No. _____

IN THE

Supreme Court of the United States

CHARLES RAY CRAWFORD,

Petitioner,

v.

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; EARNEST LEE, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY,

Respondents.

On Petition for a Writ of Certiorari
from the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), this Court clearly established that the State must provide indigent criminal defendants whose mental condition is at issue "access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'" *McWilliams* v. *Dunn*, 582 U.S. 183, 186 (2017) (quoting *Ake*, 470 U.S. at 83). Petitioner raised an insanity defense at his rape trial, but the trial court violated *Ake* by refusing to provide petitioner with the assistance of a mental health expert unless and until petitioner could convince both the court and prosecution experts that he was in fact insane. The questions presented are:

1. Whether petitioner's appellate counsel was ineffective for failing to raise an *Ake* claim on appeal, where the trial court imposed preconditions on expert assistance that violated *Ake* and denied petitioner his right to expert assistance.

2. Whether petitioner's trial counsel was ineffective for failing to continue to pursue expert assistance, to the extent that, as the court of appeals held, the trial court's imposition of the improper preconditions did not constitute a definitive denial of petitioner's *Ake* request.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Crawford v. *Cain*, No. 20-61019, U.S. Court of Appeals for the Fifth Circuit. Judgment entered November 22, 2024.

Crawford v. *Lee*, No. 3:17-CV-105, U.S. District Court for the Northern District of Mississippi. Judgment entered September 29, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Crawford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The en banc decision of the court of appeals (App. 1a-32a) is reported at 122 F.4th 158. The panel opinion (App. 90a-110a), later vacated, is reported at 68 F.4th 273. The district court's opinion (App. 33a-87a) is available at 2020 WL 5806889. The Mississippi Supreme Court opinion denying petitioner's request for post-conviction relief (ROA.3167-68) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2024. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

In *McWilliams* v. *Dunn*, this Court held that its 1985 decision in *Ake* v. *Oklahoma* clearly established that the State must provide indigent criminal defendants whose mental condition is at issue with "access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'" *McWilliams*, 582 U.S. 183, 186 (2017) (quoting *Ake*, 470 U.S. at 83). In this case, the Mississippi state trial court violated *Ake*'s clear rule by refusing to provide petitioner with expert assistance unless and until he could convince both the court and prosecution experts that he was, in fact, insane. The en banc Fifth Circuit excused that textbook *Ake* violation by holding that the trial court never definitively denied petitioner's request for an expert. As the dissenting judges below recognized, that holding gives trial courts free rein to permit the *State* to decide whether a defendant should receive the expert access that *Ake* guarantees, App. 9a, thereby rendering *Ake* and *McWilliams* a dead letter in the Fifth Circuit.

Ake established two basic propositions designed to protect an indigent defendant's access to the expert assistance that is "crucial to the defendant's ability to marshal his defense." 470 U.S. at 80. First, to establish entitlement to an expert, the defendant need only make a threshold showing that he is indigent and his mental condition is both relevant to guilt or sentencing and in question. *McWilliams*, 582 U.S. at 195; *Ake*, 470 U.S. at 70, 80. No one disputes that petitioner made that showing here. Yet the trial court held that petitioner was required to persuade both the court and

state experts that he was "in fact" insane, ROA.2096,[1] before he would be entitled to expert assistance. Second, the defendant is entitled to an expert who is sufficiently independent from the prosecution to be able to assist the defense. Yet the trial court here conditioned that assistance on obtaining agreement that petitioner was insane from experts *who later testified for the prosecution*. Those conditions rendered the *Ake* right meaningless. By definition, the expert assistance guaranteed by *Ake* is assistance in "evaluat[ing]" and "prepar[ing]" an insanity defense—that is, a defendant is entitled to an expert even where he seeks to explore a *possible* insanity defense and the prosecution disputes insanity. 470 U.S. at 70, 91. To hold, as the Fifth Circuit did, that *Ake* assistance may be conditioned on prosecution-expert agreement and a judicial determination of insanity is to hold that defendants need not ever be provided with the assistance that *Ake* guarantees them.

This case therefore should have been straightforward. Petitioner's conviction was unquestionably obtained in violation of *Ake*: his only real defense at trial was insanity, and the trial court's denial of expert assistance left petitioner entirely unable to rebut the two prosecution experts who testified that he was sane and malingering. Remarkably, petitioner's appellate counsel failed to raise that open-and-shut *Ake* violation on appeal based solely on an oversight—a stark instance of ineffective assistance of counsel about which no reasonable jurists could disagree, and that provides cause and prejudice for petitioner's failure to preserve the *Ake* claim on appeal. Yet the Fifth Circuit held that

[1] "ROA" refers to the Record On Appeal filed in the court of appeals.

appellate counsel was not ineffective because the trial court's improper conditioning of the *Ake* right did not constitute an outright denial. That holding cannot be reconciled with *Ake* and *McWilliams*. And even accepting for purposes of argument the Fifth Circuit's view that the trial court did not definitively deny expert assistance, that would simply mean that petitioner's trial counsel was ineffective for failing to continue to pursue petitioner's *Ake* right despite planning and presenting an insanity defense. The Fifth Circuit's holding that trial counsel performed reasonably by presenting an insanity defense without any expert assistance squarely contradicts *Ake*'s recognition that "the testimony of psychiatrists can be crucial and a virtual necessity if an insanity plea is to have any chance of success." 470 U.S. at 81 (citation omitted).

Petitioner's trial was rendered fundamentally unfair by the court's refusal to provide him the expert assistance to which he was entitled. To ensure that the bedrock principles set forth in *Ake* and *McWilliams* continue to have force, especially in the Fifth Circuit, this Court should grant certiorari and reverse the Fifth Circuit's decision.

STATEMENT OF THE CASE

I. Mississippi Trial Proceedings

A. In 1991, a grand jury indicted petitioner for the rape and kidnapping of K.R. Petitioner was also indicted for aggravated assault for striking K.R's companion, Nicole, with a hammer leading up to the rape. App. 8a. The two indictments were given different case numbers and were ultimately tried separately.

Petitioner's rape trial ultimately centered on his mental condition: the defense contended that he was not guilty by reason of insanity, based on his long history of civil commitment, seizures, and blackouts. Petitioner asserted that as a result of a blackout, he did not remember the assault or the rape. App. 8a. K.R. and Nicole would later testify that petitioner's personality and appearance were significantly altered during his commission of the offenses—*e.g.*, he had a blank expression and dilated, unblinking eyes. ROA.2543-46, ROA.2594-95, ROA.2599, ROA.2604-06.

Petitioner's original counsel, Randy Fortier, filed a notice of intent to pursue an insanity defense. ROA.1051. Because petitioner was indigent, counsel also filed a motion requesting funds for a mental health expert. ROA.1040. The motion stated that petitioner's mental condition "will be a primary and significant factor at both phases of the trial herein" and that due to various mental illnesses, petitioner did not understand the nature of the acts he committed. ROA.1041. Petitioner argued that the assistance of a psychiatrist or psychologist was necessary to develop and present an insanity defense and to cross-examine any state experts. ROA.1041.

In support of his motion, petitioner attached an affidavit from Dr. Lemly D. Hutt, a licensed psychologist. ROA.1043. Dr. Hutt had reviewed information pertaining to petitioner's mental health, including prior psychiatric evaluations, medical history, social background, and statements from friends, family and acquaintances. ROA.1043. Dr. Hutt preliminarily opined that petitioner exhibited signs of bipolar affective disorder and other mental disorders that "could provide the basis for a defense of Not Guilty by Reason

of Insanity." ROA.1043. Dr. Hutt stressed that a "full battery of tests" was needed to evaluate petitioner's mental condition and that such tests might even show signs of an "organic brain disorder." ROA.1043. Dr. Hutt, however, could not perform these tests without funds from the court. ROA.1043.

On April 21, 1992, the trial court heard petitioner's motion for funding for expert assistance, among other issues. ROA.2036. Invoking *Ake* v. *Oklahoma*, 470 U.S. 68 (1985), petitioner argued that, because he was indigent and his sanity would be a significant issue in his defense, the State must provide him a psychiatrist to assist in the development and presentation of his defense. ROA.2062. The State, for its part, acknowledged that if petitioner were indigent, he "would be entitled to access to a psychiatrist," and it asked the court to order him to submit to examination by state psychiatrists. ROA.2064. Petitioner objected, explaining that the State's request for examination was separate from his right to an *independent* expert to assist in his defense. ROA.2066-67. The court determined that petitioner was "[u]ndoubtedly an indigent," and it acknowledged that Dr. Hutt's report "alludes to the fact that the defendant may be suffering from some illness which effects his ability to perceive the wrongfulness of his act." ROA.2068, ROA.2074. The court nonetheless denied petitioner's request for funds for an independent expert. Instead, the court ordered that petitioner would be examined by staff at a state facility, who would inform the court whether defendant had the "ability to know right from wrong o[n] the date of the alleged offense." ROA.2068-69. The court made clear that it was "not going to spend $3,000 dollars of Tippah County's money" unless the staff at the state facility indicated that there were "exceptional

circumstances." ROA.2069-70. The court stated it would hear "further motions from either side" after the state's assessment came back. ROA.2069.

On September 14, 1992, the court again heard argument on petitioner's motion for an independent expert. Petitioner reemphasized that his right to expert assistance was separate from the State's right to examine him under local rules. ROA.2093-94. But because the state mental health center had used a social worker, rather than a psychiatrist, to evaluate petitioner, the court denied petitioner's request. ROA.2092-94. The court further explained that it would require "proof" of insanity: "[i]f the Court determines that he is, in fact, has some mental deficiency or whatever, then at that point in time the Court's going to have to address the issue of whether or not you're entitled to have an expert, your expert." ROA.2096. The court then ordered petitioner to be examined by state doctors, per the prosecution's request. ROA.2097; ROA.2096 (court stating that it was ordering examination by state doctors because "I haven't heard any proof" that petitioner "has a problem"). Finally, petitioner clarified that he had the right to reargue his request for funds after receiving the State's report. ROA.2097.

Later that year, the state experts examined petitioner and determined that he was sane. The experts diagnosed petitioner with malingering, finding that his reported memory deficits were not credible or consistent with the mental state observed by others. ROA.1135-36. The doctors concluded that petitioner was competent to stand trial and assist in his defense, and that he knew the difference between right and wrong at the time of the alleged offenses. ROA.1136.

A little over a month later, petitioner was arrested and charged with an unrelated murder, and Fortier filed a motion to withdraw due to a conflict of interest. ROA.1106. The court held Fortier's motion in abeyance while it ordered petitioner to undergo further psychiatric examination by the state to reassess his competency to stand trial. ROA.1362-64. State doctors again diagnosed petitioner as malingering. ROA.729. The court then granted Fortier's motion to withdraw and appointed James Pannell to represent petitioner. ROA.1143, ROA.2907.

While incarcerated, and before his rape trial, petitioner suffered a number of seizures, including one that caused him to fall and strike his head. ROA.3027, ROA.3029, ROA.3030, ROA.3041-43. Another seizure caused petitioner to black out for five minutes and was serious enough that the local hospital transferred him to the regional hospital for treatment and testing. ROA.3010. Dr. Hutt opined in an affidavit that these seizures could be caused by organic brain damage and that petitioner should undergo neurological testing. ROA.3009. Dr. Mark Webb, an expert hired by petitioner's sister for his murder trial, also opined that petitioner might have organic brain damage and that he should undergo neuropsychological tests. ROA.3157-58. Pannell did not engage any experts to perform these tests.

B. At trial, Pannell initially argued both that petitioner was not guilty by reason of insanity and that petitioner had not committed the offenses at all. ROA.1455-56. But Pannell did not present evidence of factual innocence and focused exclusively on insanity in his closing argument. ROA.1809 (telling the jury that it would be "dumb" to find petitioner not guilty

and that the "better road" was to "find him not guilty by reason of insanity").

Without an expert witness to support the insanity defense, Pannell was relegated to offering the lay testimony of petitioner's mother and his ex-wife. Petitioner's mother testified that she first took him to a psychiatrist as a child because he was afraid to sleep and heard voices. ROA.1647. As he got older, petitioner began experiencing severe headaches and mood swings that his mother described as a "split personality" or "spells" because he would get a blank stare on his face, his pupils would shrink, and he would suddenly become angry and violent. ROA.1648-50, ROA.1661. Petitioner's ex-wife testified to similar spells that started with a severe headache and were followed by a change in petitioner's eyes, personality, and behavior. ROA.1673-74. During these spells, he would wake her up at night jerking, shaking, and crying. ROA.1673. Neither witness, however, could explain petitioner's behavior or the cause of his spells; as one observed, "I'm not a doctor." ROA.1649, 1686-87, 1679, 1682. The court also prohibited the witnesses from testifying about petitioner's diagnosis, ROA.1648-49, whether he was seriously mentally ill, ROA.1678-79, whether he knew what he was doing during these states or had any memory of them, ROA.1678-79, and whether anything could be done to help him. ROA.1653.

Petitioner also testified that he had a lengthy history of psychiatric problems, including two hospitalizations and a diagnosis of bipolar disorder. ROA.1691-95. He agreed that he suffered "spells" accompanied by headaches, blurred vision, and memory loss, but he could not explain why they happened to him.

ROA.1697. He testified to recent blackouts and seizures in jail, but he did not know what caused them or what happened during the seizures. ROA.1698.

To rebut petitioner's insanity defense, the State called two expert psychiatrists: Dr. Reb McMichael, who evaluated petitioner at the state hospital pursuant to the State's motion for a psychiatric evaluation; and Dr. Stanley Russell, who was treating petitioner in prison. ROA.1731-32, 1752, 1755-56. Both doctors testified that petitioner did not suffer from bipolar disorder or any other major mental illness, but instead had an antisocial personality disorder, was malingering (or faking) his memory deficits, and did not meet the definition of insanity at the time of the crime. ROA.1733-34, 1739, 1760. Russell noted, however, that petitioner's blackouts could be consistent with a complex partial seizure disorder, but more tests were necessary. ROA.1732-331740. In closing argument, the prosecution emphasized that both of its experts testified that petitioner did not have any mental illness. ROA.1792-95.

The jury returned a guilty verdict on the rape charge, ROA.1823-24, and the judge sentenced petitioner to 46 years of imprisonment. ROA.1827.

II. Mississippi Appellate and Post-Conviction Proceedings

Petitioner appealed to the Mississippi Supreme Court.[2] Petitioner's appellate counsel, Glenn Swartzfager, did not challenge the trial court's clear *Ake*

[2] For various reasons, some of which are unclear, petitioner's appeal was not submitted to the Mississippi Supreme Court until March 2015. *Crawford* v. *State*, 192 So.3d 905, 912 (Miss. 2015).

violation, despite the centrality of petitioner's mental condition to the trial and the State's unrebutted expert testimony on the issue. ROA.2254-2307. The Mississippi Supreme Court affirmed. *Crawford* v. *State*, 192 So.3d 905, 926 (Miss. 2015).

Petitioner then filed a petition for post-conviction relief in the Mississippi Supreme Court. ROA2433-89. Petitioner raised three primary issues: (1) the trial court violated his due process rights, clearly established in *Ake* v. *Oklahoma*, when it refused to appoint him an independent psychiatric expert to assist with the defense; (2) appellate counsel was ineffective for failing to raise an *Ake* claim on direct appeal; and (3) if the *Ake* claim was unpreserved, trial counsel was ineffective for failing to pursue expert assistance and for presenting an incoherent "hybrid" defense. ROA.2434-35. The latter two claims also provided cause and prejudice excusing petitioner's failure to raise the *Ake* claim earlier. ROA.20-21, C.A.Pet.Panel.Opening.Br. at 30-34.

To support his ineffective assistance of counsel claims, petitioner submitted affidavits from Pannell and Swartzfager. Pannell stated that "I did not see the point in requesting funds since it was my understanding and belief that the court would force me to use the experts at the Mississippi State Hospital—the very same experts that would testify for the State." ROA.3165. Swartzfager testified that he "had no strategic reason for not raising" the *Ake* issue on direct appeal; "[i]t was an oversight on my part." ROA.2497.

To support his claim of prejudice arising from the lack of expert assistance, petitioner submitted an affidavit from Dr. Siddhartha Nadkarni, who specializes

in treating epilepsy. ROA.2492-94. Dr. Nadkarni conducted a neurological examination of petitioner and diagnosed him with Severe Brain Injury and Partial Epilepsy. ROA.2492. Dr. Nadkarni explained that "[f]or someone with [petitioner's] diagnoses of temporal lobe epilepsy and partial complex seizures, [his] reported periods of blackouts and his inability to recall his actions is a well-documented phenomenon called post-ictal amnesia." ROA.2493. Dr. Nadkarni opined that petitioner was likely "in a state of repetitive complex seizures on the day of the rape" and that "[t]here was ample evidence available at the time of [his] trial to diagnose [him] with complex seizures." ROA.2493-94. Dr. Nadkarni concluded that he had "little doubt that [petitioner] was in an epilepsy related delirium at the time of the rape, resulting from acute seizures and persistent post-ictal confusion * * * . As such, he would have had no awareness of his actions, nor agency in committing them." ROA.2494.

The Mississippi Supreme Court summarily denied petitioner's request for post-conviction relief. ROA.3167.

III. Federal Habeas Petition

A. Petitioner filed a habeas petition in the United States District Court for the Northern District of Mississippi, raising the same issues as in his state post-conviction petition. ROA.5-70. The district court denied relief, App. 87a, but granted a certificate of appealability on all claims. ROA.996-98.

B. A panel of the Fifth Circuit affirmed. For both ineffective assistance claims, the panel reasoned that, to establish deficient performance, petitioner must

show that his lawyer was so incompetent as to be "no counsel at all." *Crawford* v. *Cain*, 55 F.4th 981, 989 (5th Cir. 2022). The panel concluded that petitioner's trial and appellate counsel were not equivalent to "no counsel at all." *Id.* at 990-92. More broadly, the panel announced that "law and justice" required granting habeas relief only when the petitioner had shown that he was factually innocent. *Id.* at 994. Because petitioner did not claim factual innocence, the court held, habeas relief should be denied regardless of any fundamental constitutional errors in petitioner's trial. *Id.* at 996.

Petitioner sought panel and en banc rehearing. Both requests were denied, and the panel withdrew its original opinion and issued a slightly modified opinion in its place. *Crawford* v. *Cain*, 68 F.4th 273 (5th Cir. 2023).

The Fifth Circuit then sua sponte vacated the panel decision and voted to hear the case en banc. App. 88a-89a.

C. The en banc court affirmed the district court's denial of habeas relief.

In his briefing, petitioner argued that the panel's imposition of an actual innocence prerequisite to habeas relief had no basis in the Constitution, AEDPA, or historical practice. Petitioner also argued that he was entitled to relief on his *Ake* and ineffective assistance claims. Petitioner explained that *McWilliams* v. *Dunn*, 582 U.S. 183 (2017), held that *Ake* clearly established that an indigent defendant is entitled to expert assistance when his mental condition is relevant to guilt or sentencing and that condition is seriously in

question; and that an examination by state experts who work for, and share the results of their examination with, the prosecution does not satisfy *Ake*'s requirements. The trial court's refusal to provide petitioner with expert funding unless and until the state experts concluded he was insane thus violated *Ake*, as reaffirmed in *McWilliams*. And because the trial court issued that ruling over petitioner's objection, the issue was properly preserved. Appellate counsel was therefore ineffective in failing to raise this unambiguous and preserved *Ake* violation, and to the extent that the objection was not preserved, trial counsel was ineffective in failing to insist on petitioner's *Ake* right.

The per curiam majority did not reimpose or even mention the actual innocence prerequisite that the panel had adopted in its since-vacated opinion. The court affirmed the district court's denial of habeas relief on the ground that fair-minded jurists could conclude that petitioner's trial and appellate counsel were not ineffective for failing to preserve his *Ake* claim. The court held that appellate counsel was not ineffective in failing to raise the issue on appeal because, in its view, the trial court had not definitively denied petitioner's motion for expert funding under *Ake*. Therefore, the Fifth Circuit reasoned, the *Ake* claim was unpreserved and would not have been a strong claim on appeal. App. 3a-4a. The Fifth Circuit also rejected petitioner's argument that if trial counsel had not preserved the *Ake* claim, his performance was ineffective. Without providing reasoning of its own, the Fifth Circuit cross-referenced the district court's holding that trial counsel might have made a strategic decision to forgo investigating an insanity defense. The court further reasoned that the lack of a defense expert was not prejudicial, because petitioner had presented an

expert at his assault trial and the jury had rejected his insanity defense. App. 4a.

The Fifth Circuit also rejected petitioner's arguments based on *McWilliams*, holding that that decision was inapposite because it was issued after the relevant state court decisions and involved different facts than petitioner's case. App. 4a-5a.

D. Judge Richman, joined by Judges Southwick, Higginson, and Douglas, dissented.

The dissenting judges would have held that the Mississippi trial court violated clearly established federal law by repeatedly denying petitioner's request for an independent expert and conditioning expert assistance on proof of insanity, to be provided by the State's experts. App. 9a. "In essence, the trial court gave the State the power to foreclose access to an expert witness for" petitioner. App. 9a.

The dissenting judges further determined that appellate counsel was ineffective in failing to raise the *Ake* claim, and no reasonable jurist could disagree. App. 26a-29a. Petitioner had preserved his *Ake* claim for appeal, and it was clearly stronger than petitioner's other appellate issues. App. 28a. And even if the claim had not been preserved, it was still clearly stronger than any other claim raised, under plain-error review. App. 28a-29a.

The dissenting judges also would have held that to the extent that trial counsel failed to renew and pursue petitioner's *Ake* entitlement to expert funding, that failure constituted deficient performance. Petitioner' trial counsel, Pannell, intended to and did

pursue an insanity defense, and two mental health experts, Drs. Hutt and Webb, provided opinions to Pannell that petitioner "may suffer from organic brain damage" and strongly recommended additional neuropsychological testing. App. 10a-11a. Yet Pannell did not pursue the assistance of an independent expert. App. 11a-12a. Trial counsel's failure was indisputably prejudicial, the dissenting judges explained, because expert assistance is a "virtual necessity" if such a defense is to have any chance of success. App. 17a-18a (quoting *Ake*, 470 U.S. at 81). Petitioner's lack of expert assistance was particularly detrimental because the State presented two experts who opined that petitioner was sane and malingering, and counsel was unable to rebut that testimony without his own expert. App. 18a-19a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision cannot be reconciled with this Court's recent decision in *McWilliams* v. *Dunn*, 582 U.S. 183 (2017), which held that the constitutional principles that the Mississippi trial court ignored in petitioner's case were clearly established in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). There can be no real dispute that petitioner's constitutional rights were violated: The Mississippi trial court ordered that petitioner would not be entitled to the assistance of an independent expert, as *Ake* requires, unless and until the trial court was able to find that petitioner was "in fact" insane based on the opinions of *state* experts who worked for the prosecution, shared the results of their examinations with the prosecution, and were available to (and did in fact) testify for the prosecution. That ruling flies in the face of *McWilliams* and *Ake* and

renders the right to expert assistance illusory in the Fifth Circuit.

Petitioner's appellate counsel was clearly ineffective for failing to raise that open-and-shut constitutional violation on appeal, and no reasonable jurists could disagree. Yet the Fifth Circuit excused counsel's performance on the theory that the Mississippi trial court never definitively denied petitioner's *Ake* request for funding. That holding is directly contrary to *McWilliams* and *Ake*: over petitioner's objection, the trial court placed preconditions on petitioner's *Ake* right that *Ake* and *McWilliams* rejected. Nothing more was necessary to preserve the claim.

The Fifth Circuit's further holding that trial counsel was not ineffective to the extent counsel failed to preserve the *Ake* claim conflicts with *McWilliams*'s and *Ake*'s recognition that expert assistance is vital when a defendant plans to pursue an insanity defense, as petitioner did here. The decision also conflicts with decisions of other courts of appeals recognizing that counsel performs deficiently by failing to obtain expert assistance despite pursuing an insanity defense, and despite clear indications that the defendant's mental condition is in question. This Court's review is warranted.

I. This Court Should Review The Fifth Circuit's Holding That Petitioner's Appellate Counsel Was Effective Despite Failing To Raise Petitioner's Meritorious *Ake* Claim.

The Fifth Circuit held that petitioner's appellate counsel was not ineffective for failing to raise

petitioner's indisputably meritorious *Ake* claim because the trial court had, in the Fifth Circuit's view, never definitively denied petitioner's *Ake* request. That holding squarely conflicts with both *Ake* and *McWilliams* because it is premised on a fundamental misunderstanding of the showing that triggers the State's obligation to provide expert assistance. Petitioner made the showing that *Ake* and *McWilliams* require—yet the trial court nonetheless conditioned petitioner's right to expert assistance on his ability to demonstrate to the court that he was "in fact" insane based on the examination by the prosecution's experts. In holding that this trial-court ruling did not definitively reject petitioner's *Ake* request, the Fifth Circuit disregarded *McWilliams*'s clear explication of *Ake* and rendered the *Ake* right meaningless.

A. The state trial court violated *Ake* by refusing to provide petitioner with expert assistance.

1. In *McWilliams*, this Court held that *Ake* clearly established that criminal defendants have a constitutional right to expert psychiatric assistance and that the decision further established several subsidiary propositions. *McWilliams*, 582 U.S. at 195; *Ake*, 470 U.S. 68 (1985). Two aspects of *McWilliams*'s holding are particularly relevant here. First, *McWilliams* held that *Ake* clearly established the "conditions that trigger application of" the right to expert psychiatric assistance. 582 U.S. at 195. Specifically, *Ake* "appl[ies]" when the defendant is indigent, his mental condition is relevant to guilt or punishment, and that mental condition is "seriously in question." *Ibid*. Nothing more is required. Second, *McWilliams* held that *Ake* "clearly established" the scope of the State's obligation

when *Ake* is triggered: "the State must * * * assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83; *McWilliams*, 582 U.S. at 195. The expert thus must be "sufficiently available to the defense and independent from the prosecution" to assist the defendant in each enumerated aspect of his defense. *McWilliams*, 582 U.S. at 197.

2. *McWilliams* leaves no doubt that the state trial court violated *Ake*. That court conditioned petitioner's entitlement to expert assistance on a judicial determination, based on examination by *state* experts, that petitioner was "in fact" insane—when *Ake* commanded that petitioner be afforded an expert upon a far lesser showing. ROA.2096.

Petitioner demonstrated to the trial court that the "conditions that trigger application of" *Ake* were present. *McWilliams*, 582 U.S. at 195. Petitioner filed a motion seeking funds for an expert psychologist, in which he asserted that his mental condition would be highly relevant to guilt, and indeed "will be a primary and significant factor at both phases of the trial herein." ROA.1041. The prosecution evidently agreed, as it contemporaneously moved to have petitioner examined by its own psychiatrists in preparation for rebutting petitioner's anticipated insanity defense. ROA.2064. Petitioner also placed his mental condition "seriously in question," offering a psychologist's affidavit indicating that petitioner "suffer[ed] from various serious mental health disorders" and that further psychiatric evaluation was necessary. ROA.1041-43. At that point, *Ake* required the court to provide petitioner with access to a psychiatrist who could examine him

and who would be available to defense counsel to assist with the "evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83; *McWilliams*, 582 U.S. at 195.

Instead, the court imposed additional prerequisites that flew in the face of *Ake*, as reaffirmed in *McWilliams*. The court denied petitioner's request for funds, stating that it was "not going to spend $3,000 dollars of Tippah County's money" for an expert until petitioner had been examined by *state* experts to assess "the defendant[']s ability to know right from wrong o[n] the date of the alleged offense." ROA.2068-69. The court subsequently ordered petitioner to submit for examination by the prosecution's experts, ROA.2097, and stated: "If the Court determines that [petitioner] is, *in fact*, has some mental deficiency or whatever, then at that point in time the Court's going to have to address the issue of whether or not you're entitled to have an expert, your expert." ROA.2096 (emphasis added). Thus, the trial court ruled that petitioner would not be entitled to funds for an expert unless and until the court concluded, based on a report from the prosecution's experts, that petitioner was "in fact" insane.

That roadblock—the requirement of demonstrating insanity based on the findings of the prosecution's experts—was clearly contrary to *Ake* and *McWilliams* in two respects. First, under *Ake*, petitioner was obligated to establish only that his sanity was relevant and in question—he had no obligation to convince the trial court that he was "in fact" insane in order to obtain expert assistance. 470 U.S. at 83. Indeed, it is difficult to imagine how petitioner could satisfy that prerequisite without the assistance of an independent

expert. And *McWilliams* leaves no doubt that a defendant is entitled to expert assistance even if the defendant's evidence might not ultimately persuade the factfinder. 582 U.S. at 199. Indeed, *Ake* explained, and *McWilliams* reaffirmed, that the expert should "help determine whether the insanity defense is *viable*"—which presupposes that a defendant need not demonstrate that he is actually insane to obtain expert assistance. *Ake*, 470 U.S. at 82; *McWilliams*, 582 U.S. at 199. Second, by conditioning expert funds on a finding of insanity by state experts who were assisting the prosecution, the court effectively denied petitioner his clearly established right to an expert to aid the *defense*. *Id*. at 197. That right cannot possibly be conditioned on prosecution experts' *agreement* that the defendant is insane. As Judge Richman recognized in dissent, "[i]n essence, the trial court gave the State the power to foreclose access to an expert witness for" petitioner. App. 9a.

Petitioner's conviction was thus obtained in violation of *Ake*. Despite making a clear showing that his sanity would be a significant issue, petitioner was forced to proceed to trial with no psychiatric expert to examine him, assist him in preparing his defense, or present testimony on his behalf. The prosecution presented two experts who opined that petitioner was not insane and that he was lying about his memory loss. Petitioner could not rebut that testimony, because he was limited to presenting testimony from lay witnesses who could not opine as to whether he was sane or not. See *Ake*, 470 U.S. at 80 (noting insufficiency of lay witnesses because they can only testify to symptoms). Petitioner was therefore denied the expert assistance that was "crucial to [his] ability to marshal his defense." *Ibid*.

B. The Fifth Circuit's rejection of petitioner's appellate ineffective assistance claim conflicts with *Ake* and *McWilliams*.

1. The Fifth Circuit nevertheless rejected petitioner's appellate ineffective assistance claim on the ground that, in its view, the "trial court [n]ever denied a request under *Ake*," and therefore petitioner's *Ake* claim was unpreserved.[3] App. 3a. That conclusion cannot be reconciled with *Ake* and *McWilliams*. Although it is true that the trial court did not say that it would *never* grant expert assistance, it made crystal clear that it would grant such assistance only upon petitioner's compliance with requirements that *McWilliams* and *Ake* rejected: the court's conclusion that petitioner was "in fact" insane after a finding by state experts that "the man has a problem." ROA.2096. By refusing to recognize *Ake*'s purposely low threshold and conditioning expert assistance on agreement by the state's experts, the state trial court unequivocally denied petitioner's request for the

[3] As an initial matter, although the Fifth Circuit asserted that "the state court found that trial counsel defaulted the *Ake* claim," App. 3a, the state court in fact made no such finding. In his petition to the Mississippi Supreme Court for post-conviction relief, petitioner raised *Ake* as a standalone issue, in addition to raising alternative ineffective-assistance claims premised on counsel's failure to raise *Ake*. ROA.2434, ROA.2443-61. The court denied petitioner's *Ake* claim because the issue "*could have been raised in the direct appeal* and is barred at this stage." ROA.3167 (emphasis added). Thus, the state court determined that appellate counsel, not trial counsel, forfeited petitioner's *Ake* claim—which is of course the premise of petitioner's claim of appellate ineffective assistance. The Fifth Circuit's conclusion that the Mississippi trial court never denied petitioner's *Ake* request is therefore its own, and is entitled to no deference.

assistance to which *Ake* entitled him. Indeed, the court gave the State the power to "foreclose access" to an expert for the defense—exactly what *Ake* forbids. App. 9a. The violation of *Ake* was complete at that point.

Petitioner unquestionably preserved his challenge to that violation. He asserted at the relevant hearings that he had made the only showing required by *Ake*, and he pointed out that examination by state experts was insufficient. ROA.2095-96. Petitioner was not required to later reassert the same objection to that error. See *United States* v. *Rao*, 123 F.4th 270, 280 n.6 (5th Cir. 2024) (An issue is preserved for appeal "even if the court simultaneously encourages the defendant to raise the issue again * * * ."). By nonetheless holding that petitioner should have reasserted his request after the state experts examined him, the Fifth Circuit approved the trial court's conditioning of petitioner's *Ake* right on the State's and the court's agreement that petitioner was insane—thus rendering *Ake* a dead letter.[4]

2. Because petitioner's *Ake* challenge was preserved for appeal, appellate counsel was unquestionably ineffective in failing to raise it, and no reasonable jurist could conclude otherwise. *Strickland* v. *Washington*,

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[4] Indeed, the trial court's improper precondition for revisiting petitioner's *Ake* request never came to pass. Unsurprisingly, the State's experts opined that petitioner was sane. ROA.1135-36. It was therefore obvious, based on the trial court's comments, that the court would not grant petitioner funds for expert assistance, and any further request would have been futile. That fact confirms that the trial court violated *Ake* in imposing the conditions in the first place.

466 U.S. 668, 687 (1984); *Harrington* v. *Richter*, 562 U.S. 86, 105 (2011). Appellate counsel are ineffective when they fail to raise an issue on appeal that is "clearly stronger" than other issues raised. *Smith* v. *Robbins*, 528 U.S. 259, 288 (2000). The *Ake* claim was such an issue. It was, as discussed above, plainly meritorious and prejudicial to the outcome. Notably, the Fifth Circuit never suggested otherwise. And the *Ake* claim was much stronger than the issues that counsel did raise on appeal. Petitioner's conflict-of-interest claim had already been considered and rejected by the Fifth Circuit in a separate federal habeas proceeding; the appellate-delay claim was unsupported by precedent; the alleged instructional error was cured by other instructions; and the warrantless search was justified by the exigent need to find the woman petitioner was believed to have kidnapped. *Crawford* v. *State*, 192 So. 3d 905 (Miss. 2015). Moreover, appellate counsel made clear that his failure to raise the *Ake* claim was "an oversight." ROA.2497. No reasonable jurist could have concluded that counsel performed reasonably in failing to raise the *Ake* claim.

Counsel's deficient performance was also prejudicial. Had counsel raised the issue, the *Ake* claim likely would have resulted in vacatur of petitioner's conviction. The Mississippi Supreme Court had previously vacated convictions where the denial of a defense expert left the defendant unable to rebut the prosecution's case, rendering the trial fundamentally unfair. See, *e.g.*, *Harrison* v. *State*, 635 So.2d 894 (Miss. 1994); see also Pet.EnBanc.Br.25-27. Here, moreover, the need for an expert was particularly clear: as discussed further below, petitioner's only real defense at trial was insanity, and petitioner was entirely unable to rebut the prosecution's expert testimony that petitioner

was sane and malingering. Faced with that unusually stark record, the Mississippi Supreme Court would have vacated and remanded for trial proceedings that complied with *Ake*. There is therefore a reasonable probability that the outcome of petitioner's appeal would have been different if counsel had raised the *Ake* claim, and no reasonable jurist could reach a different conclusion.

3. The Fifth Circuit reasoned, however, that *McWilliams* is inapposite to petitioner's claim for two reasons, both wrong. First, the Fifth Circuit's assertion that *McWilliams* is irrelevant because it was decided after the relevant state-court decisions misunderstands *McWilliams*. That decision explained what propositions *Ake* clearly established when it was decided in 1985, years before petitioner's trial: a defendant must receive mental-health expert assistance if his mental condition is relevant and in question, and the expert must be sufficiently independent from the prosecution to effectively assist in the evaluation, preparation, and presentation of the defense. *McWilliams*, 582 U.S. at 197. *McWilliams* did not, as the Fifth Circuit inexplicably believed, establish any new rules of federal law on which petitioner relied in raising his *Ake* claim. Cf. 28 U.S.C. 2254(d). *McWilliams*'s explication of *Ake*'s holding was therefore centrally relevant to the proper resolution of petitioner's claim.

Second, the Fifth Circuit cast aside *McWilliams* and *Ake* on the ground that neither involved a claim of ineffective appellate counsel or facts that were precisely in line with the instant case. This reasoning, too, misconceives this Court's precedent. This Court has repeatedly held that habeas relief is appropriate when a state court identifies the correct governing legal

principle from this Court's decisions, but unreasonably applies that principle to the facts of petitioner's case. *Wiggins* v. *Smith*, 539 U.S. 510, 520 (2003). "In other words, a federal court may grant [habeas] relief when a state court has misapplied a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Ibid*. (citation omitted). The governing legal principles in this case are clear: petitioner made a showing necessary to trigger his right to independent expert assistance under *McWilliams* and *Ake*, and appellate counsel's failure to raise that claim violated his right to effective representation.

II. This Court Should Review The Fifth Circuit's Holding That Petitioner's Trial Counsel Was Effective Despite Failing To Press His *Ake* Right To Expert Assistance.

If the Fifth Circuit correctly held that the trial court never definitively denied petitioner's *Ake* request, then it should have held that trial counsel's failure to further pursue the assistance of a psychiatric expert constituted ineffective assistance of counsel. The Fifth Circuit's contrary conclusion conflicts with *Ake* and *McWilliams*, as well as decisions of other courts of appeals holding that counsel is ineffective for failing to obtain expert assistance despite pursuing an insanity-related defense.

A. The Fifth Circuit's conclusion that counsel was not deficient is irreconcilable with *Ake* and *McWilliams*.

1. *Ake* clearly establishes that when counsel pursues an insanity defense, any competent counsel would attempt to obtain an expert's assistance in evaluating, preparing, and presenting the defense. *Ake*'s holding that a defendant is entitled to expert assistance with an insanity defense is premised on the recognition that "the testimony of psychiatrists can be crucial and *a virtual necessity if an insanity plea is to have any chance of success*." *Ake*, 470 U.S. at 81 (citation omitted) (emphasis added); *id*. at 80 ("the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense"). Indeed, *Ake* holds that expert assistance is so fundamental to presenting an insanity defense that it is one of the "basic tools" of an adequate defense, without which the "fundamental fairness" of a defendant's trial is called into question. See *Ake*, 470 U.S. at 77; see also ABA Standards for Criminal Justice 5-1.4, Commentary, p. 5-20 (2d ed. 1980) ("The quality of representation at trial * * * may be excellent and yet valueless to the defendant if the defense requires the assistance of a psychiatrist * * * and no such services are available.").

Here, both petitioner's initial counsel (Fortier) and his substitute counsel (Pannell) intended to, and did, defend petitioner primarily on the basis of his alleged insanity. ROA.1392. Indeed, in his closing argument, Pannell relied exclusively on the insanity defense. See pp. 8-10, *supra*. Yet counsel did not procure expert assistance, instead going to trial without any ability to rebut the prosecution's experts' assertions that

petitioner was sane and malingering—or to present affirmative expert evidence of insanity. As petitioner has explained, that failure was the result of the trial court's improper denial of counsel's *Ake* request. But if the Fifth Circuit's holding that the trial court never actually denied the request is accepted, then counsel undoubtedly performed deficiently in failing to pursue expert assistance.

There is no possible argument that counsel made a strategic decision. Counsel self-evidently had enough information about petitioner's concerning mental symptoms (including family accounts, prior civil commitments, and preliminary psychologist reports) to proceed with an insanity defense—counsel in fact pursued exactly that defense. Counsel thus necessarily had enough information to pursue expert assistance to investigate further. See *Wiggins*, 539 U.S. at 527. Pannell later stated that he did not pursue a court-appointed expert because he believed that "the court would force me to use the experts at the Mississippi State Hospital – the very same experts that would testify for the State." ROA.3165. Thus, Pannell evidently took the trial court at its word that it would permit only an examination by state experts—which was clearly contrary to *Ake*—and either failed to follow up (if the Fifth Circuit was correct that the trial court's ruling was not definitive) or believed that *Ake* entitled petitioner to no more. Either way, no strategic decision was involved. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton* v. *Alabama*, 571 U.S. 263, 274 (2014).

2. The Fifth Circuit's conclusion that counsel performed reasonably adopted the district court's attempted excuses for counsel's performance. App. 4a. But each is irreconcilable with *Ake*'s recognition that expert assistance is critical to an effective defense when the defendant's mental condition is at issue.

a. The district court first reasoned that nothing in the record would have alerted a competent attorney to exhaustively interview Crawford's acquaintances about his mental health. App. 57a-58a. That is a non sequitur. Counsel's deficiency was in failing to obtain expert assistance—and he unquestionably knew that he was planning to present an insanity defense. That defense, as *Ake* recognized, required expert assistance to have any reasonable chance of success. *Ake*, 470 U.S. at 82.

The district court also dismissed the March 1994 affidavit of psychologist Dr. Webb as coming too late to motivate counsel to pursue neuropsychological testing before petitioner's August 1993 rape trial.[5] App. 58a-59a. Again, that misses the point. Pannell should have sought expert assistance before petitioner's rape trial because he had decided to present an insanity defense at that trial. The urging of other experts simply confirmed what was already clear. In any event, Dr. Hutt had recommended that petitioner undergo the same further testing *months before* petitioner's trial, and that affidavit was sufficient to put any reasonable attorney on notice. ROA.3009-11.

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[5] As the dissent persuasively explains, although the affidavit was executed later, it makes clear that Dr. Webb evaluated petitioner and communicated his recommendations to trial counsel *before* the rape trial. App. 10a-11a.

Finally, the district court reasoned that Pannell could not have been ineffective because he obtained an acquittal on petitioner's kidnapping charge by arguing that petitioner was factually innocent of that charge. App. 62a-63a. But it is well established that counsel's deficient performance on one defense is not insulated from Sixth Amendment scrutiny simply because counsel performs competently in other respects. See, *e.g.*, *Williams* v. *Taylor*, 529 U.S. 362, 395 (2000) (finding counsel's penalty phase representation deficient where counsel "competently handled the guilt phase of the trial"); *Strickland*, 466 U.S. at 691. Even if Pannell's decision to present both innocence and insanity defenses at trial was well founded, that does not justify torpedoing the insanity defense by forgoing expert testimony.

b. Fundamentally, the Fifth Circuit's reasoning ignores *Ake*'s central premise: if a defendant presents a defense based on his mental condition, expert assistance is crucial both in rebutting the prosecution's case and in affirmatively presenting the defense. The decision below thus conflicts with the decisions of other courts of appeals that have recognized that straightforward proposition. See, *e.g.*, *United States* v. *Laureys*, 866 F.3d 432, 440 (D.C. Cir. 2017) (finding deficient performance where "trial counsel's error led to the complete failure to provide expert mental health testimony that trial counsel himself recognized was necessary, thereby depriving [defendant] of an adequate defense"); *Skaggs* v. *Parker*, 235 F.3d 261, 270 (6th Cir. 2000) (counsel performed deficiently by pursuing mental-condition defense at sentencing using an incompetent expert); *Saranchak* v. *Sec'y, Pa. Dep't of Corr.*, 802 F.3d 579, 594 (3d Cir. 2015) (counsel performed deficiently by

failing to pursue expert assistance despite awareness of defendant's mental-health symptoms).

B. The Fifth Circuit's prejudice holding also conflicts with *Ake* and *McWilliams*.

The Fifth Circuit held that trial counsel's deficient performance was not prejudicial on the sole ground that petitioner was convicted in a separate, earlier assault trial after presenting expert testimony concerning insanity. But *Ake* and *McWilliams* held that an expert's assistance extends beyond merely testifying; the expert is also needed to help counsel prepare and present a defense that responds to the prosecution's experts' theory and to help counsel prepare to cross-examine the prosecution's experts. *McWilliams*, 582 U.S. at 199 (expert examination of defendant did not satisfy *Ake*'s requirements, where expert did not assist the defense in preparing its case).

Those functions were vital here, given that the State presented two experts to opine that petitioner was sane. Without expert assistance, the defense could not effectively rebut their testimony, either through cross-examination or affirmative presentation. That is why, as the Eleventh Circuit has held, an "*Ake* error infect[s] the entire [proceeding] from beginning to end," because the defendant is "prevented from offering any meaningful evidence * * * on his mental health, or from impeaching the State's evidence of his mental health." *McWilliams* v. *Comm'r*, 940 F.3d 1218, 1224 (11th Cir. 2019). The Fifth Circuit's conclusion that the absence of expert assistance must not have prejudiced petitioner in this case solely because he was convicted on a different charge, before a

different jury, after presenting expert testimony, conflicts with the Eleventh Circuit's decision and with *Ake* and *McWilliams*.

In addition, expert assistance in this case would have enabled petitioner to present a materially different insanity defense than in his earlier assault trial. At the time of petitioner's May 1993 assault trial, petitioner suffered several severe seizures. ROA.3027, ROA.3029, ROA.3030, ROA.3041-43. Those seizures are what led Drs. Hutt and Webb to suspect petitioner had organic brain damage and recommend further evaluation. ROA.3009, ROA.3157-59. Had counsel obtained that assistance, petitioner could have developed expert testimony different in kind than the testimony presented at his assault trial. The test results that petitioner submitted with his state post-conviction petition confirmed as much, showing that petitioner had serious brain damage and temporal lobe epilepsy that likely caused his seizures. ROA.2492, 2494 (expert opining that there was "ample evidence available at the time of [petitioner's] trial to diagnose [him] with complex partial seizures," leading to "an epilepsy related delirium at the time of the rape"). Presented with this evidence, there is at least a reasonable probability the jury would have found petitioner innocent by reason of insanity, and no reasonable jurist could conclude differently.

III. The Questions Presented Are Important.

This Court's review is urgently needed. *Ake* held that "[f]undamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system.'" *Ake*, 470 U.S. at 77 (citing *Ross* v. *Moffitt*, 417 U.S. 600, at 610 (1974)). When a defendant's mental condition will be a critical aspect of his defense, fairness demands he have access to an independent expert. *Ibid*. Just a few years ago, this Court reaffirmed those bedrock principles in *McWilliams*. Yet the Fifth Circuit's decision disregarded *McWilliams* and rendered the *Ake* right illusory.

This case therefore presents an exceptionally important question concerning whether the *Ake* right retains force in the Fifth Circuit. In *McWilliams*, this Court confirmed that ever since *Ake*, defendants have been entitled to the assistance of a mental health expert upon a showing that their mental condition is relevant and in question, and that expert must not be working for the prosecution and must be available to assist the defense. Here, the state trial court violated both of those clearly established tenets by conditioning petitioner's right to expert assistance on a judicial finding, based on an examination by state experts, that petitioner was insane. In disregarding those errors and excusing appellate counsel's forfeiture, the Fifth Circuit contravened *McWilliams* and *Ake*. Courts in the Fifth Circuit now have carte blanche to ignore *McWilliams*, and to erect barriers to expert funding that are flatly inconsistent with *Ake* and *McWilliams*.

The Fifth Circuit's holding that trial counsel was not ineffective for failing to pursue expert assistance also raises critically important questions. *Ake* and *McWilliams* recognized that expert assistance is critical to an adequate defense where the defendant's mental condition is relevant to guilt or sentencing. If that recognition is to have any force, counsel must be deemed inadequate when he fails to pursue expert assistance despite an obvious need for it. Other courts of appeals have acknowledged that straightforward proposition.

Instead of upholding *Ake*'s bedrock due process guarantee, however, the Fifth Circuit held that *McWilliams* was irrelevant, and that petitioner could not overcome AEDPA's requirements, because *Ake* and *McWilliams* had dissimilar facts. App. 4a-5a. That reasoning is flatly contrary to this Court's precedents and threatens to undermine the stability of the principles that determine entitlement to habeas relief. Until now, habeas petitioners could obtain relief on showing that the state court unreasonably applied the legal principles established in this Court's decisions, even if those decisions involved facts dissimilar to the habeas petitioner's. The Fifth Circuit's decision destabilizes that framework and threatens to deprive habeas petitioners with otherwise meritorious claims of their ability to obtain relief.

Finally, the questions presented are of paramount importance to petitioner. The trial court denied petitioner his fundamental right under *Ake* to an adequate defense, and petitioner's counsel was ineffective in failing to challenge that obvious violation. As a result, petitioner faces the death penalty. Petitioner's rape conviction—which he challenges here—was used as an

aggravating circumstance during the sentencing portion of petitioner's subsequent capital trial. *Crawford* v. *State*, 716 So.2d 1028, 1031 (Miss. 1998). Should the rape conviction be vacated, petitioner would be entitled to a new sentencing hearing. See *Johnson* v. *Mississippi*, 486 U.S. 578, 585 (1988) (remanding capital case for resentencing after an aggravator was invalidated through reversal of a prior conviction); *Gillett* v. *State*, 148 So. 3d 260 (Miss. 2014).

CONCLUSION

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

Respectfully submitted,

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February 20, 2025

APPENDICES

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-61019

Charles Ray Crawford,

Petitioner-Appellant,

v.

Burl Cain, *Commissioner, Mississippi Department of Corrections*; Earnest Lee, *Superintendent, Mississippi State Penitentiary*,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:17-CV-105.

Filed: November 22, 2024

Before Elrod, *Chief Judge*, and Jones, Smith, Stewart, Richman, Southwick, Haynes, Higginson, Willett, Ho, Duncan, Engelhardt, Oldham, Wilson, and Douglas, *Circuit Judges*.[*]

Per Curiam:

Charles Ray Crawford petitions for habeas relief. As a prisoner held pursuant to a state court judgment, Crawford must overcome the strictures of the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996. He cannot, so we affirm.

I

Crawford raped a 17-year-old girl. A Mississippi

[*] Judge Graves is recused and did not participate in this decision. Judge Ramirez joined the court after the case was submitted and did not participate in this decision.

court convicted him and sentenced him to 46 years of imprisonment. The Mississippi Supreme Court affirmed on direct review. *See Crawford v. State*, 192 So. 3d 905 (Miss. 2015). Crawford sought state postconviction relief, arguing for the first time that the trial court violated his procedural due process right to expert assistance in asserting his insanity defense under *Ake v. Oklahoma*, 470 U.S. 68 (1985). The state supreme court held Crawford procedurally defaulted this claim because it "could have been raised in the direct appeal." ROA.3167. The court also denied Crawford's ineffective-assistance-of-counsel claims and found the rest of Crawford's claims to be "without merit." *Ibid.*

Crawford next filed a habeas petition in federal district court. The district court denied the petition but granted Crawford a certificate of appealability. Crawford timely appealed.

II

A

Crawford contends that his trial and direct-appeal lawyers provided constitutionally ineffective assistance in failing to preserve his *Ake* claim.

To establish ineffective assistance of counsel, Crawford must show that counsel's failure was both (1) objectively deficient and (2) prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *accord Evitts v. Lucey*, 469 U.S. 387, 396–97 (1985) (*Strickland* claims against direct-appeal counsel). "*Strickland*'s first prong sets a high bar." *Buck v. Davis*, 580 U.S. 100, 118 (2017). There is "a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quotation omitted).

Moreover, both claims were adjudicated on the

merits in state court, so AEDPA's relitigation bar applies. *See* 28 U.S.C. § 2254(d). So Crawford must show the state court's adjudication of the claim "resulted in a decision that . . . involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). And because the Mississippi Supreme Court did not explain why it rejected Crawford's ineffective-assistance claims, we "must determine what arguments or theories . . . could have supported[] the state court's decision; and then [we] must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Richter*, 562 U.S. at 102.

Crawford cannot meet this demanding standard. We start with Crawford's direct-appeal lawyer, who failed to raise an *Ake* claim. "Declining to raise a claim on appeal . . . is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court." *Davila v. Davis*, 582 U.S. 521, 533 (2017). And "[i]n most cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors." *Ibid.*; *see also Smith v. Robbins*, 528 U.S. 259, 288 (2000). Here, the state court found that trial counsel defaulted the *Ake* claim, and that Crawford's direct-appeal counsel did not violate the Sixth Amendment by failing to raise that unpreserved claim.

We cannot say that every fairminded jurist would disagree with the state court's decision. Crawford does not point to any record evidence that the state trial court ever denied a request under *Ake*; to the contrary, the trial court expressly noted that its preliminary rulings on the matter were "without prejudice to further motions from either side for examination or for funds."

ROA.2069. Crawford never filed a further motion and hence defaulted his *Ake* claim in the trial court. Crawford's direct-appeal lawyer did not violate the Sixth Amendment by failing to press the unpreserved *Ake* claim. And we cannot say the unpreserved *Ake* claim was "plainly stronger than those actually presented to the appellate court." *Davila*, 582 U.S. at 533. Much less can we say that all fairminded jurists of reason would reject the state court's resolution of this issue. Thus, Crawford's ineffective-assistance-of-appellate-counsel claim cannot surmount AEDPA.

Crawford next contends that his trial counsel violated the Sixth Amendment by failing to raise an *Ake* claim. This claim also fails to surmount AEDPA's relitigation bar for the reasons given by the district court in its careful and thorough opinion. *See* ROA.963–69. Moreover, by the time of Crawford's rape trial, a different jury had heard and rejected Crawford's insanity defense in a related assault trial. That effectively disproves prejudice under *Strickland*, *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and AEDPA.

McWilliams v. Dunn, 582 U.S. 183 (2017), is not to the contrary. That decision postdates the relevant state court decisions and hence cannot be used to push aside AEDPA's relitigation bar. *See, e.g.*, *Greene v. Fisher*, 565 U.S. 34, 38 (2011) ("[Section] 2254(d)(1) requires federal courts to focus on what a state court knew and did, and to measure state-court decisions against this Court's precedents *as of the time the state court renders its decision*." (quotation omitted)). And neither *McWilliams* nor *Ake* involved an unpreserved claim of constitutional error, an allegedly ineffective direct-appeal lawyer, or an insanity defense that had been rejected by the defendant's first jury.

In the absence of an ineffectiveness claim that can surmount AEDPA's relitigation bar, Crawford cannot

show cause for defaulting his *Ake* claim. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Davila*, 582 U.S. at 527. Crawford does not argue that another form of cause could apply. Therefore, the claim is defaulted and barred from review here.

B

The dissenting opinion offers a different understanding of facts that occurred more than 30 years ago. But AEDPA demands far more. The dissenting opinion cannot identify any case that found ineffective assistance of appellate counsel for failure to raise an unpreserved trial error. Nor does the dissenting opinion offer any non-conclusory contention that Crawford's unpreserved *Ake* claim was stronger—much less "*plainly* stronger"—than the claims his appellate counsel raised. *Davila*, 582 U.S. at 533 (emphasis added); *see also Robbins*, 528 U.S. at 288. Finally, the dissenting opinion relies heavily on a *post hoc* affidavit filed by Crawford's trial counsel James Pannell, which he wrote in 2015 (22 years after the trial) and filed for the purpose of helping Crawford's postconviction application. *Post*, at 13–16 (Richman, J., dissenting).

But that affidavit points to no then-existing evidence that counsel overlooked at the time of the trial; offers no theory (even with the benefit of 20/20 hindsight) for why it would have been a superior trial strategy to devote time and resources to undermining the competency and sanity evaluations performed at the Mississippi State Hospital in December 1992 and February 1993 rather than to pursue the "hybrid" strategy Pannell chose; and ignores the fact that trial counsel's "hybrid" strategy won Crawford an *acquittal* on one of the two charges he faced. That a defense strategy does not "work out as well as counsel had hoped" is not proof "that counsel was incompetent." *Richter*, 562 U.S. at 109. Much less is it proof that Crawford can overcome

AEDPA's relitigation bar. And that presumably explains why the dissenting opinion cannot identify a case granting habeas relief where trial counsel was as successful as Pannell was.

* * *

AFFIRMED.

Priscilla Richman, *Circuit Judge*, joined by Southwick, Higginson, and Douglas, *Circuit Judges*, dissenting:

I respectfully dissent because Crawford's trial counsel and direct appeal counsel were ineffective. Reasonably competent trial counsel and reasonably competent appellate counsel would have determined and diligently pursued the rights clearly established by the Supreme Court's longstanding precedent in *Ake v. Oklahoma.*[1] The Supreme Court held in 1985 that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense."[2]

One of Crawford's defenses during the rape trial was that he periodically blacked out and did not remember if he had in fact raped the victim. There was testimony from the victim herself and a witness who was assaulted in tandem with the rape that Crawford's appearance changed at the time of the crime. His eyes became dilated, he stopped blinking, he had a blank stare, and he appeared scared.[3] Crawford relied on this and other evidence to present an insanity defense. But crucially and unlike the government, he did not have an expert either to assist his trial counsel in determining that Crawford suffered brain damage or to testify that Crawford's behavior was consistent with

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[1] 470 U.S. 68 (1985); *see also McWilliams v. Dunn*, 582 U.S. 183, 186 (2017) (clarifying that *Ake* "clearly established" an indigent defendant's right to an expert "independent from the prosecution").

[2] *Ake*, 470 U.S. at 83.

[3] ROA.2543-46, 2594, 2599, 2605-06.

brain damage and certain conditions flowing from it.

I

The facts of this case are somewhat complicated. Crawford was tried for three serious crimes in Mississippi state courts. In one of those cases, Crawford was convicted of murder and sentenced to death.[4] That conviction is not before us. But Crawford's contentions regarding the murder impacted the proceedings in the state court as to the present conviction, which was for the rape of a seventeen-year-old victim identified as "Sue" in Crawford's direct appeal of the rape conviction[5] and as "K.R." in briefing before our court. Before the conviction in the present rape case, Crawford was also tried and convicted for the aggravated assault of Sue's companion, Nicole, during the course of events leading to Sue's rape.[6] Crawford hit Nicole over the head with a hammer.[7] Prior to trial in these two cases, Crawford indicated he intended to pursue an insanity defense.[8] He claimed that he experienced blackouts and did not remember assaulting Nicole or raping Sue. Crawford was evaluated for competency to stand trial in both cases.[9] Three days before Crawford's trial for the aggravated assault of Nicole was to begin, Crawford was arrested on January 30, 1993, for the murder of Kristy D. Ray the day before, January 29, 1993.[10] Crawford claimed that he experienced several blackouts during the time he abducted and later killed Ray, and that he did not recall killing her.[11] As a

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[4] *Crawford v. State*, 716 So. 2d 1028 (Miss. 1998).
[5] *See Crawford v. State*, 192 So. 3d 905, 907 (Miss. 2015).
[6] *See Crawford v. State*, 787 So. 2d 1236, 1238 (Miss. 2001).
[7] *Id.* at 1240.
[8] *Crawford*, 192 So. 3d at 909.
[9] *Id.*
[10] *Id.*
[11] *See Crawford v. State*, 716 So. 2d 1028, 1034-35 (Miss. 1998).

consequence of these developments, Crawford was then again evaluated for competency to stand trial for the rape of Sue.[12] Crawford was evaluated at the Mississippi State Hospital.[13]

The trial court repeatedly declined to provide Crawford with a psychiatrist or other mental health care professional, other than a state expert, to evaluate Crawford and assist counsel in defending him, even though Crawford was indigent and that is what *Ake* required. Instead, the state trial court insisted that state experts must first evaluate Crawford to determine whether he "in fact[] has some mental deficiency" before the court would rule on the pending *Ake* motion.[14] In making proof of insanity a precondition to expert assistance, the trial court violated clearly established constitutional law. The *Ake* decision only requires a "threshold showing" that "[the defendant's] sanity is likely to be a significant factor in his defense."[15] In essence, the trial court gave the State the power to foreclose access to an expert witness for Crawford.

Trial counsel failed to pursue Crawford's rights diligently under *Ake* by failing to renew and pursue arguments in support of the *Ake* motion.[16] The state trial court declined to authorize funds for an expert, as required by *Ake*, on more than one occasion, continually deferring a ruling on the pending *Ake* motion. This was a violation of clearly established federal law.

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[12] *See Crawford*, 192 So. 3d at 910.
[13] *Id.*
[14] ROA.2096; *see also* ROA.2069 ("I'm not going to spend $3,000 of Tippah County's money.").
[15] *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985).
[16] See *Crawford v. Lee*, No. 3:17-CV-105-SA-DAS, 2020 WL 5806889, at *11 (N.D.
Miss. Sept. 29, 2020).

Crawford's trial counsel failed to articulate and pursue the *Ake* claim even though he knew of facts that indicated possible brain damage and that Crawford had a history of seizures. Those facts and other facts regarding Crawford's history of mental health issues are detailed in Crawford's brief to the panel in this case, and in the interest of brevity, will not be repeated here.

Most importantly, before the rape trial commenced, Dr. Hutt stated in an affidavit that "these subsequent seizures could possibly be caused by organic brain damage resulting from a severe head injury he suffered in his late teens."[17] Dr. Hutt recommended further neurological testing,[18] explaining that an expert would have to perform that testing to properly evaluate whether Crawford had brain damage.[19]

Another expert, Dr. Webb, likewise told trial counsel, who was also Crawford's trial counsel for murder charges pending while the rape charges proceeded, that Webb believed Crawford "may suffer from organic brain damage."[20] Webb's affidavit stated, "I have informed Mr. Crawford's attorneys that a full psychological work-up of Mr. Crawford will not be complete until it is determined whether his various symptoms have caused or are the result of organic brain damage."[21] Webb's affidavit further said, "I strongly recommend that he undergo a neuropsychological battery to determine the existence and extent of any brain dysfunction."[22] Because Webb's affidavit was prepared in March 1994, the federal district court discounted this

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[17] ROA.3009.
[18] ROA.3009.
[19] ROA.1043, 3009.
[20] ROA.3158.
[21] ROA.3159.
[22] ROA.3158.

affidavit, concluding that Webb did not give this advice to trial counsel until after the rape trial. With great respect, that is not a fair reading of the affidavit. The affidavit states Webb was retained by Crawford's sister in anticipation of his trial for capital murder, and the affidavit clearly states that Webb evaluated Crawford in April 1993.[23] The assault trial commenced in May 1993.[24] The rape trial did not occur until August 1993.[25] The murder trial commenced and the death penalty was imposed in April 1994.[26] It strains reason to conclude that Webb waited until after the rape trial, which occurred months after he evaluated Crawford, to communicate his findings to counsel, who was the same person defending Crawford for the rape, aggravated assault, and murder charges in April 1993, well before the rape trial. In any event, Dr. Hutt's advice to trial counsel alone was sufficient notice that further testing of Crawford by qualified professionals was required.

Trial counsel failed to heed the advice he received from these mental health experts, due to either ignorance of, or indifference to, *Ake*'s requirements. In either case, trial counsel was objectively ineffective. The insanity defense was pursued at the rape trial, without evidence that had some probability of persuading the jury to find in Crawford's favor.

Despite Hutt and Webb's recommendation that Crawford undergo further neurological testing, it appears that Crawford did not receive an extended EEG

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[23] ROA.3157.

[24] See *Crawford v. Lee*, No. 3:17-CV-105-SA-DAS, 2020 WL 5806889, at *4 (N.D.
Miss. Sept. 29, 2020).

[25] *See id.* at *4, *5.

[26] *See id.* at *5.

until six days *after* being found guilty of rape.[27] The extended EEG revealed "unusual wave form" activity in Crawford's front lobe.[28] While Dr. Hutt was told that an EEG was performed prior to trial (but not shown the results), Dr. Russell, who was treating Crawford at the time and was a witness for the state at Crawford's rape trial, testified that an EEG had been scheduled before trial but was cancelled "for some reason."[29]

In fact, it took years for a qualified physician to conduct a full evaluation of Crawford. Nearly six months after the rape trial, Dr. Webb continued to "strongly recommend that [Crawford] undergo a neuropsychological battery," noting that "until such is done, it cannot be said that Mr. Crawford has had a complete psychological workup."[30] But this did not appear to happen until 2014 when Crawford began to prepare for state habeas proceedings.[31]

The majority opinion asserts that "by the time of Crawford's rape trial, a different jury had heard and rejected Crawford's insanity defense in a related assault trial."[32] To the extent Crawford's counsel mounted an insanity defense in the assault trial, the jury heard essentially the same, inadequately prepared and presented insanity defense. Neither jury heard the extensive evidence that was later developed and presented in Crawford's state habeas proceedings.

The state habeas record reflects that when Crawford was finally evaluated by experts qualified in neurology and related disciplines, his diagnosis supported

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[27] ROA.1250, 3060.
[28] ROA.3060.
[29] ROA.3009, 1732-33.
[30] ROA.713.
[31] ROA.2492; Crawford Panel Br. at 51.
[32] *Ante* at 4.

evidence of his blackouts and behavior during the crime. I will not summarize or recast Crawford's briefing before the panel. Instead, I will largely include it wholesale:

In the state habeas proceeding, Crawford presented a report and affidavit from the board-certified neurologist, Siddhartha Nadkarni, M.D., who specializes in the treatment and diagnosis of epilepsy at NYU Medical Center. ROA.2492, 2915. After conducting a comprehensive review of Crawford's records and social history, and a full in-person neurological examination, Dr. Nadkarni diagnosed Crawford with Severe Brain Injury and Partial Epilepsy. ROA.2492, 2920.

> [Crawford's] neurological examination was grossly abnormal and revealed significant central nervous system injury with evidence of brain injury as well. Charles has had untreated and debilitating partial epilepsy from a very young age. He is severely brain injured from the epilepsy, repeated traumatic head injuries starting at a young age in a developing brain, and compounded by severe abuse and neglect as a child, and comorbid migraine headaches.

ROA.2492.

Dr. Nadkarni was also able to explain that the "spells" described to the jury were actually a sign of Crawford's untreated epilepsy:

> Charles is described to have spells by several people independently that were close to him. The spells are remarkably stereotyped in their occurrence and description, a hallmark of epileptic seizures. He is described to routinely in childhood and young adulthood to have these spells where he suddenly changes with dilation of the pupils, a glazed look, unresponsiveness,

> "like he's not here," a change in his voice, and even a change in the color of his skin. He generally does not look at the person he is talking to during these. . . . It seems he could have several spells in [a] short period and then really not recall what happened during that period and shortly thereafter, a well-documented phenomena called "post-ictal["] (after seizure(s)) amnesia. . . . These seizures are most likely "complex partial seizures," meaning they start in a restricted area of the brain and then spread enough to cause alteration in awareness and behavior. Complex partial seizures of temporal lobe origin can be very bland appearing and missed for seizures.

ROA.2917-18.

More importantly, Dr. Nadkarni was able to testify that Crawford's reported periods of blackouts and his inability to recall his actions constitute "a well-documented phenomenon called post-ictal amnesia," and that Crawford was "in a state of repetitive partial complex seizures on the day of the rape." ROA.2493. This was evident, in part, from the way K.R. and her friend described Crawford's appearance at the time of the crime:

> Both girls stated that his eyes changed, he stopped blinking, and he had a fixed blank stare and a different look on his face that was not normal. They stated that he looked like a different person and looked at them differently in that he stopped blinking his eyes and just stared. One of the girls noted that his eyes were very dilated. These are all class symptoms of seizure activity.

ROA.2493.

And most importantly, Dr. Nadkarni testified in his affidavit that Crawford's condition at the time of the crime met the legal standard for insanity:

> Charles was in an epilepsy related delirium . . . resulting from acute seizures and persistent post-ictal confusion in what was most probably a non-convulsive status epilepticus. As such, he would have had no awareness of his actions, nor agency in committing them. In other words, Charles was laboring under such a defect of reason from his seizure disorder that he did not understand the nature and quality of his acts at the time of the crime. He is a severely brain-injured man (corroborated both by history and his neurological examination) who was essentially not present in any useful sense due to epileptic fits at the time of the crime.

ROA.2494.

In addition to providing testimony on Crawford's mental state at the time of the crime, Dr. Nadkarni could have also rebutted the State's contention that Crawford had a personality disorder and was malingering his memory deficits. Brain deficits like Crawford's that affect "reasoning, problem solving, and judgment . . . can be perceived by lay persons as 'meanness' or antisocial behavior, but with expert evaluation and explanation are properly explained as deriving from disruption and impairments to the nervous system." *Anderson v. Sirmons*, 476 F.3d 1131, 1144 (10th Cir. 2007). Indeed, Dr. Webb strongly recommended neuropsychological testing to trial counsel because "if Mr. Crawford suffers from brain damage, this would effect [sic] that diagnosis . . . of Anti-Social Personality Disorder. . . . Since certain types of brain damage decrease one's ability to control impulses, brain damage may factor into antisocial behavior." ROA.3158.

Dr. Nadkarni arrived at this precise conclusion through his evaluation of Crawford:

> Charles was diagnosed with a "Personality Disorder NOS," with antisocial, dependent, and explosive features. Actually he has an organic cause for his behavior in that he has had so many head injuries and a severe "Frontal Lobe Syndrome," with disinhibition in behavior, poor judgment, difficulty with executive functioning, impulsivity and aggression. The reason they gave the "NOS" or "not otherwise specified," is because he did not fall into a typical personality disorder, rather he had a frontal lobe syndrome from repetitive head injury. His personality features also were contributed to by his untreated partial epilepsy, leading to altered sexuality and memory difficulties. Uncontrolled seizures can affect one's memory, judgment, behavioral control as well. It can also lead to many psychiatric problems like mood disorders or psychosis.

ROA.2920.

However, because Pannell [trial counsel] failed to obtain this expert assistance, the State's incorrect assessment of Crawford went unchallenged and prevailed with the jury.[33]

Crawford's brief also asserts, and I agree, that:

> The trial court's denial of expert assistance clearly had a "substantial and injurious effect or influence" on the jury's verdict because Crawford was left to rely on his own testimony and the testimony of two lay witnesses to present his insanity defense, while the State had the benefit of two expert witnesses who told the

[33] Crawford Panel Br. at 51-54.

> jury that Crawford was not mentally ill and was simply faking his memory deficits. Crawford's lay witnesses could not compete with the State's experts, especially because they could only describe symptoms, but lacked the expertise and education to diagnose Crawford or provide an explanation for his behavior and blackouts. ROA.1649, 1686-87, 1679, 1682. Most significantly, unlike the State's testing and examinations that counsel had been told were required, experts, they could not offer an opinion on whether Crawford met the standard for legal insanity because they lacked the expertise, and because the trial court explicitly forbade them from offering an opinion on the question. ROA.1648-49, 1686-87, 1678-79, 1682.[34]

Trial counsel's constitutional error unquestionably had a "substantial and injurious effect or influence" on the jury verdict.[35] As the Supreme Court observed in *Ake*, expert assistance is a "virtual necessity if an insanity plea is to have any chance of success."[36] That is particularly so here because the State relied on two experts to meet its burden of proving sanity and Crawford was denied "the raw materials integral to the building of an effective defense."[37] Nor did he have his own experts to assist with the cross-examination of the State's experts.[38] For example, Dr. Russell, an expert

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[34] Crawford Panel Br. at 28-29.

[35] *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

[36] *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) (quoting Martin R. Gardner, *The Myth of the Impartial Psychiatric Expert—Some Comments Concerning Criminal Responsibility and the Decline of the Age of Therapy*, 2 Law & Psych. Rev. 99, 113-14 (1976)).

[37] *Id.* at 77.

[38] *Brown v. State*, 152 So. 3d 1146, 1165-67 (Miss. 2014) (quoting *Ake*, 470 U.S. at 77) (ruling that due process was violated where

for the State, testified at trial that in his opinion, Crawford was "malingering," "faking or exaggerating symptoms of amnesia," and "symptoms of memory problems."[39] In a case in which the Supreme Court held a state court's decision affirming a conviction was contrary to, or involved an unreasonable application of, *Ake*, the Court observed "[t]here is reason to think" the violation could have mattered because the trial judge, who was a factfinder at sentencing and imposed a death sentence, "relied heavily on his belief that [the defendant] was malingering."[40] The Supreme Court continued, "[i]f [the defendant] had the assistance of an expert to explain that '[m]alingering is not inconsistent with serious mental illness,' [the defendant] might have been able to alter the judge's perception of the case."[41] The neurological expert who presented evidence on behalf of Crawford in conjunction with his state habeas application, Dr. Nadkarni, addressed malingering.[42] Crawford's trial counsel did not have an expert capable of providing such assistance before or during trial.

Further, trial counsel's fundamental misunderstanding of *Ake* forecloses any possibility that his failure to renew and pursue the *Ake* motion was the sort of "strategic choice[]" that is "virtually unchallengeable."[43] This is because "[a]n attorney's ignorance of a point of law that is fundamental to his case combined

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trial court denied defendant's *Ake* motion and prosecution relied solely on expert witness to show culpability).

[39] ROA.1760.

[40] *McWilliams v. Dunn*, 582 U.S. 183, 200 (2017).

[41] *Id.* (quoting Brief for American Psychiatric Association et al. as Amici Curiae Supporting Petitioner at 20).

[42] *See* ROA.2493-94 ("I am certain that Charles's memory deficits are credible and real, and are caused by his seizure disorder."); *see also* ROA.2918-19 (Dr. Nadkarni's evaluation).

[43] *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."[44]

Pannell, the substituted trial counsel in the 1993 rape case, confirmed that he misunderstood *Ake*, stating in a 2015 affidavit that he "did not renew [the original trial counsel's] motion for funds to hire an expert to conduct an independent psychiatric evaluation," because he mistakenly "did not see the point in requesting funds since it was [his] understanding and belief that the court would force [him] to use . . . the very same experts that would testify for the State."[45] He clarified that the evaluation by Dr. Nadkarni is "precisely the type of expert testimony" that he would have used to present an insanity defense in the rape trial.[46] Pannell's understanding of the law was plainly incorrect, and therefore deficient performance. As the Supreme Court has explained, *Ake* "clearly established that . . . the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and *independent* from the prosecution."[47] Pannell, mistakenly believing that he would not have access to an independent expert, proceeded with the "hybrid defense" that ultimately led to Crawford's conviction.[48]

Pannell's mistake of law is similar to other instances where this court and the Supreme Court have found deficient performance. Applying *Hinton*, this court found deficient performance where trial counsel failed to "conduct a mitigation investigation due to a

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[44] *Hinton v. Alabama*, 571 U.S. 263, 274 (2014).
[45] ROA.3165.
[46] ROA.3165.
[47] *McWilliams v. Dunn*, 582 U.S. 183, 186 (2017) (emphasis added).
[48] ROA.966.

misunderstanding of funding [limits] for habeas investigations."[49] Likewise, the Supreme Court found "deficient performance where counsel 'failed to conduct an investigation that would have uncovered extensive records [that could be used for death penalty mitigation purposes], not because of any strategic calculation but because they incorrectly thought that state law barred access to such records.'"[50]

The federal district court, whose reasoning the majority opinion incorporates, concluded that discussion of Pannell's affidavit and associated past errors "does little to aid or influence the decision in this case."[51] It is true that *Strickland* requires an "assessment of attorney performance" free of "the distorting effects of hindsight," one that instead focuses on "the conduct from counsel's perspective at the time."[52] However, this does not foreclose consideration of the legal error that Pannell made at the time. Pannell's admission that he did not understand the law in 1993 supports deficient performance under *Strickland* and *Hinton*.

In the present appeal, the majority opinion finds Pannell's post-conviction affidavit lacking for other reasons, but with great respect, these criticisms are straw men. Pannell's affidavit candidly admits that he did not know what *Ake* required.[53] This is discussed above in detail. That affidavit provides solid support for the ineffective-assistance-of-trial counsel claim in this regard. Nothing in the affidavit undercuts

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[49] *Canales v. Stephens*, 765 F.3d 551, 569 (5th Cir. 2014).
[50] *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 395 (2000)).
[51] *Crawford v. Lee*, No. 3:17-CV-105-SA-DAS, 2020 WL 5806889, at *14 (N.D.
Miss. Sept. 29, 2020).
[52] *Strickland v. Washington*, 466 U.S. 668, 689 (1984).
[53] ROA.3165.

Pannell's ineffectiveness.

The majority opinion says the "affidavit points to no then-existing evidence that counsel overlooked at the time of the trial."[54] However, the relevance of the affidavit was that there was then-existing, well-established federal law of which counsel was unaware and made no effort to find or study.

The majority opinion next says the affidavit "offers no theory (even with the benefit of 20/20 hindsight) for why it would have been a superior trial strategy to devote time and resources to undermining the competency and sanity evaluations performed at the Mississippi State Hospital in December 1992 and February 1993 rather than to pursue the 'hybrid' strategy Pannell chose."[55] With great respect, I do not see the logic of this argument. Pannell pursued an insanity defense at trial. He relied heavily upon it. But he had no expert witness at trial, not one, while the "competency and sanity evaluations performed at the Mississippi State Hospital" concluded that Crawford was malingering and was not truthful about his blackouts, and more to the point, that Crawford knew exactly what he was doing when he raped Sue.[56] It is difficult to comprehend how it could have been a "superior trial strategy" to accept the State's evaluations and, at the same time, hinge Crawford's defense of the rape charge primarily on an insanity defense. Pannell's failure to understand *Ake* was not a trial strategy. It was an indefensible failure to perform as competent counsel.

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[54] *Ante* at 5.
[55] *Ante* at 5.
[56] ROA.1760; *see also* Crawford Panel Br. at 15 ("Without any expert witnesses, Crawford relied on his own testimony and the lay testimony of his mother, Johnnie Smith, and ex-wife, Gail Crawford, to present the insanity defense.").

The majority opinion says the affidavit "ignores the fact that trial counsel's 'hybrid' strategy won Crawford an *acquittal* on one of the two charges he faced," and that "the dissenting opinion cannot identify a case granting habeas relief where trial counsel was as successful as Pannell was."[57] I measure success quite differently. Pannell was unsuccessful in defending Crawford in the assault case that was tried before the rape case, and he was unsuccessful in defending Crawford in the murder case, in which the insanity defense was presented without the kind of expert testimony that was later developed in the state habeas proceeding in the rape case. But most importantly, the majority opinion cites no case, and I submit cannot cite a case, for the proposition that if trial counsel obtains an acquittal of one charge during a trial, that forecloses any possibility of habeas relief based on ineffective-assistance-of-counsel as to another charge on which the defendant was convicted. That is nowhere to be found in our habeas jurisprudence.

The majority opinion also misapprehends the nature of Crawford's defenses against each charge. The jury acquitted Crawford on the kidnapping charge because the evidence raised a reasonable doubt as to whether the victim was actually kidnapped. Sue was the younger sister of Crawford's ex-wife Janet.[58] Immediately after the rape occurred, Crawford was remorseful, handed his gun to Sue, and asked her to kill him.[59] She did not, and they began a journey to another state to see Janet.[60] They were driven by another couple for some distance, who thought Crawford and Sue

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[57] *Ante* at 5-6.
[58] ROA.1544.
[59] ROA.1557-59.
[60] ROA.1560.

were romantically involved.[61] Another individual then drove them further and took them to a hotel room, where Crawford and Sue spent the night.[62] The next day, they were driven to a pay phone so Sue could call Janet to tell her about the rape, which Sue did, and they were driven to a place where Crawford could call the police and turn himself in, which he did.[63] Throughout many of these events, Sue had kept the gun.[64] As the federal district court explained, the victim (Sue) "verbally indicated" that she would cross state lines with Crawford, had "opportunities to escape or ask for help," and may not have "appear[ed] distraught."[65]

Moreover, Crawford did not claim he had blackouts during the kidnapping episode, which spanned across two days.[66] In response to questions about the alleged rape, Crawford asserted,

> "I can't honestly say that I didn't [rape the victim], and I can't sit here and tell you that I did. The only thing that I've got to go by is what she said. I'm not going to lie and say I didn't, and I'm not going to turn around and lie and say that I did, because I don't know.[67]

By contrast, he "remember[ed]" himself and the alleged kidnapping victim "leaving in [his] truck and starting to Memphis" and that he had "told her that [he] needed to go to Memphis . . . and [had] asked her

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[61] ROA.1563, 1624-26.
[62] ROA.1564-66.
[63] ROA.1566-69, 1715-16.
[64] ROA.1582-84, 1586-87, 1589, 1629, 1712.
[65] *Crawford v. Lee*, No. 3:17-CV-105-SA-DAS, 2020 WL 5806889, at *14 (N.D. Miss. Sept. 29, 2020).
[66] ROA.1560-69 (describing the alleged kidnapping as having begun one day and having ended the next day).
[67] ROA.1703; *see also* ROA.1718.

if she wanted to go with [him]."[68]

The evidence as to whether Crawford raped Sue was vastly different. She testified that he covered her mouth with tape and then bound her hands behind her back with tape.[69] He then forcibly raped her without her consent, according to Sue, while she was still bound, though she managed to lick the tape around her mouth and tried to dissuade him from the sexual assault.[70] Authorities found tape with Sue's hair on it when they investigated, as well as other physical evidence that corroborated her account of events.[71] Crawford testified at trial that he did not remember raping Sue but could not say that he did not rape her.[72] Sue also testified about hearing "a noise" while she was bound and while Crawford had left her alone.[73] After the rape, when Crawford took her back to the vehicle they arrived in with Nicole, Sue asked where Nicole was.[74] Crawford did not say, but Sue saw a hammer in Crawford's hand.[75] This was consistent with Nicole's being hit in the head by a hammer while she was waiting in the vehicle for Crawford and Sue to return from his home. The evidence that Crawford raped Sue was overwhelming and virtually uncontested. His defense at trial depended on the insanity defense. His defense to the kidnapping charge was in a far different posture and depended on whether Sue was actually kidnapped.

The record thus shows that Crawford's acquittal on

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[68] ROA.1704; *see also* ROA.1718.
[69] ROA.1554.
[70] ROA.1555-56.
[71] *See, e.g.*, ROA.1531-33, 1610.
[72] ROA.1702-03.
[73] ROA.1557.
[74] ROA.1558.
[75] ROA.1558.

the kidnapping charge speaks not to the strategic soundness of the hybrid defense but rather to the weakness of the facts underlying that charge. That acquittal, then, cannot rebut the claim of Pannell's deficient performance regarding Crawford's rights under *Ake*, which, ultimately, supplies the basis for the habeas relief that Crawford seeks here.

The state habeas court's rejection of Crawford's ineffective-assistance-of-trial-counsel claim was "contrary to, or involved an unreasonable application of, clearly established Federal law"[76] because it failed to recognize what *Ake* itself clearly established. As the Supreme Court explained in *McWilliams*, "[*Ake*] requires the State to provide the defense with 'access to a competent psychiatrist who will conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense.'"[77] The Court explained that "[n]either [a state expert] nor any other expert helped the defense prepare and present arguments that might, for example, have explained that [the defendant's] purported malingering was not necessarily inconsistent with mental illness (as an expert later testified in postconviction proceedings)."[78] The Supreme Court held that "[s]ince Alabama's provision of mental health assistance fell so dramatically short of what *Ake* requires, we must conclude that the Alabama court decision affirming McWilliams'[s] conviction and sentence was 'contrary to, or involved an unreasonable application of, clearly established Federal law.'"[79] In the present case, trial counsel's failure to understand what *Ake* plainly

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[76] 28 U.S.C. § 2254(d)(1).
[77] *McWilliams v. Dunn*, 582 U.S. 183, 198 (2017) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)) (emphases in original).
[78] *Id.* at 199.
[79] *Id.* (quoting 28 U.S.C. § 2254(d)(1)).

required was clearly ineffective assistance, it was prejudicial to Crawford's defense, and the state habeas court's failure to recognize this was contrary to, or involved an unreasonable application of, clearly established federal law.

II

Crawford's appellate counsel was also ineffective. The facts regarding Crawford's mental health struggles and blackouts were in the record. Trial counsel's failure to pursue an unmistakable right under *Ake* to assistance from a qualified mental health care expert was also glaringly apparent from the record. There was no strategic reason for failing to pursue an *Ake* failure-to-fund claim on direct appeal. To the contrary, appellate counsel affirmatively averred that the failure to pursue the claim was an oversight. Here are excerpts from his affidavit that make this clear:

> 8. During my review of Mr. Crawford's case, I was asked to give an affidavit for a petition for post-conviction relief in Mr. Crawford's capital case. In that affidavit, I pointed out a number of errors that I had preliminarily identified that I believed could be meritorious on appeal, including but not limited to the denial of funding for an expert witness for Mr. Crawford on his claim of insanity.
>
> 9. During the course of writing the brief in the direct appeal of Mr. Crawford's rape conviction, I became so focused on the issues I ultimately raised that I overlooked the issue regarding the denial of expert funding and failed to raise it on direct appeal.
>
> 10. I had no strategic reason for not raising the denial of expert funding issue in the direct appeal of Mr. Crawford's his [sic] rape

> conviction. It was an oversight on my part, and it was not intentionally left out of Mr. Crawford's direct appeal for any reason, strategic or otherwise.
>
> 11. During oral argument before the Mississippi Supreme Court on the direct appeal of Mr. Crawford's rape conviction, I first realized that I had failed to raise the denial of expert funding issue on direct appeal through an oversight on my part even though I believed the issue to be meritorious. I was stunned, but it was too late to raise it at that juncture of the direct appeal proceedings.
>
> 12. I devoted my full effort and professional skills in my representation of Mr. Crawford in the direct appeal of his rape conviction. I am extremely upset and embarrassed that I failed to raise the denial of expert funding issue on direct appeal.
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> 13. My failure to raise the issue of the denial of expert funding on direct appeal was not an attempt to create a claim of ineffective assistance of appellate counsel. Such an attempt would be unethical and dishonest. Such an attempt would also not have been in Mr. Crawford's best interest because in my opinion getting relief on the claim would be more difficult in the context of an ineffective assistance of appellate counsel claim in post-conviction proceedings than by properly raising it on direct appeal.[80]

The majority opinion maintains that appellate counsel failed to raise Crawford's *Ake* claim on appeal

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[80] ROA.2496-97.

because it was unpreserved.[81] But Crawford persuasively argues it was not. Confusion on this point arises because trial counsel withdrew the *Ake* motion in Crawford's *aggravated assault* case, but he did not do so in the rape case. Counsel stated that "[i]n case 5779 that's a moot question at this point" when the trial court asked about the motion to provide funds for expert assistance.[82] As the State admits in its brief, the trial court never issued an order denying the expert funding motion as withdrawn, moot, or otherwise.[83] And as noted in appellate counsel's affidavit above, he did not press the *Ake* claim on appeal because he thought it was withdrawn—he did so because of an "oversight." Counsel's sworn statement that the failure to bring the *Ake* claim on appeal was an oversight supports the conclusion that his failure to raise the issue was objectively unreasonable.

Even if the *Ake* claim were unpreserved, however, it was plainly a stronger ground for appeal. It is true both that "[d]eclining to raise a claim on appeal . . . is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court," and that "[i]n *most* cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors."[84]

But, as the Seventh Circuit has observed, "'most' does not mean 'all.'"[85] Here, as noted above, the trial court misapplied *Ake* by essentially giving the State

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[81] *Ante* at 3-4.
[82] ROA.1392.
[83] Cain Panel Br. at 33.
[84] *Davila v. Davis*, 582 U.S. 521, 533 (2017) (emphasis added).
[85] *Ramirez v. Tegels*, 963 F.3d 604, 617 (7th Cir. 2020) (affirming habeas relief for ineffective assistance of appellate counsel who failed to raise Confrontation Clause claim even assuming the claim was unpreserved).

the power to foreclose access to an expert witness for Crawford by making proof of insanity a precondition to expert assistance. This was an obvious misapplication of *Ake*, which requires only a "threshold showing" that "[the defendant's] sanity is likely to be a significant factor in his defense."[86] As the Mississippi Supreme Court has observed, plain-error review "will allow an appellate court to address an issue not raised at trial if the record shows that error did occur and the substantive rights of the accused were violated."[87] That court has also observed that "[p]lain-error review is properly utilized for 'correcting obvious instances of injustice or misapplied law.'"[88] Because the trial court obviously misapplied *Ake*, Crawford had a strong argument for relief even under plain-error review. Counsel's failure to raise *Ake* on appeal was objectively unreasonable.

III

Section 2254(d) of the Antiterrorism and Effective Death Penalty Act does not bar federal habeas relief on Crawford's ineffective assistance claims.[89] While the Mississippi Supreme Court adjudicated these claims on the merits,[90] that court unreasonably applied clearly established law, as determined by the Supreme Court of the United States. Crawford had a clearly established right to the effective assistance of counsel, both at trial and during his first appeal as of right.[91] And *Ake* "clearly establishe[d]" that when an

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[86] *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985).
[87] *Byrom v. State*, 863 So. 2d 836, 872 (Miss. 2003).
[88] *Smith v. State*, 986 So. 2d 290, 294 (Miss. 2008) (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981)).
[89] *See* 28 U.S.C. § 2254(d)(1).
[90] ROA.3167.
[91] *See Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *Evitts v. Lucey*, 469 U.S. 387, 393-94 (1985).

indigent defendant "'demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial,' . . . a State must provide a mental health professional capable of . . . 'conduct[ing] an appropriate examination and assist[ing] in evaluation, preparation, and presentation of the defense.'"[92]

As noted by the majority opinion, the Mississippi Supreme Court did not explain why it rejected Crawford's ineffective assistance claims.[93] Thus, we "must determine what arguments or theories . . . could have supported[] the state court's decision" and whether "fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court.[94]

The federal district court suggested that trial counsel affirmatively decided not to pursue the *Ake* motion for funding in the state trial court.[95] The federal district court also concluded that the state trial court never actually denied the motion for funding but instead, deferred it repeatedly, before Crawford's trial counsel decided to forego further pursuit of *Ake* funding.[96] No one, including the State, and the federal district court, with great respect, has offered a reasoned explanation as to why trial counsel was not ineffective for abandoning a request for funding expert

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[92] *McWilliams v. Dunn*, 582 U.S. 183, 187 (2017) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)).
[93] *Ante* at 3.
[94] *Harrington v. Richter*, 562 U.S. 86, 102 (2011).
[95] *See Crawford v. Lee*, No. 3:17-CV-105-SA-DAS, 2020 WL 5806889, at *11 (N.D. Miss. Sept. 29, 2020) ("Pannell told the court he was seriously considering defending both the rape and kidnapping charges on the facts and withdrawing the insanity defense completely. [] Both the record and Pannell's affidavit indicate that he never renewed the motion for funds as to the rape and kidnapping charge.").
[96] *Id.*

assistance, to which Crawford was clearly entitled under *Ake*. What possible explanation is there for trial counsel's decision to present an insanity defense without insisting on funding for expert evaluation of Crawford to determine if he suffered from brain damage, as suspected by experts who did evaluate Crawford but who, by their own admissions, were not qualified to assess brain damage? Why would counsel fail to insist on Crawford's rights under *Ake* to obtain expert assistance to trial counsel in deciding how to best defend Crawford in light of the questions raised about brain damage, seizures, and blackouts? I have seen no explanation, whatsoever, in this record that would support a debate among reasonable jurists as to whether counsel was ineffective.

As to appellate counsel's ineffectiveness on direct appeal, failing to raise the *Ake* funding issue excused the procedural default of that issue before the Mississippi Supreme Court.[97] But regardless of that procedural default, Crawford is not barred from bringing his ineffective-assistance-of-trial-counsel claim. State habeas counsel raised the ineffective-assistance-of-trial-counsel claim at the first opportunity, which was in state habeas court proceedings. State habeas counsel made a full record on what expert evaluation would have revealed and what testimony could have been presented at trial had trial counsel been effective. Appellate counsel on direct appeal could not have made such a record or raised ineffective assistance of trial counsel.

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[97] *See, e.g.*, *Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("[I]f the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State "); *Busby v. Dretke*, 359 F.3d 708, 718 (5th Cir. 2004) ("Ineffective assistance of counsel is sufficient 'cause' for a procedural default.").

I would grant habeas relief.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION

Cause No. 3:17-CV-105-SA-DAS

CHARLES RAY CRAWFORD

v.

COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS EARNEST LEE, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY

[Filed: September 29, 2020]

ORDER AND MEMORANDUM OPINION

[BEFORE, Sharion Aycock, District Judge]

Petitioner, Charles Ray Crawford, an inmate in the custody of the Mississippi Department of Corrections, has filed a petition for writ of habeas corpus on his conviction of rape in the Circuit Court of Alcorn County and his resulting forty-six-year sentence.

INTRODUCTION

The present petition follows a long and, at times, complicated procedural history. Because the Mississippi Supreme Court provided a clear explanation of the facts in its opinion following the direct appeal, this court sees no reason to rewrite what already has been written. Consequently, this Court quotes in full the facts provided by the Supreme Court.

On April 13, 1991, seventeen-year-old Kelly Roberts [Footnote 1 in the original noted the court's use of Sue as a pseudonym] was riding around Walnut, Mississippi, with her friend Nicole Cutberth. The girls were in Nicole's grandfather's car. The girls had been told to put fluid in the car and had purchased what was

needed. They saw Charles Ray Crawford in the Twin Oaks parking lot and went over to ask if he would help them put fluid in the car. Crawford had his young son with him at the time. Crawford agreed to help and told the girls to drive over to the ballpark. They did, and Crawford met them there. While putting fluid in the car, Crawford told Kelly that he needed to talk to her about something but refused to say what it was about.

Later that evening, as the girls continued to drive around, they spotted Crawford. They flashed their lights to pull him over. Kelly asked Crawford what he wanted to talk to her about. Crawford told her they needed to get out of Walnut to talk because his ex-wife Gail might find out he was talking to her and stop him from seeing his son. [Footnote 2 from the original. "Kelly is Crawford's ex-sister-law. Crawford was married to Kelly's older sister, Janet. Janet and Crawford divorced, and he remarried a woman named Gail Thompson. After having a son together, they also divorced. In April 1991, Crawford began seeing Janet again."] Crawford told them to meet him at Chalybeate Cemetery.

After finding Crawford parked at the cemetery, the girls pulled up their car beside his truck and rolled down the window. Crawford, who no longer had his son with him, told Kelly to get in the truck so they could talk. Kelly did and Crawford told her that her boyfriend had pictures of Kelly that were "pretty bad." Crawford also told her that he had gotten the pictures from her boyfriend and planned to get rid of them. Kelly told Crawford she wanted the pictures. Crawford replied that the pictures were at his house and she should tell Nicole they needed to ride to his house. Kelly and Nicole then got in Crawford's truck, and he drove them to his house.

As they drove by the school, Crawford asked the

girls to "scrunch down" in the truck so no one would see them. Crawford then parked by a nearby abandoned house instead of parking at his house. When they parked, Crawford told Nicole to stay in the car and told Kelly to walk with him to his house. When Kelly and Crawford got inside the back door of the house, Crawford stopped and told Kelly to stay there so he could make sure nobody was home. Kelly saw him walking through the house. When Crawford returned, he pulled a gun and put it to Kelly's head.

Crawford told her to do what he said and not to yell and no one would get hurt.

He told Kelly to get on the floor. As she did, she asked why he was doing this. Crawford told her to shut up. He taped her mouth shut with duct tape. He then told her to put her hands behind her back. When she did, Crawford taped her hands together.

Crawford pulled Kelly up and led her through the kitchen into a bedroom. Crawford lay Kelly on the bed and began removing her shoes. Kelly loosened the tape on her mouth by licking it with her tongue so she could speak. Kelly told Crawford he could not touch her because she was on her period. Crawford told her he would take care of it. Crawford pulled her pants and panties off then removed her tampon. He then engaged in sexual intercourse with her.

Afterwards, Kelly asked Crawford not to hurt Nicole. Crawford told her not to move and went outside. Kelly heard a noise then heard Crawford come back inside the house. Crawford ran into the bedroom and said somebody was there. Crawford grabbed Kelly up and they ran out of the house. As they ran out, Crawford said, "What have I done? We've got to get out of here. Somebody is here."

When they got back to the truck, Kelly did not see

Nicole, but she did see a hammer. Kelly asked Crawford where Nicole was, and Crawford responded that he had hit Nicole and she had run away. Crawford then looked at Kelly and said, "What have I done? Janet is going to hate me." Kelly responded by saying "please don't hurt me."

Crawford and Kelly walked back toward Crawford's house, and he untaped her. Kelly was able to pull her clothes back on as they got back to the house. Crawford then handed Kelly the gun and told her to shoot him. Kelly told him that she could not do it. Crawford then said that he needed to see Janet. Crawford asked her to go to Memphis, Tennessee with him to see Janet. Kelly agreed to go because she was worried he might hurt her or her sister if she did not.

Kelly and Crawford got back in Crawford's truck and began driving on back roads toward Memphis. On the way, they stopped at Barry King's house and Crawford asked to borrow his car because he knew the law would be looking for him. King refused but told Crawford to go ask Jackie Brooks if he could borrow his vehicle. Crawford and Kelly drove to Brooks's house and Crawford asked Jackie to borrow his truck because he was running from the law. Brooks refused to allow him to borrow his truck but did agree to drive him to Memphis. Brooks told Crawford to park his truck behind his house. Brooks and his wife then drove Crawford and Kelly to Memphis. There, they dropped Crawford and Kelly off at Timmy Joiner's house and returned home.

Joiner, a friend of Crawford's, drove Crawford and Kelly to a nearby Budget Inn and secured a room for them. Joiner left the two of them in the room and went back to his house. Crawford asked Kelly if she was scared. When she said she was, Crawford responded that she should not be. Kelly asked to talk to Janet,

and Crawford began crying and saying he was sorry. Crawford slept on the foot of Kelly's bed holding her foot so she could not get away.

The next day, Joiner picked up Crawford and Kelly and they drove to a few different convenience stores where Crawford tried to use the phone. Crawford finally told Joiner to pull over somewhere so he could think. They pulled down a little road and stopped. Crawford began saying he was going to kill himself. Joiner calmed him down, and Crawford told Joiner to take Kelly to call Janet.

Joiner and Kelly then left Crawford where he was and drove to a pay phone. Kelly talked to Janet and told her that Crawford had raped her. Janet asked to speak to Joiner again. When Joiner got off the phone with Janet, he said that he did not understand what was going on, but that Janet had told him to tell Crawford to turn himself in to the police. Kelly cried as they drove back to where they left Crawford, and Joiner told Crawford that Janet said he should turn himself in to the police.

Joiner then drove Crawford to a convenience store where Crawford dialed 911 and turned himself in to police. Joiner drove Kelly to meet Janet. Kelly was taken to a local hospital, and a rape kit and hair samples were taken.

Meanwhile, Deputy Greg Hopper, Chief Deputy Tommy Story, and other officers from the Tippah County Sheriff's Department responded to a call that someone had been hit in the head. They arrived at Crawford's grandparents' house and found Nicole lying on a stretcher. Nicole told the officers that Kelly needed help and that she was at Crawford's house.

The deputies then went to Crawford's house. They knocked and yelled, but no one answered the door.

Deputies found no one inside the house but did find a used tampon in the bedroom, a roll of duct tape with hair on the kitchen table, and a strip of duct tape with hair inside the house. The back door was open, and the deputies saw blood on the stairs. They also saw footprints in the garden and followed them to a nearby abandoned house. Outside they found more duct tape with hair. Relatives gave the deputies a description of Crawford's truck and an all-points bulletin (APB) was sent out.

Later, deputies located Crawford's truck behind Brooks's residence. The Memphis Police Department recovered a .22 caliber R & G revolver and apprehended Crawford. The hair found on the roll of duct tape and various pieces of duct tape found in and outside of Crawford's residence were compared with known samples of Kelly's hair and Crawford's hair. Some hair on the tape matched Kelly's known hair samples and some matched Crawford's known hair samples.

Crawford was indicted by the Tippah County Grand Jury for the kidnap and rape of Kelly (cause number 5780)—the case [then before the Supreme Court.] Crawford also was separately indicted for aggravated assault of Nicole (cause number 5779). Both cases eventually were tried separately in Chickasaw County, after the trial court granted Crawford's motion for a change of venue.

Prior to both trials, Crawford indicated that he planned to pursue an insanity defense.

Crawford was thereafter evaluated and examined by multiple mental-health professionals.

On January 30, 1993, three days before the trial for the aggravated-assault charge was set to begin, Crawford was arrested for the murder of Kristy D. Ray

while engaged in the crime of kidnapping, burglary of an occupied dwelling, rape, and sexual battery. The crimes occurred on January 29, 1993. Crawford ultimately was convicted of capital murder and sentenced to death. *See Crawford v. State,* 716 So.2d 1028 (Miss.1998).

On February 1, 1993, during a pretrial hearing the morning before the aggravated-assault case was set to start, the State moved for a competency evaluation under then Uniform Rule of Circuit and County Court 4.08. William Fortier, Crawford's trial counsel at the time for both the aggravated-assault case and the instant case, responded to the motion, stating:

> Your Honor, we have consented to the motion by the State for a psychiatric evaluation to determine whether Mr. Crawford is able to stand trial at this time. I think there is a serious question as to his ability to stand trial on these charges based on the acts that have come to light over the weekend; and, therefore, we agreed with the motion; and we have approved the order submitted to the court for the psychiatric evaluation.

The trial court responded, noting first for the record that it previously had ordered that Crawford be examined at the Mississippi State Hospital at Whitfield to determine his mental ability to stand trial. A report was issued by the State Hospital on December 23, 1992, concerning Crawford's mental health. Doctors there had concluded, based on psychiatric examinations they had conducted on Crawford, that Crawford was legally competent to stand trial. The trial court then ordered another psychiatric evaluation be conducted, finding that, based on the present circumstances, reasonable grounds existed to believe that Crawford might be incompetent to stand trial. The

court noted for the record that it was ordering the psychiatric evaluation on the court's own motion.

That same day, Fortier submitted a motion to withdraw as counsel. The trial court stayed the motion and continued all other motions and the scheduled aggravated-assault trial until another psychiatric examination of Crawford was conducted. Three days later, the trial court granted Fortier's motion to withdraw, and James Pannell was appointed as Crawford's counsel.

Meanwhile, Crawford was evaluated at the Mississippi State Hospital on February 2, 1993, by Dr. Reb McMichael and Dr. Criss Lott. A competency hearing was held on February 11, 1993, to determine Crawford's competence to stand trial in both cases. The record indicates that, prior to the hearing, both doctors briefly evaluated Crawford at the courthouse and that Pannell was present during the interview(s). During the hearing, Pannell cross-examined both doctors as to Crawford's competency to stand trial. Pannell also questioned both doctors about what medical signs he (Pannell) should be aware of while representing and preparing Crawford for trial that might indicate to him (Pannell) that Crawford is "slipping out of competency." Following the hearing, the trial court issued an order finding Crawford competent to stand trial.

Crawford stood trial for the aggravated-assault charge on May 18, 1993. The rape and kidnapping charges were brought to trial on August 3, 1993.

Prior to the aggravated-assault trial, a motion was entered on March 16, 1993, for further psychiatric evaluation of Crawford; the record does not disclose who requested the evaluation. In May 1993, Crawford through his counsel Pannell, submitted a motion for a competency evaluation in the aggravated-assault case. On the day the aggravated-assault trial began, a

pretrial competency hearing was conducted, after which the trial court found Crawford competent to stand trial. Crawford was found guilty of aggravated assault in that proceeding and was sentenced to twenty years in the custody of the Mississippi Department of Corrections. No post-trial motions were filed at that time, and no appeal was taken. See *Crawford v. State*, 787 So.2d 1236, 1238 (Miss. 2001). On March 11, 1996, Crawford filed a pro se motion for appointment of counsel, but he did not pursue that motion. *Id*. In 1998, David Bell (who was appointed co-counsel with Pannell in Crawford's capital-murder case) filed, on behalf of Crawford, a motion for judgment notwithstanding the verdict (JNOV), or, in the alternative, for a new trial. *Id*. In the motion, Bell stated that Crawford had sought new counsel, and he (Bell) was appointed. Bell requested that the motion be considered nunc pro tunc. *Id*. The trial court found the motion for a new trial was not timely and was not properly before the circuit court. *Id*. The trial court, however, at Crawford's request and over the State's objection, considered the motion for JNOV or new trial as if it had been timely filed. Id. at 1239. After hearing arguments on the motion, the trial court found no grounds which warranted granting JNOV or a new trial and denied the motion. *Id*. Crawford then appealed to [the Supreme Court], which affirmed Crawford's conviction and sentence. *Id*. at 1249.

Meanwhile, the instant case [kidnapping and raping Kelly] was brought to trial on August 3, 1993. At trial, Crawford called his mother and ex-wife Gail Thompson to testify about spells of mental illness Crawford had experienced throughout his life and about Crawford's stays in mental hospitals. Crawford also called Jackie Brooks and Brooks's wife, Tammy. Both testified that when Crawford and Kelly were

with them in Brooks's truck, they appeared to be boyfriend and girlfriend and that Kelly never indicated she had been raped. Crawford also testified at trial. His testimony indicated that he had no memory of the incident. When asked if he raped Kelly, Crawford responded: "I can't honestly say that I didn't, and I can't sit here and tell you that I did. The only thing that I've got to go by is what she said. I'm not going to lie and say I didn't, and I'm not going to turn around and lie and say that I did, because I don't know."

The State then presented two rebuttal witnesses. Dr. Stanley Russell, who had been seeing Crawford in prison while awaiting trial, testified that his diagnosis of Crawford was adjustment disorder with depressed mood and a personality disorder. Both disorders, according to Dr. Russell, were psychiatric disorders and "do not deviate [Crawford's] responsibility for behavior." Dr. McMichael, who had evaluated Crawford twice for the purpose of conducting a sanity evaluation of Crawford and determining Crawford's competency to stand trial, also testified. Dr. McMichael testified that Crawford was malingering or faking or exaggerating his memory loss. He also diagnosed Crawford with a personality disorder and noted Crawford's past struggles with cocaine abuse, alcohol abuse, and marijuana abuse. Dr. McMichael testified that "none of these diagnoses would rise to the level of something that would cause [Crawford] truly not to know what he's doing."

On August 6, 1993, Crawford's jury found him guilty of rape and not guilty of kidnapping. The trial court sentenced Crawford to forty-six years in the custody of the Mississippi Department of Corrections for the rape conviction. Crawford's trial counsel did not file any post-trial motions in the instant case, nor did he file a notice of appeal.

On September 23, 1993, Crawford was indicted by the Tippah County Grand Jury for capital murder for the killing of Kristy D. Ray. As mentioned, Bell was appointed co-counsel with Pannell in the capital-murder case. Venue changed in that case from Tippah County to the Circuit Court of Lafayette County, Mississippi. The capital-murder case went to trial on April 18, 1994. Crawford was found guilty on all counts, and Crawford was sentenced to death on April 23, 1994. Bell, Crawford's co-counsel in the capital-murder case, represented Crawford on appeal in that case. This Court affirmed Crawford's capital-murder conviction and death sentence on appeal. See *Crawford v. State*, 716 So.2d at 1053, cert. denied 525 U.S. 1021 (Nov. 30, 1998) superseded on other grounds by *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31 (Miss. 2003),

In April 1995, Crawford sent a letter to the Chickasaw County Circuit Clerk, asking when his notice of appeal was filed in the instant case. The circuit clerk responded that the record had been transferred to Tippah County, and that she had forwarded Crawford's letter to the Tippah County Circuit Clerk. In January 1996, Crawford sent a letter to Judge Kenneth Coleman, who had presided over all three cases, asking for counsel to pursue an appeal. On March 27, 1996, Judge Coleman appointed Bell to pursue Crawford's appeal in the instant case.

Bell requested the trial transcript in July 1996. In September 1998, Bell moved for JNOV or for a new trial, which Judge Coleman denied on October 13, 1998. Bell filed a notice of appeal on November 9, 1998, and designated the record on November 25, 1998. Crawford was granted leave to proceed in forma pauperis November 30, 1998. The record is silent as to why the appeal was never docketed with [the Supreme Court].

By an order entered February 2, 2002, Thomas Levidiotis was appointed by the trial court in place of Bell. Levidiotis made inquiry with [the Supreme Court] regarding the status of the appeal in this case, but the record does not reflect that anything else was done in furtherance of the appeal.

Crawford's present appellate counsel made an entry of appearance on January 7, 2014. [Footnote 3 from the original. "On December 16, 2013, the circuit court entered an order appointing the Office of the State Public Defender, Indigent Appeals Division, to represent Crawford in this appeal. The Public Defender's Office determined that it had a conflict in this case, and therefore contracted with the undersigned counsel under the provisions of Mississippi Code Section 99–40–1(2) to represent Crawford in the appeal of this matter.] Present counsel then filed an amended and corrected notice of appeal and an amended and corrected designation of record. The case was submitted for [Supreme Court] review of the issues on March 23, 2015. *Crawford State*, 192 So. 3d 905, 907-912 (Miss. 2016).

The Mississippi Supreme Court affirmed Crawford's conviction and sentence for rape and subsequently denied his petition to vacate his conviction and sentence. He then filed the present petition for a writ of habeas corpus, alleging thirteen separate issues. The Court will address each issue in turn.

THE APPLICABILITY OF THE DEFERENTIAL AEDPA STANDARD SET FORTH IN 28 U.S.C. § 2254(d)

As an initial matter, the Court notes that the parties disagreed regarding the proper standard of review in this case. The Petitioner, through counsel, improperly split his grounds for relief between the petition and his traverse. The petition itself presents facts and

arguments on all thirteen of his claims as if this Court would be conducting a *de novo* review, rather than under the restrictive standard set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which requires a federal court on habeas corpus review to give great deference to the state court's factual findings and legal conclusions. *See* 28 U.S.C. § 2254(d). The Petitioner initially declined to brief his grounds for relief through the lens of the AEDPA, deferring such discussion until the State relied on the AEDPA in its response. When the State did so, Mr. Crawford filed a lengthy traverse, raising numerous new arguments which addressed the State's AEDPA arguments. The State filed additional argument in the form of a surrebuttal, rather than an objection to the introduction of new arguments in the Traverse. Though this haphazard procedure diverges from the accepted path for briefing in federal habeas corpus cases, in the interest of judicial economy, the Court has reviewed all arguments on this issue, and the parties have thoroughly briefed all issues.

Crawford argues that several of the decisions by the Mississippi Supreme Court contain insufficient reasoning to constitute an adjudication on the merits (the trigger for deferential review in the habeas corpus context under § 2254(d)). If Crawford were correct, then the Court would not be constrained in its review by the AEDPA's deferential standard. However, as the State argued, as long as the state supreme court makes a definitive ruling – even with *no* discussion – that ruling counts as an adjudication on the merits:

> Because a federal habeas court only reviews the reasonableness of the state court's ultimate decision, the AEDPA inquiry is not altered when, as in this case, state habeas relief is denied without an opinion.

Schaetzle v. Cockrell, 343 F.3d 440, 443 (5th Cir. 2003).

Crawford's arguments on this point are without merit, and the Court has reviewed the relevant issues in this case under the deferential standard set forth in 28 U.S.C. § 2254(d):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings *unless* the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (emphasis added).

GROUND ONE — THE PETITIONER ARGUES THAT THE TRIAL COURT VIOLATED HIS RIGHTS WHEN IT DENIED HIS REQUEST FOR FUNDS FOR EXPERT PSYCHIATRIC ASSISTANCE TO AID WITH THE PREPARATION AND PRESENTATION OF AN INSANITY DEFENSE

There is no dispute that Crawford's first attorney, Fortier, filed a motion asking the trial court to order the state to provide funds to allow Crawford to retain Dr. L.D. Hutt, a psychologist. In *Ake v. Oklahoma,* the United States Supreme Court held that in capital cases the Fourteenth Amendment requires the

government to provide an indigent defendant with the psychiatric assistance necessary to prepare an effective insanity defense. *Ake v. Oklahoma,* 470 U.S. 68, 83 (1985). Fortier selected and wanted to retain Hutt to assist Crawford in pursuing an insanity defense. Crawford *for the first time in the post-conviction proceedings* charged the trial court with violating his due process rights when it denied his request for funding to obtain the services of an independent expert to examine Crawford, assist the defense and present testimony to support his claim of insanity.

The Mississippi Supreme Court found that because Crawford's appellate attorney failed to raise the supposed denial of funds for an expert witness, he waived this argument pursuant to Section 99-39-21 of the Mississippi Code, and it was therefore procedurally barred. Section 99- 39-21(1) provides:

> Failure by prisoner to raise objections, defenses, claims, questions, issues or error either in fact or law which were capable of determination at trials and/or on direct appeal, regardless of whether such are based on the laws and the constitution of the State of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

In the present case, Crawford argues that the Supreme Court erred because this procedural bar is not strictly or regularly applied.

A federal court may not consider a habeas corpus claim when: (1) "a state court [has] declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement," and (2) "the state judgment rests on independent and

adequate state procedural grounds." *Walker v. Martin*, 562 U.S. 307, 316, (2011) (quoting *Coleman v. Thompson,* 501 U.S. 722, 729–730 (1991)). This doctrine is known as *procedural bar.*

A state procedural rule is "independent" when the state law ground for the decision is not "interwoven with the federal law." *Michigan v. Long*, 463 U.S. 1032, 1040, (1983). To determine the adequacy of the state procedural bar, this Court must examine whether the state's highest court "has strictly or regularly applied it." *Stokes v. Anderson*, 123 F.3d 858, 860 (5th Cir. 1997) (citing *Lott v. Hargett*, 80 F.3d 161, 165 (5th Cir. 1996)). The Petitioner, however, "bears the burden of showing that the state did not strictly or regularly follow a procedural bar around the time of his appeal" – and "must demonstrate that the state has failed to apply the procedural bar rule to claims identical or similar to those raised by the petitioner himself." *Id.*

Crawford contends that this procedural bar, though long found by the Fifth Circuit to be both an independent and an adequate state procedural bar, is no longer strictly and regularly applied. *Stokes*, 123 F.3d at 860. He contends the Mississippi Supreme Court has made multiple exceptions and waived the bar in a handful of cases involving fundamental rights. However, in *Stokes,* the Fifth Circuit recognized Mississippi Code § 99-39-21(1) as an independent and adequate state procedural ground that was consistently applied. Because Stokes pointed to only one case that involved the waiver of the bar and it was not a similar case, the court found Stokes failed to carry his burden to show inconsistent and irregular application of the bar. Stokes' claim, the court held, was properly denied because of the default.

This Court notes that Crawford has likewise failed to meet his burden of proof in this case. Crawford cites

one case where the state court addressed the merits of a claimed *Ake* violation, despite a procedural bar. In *Pinkney v. State*, 538 So.2d 329 So. 2d 329, 343-44 (Miss. 1988), the court found that Pinkney's attorney had filed a motion for the appointment of an expert witness but failed to obtain a ruling on the motion. This would normally be procedurally barred under the waiver provisions of the Mississippi statute. The court nevertheless discussed the merits, but rather than waiving the procedural requirement to grant relief, *Pinkney* issues an alternative finding on the merits — that any *Ake* error was harmless. This Court has reviewed the other cases cited by Crawford and finds that few of them address *any* waiver of the procedural bar at issue, and none address waiver of the bar to grant relief under *Ake.* Indeed, several do not involve a waiver of the procedural bar at all.[1]

Without showing any pertinent case where this procedural bar was waived to grant relief, the Petitioner has not shown that the state procedural bar is not regularly and strictly enforced. In accordance with the ruling in *Stokes,* therefore, the Court finds that Crawford has failed to prove the procedural bar is not consistently and regularly enforced and that it is an independent and adequate bar to Crawford's claim.

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[1] *State v. Burkhalter*, 119 So.3d 1007, 1009 (Miss. 2013) (finding counsel was not ineffective for failing to obtain circumstantial evidence instruction in a case involving direct and circumstantial evidence -- no procedural bar was imposed in the case); *Childs v. State,* 133 So.3d 348, 351 (Miss. 2013) (discussing alleged error on direct appeal where procedural default was not an issue); *Chinn v. State*, 958 So.2d 1223, 1225 (Miss. 2007) (addressing right to present theory of defense as a fundamental right, but not involving either a procedural bar or the waiver of a bar); *Sharplin v. State*, 330 So. 2d 591 (Miss. 1976) (involving an Allen charge but not involving procedural bar and no waiver).

GROUND TWO — THE PETITIONER ARGUES HIS RIGHT TO EFFECTIVE ASSISTANCE WAS VIOLATED WHEN APPELLATE COUNSEL NEGLECTED TO RAISE AS ERROR ON DIRECT APPEAL THE TRIAL COURT'S VIOLATION OF PETITIONER'S RIGHT TO INDEPENDENT EXPERT ASSISTANCE

Despite the fact that Crawford's initial claim is procedurally barred, he may still prevail by demonstrating (1) cause for the procedural default and actual prejudice as a result of the alleged violation of federal law or (2) that failure to consider his claims will result in a fundamental miscarriage of justice. *See Pitts v. Anderson,* 122 F.3d 275, 279 (5th Cir. 1997). Here, Crawford attempts to demonstrate cause by arguing that his attorney's failure to object and raise the *Ake* issue on appeal constituted ineffective assistance of counsel. *See Coleman v. Thompson,* 501 U.S. 722, 753-54 (1991) ("Attorney error that constitutes ineffective assistance of counsel is cause.").

To establish ineffective assistance of counsel Crawford must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced his defense. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984). The standard of review of an attorney's performance is "highly deferential," considering only the facts and resources available to the petitioner's counsel at the time of his appeal. *Id.* at 689. When considering an ineffective assistance of counsel claim, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* When applying *Strickland* and Section 2254(d), review is "doubly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). As explained in *Mitchell v. Epps* – for the district court, "[t]he pivotal question [was] whether the

state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. When 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there exists any reasonable argument that counsel satisfied *Strickland's* deferential standard. A state court's determination that a claim lacks merit precludes federal habeas relief so long as fair minded jurists could disagree on the correctness of the state court's decision." *Mitchell v. Epps*, 641 F.3d 134, 141 (5th Cir. 2011).

In support of this argument, Crawford's appellate counsel has provided an affidavit stating that the failure to assign the trial court's denial of the *Ake* claim on direct appeal was not strategic but inadvertent. Crawford leaps from this concession of error to the conclusion that but for the error the case would have been reversed, citing multiple cases in which the Mississippi Supreme Court has reversed trial courts when they fail to abide by the dictates of the *Ake* decision. However, in this instance, the Court finds that there certainly is a reasonable argument that counsel satisfied *Strickland's* deferential standard. Indeed, it appears the state court did not in fact deny Crawford's *Ake* motion, and that certainly provides sufficient rationale for the Supreme Court's decision as to this issue.

Fortier filed a motion for funds to retain psychologist L.D. Hutt. Hutt's affidavit confirmed he was given confidential information by Fortier, statements from relatives and friends and a social background. His preliminary evaluation indicated that Crawford suffered from certain disorders which could provide a basis for an insanity defense. He found that Crawford was exhibiting symptoms of Bipolar affective disorder with

elements of substance dependency and suggested that Crawford might also be suffering from other "[p]erhaps even more severe, psychological disorders." (R. 10-1 p. 38).

While the trial court did not immediately grant the motion, neither did it deny the motion, and there is no order denying the motion in the file. Crawford's motion for expert witness funding was filed in April 1992, along with other pretrial motions, in both of the 1991 cases (the aggravated assault case and the rape/kidnapping case). At the hearing on April 22, 1992, Fortier told the court an insanity defense would be used in both cases. (R. 10-8 p. 7). Fortier told the court that the defense was going to deny the kidnapping charge on the facts, but defend the other two charges by claiming insanity (R. 10-8 p. 11 27). He, therefore, intended to move to consolidate these charges for trial. (R. 10-8 p. 12-13).

The prosecutor agreed that under *Ake,* if Crawford were truly an indigent defendant, he was entitled to an expert, but that the court, not the defendant, could make the selection. (R. 10-8 p. 23, 30). Crawford's grandfather testified he had paid Fortier's legal fees and that his grandson had no assets with which to repay him (R. 10-8 p. 23-26). The State then moved *ore tenus* for an examination under then Rule 4.08 of the Mississippi Uniform Rules of Circuit and County Court. They requested that Dr. Donald Guild conduct the evaluation (R. 10-8 p. 31).

After considering the stated expenses for retaining either the defense's choice of expert or the prosecution's preferred expert (R. 10-8 p. 31), the judge opted to get an evaluation at the local mental health facility. (R. 10-8 p. 34). The court did not believe that both the defense and the state could get examinations done in time for the cases to proceed to trial as then scheduled.

By the court:

> For the record, Miss Reporter, affidavit of Dr. Hutt Ph.D. has been filed in this case. Dr. Hutt states under oath that the defendant exhibits Bipolar Effective[sic] disorder, whatever that may mean. His report though it doesn't say it in black and white to me alludes to the fact the defendant may be suffering from some illness which effects [sic] his ability to perceive the wrongfulness of his act. The State has requested examination of the defendant under Mississippi's Rule 4.08 in anticipation of the offering of an insanity defense. I'm going to treat this case just like I have others where motions are made for psychiatric or mental evaluation, I'm going to direct that staff of the Timber Hills Mental Health Center make a report to the court, examine the defendant, administer whatever test[sic] are necessary and render their opinion to the court and to the attorneys as to the defendant's ability to know right from wrong on the date of the alleged offense. We will take it from there. By this ruling I'm in substance continuing this case but I've got real problems with Mr. Fortier's request even if he could get Dr. Hutt hired and the report comes in 10 days and the State is going to be able come in with a motion to have the defendant examined by another psychiatrist and it's not my intent by this ruling to delay this case but I don't see any other way, gentlemen. I just don't see how we can get it done in 20 days."

(R. 10-8: 34-35)

The judge told both sides "this is without prejudice to further motions from either side for examination or for funds, but I'm going to get a preliminary report and

see where we are…. (R. 10-8, p 35). The judge concluded that he wanted to see this report before he decided the *Ake* motion (R. 10-8 p. 40-41).

When the trial court reconvened for motions hearings on September 14, 1992, the court learned that a Timber Hills social worker, rather than a psychiatrist or psychologist, as intended, had evaluated Crawford (R. 10-8 p. 50). Though Crawford claims in his petition that "the trial court again denied petitioner's request for an expert" the court instead found, "[w]e haven't reached that point," an unsurprising response given the relatively benign bipolar diagnosis listed by Dr. Hutt in his affidavit (R. 10-8 p. 60). The judge wanted an evaluation done at the Mississippi State Hospital, "[t]o see whether there is a problem," and proceed after that initial evaluation to decide the *Ake* motion. *Id.* As the Petitioner has noted, Fortier objected both to the scope of the examination as contained in the prosecution's proposed order and that the evaluation would precede a defense evaluation.

Fortier then filed and argued a motion to consolidate the rape and aggravated assault charges. (R. 10-8 p. 45). He argued that trying the cases separately would create "additional financial hardships on the defendant." (R. 10-8 p. 53). The court denied the motion to consolidate after the prosecution conceded the cases were so closely interwoven that an insanity acquittal in the first trial would bar prosecution of the second under the Double Jeopardy Clause. (R. 10-8 p. 58). Fortier argued that under *Ake* "an indigent defendant was entitled to have his own expert to assist him in the defense of his case, " quoting from *Ake,* and " argued the "access to a competent psychiatrist" included "an appropriate examination and assist[ance in] and evaluation, preparation, and presentation of the defense.'" (R. 10-8 p. 60).

The court did not disagree. "Yes, sir. I understand that, and I don't think we're to that point. I think that's the thing we're all overlooking. We aren't to that point." (R. 10-8 p. 60). The court then said, "[t]he thing that bothers me about it is the case is set for trial so soon." *Id.*

After some discussion about who could perform the examination, Fortier repeated his argument that Crawford had more than just the right to be examined. Fortier admitted the defense could not demand his choice of the expert, but the expert "is supposed to be someone who is going to help him in the defense of this case, the preparation, the evaluation." (R. 10-8 p. 61). Fortier argued Crawford was entitled to an independent evaluator. ((R. 10-8 p. 62).

Again, the judge said the court needed to determine if he had some type of mental deficiency, "then at that point in time the court's going to have to address the issue of whether you're entitled to have an expert, your expert. We haven't reached that point." (R. 10-8 p. 62). The judge did not think the case was at the proper procedural point to rule on the motion. *Id.* "I would like for y'all to confer. I haven't heard any proof. I haven't heard anything that would indicate to me that the man has a problem." (R. 10-8 p. 62). Fortier then referenced the affidavit attached to the motion.

The judge responded, "Y'all confer; if you want to pursue this thing on insanity, I mean if you want to pursue having him examined, I'll give you an order; but I'm going to have him examined at the state hospital." (R. 10-8, p. 63). (Emphasis added).

> BY MR. FORTIER: "Then when we receive that report**,** I still have the right to come back and argue that he has a right to a psychiatrist for his defense.

BY THE COURT: *That's right*.

(R. 10-8 p. 63).

There was another hearing in October because Fortier did not agree to the language in State's order for the examination. Fortier objected to the state's proposed order because it included a waiver of the medical privilege and included a competency determination (R. 10-8 p. 67-68). Fortier also objected to the production of other information and documents to be produced to the Whitfield doctors, including Dr. Hutt's report, which had not yet been completed. Hutt had seen Crawford once at that point (R. 10-8 p. 73) and was expected to see him once or twice more, before issuing a report. (R. 10-8 p. 74) Fortier objected to producing Hutt's report because he had not yet seen a report himself, and "when a defendant goes out and hires at his own expense an expert to do an evaluation, he's not required to provide this information to the state except under discovery if he's going to use the expert." The decision had not yet been reached about use of the expert, per Fortier (R. 10-8 p.76). The court amended the order to eliminate the language about waiving the medical privilege (R.10-8. p 78).

By the next motions hearing, David Pannell was representing Crawford. When the court called the *Ake* motion, Pannell advised the court the motion was moot as to the aggravated assault case, where Hutt appeared and testified. Pannell told the court he was seriously considering defending both the rape and kidnapping charges on the facts and withdrawing the insanity defense completely. (R. 10-4, 39-40). Both the record and Pannell's affidavit indicate that he never renewed the motion for funds as to the rape and kidnapping charge. Because the trial court never denied the motion, the assignment of error Crawford sets out in Ground One would be without merit. Consequently,

failure to raise such an assignment cannot be deficient conduct nor could it prejudice the defense.

Finally, Crawford has not provided this Court with any new evidence that, as a factual matter, would show that he did not commit the crime of conviction. Indeed, Crawford does not make that argument at all. Consequently, he has not shown a fundamental miscarriage of justice. *See Wilder v. Cockrell,* 274 F.3d 255, 262 (5th Cir. 2001).

GROUND THREE — THE PETITIONER ARGUES HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EXPERT TESTIMONY IN SUPPORT OF THE INSANITY DEFENSE

With his next claim, Crawford argues that his trial counsel erred when he failed to discover and develop additional lay and expert testimony to support the thesis that organic brain damage and/or epilepsy rendered him legally insane. In support of this claim, he has offered excerpts of trial testimony from family members at the capital murder trial and affidavits from friends regarding Crawford's history since his childhood. For example, his father testified that Crawford was excessively afraid of the dark as a child; had been taken to a psychiatrist as a youngster because of behavior problems; and placed on some type of medication. As Crawford got older, he was in a bad mood or depressed all the time and he became very rebellious at eighteen (Dkt 1 p. 341-42, 244, 346). Crawford's grandmother testified he had spells when he would get glassy-eyed and that these spells occurred in a somewhat cyclical pattern. His sister also testified on his behalf to his childhood fear of sleeping alone. She described one incident when he was "screaming and hollering" for hours because his grandparents would not

let him take the car. When she was learning about psychology in nursing school, she became so concerned about him, she made an appointment for him in Memphis so he could get some help. But Crawford insisted he was better and would not go (Dkt. 1 p. 392, 395, 398. 400).

Crawford's friends' affidavits were largely devoted to trying to show that Crawford could have sustained brain damage from excessive use of drugs, multiple fist fights, and/or multiple car accidents, including one car-train collision. Other witnesses also addressed Crawford's spells and changes in his demeanor. They testified that he did not remember all the things he had done and sometimes appeared not to be himself during his spells.

However compelling Crawford's subsequently-hired expert may have found the evidence supporting his diagnosis before August 1993, there is no evidence in the record to support that a reasonably competent attorney would have recognized its supposed significance and launched a new investigation into the insanity defense in May 1993. Accordingly, the Court finds the Mississippi Supreme Court could reasonably decide that the failure to exhaustively interview all of Crawford's family and friends about his then recently-diagnosed epilepsy was not deficient conduct by counsel.

Crawford also accuses his trial counsel of failing to have a complete battery of neuropsychological testing done on Crawford after being specifically advised by Dr. Mark Webb that such testing was imperative. This allegation is fundamentally inaccurate.[2]

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[2] The Court notes that the record shows some psychological testing was done. The Mississippi Supreme Court referenced the "battery of psychological tests" performed by Dr. Hutt, in affirming Crawford's aggravated assault claim. *Crawford v. State*, 787

The Petitioner submitted the affidavit of Dr. Mark Webb to support the accusation that Pannell was expressly advised that a battery of neuropsychological testing was necessary. This affidavit was dated March 24, 1994, about one month before the capital murder trial and several months *after* the conclusion of the rape trial in August 1993. Dr. Webb's affidavit provided:

> Because my evaluation of Mr. Crawford leads me to believe that he may suffer from organic brain damage, I strongly recommend that he undergo a neuropsychological battery to determine the existence and extent of any brain dysfunction. Indeed, until such is done, it cannot be said that Mr. Crawford has had a complete psychological workup.

In a second affidavit, dated March 7, 2014, Webb reiterates the need for neuropsychological testing and that he told Crawford's attorneys they needed to have this testing done.[3] As the state court noted in *Crawford,* 21 So.3d at 1155, n. 5, the first affidavit provides no context for why it was being given, nor does it state when counsel was advised of this asserted need for neuropsychological testing. Given that it refers to counsel in the plural, it appears to be referencing what happened in connection with the capital murder trial, where mitigation would be a significant issue. Without any indication in the record that this expert told Pannell before

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So.2d 1236, 1243). Crawford in this case testified that Hutt performed "lots of tests" on him. (R. 10-6:37)

[3] His affidavit also discusses his review of the testing and evaluations by Brawley, Schwartz-Watts and Nadkarni, finding it to be "extremely significant mitigating evidence," which would be germane to the capital murder trial. Webb does not mention if these reports would demonstrate M'Naghten insanity.

the August 1993 trial that there was a need for this testing, it does not constitute proof of counsel's neglect to make sure this testing took place.

GROUND FOUR — THE PETITIONER ARGUES HIS RIGHT TO EFFECTIVE ASSISTANCE WAS VIOLATED WHEN TRIAL COUNSEL FAILED TO PRESENT A COHERENT THEORY OF DEFENSE

With his fourth ground, Crawford argues his trial counsel was ineffective because he employed a "disastrous hybrid defense," asserting both an insanity defense and a fact-based defense in this case. Crawford claims that the *only* reasonable defense strategy for this case would be a pure insanity defense, using the diagnoses obtained by his new experts, though their evaluation came some twenty years after Crawford's conviction.

In his attack on Pannell's competence both in failing to discover and present the new insanity defense and instead relying on a hybrid defense, Crawford has received some assistance from his former attorney. Pannell has provided an affidavit endorsing the new theory of defense and rejecting the hybrid defense he employed at trial. The court addresses this affidavit and its impact on this court's consideration of the claims of ineffective assistance of counsel.

In pertinent part, the affidavit provides:

> I used an insanity defense in all three of Mr. Crawford's trials [the aggravated assault, rape/kidnapping case and the capital murder case]. However, in his rape case, I used a hybrid defense and argued that Mr. Crawford was insane, and also that there was insufficient evidence to prove that Mr. Crawford committed rape.

> I have recently reviewed the expert evaluation obtained by Mr. Crawford's post- conviction attorneys. These include an independent medical evaluation by Dr. Siddhartha Nadkarni, a neurologist; a psychiatric evaluation by Dr. Donna Schwartz-Watts; and the results of neuropsychological testing conducted by Dr. Tora Brawley, Ph.D. The information contained in their reports is precisely the type of expert testimony that I would have used to present an insanity defense in Mr. Crawford's rape trial. I believe the outcome of Mr. Crawford's rape trial would have been different had I presented this expert testimony to the jury. If I had obtained these reports prior to Mr. Crawford's trial, I would have only pursued an insanity defense, and I would not have used the hybrid defense. Additionally, had I received these expert reports prior to Mr. Crawford's trial, I believe that I would have been able to convince him not to take the stand to testify in his own defense because the insanity defense is so strong.

(R.1:715-716).

This affidavit does little to aid or influence the decision in this case for multiple reasons. First, Pannell may have endorsed the new insanity defense proffered by post-conviction counsel, but he by no means confesses that he has been guilty of ineffective assistance of counsel, which would confess incompetence. As will be discussed below in more detail, Pannell's enthusiasm for the new insanity defense has overlooked some fundamental flaws shown in the record. The hope that this new defense would likely lead to a different and favorable outcome is misplaced. His affidavit - executed in 2015 - twenty-two years after the trial clearly "fails to reconstruct the circumstances of counsel's

challenged conduct" and "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Reliance on "the harsh light of hindsight," even by counsel himself, is what the *Strickland* standards prohibit. *Bell v. Cone*, 535 U.S. 685,702 (2002).

Here, his affidavit so many years later indicates that time has distorted his recollection and that counsel himself may have forgotten the circumstances he faced. He clearly has overlooked the success he had at trial. His client faced two charges -- rape and kidnapping -- either of which could have resulted in a life sentence. His hybrid defense yielded an *acquittal* on the kidnapping charge. Pannell challenged the sufficiency of the evidence to convict Crawford on both the rape and the kidnapping charges. That the hybrid defense worked against one charge, even if not against both, is indicative of not only a strategic choice by counsel, but one that was at least in part successful. That a defense strategy does not "work out as well as counsel had hoped" is not proof "that counsel has been incompetent." *Harrington v. Richter,* 562 U.S. 86, 109 (2011).

Nor does the fact that an acquittal was obtained on the kidnapping charge mean that the evidence did not support the indictment. Pannell cleverly focused the jury's attention on the fact that Kelly verbally indicated she would go to Memphis with Crawford; that she had opportunities to escape or ask for help; and that two witnesses testified that she did not appear distraught.

But other evidence fully supported the charge. Kelly testified she told Crawford she would go with him because she feared he would hurt her or her sister if she refused. Her "consent" was given shortly after Crawford had bound her with duct tape at gunpoint and dragged her through his house to rape her. As one of the prosecuting attorneys pointed out, this evidence

showed she was kidnapped before ever leaving the county (R. 10-6 p. 156). Crawford told Kelly, while armed with the hammer, that he had hit her friend who had then run away. Around the time he was asking her to go to Memphis, Kelly had been begging Crawford not to hit her with the hammer. Winning an acquittal on this charge was significant; it could not have been accomplished without employing a hybrid, fact-based defense, given that Crawford admitted remembering the chain of events underlying that charge.

Furthermore, as in *Richter*, Pannell had cause to doubt his client's truthfulness, given the general implausibility of his story of on-and-off memory, his history of malingering, and the strength of the state's testimony to this effect in both cases. While not the diagnosis Crawford now advocates, Pannell had already tried one case on a pure insanity defense, only to see Crawford convicted on the aggravated assault charge and receive a twenty-year sentence.

Pannell's affidavit shows that he is second-guessing himself, and his hindsight is no more accurate nor determinative than a court's hindsight review would be. Pannell does not claim to be incompetent, and the record shows quite the opposite. Knowing now that the tactics he employed did not work, he speculates that he would have made a different decision at that time, with the Nadkarni report. But that is not the standard for this court's decision.

After an adverse verdict at trial, even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify his own responsibility for an unfavorable outcome. *Strickland,* however, calls for an inquiry into the *objective reasonableness* of counsel's performance, not counsel's subjective state of mind. *Richter*, 562 U.S. at 109-110.

While agreeing that dissuading Crawford from testifying would be crucial to the success of any proposed trial strategy, Pannell's opinion that he could have talked Crawford out of testifying is pure speculation. Crawford foolishly ignored Pannell's advice the first time. He was clearly not a client inclined to listen to his attorney.[4] In any event, Crawford made the decision he did, and counsel's guess that a different argument would have persuaded his client to be more prudent does not entitle Crawford to a mulligan decades after the fact.

It is perfectly understandable that Pannell in the intervening years has also forgotten pertinent details about the damage Crawford inflicted on himself with his testimony. Crawford's decision hurt his cause. Where the defense is M'Naghten insanity, cogent, organized, even clever testimony from the defendant does not aid the cause, not to mention that mounting a fact-based defense on the kidnapping charge was imperative.

In the end, Pannell's affidavit is entitled to little weight or consideration precisely because it is the belated review of long-ago events. The court instead relies on what the contemporaneous record demonstrates about the actual conduct of counsel, and here it was not deficient.

GROUND FIVE — THE PETITIONER ARGUES HIS RIGHT TO EFFECTIVE ASSISTANCE WAS VIOLATED WHEN TRIAL COUNSEL MADE PREJUDICIAL STATEMENTS ABOUT HIM THROUGHOUT

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[4] In his capital murder trial, Crawford wrote to Pannell demanding that he file motions to dismiss, to challenge the indictment and a recusal motion. Among other complaints, he chastised his attorney for failing to obtain a favorable ruling on the motion to recuse. *Crawford v. Epps,* 2008 WL 4419347, * 33.

TRIAL

In Ground Five, the Petitioner accuses his trial counsel of making prejudicial statements about him throughout the trial. Crawford argues his attorney attacked him; undermined his theory of defense; urged the jury to reject his innocence and characterized his client as violent and dangerous. He accuses Pannell of introducing irrelevant and prejudicial testimony and argues that counsel's behavior at trial cannot be considered reasoned, strategic judgment.

Crawford has a catalog of complaints here, starting with a reference in opening statement to a fable of a young girl who picked up a snake. He claims this reference both blamed the victim for being raped and characterized him as an inherently dangerous. Regardless of Crawford's interpretation of the fable, Pannell immediately followed with the argument that he expected the evidence to show Kelly was infatuated with her former brother-in-law; that if Crawford felt guilty about anything it was about getting involved with his ex-wife's sister; and that there would not be scientific evidence to corroborate Kelly's claims. He said that while his client could not remember what happened, there was serious doubt about whether a crime had been committed at all. He told the jury that Crawford had a long history of mental problems, basically of being troubled and that may have made him more attractive to Kelly. (R 10-4 p. 136-38).

Crawford also complains his attorney brought up the fact that he was testifying against the advice of counsel in front of the jury. Though this is typically done outside the presence of the jury, this brief interchange does not appear prejudicial, particularly where counsel asked him why he was going to testify anyway. Crawford responded: "I feel that I need to say my part, you know to testify." (R. 10-6:31). Under the

circumstances it does not seem unreasonable to try to explain why Crawford was testifying – to convince the jury that Crawford had nothing to hide. It is also consistent with an attorney faced with an extremely difficult situation.

With the presentation of any insanity defense, prejudicial evidence is practically unavoidable. A defense of insanity opens the door, "for the admission of evidence of every act of the accused's life relevant to the issue of sanity and is admissible in evidence." *McLeod v. State*, 317 So. 2d 389, 391 (Miss. 1975). As part of Ground Five, Crawford complains that Pannell let into evidence that his mother and ex-wife were afraid of him. However, that evidence was going to come out on direct examination or cross examination. Bringing out this damaging testimony on direct rather than waiting for it to come out on cross examination is a matter of trial strategy. Crawford made a similar complaint about the introduction of unfavorable evidence in *Crawford v. Epps,* 2008 WL 4419347 at * 46, and this Court found there was no showing of entitlement to relief. *Id.*

Crawford also argues Pannell was ineffective when he told the jury they did not have to believe Jackie Brooks and may not like him. Pannell told the jury Brooks had been convicted on a marijuana charge. If Pannell thought Brooks was a bad witness, distancing the defense from him was a reasonable, strategic decision. Additionally, witnesses are subject to impeachment for their criminal convictions. In this case the prosecution left the job of Brooks' impeachment half done - raising the fact that he had some type of criminal record, but not addressing the actual conviction. A reasonable attorney could decide that telling the jury he was guilty of using marijuana was preferable to leaving the jury to speculate about the nature of his

criminal history.

Looking at the whole of the trial, the Mississippi Supreme Court could reasonably find that Crawford was provided with constitutionally adequate assistance of counsel and that the prosecution's case was subjected to "meaningful adversarial testing." *United States v. Cronic,* 466 U.S. 2039, 2045 (1984). Pannell conducted meaningful cross-examinations during the State's case, presented evidence in support of the defense, and conducted effective cross-examinations of the State's expert witnesses. Counsel's performance was not error free, but neither was it incompetent.

Finally, this Court notes that Crawford does not contend that the argument, comments or other errors alleged in Ground Five alone prejudiced the result. Rather, he argues again that the failure was counsel's decision not to present the new insanity defense. According to Crawford's current counsel, had Pannell investigated the Crawford's insanity defense and retained expert assistance, he would not have pursued the hybrid defense and "would have been able to convince Mr. Crawford not to take the stand to testify in his own defense because the insanity defense was so strong." Petition (Dkt 1 p. 39).

This argument acknowledges the harmful impact of Crawford testifying but fails to show that counsel was ineffective or that he could have in fact talked his client out of testifying. It is also an implicit admission that the conduct of counsel in the trial was not prejudicial. Again, the Court denies this argument as meritless.

GROUND SIX — THE PETITIONER ARGUES HIS RIGHTS WERE VIOLATED WHEN IT TOOK MORE THAN TWENTY YEARS TO DOCKET HIS DIRECT APPEAL

In Ground Six, Crawford argues that his constitutional "rights to due process and a speedy appeal guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated as result of the more than twenty-year delay in the docketing of petitioner's direct appeal of this conviction." Petition (Dkt. 1 p. 41).

In its 2015 opinion, the Mississippi Supreme noted that Crawford was convicted on the rape charge and acquitted on the kidnapping charge on August 6, 1993 and sentenced to forty-six years. *Crawford v. State,* 192 So. 3d 905, 911 (Miss. 2015). The case was submitted to the Supreme Court on March 23, 2015. The Mississippi Supreme Court noted: "The record does not disclose why an appeal was not filed with this Court until now, which Crawford's current appellate counsel acknowledges. Counsel asserts, however, that Crawford is not to blame. We do not know that to be the case from the record before us." *Id.* at 912.

Regardless, the Mississippi Supreme Court found it had never extended - and was not required by United States Supreme Court precedent to extend - speedy trial protection to the appellate context. The Supreme Court noted that the criminal defendant has a duty to pursue his appeal from conviction. The Supreme Court proceeded to consider the appeal on the merits, because it was not certain that Crawford had "eschewed" his responsibility to pursue his appeal. Consistent with Mississippi law however, the Supreme Court held that where there is no other reversible error - that it would not reverse on the grounds of denial of the failure to have a speedy appeal. *Id*. at 912-13.

This Court finds the Petitioner has failed to prove an unreasonable application of federal constitutional precedent. *Barker v. Wingo*, 407 U.S. 514 (1972) is the controlling precedent for the right to a speedy trial but

does not mandate extension of that right to appeals. Because there were no other grounds that were reversible, the denial of this claim was in keeping with Mississippi precedent and not contrary to clearly established federal law as determined by the Supreme Court of the United States.

GROUNDS SEVEN, EIGHT AND NINE — THE SECOND MENTAL EVALUATION

Grounds Seven, Eight, and Nine revolve around a second evaluation the trial judge ordered after Crawford sexually assaulted, raped and murdered Kristy Ray. After committing these new crimes, Crawford told law enforcement officers he had experienced blackouts around the time and remembered only parts of what happened. As discussed *supra,* these crimes occurred four days before trial was scheduled to commence in the present case. In Grounds Seven, Eight and Nine, Crawford contends that the trial court violated his rights when it ordered a competency and sanity evaluation two days after this new arrest for Ray's murder. The order required a second evaluation by Dr. Lott and Dr. McMichael, which was done the next day, when Crawford would otherwise have gone to trial on the present charge of kidnapping and raping Kelly Roberts.

Crawford alleges in Ground Seven that his due process rights and his right to effective assistance of counsel were violated when the trial court allegedly forced his attorney to continue representing him at a critical stage of the proceedings. In Ground Eight, he alleges his Fifth and Sixth Amendment rights were violated when the state's experts were permitted to evaluate him and testify in rebuttal. With Ground Nine, Crawford alleges that his attorney was ineffective when he failed to object to the admission of this expert testimony.

CIRCUMSTANCES LEADING TO THE SECOND EVALUATION

William Randy Fortier, Crawford's first attorney, had been representing him on the aggravated assault, rape and kidnapping charges. Four days before he was scheduled for trial, Crawford's family found a copy of a ransom note in the attic of the home where Crawford was staying. Afraid Crawford might be planning to kidnap someone, family members told Fortier about the note. The family and attorney alerted law enforcement, who started looking for Crawford. Unfortunately, they did not find him in time. Later that day, Kristy Ray disappeared, and a ransom note was found in her home. Crawford had broken into her family's home, attacked her, and abducted her. Sometime the next day Crawford killed Ray and on returning to his home was arrested. He waived his rights and quickly confessed that Ray was dead and led law enforcement to her body.

As with the pending rape, kidnapping, and aggravated assault charges, Crawford told law enforcement he experienced memory blackouts during these crimes. Crawford claimed he went to an abandoned barn, which he had been stocking with food and supplies the previous month. As later proof would show, he also went to the barn with a gun, a knife, a toboggan he pulled down over his face, and handcuffs. He claimed that he blacked out after setting out for a walk and "came to himself" inside the Ray's home, to find Kristy handcuffed and crying in a bedroom. He admitted he knowingly abducted Kristy and held her overnight in the barn. He claimed he intended to release her. The next day he claimed he took off his ski mask and realized Kristy had recognized him. He then suffered another blackout. When he came out of this blackout, he found Kristy, handcuffed to a sapling, dead at his feet.

He had stabbed her in the heart and lung.

On Monday, February 1, 1993, Fortier filed his motion to withdraw. Fortier advised the court he had a conflict of interest. He no longer believed in his client's insanity or innocence but believed that Crawford had murdered Ray in cold blood. His motion stated his feelings were so prejudiced towards Crawford that he could not capably and properly represent him. He also stated that pursuant to Rule 1.6 of the Mississippi Rules of Professional Conduct, he had cooperated with law-enforcement officers in the attempt to prevent his client from committing further crimes. Because of that cooperation, he stated that he had "a clear and distinct conflict of interest." (R. 10-1:101).

That day instead of calling his motion to withdraw for hearing, the judge met with Fortier and the district attorney in chambers. When the parties went on the record, the district attorney stated the parties had agreed to an evaluation of Crawford by Drs. McMichael and Lott at MSH. The district attorney recommended:

> In light of the recent events that I think the court is aware of and could take judicial notice of, Mr. Crawford has now been charged with capital murder of a young lady, which occurred Saturday, January 30th. The State would like to proceed as quickly as possible to trial on the aggravated assault charge as we had originally intended; however, under Rule 4.08 of the Court Rules, I think the legitimate question has arisen as to whether the defendant is presently competent to be able to assist his lawyer at such a trial; therefore, I have made a motion, an oral motion, *ore tenus* under Rule 4.08 to ask the Court to have him examined as to his present competency and sanity. Mr. Fortier and I have

> conferred, and Mr. Fortier has agreed to join me in the motion.

(R.10-4:8-9).

Fortier responded that he consented to the motion to determine whether Crawford was competent to stand trial. "I think there is a serious question as to his ability to stand trial on these charges based on the facts that have come to light over the weekend; and, therefore, we have agreed with the motion; we have approved the order submitted to the court for the psychiatric evaluation." (R.10-4: 8-9).

After noting the prior examination, the judge found he could order the examination on his own motion under Rule 4.08 (R. 10-4 p. 9-10).

> [The] Court is of the opinion that the Court does have reasonable grounds to believe that he needs to be psychiatrically examined to determine whether, or not, he is in fact, capable to stand trial, competent to stand trial.

Id. Crawford was not present at the hearing, nor had he been advised of the hearing before it was held. Fortier did not consult with Crawford before consenting to the examination or meet with Crawford after the hearing and before the examination (R. 1:726-28).

GROUND SEVEN – THE PETITIONER ARGUES HIS RIGHTS TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED WHEN THE TRIAL COURT ALLEGEDLY FORCED TRIAL COUNSEL TO REPRESENT HIM DESPITE WHAT HE DESCRIBES AS A CONFLICT OF INTEREST

In Ground Seven, Crawford argues that Fortier had a conflict of interest when he agreed to the order for the second examination and that he is entitled to an

automatic reversal in accordance with *Holloway v. Arkansas,* 435 U.S. 475, 488 (1978). He made this same argument on direct appeal. The Mississippi Supreme Court rejected *Holloway* as the applicable standard for reviewing the claim of conflict between counsel and client. In an extended discussion, the Mississippi Supreme Court considered instead whether the "near per se" test of *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) should apply in addressing the conflicts between the interests of the defendant and his attorney's interest, or if that court should apply the more lenient *Strickland* standards, as held by the Fifth Circuit in *Beets v. Scott,* 65 F.3d 1258, 1270 (5th Cir. 1995).

In *Cuyler* - a case addressing multiple representation conflict - reversal is warranted if there is an actual conflict and that the conflict of interest adversely affects his lawyer's performance. *Cuyler*, 446 U.S. at 350. Of course, with virtually no difference between the expert testimony that would have been offered with or without the February evaluation, Crawford could not hope to meet the prejudice standard set out by *Strickland.* The Mississippi court opted to leave the question open as to which standard it would apply in looking at conflicts arising from counsel's interests, and instead held that Crawford was not entitled to relief under either standard. The court explained that "Crawford was not prejudiced by the February 2 evaluation. And there is no showing whatever that the attorney's personal conflict in the matter had any adverse effect on his legal representation of his client." *Crawford,* 192 So. 3d at 920. Looking solely at whether Crawford could meet the higher *Cuyler* standard, the decision that it did not cannot be held unreasonable. As the Supreme Court noted, there was more than sufficient evidence apart from the February 2 evaluation, upon which the jury could have based its verdict. This Court

agrees with the Mississippi Supreme Court that nothing in Fortier's conduct when he agreed to the second examination prejudiced his client.

GROUNDS EIGHT AND NINE – THE PETITIONER ARGUES THAT VARIOUS RIGHTS WERE VIOLATED WHEN THE STATE'S PSYCHIATRIC EXPERTS WERE PERMITTED TO EVALUATE HIM AND OFFER REBUTTAL TESTIMONY AND WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE INTRODUCTION OF THAT TESTIMONY

Addressing these issues, the Mississippi Supreme Court followed closely the findings and reasoning of this court and the Fifth Circuit on the capital murder Sixth Amendment challenges to the same court-ordered psychiatric evaluation. As a result, little need be said to convince this Court that the Mississippi Supreme Court's decision does not represent an unreasonable application of binding federal precedent, nor an unreasonable finding of facts. The Supreme Court held that the court-ordered February evaluation did not violate Crawford's Sixth Amendment rights in this case, just as this court and the Fifth Circuit suggested in dicta, in the capital murder case.[5] Crawford was in fact represented by counsel at the time the examination was ordered, and Fortier was still acting as Crawford's counsel when he agreed to the order and signed off on it.

The Supreme Court went further and explained that even assuming the second evaluation was done in violation of the Sixth Amendment, such error was harmless. The court explained there was ample

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[5] *Crawford v. Epps*, 353 F. App'x 977, 983-84 (5th Cir. 2009) ("Fortier's approval likely satisfied any Sixth Amendment concerns in the rape and assault case."); *Crawford v. Epps*, 2008 WL 4419347, at *13 N.D. Miss. Sept. 25, 2008).

evidence to support the testimony of Dr. McMichael, without any reference to the findings in the second examination. This Court agrees. The Mississippi Supreme Court's decision that any Sixth Amendment error was harmless is a reasonable application of federal constitutional law, and there was ample evidence to support the testimony of Dr. McMichael, without any reference to the findings in the second examination.[6]

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[6] Crawford suggests that the Mississippi Supreme Court erred in its harmless error analysis by applying the standard of review in *Brecht v. Abrahamson,* 507 U.S. 619, 623 (1993)*,* instead of the standard set out in *Chapman v. California,* 386 U.S. 18 (1967). Assuming *arguendo* that Crawford was functionally without counsel at this critical point in the proceedings, the determination of whether the Sixth amendment error was harmless is governed by *Chapman*. A constitutional error at the trial court level, may be deemed harmless error on direct appeal, if the error is found to be harmless "beyond a reasonable doubt. *Brecht* is the appropriate standard for determining harmless error on habeas review. Error is harmless unless it "had a substantial and injurious influence or effect" on the verdict. *Brecht,* 507 U.S. at 623.

Crawford's contention that the wrong standard was applied fails. First the state court does not appear to have applied *Brecht*, and secondly, any Sixth Amendment violation on the record before this court, meets the stringent requirements of *Chapman,* that the error is harmless beyond a reasonable doubt. The state court noted its agreement with this court's harmless error ruling in the capital murder hearing, including this court's reference to *Brecht.* It is also true that the state court never cited *Chapman* in its own adjudication. But in its decision the Mississippi Supreme Court held: "*We are more than satisfied that the February 2 evaluation, standing alone, did not contribute to the verdict*." C*rawford (Direct App)* 192 So.3d at 916. (Emphasis added). The decision does not reflect application of the wrong standard.

Even if this court suspected that the wrong standard was applied by the Mississippi Supreme Court on direct review, given that the only substantive mention of information derived from the second evaluation came from Crawford's testimony and his counsel's cross-examination of Dr. McMichael, the undersigned finds that any error would be harmless beyond a reasonable doubt, based on

Dr. McMichael's testimony was consistent with the findings of the first examination (R. 10-1 p. 126-131). He even pointed to some of the facts brought out in the trial testimony that he thought provided further support for his diagnosis that Crawford was malingering.[7]

Pannell has provided his affidavit that he would have objected and counseled with Crawford had he been appointed first. Having stated no grounds for the objection, there is no reason to consider this statement. Nor is there a reasonable basis to think that any objection or consultation would have stopped the evaluation or changed anything except perhaps the date of the examination. With no arguable defense other than the insanity defense to either the aggravated assault or capital murder charges, it is unthinkable that Pannell would have advised him not to submit to the evaluation.

It is equally unthinkable that any objection would have stopped the court from ordering an examination, at least to determine if Crawford was competent. Trial of an incompetent defendant is a due process violation. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). And if evidence raises a bona fide doubt as to the defendant's competency, the court must *sua sponte* make inquiry into the competence. *Id.* at 387. Given this constitutional imperative and Crawford's statements to law enforcement about his lack of memory, there was a bona fide doubt regarding his competency. Not only did

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all the evidence in the record. Accordingly, this argument should be rejected.

[7] McMichael questioned how Crawford could tell Barry King he was in trouble with the law and tell Memphis law enforcement they were looking for him, when he supposedly did not know he had assaulted Nicole, and Kelly, his only known victim, had been with him the entire time. (R. 10- 6: 105-06).

the trial judge have the authority to order an examination, he likely had no other option.

Crawford also argues that the trial court violated his Fifth Amendment rights when it allowed these experts to question him the second time. However, as the court noted, the Fifth Amendment can be waived, and there is no dispute that Crawford was specifically warned prior to the evaluation that the report generated as a result of the examination would be disclosed. He also was reminded of his right not to say anything which might incriminate him in a court of law. This Court agrees with the state court that no contention or showing has been made that Crawford was not informed or counseled as to his rights prior to the examination, and thus this argument as it relates to the Fifth Amendment fails.

In Ground Nine, Crawford argues that his constitutional rights were violated when his trial counsel failed to object to the introduction of the expert rebuttal testimony. As the respondent points out, however, this argument was not raised on direct appeal and thus will not be considered here.

MISCELLANEOUS TRIAL ERRORS

Finally, the Court must address a collection of miscellaneous allegations of trial error. In Ground Ten, Crawford claims he was deprived of due process and a fair trial when the trial court gave a jury instruction that "improperly shifted the burden of proof" to him. In Ground Eleven, Crawford contends the trial court denied him a fair trial when it prohibited him from testifying to his theory of defense. In Ground Twelve, Crawford alleges the trial court denied him a fair trial because of prosecutorial misconduct. Finally, in Ground Thirteen, Crawford contends the trial court violated his due process rights when it improperly

granted a flight instruction to the jury.

GROUND TEN — THE PETITIONER ARGUES THE TRIAL COURT VIOLATED HIS CONSTITUTIONAL RIGHTS WHEN IT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO HIM

Crawford contends the court gave a jury instruction that placed the burden of proof on the defendant to establish his insanity. The challenged instruction provided:

> THE COURT instructs the jury that the defendant, CHARLES RAY CRAWFORD, has raised the defense of insanity in this case. The terms and concepts of "sanity" and "insanity" as used in jury instructions and in this case are legal terms and concepts and not medical terms.
>
> The legal test for insanity under the law in the state of Mississippi is referred to as the M'Naghten Rule. The M'Naghten Rule states: To establish a defense on the grounds of insanity, it must be clearly proved that at the time of committing the act for which the defendant has been indicted that the defendant was laboring under such defect of reason from disease of the mind, as to not know the nature and quality of the act the defendant was doing, or, if the defendant did know the nature and quality of the act, that the defendant did not know it was wrong.
>
> Stated more succinctly, the test for insanity is whether the defendant was able to distinguish right from wrong at the time the act was committed.
>
> The question of insanity is for the jury to determine. Furthermore, the jury is not bound by

> any expert's testimony and may accept or reject it in whole or in part.
>
> The Court instructs the jury that even should you find that the defendant was suffering from a mental illness, an emotional problem, or some other condition or problem which could be classified as a "disease of the mind," you may not find the defendant not guilty by reason of insanity unless you also find from all the evidence in this case that the defendant's condition left the defendant unable to distinguish right from wrong at the time the act was committed.

(Instruction S-8. R. 10-2, p. 87-88).

The trial court also specifically instructed the jury concerning the State's burden of proof regarding Crawford's insanity defense in S-4 (R. 10-2 p. 71- 2):

> THE COURT instructs the jury that if you find that the State of Mississippi has proved beyond a reasonable doubt all the essential elements of rape as set forth in jury instruction number S-2, then you must find the defendant, Charles Ray Crawford, guilty of rape, unless the State of Mississippi has failed to prove beyond a reasonable doubt that the defendant' Charles Ray Crawford, was sane at the time the defendant committed the rape.
>
> In order to prove the defendant, Charles Ray Crawford, was sane at the time he committed the rape the State of Mississippi must prove beyond a reasonable doubt that at the time of commission of the rape the defendant, Charles Ray Crawford, had the mental capacity to realize and appreciate the nature and quality of his actions and to distinguish between right and wrong with reference to the actions he

committed.

If after considering all of the evidence in this case you find the State of Mississippi has failed to prove beyond a reasonable doubt that the defendant was sane at the time of the commission at the rape, then your verdict under Count I of the indictment must be not guilty by reason of insanity.

(R. 10-2 p. 71-72).

This jury instruction addressed other matters to be determined in the event of an insanity acquittal. Jury Instruction S-4-A (R. 10-2 p. 73-74) was a reiteration of the S-4 instruction, save that it applied to the kidnapping charge. The court also instructed the jury on the presumption of innocence and that the defendant is not required to show his innocence. (R. 10-2 p. 89).

The Mississippi Supreme Court found the challenged jury instruction was an imperfect statement of the law but, when read with the other instructions, the jury was appropriately instructed. Errors in the charge to the jury rarely form a basis for federal habeas relief. That an instruction may be erroneous is not enough; rather there must be a constitutional error. *Gilmore v. Taylor*, 508 U.S.333, 341 (1993); *Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). Reading the instructions together, the jury was adequately instructed. Additionally, Pannell addressed the burden of proof in closing arguments and stressed the burden was on the state. R. 10-6 p. 147. Pannell explained when the defendant has raised a reasonable doubt about his sanity, the state must prove the defendant was sane beyond a reasonable doubt. While the district attorney doubted whether Crawford's sanity was put in doubt by the lay testimony, he argued the proof of the defendant's sanity was found both in the testimony

of the experts and Crawford's behavior around the time of the crime (R. 10-6 p. 135). Accordingly, Crawford has failed to demonstrate constitutional error as to this issue.

GROUND ELEVEN — THE PETITIONER ARGUES THE TRIAL COURT VIOLATED HIS CONSTITUTIONAL RIGHTS WHEN IT PROHIBITED HIM FROM TESTIFYING TO HIS THEORY OF DEFENSE

In a fact-based defense against the rape charge, Crawford claimed that he could not have held a gun to Kelly's head and bound her with duct tape as she had testified. (R. 10-6 p. 45-47). Crawford testified at trial that a few days before this crime, he had fallen and hurt his arm when he fell eight to ten feet and landed on his head and arm. (R. 10-6 p. 45-46). While the testimony varied about whether he had a cast or sling on his arm, the testimony was consistent that Crawford had sustained some type of arm injury. Crawford argued in this ground that the court deprived him of his right to present his theory because the trial judge sustained and refused to allow Crawford to answer a single question in the following exchange:

> Q. Is there any way physically that you could have held a gun and taped her with this cast on your hand?
>
> BY MR. LITTLE: Object to the form of the question your honor, if he doesn't remember.
>
> BY THE COURT: I sustain the objection.
>
> Q: With the cast on your hand did you have the physical dexterity to use something like she described?
>
> BY MR. LITTLE: Same objection, your honor.
> BY THE COURT: Sustained.

(R. 10-6 p. 47).

Given that Crawford was testifying about events that he professed he did not remember, the question was a hypothetical question to a lay witness. But even if the objection was erroneously sustained, the record clearly shows that whether Crawford could have restrained Kelly, given his injury, was presented to the jury for their consideration. Kelly herself testified that Crawford was barely able to use his right arm when he taped her. (R. 10-5 p. 196). That she could wet the tape over her mouth and loosen it so she could speak to him during the rape showed that Crawford was not particularly effective in at least part of his taping. Additionally, Pannell cross-examined Kelly about how Crawford could have held a gun to her head and bound her with tape with his arm injury. (R. 10-5 p. 218-20).

Crawford also testified about the injury to his arm he sustained two days before the rape. He told the jury he had been taken to hospital and his arm put in a cast or sling and though badly strained, it was not broken. The jury was told the injury was to his right, dominant arm, and he told them the cast or splint severely limited the use of his right hand. Because Crawford presented this defense, supported by his testimony and the victim's testimony, the refusal to allow the answer to these two questions was not prejudicial to the presentation of this theory of defense.

GROUND TWELVE — THE PETITIONER ARGUES HIS CONSTITUTIONAL RIGHTS WERE VIOLATED BY PROSECUTORIAL MISCONDUCT

Next, Crawford complains of prosecutorial misconduct. Specifically, he alleges the prosecutor engaged in improper cross examination of defense witness, Jackie Brooks, and made improper comments about Brooks during closing argument. Brooks had driven Crawford

and Kelly to Memphis after she was raped. Crawford complains that during Brooks' cross examination, (R. 10-5, p. 122-128), the prosecutor mentioned that he and Brooks were acquainted, letting the jury know that he previously prosecuted Brooks. The prosecutor also asked Brooks if he and Crawford smoked marijuana cigarettes on the way to Memphis, to which Brooks replied that he did not remember, but that he usually smoked Winston cigarettes.

He also questioned Brooks about the route taken to Memphis, suggesting that it was chosen because it was less traveled and because it went through Tennessee, not Mississippi. Brooks denied Crawford told him he was in trouble with the law, but admitted that Crawford told him he needed to get to the Memphis and that Brooks was better off not knowing why. Brooks decided not to ask. He testified that Crawford told him he needed to borrow his truck because his was torn up, though he had to admit Crawford had driven it to his house, and Brooks did not ask him about that either. Brooks also admitted on cross examination that when he learned the next day that Crawford "had done beat a girl with a hammer," (R. 10-5, p. 124-25), he called his lawyer, not the sheriff.

In the course of the entire closing argument - including one and one-half pages addressing Brooks' testimony - Crawford complains that the prosecutor said the following about Brooks: "Folks, I have prosecuted Jackie Brooks. I don't like Jackie Brooks. He don't like me. I don't believe a word that man says. If y'all do, that's fine. That's y'all's job." (R. 10-6 p. 5).

A prosecutor should not offer personal opinions about a witness' credibility. Doing so runs the risk of giving the impression that the prosecutor's opinion is based on evidence not in the record, or that his opinion is sanctioned by the government. *United States v.*

Young, 470 U.S. 1, 18-19 (1985). While a witness may be impeached with a felony conviction, the prosecutor never identified any crime of conviction so the jury could assess the impact on the witnesses' credibility.[8]

Understanding this, the Court must determine if any improper questioning or comments were harmful to the defendant and determine whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). The Mississippi Supreme Court rejected this ground, and this Court is bound by that determination unless unreasonably wrong.

Brooks testified about his interaction with Kelly and Crawford on the night of the crime and the fact that she did not appear to be frightened or under duress. (R. 10-5 p.119). He testified to Kelly's opportunity to escape. In the fifteen to twenty minutes it took for Crawford to talk Brooks into helping him and for Tammy Brooks to get dressed, Crawford remained inside the home and Kelly remained in Crawford's truck with the truck running, per Jackie's testimony. (R. 10-5, p. 117). He testified that it was his impression that Crawford and Kelly were girlfriend and boyfriend. (R. 10-5 p. 118, 119).

Whatever the intent of the prosecutor – and whatever criticisms might be directed at the propriety of his questions and comments – they are isolated within the context of the case and did not infect the case with unfairness. Aside from these comments, Brooks' testimony gave cause for questioning his veracity. But it appears that the jury likely credited at least some portion of his testimony, given that Crawford was

[8] In fact, this omission led to Crawford's attorney telling the jury that Brooks had a marijuana conviction.

acquitted on the kidnapping charge. Accordingly, there is no showing that the Mississippi court's rejection of this ground was unreasonably wrong.

GROUND THIRTEEN — THE PETITIONER ARGUES THE COURT VIOLATED HIS CONSTITUTIONAL RIGHTS WHEN IT GAVE THE JURY AN IMPROPER FLIGHT INSTRUCTION

In his final Ground, the Petitioner alleges the trial court violated his Sixth and Fourteenth Amendment rights when it gave the jury an improper flight instruction. As already noted, challenges to jury instructions rarely provide a basis for habeas corpus relief. *Gilmore v. Taylor,* 508 U.S. 333, 342 (1993); *Estelle v. McGuire,* 502 U.S. 61 (1991).

Crawford contends his trip to Memphis was explained, because both he and his victim testified they were going to see his ex-wife, Kelly's older sister. Therefore, according to Crawford, granting the flight instruction was error. The flight instruction provided:

> THE COURT instructs the jury that "flight" is a circumstance from which guilty knowledge and fear may be inferred. If you believe from the evidence in this case, beyond a reasonable doubt that the defendant, CHARLES RAY CRAWFORD, did flee or go into hiding, such flight or hiding is to be considered in connection with all other evidence in this case. You will determine from all of the facts whether such flight or hiding was from a conscious sense of guilt or whether it was caused by other things and give it such weight as you think it is entitled to in determining your verdict in this case.[9]

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[9] The respondents point out a second instruction on flight which advised the jury that "'flight' is the evading of the course of justice

The record reveals ample evidence to support granting this instruction. When Kelly asked Crawford not to hurt Nicole, Crawford went outside and repeatedly hit Kelly's friend in the back of her head with a hammer. He said, "What have I done? We've got to get out of here. Somebody is here." When they got outside, he told Kelly that he had hit Nicole and she ran away. He told Kelly he needed to go to Memphis to talk to her sister. Crawford asked Kelly to shoot him at one point, and that "I need to see Janet. I've got to see Janet. I've got to talk to her because I can't go back to jail."

He then started driving to Barry King's house, driving on the back roads heading toward Memphis. He told Kelly that he was going to ask King to borrow a vehicle because he knew the law was looking for him. He then went to Jackie Brooks' home again seeking to borrow a vehicle. Brooks agreed to give him a ride. Crawford told Brooks he could keep the truck because he probably would not be coming back because he was in "deep crap." Brooks told Crawford to park his truck behind his house so it could not be seen from the road.

In other words, there is ample evidence that Crawford left not just the scene, but the state, trying to avoid apprehension. That Crawford construes the evidence as having an innocent explanation does not change the fact that there was evidence supporting the flight instruction, and thus, there is no merit to this assignment of error.

CONCLUSION

The Mississippi Supreme Court rejected twelve of

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by voluntarily withdrawing oneself in order to avoid arrest or detention, or the institution or continuation of criminal proceedings, regardless of whether one leaves the jurisdiction." Jury Instruction S-6. (R. 10-2 p. 85).

Crawford's thirteen claims. For the reasons stated above, the Court finds that such decisions are neither unreasonable applications of governing United States Supreme Court precedent nor unreasonable findings of fact in view of the record. That is, all twelve of these grounds are without merit. The Court further finds that the procedural bar to Ground One prohibits this Court from considering that ground, given the failure of Crawford to show cause, prejudice, or a fundamental miscarriage of justice. Accordingly, the instant petition for a writ of habeas corpus is DENIED.

SO ORDERED, this the 29th day of September, 2020.

/s/ Sharion Aycock

UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-61019

Charles Ray Crawford,

Petitioner-Appellant,

v.

Burl Cain, *Commissioner, Mississippi Department of Corrections*; Earnest Lee, *Superintendent, Mississippi State Penitentiary*,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:17-CV-105.

Filed: June 29, 2023

ON PETITION FOR REHEARING EN BANC

(Opinion December 15, 2022, 5 Cir., 2022, 55 F.4th 981, Withdrawn)
(Opinion May 19, 2023, 5 Cir., 2023, 68 F.4th 273)

Before Richman, *Chief Judge*, and Jones, Smith, Stewart, Elrod, Southwick, Haynes, Higginson, Willett, Ho, Duncan, Engelhardt, Oldham, Wilson, and Douglas, *Circuit Judges*.[1]

Per Curiam:

A majority of the circuit judges in regular active service and not disqualified having voted in favor, on the Court's own motion, to rehear this case en banc,

[1] Judge James E. Graves, Jr. did not participate in the consideration of the rehearing en banc.

IT IS ORDERED that this cause shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs. Pursuant to 5th Circuit Rule 41.3, the panel opinion in this case dated May 19, 2023, is VACATED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-61019

Charles Ray Crawford,

Petitioner-Appellant,

v.

Burl Cain, *Commissioner, Mississippi Department of Corrections*; Earnest Lee, *Superintendent, Mississippi State Penitentiary*,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:17-CV-105.

Filed: May 19, 2023

Before Smith, Duncan, and Oldham, *Circuit Judges*.

Andrew S. Oldham, *Circuit Judge*:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED. The opinion is WITHDRAWN, and the following opinion is SUBSTITUTED:

Charles Crawford petitions for habeas relief. As a prisoner held under a state court judgment, Crawford must overcome the strictures of the Anti- Terrorism and Effective Death Penalty Act ("AEDPA"). He also must prove that "law and justice require" relief. 28 U.S.C. § 2243. Crawford does neither. We affirm.

I.

A.

Crawford was convicted of raping a 17-year-old girl (Kelly Roberts), assaulting a 16-year-old girl (Nicole Cutberth) with a hammer, and raping and murdering a 20-year-old woman (Kristy Ray). The series of gruesome crimes began on April 13, 1991.

On that fateful day, Roberts and Cutberth were riding around Walnut, Mississippi. The girls went to a store to purchase fluid for the car. When they left, they saw Crawford—who at that time was Roberts's brother-in-law—and asked him to help put the fluid in the car. Crawford agreed.

Crawford then began his scheme to lure the girls to his house. He told Roberts that he needed to talk to her about something important but refused to say what. Roberts insisted he tell her. Eventually, Crawford agreed to tell her if she met him at a cemetery outside the city. Roberts reluctantly agreed.

Later that evening, the girls met Crawford at the cemetery. There, Crawford told Roberts that her boyfriend had pictures of her that were "pretty bad," that Crawford had gotten the pictures from her boyfriend, and that Crawford planned to get rid of them. Roberts told Crawford she wanted the pictures. Crawford replied that the pictures were at his house and that he would take her there. Roberts and Cutberth then got into Crawford's truck, and he drove them to his house.

Crawford drove the girls to an abandoned house near his and parked. He told Cutberth to stay in the car while he and Roberts got the photos. Once Crawford and Roberts entered the house, Crawford told Roberts to stay by the door so he could make sure nobody was home. When Crawford returned, he pulled a

gun and put it to Roberts's head. Crawford told her to do what he said and no one would get hurt.

He ordered Roberts to get onto the floor. Roberts obeyed. Crawford taped her mouth shut. He then commanded her to put her hands behind her back. Roberts again obeyed. Crawford taped her hands together. Crawford then forced Roberts into a bedroom and onto a bed. He undressed her. And then he raped her.

Afterwards, Roberts begged Crawford not to hurt her friend. But Crawford didn't listen. He went outside and bludgeoned Cutberth on the back of the head with a hammer. Roberts heard the assault happen. Crawford then went back inside the house, grabbed Roberts, and forced her into his truck.

Eventually, Crawford let Roberts go and turned himself in to the police. The police found Cutberth alive, recovered the gun, and found Roberts's and Crawford's hair on used pieces of duct tape in Crawford's house. Crawford was charged with the rape and kidnapping of Roberts and the aggravated assault of Cutberth.

But this was not the end of Crawford's crimes. Crawford was let out on bond. While out on bond, Crawford kidnapped 20-year-old Kristy Ray. He took Ray to a secluded barn in the woods, where he raped and murdered her. The police quickly arrested Crawford. And Crawford admitted to raping and murdering Ray and led the police to Ray's body. He was charged with capital murder, kidnapping, burglary of an occupied dwelling, rape, and sexual battery.

Crawford received three separate trials, which occurred in the following order: (1) the aggravated assault of Cutberth, (2) the rape and kidnapping of Roberts, and (3) the murder of Ray. For each, Crawford pressed an insanity defense. At the aggravated-

assault trial (1) and the murder trial (3), Crawford had an expert testify that he was insane at the time of the incidents. At the rape trial (2), Crawford pressed a substantively identical insanity defense but only had lay witnesses testify. He also challenged the kidnapping charge on the facts and the rape charge on the theories that Roberts consented, or alternatively, that Roberts and Crawford never had sex. Crawford was convicted of raping Roberts (but acquitted of kidnapping) and was sentenced to 46 years of imprisonment. Crawford was convicted of assaulting Cutberth and was sentenced to 20 years of imprisonment. Crawford was convicted of murdering Ray and was sentenced to death.

B.

The present appeal involves only Crawford's conviction for raping Roberts. Crawford directly appealed his rape conviction in state court and almost succeeded in getting a new trial: The Mississippi Supreme Court affirmed his conviction by a 5–4 vote. *See Crawford v. State*, 192 So. 3d 905 (Miss. 2015).

Crawford next tried his luck at state postconviction relief. Again, he failed. Crawford argued for the first time that the trial court violated his procedural due process right to expert assistance in his insanity defense under *Ake v. Oklahoma*, 470 U.S. 68 (1985), along with many other claims. The Supreme Court of Mississippi held that Crawford procedurally defaulted his *Ake* claim because it "could have been raised in the direct appeal." The court also denied Crawford's ineffective-assistance-of-counsel claims and found the rest of Crawford's claims to be "without merit."

Crawford next filed a habeas petition in federal district court, raising thirteen claims. The district court denied Crawford's petition but granted Crawford a

certificate of appealability ("COA") on all thirteen claims. Crawford timely appealed.

II.

Crawford raises only three claims on appeal.[1] First, Crawford claims that his lawyer provided ineffective assistance by failing to raise an *Ake* claim on direct appeal. Second, Crawford raises an *Ake* claim and argues that the claim is not procedurally barred because his appellate counsel's ineffectiveness establishes cause and prejudice. Third, Crawford claims that his trial counsel provided ineffective assistance.

All fail. We first (A) provide some background on (1) AEDPA and (2) ineffectiveness claims. We then (B) conclude that Crawford failed to establish ineffective assistance of appellate counsel. We last (C) determine that Crawford has not established ineffective assistance of trial counsel.

A.

1.

AEDPA first. Everyone agrees AEDPA's strictures—including its relitigation bar in 28 U.S.C. § 2254(d)—apply to each of Crawford's ineffectiveness arguments. *See Lucio v. Lumpkin*, 987 F.3d 451, 465 (5th Cir. 2021) (en banc) (plurality op.). Section 2254(d) "restores the *res judicata* rule" that long underpinned habeas "and then modifies it" by providing

[1] Although Crawford obtained a COA on thirteen claims, Crawford provides arguments on only three claims and tries to incorporate by reference his application before the district court for the rest. He has thus abandoned the ten unbriefed claims. *See, e.g.*, *Turner v. Quarterman*, 481 F.3d 292, 295 n.1 (5th Cir. 2007) (arguments incorporated by reference from prior briefing are "not adequately briefed" and forfeited); *McGowen v. Thaler*, 675 F.3d 482, 497 (5th Cir. 2012).

"narrow exceptions." *Langley v. Prince*, 926 F.3d 145, 155 (5th Cir. 2019) (en banc). As relevant here, Crawford must show the state court's adjudication of the claim "resulted in a decision that . . . involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

To meet the unreasonable-application exception to the relitigation bar, "a prisoner must show far more than that the state court's decision was merely wrong or even clear error." *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam) (quotation omitted). "Rather, the relitigation bar forecloses relief unless the prisoner can show the state court was *so* wrong that the error was 'well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Langley*, 926 F.3d at 156 (quoting *Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (per curiam)). "In other words, the unreasonable-application exception asks whether it is 'beyond the realm of possibility that a fairminded jurist could' agree with the state court." *Ibid.* (quoting *Woods v. Etherton*, 578 U.S. 113, 118 (2016) (per curiam)).

To apply the relitigation bar, we first "must identify the relevant state-court 'decision.'" *Lucio*, 987 F.3d at 465. Here, the relevant decision is the sole state court opinion involving ineffectiveness: the Mississippi Supreme Court's order denying Crawford's application for leave to file a motion to vacate his conviction and sentence. ROA.3167–68. All agree that the court's denial of leave is a decision "adjudicat[ing] . . . the merits" of Crawford's ineffectiveness claims. *See* 28 U.S.C. § 2254(d). And for good reason. The Mississippi Supreme Court plainly rejected those claims on the merits: "The Court further finds that the claims of ineffective assistance of counsel fail to meet the *Strickland v.*

Washington standard." ROA.3167; *cf. Harrington v. Richter*, 562 U.S. 86, 100 (2011) ("This Court now holds and reconfirms that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'").

But the Mississippi Supreme Court did not explain why it rejected Crawford's *Strickland* claim. This is significant. When "a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. We "must determine what arguments or theories . . . *could have supported*[] the state court's decision; and then [we] must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Id.* at 102 (emphasis added); *see also Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018) (per curiam) (same); *Cullen v. Pinholster*, 563 U.S. 170, 188 (2011) (same). That is, we imagine the reasons that Story, Brandeis, and Frankfurter could've dreamt up to support the state court's decision, and then we ask whether every reasonable jurist would conclude that all those hypothetical reasons violate the relitigation bar. That makes § 2254(d) very close to a *res judicata* provision.

2.

Next, ineffective assistance of counsel. The Sixth Amendment generally obliges the State to provide an indigent defendant with counsel. *See* U.S. Const. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963). But not just any counsel. According to the Supreme Court, States must provide effective counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). That's because "a party whose counsel is unable to provide effective representation is in no better position than one

who has no counsel at all." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

To establish ineffectiveness, Crawford must show that counsel's failure was both (1) objectively deficient and (2) prejudicial. *Strickland*, 466 U.S. at 687. "*Strickland*'s first prong sets a high bar." *Buck v. Davis*, 137 S. Ct. 759, 775 (2017). "To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness." *Richter*, 562 U.S. at 104 (quotation omitted). There is "a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Ibid.* (quotation omitted). And to show deficient performance, the defendant must show that his lawyer was so bad as to be "no counsel at all." *Lucey*, 469 U.S. at 396.[2]

AEDPA makes it even more difficult to win an ineffectiveness claim. The "more general the rule, the more leeway state courts have." *Kayer*, 141 S. Ct. at 523 (quotation omitted). And "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). "The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (quotation omitted); *see also Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (per curiam) ("doubly deferential"); *Mirzayance*, 556 U.S. at 123 ("doubly deferential").

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[2] Because Crawford's lone preserved *Strickland* claim fails at prong one, we need not discuss the prejudice prong in this case. *See infra* 10–13.

B.

We now address the first two claims, each turning on whether Crawford's appellate counsel was ineffective for failing to raise *Ake* on direct appeal. "Declining to raise a claim on appeal . . . is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court." *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017). "In most cases, an unpreserved trial error will not be a plainly stronger ground for appeal than preserved errors." *Ibid.* "Thus, in most instances in which the trial court did not rule on the alleged trial error (because it was not preserved), the prisoner could not make out a substantial claim of ineffective assistance of appellate counsel." *Ibid.*

Here, the district court held the state court could've reasonably found the *Ake* claim unpreserved. We agree. Crawford's trial counsel withdrew his *Ake* motion, so the trial court never ruled on it. Crawford must thus show that every fairminded jurist would conclude that this is the extraordinary instance where an unpreserved claim was stronger than the preserved claims, and that appellate counsel's failure to press the unpreserved *Ake* claim was tantamount to providing no appellate counsel at all.

Crawford cannot come close to that showing. His appellate counsel raised numerous issues on direct appeal and nearly won a new trial from the State's highest court. *See Crawford*, 192 So. 3d at 905 (vote of 5–4). It thus borders on absurd to contend that appellate counsel was deficient for failing to raise an unpreserved claim, or that the state court transgressed the every- reasonable-jurist standard.

But even if the *Ake* claim were preserved, the ineffectiveness claim still fails. Even though Crawford has

the burden to show ineffectiveness under AEDPA's strictures, he merely argues that he meets *Ake*. *See Burt v. Titlow*, 571 U.S. 12, 22–23 (2013) ("[T]he burden to show that counsel's performance was deficient rests squarely on the defendant." (quotation omitted)). That's not close to enough. He has not shown that his *Ake* argument is *so* strong that his appellate counsel's failure to raise it was tantamount to providing no counsel at all. *Lucey*, 469 U.S. at 396. And even if he could make that showing, which he doesn't even try to make, Crawford would still fail because he hasn't tried to show that his *Ake-Strickland* claim would satisfy AEDPA's relitigation bar.

C.

Crawford's ineffective-assistance-of-trial-counsel claim fares no better. We (1) provide two independent reasons that doom Crawford's claim. Then we (2) reject Crawford's remaining counterarguments.

1.

A fairminded jurist could conclude that the trial counsel's performance was not deficient and prejudicial. That's for two independent reasons.

First, the jury found Crawford not guilty of the kidnapping charge. Crawford does not dispute that his counsel's performance contributed to this result. It's thus difficult to say that the State failed to provide Crawford with counsel that was effective to some extent and that Crawford was "in no better position than one who has no counsel at all." *Lucey*, 469 U.S. at 396.

Second, before the rape trial began, the same trial counsel tried an insanity defense in the related assault trial, and the jury rejected it—even though counsel presented an expert who testified that Crawford was insane. In the subsequent rape trial, counsel tried

something different: He presented a substantively identical insanity defense but with lay testimony instead of the prior expert whose testimony was already rejected, and he tried to raise reasonable doubt as to the rape charge based on a theory of consent and a theory that Crawford and Roberts never had sex. A fair-minded jurist could conclude that counsel made an adequate strategic choice not to do the same thing over again and expect a different result.

2.

Crawford's remaining counterarguments are unpersuasive.

Crawford argues that we can't evaluate trial counsel's overall conduct; instead, we must dissect the trial counsel's insanity-defense performance in a vacuum. Not so. *Strickland*'s prejudice prong *requires* that a court consider whether the challenged act or omission changed the result of the proceeding. *Strickland*, 466 U.S. at 691 (holding an "error by counsel" doesn't "warrant setting aside the judgment of a criminal proceeding" where in the context of the whole proceeding the identified error "had no effect on the judgment"). That means looking at trial counsel's overall conduct in the context of the whole proceeding and determining whether the identified error would have changed the outcome.

But even if we focused on the insanity defense alone, Crawford still cannot surmount AEDPA's relitigation bar. Contrary to Crawford's suggestion, every fair-minded jurist would not think that the absence of an expert for an insanity defense is *per se* error. The Supreme Court has "often explained that strategic decisions—including whether to hire an expert—are entitled to a strong presumption of reasonableness." *Reeves*, 141 S. Ct. at 2410 (quotation omitted). That's

why "*Strickland* does not . . . require[] for every prosecution expert an equal and opposite expert from the defense. . . . When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict." *Richter*, 562 U.S. at 111. And Crawford's first jury heard his insanity defense, replete with expert testimony, and rejected it—thus showing counsel the defense was weak. *Cf. Mirzayance*, 556 U.S. at 124 ("Rather, his counsel merely recommended the withdrawal of what he reasonably believed was a claim doomed to fail. The jury had already rejected medical testimony about Mirzayance's mental state in the guilt phase, during which the State carried its burden of proving guilt beyond a reasonable doubt."). Thus, a fairminded jurist could find the strategic choice to cross-examine the State's experts and present lay testimony to be adequate performance.

Crawford offers a hodgepodge of cases, but none helps him. In fact, only one of his cases (*Hinton v. Alabama*, 571 U.S. 263 (2014) (per curiam)) could even potentially help him because *Hinton* is his only case that found deficient performance. *Id.* at 274. And we've held that only a case finding deficient performance can clearly establish the law for an ineffectiveness claim under § 2254(d). *See Lucio*, 987 F.3d at 485 ("We are aware of no authority for turning the Supreme Court's rejection of one prisoner's claim into clearly established law that supports a second prisoner's claim.").

Hinton, however, doesn't help either. If a state court "must extend a rationale" from *Hinton* before "it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision" and thus was not sufficient to pass the relitigation bar. *White v. Woodall*, 572 U.S. 415, 426 (2014). This follows from the statutory text:

"Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* [the Supreme] Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error." *Ibid.*

At the very least, a state court would've had to extend *Hinton* to grant relief here. In *Hinton*, the Court concluded that trial counsel's "failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under [state] law constituted deficient performance." 571 U.S. at 274. The Court found two features significant. First was that "the core of the prosecution's case was the state experts' conclusion . . . and effectively rebutting that case required a competent expert on the defense side." *Id.* at 273. Second was that counsel's failure "was based not on any strategic choice but on a mistaken belief that available funding was capped." *Ibid.*

Neither of the two features the Supreme Court found significant in *Hinton* is present here. *See, e.g.*, *Woods v. Donald*, 575 U.S. 312, 317–18 (2015) (per curiam) ("Because none of our cases confront the specific question presented by this case, the state court's decision could not be 'contrary to' any holding from this Court," nor an "unreasonable application" thereof. (quotation omitted)); *Langley*, 926 F.3d at 160 (collecting cases). Given defense counsel's hybrid strategy, the "core" of the prosecution's case was proving that the rape occurred, not that Crawford was sane. And Crawford points to no mistake in law that led to counsel's choice. On top of that, *Hinton* did not involve a situation where a jury previously rejected the substantively identical defense with expert assistance for a contemporaneous crime. These differences are fatal.

III.

Moreover, the Supreme Court recently released two landmark habeas decisions—*Brown v. Davenport*, 142 S. Ct. 1510 (2022), and *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022)—that direct us to refocus our attention in AEDPA cases. In *Davenport*, the Supreme Court made clear that "Congress invested federal courts with discretion when it comes to supplying habeas relief—providing that they 'may' (not must) grant writs of habeas corpus, and that they should do so only as 'law and justice require.'" 142 S. Ct. at 1523 (quoting 28 U.S.C. §§ 2241, 2243). This meant that AEDPA "did not guarantee relief upon . . . satisfaction" of its conditions; instead, "even a petitioner who prevails under AEDPA must still today persuade a federal habeas court that 'law and justice require' relief." *Id.* at 1524 (quoting 28 U.S.C. § 2243); *see also Pacheco v. El Habti*, 48 F.4th 1179, 1187–88 (10th Cir. 2022) (noting, even after AEDPA, federal courts retain "traditional equitable authority" (citing *Davenport*, 142 S. Ct. at 1524)).

About a month later, the Supreme Court in *Ramirez* doubled down on the proposition that passing AEDPA's strictures and the preexisting equitable doctrines are necessary but not sufficient to get habeas relief:

> To ensure that federal habeas corpus retains its narrow role, AEDPA imposes several limits on habeas relief, and we have prescribed several more. And even if a prisoner overcomes all of these limits, he is never entitled to habeas relief. He must still persuade a federal habeas court that law and justice require it.

142 S. Ct. at 1731 (quotation omitted).

Davenport and *Ramirez* thus indicate that courts should apply a two-prong framework to adjudicate

habeas petitions from state prisoners.[3] The first prong is business as usual: whether the state prisoner satisfies AEDPA and the usual equitable and prudential doctrines (*e.g.*, procedural default and prejudicial error). *See Ramirez*, 142 S. Ct. at 1731 ("AEDPA imposes several limits on habeas relief, and *we have prescribed several more*." (emphasis added) (quotation omitted)). The second prong is whether law and justice require granting habeas relief. *See ibid.* ("And *even if* a prisoner overcomes all of these limits, he is never entitled to habeas relief. He must still persuade a federal habeas court that law and justice require it." (emphasis added) (quotation omitted)). Much like qualified

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[3] Crawford is a state prisoner, so we need not determine whether federal courts may employ the two-prong framework in adjudicating § 2255 motions. *See United States v. Cardenas*, 13 F.4th 380, 384 n.* (5th Cir. 2021) ("Section 2255 is, of course, a statutory *substitute* for habeas corpus."); *Beras v. Johnson*, 978 F.3d 246, 252 (5th Cir. 2020) (explaining that while state prisoners file "applications," federal prisoners file "motions"). But there is good reason to think that federal courts can and should. The Supreme Court has made clear that "the '*sole purpose*' of § 2255 was to change the venue for challenges to a sentence." *Wright v. Spaulding*, 939 F.3d 695, 698 (6th Cir. 2019) (Thapar, J.) (emphasis added) (quoting *United States v. Hayman*, 342 U.S. 205, 219 (1952)). The Supreme Court has repeatedly emphasized that there is "no basis for affording federal prisoners a preferred status when they seek postconviction relief." *United States v. Frady*, 456 U.S. 152, 166 (1982); *see also Withrow v. Williams*, 507 U.S. 680, 723 (1993) (Scalia, J., concurring in part and dissenting in part) ("A federal court entertaining collateral attack against a state criminal conviction should accord the same measure of respect and finality as it would to a federal criminal conviction. As it exercises equitable discretion to determine whether the merits of constitutional claims will be reached in the one, it should exercise a similar discretion for the other."). For this reason, we generally apply the same equitable and prudential doctrines to federal and state prisoners. *See United States v. Vargas-Soto*, 35 F.4th 979, 996 & n.6 (5th Cir. 2022).

immunity after *Pearson v. Callahan*, 555 U.S. 223 (2009), both prongs are necessary to get relief and a court may analyze either one first.[4] *Id.* at 236.

We next (1) explain that law and justice do not compel issuance of the writ in the absence of factual innocence. Then we (2) conclude that Crawford can't make the required showing.

1.

As the Supreme Court recently reminded us, habeas is and always has been a discretionary remedy. *See Davenport*, 142 S. Ct. at 1520–24; *Ramirez*, 142 S. Ct. at 1731. In England, the "Great Writ" of habeas corpus *ad subjiciendum* gave common-law courts the discretionary power to investigate the Crown's basis for detaining its subjects. *See* Petition of Right, 3 Car. 1, ch.1, ¶¶ 5, 8 (1628). The Judiciary Act of 1789 gave our new federal courts that same power. *See* § 14, 1 Stat. 81–82. And modern federal courts retain it—though it remains, as always, a discretionary power and not a mandatory obligation. *See* 28 U.S.C. § 2241 ("Writs of habeas corpus *may* be granted . . . (emphasis added)); *id.* § 2243 ("as law and justice require").

Law and justice do not require habeas relief—and hence a federal court can exercise its discretion not to grant it—when the prisoner is factually guilty. *See Davenport*, 142 S. Ct. at 1523 (concluding "guilt[]" is the primary consideration in evaluating whether "law and justice" require the writ (quotation omitted));

[4] Jurisdiction is the only exception. That's because "[i]n habeas proceedings, as in every other kind, federal courts must do jurisdiction first. And where jurisdiction is lacking, federal courts also must do jurisdiction last." *Davis v. Sumlin*, 999 F.3d 278, 279 (5th Cir. 2021) (quotation omitted). But whenever the court is assured of its jurisdiction, *Davenport* and *Ramirez* suggest that courts can perform either step first.

Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970) ("[W]ith a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence."). Again, this comports with the historical office of the writ. For the first 500 or so years of the writ's existence, it generally could not be used to challenge a judgment of guilt. *See* Paul D. Halliday, Habeas Corpus: From England to Empire 16–18 (2010) (comparing *habeas corpus ad subjiciendum* to various medieval writs that courts used after Magna Carta); *id.* at 18 (dating the writ's emergence to the latter half of the fifteenth century). That's because the historical purpose of the writ was to ensure that the prisoner's detention comported with due process, and "a trial was generally considered proof he had received just that." *Davenport*, 142 S. Ct. at 1521 (citing *Bushell's Case*, 124 Eng. Rep. 1006, 1009–10 (C. P. 1670)).

Requiring prisoners to show factual innocence also comports with the federalism principles undergirding AEDPA. The Supreme Court emphasized that courts must "adjust the scope of the writ in accordance with equitable and prudential considerations." *Davenport*, 142 S. Ct. at 1523 (quotation omitted). "Foremost among those considerations is the States' powerful and legitimate interest in punishing the guilty." *Ibid.* (quotation omitted); *see also Ramirez*, 142 S. Ct. at 1731 ("To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." (quotation omitted)); *ibid.* (describing the States' interests and the significant costs of granting federal habeas relief). The States' preeminent interest is at its apex where, as here, the

conviction occurred long before the federal postconviction proceedings. *See, e.g.*, *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) ("When previously convicted perpetrators of violent crimes go free merely because the evidence needed to conduct a retrial has become stale or is no longer available, the public suffers, as do the victims."); *Herrera v. Collins*, 506 U.S. 390, 403, 417 (1993) (worrying that "the passage of time only diminishes the reliability of criminal adjudications" and worrying about "the enormous burden that having to retry cases based on often stale evidence would place on the States"). Requiring a state prisoner to show factual innocence in his federal habeas petition thus promotes federalism interests.

Requiring federal habeas petitioners to show factual innocence also protects other parties not before the court. When the Supreme Court erased "[t]he traditional distinction between jurisdictional defects and mere errors in adjudication," "[f]ederal courts struggled with an exploding caseload of habeas petitions from state prisoners." *Davenport*, 142 S. Ct. at 1522; *see also Langley*, 926 F.3d at 154 ("It was not until 1953 that state prisoners could use federal habeas proceedings to relitigate free-standing constitutional claims after pressing and losing them in state court."). Federal courts desperately needed "new rules aimed at separating the meritorious needles from the growing haystack." *Davenport*, 142 S. Ct. at 1523. After all, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in result). As Judge Friendly explained long ago:

> It defies good sense to say that after

> government has afforded a defendant every means to avoid conviction, not only on the merits but by preventing the prosecution from utilizing probative evidence obtained in violation of his constitutional rights, he is entitled to repeat engagements directed to issues of the latter type even though his guilt is patent. A rule [requiring prisoners to show innocence] would go a long way toward halting the inundation; it would permit the speedy elimination of most of the petitions that are hopeless on the facts and the law, themselves a great preponderance of the total, and of others where, because of previous opportunity to litigate the point, release of a guilty man is not required in the interest of justice even though he might have escaped deserved punishment in the first instance with a brighter lawyer or a different judge.

Friendly, *supra*, at 157 (quotation omitted).

Factual innocence is an assertion by the defendant that he did not commit the *conduct* underlying his conviction. By contrast, affirmative defenses do *not* implicate factual innocence; they implicate *legal* innocence. *Cf. Bousley v. United States*, 523 U.S. 614, 623 (1998) ("It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency."). Although law and justice can require habeas relief for certain legal errors that are deeply rooted in the writ's history, "mere legal insufficiency" or "legal innocence" are not among them. *Ibid.*[5]

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[5] As Judge Friendly observed: "the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense or because the statute under which the defendant had been prosecuted was unconstitutional or because the sentence was one the court could not lawfully impose."

The colorable-claim-of-factual-innocence requirement critically differs from the prejudicial-error requirement under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). While the prejudicial-error requirement forecloses "relief against constitutional claims on immaterial points, the test on collateral attack generally should be not whether the error could have affected the result but whether it could have caused the punishment of an innocent man." Friendly, *supra*, at 157 n.81. In other words, prejudicial error does not focus on factual innocence but on the significance of the error.

2.

Crawford has not made a colorable claim of factual innocence. Crawford does not deny that he committed the elements of the offense. He raped Roberts. Instead, he at most asserts that he wasn't legally culpable under Mississippi law because of the affirmative defense of insanity. *Cf.* ROA.963 ("Crawford has not provided this Court with any new evidence that, as a factual matter, would show that he did not commit the crime of conviction. Indeed, Crawford does not make the argument at all."). But affirmative defenses go to legal

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Friendly, *supra*, at 151 (citing *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830); *Ex parte Siebold*, 100 US. 371 (1879); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873)). Only such legal errors, deeply rooted in the Great Writ's history, will satisfy the law and justice requirement when a prisoner challenges his guilty conviction in a habeas proceeding. We have no occasion to consider, however, what law and justice might require when a prisoner challenges only his *sentence* and not his underlying *conviction*. *Cf. Wilkinson v. Dotson*, 544 U.S. 74, 85 (2005) (Scalia, J., concurring) (noting the phrase "law and justice" has been interpreted to allow prisoners to separately challenge their convictions and their sentences); *Jennings v. Stephens*, 574 U.S. 271, 278–79 (2015) (entertaining habeas challenge to capital sentence where prisoner did not contest his guilt for underlying crime).

innocence—not factual innocence.

Even if insanity implicated factual innocence, Crawford's innocence claim is not colorable, so law and justice would still require denying his petition. *See* 28 U.S.C. §§ 2241, 2243. Crawford presented substantively identical insanity defenses at all three of his trials. At two of his trials, Crawford presented an expert witness to support his defense. Both juries flatly rejected that Crawford was insane. And one of the trials involved an incident contemporaneous with the rape of Roberts, and the same expert Crawford wanted for the rape trial (Dr. Hutt) testified at the assault trial. *See Crawford*, 787 So. 2d at 1240, 1243. The State also presented at all three trials two experts who opined that Crawford was sane. There is thus no colorable reason to think that Crawford is insane, much less that he is factually innocent.

* * *

Crawford unquestionably raped a 17-year-old girl. AEDPA and "law and justice" both require denying his request for federal habeas relief.

AFFIRMED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20-61019

Charles Ray Crawford,

Petitioner-Appellant,

v.

Burl Cain, *Commissioner, Mississippi Department of Corrections*; Earnest Lee, *Superintendent, Mississippi State Penitentiary*,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 3:17-CV-105.

Filed: November 22, 2024

Before Elrod, *Chief Judge*, and Jones, Smith, Stewart, Richman, Southwick, Haynes, Higginson, Willett, Ho, Duncan, Engelhardt, Oldham, Wilson, and Douglas, *Circuit Judges*.[1]

JUDGMENT ON REHEARING EN BANC

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

Jennifer Walker Elrod, *Chief Judge*, and Jones, Smith, Stewart, Haynes, Willett, Ho, Duncan, Engelhardt, Oldham, and Wilson, *Circuit Judges,*

[1] Judge Graves is recused and did not participate in this decision. Judge Ramirez joined the court after the case was submitted and did not participate in this decision.

concurring.

Priscilla Richman, *Circuit Judge*, joined by Southwick, Higginson, and Douglas, *Circuit Judges*, dissenting.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.