No. _____

IN THE
Supreme Court of the United States

TIMOTHY RONK,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition for Writ of Certiorari
to the Mississippi Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the failure of death penalty defense counsel to seek funding for an independent expert, coupled with the failure to challenge the State's flawed expert testimony before or during trial, constitute a violation of the defendant's Sixth Amendment right to effective assistance of counsel, when those omissions left key elements of the prosecution's evidence in both the guilt and sentencing phases unchallenged?

2. Can a novel procedural rule be used by a state court in a death penalty case to preclude review of a federal constitutional claim?

PARTIES TO THE PROCEEDING

The parties are named in the caption. The Petitioner, Timothy Ronk, was the Petitioner below. The Respondent is the State of Mississippi, Respondent below.

STATEMENT OF RELATED PROCEEDINGS

Trial Court Proceedings

Petitioner was indicted for capital murder in *State of Mississippi v. Timothy* Ronk, In the Circuit Court of Harris County, Mississippi; Cause No. B2401-2009-00434. He was convicted of capital murder and armed robbery and sentenced to death plus thirty years imprisonment.

Appellate Proceedings

Petitioner appealed his conviction and death sentence directly to the Supreme Court of Mississippi. The docket number of the direct appeal was No. 2011-DP-00410-SCT. Petition's direct appeal was denied, *Ronk v. State,* 172 So.3d 1112 (Miss. 2015), as was Petitioner's motion for rehearing. Petitioner then sought relief from the United States Supreme Court by petition for writ of certiorari, but the petition was denied, *Ronk v. Mississippi*, 578 U.S. 926 (2016).

Initial State Post-Conviction Proceedings

Petitioner filed his first post-conviction petition in the Supreme Court of Mississippi. The docket number for the post-conviction proceeding was 2015-DR-01373-SCT. Petitioner was denied post-conviction relief, *Ronk v. State*, 267 So.3d 1239 (Miss. 2019), as well as rehearing. No evidentiary hearing was held in the initial state post-conviction proceedings.

Federal Habeas Corpus Proceedings

Petitioner then initiated federal habeas corpus proceedings in the United States District Court for the Southern District of Mississippi, Southern Division, the Honorable Halil Suleyman Ozerden, presiding. The Civil Action Number for those habeas proceedings is 1:19-cv-346-HSO. Petitioner's federal habeas

proceedings are stayed pending the resolution of the issues raised in this proceeding.

Second State Post-Conviction Proceedings

While Petitioner was engaged in the federal habeas corpus proceedings, he filed his second post-conviction petition in the Supreme Court of Mississippi. The docket number for the second post-conviction proceeding was 2021-DR-269-SCT. Petitioner was denied post-conviction relief, *Ronk v. State*, 391 So.3d 785 (Miss. 2024), as well as rehearing. No evidentiary hearing was held in the second state post-conviction proceedings. It is from the denial of the second post-conviction petition that Petitioner seeks certiorari review in this matter.

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Timothy Ronk, respectfully submits this petition for a writ of certiorari to review the judgment of the Mississippi Supreme Court.

OPINION BELOW

The Mississippi Supreme Court opinion is published at *Ronk v. State,* 391 So.3d 785; 2024 Miss. LEXIS 6 (Miss. 2024). App. at 1-67.

JURISDICTION

The Judgment was entered by the Mississippi Supreme Court on January 11, 2024. App. at 1-67. Petitioner sought rehearing, which was denied on July 18, 2024, within 90 days of the filing of this Petition. App. at 68.

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

Further, review is proper under Supreme Court Rule 10(c), which provides that certiorari review is considered where "a state court…has decided an important federal question in a way that conflicts with relevant decisions of this Court."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides: "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 accusation; 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 defence." U.S. Const. amend. VI.

The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution applies to the states by way of Section 1 of the Fourteenth Amendment to the U.S. Constitution[1], which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, Section 1.

STATEMENT OF THE CASE

The Sixth Amendment provides an accused the right to effective assistance of counsel. In this death penalty case, Petitioner's trial counsel failed to investigate forensic issues in the case that went to the heart of whether the offense was even eligible for the death penalty, failed to obtain independent expert assistance, and failed to challenge flawed and false testimony of the prosecution's expert witness. Because of counsel's failures, the Petitioner was unjustly convicted of capital murder and sentenced to death. These failures were recently uncovered yet the Mississippi Supreme Court held review of them to be barred using a novel procedural rule.

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[1] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

A. Factual Background.

Timothy Ronk was indicted for capital murder of Michelle Craite and armed robbery. Ronk and Craite had been in a personal relationship and the alleged crimes occurred at her home. At its core, the prosecution alleged that Ronk stabbed Craite, took items from her house, and then set the house on fire. Ronk claimed he stabbed Craite in self-defense and then panicked, setting the fire after the fact to cover his involvement and then fled.

Under Mississippi law, capital murder is defined by statute. *See Miss. Code Ann.* § 97-3-19(2). In this case, the capital murder charge was based upon a theory of felony murder: that Ronk killed Craite while in the commission of the felony crime of arson. *See Miss. Code Ann.* § 97-3-19(2)(e). Without the underlying felony of arson, the charge against Ronk related to the killing could not be capital murder. It could have been deliberate design murder or some other lesser killing offense, but not capital murder that made the case eligible for the death sentence.

Thus, the timing of the fire in relation to Craite's death was crucial to the State's theory and case. If Craite was dead at the time the fire was started (for instance, to cover up a killing) then the State could not prove the essential element that Craite died during the course of the commission of the underlying felony of arson. At a bare minimum, this fact would substantially alter the jury question and could have led to at least one juror voting not guilty on the charge of Capital Murder or the jury finding Ronk guilty of a lesser offense that was not eligible for the death penalty. The fire and its timing were also used during the sentencing phase in support of aggravating circumstances.

Simply put, as in many capital murder cases based upon a felony murder theory, the underlying felony and its connection to the death of the victim was one of the most crucial aspects of the case. It is one of the foremost issues that can change the course of a death penalty case. But if overlooked by defense counsel, it is an issue that can result in flawed convictions and death sentences. That is what has happened in the case of Timothy Ronk.

The State's forensic evidence in support of the underlying felony's connection to Craite's death was flawed and incorrect. Yet it went unchallenged by defense counsel, chiefly because trial counsel did not secure expert assistance to review the State's opinions, provide expert opinions independent from the State, assist in providing cross-examination material to defense counsel, and otherwise provide assistance to show the judge and jury the flaws in the State's forensic evidence. Unfortunately, those failures extended past trial and into the post-conviction stage. Prior to the case reaching the federal habeas corpus stage, no attorney acting on behalf of Ronk had ever investigated the forensic issues related to the underlying felony or consulted with an independent expert. As detailed below, the failure to do those things has profoundly prejudiced Mr. Ronk.

Forensic pathologist Dr. Paul McGarry was the State's star witness during Petitioner's trial. He was used to tie the arson to the killing by opining that Craite was alive when the fire was set. He testified that Craite, "in spite of her wounds and her internal bleeding and collapsed lungs, was still breathing and alive in the fire." Tr. 524. He further stated that Craite's blood "[a]ctually contained a high level [of carbon monoxide], which he said supported his opinion that she was alive while the fire burned. *Id.*

On cross-examination, Dr. McGarry noted that "She's making respiratory efforts but they are not normal, they are not effective, but she is breathing in some of the gas of the surrounding area and absorbing the carbon monoxide from that gas." Tr. 529.

Petitioner's trial counsel filed a pretrial motion asking the trial court "to authorize his attorney to procure the services of an expert or experts, whether they are forensic, medical, or any other type of expert, that might be needed to assist the Defendant's attorney in the preparation for trial of this case." Tr. 62. At trial counsel's request, the trial court entered an order "reserve[ing] this motion should the need for any experts arise." Tr. 104. Petitioner's trial counsel also requested, and was granted, funds to hire a psychologist to evaluate Petitioner prior to trial. Tr. 78; 92-93. Petitioner's trial counsel, however, never sought funding to hire an independent forensic pathologist to assist in reviewing Dr. McGarry's autopsy report and in addressing the most difficult issue in Petitioner's case; namely, whether Craite was still alive when she was burned in the house fire. This failure is admitted in the affidavit of one of Mr. Ronk's trial attorneys, which was presented to the Mississippi Supreme Court.

In a case based on felony murder that relied exclusively on the opinion of a State expert to connect the underlying felony to the death of the victim, investigating those issues and obtaining independent expert assistance are some of the most basic tasks of competent counsel.[2] They were not done here by

[2] The 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES emphasize the central importance of

Ronk's trial counsel and the State's star witness made his desired impact: Ronk was convicted of capital murder and sentenced to death.

As detailed below, it was discovered for the first time in Ronk's federal habeas corpus proceedings that the forensic evidence offered by Dr. McGarry as to the timing of Craite's death relative to the fire was incorrect and based on flawed science. Dr. James Lauridson, a forensic pathologist, opined that Dr. McGarry's opinions were incorrect and that the evidence supported that Craite died from her stab wounds and was dead at the time the fire started.

Ronk's trial counsel did nothing to investigate or seek expert assistance to rebut Dr. McGarry's flawed and crucial testimony. And despite knowing from the direct appeal opinion the centrality of Dr. McGarry's testimony for the State's case both as to guilt and sentencing issues, Petitioner's first state post-conviction counsel also did not retain an independent forensic pathologist to review Craite's autopsy report and Dr. McGarry's trial testimony. In an Affidavit, Mississippi Office of Capital Post-Conviction Counsel Senior Staff Attorney Alexander D.M. Kassoff said: "Prior to filing Mr. Ronk's initial and supplemental capital post-conviction petitions, we did not investigate certain facts pertaining to forensic issues

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investigation of guilt and sentencing issues in death penalty cases. *See* Guideline 10.7 (Investigation). ABA Guideline 10.7 includes a directive for counsel to consult "appropriate experts" as part of a competent investigation. This Court has consistently held that the ABA Guidelines are to be used when "determining what is reasonable" when examining claims of ineffective assistance of counsel. *See, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

in Mr. Ronk's case. For example, we did not consult with or retain a forensic pathologist to review Ms. Craite's autopsy report and Dr. Paul McGarry's trial testimony."

Petitioner's current counsel have consulted with forensic pathologist James R. Lauridson, M.D. Dr. Lauridson is the former Chief Medical Examiner for the Alabama Department of Forensic Sciences. According to an Affidavit from Dr. Lauridson that was submitted to the Mississippi Supreme Court, laboratory test results from Garden Park Medical Center results "reveal that Michelle Craite's carboxyhemoglobin level was 5.5. Normal carboxyhemoglobin levels range anywhere from 0 percent to as high as 10 percent in smokers. Craite's 5.5 carboxyhemoglobin level was within normal limits for the general population and was not an indication of exposure to smoke or products of combustion. Dr. McGarry's testimony that Craite's carboxyhemoglobin level was abnormally high was factually incorrect." Although the State provided the Garden Park Medical Center lab report to Petitioner's trial counsel prior to trial, Petitioner's trial counsel did not renew the motion for funds to retain a qualified forensic pathologist after receiving it, nor did he refer to the report when he cross-examined Dr. McGarry. Tr. 526-31.

Not only did Dr. McGarry make false statements about the level of carbon monoxide in Craite's blood; he also falsely testified that she was alive when Petitioner set her house on fire when he stated that "she was, in spite of her wounds and her internal bleeding and her collapsed lungs, was still breathing and alive in the fire." Tr. 524. Although trial counsel attempted to challenge Dr. McGarry on how he could possibly know that Craite was still breathing and still

alive during the fire, he did not rely upon any extrinsic evidence when trying to make these points to the jury. Tr. 527-31.

According to Dr. Lauridson's Affidavit, Dr. McGarry's testimony about Craite being alive when the fire was set was also false:

> Dr. McGarry's testimony that the blistering and burning which occurred in Ms. Craite's airway indicated she was still alive when Mr. Ronk set her house on fire was highly subjective. The deteriorated condition of Ms. Craite's airway can be attributed to the burned state of her body when it was found.
>
> To a reasonable degree of medical certainty, Ms. Craite's carboxyhemoglobin level was within normal limits and the burning and blistering that occurred in her airway can be attributed to the post-mortem burning of her body. Ms. Craite died as a result of being stabbed.

For its part, the State relied upon Dr. McGarry's testimony to emphasize to the jury that Craite was still alive when Petitioner set her house on fire. In its initial closing guilt phase argument, the State contended:

> And you know from the testimony of Dr. McGarry that she was alive when the fire was set. He testified that she had carbon monoxide in her blood when he performed the autopsy. That her organs were that bright cherry red color. He did the test. And even more telling the inside of her mouth, her tongue and down her

> windpipe were burned from the heat of that fire. You know she felt that pain, you know she was breathing.

Tr. 639-40.

The State further emphasized these points during its rebuttal closing guilt phase argument:

> As to Dr. McGarry's credibility that is relevant. Not only did he find the cherry colored specimens of her blood, her organs, but the lab also confirmed independently of him there were high levels of carbon monoxide in her mouth and tongue and the throat, the tissues, the mucosa were burned. Not only did the heat and the smoke travel to her mouth and to her throat, it didn't stop there. It went into her lungs and was sufficiently metabolized through her lungs and heart that it went to her organs…**That's the proof before you, and it's not been contradicted.**

Tr. 656 (emphasis added).

Once the jury found Petitioner guilty of capital murder, the State again reiterated Dr. McGarry's false testimony during its initial penalty phase closing argument:

> Go back to the scene and think about what Michelle felt as she fell to the floor. You know it was painful. You heard Dr. McGarry tell you that her lungs were collapsed and that one hit an aorta. As she fell to the floor do you think she saw his feet walk away leaving the room? Do you think she saw his feet come back? Do

> you think she smelled the gasoline? Do you think she was terrified knowing that she could not get up off the floor, that she could not get up? Do you think she heard the roar of the fire as it came racing down the hallway towards her? Don't forget the facts.

Tr. 735.

Based on Dr. McGarry's false testimony, the State requested, and was granted, a jury instruction stating that Craite's death was especially heinous, atrocious, or cruel. Tr. 707. In support of that proposed sentencing instruction, the State said: "The capital offense was especially heinous, atrocious or cruel **to be supported by the testimony of Dr. McGarry**." Tr. 707 (emphasis added). The jurors found this aggravating factor when sentencing Petitioner to death. Tr. 746.

B. Procedural History Before the Case at Issue.

On June 1, 2009, a Harrison County Grand Jury returned a two-count indictment charging Timothy Ronk with the Capital Murder of Michelle Craite on or about August 26, 2008, with an underlying offense of arson. A second count charged Ronk with Armed Robbery on that same date.

At trial, jury selection commenced on October 4, 2010, and the culpability phase of the trial was completed with a guilty verdict on October 7, 2010. The penalty phase was held on October 8, 2010, and resulted in a jury verdict of death. Throughout the trial, Ronk's first chair counsel was suffering from the effects of an ongoing serious illness and at times required accommodations including being absent from proceedings. He has since died. Ronk timely filed his Motion for a New Trial or Judgment Notwithstanding the Verdict on October 15, 2010, which was handled

by second chair counsel in the absence of first chair counsel and denied on February 28, 2011. Ronk timely appealed.

On May 7, 2015, Mr. Ronk's conviction and sentence were affirmed by the Mississippi Supreme Court on direct appeal. A timely filed petition for rehearing was denied on September 17, 2015. *Ronk v. State*, 172 So.3d 1112 (Miss. 2015) (*Ronk I*). This Court denied certiorari on April 18, 2016. *Ronk v. Mississippi*, 578 U.S. 926 (2016).

Ronk's first application for post-conviction relief was filed in the Mississippi Supreme Court on September 23, 2016. It raised no issues related to the forensic science of the timing of the fire relative to Craite's death, either substantively or with regard to trial counsel's failures to pursue such evidence. On January 17, 2019, the Mississippi Supreme Court denied the post-conviction application. A timely-filed Motion for Rehearing was denied on May 9, 2019. *Ronk v. State*, 267 So.3d 1239 (Miss. 2019) (*Ronk II*).

Ronk then commenced his federal habeas corpus proceedings in the United States District Court for the Southern District of Mississippi. The Civil Action Number for those habeas proceedings is 1:19-cv-346-HSO. For the first time in Ronk's case, federal habeas counsel investigated and uncovered the forensic issues related to the timing of the fire relative to Craite's death. The federal court stayed Ronk's habeas corpus proceedings to allow him to present these claims to the Mississippi Supreme Court, which had a decade-old, recognized procedure for death penalty inmates to raise claims when their original post-conviction counsel were ineffective for not raising them in initial post-conviction proceedings.

Ronk then filed his second state post-conviction application in the Mississippi Supreme Court. This Petition arises from that case.

C. The Proceedings At Issue Here.

On August 22, 2022, Ronk filed in the Mississippi Supreme Court his Moton for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief. This was Ronk's second state post-conviction proceeding. Ronk's Motion raised eight separate grounds for relief, though many of them focused on the forensic issues tied to the timing of Craite's death relative to the fire that served as the underlying felony for Ronk's capital murder charge. The State of Mississippi opposed Ronk's Motion. On January 11, 2024, the Mississippi Supreme Court denied Ronk's request for post-conviction relief. *Ronk v. State*, 391 So.3d 785 (Miss. 2024) (*Ronk III*). App. at 1-67. Ronk filed a Motion for Rehearing, which was denied on July 18, 2024. App. at 68.

The Mississippi Supreme Court denied Ronk relief on two general grounds. First, it overruled prior precedent and held that Ronk's claims were barred under Mississippi's one-year statute of limitations for death penalty post-conviction claims and the successive writ bar. App. at 4-14. Second, the Court examined the merits of Ronk's claims and denied relief. App. at 14-59.

In his filings, Ronk had asserted that the time and successive writ bars were overcome because of the ineffective assistance of his initial post-conviction counsel in failing to raise the claims in his first petition, which had been denied in 2019. Ronk did so based upon prior Mississippi Supreme Court precedents that established that (a) death-sentenced inmates have a right to effective counsel in initial

post-conviction proceedings and (b) a demonstration of ineffective post-conviction counsel can provide cause to exempt the application of the time and successive writ bars.

The Mississippi Supreme Court, for the first time, overruled those precedents in Ronk's case. App. at 14. The Court analyzed the history of the ineffective assistance of post-conviction counsel exception to the bars, announced in *Grayson v. State*, 118 So.3d 118 (Miss. 2013). The Court lamented the fact that, post-*Grayson*, many death-sentenced inmates in Mississippi (of which there are approximately 35 at present) had availed themselves of the procedure. App. at 7-8. The Court then went on to examine whether the exception established by *Grayson* was still tenable following the Court's earlier decision overruling another recognized exception in *Howell v. State*, 358 So. 3d 613 (Miss. 2023). The Court, relying on *Howell*, held that any exception to the post-conviction bars under Mississippi law must be enacted by the Legislature and not be a creation of a court. The Mississippi Supreme Court thus overruled *Grayson* and held that Ronk's claims were barred from review because there was no legislative exception for the violation of the still-recognized right of effective assistance of counsel in death penalty post-conviction cases. App. at 6-14.

Three Justices of the Mississippi Supreme Court dissented on the decision to overrule *Grayson*. App. at 60-68. The dissenters urged that if death-sentenced inmates have a right to effective assistance of counsel then the courts must provide them a meaningful remedy to vindicate that right, regardless of whether the legislative branch had done so. App. at 60-62. They observed: "Today's partial overruling of *Grayson* is a sad continuation of this Court's abdication of its

essential function as the state's court of last resort." App. at 65. Concluding, the dissenting opinion states: "Today, the Court holds that while we have determined that death-penalty defendants have the right to effective assistance of post-conviction counsel, we will not decide whether that right was violated, we will not determine whether a first post-conviction motion was a sham, and we will not facilitate the opportunity to present a meritorious PCR motion." App. at 66-67.

After holding Ronk's claims were barred due to the overruling of *Grayson*, the majority opinion continued to examine the claims on the merits since it was the first time they had announced the Court's departure from precedent upon which Ronk relied in filing his second petition. App. at 14. While Ronk raised multiple claims to the Mississippi Supreme Court and each were analyzed, the only issue raised in this Petition was the ineffectiveness of trial counsel in failing to investigate and seek independent expert assistance on forensic issues related to the timing of Craite's death with respect to the arson that served as the underlying felony. The Mississippi Supreme Court analyzed that issue first. App. at 14-32.

The Court rejected Ronk's *Strickland* claim as to both the deficient performance and prejudice prongs. App. at 14-32. With regard to deficient performance, the Mississippi Supreme Court found that it was sufficient for trial counsel to question Dr. McGarry's opinions and offer competing interpretations of forensic issues through cross-examination. App. at 29. The Court did not meaningfully address the failures to seek independent expert assistance or to conduct a thorough investigation on these issues.

As to prejudice, the Mississippi Supreme Court held that the competing evidence that Ronk has now uncovered (in the form of opinions of Dr. Laurison) would not have affected the outcome of the trial due to operation of Mississippi's "one-continuous-transaction rule". App. at 29-30. The Mississippi Supreme Court concluded that "[n]o matter the exact timing of Craite's death, the murder and arson were part of one continuous transaction." App. at 30. Thus, the Court ruled, Dr. Lauridson's opinions that took issue with those of Dr. McGarry—on which the prosecution had heavily relied—would not have affected the outcome of the trial. App. at 30-32. And finally, the Mississippi Supreme Court concluded that even without Dr. McGarry's testimony the use of the "especially heinous, atrocious, or cruel" aggravating factor at sentencing was proper. App. at 32.

The Mississippi Supreme Court rejected all of the claims raised in Ronk's second post-conviction proceeding. App. at 59.

REASONS FOR GRANTING THE PETITION

In this death penalty case, the failure of defense counsel to obtain a medical expert to challenge the prosecution's flawed expert testimony violates the Sixth Amendment's guarantee of effective assistance of counsel. The violation is compounded by the use of Mississippi's "One-Continuous-Transaction Doctrine" to excuse the failures of counsel and relieve the prosecution of its burden of proving all elements of capital murder beyond a reasonable doubt.

The Sixth Amendment guarantees a defendant the right to effective assistance of counsel, as outlined in *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny. This Court has also recognized on numerous occasions the right of an indigent criminal

defendant to funds for independent expert assistance. *See, e.g., McWilliams v. Dunn,* 582 U.S. 183 (2017)*; Hinton v. Alabama*, 571 U.S. 263 (2014); *Ake v. Oklahoma*, 470 U.S. 68 (1985).

These fundamental rights were violated in this case due to the failures of trial counsel. When presented with this evidence, the Mississippi Supreme Court used a novel procedural rule to hold the issue was barred from review. The Court proceeded to review the merits of the claim and deny relief by employing Mississippi's "One-Continuous-Transaction Rule" to find that Ronk's new evidence would be immaterial, as the doctrine would relieve the prosecution from having to prove that the underlying arson (or at least the intent to commit it) occurred prior to Craite's death.

A. Petitioner Was Denied His Right to the Effective Assistance of Counsel When His Attorneys Failed to Seek Funding to Hire an Independent Pathologist to Review Dr. McGarry's Autopsy Report and to Challenge His Trial Testimony.

1. Ronk Received Prejudicial Ineffective Assistance of Counsel in His Death Penalty Case

The central focus of the testimony of prosecution expert Dr. Paul McGarry—now known to be flawed—has been evident throughout Mr. Ronk's case. On direct appeal in 2015 (before the new evidence at the heart of this petition was discovered), the Mississippi Supreme Court on multiple occasions highlighted the importance of Dr. McGarry's testimony as to both guilt and sentencing phase issues. *Ronk v. State*, 172

So.3d 1112 (Miss. 2015) ("*Ronk I*"). At the outset of the opinion, the Court noted that, based upon Dr. McGarry's testimony, Craite was alive at the time of the fire but was "incapacitated…so that she could not escape from the fire." *Ronk I*, 172 So.3d at 1121, ¶ 2.

In determining whether the capital murder conviction was against the weight of the evidence, the Mississippi Supreme Court relied almost exclusively on Dr. McGarry's opinions:

> Dr. McGarry offered **substantial evidence indicating Craite was still alive at the time of the fire**, but was unable to escape due to her stab wounds. Faced with this evidence, a reasonable jury could find that Ronk killed Craite "without the authority of law" while he was "engaged in the commission of" an arson, as required by our capital-murder statute. *See Miss. Code Ann.* § 97-3-19(2)(e) (Rev. 2014). **Accordingly, we hold that the evidence presented was sufficient to sustain a conviction of capital murder with the underlying felony of arson.**

Id. at 1130, ¶ 35 (emphases added).

Later on, the Court again described the centrality of Dr. McGarry's testimony to the State's case and, in doing so, highlights the now-known deficiencies of Ronk's trial counsel. The Mississippi Supreme Court Court said:

> **Dr. McGarry's testimony was relevant to proving the connection between Craite's death and the arson.** During trial, part of Ronk's theory of defense was that Craite was already dead when he set her house

> on fire. Thus, Dr. McGarry's testimony had significant probative value in contradicting this assertion and supporting the State's theory that Ronk had committed capital murder during the commission of an arson.

Id. at 1137, ¶ 60 (emphasis added).

This analysis demonstrates not only the centrality of Dr. McGarry's opinions to the conviction but also that Ronk's trial counsel knew of the importance of the issue yet did not adequately investigate or obtain and utilize expert assistance to effectively implement a known, chosen defense theory.

The Mississippi Supreme Court also relied on Dr. McGarry's opinions when reviewing sentencing issues on direct appeal. One of Ronk's sentencing arguments related to the jury finding the aggravating circumstance that the killing was committed during the commission of the crime of arson. Ronk argued on direct appeal that Craite was already dead when the fire was set. *Id.* at 1142, ¶ 80. The Mississippi Supreme Court rejected the argument for the same reasons it rejected the sufficiency of the evidence argument as to the underlying felony: "As stated previously, sufficient evidence supports a finding that Craite was still alive at the time of the arson, and she was unable to escape the fire due to the wounds inflicted upon her by Ronk." *Id.* at 1142-43, ¶ 80.

Rejecting similar arguments regarding the especially heinous, atrocious, or cruel aggravating circumstance, the Mississippi Supreme Court held:

> In the instant case, the State presented evidence through the testimony of Dr. McGarry that Ronk's knife severed a major artery in Craite's chest, punctured

> both her lungs, and pierced her liver, filling her chest and abdominal cavities with blood. **He also explained that Craite was still alive and breathing during the fire;** that she had suffered burning and blistering to the lining of her mouth, tongue, larynx, and windpipe; and that the fire had destroyed much of her flesh down to the bone. After stabbing Craite, Ronk had poured gasoline in the bedroom where she lay incapacitated, evincing his intent to destroy her body. **According to Dr. McGarry, Craite would have been able to feel the pain of her body burning, but she was unable to escape due to her wounds.**

Id. at 1143, ¶ 82 (emphases added).

In *Hinton v. Alabama,* this Court held that Anthony Hinton's trial attorney rendered prejudicial ineffective assistance by failing to seek additional funding to retain a qualified forensic expert to rebut expert testimony that was crucial to the State's case due to the attorney's mistaken belief that Alabama law capped such expert funding at $1,000, and the trial court had already allocated the maximum fee in Mr. Hinton's case. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam). This Court emphasized that it was trial counsel's "unreasonable failure to understand the resources that state law made available to him", which resulted in trial counsel retaining an expert that he himself deemed to be unqualified, that constituted deficient performance." *Id.*

Similarly, Petitioner's trial counsel had no legitimate strategic reason for failing to exercise his

right to seek court funding to hire a forensic pathologist. Trial counsel clearly anticipated needing such expert assistance when he filed his motion seeking funding to hire a forensic expert. Tr. 62. After receiving the lab report from Garden Park Medical Center, however, Petitioner's trial counsel did not renew his original motion for funds to retain a qualified forensic pathologist, even though it could have used the lab report to support such a request. Trial counsel could have used the information contained in the lab report to revise the initial generic funding motion and to bring it into compliance with the specificity required by Mississippi law. Available evidence presented to the Mississippi Supreme Court shows that there was no strategic reason for trial counsel's failure to seek funding to hire a forensic pathologist.

The failure is further demonstrated—and prejudice shown—by the fact, as the Mississippi Supreme Court recognized on direct appeal, that part of Ronk's defense was that Craite was dead at the time the fire was set. Recognizing and selecting a potentially viable defense theory but wholly failing to investigate and utilize expert assistance to advance that theory is nothing but ineffective assistance of counsel. It is not trial strategy: it is a failure of investigation and preparation. And, as demonstrated herein, the prejudice to Ronk is evident.

In *Hinton*, this Court emphasized the ways in which a petitioner can be prejudiced when his attorney fails to retain a qualified forensic expert to refute the State's allegations against him:

> Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair

> criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials.... One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases." This threat is minimized when the defense retains a competent expert to counter the testimony of the prosecution's expert witnesses; it is maximized when the defense instead fails to understand the resources available to it by law.

Hinton v. Alabama, 571 U.S. at 276 (internal citations omitted).

Here, Petitioner's trial counsel unreasonably declined to assert Ronk's right to seek funding to hire a qualified forensic pathologist such as Dr. Lauridson, who could review Dr. McGarry's flawed autopsy report and offer valuable insight on how to impeach his credibility during cross-examination. Instead, Dr. McGarry's sensational yet flawed testimony was seared into the jurors' brains and resulted in them finding that Craite was killed during the commission of the crime of arson despite the fact that the evidence supported that Craite was dead at the time of the fire. It is undisputed that Craite actually died of stab wounds. If the fire was merely incidental to that killing or occurred after that killing was completed, then a capital murder conviction with an underlying felony of arson could not be sustained. At a minimum, there is a reasonable probability that the result would

have been different, i.e., at least one juror would not have found Ronk guilty of capital murder.

In addition, Dr. McGarry's incorrect testimony was proffered by the State and accepted by the jury to find Craite's murder was especially heinous, atrocious, or cruel during the sentencing phase. Tr. 707, 746. Indeed, according to an Affidavit from one of Petitioner's former trial attorneys Matthew Busby, "the jury was deeply affected by Dr. McGarry's testimony about Ms. Craite burning alive." Had Petitioner's jurors been informed that this was not the case, there is more than a reasonable probability that the outcome of Petitioner's trial (both his conviction and sentence) would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

The Mississippi Supreme Court's rejection of the merits of Ronk's ineffective assistance of counsel claims related to the failure to properly investigate, seek independent expert assistance for, and contest the forensic issues in the case contradicts this Court's precedents. *Strickland* imposes a duty on counsel to conduct an "independent examination of the facts, circumstances, pleadings and laws involved". *Strickland*, 466 U.S. at 680. Likewise, *Hinton* imposes a duty on counsel to know the law about access to experts and to make a reasoned determination about seeking adequate expert assistance after a thorough investigation that would reveal the need for it. 571 U.S. at 274. Ronk has conclusively shown that these things did not happen. And it is not enough that counsel merely cross-examined Dr. McGarry on these issues. A proper investigation and use of independent expert assistance would have given defense counsel the tools needed to expose flaws in Dr. McGarry's testimony and present competing evidence. Counsel was deficient and Ronk was clearly prejudiced.

The Mississippi Supreme Court's 2024 opinion stands in stark contrast to its 2015 opinion in *Ronk I*. As detailed above, the Mississippi Supreme Court repeatedly emphasized Dr. McGarry's testimony when reviewing both guilt and sentencing phases issues in Ronk's direct appeal. Indeed, it called Dr. McGarry's testimony "substantial evidence" and noted how it was needed to rebut a defense theory that Craite was dead before the fire started (which new evidence, of course, shows to have scientific support). *Ronk I*, 172 So.3d at 1130, ¶ 35 and 1137, ¶ 60.

But its 2024 opinion—issued after Ronk uncovered multiple inaccuracies in Dr. McGarry's trial testimony—reads as if Dr. McGarry was a miniscule part of the trial. A plain review of the trial transcript shows that the Mississippi Supreme Court's view in *Ronk I* is accurate: Dr. McGarry was the star witness for the State and, in multiple respects, the overwhelming if not only evidence used to support multiple prongs of the prosecution's case.

In short, the Mississippi Supreme Court cannot have it both ways: Dr. McGarry's testimony cannot be substantial, crucial evidence to support both Ronk's conviction and death sentence, as the Court exhaustively detailed in its direct appeal opinion in *Ronk I* in 2015, and then be immaterial when found to be incorrect, as in its 2024 opinion at issue here.

Because Petitioner's trial counsel rendered prejudicial ineffective assistance as described above, this Court should grant this Petition and review the Judgment of the Mississippi Supreme Court which allowed Petitioner's capital murder conviction and death sentence to stand despite these clear and prejudicial failures of trial counsel.

2. The "One-Continuous-Transaction Rule" Unconstitutionally Relieves the Prosecution of Its Burden of Proof and Arbitrarily Expands Death Penalty Eligibility in Mississippi

In examining the merits of Ronk's claims, the Mississippi Supreme Court ruled that the new evidence that was not previously discovered because of trial counsel's failure to request independent expert assistance would not have mattered, since the timing of Craite's death relative to the underlying arson was irrelevant. To support this ruling, the Mississippi Supreme Court relied on Mississippi's "one-continuous-transaction doctrine." *Ronk*, 2024 Miss. LEXIS 6 at *30-31. App. at 1-67. However, that doctrine is constitutionally infirm, and this Court should take the opportunity to examine it.

Under Mississippi law, capital murder is a specific intent crime, with the State having to prove either (1) the intent to kill under certain circumstances or (2) the intent to commit a certain felony offense from which death (intentional or not) results (commonly known as the felony murder rule). *See Miss. Code Ann.* § 97-3-19(2); *Pinkney v. State*, 538 So.2d 329 (Miss. 1988). Here, the indictment charged Ronk with capital murder based upon the felony murder rule, with the underlying felony being arson.

"It is bedrock law in Mississippi that criminal statutes are to be strictly construed against the State and liberally in favor of the accused." *Coleman v. State*, 947 So. 2d 878, 881 (Miss. 2006). This principle is keeping with the longstanding constitutional rule that not construing statutes in favor of the offender violate fundamental principles of due process. *Dunn v. U.S.*, 442 U.S. 100, 112 (1979); *Marks v. U.S.*, 430

U.S. 188 (1977); *Rabe v. Washington*, 405 U.S. 313 (1972); *Bouie v. City of Columbia*, 378 U.S. 347, (1964)).

In this case, the chief question under the Due Process Clause is whether, viewing the evidence in the light most favorable to the prosecution, and according to the benefit of all reasonable inferences to the State, any rational trier of fact could have found Ronk guilty, beyond any reasonable doubt, of murder **in the course of arson** as defined by statute. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Jackson unequivocally requires: "No person shall be made to suffer the onus of a criminal conviction except upon sufficient proof–defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Id.* at 316. The Court described this requirement as "an essential of the due process guaranteed by the Fourteenth Amendment." *Id. See also Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) ("What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements."). "It is self-evident, we think, that the *Fifth Amendment* requirement of proof beyond a reasonable doubt and the *Sixth Amendment* requirement of a jury verdict are interrelated . . . . In other words, the jury verdict required by the *Sixth Amendment* is a jury verdict of guilty beyond a reasonable doubt." *Id.* at 278.

The Supreme Court in *Jackson* was careful to draw the distinction between the constitutionally

necessary evidence sufficient to support a conviction and "any evidence"—pointing out that any relevant evidence might tend to make the existence of an element of a crime more probable, but that "it could not be seriously argued that such a 'modicum' of evidence by itself could rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 320.

Although states retain leeway to define the elements of a crime, once they have so defined them, the Due Process Clause requires that a defendant only be convicted upon proof beyond a reasonable doubt of each of the elements of such a crime. *In Re Winship*, 397 U.S. 358, 364 (1967). *Jackson v. Virginia* allows State Courts to give deference to juries' assessment of disputed facts, but it does not grant a license to ignore the facts or engage in speculation.

The jury in this case was not instructed to determine if Ronk's intent to commit the specific intent crime of arson was formed before the death of Craite. Rather, the jury was allowed to convict Ronk of Capital Murder in the course of arson on the mere finding that the killing and the arson were part of "a chain of events". The jury instructions on the one-continuous-transaction doctrine allowed the jury to find an arson occurred, without any regard for the timing of the arson in relation to the death. The only requirement set forth by such an instruction is that the person carry out the acts on the same victim regardless of the sequencing of the distinct acts of arson and killing. This relieved the prosecution of its burden of proving beyond a reasonable doubt a killing during the commission of arson, which was required in this capital murder prosecution.

"Jury instructions relieving States of this burden [to prove guilt beyond a reasonable doubt] violate a

defendant's due process rights," *Carella v. California*, 491 U.S. 263, 265 (1989). Indeed, as the Fourth Circuit reasoned in granting the writ on a *Jackson* claim of insufficient evidence:

> The very existence of the *Jackson* test presupposes that **juries accurately charged on the elements of a crime and on the strict burden of persuasion to which they must hold the prosecution**, nevertheless may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. The test was adopted to provide an additional safeguard against that possibility, and was to give added assurance that guilt should never be found except on a rationally supportable state of near certitude.

Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir. 1994) (emphasis added).

This presupposition was completely absent from Ronk's trial (as was, due to the ineffectiveness detailed above, the exposure of the prosecution's false testimony in support of the timing of the death relative to the arson or competing expert testimony from the defense). Instead, the contrary presumption was employed—that whether or not Craite was dead at the time of the requisite underlying felony of arson, there was no necessity of finding any specific intent to commit the arson prior to the killings. In addition to *Carella*, this violated *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979), which held that an instruction that the law presumes a person intends the ordinary consequences of his voluntary acts violates the Fourteenth Amendment's requirement

that the State prove every element of the crime beyond a reasonable doubt.

The Mississippi Supreme Court rejected Ronk's ineffective assistance of counsel claims by saying that the forensic evidence that was recently uncovered that contradicts and undermines the testimony of the prosecution's expert (Dr. McGarry) would not have affected the outcome. That court said: "No matter the exact timing of Craite's death, the murder and arson were part of one continuous transaction." *Ronk*, 2024 Miss. LEXIS 6 at *31; App. at 30. The court then noted that the jury at Ronk's trial was instructed on Mississippi's one-continuous-transaction doctrine. *Id.*

The "one-continuous-transaction doctrine" is a judicial creation, and not a plain reading or strict construction of a criminal statute, as required by this Court's Due Process precedent. The doctrine is a judicially created fiction and operated in this case to reduce the State's burden of proof and make conviction more likely. The rule allows jurors to speculate and guess to arrive at the conclusion that two events are sufficiently connected to support killings "during the commission of" the underlying offense of arson. The "one-continuous-transaction doctrine" is also so vague and amorphous as to violate Due Process and, in contravention of prior precedent of this Court, arbitrarily expands—as opposed to limits—the types of cases in which the death penalty can be employed. *See Gregg v. Georgia*, 428 U.S. 153 (1976). Any event that follows another is, by logic, a continuous chain of events, whether separated by seconds, days, weeks, or months. But when one considers the new evidence that Ronk has produced that shows that Craite was dead when the fire was started, it strains logic and a strict construction of the capital murder and arson statutes that the killing in

this case occurred "while in the commission" of an arson. In Mississippi, the "one-continuous-transaction doctrine" serves to judicially enlarge two loosely connected events into the ultimate crime of capital murder, which allows for the ultimate punishment of death. Due process forbids this. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347 (1964).

Succinctly stated, for a jury to find that Michelle Craite was killed by Mr. Ronk while he was "in the commission of" the crime of arson, the prosecution must have proved to them beyond reasonable doubt that he at least had the intent to commit arson **before** the killing took place. Failure—via the use of the "one-continuous-transaction doctrine" instruction—to require the jury to find this amounted to an abrogation of the "engaged in the commission of arson" element of capital murder. Due Process will not allow such wholesale broadening of the statutory language to stand. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347, 348 (1964) (vacating convictions based upon judicial interpretation of criminal statutory elements that violated Due Process standards).

This Court in *Bouie* stated the concept well: "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Id.* at 352. The use of the "one-continuous-transaction doctrine" in this case battles the fundamental requirements of Due Process. Due Process must win the day.

This Court should grant this Petition and review the merits of Ronk's ineffective assistance of counsel claims and, in doing so, reject Mississippi's judicially created "one-continuous-transaction doctrine" that

relieves the prosecution's burden of proof in capital murder cases.

B. The Mississippi Supreme Court Employed a Novel Procedural Rule to Bar Review of a Federal Constitutional Claim.

Prior to reaching the merits of Ronk's ineffective assistance of counsel claims detailed above, the Mississippi Supreme Court first ruled that they were procedurally barred. However, in doing so, the Court announced a novel procedural rule that deviated from decades of prior precedent. Because the Mississippi Supreme Court's procedural denial of Ronk's ineffective assistance of counsel claims was novel and unforeseeable, it should not preclude this Court from a review of the merits of the claims Ronk raises in this Petition.

In *Grayson v. State*, 118 So. 3d 118 (Miss. 2013), the Mississippi Supreme Court held that a death-sentenced prisoner may seek relief in a second petition if he could show that he received ineffective assistance from his initial post-conviction counsel. A showing of post-conviction counsel's ineffectiveness would provide cause for not raising a claim earlier and permit the court to reach the merits of an otherwise defaulted claim. *Id.* at 126. *See also Walker v. State*, 131 So. 3d 562 (Miss. 2013) (finding the performance of initial post-conviction counsel to be deficient and remanding for consideration of the merits of a constitutional claim).

The holding in *Grayson* flowed directly from the Mississippi Supreme Court's 1999 decision in *Jackson v. State*, 732 So. 2d 187 (Miss. 1999). In *Jackson*, the Mississippi Supreme Court ruled that death-sentenced prisoners had the right to post-conviction

counsel because post-conviction proceedings are considered part of the direct appeal process. 732 So. 2d at 191. Without counsel, those prisoners would be denied their right to access to the courts and due process. *Id.* at 190-91. The right to counsel was borne out of the "reality that indigent death row inmates are simply not able, on their own, to competently engage in this type of litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of" state post-conviction laws. *Id.* at 190.

The combined impact of those precedents for over a decade was this: (1) death-sentenced inmates in Mississippi have a right to post-conviction counsel (*Jackson*) and (2) those inmates have a mechanism for review of claims that were not previously raised because of the ineffectiveness of the counsel to which they had that right (*Grayson*). In this case, Ronk relied on that established right and procedure to seek review of the ineffective assistance of counsel claim raised in this Petition.

In announcing that it was overruling *Grayson*, the Mississippi Supreme Court employed a novel rule to bar review of Ronk's claims. The Mississippi Supreme Court itself acknowledged it was doing this: "Because we partially overrule *Grayson* here **for the first time**, we will address the merits of Ronk's motion." *Ronk III*, at ¶ 29; App. at 14 (emphasis added). Although the Mississippi Supreme Court went on to address the merits of Ronk's claims, it is anticipated that the State will argue that this Court cannot do so because of the procedural bar that was employed prior to the merits analysis.

Although dismissal of a claim by a state court based on a state procedural rule that is "firmly established and regularly followed" generally forecloses review of a federal claim, *Beard v. Kindler*, 588 U.S. 53, 60 (2009), "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457–58 (1958). Thus, "an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964); *see also, e.g.*, *Ford v. Georgia*, 498 U.S. 411, 425 (1991) (state procedural rule that was not "firmly established at the time in question . . . cannot bar federal judicial review"); *Johnson v. Mississippi*, 486 U.S. 578, 588–89 (1988) (state procedural rule that was not "consistently or regularly applied" was not an "adequate and independent state ground").

Under the circumstances of this case, review by this Court should not be precluded by Mississippi's abandonment of its decade-long practice of reviewing constitutional claims in death penalty cases when those claims were not previously raised because of ineffective assistance of initial post-conviction counsel. This Court should grant this Petition and review the merits of Petitioner's claims.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 15, 2024.

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2021-DR-00269-SCT

TIMOTHY ROBERT RONK a/k/a TIMOTHY RONK a/k/a TIMOTHY R. RONK

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT: 10/08/2010

TRIAL JUDGE: HON. LISA P. DODSON

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:
GRAHAM PATRICK CARNER
CAROL RENÉ CAMP

ATTORNEY FOR APPELLEE:
OFFICE OF THE ATTORNEY GENERAL
BY: ALLISON KAY HARTMAN
ASHLEY LAUREN SULSER
BRAD ALAN SMITH

NATURE OF THE CASE: CIVIL – DEATH PENALTY – POST CONVICTION
DISPOSITION: POST-CONVICTION RELIEF DENIED - 01/11/2024

MOTION FOR REHEARING FILED:

EN BANC.

GRIFFIS, JUSTICE, FOR THE COURT:

¶1 For his armed-robbery and capital-murder convictions, Timothy Robert Ronk was sentenced to thirty years in prison and death, respectively. ***Ronk v. State*** **(Ronk I)**, 172 So. 3d 1112, 1121 (Miss. 2015). We affirmed. ***Id***. And we later denied post-conviction relief. ***Ronk v. State (Ronk II)***, 267 So. 3d 1239, 1291 (Miss. 2019).

¶2. Now for a second time, Ronk seeks post-conviction relief through his Motion for Relief from Judgment or for Leave to File Successive Petition for Post-Conviction Relief. His claims include that post-conviction counsel were ineffective.

¶3. The State of Mississippi opposes relief and asks us to overrule ***Grayson v. State***, 118 So. 3d 118 (Miss. 2013), to the extent ***Grayson*** held that ineffective-assistance-of-postconviction-counsel claims are excepted from the bars in the Mississippi Uniform Post-Conviction Collateral Relief Act (UPCCRA). That exception must fall, the State says, based on our recent decision in ***Howell v. State***, 358 So. 3d 613 (Miss. 2023). ***Howell*** overruled all cases in which we have held that Mississippi courts can apply "judicially crafted fundamental-rights exception[s]" to the UPCCRA's bars. 358 So. 3d at 615–16.

¶4. Because ***Grayson*** crafted an ineffective-assistance-of-post-conviction-counsel exception to the

UPCCRA's bars, we agree that Howell compels the partial overruling of *Grayson*. And we deny Ronk's request for post-conviction relief.

FACTS AND PROCEDURAL HISTORY

¶5 While extinguishing a house fire, firefighters found Michelle Lynn Craite's remains in the master bedroom. ***Ronk I***, 172 So. 3d at 1121–22. Evidence showed that the fire was intentional. ***Id***. at 1122. Craite's live-in boyfriend, Ronk, became the main suspect. ***Id***. On the morning she died, he used her debit card. ***Id***. And he had been using one of her cell phones to contact his online girlfriend, Florida resident Heather Hindall. ***Id***. at 1123.

¶6. After Ronk's arrest, he told Hindall that Craite was the aggressor. ***Id***. In a letter to Hindall, he said that Craite "began slapping him and then approached him with a knife" after he told Craite that he was going to Florida. ***Id***. He maintained that he never intended to kill Craite; rather, "he . . . stabbed her only after she threatened to shoot him." ***Id***. "When I realized what I had done," he said, "I cleaned the knife off, changed my clothes, doused the house with gasoline, set it on fire and drove off . . . ." ***Id***. (alteration in original) (internal quotation marks omitted).

¶7. No weapons were found in Craite's home. ***Id***. But two unloaded shotguns were found in a studio apartment behind her home. ***Id***.

¶8. A jury convicted Ronk of armed robbery and capital murder with the underlying felony of arson. ***Id***. at

1124. He was sentenced to thirty years in prison and death, respectively. ***Id***.

¶9. In sentencing Ronk to death, the jury found that the mitigating circumstances failed to outweigh three aggravating circumstances: (1) "[t]he capital offense was committed while [Ronk] was engaged in the commission of [a]rson"; (2) "[t]he capital offense was committed by a person under sentence of imprisonment"; and (3) "[t]he capital offense was especially heinous, atrocious, or cruel." ***Id***.

¶10. We affirmed. ***Id***. at 1149. And we later denied post-conviction relief. ***Ronk II***, 267 So. 3d at 1291.

¶11. In December 2019, Ronk petitioned the United States District Court for the Southern District of Mississippi for a writ of habeas corpus. In February 2021, the district court stayed those proceedings to allow him to return here and exhaust certain claims.

¶12. This successive post-conviction motion followed.

ANALYSIS

¶13. Though Ronk proceeds under both Rule 60(b)(6) of the Mississippi Rules of Civil Procedure and the UPCCRA, the filing is a post-conviction motion subject to the UPCCRA. See ***Knox v. State***, 75 So. 3d 1030, 1035 (Miss. 2011) ("A pleading cognizable under the UPCCRA will be treated as a motion for post-conviction relief that is subject to the procedural rules promulgated therein, regardless of how the plaintiff has denominated or characterized the pleading."

(citing ***Edmond v. Miss. Dep't of Corrs.***, 783 So. 2d 675, 677 (Miss. 2001))). Under the UPCCRA, relief is granted "only if the application, motion, exhibits, and prior record show that the claims are not procedurally barred and that they 'present a substantial showing of the denial of a state or federal right.'" ***Garcia v. State (Garcia III),*** 356 So. 3d 101, 110 (Miss. 2023) (internal quotation marks omitted) (quoting ***Ronk II***, 267 So. 3d at 1247; Miss. Code. Ann. § 99-39-27(5) (Rev. 2015)).

¶14. The claims must be "procedurally alive." ***Ronk II***, 267 So. 3d at 1247 (quoting ***Neal v. State***, 525 So. 2d 1279, 1280–81 (Miss. 1987)). Capital cases have a one-year limitations period. Miss. Code. Ann. § 99-39-5(2)(b) (Rev. 2020). And successive writs are barred. Miss. Code. Ann. § 99-39-27(9) (Rev. 2020).

¶15. To surmount those and any other bars, Ronk invokes three exceptions. The first is newly discovered evidence—i.e., "evidence, not reasonably discoverable at the time of trial, that is of such nature that it would be practically conclusive that, if it had been introduced at trial, it would have caused a different result in the conviction or sentence." Miss. Code Ann. § 99-39-27(9) (Rev. 2020); see also Miss. Code Ann. § 99-39-5(2)(a)(i) (Rev. 2020). Such evidence is excepted from the time and successive-writ bars. Miss. Code. Ann. §§ 99-39-5(2)(a)(i), -27(9) (Rev. 2020).

¶16. Next is the fundamental-rights exception. Before ***Howell***, "[e]rrors affecting fundamental constitutional rights" were excepted from the UPCCRA's bars. 358 So. 3d at 615 (internal quotation mark omitted) (quoting ***Jones v. State***, 119 So. 3d 323,

326 (Miss. 2013)). But *Howell*, which handed down after Ronk filed this motion, overruled any case that "ha[s] held that the fundamental-rights exception can apply to the substantive, constitutional bars codified by the Legislature in the [UPCCRA]." *Id.* at 616. As a result, the fundamental rights exception is inapplicable here. See *Gibson v. Bell*, 312 So. 3d 318, 324 (Miss. 2020) ("Generally, 'all judicial decisions apply retroactively unless the Court has specifically stated the ruling is prospective.'" (quoting *Mid-S. Retina, LLC v. Conner*, 72 So. 3d 1048, 1052 (Miss. 2011))).

¶17. Third and finally is *Grayson's* ineffective-assistance-of-post-conviction-counsel exception. Based on *Howell*, the State asks us to overrule *Grayson* and abrogate that exception.

¶18. *Grayson* established that death-penalty petitioners' claims related to ineffective assistance of post-conviction counsel are unbarred. *Brown v. State,* 306 So. 3d 719, 748 (Miss. 2020) (citing *Grayson*, 118 So. 3d at 126). There, *Grayson*, a death-row inmate, filed a successive post-conviction motion, claiming that he was denied effective assistance of postconviction counsel in initial post-conviction proceedings. *Grayson*, 118 So. 3d at 122, 125. Though the Court conceded that it "ha[d] not recognized a general right to the effective assistance of PCR counsel in every criminal case[,]" it crafted an exception for death-penalty petitioners:

> We have said that the death-penalty petitioner is "entitled to appointed competent and conscientious counsel to assist him with his

> pursuit of post-conviction relief." ***Puckett [v. State]***, 834 So. 2d [676,] . . . 680 [(Miss. 2002)] (emphasis added). Our laws provide that an accused shall have "representation available at every critical stage of the proceeding against him where a substantial right may be affected." Miss. Code Ann. § 99-15-15 (Rev. 2007). And because this Court has recognized that PCR proceedings are a critical stage of the death-penalty appeal process at the state level, today we make clear that PCR petitioners who are under a sentence of death do have a right to the effective assistance of PCR counsel. ***Jackson v. State***, 732 So. 2d 187, 191 (Miss. 1999) [.]

Id. (footnote omitted). So the Court reached the merits of Grayson's claim but found it lacking. ***Id***. at 126, 147.

¶19. After ***Grayson***, the State says it is now "the modus operandi of Mississippi's death-eligible prisoners to claim ***Grayson's*** right to PCR counsel has created a new cause of action and means to litigate it in state court." In the United States District Court for the Southern District of Mississippi, for example, the State says, "every death-eligible prisoner—save one—who has requested a stay . . . on the basis of ***Grayson's*** holding has obtained at least one stay of his habeas proceedings."

¶20. Ronk fared the same. In staying his federal habeas corpus proceedings, the district court said that

> after ***Grayson*** was decided, no claim of ineffective assistance of PCR counsel could be deemed exhausted in this Court unless the Mississippi Supreme Court had considered the

> issue. That being so, all of the capital habeas cases raising the issue of ineffectiveness of PCR counsel that were pending in this Court were stayed, so that the petitioners in those cases could return to state court to exhaust that issue. Even though some of the cases had been closed in state court for some time, the Mississippi Supreme Court reviewed each one.
>
> …State law is clear… that no matter how slim his chances of success might be, Ronk has the right to raise this claim in state court.

Order Granting Motions to Stay and Abate, ***Ronk v. Cain***, No. 1:19-cv-00346-HSO, at **1–2 (S.D. Miss. Feb. 23, 2021) (citations omitted).

¶21. In light of ***Howell***, however, the State argues that ***Grayson's*** right to the effective assistance of post-conviction counsel is no longer an exception to the UPCCRA's bars.

¶22. ***Howell*** "overrule[d] [***Rowland v. State (Rowland I)***], 42 So. 3d 503 (Miss. 2010), [***Rowland v. State (Rowland II)***], 98 So. 3d 1032 (Miss. 2012), and any other case in which, and to the extent that, we ha[d] held that the fundamental-rights exception can apply to the substantive, constitutional bars codified by the Legislature in the [UPCCRA]." ***Howell***, 358 So. 3d at 616. There, Howell had relied on the illegal-sentence fundamental-rights exception to surmount the UPCCRA's time bar. ***Id.*** at 615. But we deemed the UPCCRA's time bar substantive law, which, if constitutional, cannot be judicially amended or ignored. Id. at 615–16. So we "overrule[d] ***Rowland I,***

Rowland II, and any other case in which [we] ha[ve] held that the courts of Mississippi can apply the judicially crafted fundamental-rights exception to constitutional, substantive enactments of the Legislature . . . ." ***Howell***, 358 So. 3d at 615 (citations omitted). At the same time, we "acknowledge[d] that other arguments may be used to attack the constitutionality of the statutory bars, either as applied to particular cases or on their face . . . ." ***Id.*** at 616.

¶` 23. Because ***Howell*** supports that no judicially crafted exception—even for fundamental rights—applies to the UPCCRA's substantive, constitutional bars, we overrule ***Grayson*** to the extent it crafted an exception for ineffective-assistance-of-post-conviction-counsel claims in death-penalty cases. To hold otherwise would be to "amend or ignore constitutionally sound law enacted by the Legislature[,]" which we cannot do. ***Howell***, 358 So. 3d at 616. As in ***Howell***, our holding does not foreclose the possibility that "other arguments or doctrines" might afford relief. ***Id.***

¶24. The dissent criticizes our holding as "violat[ing] the maxim that there "is no right without a remedy, for 'whensoever the law giveth any right, . . . it also giveth a remedy.'" Diss. Op. ¶ 135 (internal quotation marks omitted) (quoting ***McInnis v. Pace***, 78 Miss. 550, 29 So. 835, 835 (Miss. 1901)). Indeed, "[t]he Mississippi Constitution provides that a remedy shall be available in the courts for every injury." ***Robinson v. Stewart***, 655 So. 2d 866, 868 (Miss. 1995) (citing Miss. Const. art. 3, § 24). But generally speaking, "no right without a remedy" is just as the

dissent puts it: a maxim or principle (albeit an important one), Diss. Op. ¶ 135 (quoting *McInnis*, 29 So. 835), "not an ironclad rule." Richard H. Fallon, Jr. Daniel J. & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1778 (1991) (stating that the "apparent promise of effective redress for all constitutional violations" set forth in *Marbury v. Madison*, 5 U.S. 137, 147, 2 L. Ed. 60 (1803), "reflects a principle, not an ironclad rule, and its ideal is not always attained[]"); *Webster v. Doe*, 486 U.S. 592, 613, 108 S. Ct. 2047, 2059, 100 L. Ed. 2d 632 (1988) (Scalia, J. dissenting) ("[I]t is simply untenable that there must be a judicial remedy for every constitutional violation."). And the Mississippi Constitution's Remedy Clause "erects no barriers against legislation." *Robinson*, 655 So. 2d at 869 (*citing Grimes v. Pearl River Valley Water Supply Dist.*, 930 F.2d 441, 443–44 (5th Cir. 1991)). As examples, neither "limitations upon suits against government entities[,]" id. (citing *Wells v. Panola* Cnty. Bd. of Educ., 645 So. 2d 883, 889 (Miss. 1994)), nor "other complete statutory bars to recovery" violate the remedy clause. *Id.* (citing *Anderson v. Fred Wagner & Roy Anderson, Jr., Inc.*, 402 So. 2d 320, 321–24 (Miss. 1981)). In the same way here, legislation (i.e., the UPCCRA) omits ineffective assistance of post-conviction counsel as an exception.

¶25. Moreover, no federal constitutional right is at stake here. *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings[.]"). And the state

constitutional right's underpinnings are shaky. Mississippi alone recognizes a constitutional right to appointed counsel in state post-conviction proceedings. ***Gibson v. Turpin***, 513 S.E.2d 186, 191–92 (Ga. 1999) ("[N]o state, save for Mississippi, has recognized a constitutional right to appointed counsel upon habeas corpus." (citing ***Jackson v. State***, 732 So. 2d 187 (Miss. 1999)). And as ***Jackson's*** special concurrence noted, the ***Jackson*** majority cited no authority for a right to post-conviction counsel in the Mississippi Constitution. ***Jackson***, 732 So. 2d at 192 (Mills, J., specially concurring). "Such a post-trial right," Justice Mills said, "is constitutionally nonexistent . . . ." ***Id***. He and the two Justices who joined him would have based indigent death-row inmates' right to post-conviction counsel on Mississippi Code Section 99-15-15, not the Mississippi Constitution. See ***Id***.

¶26. Post-***Jackson***, ***Puckett*** added that death-row inmates are "entitled to appointed competent and conscientious counsel to assist [them] with [their] pursuit of post-conviction relief." 834 So. 2d at 680 (emphasis added) (citing ***Jackson***, 732 So. 2d 187).[1] ***Grayson*** then went even further, stating that "PCR petitioners who are under a sentence of death do have a right to the effective assistance of PCR counsel." 118

[1] "Competent counsel" could concern only initial appointment, not the end result. See ***Ex parte Graves***, 70 S.W.3d 103, 114 (Tex. Crim. App. 2002) (defining the statutory right to competent counsel in state death-penalty habeas corpus proceedings to mean counsel's "qualifications, experience, and abilities at the time of his [or her] appointment" "rather than the final product of representation").

So. 3d at 126 (emphasis added) (citing ***Jackson***, 732 So. 2d at 191). Per ***Howell***, that was a bridge too far—i.e., the ***Grayson*** Court exceeded its bounds by judicially crafting an exception to the UPCCRA's substantive, constitutional bars.

¶27. Nor is ***Grayson*** tenable. "[B]ecause . . . PCR proceedings are a critical stage of the death-penalty appeal process at the state level," it said, "PCR petitioners who are under a sentence of death do have a right to the effective assistance of PCR counsel." ***Grayson***, 118 So. 3d at 126 (emphasis added) (citing ***Jackson***, 732 So. 2d at 191). At what post-conviction proceeding, then, does the right cease? The first? second? third? As one court put it: "A claim of ineffective assistance of the prior habeas counsel would simply be the gateway through which endless and repetitious writs would resurrect." ***Graves***, 70 S.W.3d at 115. Whether Mississippi law should except ineffective-assistance-of-post-conviction-counsel claims from the UPCCRA's bars, as the dissent advocates, is a decision for the Legislature, not us. See ***Howell***, 358 So. 3d at 615 ("[T]he Legislature only can enact substantive law . . ."); see also ***Graves***, 70 S.W.3d at 115 ("If the Legislature had intended ineffective assistance of habeas counsel claims to be an exception to the bar on subsequent applications, it could have made that exception explicit just as it did with the three statutory exemptions that it specified.").

¶28. While criticizing ***Howell***, the dissent acknowledges that our partial overruling of ***Grayson*** flows from it. See Diss. Op. ¶ 143. To diverge and follow the dissent's path would be to ignore ***Howell***

and stray beyond our bounds. In forgoing that path, we stay within our bounds and break no new ground. See ***Frazier v. State***, 303 S.W.3d 674, 680 (Tenn. 2010) (stating that Tennessee's statutory right to post-conviction counsel "does not . . . serve as a basis for relief on a claim of ineffective assistance of counsel in a post-conviction proceeding and does not include 'the full panoply of procedural protection that the Constitution requires be given to defendants who are in a fundamentally different position—at trial and on first appeal as of right'" (quoting ***House v. State***, 911 S.W.2d 705, 712 (Tenn. 1995))); ***Graves***, 70 S.W.3d at 117 (holding that Texas law "grants a statutory right to the appointment of competent counsel, but it does not give a habeas applicant a constitutional or statutory right to effective assistance of that counsel in the particular case that can form the basis of a subsequent writ"); ***People v. Davis***, 619 N.E.2d 750, 756 (Ill. 1993) (holding that the defendant could not assert ineffective assistance of post-conviction counsel because postconviction assistance of counsel created by statute "is not the assistance of counsel contemplated by the sixth amendment" (citing ***People v. Flores***, 606 N.E.2d 1078, 1084 (Ill. 1992))); ***State v. Gray***, 612 N.W.2d 507, 511 (Neb. 2000) (holding that because "[t]he Nebraska Constitution's provision for assistance of counsel in a criminal case is no broader than its counterpart in the federal constitution[,]" "a prisoner cannot claim constitutionally ineffective assistance of counsel as a result of an attorney's service in a postconviction proceeding." (quoting ***State v. Stewart***, 496 N.W.2d 524, 529 (Neb. 1993))); see also ***Zebroski v. State***, 12 A.3d 1115, 1121 n.33 (Del. 2010) (noting that "[s]tates are divided on whether there is a postconviction right to the effective assistance of

counsel under their respective rules, statutes or constitution" and collecting authorities).

¶29. Because we partially overrule ***Grayson*** here for the first time, we will address the merits of Ronk's motion. ***Howell***, 358 So. 3d at 616–17 (addressing the petition's merits because the Court "announce[d] the partial overruling of ***Rowland*** . . . for the first time").

> *(1) Ronk's claim that counsel were ineffective for failing to seek funds to hire an independent forensic pathologist to review Dr. Paul McGarry's autopsy report and to challenge his trial testimony is neither sufficient to surmount the bars nor satisfies the newly-discovered-evidence exception.*

¶30. Ineffective assistance of counsel is a two-part test that is hard to meet. ***King v. State***, 23 So. 3d 1067, 1072 (Miss. 2009) (quoting ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see ***Moffett v. State***, 351 So. 3d 936, 945 (Miss. 2022) ("[S]urmounting ***Strickland's*** high bar is never an easy task." (alteration in original) (internal quotation marks omitted) (quoting ***Cullen v. Pinholster***, 563 U.S. 170, 197, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011))).

¶31. First, counsel's performance must have been deficient—i.e., "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***King***, 23 So. 3d at 1072 (quoting ***Strickland***, 466 U.S. at 687). Performance is assessed using "an objective standard of reasonableness," with high deference to

counsel and "a strong presumption" that counsel's conduct "fell within the wide range of reasonable professional assistance." ***Garcia III***, 356 So. 3d at 111 (internal quotation mark omitted) (quoting ***Ross v. State***, 954 So. 2d 968, 1003–04 (Miss. 2007)). "[E]very effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Id.*** (second alteration in original) (internal quotation mark omitted) (quoting ***Strickland***, 466 U.S. at 689).

¶32. Second, the deficiency must have prejudiced the defense—i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." ***Id.*** (internal quotation mark omitted) (quoting ***Strickland***, 466 U.S. at 677). A "reasonable probability" must exist that the trial result would have been different but for counsel's errors. ***Id.*** (quoting ***Ross***, 954 So. 2d at 1003–04). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (internal quotation marks omitted) (quoting ***Ross***, 954 So. 2d at 1004).

¶33. "If a post-conviction claim fails on either of the ***Strickland*** prongs, the inquiry ends." ***Williams v. State***, 722 So. 2d 447, 451 (Miss. 1998) (citing ***Foster v. State***, 687 So. 2d 1124, 1130 (Miss. 1996)). And deficient performance need not be examined before prejudice. ***Strickland***, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." ***Id.***

¶34. Here, Gordon Eric Geiss, Charles Stewart, Dawn Stough, and Matthew Busby represented Ronk at trial, with Geiss serving as lead counsel. ***Ronk II***, 267 So. 3d at 1248. Ronk's post-conviction counsel were Mississippi Office of Capital Post-Conviction Counsel attorneys Louwlynn Vanzetta Williams, Alexander D. M. Kassoff, and Scott Johnson.

¶35. Ronk argues that both sets of counsel were ineffective: trial counsel were ineffective for failing to seek funds to hire an independent forensic pathologist to review Dr. McGarry's autopsy report and to challenge his trial testimony, and post-conviction counsel were ineffective for neither investigating nor asserting trial counsel's ineffectiveness in that respect.

¶36. Before ***Howell***, ineffective-assistance-of-trial-counsel claims could be excepted from the bars in "extraordinary circumstances." ***Chapman v. State***, 167 So. 3d 1170, 1173–74 (Miss. 2015). That is not so after ***Howell***. See ***Howell***, 358 So. 3d at 616.

¶37. So besides newly discovered evidence, Ronk's only procedurally alive claim is that post-conviction counsel were ineffective. Still, his ineffective-assistance-of-trial-counsel claim is relevant: Because his ineffective-assistance claims are layered, trial counsel's ineffectiveness is tied to post-conviction counsel's ineffectiveness. See ***Rippo v. State***, 423 P.3d 1084, 1098 (Nev. 2018) ("[W]hen a petitioner presents a claim of ineffective assistance of postconviction counsel on the basis that postconviction counsel failed to prove the ineffectiveness of his trial or appellate attorney, the petitioner must prove the ineffectiveness of both attorneys." (citing ***State v. Jim***, 747 N.W.2d

410, 418 (Nev. 2008))), amended on denial of reh'g, 432 P.3d 167 (Nev. 2018) (table).

¶38. To surmount the bars, Ronk's ineffective-assistance-of-post-conviction-counsel claim must have some arguable basis. See ***Means v. State***, 43 So. 3d 438, 442 (Miss. 2010).

¶39. Turning to that inquiry, the underlying felony for his capital-murder charge was arson. ***Ronk I***, 172 So. 3d at 1130. So the State had to "prove beyond a reasonable doubt that [he] killed Craite, without the authority of law, and with or without any design to effect her death, while he was engaged in the commission of the crime of arson." ***Id***. at 1129–30 (emphasis added) (citing Miss. Code Ann. § 97-3-19(2)(e) (Rev. 2014)).

¶40. To prove that, Ronk says the State relied solely on its "star witness," Dr. McGarry. Though Dr. McGarry deemed "stab wounds of the back causing internal hemorrhage and collapse of the lungs" as the cause of death, he also said that Craite was burned alive.

¶41. When asked if there were any signs that she was alive during the fire, Dr. McGarry said that

> [s]he had burning and blistering of her lining of her mouth over her tongue down into her larynx, all the way down into her windpipe where the lining, the delicate tissue was blistered. The only way that happens is when very hot burning fumes are inhaled and

> eventually blister the lining of the respiratory track all the way down into the windpipe.

And he affirmed that there were signs of carbon monoxide in her body:

> Q. Was there any evidence from your observations during the autopsy of the presence of carbon dioxide in her body?
>
> [Dr. McGarry]. She had those -- her blood and the tissues that I examined had a bright cherry red color. This is the color of -- not carbon dioxide, but carbon monoxide, which is the product of burning of carbon monoxide material in a place that is for sometime closed such as a house fire. Where the burning of the inside of a house uses up the oxygen and then gives off carbon monoxide. The person who is still alive in the fire is trying to breathe and breathes in the carbon monoxide which causes their tissues and their blood to become bright red because of the presence of carbon monoxide combining with the hemoglobin of their blood and any tissues, and she showed all of that indicating that she was, in spite of her wounds and her internal bleeding and her collapsed lungs, was still breathing and alive in the fire. . . . .
>
> Q. As part of conducting the autopsy do you take blood samples and ask the coroner to have those tested for the presence of carbon monoxide in her blood?
>
> [Dr. McGarry]. Yes.

> Q. Have you had occasion to review those?
>
> [Dr. McGarry]. Yes.
>
> Q. Do those results confirm your visual findings of the presence of that cherry red tissue samples?
>
> [Dr. McGarry]. Yes.
>
> Q. So in addition to what you saw her blood showed the presence –
>
> [Dr. McGarry]. Actually contained a high level.
>
> Q. High level of carbon monoxide.

¶42. Absent any fire or medical treatment, Dr. McGarry said that Craite would have died "in minutes to an hour" after the stabbing. The stab injuries prevented her escape, he said. And she would have felt the "pain of her body being burned."

¶43. On cross-examination, Geiss challenged whether Craite was conscious after the stabbing. Dr. McGarry said that "[a]ll of [his] findings indicated that she w[as] . . . ." "She did not have an injury that would make her unconscious," he said. "I would expect the stab wounds to affect her chest and for her to be mainly in trouble with bleeding and breathing, and her consciousness which is a function of the brain would still be intact."

¶44. Geiss pressed on:

> Q. Maybe you're not getting my meaning. She was maybe alive but was she conscious?
>
> [Dr. McGarry]. I would expect her to be conscious.
>
> Q. Dr. McGarry?
>
> [Dr. McGarry]. Until she gets to the point where she has lost enough blood and where her respirations have been impaired enough that she would then go into shock and lose consciousness as she was dying, not at the beginning.
>
> Q. Dr. McGarry, if where they located her body was the same place the knife wounds had been inflicted would not indicate to you that she was, in fact, not conscious?
> [Dr. McGarry]. No.
>
> Q. The fact –
>
> [Dr. McGarry]. She is incapacitated. If she's incapacitated and can't do anything about it she doesn't have to be unconscious.

¶45. Geiss then asked Dr. McGarry how Craite could have breathed with collapsed lungs. Dr. McGarry explained that

> [a]s she is dying she is breathing, and in respiratory distress she's able to do some breathing, not adequate to oxygenate her

> tissues so she's incapacitated. She's making respiratory efforts but they are not normal, they are not effective, but she is breathing in some of the gas of the surrounding area and absorbing the carbon monoxide from that gas.

¶46. Geiss posed "a simple chemistry question": Could the hot, expanding gas have caused "an intake of flame perhaps down a larynx?" Dr. McGarry said, "No." Instead, Dr. McGarry attributed the flame intake to "[b]reathing inward inhalation."

¶47. Ronk says the State emphasized Dr. McGarry's testimony in its guilt- and penalty phase closing arguments. In its guilt-phase closing argument, it told that jury that

> you know from the testimony of Dr. McGarry that [Craite] was alive when the fire was set. He testified that she had carbon monoxide in her blood when he performed the autopsy. That her organs were that bright cherry red color. He did the test. And even more telling the inside of her mouth, her tongue and down her windpipe were burned from the heat of that fire. You know she felt pain, you know she was breathing.
>
> . . . .
>
> As to Dr. McGarry's credibility that is relevant. Not only did he find the cherry colored specimens of her blood, her organs, but the lab also confirmed independently of him there were high levels of carbon monoxide in her mouth

> and tongue and the throat, the tissues, the mucosa were burned. Not only did the heat and the smoke travel to her mouth and to her throat, it didn't stop there. It went into her lungs and was sufficiently metabolized through her lungs and heart that it went to her organs. . . . That's the proof before you, and it's not been contradicted.

¶48. And in its penalty-phase closing argument, the State urged the jury to

> [g]o back to the scene and think about what [Craite] felt as she fell to the floor. You know it was painful. You heard Dr. McGarry tell you that her lungs were collapsed and one hit an aorta.
>
> As she fell to the floor do you think she saw his feet walk away leaving the room? Do you think she saw his feet come back? Do you think she smelled the gasoline? Do you think she was terrified knowing that she could not get off the floor, that she could not get up? Do you think she heard the roar of the fire as it came racing down the hallway towards her? Don't forget the facts.

¶49. The State also relied on Dr. McGarry's testimony to support a sentencing instruction on the heinous, atrocious, cruel aggravator. See Miss. Code. Ann. § 99-19-101(5)(h) (Rev. 2007) (including whether "[t]he capital offense was especially heinous, atrocious or cruel" as an aggravating circumstance).

¶50. Then on direct appeal, Ronk says this Court repeatedly highlighted the significance of Dr. McGarry's testimony for both the guilt and penalty phases:

> • "[Dr. McGarry] noted that the stab wounds . . . incapacitated Craite so that she could not escape from the fire." *Id.* at 1121.
>
> • "Dr. McGarry offered substantial evidence indicating Craite was still alive at the time of the fire but was unable to escape due to her stab wounds. Faced with this evidence, a reasonable jury could find that Ronk killed Craite 'without the authority of law' while he was 'engaged in the commission of' an arson, as required by our capital-murder statute. Accordingly, we hold that the evidence presented was sufficient to sustain a conviction of capital murder with the underlying felony of arson." *Id.* at 1130 (citation omitted).
>
> • "Dr. McGarry's testimony was relevant to proving the connection between Craite's death and the arson. During trial, part of Ronk's theory of defense was that Craite was already dead when he set her house on fire. Thus, Dr. McGarry's testimony had significant probative value in contradicting this assertion and supporting the State's theory that Ronk had committed capital murder during the commission of an arson." *Id.* at 1137.
>
> • "[T]he State presented evidence through the testimony of Dr. McGarry that Ronk's knife

> severed a major artery in Craite's chest, punctured both her lungs, and pierced her liver, filling her chest and abdominal cavities with blood. He also explained that Craite was still alive and breathing during the fire; that she had suffered burning and blistering to the lining of her mouth, tongue, larynx, and windpipe; and that the fire had destroyed much of her flesh down to the bone. After stabbing Craite, Ronk had poured gasoline in the bedroom where she lay incapacitated, evincing his intent to destroy her body. According to Dr. McGarry, Craite would have been able to feel the pain of her body burning, but she was unable to escape due to her wounds." *Id.* at 1143.

¶51. Now, Ronk says Dr. McGarry was wrong. Specifically, Ronk alleges that Dr. McGarry falsely testified that Craite's blood had a high carbon-monoxide level and that she was burned alive. As support, Ronk offers an affidavit from forensic pathologist Dr. James R. Lauridson and highlights two excerpts.

¶52. First, Dr. Lauridson says the Garden Park Medical Center Laboratory Report (hereinafter, "the GPMC Report")—which trial counsel had—showed that Craite's "carboxyhemoglobin level was within normal limits":

> The [GPMC Report] reveal[s] that [Craite's] carboxyhemoglobin level was 5.5. Normal carboxyhemoglobin levels range anywhere from 0 percent to as high as 10 percent in

smokers. *Ms. Craite's 5.5 carboxyhemoglobin level was within normal limits for the general population and was not an indication of exposure to smoke or products of combustion. Dr. McGarry's testimony that Ms. Craite's carboxyhemoglobin level was abnormally high was factually incorrect.*

The only objective issue in the question of whether Ms. Craite was alive in the fire is the laboratory test indicating the level of carboxyhemoglobin measured in her blood by Garden Park Medical Laboratory, a level of 5.5%. This value must be viewed in context. Garden Park Medical Laboratory is a clinical laboratory and offers a reference value of 0.0 to 1.5% as guidance for physicians treating individual patients. The importance of a reported value depends entirely on individual circumstances and the population of subjects being tested. Thus, *to declare any value above 1.5% as "a high level" is an error and is misleading*.

In the practice of forensic pathology, carboxyhemoglobin levels up to 10% are frequently seen in persons whose deaths were not associated with exposure to smoke or carbon monoxide. A common practice among forensic pathologists is to consider carbon monoxide as a factor in death associated in fire or smoke deaths only if the level of carboxyhemoglobin is above 10%. *See* W. Spitz, ed., *Medical Legal Investigation of Death: Guidelines for the Application of Pathology to Crime Investigation*, 762 (4th ed. 2006).

(Emphasis added.)

¶53. Second, Dr. Lauridson disputes that Craite was burned alive:

> Dr. McGarry's testimony that the blistering and burning which occurred in Ms. Craite's airway indicated she was still alive when Mr. Ronk set her house on fire was highly subjective. The deteriorated condition of Ms. Craite's airway can be attributed to the burned state of her body when it was found.
>
> To a reasonable degree of medical certainty, Ms. Craite's carboxyhemoglobin level was within normal limits and the burning and blistering that occurred in her airway can be attributed to the post-mortem burning of her body. Ms. Craite died as a result of being stabbed by Mr. Ronk.

(Emphasis added.)

¶54. Ronk thus argues that trial counsel were ineffective. Their performance was deficient, he says, because they neither investigated the arson's connection to Craite's death—the most crucial, difficult aspect of the case—nor sought funds to hire an independent forensic pathologist. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.7, *reprinted* in 31 Hofstra L. Rev. 913 (2003) ("ABA Guidelines"). Though Geiss tried to challenge Dr. McGarry's opinions, Geiss lacked counter evidence.

And without that, the State's "flawed and incorrect" forensic evidence went unchallenged.

¶55. Ronk likens his case to ***Hinton v. Alabama,*** 571 U.S. 263, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014). There, the Supreme Court held that defense counsel was ineffective for inexcusably failing to know that more expert funding was available. Id. at 274–75. Expert consultation was essential in ***Hinton*** because that case turned on the State's expert witnesses' testimony on "firearms and toolmark" evidence. ***Id.*** at 265–66, 273 (internal quotation marks omitted). Defense counsel mistakenly believed that he was entitled to no more than $1,000 to hire an expert. ***Id.*** at 268. And that mistaken belief caused him to hire an inadequate expert. ***Id.*** at 268, 275. The Supreme Court held that counsel's "inexcusable mistake of law" constituted Strickland deficiency, so it remanded the case for consideration of Strickland prejudice. ***Id.*** at 275–76.

¶56. Ronk says his trial counsel, too, lacked a valid, strategic reason for not seeking funds to hire an independent forensic pathologist. Despite part of Ronk's defense theory being that Craite died before the fire was set, trial counsel unreasonably failed to hire an expert to advance that theory and counter Dr. McGarry. Ronk insists that the GPMC Report should have spurred trial counsel to use its results to seek funds to hire a forensic pathologist. *See* ***Ruffin v. State***, 447 So. 2d 113, 118 (Miss. 1984) (stating that an indigent defendant's statutory "right to defense expenses . . . is conditioned upon a showing that such expenses are needed to prepare and present an

adequate defense" (quoting ***State v. Acosta***, 597 P.2d 1282, 1284 (Or. Ct. App. 1979)) (emphasis omitted)).

¶57. Had trial counsel presented counter evidence via expert testimony, Ronk maintains that more than a reasonable probability exists that the result would have been different. Dr. McGarry's "sensational yet flawed testimony," he says, "was seared into the jurors' brains" and led them to find that Craite was killed during the commission of arson. But if the fire was only incidental to the murder or if Craite died before it began, then the State could not prove an essential element—i.e., that she died during the course of arson. At minimum, then, counter expert testimony would have caused at least one juror to find him not guilty of capital murder. The same is true for the penalty phase. Busby believes "the jury was deeply affected by Dr. McGarry's testimony about Ms. Craite burning alive." Had jurors known the truth, however, Ronk says a reasonable probability exists that they would have imposed a lesser sentence.

¶58. Post-conviction counsel were ineffective too, he argues, for neither investigating nor raising trial counsel's ineffectiveness in failing to seek funds to hire a forensic pathologist—even after ***Ronk I*** highlighted Dr. McGarry's importance. As a result, Ronk says false forensic evidence went unchallenged throughout trial, appellate, and postconviction proceedings.

¶59. We find that this claim lacks an arguable basis and is insufficient to surmount the bars. Nor is the newly-discovered-evidence exception met.

¶60. "***Strickland*** d[id] not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." ***Harrington v. Richter***, 562 U.S. 86, 111, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). "In many instances cross-examination will be sufficient to expose defects in an expert's presentation." ***Id***.

¶61. Here, Geiss challenged Dr. McGarry's opinions. Geiss questioned Craite's consciousness, asked how she could have breathed with collapsed lungs, and suggested that the hot, expanding gas caused the blistering and burning in her airway.

¶62. For Ronk to show that the lack of a counter expert prejudiced him, Dr. Lauridson's affidavit must rebut Dr. McGarry's testimony. See ***Howard v. State***, 945 So. 2d 326, 352 (Miss. 2006) ("[I]n order for Howard to show that the result of the proceeding would have been different, he must offer an affidavit from an expert witness who rebuts the State's expert testimony."). Yet it falls short.

¶63. Because Mississippi follows the one-continuous-transaction doctrine, there is no reasonable probability that Dr. Lauridson's testimony would have spared Ronk from being convicted of capital murder. That doctrine "applies to felony-murder cases and defines the causal nexus required between the killing and the underlying felony." ***Evans v. State***, 226 So. 3d 1, 35 (Miss. 2017) (citing ***Turner v. State***, 732 So. 2d 937, 950 (Miss. 1999)). "[A] killing occurring while engaged in the commission of one of the enumerated felonies," it says, "includes the actions of the defendant leading up to the felony, the

attempted felony, and flight from the scene of the felony." ***Id***. (internal quotation marks omitted) (quoting Turner, 732 So. 2d at 950). Put differently, "where the two crimes . . . are connected in a chain of events and occur as part of the res gestae, the crime of capital murder is sustained." ***Id***. (internal quotation marks omitted) (quoting ***Gillett v. State***, 56 So. 3d 469, 492 (Miss. 2010)).

¶64. No matter the exact timing of Craite's death, the murder and arson were part of one continuous transaction. By Ronk's own account, he stabbed her, "cleaned the knife off, changed [his] clothes, doused the house with gasoline, set it on fire and drove off . . . ." ***Ronk I,*** 172 So. 3d at 1123 (second alteration in original) (internal quotation mark omitted); cf. ***State v. Campbell***, 418 S.E.2d 476, 479 (N.C. 1992) (stating that the "murder and arson were clearly part of one continuous transaction" when evidence showed that the defendant "beat [the victim] to death with a crowbar, searched the house for valuables and then set the house on fire"). And the jury received an instruction on the one-continuous-transaction doctrine. ***Ronk I,*** 172 So. 3d at 1129.

¶65. Substantively, Dr. Lauridson offers counter testimony and evidence that Craite's "5.5 carboxyhemoglobin level was withing normal limits." But even if true, Dr. McGarry based his opinion not only on the GPMC Report, but also on Craite's blood and tissues' "bright cherry red color." "The person who is still alive in the fire," he said, "is trying to breathe and breathes in the carbon monoxide which causes their tissues and their blood to become bright red because of the presence of carbon monoxide combining

with the hemoglobin of their blood and any tissues . . . ."

¶66. As for the burning and blistering to Craite's airway, Dr. Lauridson's affidavit does not exclude her inhaling hot, burning fumes as a possible cause. He first says that "Dr. McGarry's testimony that the blistering and burning which occurred in Ms. Craite's airway indicated she was still alive when Mr. Ronk set her house on fire was highly subjective." (Emphasis added.) "Highly subjective" does not equal false. And second, Dr. Lauridson says "the burning and blistering that occurred in [Craite's] airway can be attributed"—not is attributable—"to the post-mortem burning of her body." (Emphasis added.) "Can be" connotes possibility. See ***United States v. Frazier***, 387 F.3d 1244, 1281 (11th Cir. 2004) (Tjoflat, J., specially concurring) ("'Can' necessarily connotes only a bare possibility (something over one percent), and though 'frequently' suggests something more, it does not connote 'usually' or 'most of the time' or in any way suggest that something happens 'more often than not.'").

¶67. So even though Dr. Lauridson surely disagrees with Dr. McGarry's opinion about the burning and blistering to Craite's airway and presents another possible cause, Dr. Lauridson does not disprove Dr. McGarry's opinion. Nor does Dr. Lauridson explain the rationale for his own theory about what caused the burning and blistering.

¶68. Moreover, Dr. Lauridson does not rebut Dr. McGarry's testimony that Craite could have lived up to an hour after the stabbing. "[S]he would have died

without treatment in minutes to an hour," Dr. McGarry said. To have been alive during the fire, Craite would not have had to live long. She called someone at approximately 8:50 a.m.—near the time Ronk set the fire. By his own telling, he doused the home with gasoline, set it afire, and drove away. ***Ronk I***, 172 So. 3d at 1123. Fifteen minutes from Craite's home is a Walmart, and the Walmart's ATM surveillance camera photographed Ronk at 9:05 a.m. Around 9:00 a.m., someone around the corner from Craite's home saw smoke. And police responded to the fire at 9:07 a.m.

¶69. Finally, even if Dr. McGarry's opinion about Craite's carbon-monoxide level were discredited and his causation theory concerning the burning and blistering to her airway were called into question, ample evidence still supported the heinous, atrocious, or cruel aggravator. At the very least, Craite suffered a painful, brutal stabbing and died helplessly alone. Or worse, adding to that, she stayed alive long enough to smell the gasoline, see or feel the flames, and breathe the fumes. Either way, the killing was heinous, atrocious, and cruel.

(2) Ronk's prosecutorial-misconduct claim is barred; his related ineffective-assistance-of-post-conviction-counsel claim is insufficient to surmount the bars; and the newly-discovered-evidence exception is unmet.

¶70. Ronk argues that the State committed prosecutorial misconduct and violated his dueprocess rights by using Dr. McGarry's testimony—which it knew to be false—to secure the conviction. And Ronk

argues that post-conviction counsel were ineffective for failing to investigate and raise this claim.

¶71. He *cites Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). There, the Supreme Court reversed a conviction because known false testimony may have affected the outcome. *Id.* at 269, 272. A key witness in that case testified that he received no promise of consideration in return for his testimony. *Id.* at 265. That was false. *Id.* at 266–67. And the prosecutor's failure to correct that falsehood violated due process. *Id.* at 265. Had the jury known the truth, the Supreme Court said, it may have found that the witness lied to gain the prosecutor's favor. *Id.* at 270. "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction," the Supreme Court explained, "does not cease to apply merely because the false testimony goes only to the credibility of the witness." *Id.* at 269.

¶72. We find that the claims merit no relief. Prosecutorial-misconduct claims are not excepted from the UPCCRA's bars. See *Howell*, 358 So. 3d at 616. The ineffective assistance-of-post-conviction-counsel claim lacks an arguable basis and is insufficient to surmount the bars. And the newly-discovered-evidence exception is unmet.

¶73. No *Napue* violation is shown. That requires a showing that "1) the testimony was actually false, 2) the state knew it was false, and 3) the testimony was material." *Canales v. Stephens*, 765 F.3d 551, 573 (5th Cir. 2014) (internal quotation marks omitted) (quoting *Pyles v. Johnson*, 136 F.3d 986, 996 (5th Cir.

1998)). As stated already, Dr. Lauridson's affidavit does not disprove all of Dr. McGarry's opinions. And even if it did, nothing shows that the State knew Dr. McGarry's opinions to be false. Still more, given our adherence to the one-continuous-transaction doctrine, there is no reasonable probability that Dr. Lauridson's testimony would have affected Ronk's capital-murder conviction.

(3) Ronk's claim that counsel were ineffective for failing to impeach Dr. McGarry's testimony about the carbon-monoxide level in Craite's blood and her being burned alive is neither sufficient to surmount the bars nor satisfies the newly-discovered-evidence exception.

¶74. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." ***Strickland***, 466 U.S. at 691.

¶75. Here, Ronk argues that trial counsel were ineffective for failing (1) to reasonably investigate Dr. McGarry and (2) to impeach his testimony with the GPMC Report. Ronk adds that post-conviction counsel were ineffective, too, for failing to investigate and assert trial counsel's ineffectiveness in those respects.

¶76. First, Ronk says trial counsel shirked their duty to do a reasonable, independent investigation of Dr. McGarry. Had they done so, he says, they would have discovered not only Dr. McGarry's history of botched autopsies (discussed later) but also the falsity

of his opinions. They may even have disqualified him as an expert.

¶77. Second, Ronk says trial counsel failed to use the GPMC Report to impeach Dr. McGarry's opinions about the high carbon-monoxide level in Craite's blood and her being burned alive. Though Geiss tried to challenge how Dr. McGarry could possibly know that Craite was alive during the fire, Geiss offered no counter evidence.

¶78. Ronk says Dr. McGarry's compelling (and essentially unchallenged) testimony significantly affected the jury. Without it, Ronk says, the State could not have obtained a death sentence. The State seized on Dr. McGarry's graphic imagery in its guilt- and penaltyphase closing arguments to sear Craite's awful fate into jurors' minds. And the State used the same testimony to secure a jury instruction on the heinous, atrocious, cruel aggravator.

¶79. As support, Ronk cites four cases: ***Foster v. Wolfenbarger***, 687 F.3d 702, 710 (6th Cir. 2012) (holding that trial counsel was ineffective for failing to investigate fully an alibi defense); ***Elmore v. Ozmint***, 661 F.3d 783, 786, 851, 855, 861, 863 (4th Cir. 2011) (holding that trial counsel were ineffective for failing to investigate forensic evidence that was "obviously vital" to the prosecution's case, when post-conviction proceedings showed that an investigation would have raised many questions about the evidence's legitimacy and reliability); ***Bell v. Miller,*** 500 F.3d 149, 157 (2d Cir. 2007) (holding that "where the only evidence identifying a criminal defendant as the perpetrator is the testimony of a single witness,

and where the memory of that witness is obviously impacted by medical trauma and prolonged impairment of consciousness, and where the all-important identification is unaccountably altered after the administration of medical drugs, the failure of defense counsel to consider consulting an expert to ascertain the possible effects of trauma and pharmaceuticals on the memory of the witness is constitutionally ineffective"); ***Rolan v. Vaughn***, 445 F.3d 671, 674, 683 (3d Cir. 2006) (holding that trial counsel was ineffective for failing to investigate defense witnesses who would have supported the defendant's selfdefense claim).

¶80. We find that this claim lacks an arguable basis and is insufficient to surmount the bars. Nor is the newly-discovered-evidence exception met.

¶81. Ronk's argument that post-conviction counsel were ineffective for failing to investigate Dr. McGarry (or to raise trial counsel's ineffectiveness for failing to do so) is discussed later. Otherwise, trial counsel's failure to use the GPMC Report to impeach Dr. McGarry's testimony did not constitute ***Strickland*** prejudice or deficiency. Even if trial counsel had used the GPMC Report as Ronk proposes, a different conviction is not reasonably probable based on the one-continuous-transaction doctrine. And as the State notes, the GPMC Report flagged Craite's 5.5 "CARBOXY HGB" result as "CH." Though the meaning of "CH" is unclear, either the prosecution, Dr. McGarry, or both could have argued (as the State does here) that "CH" meant "Critical High." And as discussed already, the GPMC Report was not the only

evidence relevant to whether Craite was alive during the fire.

(4) Ronk's claim that the State suppressed material information about Dr. McGarry's past is barred; his related ineffective-assistance-of-postconviction counsel claim is insufficient to surmount the bars; and the newly-discovered-evidence exception is unmet.

¶82. "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Brady v. Maryland***, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). A ***Brady*** violation requires proof (1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. ***King v. State,*** 656 So. 2d 1168, 1174 (Miss. 1995) (citing ***United States v. Spagnoulo***, 960 F.2d 990, 994 (11th Cir. 1992)).

¶83. Ronk argues that the State violated ***Brady*** by withholding material impeachment evidence about Dr. McGarry's termination from the Orleans Parish Coroner's Office and his history of botched autopsies. Post-conviction counsel were ineffective too, he

argues, for failing to investigate and assert a ***Brady*** claim.

¶84. During Dr. McGarry's nearly thirty-year tenure with the Orleans Parish Coroner's Office, Ronk says Dr. McGarry's work came under fire in several cases. Five are discussed.

¶85. The first is Adolph Archie. Laura Maggi, *Orleans Parish coroner's office autopsies of some who died in police custody are questioned*, NOLA.com | The Times-Picayune (Jan. 30, 2011), https://www.nola.com/news/politics/orleans-parish-coroners-office-autopsies-ofsome-who-died-in-police-custody-are-questioned/article_09a9ad1b-1cb1-5f2c-afe5-f0ae9 9d79428.html. In 1990, after fatally shooting a police officer, Archie was beaten by officers and later died. *Id.* Dr. McGarry deemed an accidental fall as the cause of death. *Id.* But independent autopsies found that Dr. McGarry missed injuries caused by blunt-force trauma. Id. After protests, the coroner's office changed Archie's cause of death to homicide by police intervention. *Id.*

¶86. Second is Raymond Robair. Sergio Hernandez, *NOPD Officers Convicted in Handyman's Beating Death*, ProPublica (Apr. 13, 2011), https://www.propublica.org/ article/nopd-officers-convicted-in-handymans-beating-death. Dr. McGarry deemed Robair's 2005 death accidental. *Id.* But another pathologist found that Dr. McGarry overlooked multiple injuries and that a beating had caused Robair's ruptured spleen. *Id.* That eventually led to criminal convictions for two police officers. *Id.*

¶87. Third is Gerald Arthur. A.C. Thompson, Mosi Secret, Lowell Bregman & Sandra Bartlett, *The Real CSI: How America's Patchwork System of Death Investigations Puts the Living at Risk*, ProPublica (Feb. 1, 2011), https://www.pbs.org/wgbh/pages/frontline/post-mortem/real-csi/. In 2006, Arthur died following a struggle with police officers. *Id.* Dr. McGarry deemed Arthur's death accidental. *Id.* But another pathologist found that Dr. McGarry missed injuries that suggested strangulation. *Id.* Arthur's family received a $50,000 settlement. *Id.*

¶88. Fourth is Lee Demond Smith. A.C. Thompson, Mosi Secret, Lowell Bregman & Sandra Bartlett, *In New Orleans, Uncovering Errors and Oversights*, ProPublica (Feb. 1, 2011), https://www.npr.org/2011/02/01/133301618/in-new-orleans-uncovering-errors-andoversights#:~:text=In%20New%20Orleans%2C%20Uncovering%20Errors%20and%20Oversights%20%3A%20NPR&text=In%20New%20Orleans%2C%20Uncovering%20Errors%20and%20Oversights%20In%20three%20instances,in%20to%20perform%20second %20autopsies. Smith died in jail, and Dr. McGarry's 2006 autopsy attributed Smith's death to pulmonary embolism. *Id.* But another specialist found injuries that Dr. McGarry missed and concluded that Smith was strangled. *Id.*

¶89. Fifth and finally is Cayne Miceli. Gwen Filosa, *Cayne Miceli's death in jail restraints was not a crime, prosecutors say*, Times-Picayune (Dec. 8, 2011), https://www.nola.com/ news/crime_police/cayne-micelis-death-in-jail-restraints-was-not-a-crime-

prosecutor-says /article_118c6854-5663-5545-9b2a-1bbeaab5bf07.html#:~:text=%22Cayne%20Miceli's%20death%20was%20caused,office%20performed%20a%20thorough%20investigation.%22. Miceli suffered from chronic asthma, depression, and panic attacks. *Id.* In 2009, she was arrested and jailed for disturbing the peace at a hospital. *Id.* While in jail, she was restrained to a metal bed. *Id.* After four hours, she went limp, was rushed to the hospital, and later died. *Id.* Dr. McGarry's autopsy attributed Miceli's death to drugs. Thompson, supra, *In New Orleans, Uncovering Errors and Oversights.* But in a second autopsy, Dr. Lauridson found that Miceli died from severe asthma combined with the jail restraints. *Id.* Miceli's family received a $600,000 settlement. Richard A. Webster, Sheriff Marlin Gusman settles inmate death lawsuit for $600,000 (Oct. 17, 2014), https://www.nola.com/news/crime_police/ sheriff-marlin-gusman-settles-inmate-death-lawsuit-for-600-000/article_d56f1a47-7a11-5 d2b-af17-3cd90b6b4a44.html. According to Ronk, Miceli's case led to Dr. McGarry's being fired from the Orleans Parish Coroner's Office.

¶90. Ronk likens his case to Miceli's. Dr. McGarry attributed her death to drugs even though a drug-and-alcohol screening showed neither in her blood. Thompson, supra, *In New Orleans, Uncovering Errors and Oversights*. Here, similarly, Dr. McGarry said that Craite was burned alive even though the carbon-monoxide level in her blood was within normal limits.

¶91. Ronk accuses the State of failing to disclose Dr. McGarry's checkered past—despite defense counsel's pretrial discovery motion. At a pretrial motion

hearing, the State represented that it "ha[d] provided everything in [its] file known to [it]." "[I]f other information becomes known as it relates to aggravating, mitigating, exculpatory, ***Brady*** information," it added, "of course, we have a continuing obligation to [disclose]." Yet Ronk says it breached that obligation.

¶92. Ronk maintains that suppressed evidence about Dr. McGarry's past is material for ***Brady*** purposes. Dr. McGarry's credibility was key—as Geiss knew. "If they [(the jury)] don't believe Dr. McGarry," Geiss said, "then they don't believe it's capital murder."

¶93. Ronk likens his case to ***Banks v. Dretke***, 540 U.S. 668, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004). There, the Supreme Court held that the prosecution violated ***Brady*** by suppressing that one key witness had been "intensively coached" and that another was a paid informant. ***Banks***, 540 U.S. at 675, 698, 703. The suppressed evidence did not surface until federal habeas corpus proceedings. ***Id***. at 675. "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession," the Supreme Court said, "it is ordinarily incumbent on the State to set the record straight." ***Id***. at 675–76.

¶94. In response, the State insists that Mississippi Code Section 99-39-27(5) is unmet, and it discounts the news articles. It targets the ***Robair*** case specifically, highlighting that a third pathologist's findings and opinions aligned with Dr. McGarry's. That assertion, notably, is based solely on the State's representation of information contained in an

appellant's brief. Appellant's Brief, ***United States v. Williams*** (5th Cir. Apr. 12, 2012) (No. 11-30877), 2012 WL 1408709, at **10, 20, 22–23, 25–27, 29. Such document is neither provided nor accessible to us. The State also says that the examiner who disputed Dr. McGarry's findings has since come under scrutiny.

¶95. We find that the claims merit no relief. Even pre-***Howell***, ***Brady*** claims were not excepted from the UPCCRA's bars. En Banc Order, ***Underwood v. State***, No. 2015-DR 01378-SCT, at **6–7 (Miss. Dec. 16, 2021). The ineffective-assistance-of-post-conviction counsel claim lacks an arguable basis and is insufficient to surmount the bars. And the newly-discovered-evidence exception is unmet.

¶96. No ***Brady*** violation is shown. Nothing shows that the State possessed or controlled the evidence at issue. See ***United States v. Graham***, 484 F.3d 413, 417 (6th Cir. 2007) ("***Brady*** clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess." (internal quotation mark omitted) (quoting ***United States v. Beaver***, 524 F.2d 963, 966 (5th Cir. 1975))); ***United States v. Delgado***, 350 F.3d 520, 527 (6th Cir. 2003) ("***Brady*** does not apply to materials that are not 'wholly within the control of the prosecution.'" (quoting ***Coe v. Bell***, 161 F.3d 320, 344 (6th Cir. 1998))). Nor does anything show that Ronk could not have obtained the evidence himself with reasonable diligence. See, e.g., ***United States v. Dixon***, 132 F.3d 192, 199 (5th Cir. 1997) ("***Brady*** does not obligate the government "to produce for [a defendant] evidence or information . . . that he could have obtained from other sources by exercising reasonable diligence." (first

alteration in original) (quoting ***Brown v. Cain***, 104 F.3d 744, 750 (5th Cir. 1997))); ***Spirko v. Mitchell***, 368 F.3d 603, 610 (6th Cir. 2004) ("[T]he ***Brady*** rule does not apply if the evidence in question is available to the defendant from other sources[.]" (internal quotation marks omitted) (quoting ***United States v. Wilson***, 901 F.2d 378, 380 (4th Cir. 1990))); ***United States v. Rodriguez,*** 162 F.3d 135, 147 (1st Cir. 1998) ("The government has no ***Brady*** burden when the necessary facts for impeachment are readily available to a diligent defender . . . ." (citing ***Lugo v. Munoz***, 682 F.2d 7, 9 (1st Cir. 1982))). Although "***Brady*** held that the '[g]overnment may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case.'" ***United States v. White***, 970 F.2d 328, 337 (7th Cir. 1992) (alterations in original) (quoting ***United States v. Marrero***, 904 F.2d 251, 261 (5th Cir. 1990)). Here, Ronk had ample time to investigate and even interview Dr. McGarry: No fewer than three times before trial, including about eight months beforehand, the State disclosed Dr. McGarry as a potential witness.

> *(5) Ronk's claim that counsel were ineffective for failing to investigate Dr. McGarry's past and to impeach his testimony is neither sufficient to surmount the bars nor satisfies the newly-discovered-evidence exception.*

¶97. Ronk argues that both trial and post-conviction counsel were ineffective for failing to investigate Dr. McGarry's past—specifically, his tarnished tenure with the Orleans Parish Coroner's

Office and history of botched autopsies—and to then impeach his testimony with that information. Busby admits that no one investigated Dr. McGarry's past. As a result, Ronk says Dr. McGarry was able to impress the jury with his board certification and vast experience (more than 13,000 autopsies) without trial counsel challenging his qualifications or highlighting his checkered past.

¶98. We find that this claim lacks an arguable basis and is insufficient to surmount the bars. Nor is the newly-discovered-evidence exception met.

¶99. Even if Dr. McGarry's testimony deeply affected the jury (as Busby says) and impeachment evidence had tarnished Dr. McGarry's credibility in jurors' eyes, a different result is not reasonably probable.

¶100. At the time of Ronk's trial, Dr. McGarry had been qualified as an expert in "[s]everal hundred" cases. News articles alone are insufficient to show that Dr. McGarry should have been disqualified and that Ronk's capital-murder conviction and death sentence should be set aside. See ***Wilson v. State***, 21 So. 3d 572, 588–89 (Miss. 2009) (stating that news articles alone were insufficient to show that the petitioner's due-process rights were violated and that his death sentence should be set aside merely because forensic pathologist Dr. Steven T. Hayne testified).

¶101. No doubt, the news articles are mostly critical of Dr. McGarry. But not fully. One, for example, says, "Some in the field champion McGarry, praising his track record." Thompson, et al., supra, *The Real CSI*.

Among them is James Traylor, a forensic pathologist at the LSU Health Sciences Center in Shreveport, LA, who was trained by and worked alongside Dr. McGarry. ***Id.***; Maggi, *supra, Orleans Parish coroner's office autopsies of some who died in police custody are questioned*.

¶102. Moreover, the evidence of guilt was overwhelming, ***Ronk II***, 267 So. 3d at 1284 (noting the "overwhelming evidence"), leaving Ronk unable to show ***Strickland*** prejudice. See ***Morales v. Ault***, 476 F.3d 545, 551 (8th Cir. 2007) (stating that prejudice cannot be shown if the evidence of guilt is overwhelming (citing ***Reed v. Norris***, 195 F.3d 1004, 1006 (8th Cir. 1999))). Even with an impeached Dr. McGarry, there is still the one-continuous transaction-doctrine hurdle, plus ample evidence that the killing was heinous, atrocious, and cruel.

> *(6) Ronk's claim that counsel were ineffective for failing to further investigate the details of Craite's prior assault-and-battery conviction and to present evidence of her criminal history as support for their defense theory is neither sufficient to surmount the bars nor satisfies the newly-discovered-evidence exception.*

¶103. Ronk says trial counsel *tried* to argue self-defense. In his opening statement, Geiss alluded to self-defense but did not say that was the defense's theory of the case. "[O]ur defense," he said, "is actually based on a legal claim on what you will be instructed insofar as the law goes when it's all over."

¶104. Earlier, the State had orally moved to prevent Ronk's counsel from referencing Craite's prior domestic-violence incident. Pretrial discovery showed that Craite had once been arrested in Michigan "for some type of domestic violence involving a firearm" and that she had possibly received a year of probation. Geiss reassured both the trial court and the State that the defense did not intend to discuss that. True to his word, they never did.

¶105. Exhibit 7 to Ronk's post-conviction motion includes a 2003 Michigan felony complaint against Craite, alleging that she shot at her then husband. She pleaded guilty to assault and battery and was sentenced to one year of probation.

¶106. Yet despite Craite's criminal past, Ronk says the only self-defense evidence at trial came from the State's questioning of Hindall. Hindall said, "[Ronk] told me that [Craite] attacked him while he was trying to leave[,] . . . [and] he fought back because she was going for a shotgun in the house."

¶107. Ronk received jury instructions on self-defense and the lesser-included offense of murder. But he complains that Geiss made conflicting statements in closing arguments. On one hand, Geiss framed Craite as the aggressor. "[Craite] became irate, . . . attacked [Ronk]," Geiss said. But then shortly after that, Geiss undermined the self-defense theory:

> We are hard pressed to tell you this is a good solid self-defense case, but we don't have to prove that. It's rather the State's burden to prove that there was not self-defense, and I

> don't think they have put up anything that says this was not self-defense. All that we have are what [Ronk] himself has told everyone from the beginning, and told them over and over again. That [Craite] attacked him, he thought she was going for the shotgun, which he thought was in the bedroom closet, and so he stabbed her.

Ronk says that simply teed up his self-defense theory for the State to crush in its rebuttal:

> This was not done in necessary self-defense. Did you hear where the stab wounds were? They were in her back. Think of a self-defense. Think of what you consider in your common experience as a -- thinking of things in your life's experiences, a self-defense case is not a stab wound three times in the back and then covering the house with gasoline. And the defense wants to make you think this is self-defense because of the information we received through [Hindall] through [Ronk] that he thought [Craite] was going to get a gun. Try to compare that to what the physical evidence, not what the skewed self-serving statements are, the physical evidence.
>
> What did we find out about a gun in the house? . . . [T]he crime scene specialist from the Biloxi [Police Department][] said there were a couple of guns. We did find some. They were in a separate detached studio apartment, they were unloaded, and they were in cases. If there were two, I remember one, there might have been two. The separate detached studio apartment.

> So think of this as reasonable because self-defense has to be reasonable. She would have to have left the bedroom, traveled down the hall, through the kitchen, out the door to the studio apartment, get the gun, open the box, load it up, come back, and then proceed to try to shoot [Ronk]. That's about as unreasonable as the sun rising in the west.

¶108. Here, Ronk argues that evidence concerning Craite's prior assault-and-battery conviction would have strengthened the credibility of his version of events by showing that Craite's domestic-violence history gave him reason to fear her. The jury, then, would have had a basis for finding that she was the initial aggressor and that he acted reasonably in selfdefense.

¶109. So Ronk contends that trial and post-conviction counsel were ineffective for neither investigating Craite's past nor obtaining a copy of her prior assault-and-battery conviction.

¶110. We find that this claim lacks an arguable basis and is insufficient to surmount the bars. Nor is the newly-discovered-evidence exception met.

¶111. Craite's prior crime would have been relevant and admissible only if Ronk knew about it. See ***Richardson v. State***, 147 So. 3d 838, 842 (Miss. 2014) ("[E]vidence showing [the defendant's] knowledge of [the victim's] prior violent criminal history was quite clearly relevant under [Mississippi] Rule [of Evidence] 401's standard and admissible under the standards of [Mississippi] Rule [of Evidence] 404(a)(2) and Rule

404(b)." (emphasis added)); ***Jordan v. State***, 211 So. 3d 713, 717 (Miss. Ct. App. 2016) ("Evidence of prior violent acts of the victim, when known to the defendant, are . . . relevant and admissible under Rule 404(b) to show the defendant's state of mind at the time of the incident and the reasonableness of his use of force." (emphasis added) (citing ***Richardson***, 147 So. 3d at 842)); ***Sheffield v. State***, 844 So. 2d 519, 522 (Miss. Ct. App. 2003) ("[I]t is essential that the proper predicate be laid for the admissibility of evidence of the victim's propensity for violence, i.e., that the defendant was *actually aware* of the victim's character so that this prior knowledge colored the defendant's decision regarding the necessity of violent physical effort to avoid an anticipated attack." (emphasis added)). At least some evidence shows he did. In a pretrial psychological evaluation, Ronk said that "he knew [Craite] was serious [about getting a gun and shooting him] because she had previous charges for aggravated assault and shooting her husband."

¶112. But even if Ronk knew about Craite's prior crime and that evidence had been admitted, there is still no reasonable probability of a different result.

> The plea of self-defense must be supported by evidence of facts and circumstances from which the jury may conclude that a defendant was justified in having committed the homicide because he was, or had reasonable grounds to believe that he was, in imminent danger of suffering death or great bodily harm at the hands of the person killed.

Willis v. State, 352 So. 3d 602, 616 (Miss. 2022) (emphasis added) (quoting ***Strong v. State***, 600 So. 2d 199, 203 (Miss. 1992)). Imminent danger is "an immediate threat to one's safety that justifies the use of force in self-defense—The danger resulting from an immediate threatened injury sufficient to cause a reasonable and prudent person to defend himself or herself." ***Wells v. State***, 233 So. 3d 279, 285 (Miss. 2017) (internal quotation marks omitted) (quoting *Imminent danger*, Black's Law Dictionary (10th ed. 2014)). And *immediate* means "occurring without delay; instant[.]" ***Id.*** (alteration in original) (internal quotation marks omitted) (quoting *Immediate*, Black's Law Dictionary (10th ed. 2014)). But in Ronk's case, immediacy was lacking: No weapons were found inside Craite's home, and Ronk stabbed her in the back multiple times. ***Ronk I***, 172 So. 3d at 1121, 1123, 1133, 1148.

> *(7) Ronk's claim that counsel were ineffective for failing to seek funds to hire a neuropsychologist to present mitigating evidence of his history of neurological dysfunction, bipolar disorder, and attention deficit with hyperactivity disorder (ADHD) is neither sufficient to surmount the bars nor satisfies the newly-discovered-evidence exception.*

¶113. Ronk argues that trial and post-conviction counsel were ineffective for failing to seek funds to hire a neuropsychologist to explain that his crime was not a willful, "pure[ly] evil" choice.

¶114. Pretrial, the trial court granted defense counsel's motion to hire Dr. Beverly Smallwood to evaluate Ronk "to determine whether he knew right from wrong at the time of the alleged incident, whether he [wa]s competent to assist counsel in the trial of his case and, whether or not a psychological evaluation would reveal any mitigating circumstances." She did so and was his only penalty-phase witness. She testified that he had (a) the competency to stand trial and assist defense counsel; (b) mental disorders that did not prevent him from distinguishing right from wrong; and (c) an above-average IQ.

¶115. Ronk says her testimony proved "extremely damaging." He reasons as follows. Of the eight malingering subtests she administered, she found that he "probably feign[ed]" (i.e., "exaggerat[ed] psychological symptoms") on two and was "in the indeterminate range" (i.e., "kind of borderline between probable and honest") on four. Based on his mental-health records, she agreed with the bipolar-disorder and ADHD diagnoses. But after discussing his resentment about being adopted, suicide attempts, impulsive behavior, and drug-and-alcohol abuse, she added a diagnosis independent from his records: "a conduct disorder." That then enabled her on cross-examination to diagnose him with antisocial personality disorder.

¶116. Ronk says the State seized on that in its closing arguments:

> [Ronk] can't blame his childhood, he can't blame his bipolar or his ADHD

> . . . . .
>
> Evil does exist in this world, and I submit to you that there's no other explanation for such a horrific crime than pure evil
>
> . . . . .
>
> Someone years back diagnosed him as ADHD and bipolar. Well [Dr. Smallwood] agreed with me that that's a classic clear example of someone who has antisocial personality disorders. And in my inability to talk to her on the same level I said is that the same thing as sociopathic, and she agreed. And that's the same kind of recklessness and indifference to the value of human life, impulsiveness that landed us in this courtroom and landed . . . Craite deceased. Take that into consideration please. Don't allow bad childhood to be a crutch.

¶117. Ronk argues that the frontal-lobe problems documented in his records should have prompted defense counsel to seek funds to hire a neuropsychologist. See *Caro v. Woodford*, 280 F.3d 1247, 1255–56 (9th Cir. 2002) (stating that blood tests and "Caro's extraordinary history of exposure [to pesticides and toxic chemicals] should have prompted counsel to ask an expert about the risks of Caro's chronic exposure"). As support, he offers an affidavit from neuropsychologist Dr. Robert G. Stanulis.

¶118. Dr. Stanulis says Ronk's documented frontal-lobe problems should have alerted Dr. Smallwood to the need for a full neuropsychological evaluation:

> Dr. Smallwood . . . testified that Mr. Ronk had not been "overcome by some kind of organic mental disorder or anything like that." Dr. Smallwood's concession is puzzling given Mr. Ronk's history of "frontal lobe problems" and impulsive behavior. Dr. Smallwood did not address these issues in her evaluation. ADHD is a frontal lobe problem and Bipolar Disorder is a biochemical disorder. Failure to address the neuropbiological underpinnings of Mr. Ronk's diagnoses is puzzling given that the question about "organic mental disorder" usually means biological dysfunction of the brain.
>
> [N]o forensic psychologist or neuropsychologist evaluated Mr. Ronk. . . .
>
> Records that were provided to Dr. Beverly Smallwood prior to her evaluation of Mr. Ronk revealed that Mr. Ronk's long history of impulsive behavior and frontal lobe problems should have alerted her that he needed a neuropsychological evaluation. Specifically, in his June 15, 1998 Discharge Summary from Mountainside Hospital, Dr. Edward Latimore stated that "much of his [Mr. Ronk's] impulsive behavior is rooted in his manic depressive illness, and that he has to stay on medications or else he will certainly decompensate again and become unruly, etc." A progress note from Gulfport Memorial Hospital dated January 2,

2008 documented Mr. Ronk's history of "frontal lobe problems."

The combination of Mr. Ronk's inability to maintain control of his actions if unmedicated combined with his history of frontal lobe problems warranted a complete neuropsychological workup to determine the extent to which he was responsible for his actions. Frontal lobe dysfunction is well known to cause a lack of behavioral control and problems in the appreciation of the consequences of one's actions, which courts have recognized as significant mitigating evidence to reduce criminal culpability and to justify a sentence less than death.

. . . .

A thorough evaluation of Mr. Ronk's thinking and feelings at the time of the instant offense is required to assess to what degree his actions were or were not a mere behavioral choice. While extreme emotional distress or a lack of substantial capacity to conform his conduct to the requirements of the law would not qualify as an insanity defense in Mississippi, they would negate the prosecution's argument that the commission of the crime was just a behavioral choice and could be seen by the jury as mitigating. Assessing Mr. Ronk's active symptoms at the time of the instant offense is critical to understanding the extent to which his actions were or were not a mere behavioral choice.

> Mr. Ronk did not undergo a thorough forensic psychological or neuropsychological evaluation. The biological underpinnings of his diagnoses were not explained to the jury. While legal insanity was ruled out, an evaluation to assess the role of his multiple diagnoses in the instant offense was not performed. The fact that Mr. Ronk was being medicated to control his otherwise uncontrollable impulses and emotions was not presented to the jury. The role of ADHD and Bipolar Disorder in his criminal history was not assessed or explained to the jury. In addition, Dr. Smallwood's evaluation of Mr. Ronk was not informed by a full mitigation investigation, so the jury did not have the benefit of that information when deciding his sentence.

¶119. Ronk says a qualified neuropsychologist (like Dr. Stanulis) would have educated the jury that Ronk's crime was "a manifestation of behavior he could not control rather than 'pure evil' or a 'choice.'" And had the jury known that, more than a reasonable probability exists that the result would have been different. The information would have supported two mitigators: (1) that Ronk acted "under the influence of extreme mental or emotional disturbance" and (2) that his "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Miss. Code. Ann. § 99-19-101(6)(b), (f) (Rev. 2007).

¶120. Ronk argues that trial counsel had no strategic reason for failing to hire a

neuropsychologist. Busby says Dr. Smallwood was hired simply because she was the public defender's office's "go to" mental-health expert. But by Dr. Smallwood's own admission, a mitigation investigation fell outside of her expertise. ***Ronk II***, 267 So. 3d at 1261.

¶121. Post-conviction counsel did retain neuropsychiatrist Dr. Shawn Agharkar. Yet Dr. Stanulis says, "Dr. Agharkar did not finish his evaluation nor did he administer any neuropsychological testing . . . ."

¶122. We find that this claim lacks an arguable basis and is insufficient to surmount the bars. Nor is the newly-discovered-evidence exception met.

¶123. Ronk mainly faults Dr. Smallwood. She failed to address "the neurobiological underpinnings" of Ronk's diagnoses, Dr. Stanulis says. And he says medical records "should have alerted her that [Ronk] needed a neuropsychological evaluation." (Emphasis added.)

¶124. But Ronk "[wa]s not entitled to effective assistance of an expert." ***Garcia III***, 356 So. 3d at 119 (citing ***Brown v. State***, 798 So. 2d 481, 499 (Miss. 2001)).

¶125. No psychological expert is infallible. ***Garcia v. State*** (***Garcia IV***), 369 So. 3d 511, 521 (Miss. 2023) (quoting ***Doss v. State***, 19 So. 3d 690, 714 (Miss. 2009)). Nor must trial counsel "always go behind the retained psychological expert and question whether there are additional diagnoses defense counsel should

pursue." *Id.* at 523 (citing *Garcia III*, 356 So. 3d at 112–13). "[W]hen 'defense counsel has sought and acquired a psychological evaluation of the defendant . . . , counsel generally will not be held ineffective for failure to request additional testing[.]'" *Id.* (second alteration in original) (internal quotation marks omitted) (quoting *Garcia III*, 356 So. 3d at 112).

¶126. It was not unreasonable for Ronk's trial and post-conviction counsel to rely on their experts. See *Garcia III*, 356 So. 3d at 112–14 (finding that trial counsel was not deficient for failing to glean from sources, including expert evaluation, that the defendant may suffer from fetal alcohol syndrome disorder (FASD) when neither the sources nor the expert report indicated that the defendant suffered from FASD); *Clark v. Mitchell,* 425 F.3d 270, 285 (6th Cir. 2005) ("It was not unreasonable for [petitioner's] counsel, untrained in the field of mental health, to rely on the opinions of [retained psychological and psychiatric experts]."); *Wyatt v. State,* 71 So. 3d 86, 110 (Fla. 2011) ("[D]efense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire." (internal quotation mark omitted) (quoting *Reese v. State*, 14 So. 3d 913, 918 (Fla. 2009))); see also *Segundo v. Davis,* 831 F.3d 345, 352 (5th Cir. 2016) ("Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so." (internal quotation marks omitted) (quoting

Smith v. Cockrell, 311 F.3d 661, 676–77 (5th Cir. 2002), overruled on other grounds by *Tennard v. Dretke*, 542 U.S. 274, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004))). Because those experts did not suggest that a "forensic psychological or neuropsychological evaluation" was needed, counsel were not ineffective for failing to find otherwise. See *Clark*, 425 F.3d at 286 (holding that "counsel was not ineffective for failing independently to discover the need for additional neurological testing" because "[n]either expert concluded that [the petitioner] suffered from organic brain damage, nor did either suggest that [he] needed further neurological testing"); *Stokley v. Ryan*, 659 F.3d 802, 813 (9th Cir. 2011) ("[N]either of the experts counsel hired unequivocally stated that [the petitioner] should be examined by a neuropsychologist—and counsel was under no obligation to seek neuropsychological testing in the absence of any such recommendation." (citing *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998))).

¶127. What is more, Dr. Smallwood discussed Ronk's capacity to control his behavior. When asked about Ronk's ability to control his impulsivity, she answered, "[T]he presence of the bipolar disorder and ADHD, which he has, would make it much more difficult for him to control than the average person." Still, she did not find that he had "a mental disorder that overpowered his will to the point that he did not know right from wrong."

¶128. Portraying Ronk's behavior as beyond his control is not necessarily mitigating anyway. See *Foster v. Schomig*, 223 F.3d 626, 637 (7th Cir. 2000) ("Sentencing judges 'may not be impressed with the

idea that to know the cause of viciousness is to excuse it; they may conclude instead that when violent behavior appears to be outside the defendant's power of control, capital punishment is appropriate to incapacitate." (***quoting Burris v. Parke***, 130 F.3d 782, 784–85 (7th Cir. 1997))).

(8) Cumulative error does not merit relief.

¶129. Ronk says ***Ronk II*** was far from clear cut. For one, the Court described Geiss's "illnesses and prescription-drug use" as "troubling." ***Ronk II***, 267 So. 3d at 1256. And it said that "[trial] counsel's mitigation investigation arguably was deficient." ***Id***. at 1273. Still more, three Justices would have granted Ronk leave to seek post-conviction relief in the trial court on whether counsel were ineffective during the penalty phase. ***Id***. at 1291–92 (Coleman, J., concurring in part and dissenting in part, joined by Kitchens, P.J., and King, J.).

¶130. So Ronk contends that the cumulative effect of ***Ronk II***'s findings and the claims raised here merit relief.

¶131. We find that cumulative error does not merit relief

CONCLUSION

¶132. Based on ***Howell***, ***Grayson*** is overruled to the extent it excepted ineffective assistance-of-post-conviction-counsel claims from the UPCCRA's bars in death-penalty cases. And Ronk's post-conviction motion is denied.

¶133. **POST-CONVICTION RELIEF DENIED.**

RANDOLPH, C.J., COLEMAN, MAXWELL, BEAM, AND CHAMBERLIN, JJ., CONCUR. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J., AND ISHEE, J.

KITCHENS, PRESIDING JUSTICE, DISSENTING:

¶134. Respectfully, I dissent. In *Grayson v. State*, 118 So. 3d 118, 128 (Miss. 2013), this Court correctly held that a claim of ineffective assistance of post-conviction counsel is exempted from the procedural bars of the Mississippi Uniform Post Conviction Collateral Relief Act (UPCCRA). We noted that "[o]ur laws provide that an accused shall have 'representation available at every critical stage of the proceeding against him where a substantial right may be affected.'" *Id.* at 126 (quoting Miss. Code Ann. § 99-15-15 (Rev. 2007)). Post-conviction proceedings are a critical stage of the death-penalty appeal process. *Id.* "PCR counsel's deficient performance cannot preclude the petitioner's opportunity to file meritorious claims for relief." *Crawford v. State*, 218 So. 3d 1142, 1150 (Miss. 2015) (citing *Grayson*, 118 So. 3d at 128).

¶135. Today's partial reversal of *Grayson* leaves death-penalty petitioners with a right to "competent and conscientious" post-conviction counsel but with no mechanism for petitioning for redress of a viable claim that post-conviction counsel was ineffective. *Grayson*, 118 So. 3d at 126 (citing *Puckett v. State*, 834 So. 2d 676, 680 (Miss. 2002)). This nonsensical outcome

violates the maxim that there "is no right without a remedy, for 'whensoever the law giveth any right, . . . it also giveth a remedy.'" ***McInnis v. Pace***, 78 Miss. 550, 29 So. 835 (1901) (quoting Co. Litt. 56). The majority characterizes the no-right without-a-remedy principle as an "ideal" that is "not always attained[.]" Maj. Op. ¶ 24. Yet it discards an ideal we have attained in our precedent and have no justifiable reason for abandoning. Starting with ***Jackson v. State***, 732 So. 2d 187, 189-90 (Miss. 1999), we held that "recognition of the nature of death penalty litigation in the courts of this state, coupled with the ultimate penalty the State seeks to impose," requires the appointment of post-conviction counsel even though "[n]othing in the UPCCRA requires that one seeking relief be furnished counsel . . .."

¶136. "[D]eath undeniably is different." ***Hansen v. State***, 592 So. 2d 114, 142 (Miss. 1991). The right to access the courts is acutely critical under the heightened standards applicable to death penalty proceedings. ***Id***. at 125. "This Court recognizes that 'what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.'" ***Chamberlin v. State***, 55 So. 3d 1046, 1049-50 (Miss. 2010) (internal quotation marks omitted) (quoting ***Flowers v. State***, 773 So. 2d 309, 317 (Miss. 2000)). "[P]rocedural niceties give way to the search for substantial justice, all because death undeniably is different." ***Hansen***, 592 So. 2d at 142. "We must resolve all genuine doubts in favor of the accused." ***Ronk v. State***, 172 So. 3d 1112, 1125 (Miss. 2015) (citing ***Walker v. State***, 913 So. 2d 198, 216 (Miss. 2005)).

¶137. In ***Grayson***, this Court acknowledged that the "State is correct that this Court has not recognized a general right to the effective assistance of PCR counsel in every criminal case. However, we have acknowledged that death-penalty cases are different." ***Grayson***, 118 So. 3d at 126. "[B]ecause this Court has recognized that PCR proceedings are a critical stage of the death-penalty appeal process at the state level, today we make clear that PCR petitioners who are under a sentence of death do have a right to the effective assistance of PCR counsel." ***Id***. (citing ***Jackson***, 732 So. 2d at 191).

¶138. Because our state law recognizes a right to effective assistance of post-conviction counsel in death penalty cases, Mississippi law should continue to provide access to the courts to remedy a violation of that right. The majority asserts that we "break no new ground" by denying access to the courts for a death penalty defendant who has received ineffective assistance of post-conviction counsel, and for support cites cases from jurisdictions that—unlike Mississippi—do not recognize the right to effective assistance of postconviction counsel. *See* Maj. Op. ¶ 28. The majority's assertions amount to a concession that, by eliminating the remedy, this Court's true intent, functionally, is to eliminate the right.[2]

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[2] ***Frazier v. State***, 303 S.W. 3d 674, 679 (Tenn. 2010), cited by the majority, is not a death penalty case. That jurisdiction acknowledged that "there are circumstances under which courts must consider the merits of a post-conviction petition even when the petition is filed beyond the statute of limitations" and set reasonable standards for the performance of postconviction counsel even though the right to post-

¶139. The heightened standards applicable to death penalty cases have no meaning if the courts are not open for business. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Strickland v. Washington,*** 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This Court has extensive precedent granting evidentiary hearings on whether trial counsel was ineffective under the ***Strickland*** standard. See ***Spicer v. State***, 973 So. 2d 184 (Miss. 2007); ***Doss v. State***, 882 So. 2d 176 (Miss. 2004); ***Davis v. State***, 743 So. 2d 326 (Miss. 1999); ***Davis v. State***, 743 So. 2d 326 (Miss. 1999); ***Leatherwood v. State***, 473 So. 2d 964 (Miss. 1985).

¶140. In these and other similar cases, post-conviction counsel acted effectively by investigating trial counsel's performance and advocating for their clients in post-conviction proceedings. Under ***Grayson***, we recognized a right to challenge the effectiveness of post-conviction counsel despite the procedural bars of the UPCCRA. ***Grayson***, 118 So. 3d at 128. We granted relief on such a challenge in ***Walker v. State***, 131 So. 3d 562, 564 (Miss. 2013), holding that the failure of post-conviction counsel to present a claim of ineffective assistance of trial counsel constituted ineffective assistance of counsel. Walker's trial counsel had failed to research Walker's background, which should have been done to identify

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conviction counsel was statutory rather than constitutional. ***Id***. at 679-80.

mitigation evidence for the sentencing trial. *Id.* at 563. We found that "the mitigation evidence Walker has presented in his petition shows that he potentially was prejudiced by trial counsel's deficient performance at the penalty stage" and that "Walker's claim of ineffective assistance of post-conviction counsel is sufficient to overcome the procedural bars and allow this Court to reach the merits of his claim." *Id.* at 564.

¶141. But now, with no process extant for reviewing the performance of post-conviction counsel, a gap exists for an unjust result to carry through from trial to execution of the ultimate penalty. See *Strickland*, 466 U.S. at 686. Here, the majority goes through the essentially empty motion of analyzing the merits of Ronk's successive post-conviction petition. The crux of today's ruling, however, is that successive post-conviction petitions alleging ineffective assistance of post-conviction counsel are barred.[3] "The denial of an opportunity to present a properly supported motion seeking post-conviction collateral relief is, in effect, the denial of meaningful access to the courts." *Grayson*, 118 So. 3d at 146 (citing *Jackson*, 732 So. 2d at 191).

¶142. The majority compares the absence of a remedy here to other civil limitations such as limitations on suits against government entities. Maj. Op. ¶ 24. This comparison is not apt. All civil actions are not the same. In *Jackson*, this Court noted that the UPCCRA followed "the tradition of habeas corpus

[3] That is, they are barred under the current provisions of the UPCCRA.

practice" by providing that motions for post-conviction relief "shall be filed as an original civil action . . . ." ***Jackson***, 732 So. 2d at 190 (internal quotation mark omitted) (quoting Miss. Code Ann. § 99-39-7 (Rev. 1994)). Then we qualified that

> [t]hough this Court treats this statutory classification with respect, it is obvious that actions under the UPCCRA, which collaterally attack criminal convictions, are a unique kind of civil action. The reality is that postconviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level.

Id. (citation omitted).

¶143. Today's ruling implicates serious due-process concerns and demonstrates why the codification of our common law habeas writs in the UPCCRA should be categorized correctly as a procedural enactment. Today's partial overruling of ***Grayson*** is a sad continuation of this Court's abdication of its essential function as the state's court of last resort. See ***Howell v. State***, 358 So. 3d 613, 620 (Miss. 2023) (Kitchens, P.J., dissenting). Following the flawed logic of ***Howell***, the majority treats the UPCCRA's bar on successive post-conviction petitions as substantive.

¶144. Prior to ***Howell***, this Court unanimously and without controversy categorized the bars of the UPCCRA as procedural, not substantive. ***Id***. at 618. We valued the ideal that "[t]o deny relief for a fundamental-rights violation brought to our attention in a successive PCR would ignore the serious due-

process concerns underlying the fundamental-rights exception." ***Smith v. State***, 149 So. 3d 1027, 1031 (Miss. 2014) (quoting ***Rowland***, 42 So. 3d at 507), *overruled by* ***Pitchford v. State***, 240 So. 3d 1061 (Miss. 2017). With the Court's abandonment of our decades-long recognition of the fundamental rights exception to procedural bars, we leave death penalty petitioners with no mechanism for out-of-time redress of viable claims. *See* ***Rowland v. State,*** 42 So. 3d 503 (Miss. 2010), *overruled* by ***Howell***, 358 So. 3d 613; ***Rowland v. State***, 98 So. 3d 1032 (Miss. 2012), *overruled by* ***Howell***, 358 So. 3d 613. Now, for the scenario of ineffective assistance of post-conviction counsel, petitioners do not even have the option of an on-time petition for redress. The opportunity to seek relief is categorically barred.

¶145. Especially when the ultimate possibility is death, the judicial branch of government is possessed of the obvious and plenary authority to facilitate the redress of violations of fundamental rights. In ***Grayson***, we described our judicial function and responsibility thusly:

> Having determined that Grayson had a right to the effective assistance of PCR counsel during his original PCR proceedings, we now must determine whether that right was violated. If it was violated, then Grayson's first PCR motion was a sham, and he was denied an opportunity to present a meritorious PCR motion.

Grayson, 118 So. 3d at 126. Today, the Court holds that while we have determined that death-penalty defendants have the right to effective assistance of

post-conviction counsel, we will not decide whether that right was violated, we will not determine whether a first post-conviction motion was a sham, and we will not facilitate the opportunity to present a meritorious PCR motion.

¶146. I cannot join this position; therefore, I dissent.

KING, P.J., AND ISHEE, J., JOIN THIS OPINION.

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

July 18, 2024

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 18th day of July, 2024.

Supreme Court Case # 2021-DR-00269-SCT

Trial Court Case # B2401-09-434

Timothy Robert Ronk a/k/a Timothy Ronk a/k/a Timothy R. Ronk v. State of Mississippi

Petitioner Timothy Ronk's motion for rehearing is denied. Kitchens and King, P. JJ., would grant.

*NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: https://courts.ms.gov, and selecting the appropriate date the opinion was rendered under the category "Decisions."