23-6292

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

RAY O. CROWELL JR. -PETITIONER
(Your Name)

MARK SEVIER -RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
(NAME THE COURT THAT LAST RULED ON THE MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Ray O. Crowell Jr.
(Your name)

P.O. Box A
(Address)

New Castle, IN 47362-1041
(City, State, Zip Code)

None
(Phone Number)

QUESTION(S) PRESENTED

Whether the state courts resolution of Crowell's ineffective assistance of counsel claim for failing to advise of a affirmative defense was contrary to, and, or involved an unreasonable application of clearly established law under Strickland, and Hill pursuant to 28 U.S.C. §2254 (d)(1).

Whether the 7th Circuits decision denying Crowell habeas corpus relief of his ineffective assistance of counsel claim for failing to advise of a affirmative defense was contrary to, and, or involved an unreasonable application of clearly established law under Strickland, and Hill.

Whether lower courts may assume guilty verdicts and consecutive sentences when unsupported by evidence in the prejudice inquiry of a guilty plea.

Whether the 7th Circuits expansion of Lee to post-conviction relief proceedings is erroneous.

Whether the federal courts owed the state courts decision any deference per 28 U.S.C. § 2254(d)(1).

Whether trial counsel was deficient for failing to discover or failed to advise of a statute of limitations defense to six of the thirteen counts including the one Crowell plead guilty to under Strickland.

LIST OF ALL PARTIES

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

LIST OF ALL PROCEEDINGS

State of Indiana County of Allen
02D05-1702-PC-15
Ray O. Crowell Jr. v. State of Indiana
Decided 5-22-2019

Court of Appeals of Indiana
19A-PC-1360
Ray O. Crowell Jr. v. State of Indiana
Decided 1-2-2020

United States District Court Southern District of Indiana Indianapolis Division
1:20-cv-01450-RLY-MJD
Ray O. Crowell Jr. v. Mark Sevier
Decided 7-6-2021

United States Court of Appeals for the Seventh Circuit
21-2416
Ray O. Crowell Jr. v. Mark Sevier
Decided 8-8-2023

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

I. The state courts and federal courts resolution of Crowell's ineffective assistance of counsel claim was contrary to this Courts clearly established law 9

II. The lower courts unsupported assumptions that Crowell would have been convicted and sentenced to consecutive sentences is contrary to this Courts precedent in Strickland . . 14

III. The Indiana appellate court applied a rule that contradicts this Courts governing law by placing a higher burden on Crowell to establish prejudice 20

IV. The 7th Circuit has erroneously expanded this Courts precedent to post-conviction proceeding 22

CONCLUSION 23

INDEX TO APPENDIX

Description	Page Numbers
Seventh Circuit Appeals Court decision	1-10
United States District Court, Southern District of Indiana decision	11-22
Indiana Court of Appeals decision	23-36
Post-Conviction Relief Courts decision	37-45
Seventh Circuit Appeals Court order denying petition for rehearing	46
Seventh Circuit Appeals Court order granting Certificate of Appealability	47
Indiana Supreme Courts order denying petition to tranfer	48
Indiana Appeals Court order denying petition for rehearing	49
Petition under 28 U.S.C. §2254 for Writ of habeas corpus	50-66
Plea agreement	67-68

Motion to require petitioner to submit case by affidavit. 69-70
Motion to set hearing 71-74
Amended petition for post-conviction relief 75-78
Answer of Respondent to amended petition for post-conviction relief. . 79-84
Submission of case by affidavit 85-88
Request for issuance of subpoenas and supporting affidavit 89-92
Motion to set hearing 93-94
Response to submission of case by affidavit 95-102
Appellants brief in the Indiana appellate court 103-124
Transcript of miscellaneous motions hearing 125-134
Transcript of sentencing hearing 135-146
Chronological Case Summary of the post-conviction court . . . 147-153
Petition for rehearing and rehearing en banc to the 7th Circuit . . . 154-173

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

Anderson v. Neven, 797 Fed. Appx. 293 (9th Cir. 2019) 12

Barrit v. Sec'y. Dep't. of Corr., 968 F.3d 1246 (11th Cir. 2020) 12

Blalock v. Lockhart, 977 F.2d 1255 (8th Cir. 1992) 12

Bobadilla v. State, 117 N.E.3d 1272 (Ind. 2019) 10, 11, 20

Bosse v. Oklahoma, 580 U.S. 1 (2016) 9

Dunn v. Neal, 44 F. 4th 696 (7th Cir. 2022) 21

Ellis v. State, 744 N.E. 2d 424 (Ind. 2001) 19

Gish v. Hepp, 955 F.3d 597 (7th Cir. 2020) 12, 13

Hill v. Lockhart, 474 U.S. 52 (1995) 9-14, 17

Hohn v. United States, 524 U.S. 236 (1998) 9

Knight v. United States, 576 Fed. Appx. 4 (2nd Cir. 2014) 12

Lee v. United States, 582 U.S. 357 (2017) 10-13, 16, 17, 21-23

Premo v. Moore, 562 U.S. 115 (2011) 13

Shimel v. Warren, 838 F.3d 685 (6th Cir. 2016) 12

Stanbridge v. Scott, 791 F.3d 715 (7th Cir. 2015) 10

Strickland v. Washington, 466 U.S. 668 (1984) . . . 9, 14, 16, 17, 19, 21

Suarez v. State, 967 N.E 2d 552 (Ind. App. Ct. 2012) 10

Ulrey v. Zaveral, 483 Fed. Appx. 536 (10th Cir. 2012) 12

United States v. Kmet, 806 Fed. Appx. 104 (3rd Cir. 2020) . . . 12

United States v. Mooney, 497 F.3d 397 (4th Cir. 2007) 12

United States v. Solofa, 745 F.3d 1226 (D.C. Cir. 2014) . . . 12

United States v. Valdez, 973 F.3d 396 (5th Cir. 2020) 12

Williams v. State, 86 N.E.3d 185 (Ind. App. Ct. 2017) 19

Williams v. Taylor, 529 U.S. 362 (2000) 21

STATUTES AND RULES

Sixth Amendment of the United States Constitution . . . 3, 8, 9, 20

Indiana Appellate Rule 27 16

28 U.S.C. § 2253 8

28 U.S.C. § 2254(d)(1) 3, 21

OTHER

User Guide Fequently Asked Questions, Nat'l Inventory of Collateral Consequences . 10

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTRIORARI

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

OPINIONS BELOW

[X] For cases from Federal Courts:

The opinion of the United States Courts of Appeals appears in Appendix 1-10 to the petition and is

[X] reported at 77 F.4th 539; 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 11-22 to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[X] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix 23-36 to the petition and is

[X] reported at 139 N.E.3d 765; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the State of Indiana County of Allen court appears at Appendix 37-45 to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was August 8, 2023.

[ ] 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 12, 2023, and a copy of the order denying rehearing appears at Appendix 46.

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

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

[ ] For cases from the state courts:

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

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Appendix No. ____A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment of the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. § 2254(d):

An application for a writ of habeas corpus on behalf a person in state custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on a unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

On September 28, 2015, the State of Indiana charged Crowell with thirteen counts - including four counts of Class A felony child molesting (Counts I-IV), four counts of Class B felony sexual misconduct with a minor (Counts V-VIII), one count of Class C felony incest (Count IX), two counts of Level 5 felony incest (Counts X-XI), one count of Class C child molesting (Count XII), and one count of Class C felony sexual misconduct with a minor (Count XIII). App. 24. Crowell was appointed counsel, who proceeded to miss a significant flaw in the prosecution's case. There is no dispute that counsel failed to inform Crowell that six of the thirteen counts with wich he was charged, and one of the three counts to which he later plead guilty, were barred by the statute of limitations. App. 2-3, 42-43. Crowell "would not have pleadl[ed guilty] to a time-barred count," and "would have went to trial" had he been properly advised as to the statute of limitations defense available to him. App. 59.

Crowell's concerns with appointed counsel came to light during a miscellaneous motions hearing before the state court on February 18, 2016, in which Crowell sought permission to address the court directly. App. 125-134. Crowell informed the court that he wanted to terminate his appointed counsel's representation, stating that he believed counsel had provided false statements to him regarding his ex-wife and son. App. 128. Specifically, counsel had informed Crowell that his ex-wife and son were planning to testify for the prosecution, a statement Crowell believed to be false. Id. Crowell suspected that this false information was designed to encourage him to take the states offered plea. Id. While counsel maintained that the information he provided come from discussions with these witnesses and assured the court that he had not misrepresented anything to Crowell or urged him to forego his right to trial, Crowell still believed counsel had given untrue information. App. 128-129; 85-86.

Without directing any questions to Crowell himself, the court quickly denied his motion to terminate his appointed counsel, stating counsel was competent. App. 129. The court also suggested that Crowell's request "seem[ed] a little convenient," given that his trial was set for the following week. Id. The court informed Crowell he could plead guilty, but he was also entitled to trial by jury if he so chose. Id. Crowell said he was "not pleading." Id.

Before trial, however, on February 22, 2016, Crowell entered into the states offered plea agreement. App. 67-68. The plea agreement was the same one offered to Crowell at the February 18, 2016 motions hearing. Crowell agreed to plead guilty to one Class A felony, one Class B felony, and one Class C felony. Id. Under the terms of the agreement, Crowell would receive a fixed sentence of 30 years for the Class A felony, with 24 years executed in the Indiana Department of Corrections and six years suspended to probation, and concurrent terms of 20 years for the Class B felony conviction and eight years for the Class C felony conviction. Id. In exchange, the state agreed to dismiss the remaining ten counts. Id. Following a hearing on March 28, 2016, the court accepted the plea agreement and sentenced Crowell pursuant to the terms of the agreement. App. 135-146. At no time before the court accepted Crowell's plea agreement did counsel advise him that six of the counts with which he was charged - including the Class B felony count to which he pleaded guilty - were barred by the statute of limitations. App. 2, 42-43.

On February 3, 2017, Crowell filed a pro se petition for post-conviction relief ("PCR Petition"), which he amended on August 30, 2018. App. 75-78. Crowell argued that counsel rendered ineffective assistance by failing to advise him that all four of the Class B felony counts and two of the Class C felony counts with which he was charged were barred by the statute of limitations. App. 77. Crowell also argued that counsel was ineffective by creating a conflict of interest and failing to investigate evidence helpful to the defense. Crowell

contended that counsel created this conflict of interest by telling him that his ex-wife and son were working with the prosecution, something he believed to be untrue. App. 76. At the time, Crowell did not believe that anyone from the prosecution or counsel had spoken to his ex-wife and son. Id. Regarding the failure to investigate, Crowell believed that counsel had only contacted two of the six potential witnesses he had identified. App. 76-77. Crowell also argued that the trial court abused its discretion in failing to hold a hearing on the alleged conflict of interest. Crowell asked the court to issue subpoenas for his ex-wife, son, and trial counsel to testify at an evidentiary hearing. App. 89-94. The Indiana Superior Court ("PCR Court"), however, denied Crowell's request for a hearing on the conflict-of-interest claim, and the failure to advise of time-barred counts claim. App. 151. On December 7, 2018, the State submitted its response to case by affidavit. App. 95-102.

On May 22, 2019, the PCR Court then denied Crowell's PCR Petition. App. 37-45. While the court denied the petition, the court acknowledged that Crowell identified a genuine issue with respect to his first argument - that counsel had failed to inform him that six of the thirteen counts with which he was charged were barred by the statute of limitations. App. 42-43. The court nevertheless rejected Crowell's ineffective assistance of counsel claim because the plea agreement "provided for a much shorter aggregate sentence", and Crowell did not show that he was prejudice by counsel's failure to give him accurate advice. App. 43.

Crowell appealed the denial of his PCR Petition, again arguing that counsel was ineffective for failing to advise him of the time-barred charges and failing to assert a statute of limitations defense to those charges. App. 104. The Indiana Court of Appeals affirmed the denial of his PCR Petition. App. 23-36. The Court of Appeals did not address whether the failure to advise as to the time-barred charges or to raise a statute of limitations defense constituted deficient

performance on the part of Crowell's counsel. Instead, the court affirmed because Crowell had "advanced no special circumstances to support his claim that, had [counsel] advised him differently, [he] would have rejected the plea agreement as to the non-time-barred counts. App. 30. The Court of Appeals denied his pro se petition for rehearing, and the Indiana Supreme Court denied his pro se petition to transfer on April 16, 2020. App. 48, 49.

On May 20, 2020, Crowell filed a pro se petition for a writ of habeas corpus in the United States District Court for the Southern District of Indiana. App. 50-66. Crowell again claimed he was denied effective assistance of counsel because counsel failed to advise him of the six time-barred charges and failed to raise a statute of limitations defense.[1] App. 57-59. Crowell contended that his choice to proceed with a plea agreement was motivated by a "fear of going to trial the following day" while still being represented by appointed counsel. App. 55. Crowell believed, as he told the court in the February 18, 2016 hearing, that counsel had not been truthful with him regarding his ex-wife's and son's involvement in the prosecution's case and he further believed, as he raised in his PCR petition and subsequent appeal, that counsel had not conducted sufficient investigation into the witnesses he identified. Crowell asserted that "he would have proceeded to trial" if he had "been given a competent attorney." App. 54-55, 61.

---

[1] Crowell also argued that counsel created a conflict of interest by telling him his ex-wife and son were cooperating with the prosecution and failing to investigate the case by contacting the witnesses Crowell identified. The court dismissed these claims, characterizing Crowell's conflict-of-interest claim as "really just a disagreement", finding that Crowell had not exhausted his state court remedies with respect to his failure to investigate claim because he did not raise them in his appeal to the Indiana Court of Appeals. App. 53-55; App. 61; App. 18-20.

On July 6, 2021 the district court denied Crowell's pro se petition for a writ of habeas corpus. App. 11. Without addressing counsel's performance at all, the court held that Crowell had not "demonstrated prejudice from counsel's failure to advise him about the time-barred charges", as "counsel's errors likely had very little impact on Mr. Crowell's decision to plead guilty." App. 17. Accordingly, the court denied Crowell's habeas petition in its entirety and denied a certificate of appealability, concluding that "[n]o reasonable jurist could conclude that Mr. Crowell is entitled to relief on any of the issues he raised in his petition." App. 20.

On July 26, 2021 Crowell filed a pro se notice of appeal with the 7th Circuit Court of Appeals, which the court construed as an application for a certificate of appealability pursuant to 28 U.S.C. § 2253. App. 47. Once again, Crowell contended, among other things, that counsel was ineffective for failing to advise him as to the time-barred charges. The 7th Circuit Court of Appeals granted a certificate of appealability finding that Crowell had "made a substantial showing of the denial of his right to effective counsel under the Sixth Amendment." App. 47.

On August 8, 2023 the 7th Circuit Court of Appeals affirmed the district court because "[t]he state court reasonably concluded that contemporaneous evidence did not support a finding that if Crowell had been properly advised, he would have rejected the plea agreement." App. 8-9.

On August 18, 2023, Crowell then filed a pro se petition for rehearing and rehearing en banc, pointing out the courts conflict between its own precedent and this Courts precedent for claims of counsels failure to advise of a affirmative defense. App. 154-173. The 7th Circuit Court of Appeals denied Crowell's pro se petition for rehearing and rehearing en banc on September 12, 2023. App. 46.

Crowell now petitions this Court for a Writ of Certiorari

REASONS FOR GRANTING THE WRIT

I. The state courts and federal courts resolution of Crowells ineffective assistance of counsel claim was contrary to this Courts clearly established law.

The Sixth Amendment of the United States Constitution specifically states that the accused shall have assistance of counsel for his defense. This Courts decision in Strickland v. Washington, 466 U.S. 668 (1984) announced a two prong standard when analyzing a ineffective assistance of counsel claim under the Sixth Amendment. To succeed on a claim that counsel was ineffective, a petitioner must show that counsel's performance "fell below an objective standard of reasonableness" and "that the deficient performance prejudiced the defense." Id at 687-688. Counsel has a "duty to advocate the defendants cause" and "consult with the defendant on important decisions." Id at 688. One year later this Court decided Hill v. Lockhart, 474 U.S. 52 (1985) and did so to articulate what a defendant must show to establish that his trial counsel rendered ineffective assistance in advising him to plead guilty.

In Hill the first prong of Strickland remained the same. When it comes to prejudice "the defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. This Court went further and addressed how the inquiry changes where, as here, counsel failed to advise of a affirmative defense. In these circumstances this Court held that "the resolution of the prejudice inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." Id at 59. This Courts "decisions remain binding precedent until [this Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about continuing vitality." Bosse v. Oklahoma, 580 U.S. 1, 3 (2016) (per curiam) (citing Hohn v. United States, 524 U.S. 236, 252-253 (1998)). The prejudice inquiry announced in Hill for claims of counsel's failure to advise of a affirmative defense has never been reconsidered by this Court,

and no subsequent cases by this Court has ever raised doubt of its vitality in these claims. Therefore, Hill remains the precedent for the prejudice prong in these claims of counsel's failure to advise of a affirmative defense.

Six years ago this Court decided Lee v. United States, 582 U.S. 357 (2017) analyzing a claim of counsels failure to advise correctly of deportation consequences in a plea setting, and how in these claims of ineffective assistance of counsel, contemporaneous evidence and special circumstances are at center of the prejudice inquiry, even when a defendant has no viable defense. Id. at 369. All of the lower courts have decided Crowell's claim under this legal standard of counsel's failure to advise of deportation. However, this is not Crowell's claim because he is a United States citizen and cannot be deported, nor was his claim of a collateral consequence of his plea because he was convicted and sentenced to a charge the state was barred from prosecuting. In general, "[a] consequence is direct if it is imposed by the sentencing court as part of the authorized punishment, and included in the courts judgment." User Guide Frequently Asked Questions, Nat'l Inventory of Collateral Consequences, http://www.abacollateralconsequences.org/user-guide/#q02 (last visited June 26, 2015). See also: Stankbridge v. Scott, 791 F.3d 715, 719 (7th Cir. 2015).

The PCR Court applied the legal standard announced by the Indiana Appellate Court in Suarez v. State, 967 N.E. 2d 552 (Ind. Ct. App. 2012) deciding a case of counsels failure to advise of deportation and how these claims require a showing of "special circumstances that would have affected a reasonable persons decision to plead guilty." App. 44. The Indiana Appellate Court recited verbatim the PCR Courts decision but applied the Indiana Supreme Courts new precedent announced in Bobadilla v. State, 117 N.E.3d 1272 (Ind. 2019) deciding a case of counsel's failure to advise of deportation and how "the prejudice inquiry is a subjective test, turning upon

whether that particular defendant's special circumstances support that, had he been properly advised, he would have rejected the plea and insisted on going to trial." App. 28. Bobadilla was decided entirely on this Courts new application of counsel's failure to advise of deportation as announced in Lee. See; Bobadilla, 117 N.E.3d at 1284.

The Federal District Courts decision states that "[c]ourts will not find prejudice unless the defendant alleges 'special circumstances that might support the conclusion' that his decision to take the plea was caused by counsel's deficient performance." (quoting Lee, 582 U.S. at 365). App. 16. The District Court concluded that the Indiana Appeallate Court reasonably applied Supreme Court precedent on this issue. App. 18. The 7th Circuit Court of Appeals ("7th Circuit") affirmed the district court based on this Courts precedent announced in Lee. "The state court reasonably concluded that contemporaneous evidence did not support a finding that if Crowell had been properly advised he would have rejected the plea agreement." App. 8-9. As can only be discerned from the lower courts is that Lee has completely replaced Hill when it comes to the prejudice inquiry in guilty pleas no matter the claim of ineffective assistance. In fact, the only courts to even mention Hill was the district court and the 7th Circuit, and that was only done in passing. App. 6; 16.

All of these decisions by the lower courts are contrary to this Courts precedent announced in Hill, 474 U.S.. Although Hill was decided in the context of counsel's failure to advise of a collateral consequence of parole eligibility and how "[h]e alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." Id at 60. Hill also provided the legal standard for claims of counsel's failure to advise of a affirmative defense which is precisely Crowell's claim. "[T]he resolution of the prejudice inquiry [in Crowell's case] depend[ed]

largely on whether the affirmative defense likely would have succeeded at trial." Id at 59. All circuit appeal courts have acknowledged that this is the correct legal standard for the prejudice prong in these claims of ineffective assistance of counsel's failure to advise of a affirmative defense. See; Knight v. United States, 576 Fed. Appx. 4, 6 (2nd Cir. 2014); United States v. Kmet, 806 Fed. Appx. 109, 114 (3rd Cir. 2020); United States v. Mooney, 497 F.3d 397, 401 (4th Cir. 2007); United States v. Valdez, 973 F.3d 396, 403 (5th Cir. 2020); Shimal v. Warren, 838 F.3d 685, 698 (6th Cir. 2016); Blalock v. Lockhart, 977 F.2d 1255, 1257 (8th Cir. 1992); Anderson v. Neven, 797 Fed. Appx. 293, 294 (9th Cir. 2019); Ulrey v. Zavaral, 483 Fed. Appx. 536, 544 (10th Cir. 2012); Barrit v. Sec'y. Dept. of Corr., 968 F.3d 1246, 1253-1254 (11th Cir. 2020); United States v. Solofa, 745 F.3d 1226, 1229 (D.C. Cir. 2014).

The 7th Circuit that affirmed the denial of Crowells habeas corpus petition had also recently affirmed that the correct legal standard when a claim is that counsel failed to advise of a affirmative defense is that announced in Hill, 474 U.S.. In the case of Gish v. Hepp, 955 F.3d 597 (7th Cir. 2020), just like Crowell, his court appointed appellate counsel argued before the 7th Circuit under the wrong legal standard of Lee. The court quickly corrected this in Gish, and held that "[t]he standards announced in Hill map directly into Gish's claim and put him under a two fold showing." Id. at 605. First, the 7th Circuit explained that the petitioner had to show that trial counsel performed deficiently in failing to investigate the defense. Id. And second, he "had to demonstrate that there existed a reasonable probability that had counsel investigated the defense, he would have rejected the plea offer and proceeded to trial with a likelihood of succeeding on the defense." Id at 605. This follows the legal standard announced by this Court in Hill for these types of claims. The 7th Circuit went further to affirm that Lee, 582 U.S

is not controlling in these types of claims, stating that, "[w]e decline Gish's invitation to deviate from the prejudice inquiry the Supreme Court articulated in Hill." Gish, 955 F.3d at 607. In the case of Crowell the 7th Circuit completely deviated from this Courts precedent announced in Hill. This Court has never made a connection of the legal standard for claims of counsel's failure to advise of a affirmative defense, and that of a counsel's failure to advise of collateral consequences such as deportation. It would be absurd to hold that a defendant who's counsel did not advise them of a affirmative defense to a crime they were convicted and sentenced to in a plea agreement must also show some kind of special circumstances that they placed particular emphasis on counsel to defend them of the crime. Yet, this is exactly the precedent the lower courts have set in Crowell's case.

This Court in Lee acknowledged the seperation of these claims. "The dissent contends that a defendant must also show that he would have been better off going to trial. That is true when the defendant's decision about going to trial turn on his prospects of success and those are affected by the attorney's errors - for instance, where a defendant alleges that his lawyer should have but did not seek to surpress an improperly obtained confession. Not all errors, however, are of that sort." Lee, 582 U.S. at 365 (citing Premo v. Moore, 562 U.S. 115, 118 (2011)); cf., e.g., Hill, 474 U.S. at 59 (discussing failure to investgate potentially exculpartory evidence). It must logically follow that this Courts holding in Lee did not modify Hill's prejudice inquiry in cases of counsels failure to advise of a affirmative defense.

None of the lower courts confronted the first prong of whether counsel was deficient or not. Even though the 7th Circuit made it a part of the certificate of appealability. App. 47. However, the state conceeded that counsel was deficient for

not advising of the time-barred counts in its response to Crowell's amended PCR Petition, and during briefing in the 7th Circuit. App. 80, It is uncontested that counsel was deficient for not advising Crowell of a statute of limitations defense that would have succeeded on nearly half the charges had counsel acted competently. To be sure, "even if a defendant shows that particular errors of counsel were unreasonable [] the defendant must show that they actually had an adverse effect on the defense," Hill, 474 U.S. at 58 (quoting Strickland, 466 U.S. at 693). Counsel's failure cannot be seen under any other light then having a direct adverse effect on Crowells defense. Had counsel acted competently the time-barred counts would have been dismissed well before the state even offered a plea, and Crowell would not have been convicted and sentenced on Count 5. In fact, counsel's advise should have been to reject the plea due to all the untimely counts it contained. Counsel's failure to even perform the very basic investigation of the charging information should cast serious doubt that counsel in good faith investigated the facts of the case, or witnesses. Crowell certainly had a constitutionally protected right to a defense that his trial counsel failed to discover and failed to advise of. Denying relief to defendants in Crowell's position only generates dark incentives for prosecutors to threaten no-holds-barred prosecution on even untenable charges. The lower courts complete avoidance to address counsel's performance sends a clear message that it is now acceptable for counsel to forgoe investigating the charging information and need not advise his client of a affirmative defense.

II. The lower courts unsupported assumptions that Crowell would have been convicted and sentenced to consecutive sentences is contrary to this Courts precedent in Strickland.

The lower courts have all assumed that Crowell would have been

convicted of all timely counts and would have received consecutive sentences. The record that was before the PCR Court contained absolutely no evidence, confessions, or witness statements to support any of the alleged crimes. Before a evidentiary hearing was scheduled the state moved to have the case submitted by affidavit in the PCR Court. App. 69-70. Throughout the entire proceedings the state never submitted a affidavit of any witness, nor did the state present or even allege evidence to support any of the charging information to the PCR Court. Crowell moved for a evidentiary hearing twice so both sides could submit evidence and testimony of witnesses in the PCR Court. App. 71-74; 93-94. Crowell also submitted a request for subpoenas and supporting affidavit for his ex-wife, son, and trial counsel to testify at a evidentiary hearing to support his claims of ineffective assistance of counsel. App. 89-94.

The states entire argument in the PCR Court was of Crowell's possible sentencing exposer if he were convicted on all timely counts. However, the state made no argument that convictions were more likely then not. In fact, the state never even suggests that it had a strong case against Crowell, or that there existed overwhelming evidence of guilt, and neither does any decision in the state courts because the states case was extremely weak. App. 27-36; 37-45; 95-102. The only reference to the states case was the PCR Courts finding, and the Indiana Appellate Courts verbatim adoption that "Mr. Crowell has shown no obvious weaknesses in the state's case." App. 30. This finding completely ignores the fact that there was a very obvious weakness in the states case because on the face of nearly half the charges the state filed, it could not prosecute due to the statute of limitations. If the state had even a moderate case against Crowell the state would have certainly presented at the very

least a argument or evidence of this to the PCR Court when it had the opportunity.[2] This Court has stated that as a general matter it makes sense that "a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a plea." Lee, 582 U.S. at 366-367 (emphasis added) (internal citation omitted). It must logically follow that a defendant that plead guilty to charges with no support of evidence can certainly show prejudice. This is in-line with this Courts holding that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors then one with overwhelming record support." Strickland, 466 U.S. 696. As stated above, none of the lower courts have even suggested that the states case was strong against Crowell, or that he was more then likely to be found guilty.

The 7th Circuit ended its decision suggesting that this Court has never held that courts may not assume guilt. "More important, Crowell identifies no Supreme Court precedent establishing that the state appellate court committed legal error beyond any fair-minded disagreement when it guaged Crowells likely decision by assuming he would have faced convictions and consecutive sentences on all timely counts" App. 9. The lower courts have all ignored that this Courts precedent specifically warns lower

---

[2] During brieting in the state appellate court the state illegally filed a copy of the probable cause affidavit that was never stipulated as factual in the trial court and was never submitted as evidence to the PCR Court, see; Indiana Appellate Rule 27 (record on appeal shall consist of clerks record and all proceedings before the trial court). The Indiana Appellate Court rightfully ignored the probable couse affidavit in its decision, and the PCR Court made no mention of any information it contained because it was never presented to the PCR Court. Even if the state had submitted the probable cause affidavit in the PCR Court it only contained a allegation that may have supported one of the Class A felonies. The remaining three Class A felonies were never even alleged by the alleged victim. Furthermore, the probable cause affidavit contains multiple levels of hearsay.

courts of assuming guilt or innocents. "As we explained in Strickland v. Washington, supra, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the idiosyncrasies of the particular decisionmaker." Hill, at 59-60 (quoting Strickland, at 695)(internal citations omitted). Therefore, the question is, could a reasonable court or jury applying the law to the facts of the case find the defendant guilty. See; Lee, 582 U.S at 380 (Justice Thomas dissenting, Alito concurring). In the case of Crowell that answer is no.

The PCR Court concluded, and the state appellate court emphasized, that Crowell would not have been able to provide any credible argument that he would have rejected the plea and gone to trial on the non-time-barred counts. App. 29; 43. This conclusion is contradicted by the fact that Crowell did reject the plea at the motions hearing while he was completely unaware that nearly half the charges against him were time-barred, and while facing a even more severe penalty then was even possible. App. 129. To be sure, Crowell did enter into the states offered plea four days later, but once again, the record contradicts the state courts conclusion that Crowell took the plea to mitigate his sentence. If Crowell was simply looking to mitigate his sentence because the state had some kind of overwhelming evidence (which it did not) against him, he would have certainly accepted the plea at the motions hearing. In Crowell's case-by-affidavit he clearly states that he plead guilty because he felt "he would not be given proper representation by [trial counsel] or a fair hearing by the court." App. 87. In other words, if Crowell could not trust his court appointed counsel to be truthful with him about witnesses, how can he trust that counsel is going to advocate his defense.

The trial court denied Crowell's motion to dismiss counsel without even allowing Crowell the opportunity to inform the court

what exactly counsel told Crowell or who exactly the witnesses were, and the trial court went as far as suggesting that Crowell was making false statements to post-pone trial. App. 129. Since the trial court wasn't willing to give Crowell a fair opportunity to be heard at a motions hearing, we can conclude this would be no differnt at trial. Furthermore, the trial court was advocating for counsel, stating that trial counsel was certainly competent counsel. Id. Which even by the states own admittance trial counsel was not. Crowell's choices at the time he plead guilty was to either go to trial with counsel he has no trust in to advocate his defense and is misrepresenting witnesses, or accept the states offered plea and fight it from there since trial counsel refused to withdraw and the trial court refused to dismiss counsel when Crowell brought the conflict and breakdown between himself and counsel to the courts attention, Crowell only wanted a fair opportunity to defend himself to a jury to prove he did not commit these crimes, but he knew that would not happen with his appointed counsel. As it turns out Crowells suspicions of counsel's incompetence was correct.

The PCR Courts final conclusion was that since consecutive sentences would have been imposed had Crowell went to trial and was convicted on all timely counts he was not prejudiced by counsel's failure to advise him of the time-barred counts. App. 43. Consecutive sentences were based on the PCR Courts personal opinion that due to "the great length and severity of Mr. Crowell's course of abusive conduct as discribed by the victim at sentencing, it cannot be imaigened that concurrent sentences would have been found appropriate in any event" App. 43. The Indiana Appellate Court even placed emphasis on this in its decision, and both federal courts make this a central point of their decisions. App. 30; 17; 7-8. This conclusion has no merit because even after the trial court heard the victim impact statement the court

accepted the plea and imposed concurrent sentences per the plea agreement, exactly what the PCR Court stated would not "have been found appropriate in any event." App. 30 (emphasis added). The sentencing court in Crowell's case made no hesitation, or remarks against, imposing concurrent sentences and even agreed to suspending 6 years with only 5 years on probation after hearing the victim impact statement.[3] App. 143-145. The state felt that a 24 year excuted sentence was adequate punishment, as did the trial court by its acceptance of the plea agreement. Would the state have seriously argued for a 220 year sentence if Crowell had been tried and convicted in order to punish him for exercising his constitutional rights and putting the state through the bother of a trial? Would that not been deemed vindictive? More important, is this Courts precedent that "[e]vidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example a particular judges sentencing practices, should not be considered in the prejudice determination." Strickland, 466 U.S. at 695. The 7th Circuit even acknowledged that "[w]e do not know from the record before us what a realistic sentence would have been if he had been convicted on all timely counts." App. 8 (emphasis added). As stated above, the record clearly shows that even after the trial court heard the victim impact statement, the court had no issue with imposing concurrent sentences. Notwithstanding, that even if Crowell was convicted on all counts, competent counsel would have certainly brought to the trial courts attention the states offered plea and sentence it felt was appropriate

---

[3] Indiana trial courts can, and have, rejected concurrent sentencing pleas after hearing victim impact statements. See; Williams v. State, 86 N.E.3d 185 (Ind. App. Ct. 2017) (court rejected plea at sentencing after hearing victim impact statement because the court was not comfortable imposing concurrent sentences); Ellis v. State, 744 N.E.2d 424 (Ind. 2001) (court rejected plea after hearing victim impact statement due to sentences being concurrent).

in the agreement.

Crowell's concerns were not of consecutive or concurrent sentences, because if they were he would have accepted the plea when first offered. Crowell's concerns were entirely of getting a fair trial with competent counsel. The Sixth Amendment guarantees a defendant effective assistance of counsel for his defense, and Crowell received neither. The lower courts decisions have stripped the Sixth Amendment of its very meaning.

III. The Indiana appellate court applied a rule that contradicts this Courts governing law by placing a higher burden on Crowell to establish prejudice.

The state appellate courts decision applied a legal standard that Crowell had to show he would have rejected the plea and proceeded to trial. First, the state court explained the legal standard it applies to all guilty pleas involving ineffective assistance of counsel. "In analyzing prejudice in the context of a guilty plea, we review such ineffective assistance of counsel claims under Bobadilla v. State, 117 N.E. 3d 1272, 1287 (Ind. 2019). '[T]he prejudice inquiry is a subjective test, turning upon whether that particular defendants special circumstances supports his claim that, had he been properly advised, he would have rejected the plea and insisted on going to trial.' Bobadilla, 117 N.E. 3d at 1287." App. 28. Second, the state appellate court made its conclusion that "[a]lthough Crowell states that he would have rejected the plea agreement and proceeded to trial Crowell has advanced no special circumstances to support his claim that, had [trial counsel] advised him differently, Crowell would have rejected the plea agreement." App. 30. The state court completely mischaracterizes this Courts legal standard in its decision. At no time in the state appellate courts decision did it identify the correct legal standard that Crowell only needed to show a reasonable probability that had he been advised correctly that he would have rejected the plea and gone to trial.

As this Court explained in Williams v. Taylor, 529 U.S. 362, 405-406 (2000):

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. Take, for example, our decision in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 802 L. Ed 2d 674 (1984). If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the result of his criminal procedure would have been different, that decision would be "diametrically different", "opposite in character or nature" and "mutually opposed" to our clearly established precedent because we held in Strickland that the prisoner need only demonstrate a "reasonable probability that... the result of the proceeding would have been different." Id at 694. ... [In that scenario], a federal court will be unconstrained by §2254(d)(1) because the state-court decision falls within that provisions "contrary to" clause.

Therefore, the 7th Circuit could not have concluded that the state court reasonabley applied this Courts legal standard as it did. In fact, the 7th Circuit has taken issue with the Indiana appellate court for deciding a case in this very way. In Dunn v. Neal, 44 F. 4th 696, 702-703 (7th Circuit 2022) the 7th Circuit concluded that although the state court identified the correct legal standard, it mischaracterized the legal standard at all critical points in its decision, therefore, the state courts decision was contrary to this Courts precedent. Unlike Dunn were the state court did identify the correct legal standard but did not apply it correctly at all critical points, the state court in Crowell's case at no time in its decision did it even identify the correct legal standard of this Court.

Not only was the state courts decision "contrary to" this Courts precedent when it applied Lee to Crowell's claim of ineffective assistance of counsel, but it was also "contrary to" this Courts

standard that a prisoner only need show a reasonable probility the result of the proceeding would have been different.

IV. The 7th Circuit has erroneously expanded this Courts precedent to a post-conviction proceeding.

The 7th Circuits decision concluding that the state courts decision was reasonable was as follows:

> As evidence that he would have gone to trial if properly advised, Crowell points to the pretrial hearing, in which he asserted that he would not plead guilty. That assertion does not deserve much weight. Just four days after the hearing, Crowell plead guilty under the agreement. Crowell also cites his federal habeas petition and his appellate brief in the post-conviction proceedings. In both, he insisted that he would not have plead guilty to a time-barred count if he had known of the bar. <u>These statements were not before the state court hearing his petition for post-conviction relief, however, and they are precisely the type of post hoc assertions on which courts may not, and certainly need not, solely rely.</u> See <u>Lee</u>, 582 U.S. at 369. The state court reasonably concluded that contemporaneous evidence did not support a finding that if Crowell had been properly advised, he would have rejected the plea agreement.

(emphasis added) App. 8-9.

This Courts holding in <u>Lee</u> was in the context of defendants who were not advised of collateral consequences of deportation and how courts should approach the prejudice inquiry. "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendants expressed preferances." Lee, 582 U.S. at 369. Its clear in this Courts holding of <u>Lee</u> that in these inquirys lower courts are to look at a defendants expressed preferences in the proceedings that were in the trial court. The 7th Circuit on its

own erroneously expands this Courts holding to include post-conviction relief proceedings. Although Crowell does not spicifically state in the PCR Court that he would not have plead guilty to a time-barred count, it is clear that is the import of his claim. In Crowells case-by-affidavit he states that his plea was neither "knowing or voluntary" due to trial counselr deficient performance. App. 87. More important, the state appellate courts decision even acknowledged that Crowell stated "that he would have rejected the plea agreement and proceeded to trial." App. 30. Contrary to the 7th Circuits decision the state appellate court actually denied Crowell relief because he "advanced no special circumstances to support his claim" that he would have rejected the plea. App. 30. As discussed previously the application of Lee by the state court to Crowells ineffective assistance of counsel claim is contrary to this Courts precedent. Even assuming that Lee is the correct legal standard (which it is not) contemporaneous evidence from the motions hearing shows that Crowell's expressed preferance was to have his court appointed counsel dismissed and not plead guilty. (emphasis added).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

Ray O Crowell

Petitioner, Pro se

Ray O. Crowell Jr.

Date: December 7, 2023

NOTARIZED STATEMENT OF MAILING
BY AN INCARCERATED PERSON

I declare under penalty of perjury under the laws of the United States of America that on the 7th day of December, 2023, the original of the MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI, with Appendices, were personally handed to the appropriate staff at the New Castle Correctional Facility for deposit in the United States Mail, First-Class postage prepaid, to the United States Supreme Court, 1 First St. NE, Washington, DC 20543-0001.

Ray O Crowell

Petitioner, *pro se*

Ray O. Crowell Sr. (PRINTED NAME)

New Castle Correctional Facility
IDOC # 259697
P.O. Box A
New Castle, IN 47362-1041

STATE OF INDIANA)
) SS: NOTARIZATION
COUNTY OF HENRY)

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for the above State and County, on this 7th day of December, 2023.

Jennifer A. Smith

Notary – Signature

Jennifer A. Smith

Notary – Printed Name

04/19/2024

My Commission Expires

County of Residence

NOTARY PUBLIC SEAL INDIANA
JENNIFER A. SMITH
Notary Public, State of Indiana
Henry County
Commission Number 683913
My Commission Expires
April 19, 2024