise was caused by some act on the Petitioner's part to prevent the testimony and cross-examination. This Petitioner did not cause the demise of the witness Boyd.

REASONS FOR GRANTING THE PETITION

On April 21, 2021, at jury trial of the Petitioner, the Defense Counsel Arkie Byrd should have prevented the illegal use of the deceased witness Boyd's testimony at all costs, to include, if necessary, the use of an Interlocotory Appeal, thus **barring** the trial pending the outcome. The fact that Trial Court Judge James M. Moody Jr. permitted a Constitutional abuse under **Crawford** (124 S.Ct. 1354 (2004)) is a clear Constitutional violation to this Petitioner, one that cannot be defended by **law**. The District Court Judge Moody knew this. The two U.S. Attorneys, Julie Petters and Chris Givens knew this, and Defense Counsel Arkie Byrd knew that this could not be allowed, yet the Defense Counsel did not make an objection at trial, or even make a Motion for the **Crawford** Sixth Amendment Constitutional violation.

The Framers [of the US Constitution] would not have allowed admission of a Testimonial Statement of a deceased witness who did not appear at trial unless he was unavailable to testify, and the Defendant had a prior opportunity for cross-examination. The Petitioner never had prior opportunity to cross examination of the witness Boyd due to his demise. The District Court Judge knew that he was in error for allowing the admission of the video testimony of a deceased witness to enter his court, which violated the Petitioner's Sixth Amendment right under the Confrontation clause, and the Petitioner's Fourth Amendment right to Due Process. Defense Counsel Arkie Byrd not making an objection to this admission was also a clear Constitutional violation.

REASONS FOR GRANTING THE PETITION

The Supreme Court of the United States has held under Crawford the Petitioner's petition should be granted, and should overturn the Conviction and Sentence due to this Constitutional violation that was done by the District Court Judge, and Counsel Arkie Byrd. This video testimonial was used to prove the Government's case of drug sales, and the veracity of the Supervising Officer's own testimony to the same events. Whichever way it was presented, it was to establish the truth in this matter, and was used to convict the Petitioner. The illegal use of this video evidence, and the grossly ineffective assistence from the Defense Counsel is the compelling reason the petition should be granted before this Court.

Under **Ellis**, 313 F.3d 636 (1st Cir. 2002); "The manifest injustice standard is difficult to acheive: a finding of manifest injustice requires a definite and firm conviction that a prior ruling on a material matter is unreasonable or obviously wrong." **Patton**, 606 Fed. Appx. 924 [LEXIS PAge 7](10th Cir. 2015); "The Sixth Amendment's Confrontation Clause bars admission of a testimonial heresay statement when a witness is unavailable to testify at Trial, [Boyd had passed away prior to Trial], and the defendant had no prior opportunity to cross-examine the witness, [There was no cross-examination of Boyd at the Suppression Hearing, while Boyd was available and alive, no one knew of Boyd's untimely demise, thus no opportunity to petition the Court was possible prior to the untimely death of Boyd, **Boyd could not be cross-examined prior to Trial**]. **Crawford**, 541 US 36, 53-54 (2004). A heresay statement is testimonial if made with a 'primary purpose of creating an out-of-court substitute for Trial testimony. **Bryant**, 131 S.Ct. 1143, 1155(2011). **Crawford**, 541 US 53-54 states; "The historical record also supports a second proposition:

> **That the Framers, [of the United States Constitution], would not have allowed admission of testimonial statements of a witness who did not appear at Trial...**
>
> **unless he was unavailable to testify,**
>
> **and the defendant had a prior opportunity for cross-examination."**

Therefore, Judge Moody caused the **Crawford** violation, which only applies at Trials, thus could not legally have been challenged prior to its admission at Trial, as the Judge so claimed the Suppression Hearing did, for how could the unavailability of Boyd have been known at the Suppression Hearing, when he was still alive at the time to have raised any complaint of the impossibility of cross-examination months later ? No, **Crawford's** violation arose only at Trial and only after the Judge Moody allowed the testimonial video statement of deceased witness Boyd, and during Trial, the Defense Counsel raised no complaint on the Record Transcript of Judge Moody's Constitutional Violation, for which act that Defense Counsel is plainly ineffective assisatnce for. Yet another reason that Judge Moody cannot preside over this §2255 Remand Petitioner is entitled to, the Judge abused Petitioner's Constitutional rights, firmly established by law, and created a manifest injustice, thus prejudiced the Petitioner's Trial Rights. **Delo**, 160 F.3d 416 [LEXIS Page 9[(8th Cir. 1998); "Manifest injustice is the plain error standard under Federal Law..." **Carrillo-Gonzales**, 627 Fed. Appx. 366 [LEXIS Page 4](5th / 11th Cir. 2015) "To succeed on plain-error review, [Petitioner must show:

1) **A forfeited error:**

   Petitioner's counsel failed to raise at Trial, the **Crawford** violation, post-Trial, and on Direct Appeal properly.

2) **That it was clear or obvious;**

The fact that all Attorney's present, and that includes Judge Moody, had knowledge that allowance of testimony is any form, from an unavailable witness that has not been, on a prior occassion, cross-examined is forbidden under **Crawford** is a clear and obvious error of law.

3) **It affected substantial rights;**

Crawford never permits, it is not a discretionary function, it **never permits** the use of testimonial evidence if the witness is unavaiable for Trial and there has been no opportunity for prior cross-examination of that witness. **THERE ARE NO EXCEPTIONS TO THAT RULE.**

Washington, 843 F.2d 319 [LEXIS Page 19[(9th Cir. 1987)(the Judge has a duty to protect the defendant's rights to a fair trial). **Alderman**, 423 F.Supp. 847 [LEXIS Page 27](4th Dist. 1976)(a Judge's duty to safeguard a defendant's due process rights). Thus Judge Moody was fully aware that he failed in a Judge's duty to protect the Petitioner's Sixth Amendment right under **Crawford** to never have a testimonial by an absent witness whom was not previously cross-examined. The basis of the reasoning is that absent any opportunity for cross-examination, the witness cannot be impeached, the testimony cannot be questioned as to accuracy, and the jury is usurped from its province of determination of the credibility of the witness and the statement made. **Mayhall**, 2014 US Dist. LEXIS 11397 [LEXIS Page 11](8th Dist.)"Credibility determinations, the weighing of evidence and the drawing of legitimate inferences from the facts are **Jury functions, not those of a Judge.** A Court may not invade the province of the Jury." Therefore, the Judge's Opinion comment of the 'overwhelming evidence of guilt,' that he feels towards the Petitioner is a sign of his personal bias, since the Judge cannot determine that, but for the removal of the video evidence given as testimony by Boud, that the Jury could not have adjudicated otherwise, i.e., found Petitioner not guilty. The Judge's personal beliefs of the Petitioner's guilt or innocence are in opposition to the task of being an unbiased party, and outside of Judicial functions.

Again, **Thomas**, 2010 US Dist. LEXIS 140706 [LEXIS Page 8](8th Dist.)(stating how even is a defendant cannot establish 'cause and prejudice' he may still be entitled to relief under §2255, if there is Constitutional error which would have resulted in a complete miscarriage of justice. **Carrier**, 477 US 478 (1986); **Bousley**, 523 US 614, 620-22 (1998)." **Crawford** is evidence of a complete miscarriage of justice, and by its own Supreme Court Opinion, states, unequivically, that a non-appearing witness testimonial may not be used absent the prior cross-examination opportunity, and Petitioner never had that with Boyd. Since the wiping -out of Boyd's testimony would require a new Jury to determine the remainder of the evidence, weighing the credibility, or lack thereof, of the witnesses who appear to testify, and making any inferences they determine as factual, **as is the sole province of he Jury, and not a Judge, as Judge Moody openly stated in the Opinion his personal feeling, not the legal ones.** There is personal bias displayed and a

1) Counsel was ineffective for failing to properly argue, preserve and prevent the testimonial video of a deceased witness, used for the truth of the matter and thus is barred under Crawford v. Washington.

United States v. Joseph Shayota, 2016 US Dist. LEXIS 145720 (9th Dist.);

> The Confrontation Clause applies to all "testimonial" statements. *Crawford v. Washington*, 541 U.S. 36, 50-51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "Testimony . . . is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (citations and quotation marks omitted). The Confrontation Clause applies not only to in-court **testimony** but also to out-**of**-court statements introduced at trial to prove **the truth of the matter** asserted, i.e., "**testimonial** hearsay," regardless **of the** admissibility **of the** statements under state laws **of** evidence. *Id.* at 50-51; *Tennessee v. Street*, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985) ("The *nonhearsay* aspect of [the] confession . . . raises no Confrontation Clause concerns."). Out-of-court statements by witnesses that are testimonial hearsay are barred under the Confrontation Clause unless: (1) the witnesses are unavailable, and (2) Defendants had a prior opportunity to cross-examine the witnesses. *Id.* at 59. However, case law is clear that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 59 n.9 (citing *California v. Green*, 399 U.S. 149, 162, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)).

United States v. James Kalbflesh, 621 Fed. Appx. 157; 2015 US App. LEXIS 14210 (4th Cir.);

> The Confrontation Clause of the Sixth Amendment "bars the admission of 'testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" United States v. Dargan, 738 F.3d 643, 650 (4th Cir. 2013) (quoting Crawford v. Washington, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). "Evidence implicates the Confrontation Clause only if it constitutes a testimonial statement - that is, a statement made with 'a primary purpose of creating an out-of-court substitute for trial testimony.'" United States v. Reed, 780 F.3d 260, 269 (4th Cir. 2015) (quoting Michigan v. Bryant, 562 U.S. 344, 358, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)). "If a statement's primary purpose is not to create a record for trial, then the Confrontation Clause does not apply." Id. (citation and internal quotation marks omitted).

Witness Boyd, whom was deceased prior to trial, was never cross examined, thus his 'Testimony' albeit in the form of a video of a 'controlled buy' could not be used as evidence that clearly lead to the truth of the claim that the buy itself took place as the officers testified at Trial to. The Counsel should have prevented this illegal use of that deceased-witness 'testimony' at all costs, to include, if necessary the use of an Interlocatory Appeal, thus barring the Trial pending the outcome. The fact that the Trial judge permitted an abuse under **Crawford**, 124 S.Ct. 1354 (2004) demonstrates a bias favoring the Prosecution, not the unbiased protection of the rights of the accused by abuse by Government.

Paine had settled the rule requiring a prior opportunity for cross-examination as a matter of common law, but some doubts remained over whether the Marian statutes prescribed an exception to it in felony cases. The statutes did not identify the circumstances under which examinations were admissible, see 1 & 2 Phil. & M., c. 13 (1554); 2 & 3 id., c. 10 (1555), and some inferred that no prior opportunity for cross-examination was required. See Westbeer, supra, at 12, 168 Eng. Rep., at 109; compare Fenwick's Case, 13 How St. Tr., at 596 (Sloane), with id., at 602 (Musgrave). Many who expressed this view acknowledged that it meant the statutes were in derogation of the common law. See King v Eriswell, 3 T. R. 707, 710, 100 Eng. Rep. 815, 817 (K. B. 1790) (Grose, J.) (dicta); id., at 722-723, 100 Eng. <*pg. 190> Rep., at 823-824 (Kenyon, C. J.) (same); compare 1 Gilbert, Evidence, at 215 (admissible only "by Force 'of the Statute'"), with id., at 65. Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases. See King v Dingler, 2 Leach 561, 562-563, 168 Eng. Rep. 383, 383-384 (1791); King v Woodcock, 1 Leach 500, 502-504, 168 Eng. Rep. 352, 353 (1789);

[541 US 47]

cf. King v Radbourne, 1 Leach 457, 459-461, 168 Eng. Rep. 330, 331-332 (1787); 3 Wigmore § 1364, at 23. Early 19th-century treatises confirm that requirement. See 1 T. Starkie, Evidence 95 (1826); 2 id., at 484-492; T. Peake, Evidence 63-64 (3d ed. 1808). When Parliament amended the statutes in 1848 to make the requirement explicit, see 11 & 12 Vict., c. 42, § 17, the change merely "introduced in terms" what was already afforded the defendant "by the equitable construction of the law." Queen v Beeston, 29 Eng. L. & Eq. R. 527, 529 (Ct. Crim. App. 1854) (Jervis, C. J.).[2]

B

Controversial examination practices were also used in the Colonies. Early in the 18th century, for example, the Virginia Council protested against the Governor for having "privately issued several commissions to examine witnesses against particular men ex parte," complaining that "the person accused is not admitted to be confronted with, or defend himself against his defamers." A Memorial Concerning the Maladministrations of His Excellency Francis Nicholson, reprinted in 9 English Historical Documents 253, 257 (D. Douglas ed. 1955). A decade before the Revolution, England gave jurisdiction over Stamp Act offenses to the admiralty courts, which followed civil-law rather than common-law

[541 US 48]

procedures and thus routinely took testimony by deposition or private judicial examination.

court held: "[I]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine." Id., at 104.

Similarly, in State v Campbell, 30 SCL 124 (App L 1844), South Carolina's highest law court excluded a deposition taken by a coroner in the absence of the accused. It held: "[I]f we are to decide the question by the established rules of the common law, there could not be a dissenting voice.. For, notwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are ex parte, and, therefore, utterly incompetent." Id., at 125. The court said that one of the "indispensable conditions" implicitly guaranteed by the State Constitution was that "prosecutions be carried on

[541 US 50]

to the conviction of the accused, by witnesses confronted by him, and subjected to his personal examination." Ibid.

Many other decisions are to the **<*pg. 192>** same effect. Some early cases went so far as to hold that prior testimony was inadmissible in criminal cases even if the accused had a previous opportunity to cross-examine. See Finn v Commonwealth, 26 Va 701, 708 (1827); State v Atkins, 1 Tenn 229 (Super. L. & Eq. 1807) (per curiam). Most courts rejected that view, but only after reaffirming that admissibility depended on a prior opportunity for cross-examination. See United States v Macomb, 26 F Cas 1132, 1133 (No. 15,702) (CC Ill 1851); State v Houser, 26 Mo 431, 435-436 (1858); Kendrick v State, 29 Tenn 479, 485-488 (1850); Bostick v State, 22 Tenn 344, 345-346 (1842); Commonwealth v Richards, 35 Mass 434, 437 (1837); State v Hill, 20 SCL 607, 608-610 (App 1835); Johnston v State, 10 Tenn 58, 59 (Err. & App. 1821). Nineteenth-century treatises confirm the rule. See 1 J. Bishop, Criminal Procedure § 1093, p 689 (2d ed. 1872); T. Cooley, Constitutional Limitations *318.

III

[3a][4a] This history supports two inferences about the meaning of the Sixth Amendment.

A

[3b][5a] First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth

[4e] Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness's prior trial testimony. Mattox v United States, 156 US 237, 39 L Ed 409, 15 S Ct 337 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness: "The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of . . . ." Id., at 244, 39 L Ed 409, 15 S Ct 337.

Our later cases conform to Mattox's holding that prior trial or preliminary hearing testimony is admissible only if the defendant had an adequate opportunity to cross-examine. See Mancusi v Stubbs, 408 US 204, 213-216, 33 L Ed 2d 293, 92 S Ct 2308 (1972); California v Green, 399 US 149, 165-168, 26 L Ed 2d 489, 90 S Ct 1930 (1970); Pointer v Texas, 380 US, at 406-408, 13 L Ed 2d 923, 85 S Ct 1065; cf. Kirby v United States, 174 US 47, 55-61, 43 L Ed 890, 19 S Ct 574 (1899). Even where the defendant had such an opportunity, we excluded the testimony where the government had not established unavailability of the witness. See Barber v Page, 390 US 719, 722-725, 20 L Ed 2d 255, 88 S Ct 1318 (1968); cf. Motes v United States, 178 US 458, 470-471, 44 L Ed 1150, 20 S Ct 993 (1900). We similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine. See Roberts v Russell, 392 US 293, 294-295, 20 L Ed 2d 1100, 88 S Ct 1921 (1968) (per curiam); Bruton v United States, 391 US 123, 126-128, 20 L Ed 2d 476, 88 S Ct 1620 (1968); Douglas v Alabama, 380 US 415, 418-420, 13 L Ed 2d 934, 85 S Ct 1074 (1965). In contrast, we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial. See Dutton v Evans, 400 US, at 87-89, 27 L Ed 2d 213, 91 S Ct 210 (plurality opinion).

United States v. Delgrosso, 852 F.3d 821; 2017 US App. LEXIS 5567 (8th Cir.);

A defendant must satisfy five requirements to justify a new trial on this basis:

> (1) the evidence must have been discovered after trial; (2) the failure to discover this evidence must not be attributable to a lack of due diligence on the part of the movant; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be likely to produce an acquittal if a new trial is granted. *Id.* Here, Delgrosso and Cain fail to satisfy the fifth requirement because Wright's affidavit would not "be likely to produce an acquittal if a new trial is granted." *See id.*

First, the affidavit itself likely would be inadmissible at a new trial. An affidavit offered in lieu of in-court **testimony**, if offered for **the truth of the matter** asserted in the affidavit, is hearsay evidence. *See* Fed. R. Evid. 801(c). "Hearsay is inadmissible unless it falls within an established exception." *United States v. Smith*, 591 F.3d 974, 980 (8th Cir. 2010). Delgrosso contends that Federal Rule of Evidence 804(b)(3) would provide such **{2017 U.S. App. LEXIS 8}** an exception because the affidavit is a statement against interest insofar as it may expose Wright to new criminal charges. However, even if so, given Wright's criminal record, it is far from clear that the district court would admit the affidavit under Rule 804(b)(3), which requires that the evidence be "supported by corroborating circumstances that clearly indicate its trustworthiness." *See* Fed. R. Evid. 804(b)(3)(B); *United States v. Halk*, 634 F.3d 482, 490 (8th Cir. 2011) (considering "the general character of the speaker" in determining the trustworthiness of a hearsay statement against interest (citation omitted)).

In one example of the only exception to the bar to use deceased witness testimony at Trial when they have not had prior opportunity to cross-examine, is the one wherein the defendant has caused the reason for the non-appearance of the witness, i.e., caused the death itself, thus creating the situation wherein the witness could not have been cross-examined. Absent this situation, there is no exception to allow the testimony of a deceased party, when no prior opportunity to cross-examine that witness existed. The defendant did not cause the death of witness Boyd, could not have forseen the death of witness Boyd, and therefore could not have arranged a prior opportunity to cross-examine Boyd. This being the facts, the counsel should have, in no way permitted the testimony of Boyd to enter the Court's record. There was no method of cross-examination, the testimony of the officer whom sent Boyd to obtain the video is insufficient, since the officer can not be cross-examined to give responses meant personally for Boyd. This was upheld in the matter of **Melendez-Diaz**, as seen in **Torrez**, 925 F.3d 391, 394-95 (8th Cir. 2019); "U.S. Constitutional Amendment IV. The 'witnesses' in this right, [the Confrontation Clause], are any person who bears testimony against a defendant. **Melendez-Diaz**, 129 S.Ct. 2527 (2009). Where a drug analysis report is offered at Trial, the defendant has a right to confront the analyst who wrote the report." In our matter, this relates as in **Melendez-Diaz** itself, where a supervisor had testified at Trial to the contents of a Report that he himself had no active part in creation of. In our case, the supervising officer is no different than the Lab Supervisor was in **Melendez-Diaz**, he himself is not the one that created the 'evidence' and 'testimnoy' in the video used at Trial, Boyd was. The officer was merely a Supervisor. This then qualifies as reason to bar the video from Trial.

As this video 'testimonial evidence' was, at a minimum half of the Government's evidence in the case, and clearly material testimony in a claim of two 'controlled buys' by Government, and associated with the Wire-tap issue of why the Government did not respond to the proof of exhaustion requirement prior to issuance of the wiretap warrant, [there is a requirement that Government prove, under 18 U.S.C. §2518, prior to issuance of a wiretap warrant that;

18 U.S.C. §2518(1)(c);

> "A full and complete statement as to whether or not other investigative procedures have been tried **and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;**"].

Since the bulk of the remainder of the Government's case-in-chief depended upon the wiretaps that were obtained as a result of the deceased witness Boyd's testimonial video evidence, then they remain interrelated for the issue that;

There is no statement that can claim that other methods...i.e, the continuation of the twice-proven effective 'controlled buys' of the Government, beacuse it did not fail. Therefore, the Government's use of the **Crawford**-banned testimonial is key to the Government's case, and would clearly have altered the outcome, since it would have banned the Video testimonial of Boyd, and cancelled the use of the wiretaps, which the Government should not have obtained, and should not have used as evidence, but for the incompetence of counsel whom did not issue one Interlocatory Appeal to prevent their going forward and using the tainted evidence for Trial. There is a fair probability that absent both the Boyd testimony and the wiretaps that the Petitioner would have been acquitted if trial were even necessary. Petitioner says even if necessary, since has the counsel done their job, at the suppression hearing, or the subsequent Interlocatory Appeal, that evidence would have been stricken, and the Trial for Petitioner would not even have taken place with the lack of usable evidence. And the Government knew so, which is why they avaoided all references to the 18 U.S.C. §2518 wiretap claims on Direct Appeal. Had the counsel not been so ineffecient, and twice, once by the Government at the February 6th, 2020 Suppression Hearing; Where Government argued that Petitioner's Counsel was using the improper statute for the wiretap claim; and at Appeal, where the counsel had 'waffled' in the Original Brief, claiming Petitioner stated it was not him on the wiretaps, then claiming that it was him, and that he had standing for complaint in their usage. What competent counsel cannot keep a story straight, places a new argument on the Reply Brief not in the Original Brief, [to which the Appeal decision made a direct reference, thus also found counsel ineffective], and never once Motioned to Compel the Government for the documents required under 18 U.S.C. §2518(1)(c)??

> Finally, we reiterate that, when the declarant appears for **cross-examination** at trial, the **Confrontation Clause** places **no** constraints at all on the use of his **prior** testimonial statements. See California v Green, 399 US 149, 162, 26 L Ed 2d 489, 90 S Ct 1930 (1970). It is therefore irrelevant that the reliability of some out-of-court statements "'cannot be replicated, even if the declarant testifies to the same matters in court.'" Post, at 74, 158 L Ed 2d, at 206-207 (quoting United States v Inadi, 475 US 387, 395, 89 L Ed 2d 390, 106 S Ct 1121 (1986)). The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it. (The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See Tennessee v Street, 471 US 409, 414, 85 L Ed 2d 425, 105 S Ct 2078 (1985).)

Government may not claim that deceased witness Boyd's video was anything other that 'to prove the truth of the matter,' since it was used to prove the truth of the Government's case of drug sales, and as veracity of the Supervising Officer's own testimony to the same events. Whichever way it was presented, it was to establish the 'truth of the matter,' and to convict Petitioner of the drug sale in that video itself.

Greiber v. Wells, 417 F.3d 305; 2005 US App. LEXIS 16581 (2nd Cir.);

> Specifically, it does not fit into the Federal Rule of Evidence Rule 804(b)(1) exception for admission of the former testimony of an unavailable witness because Lafazan, now deceased, was never subject to cross-examination. *See* Fed. R. Evid. 804(b)(1)**{2005 U.S. App. LEXIS 56}** . Second, Simons's purported statement to Lafazan is hearsay as well and not subject to the Rule 804(b)(3) exception for statements against **{417 F.3d 326}** interest because, at the time of the district court's evidentiary hearing, Simons was clearly available to testify - he did testify. *See* Fed. R. Evid. 804(a) (defining unavailability). Wells relies almost entirely, therefore, on Simons's inability to remember his reasons for conducting the trial in the manner that he did. This is insufficient evidence to overcome the presumption of constitutionally effective counsel sustained by the record justification for Simons's actions. 28
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> **{2005 U.S. App. LEXIS 57}** Time inevitably fogs the memory of busy attorneys. That inevitability does not reverse the *Strickland* presumption of effective performance. Without evidence establishing that counsel's strategy arose from the vagaries of "ignorance, inattention or ineptitude," *Cox*, 387 F.3d at 201, *Strickland*'s strong presumption must stand. Wells has not shown that his lawyer's performance was deficient; the district court erred by granting Wells's petition.

> United States Supreme Court has held, "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Because he was dead, Mr. Cooper was unavailable for trial.

STANDARD OF REVIEW:

> But for the purposes of habeas review, we assess the prejudicial impact of constitutional trial errors under the "substantial and injurious effect" standard set forth in *Brecht*, examining the error by applying the factors announced in *Delaware v. Van Arsdall* to the facts in the case. 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). These include: (1) the importance of the witness's testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted, and . . . (5) the overall strength of the prosecution's case. *Id.* at 684. The district court properly considered these factors in finding that the state court's harmless error analysis was reasonable.

Using this Standard, we have:

(1) the importance of the witness's testimony in the prosecutions' case;

As discussed, Boyd's testimonial video was half of the Government 'controlled buy evidence, and key to the controversy over the absent requirements of 18 U.S.C. §2518(1)(c), there being no evidence that more controlled buys were to be either unproductive or too dangerous to continue, thus would have resulted, with proper counsel rebuttals and if required, Interlocatory Appeals to prevent illegal introduction of evidence and testimonials at Trial against its' client.

(2) whether the testimony was culmative;

This refers to whether there was more than ample other supportive testimonials and evidence other that the related wiretaps to convict the Petitioner upon, i.e., overwhleming evidence against the Petitioner, There was not, in fact, other evidence than the at best, first 'controlled buy.' There would have been no Trial if competent counsel had managed the Suppression Hearing, and if it failed in District, Motioned an Interlocatory Appeal to deny usage at Trial.

(3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;

Boyd's testimonial was only corroborated by the Supervisors' heresay testimony, thus legally has the identical impact that **Melendez-Diaz** did it is barred. Absent that testimony, there is no other corroboration, since Boyd's "controlled buy" video testimony was never followed by any additional "controlled buys," which held no reason to believe they would not be successful, nor any evidence that they were any more dangerous than Boyd's last video "controlled buy" was. Thus, there was no outside corroboration for Boyd's absent video testimonial.

(4) the extent of cross-examination otherwise permitted;

There was a challenge made to the use of Boyd's testimonial video on March 22nd, 2021, but the Petitioner informed to Attorney to File a Motion, wherein the Judge Ordered the counsel to "File something in writing," which counsel refused to do. There was no other opportunity for cross-examination of Boyd on the topic at all.

(5) the overall strength of the prosecution's case;

Admitting to the true facts of the matter, the reason that Prosecution would not sever the Trial was that the Petitioner's Co-Defendant's guilt was overwhelming, and the Prosecution used that guilt evidence to influence the jury to continue, and find Petitioner guilty on the bare-bones facts that were based upon the unusable Boyd's video testimonial and the wiretap evidence that counsel failed, notable by Prosecution's own statement of the "Use of the quote to the wrong Statute by the Defense Counsel," thus making a Court Record of the ineffectiveness, and lack of legal investigations done by the Petitioner's counsel. It was completely ineffective, and even Appeal Opinion stated that Counsel had not even obeyed one of the longest standing rules in Appeals; **F.T.C.**, 454 F.2d 1083, 1093 (8th Cir. 1972). See also: Fed. R. App. P. §28(a). "Appellants generally must raise and Brief all issues in their Opening Brief." Counsel thus was fully aware that their Reply Brief was in direct violation of the Federal Rules of Appellate Procedures, a fact any compentent counsel would have known and obeyed, thus the Petitioner's counsel purposely submitted a Reply Brief they knew would be then disallowed.

The end result is that the Prosecution's case was admittedly weak for this Petitioner, or; (1) Prosecution would not have disobeyed the wiretap 18 U.S.C. §2518 requirement that they prove that they had to have the wiretap, as the attempt of any third "controlled buy" would have been ineffective or prove to be too dangerous, and they did not do so, because they cannot prove that true; (2) Prosecution was fully aware that under the **Crawford/Melendez-Diaz** rules for testimonials, which clearly the Boyd video was testimonial evidence to both the claim by Government of the second "controlled buy" and the grounds for the wiretap as well. Absent the use of this Boyd's video testimonial evidence, the Prosecution would never have obtained the wiretap warrant, nor had evidence to convict Petitioner at Trial. The case was so weak, in fact, (3) the Government knowingly would not sever the Trial, because it would have left doubt as to the Petitioner's odds at conviction. Mays' conviction by overwhelming evidence was the bolster to Petitioner's weak matter.

2.) **Counsel was ineffective for failing to investigate, as required by the duty owed the client and held under Strickland v. Washington standards.**

Wiggins v. Smith, 123 S.Ct. 2527 (2003); '[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' Id., at 690-91, 104 S.Ct. 2052.

Our opinion in **Williams v. Taylor** is illistrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied **Strickland** and concduded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Willimas' voluntary confessions, because counsel had not 'fulfill[ed] their obligations to conduct a thorough investigation of the defendant's background.' 529 US, at 396, 120 S.Ct. 1495 (citing ABA Standards for Criminal Justice 4-4.1, commentary, page 4-55 (2nd Ed. 1980)). While Williams had not yet been decided at the time the Maryland Court of Appeal rendered the decision at issue in this case, cf. post, at 542, 156 L.Ed.2d, at 497-98. (Scalia, J., dissenting), Williams case was before us on habeas review. Contrary to the dissent's contention, post, at 543, 156 L.Ed.2d at 499, we therefore made no new law in resolving Williams' ineffectiveness claim. See **Williams**,529 US, at 390, 120 S.Ct. 1495 (noting that the merits of Williams' claim 'are squarely governed by our holding in Strickland'); see also Id., at 395, 120 S.Ct. 1495 (noting that the trial court correctly applied both components of the **Strickland** standard to Petitioner's claim and proceeding to discuss counsel's failure to investigate as a violation of **Strickland's** performance prong). In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same 'clearly established' precedent of **Strickland** we apply today. Cf. 466 US, at 690-91, 104 S.Ct. 2052 establishing that 'thorough investigation[s] are 'virtually unchallengeable' and underscoring that 'counsel has a duty to make reasonable investigations'); see also Id., at 688-89, 104 S.Ct. 2052 ('Prevailing norms of practice as reflected in American Bar Association standards and the like...are guides to determining what is reasonable').

"**Strickland**, 466 US at 688. In making that assessment, 'the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. **Strickland**, 466 US at

690. In determining whether a counsel's challenged conduct is the result of reasonable professional judgment, our scrutiny is highly deferential, cognizant of the distorting effects of hindsight. Id. at 689. We therefore employ a presumption that the challenged conduct might be considered sound trial strategy. Id. A decision not to investigate and present expert testimony as a matter of trial tactics can fall within the range of reasonable performance. **Rogers v. Israel**, 746 F.2d 1288, 1294 (7th Cir. 1984). 'But for this deference to apply, the decision must be fact-strategic,' and 'consequences or inattention rather than reasoned strategic decisions are not entitled to the presumption of reasonableness.' **Dunn**, 981 F.3d at 591, quoting **Mosley v. Atchison**, 689 F.3d 838, 848 (7th Cir. 2012). As the Court recognized in **Strickland**, 'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary,' and accordingly, '[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' **Strickland**, 466 US at 691.

Counsel did no research into the case, did no legal research into the Pre-Trial, Trial and Direct Appeal arguments, was unprepared for any phase of the proceedings, and made no legal objections to issues that were legally barred use, and the lack of investigations only accentuated the incompetence of this counsel. The Government has stated on Court Record that Counsel did not research and state the proper Statute for the wiretap warrant argument, thus barring Government on Direct Appeal from any claim that counsel was not ineffective. Counsel produced, at the Suppression Hearing, no legal argument against the use of the wiretaps, kept floundering, first arguing that it was not the Petitioner's voice on the wiretaps, but attempting to assert legal rights to argue Suppression that do not exist, then flopping back on Replies to state that it was now her petitioner's voice, and again asserting the right to Suppress. This then made the Petitioner, whom legally the Court blames for all Appeal assertions while under Motions for 28 U.S.C. §2255, instead of the truth of the matter, that counsel, not the Petitioner is completely in control of any and all Briefings and arguments, since Briefs are submitted to the Court prior to mailings to the Petitioner, thus the Petitioner never pre-approved any Briefings at all on Direct Appeal. Even when Ordered by the Court, as counsel was on March 22nd, 2021, counsel refused to do the legal research to submit an Ordered reply to the Court on a Motion Briefing. It cannot be stated that this Petitioner's case did not suffer at the hands of this counsel.

On Direct Appeal the Court Opinion stated that the Defense Counsel had placed on the Reply Brief arguments not raised in the Original Brief, which violates F.R.App.P. §28. As this same Appellate law applies to all matters Briefed, such as even the District Court levels, then this counsel for the defense knew full well, or was plainly incompetent for disobeying an Appellate Rule written before cousel was even born, and obviously had to have known at one time to have passed the Bar Exams to even become an Attorney.

That this counsel failed at every stage of the process is without question. Counsel failed to investigate the proper statutes and applicable laws prior to the Suppression Hearing, Counsel failed to Motion for an Interlocatory Appeal to prevent the **Crawford/ Melendez-Diaz** Confrontational Clause violation of Boyd's video testimonial at Trial, Counsel did not file any Post-Conviction Motions, Counsel failed on Direct Appeal to obey Appellate laws, counsel made irrational legal arguments, that the client did not make the phone calls, that client did make the phone calls, it was not even what the Courts would permit a Pro-Se inmate to have submitted for legal arguments. The United States Attorney even called the counselor ineffective at the March 22nd, 2021 Hearing, Motioning under the improper Statute for wiretaps.

Counsel clearly did no legal research, did not investigate the situation for the client, did not make even a half-hearted effort at defense. Counsel clearly was entirely ineffective assistance.

"In **Taylor v. Steele**, we stated that Martinez's some-merit requirement 'means that whether [the claimant's] trial counsel was ineffective...must be least be debatable among jurists of reason.' 6 F.4th 796, 801 (8th Cir. 2021)9internal quotation marks omitted), petitioner for cert. filed ___ U.S.L.W. (U.S. Mar. 23, 2022)(No. 21-7449); see also: **Harris**, 984 F,3d at 648-49; accord **McGill v. Shinn**, 16 F.4th 666, 698-99(9th Cir. 2021); **Owens v. Stirling**, 967 F.3d 396, 424 (4th Cir. 2020); **Brown v. Brown**, 847 F.3d 502, 517 (7th Cir. 2017); **Hittson**, 759 F.3d at 1269-70. **Ward** and **Dansby** do not compel a contrary conclusion. In **Ward**, we did not even quote, much less elaborate on, Martinez's statement that the petitioner's ineffective assistance claim must have 'some merit,' 566 U.S. at 14, if he is to overcome procedural default. See **Ward**, 738 F.3d 915. And in **Dansby**, we acknowledge but neither endorsed nor rejected the petitioner's argument that Martinez's substantiality standard is identical to **Miller-El's** certificate-of-appealability standard. See **Dansby**, 766 F.3d at 840, note 4 (noting that the case's outcome did not depend on whether the petitioner was correct)."

3)Counsel was ineffective on many vital steps in the defense of the client, for which competent counsel could not have failed, and which thus prejudiced the Petitioner, and lead to his conviction.

Emery v. United States, 2011 US Dist. LEXIS 131421 (8th Dist.);

INEFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim alleging **ineffective assistance** of counsel, the movant must satisfy the two-part test of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, the movant must first show that the counsel's performance was deficient. 466 U.S. at 687. This requires the movant to show "that counsel made errors **{2011 U.S. Dist. LEXIS 7}**so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Secondly, the movant must demonstrate that the deficient performance prejudiced the defense so as "to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The Eighth Circuit has described the two-fold test as follows: (1) counsel's representation fell below an objective standard of reasonableness; and (2) but for this **ineffective assistance**, there is a reasonable probability that the outcome of the trial would have been different. *Rogers*, 1 F.3d at 700 (quotations omitted). More recently the Eighth Circuit has described the *Strickland* test as follows: "whether counsel's performance was in fact deficient and, if so, whether the defendant was prejudiced by the inadequate representation. If we can answer 'no' to either question, then we need not address the other part of the test." *Fields v. United States*, 201 F.3d 1025, 1027 (8th Cir. 2000).

When **{2011 U.S. Dist. LEXIS 8}**evaluating counsel's performance, the court "must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Counsel's performance is considered objectively, and gauged "whether it was reasonable 'under prevailing professional norms' and 'considering all the circumstances.'" *Fields*, 201 F.3d at 1027, quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65. Counsel's challenged conduct is viewed as of the time of his representation. "And we avoid making judgments based on hindsight." *Fields*, 201 F.3d at 1027. A reviewing court's"scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. "'When assessing attorney performance, courts should avoid the distorting effects of hindsight and try to evaluate counsel's conduct by looking at the circumstances as they must have appeared to counsel at the time.'" *Rodela-Aguilar v. United States*, 596 F.3d 457, 461 (8thCir. 2010), quoting *United States v. Staples*, 410 F.3d 484, 488 (8th Cir. 2005).

Counsel did not object one time on Trial Court Record to the use of deceased witness Boyds' testimonial video, did not Motion for Interlocatory Appeal, in simpler terms did nothing to prevent the usage of the barred testimony under **Crawford/Melendez-Diaz** standards. On February 6th, 2020, at the Suppression Hearing,while several claims were made, when counsel lost the argument, did nothing in the way of filing an Interlocatory Appeal. On that same February 6th, 2020 Suppression, on Court's Record, is the Government Motion of Complaint that counsel applied the wrong Statute in their Motion to Suppress, thus should be denied Hearing. Therefore, the Government, as well as the Appeals Court have agreed that counsel was ineffective, having failed to use the proper argument based on a wrong Statute, simple proof of ineffective assistance.

On March 22nd, 2021, the challenge was made to Boyd's testimony, and also the Competency/Release Hearing was held that same date. Counsel was instructed, upon a complaint made by Petitioner, by Judge James M. Moody, Jr. to "File something on that." Which counsel never did. Even the U.S. Attorney stated that counsel was ineffective.

Applicable Standards

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. AMEND. VI. Thus, a criminal defendant is constitutionally entitled to the effective assistance of counsel both at trial and on direct appeal. *Evitts v. Lucey,* 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Bear Stops v. United States,* 339 F.3d 777, 780 (8th Cir. 2003); *see also Steele v United States,* 518 F.3d 986, 988 (8th Cir. 2008). By the same token, "**ineffective assistance** of counsel" could result in the imposition of a sentence in violation of the Constitution **{2009 U.S. Dist. LEXIS 13}**or laws of the United States. 28 U.S.C. § 2255; *Bear Stops,* 339 F.3d at 781 ("To prevail on a § 2255 motion, the petitioner must demonstrate a violation of the Constitution or the laws of the United States."). As noted above, in the discussion of procedural default, the Eighth Circuit Court of Appeals has expressly recognized that a claim of **ineffective assistance** of counsel should be raised in a § 2255 proceeding, rather than on direct appeal, because it often involves facts outside of the original record. *See Hughes,* 330 F.3d at 1069 ("When claims of **ineffective assistance** of trial counsel are asserted on direct appeal, we ordinarily defer them to 28 U.S.C. § 2255 proceedings.").

As the Eighth Circuit Court of Appeals has explained, "'The applicable law here is well-established: post-conviction relief will not be granted on a claim of **ineffective assistance** of trial counsel unless the petitioner can show not only that counsel's performance was deficient but also that such deficient performance prejudiced his defense.'" *United States v. Ledezma-Rodriguez,* 423 F.3d 830, 836 (8th Cir. 2005) (quoting *Saunders v. United States,* 236 F.3d 950, 952 (8th Cir. 2001), in turn citing *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); **{2009 U.S. Dist. LEXIS 14}***Davis v. Norris,* 423 F.3d 868, 877 (8th Cir. 2005) ("To prove that his counsel rendered **ineffective assistance** in violation of the Sixth Amendment, [the movant] must satisfy the two prong test outlined in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)," which requires the movant to "show that his counsel's performance was deficient" and that he was "prejudice[d]").

The "deficient performance" prong requires the movant to "show that his 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *United States v. Rice,* 449 F.3d 887, 897 (8th Cir. 2006) (quoting *Strickland,* 466 U.S. at 687). That showing can be made by demonstrating that counsel's performance "'fell below an objective standard of reasonableness.'" *Wiggins v. Smith,* 539 U.S. 510, 522, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (quoting *Strickland,* 466 U.S. at 688). There are two substantial impediments to making such a showing, however. First, "'[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *Rice,* 449 F.3d at 897 (quoting *Strickland,* 466 U.S. at 690). Second, "[t]here **{2009 U.S. Dist. LEXIS 15}**is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* (quoting *Strickland,* 466 U.S. at 689); *Davis,* 423 F.3d at 877 ("To satisfy this prong [the movant] must overcome the strong presumption that his counsel's conduct fell within the wide range of reasonable professional assistance."). If the movant fails to show deficient performance by counsel, the court need proceed no further in its analysis of an "**ineffective assistance**" claim. *United States v. Walker,* 324 F.3d 1032, 1040 (8th Cir. 2003).

Even if counsel's performance was "deficient," the movant must also establish "prejudice" to overcome the presumption of reasonable professional assistance. *Ledezma-Rodriguez,* 423 F.3d at 836; *Davis,* 423 F.3d at 877. To satisfy this "prejudice" prong, the movant must show "'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different . . . [,] a reasonable probability [meaning] a probability sufficient to undermine confidence in the outcome.'" *Rice*, 449 F.3d at 897 (again quoting *Strickland*, 466 U.S. at 694); *Davis*, 423 F.3d at 877 (same). Thus, "'[i]t **{2009 U.S. Dist. LEXIS 16}**is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Pfau v. Ault*, 409 F.3d 933, 939 (8th Cir. 2005) (quoting *Strickland*, 466 U.S. at 693). Although the two prongs of the "**ineffective assistance**" analysis are described as sequential, courts "do not . . . need to address the performance prong if petitioner does not affirmatively prove prejudice." *Boysiewick v. Schriro*, 179 F.3d 616, 620 (8th Cir. 1999) (citing *Pryor v. Norris*, 103 F.3d 710 (8th Cir. 1997)).

Counsel was stated by the Government as being ineffective on March 22nd, 2021 at the Competency/Release hearing and Motion to Suppress Hearing. Counsel was ordered by Judge James M. Moody to "File something about" [the argument Petitioner, not Counsel made on the Court's Record], Counsel refused and never did obey the Court's Order. On March 22nd, 2021 this took place. The wrong Statute is located at [Doc. 232, 233]. The Order to 'File something' is at [Doc. 386]. These are both matters of Court Records. On Appeal this Counsel gave an argument that went; "Petitioner claims that the wiretap recorded voice was not his," then on reply the Counsel stated; "The voice was that of the Petitioner, and he asserts his rights to contest that wiretap evidence." The Opinion from the Appeal even states this 'flopping back and forth,' the counsel did, and admonished counsel for the inconsistency. It went as far as to question how this counsel did not know that it could not raise a new argument on a reply not already stated within the Original Brief. No competent counsel could have made all these legal errors, in fact, it is a wonder this counsel was not Sanctioned and removed.

None of the arguments made on Appeal were ever raised during the Suppression Hearing. Had this counsel done a proper investigation into the legal arguments and the case itself, the arguments would have been fully briefed at the Suppression Hearing, the wrong Statute would not have been quoted, and Boyd's testimony, with him being deceased through no part of the client's doing, would never have been introduced at Trial. There are literally hundreds of cases using Circuit decisions to back up the fact that a deceased witness testimony may not be used absent the exception of the case when the Petitioner caused the witness not to appear. That is not the case herein, thus no exception to the legal bar from use of that testimony is found. Counsel should have researched and backed up this argument. Even worse, the Counsel was directly Ordered to research and File a Motion to a question posed by Petitioner, by Judge James M. Moody, and refused to comply. Counsel was declared by the Government as ineffective, thus they cannot now, on a Motion under 28 U.S.C. §2255 defend that position as otherwise. Since this infected not only the Pre-Trial, but the Trial and Direct Appeal as well, it must then be taken back to the post-Arraignment stage of the proceedings to correct. A New Trial must be the result.

In light of the clear and multiple Constitutional violations by the District Court Judge, James M. Moody Jr., along with the grossly ineffective assistence from the Defense Counsel, Arkie Byrd, the Petitioner begs the esteemed Supreme Court to review his case. The Petitioner respectfully requests that the Writ of Certiorori be granted

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James Richards

Date: November 7th, 2023