No. 20-61019

In the United States Court of Appeals for the Fifth Circuit

CHARLES RAY CRAWFORD,
Petitioner-Appellant,

v.

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; EARNEST LEE, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY,
Respondents-Appellees.

On Appeal from the United States District Court
for the Northern District of Mississippi

BRIEF FOR THE STATES OF TEXAS AND LOUISIANA AS AMICI CURIAE

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Charles Ray Crawford,
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v.

Burl Cain, Commissioner, Mississippi Department of Corrections; Earnest Lee, Superintendent, Mississippi State Penitentiary,
Respondents-Appellees.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Identity and Interest of Amici Curiae

The States of Texas and Louisiana have a fundamental interest in the enforcement of their criminal laws and a corresponding interest in preserving the intended function of federal habeas corpus as a "guard against extreme malfunctions" rather than "a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011). Those interests are directly affected by the questions presented in this case concerning federal courts' discretion to award habeas relief "as law and justice require," 28 U.S.C. § 2243, and application of 28 U.S.C. section 2254(d)(1)'s relitigation bar.

Summary of the Argument

When a convicted state prisoner seeks habeas relief in federal court, the court has discretion to deny relief "*even if* [the] prisoner overcomes all of the[] limits" already imposed by the federal habeas statute and court-made procedural doctrines. *Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022) (emphasis added); *accord Brown v. Davenport*, 142 S. Ct. 1510, 1524 (2022). The panel addressed that discretion. Contrary to Crawford and his amici's characterization, the panel did not radically depart from established habeas practice. Rather, the panel concluded that law and justice do not require that this petitioner, Crawford, be afforded habeas relief.

Factual innocence is an appropriate consideration for a court weighing the equities of awarding habeas relief. In accordance with historic habeas practice, law and justice may require relief where the convicting court lacked jurisdiction, broadly understood to include infirmities that void the judgment. That aligns with

longstanding precedent recognizing that in any habeas proceeding brought by a convicted prisoner, the equities turn heavily—sometimes conclusively—on whether a constitutional error caused the conviction of an actually innocent person. Crawford does not make the barest suggestion that he is factually innocent. A court can properly take that into account when exercising its discretion to award relief as law and justice require.

Even setting law and justice aside, Crawford cannot obtain habeas relief because it is barred by AEDPA. A federal court considering a habeas petition from a state prisoner is absolutely precluded from granting relief unless the state judgment of conviction is based on an unreasonable application of clearly established Supreme Court precedent. As Respondents have ably explained, Crawford cannot make that showing as to any of his claims. The district court correctly denied him relief.

ARGUMENT

I. Factual Innocence is a Proper Consideration for a Court Exercising its Discretion over Habeas Relief.

Crawford's primary quarrel is with Supreme Court precedent, which recognizes that a federal habeas court has discretion to determine whether "law and justice require" habeas relief. The panel addressed how a court should exercise that discretion in a case like Crawford's. Its reference to factual innocence accords with history and tradition and reflects longstanding equitable consideration of a convicted criminal's claim to factual innocence.

A. The panel applied Supreme Court precedent holding that federal courts have discretion to deny habeas relief even if a convicted criminal clears AEDPA and court-made hurdles.

1. Crawford's core contention is that habeas relief is mandatory if the federal court finds "a properly presented constitutional error." Pet'r Supp. Br. at 53. Supreme Court precedent forecloses that argument. As the Court has explained, "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].'" *Ramirez*, 142 S. Ct. at 1731 (quoting *Davenport*, 142 S. Ct. at 1524). Crawford's quarrel is with the Supreme Court, not the panel.

Crawford suggests (at 47–48) that "law and justice" means only that "courts may tailor habeas relief to the circumstances of the case" and "adjust the scope of the writ based on prudential considerations." And he argues (at 48) such adjustments cannot go beyond "claims-channeling and other procedural rules that govern the time and manner for bringing and proving habeas claims." As Crawford puts it (at 50), "the Supreme Court has never suggested that the 'law and justice' provision gives courts the authority to deny relief to habeas petitioners without regard to whether they can demonstrate through properly presented claims that they are 'in custody in violation of the Constitution.'"

But the Supreme Court *did* say that: "[A] state prisoner 'is never entitled to habeas relief.'" *Ramirez*, 142 S. Ct. at 1731; *see* Panel Op. at 14–15 (May 19, 2023). Both *Davenport* and *Ramirez* recognized that a federal habeas court has discretion to deny relief "*even if* a prisoner overcomes all of the[] limits" already imposed by

AEDPA and court-made procedural doctrines. *Ramirez*, 142 S. Ct. at 1731 (emphasis added); *see also Davenport*, 142 S. Ct. at 1524. Any prisoner who has done those two things will necessarily have shown a constitutional error and found a way around (or through) the relitigation bar. *Cf.* Pet'r Supp. Br. at 19–27. He likewise will have already satisfied (or been excused of) the exhaustion and procedural default rules. *Cf.* Pet'r Supp. Br. at 27–35. Even so, the Court explained, "[h]e must *still*" show that "law and justice" require relief. *Davenport*, 142 S. Ct. at 1524; *Ramirez*, 142 S. Ct. at 1731; *see* Panel Op. at 13. Why? Because federal courts have "discretion" to award relief as law and justice require. *Davenport*, 142 S. Ct. at 1523 (quoting 28 U.S.C. §§ 2241, 2243).[1]

It is the Supreme Court that reads section 2243 to encompass discretion as to whether habeas relief should be granted. The en banc Court must take it as a given that such discretion exists and therefore must reject Crawford's lead argument. The panel offered a modest proposal for how to exercise discretion in a case like this one, where a convicted rapist alleges a trial error that, if proved, would undermine how his trial counsel put on the defense case but would not undermine the jury's conclusion that he is factually guilty. In that context, the difference between factual innocence and legal innocence is undoubtedly relevant. *See infra* Part I.B–C.

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[1] *Ramirez* and *Davenport* did not address section 2255 proceedings, which are subject to explicit statutory directives regarding relief that are absent when it comes to state prisoners seeking relief in habeas. *Compare* 28 U.S.C. § 2255(b), *with id.* §§ 2241, 2243. The panel recognized (at 18 n.5) that the inquiry may be different for federal prisoners seeking collateral review under section 2255.

2. Crawford's arguments also require ignoring what the panel actually did. On Crawford's reading (at 35–47), the panel held "that no habeas petitioner—even one whose conviction or sentence is unconstitutional under clearly established law—is entitled to relief unless he can make a colorable showing of factual innocence." Pet'r Supp. Br. at 35. As he puts it elsewhere, the panel held "that Section 2243 itself requires proof of innocence." Pet'r Supp. Br. at 47. But Crawford's argument fails to account for important context in the panel's discussion of how a federal court is to exercise its discretion in granting habeas relief—discretion that the Supreme Court has recognized. After citing *Davenport*'s explanation that habeas relief is discretionary, the panel went on to cite *Ramirez*, which reiterated that a state prisoner "is never entitled to habeas relief," and even upon overcoming the limits imposed by AEDPA and judge-made doctrines, the prisoner "must still persuade a federal habeas court that law and justice require [relief]." Panel Op. at 13 (quoting *Davenport*, 142 S. Ct. at 1523–24; *Ramirez*, 142 S. Ct. at 1731).

To be sure, the panel opinion refers (at 18) to "[r]equiring federal habeas petitioners to show factual innocence" and concludes (at 19) that "law and justice . . . require denying [Crawford's] petition." But context shows what the panel meant—i.e., that Crawford's lack of factual innocence was an appropriate consideration for a federal court. That is why the opinion repeatedly cited a thoughtful article by Judge Friendly. *See* Panel Op. at 16 (citing Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970)). Posing Judge Friendly's decades-old question, the panel answered simply that a convicted petitioner's factual innocence (or guilt) is relevant. In other words,

"[l]aw and justice do not *require* habeas relief . . . when the prisoner is factually guilty." *Id.* at 287 (emphasis added). And under section 2243, the panel concluded that law and justice do not require relief in Crawford's specific case.

More importantly, the panel did not conclusively resolve the issue for any and every "habeas petitioner." Pet'r Supp. Br. at 35. Consider a person challenging his involuntary civil commitment or a person summarily jailed without ever being accused of a crime, for example. In *these* scenarios—as Crawford's amici admit elsewhere—courts may be faced with "the quintessential habeas scenario[s]" where habeas could be used to remedy the detention of a prisoner who stands innocent before the law.[2] By contrast, where the petitioner stands convicted under a final criminal judgment, "'[t]he cause of imprisonment is shown as fully by the'" judgment and—absent a jurisdictional defect, *see infra* at 8–10—"'the writ ought not to be awarded.'" *Ex parte Watkins*, 28 U.S. 193 (1830); *cf. Herrera v. Collins*, 506 U.S. 390, 399–400 (1993).

The "law and justice" standard may, therefore, appropriately demand more when the habeas writ is used in ways at odds with the traditional "law and justice" of the writ's administration. Recognizing that a habeas court has discretion to deny relief in certain cases, the panel offered one proposal for how such discretion should be exercised in a case like this one.

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[2] Lee Kovarsky, *The New Negative Habeas Equity* 18–19 (2023), unpublished manuscript available at https://ssrn.com/abstract=4520056.

B. Looking to factual innocence—and the lack thereof—accords with the historical and traditional sweep of the habeas writ.

The panel's approach to the exercise of discretion accords with tradition and precedent. The Supreme Court said a century ago that "law and justice" points to "the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought." *Salinger v. Loisel*, 265 U.S. 224, 231 (1924). And exercising discretion consistent with "law and justice" requires considering the traditional and historical "law and justice" of the habeas writ itself. *See Davenport*, 142 S. Ct. at 1523 (noting the Court has exercised its discretion to "return[] the Great Writ closer to its historic office"); *Woodfox v. Cain*, 789 F.3d 565, 569 (5th Cir. 2015) (discussing "the historic nature of the [habeas] writ" alongside the "law and justice" standard).

1. Early American habeas practice does not support Crawford's contention that a convicted criminal is automatically entitled to discharge every time he shows a "properly presented" constitutional violation.

The Great Writ originated as a mechanism for courts to ask "why the liberty of [a] subject[] is restrained." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1567 (2021) (Gorsuch, J., concurring) (quoting 3 William Blackstone's Commentaries at 131). Although the habeas writ could be used to question a multitude of confinements, it is best remembered for its use preceding the English Civil War—a period when the Stuart kings "jail[ed] their subjects summarily and indefinitely, with little explanation and even less process." *Id.* In response to such executive overreach, courts used the habeas writ to force the Crown to provide a reason for the

confinement and, if necessary, adequate process (like a criminal trial) to justify any confinement. *See* Petition of Right, 3 Car. 1, ch. 1, ¶¶ 5, 8 (1628). Said another way, "habeas corpus [w]as the instrument by which due process could be insisted upon." *Hamdi v. Rumsfeld*, 542 U.S. 507, 555 (2004) (Scalia, J., dissenting).

Understandably, then, the writ had little role to play when it came to convicted criminals. Because a final criminal judgment provided a lawful basis for confinement, the writ was unavailable to prisoners seeking "to challenge a final judgment of conviction issued by a court of competent jurisdiction." *Davenport*, 142 S. Ct. at 1520–21 (2022) (citing *Opinion on the Writ of Habeas Corpus*, Wilm. 77, 88, 97 Eng. Rep. 29, 36 (K.B. 1758)). This limit—well recognized at common law—comports with the purpose of the writ: "If the point of the writ was to ensure due process attended an individual's confinement, a trial was generally considered proof he had received just that." *Davenport*, 142 S. Ct. at 1521 (citing *Bushell's Case*, Vaugh. 135, 142–43, 124 Eng. Rep. 1006, 1009–1010 (C. P. 1670)). That was true in English courts prior to the founding; it remained true for more than 150 years of American history as well. *See id.*; *Langley v. Prince*, 926 F.3d 145, 154 (5th Cir. 2019) (en banc).

Congress first authorized federal courts to issue the writ of habeas corpus in Section 14 of the Judiciary Act of 1789. 1 Cong. ch. 20, § 14, 1 Stat. 73, 81–82. The statute does not define the scope of relief. So when questions arose about the scope of relief Congress authorized, Chief Justice Marshall was clear that "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–94 (1807). And "the black-letter principle of the common law [was] that the writ was simply not available at all to one convicted

of a crime by a court of competent jurisdiction." Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 465–66 (1963); *see Felker v. Turpin*, 518 U.S. 651, 663 827 (1996) (citing *Ex parte Watkins*, 28 U.S. 193 (1830)). Once again, Crawford's own amici elsewhere concede as much about the writ's origins, claiming instead a court's power to "expand" the remedy over time. *See* Kovarsky, *supra* n.2, at 4–5.

But the writ remained largely unchanged until the mid-twentieth century. Over the ensuing decades, Congress passed statutes that altered who could sue out a writ in federal court. *See* Act of Mar. 2, 1833, 22 Cong. ch. 57, § 7, 4 Stat. 632, 634–35; Act of Aug. 29, 1842, 27 Cong. ch. 257, 5 Stat. 539, 539; Act of Feb. 5, 1867, 39 Cong. ch. 28, § 1, 14 Stat. 385, 385. But it never purported to turn the writ upside down and authorize relief diametrically opposed to its traditional use and purpose. Thus, federal courts "continued to interpret the habeas statute consistent with historical practice. If a prisoner was in custody pursuant to a final state court judgment, a federal court was powerless to revisit those proceedings unless the state court had acted without jurisdiction." *Edwards*, 141 S. Ct. at 1567–68 (Gorsuch, J., concurring) (collecting cases from nineteenth and twentieth centuries); *see also Davenport*, 142 S. Ct. at 1521 n.1.

In time, the Supreme Court "expand[ed] the category of claims deemed to be jurisdictional for habeas purposes." *Wright v. West*, 505 U.S. 277, 285 (1992) (plurality op.). If the state judgment violated the Double Jeopardy Clause, for example, the prisoner could obtain relief. Because initial jeopardy had already attached, habeas doctrine reasoned that the convicting court could not lawfully

throw the defendant into second jeopardy at all—much less impose a second judgment or sentence—because the petitioner "had been convicted twice for the same offense." *Ex parte Nielsen*, 131 U.S. 176, 182–84 (1889); *cf. Coleman v. Tennessee*, 97 U.S. 509, 519–20 (1878) (addressing habeas relief for a prisoner already convicted by a court-martial of the same murder). A sentence that violated the Fifth Amendment in this way, the courts reasoned, was not "a mere error in law," but "one in which the judgment is void," and thus no lawful justification for confinement. *Nielsen*, 131 U.S. at 184.

But if the convicting court "ha[d] jurisdiction of the subject matter and of the person, although its proceedings may be irregular or erroneous, yet, [the judgment could not] be set aside" through habeas proceedings. *Ex parte Toney*, 11 Mo. 661, 662 (1848). As a unanimous Supreme Court explained:

> Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a habeas corpus, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded.

Ex parte Siebold, 100 U.S. 371, 375 (1879); *accord Watkins*, 28 U.S. at 193; *see also Davenport*, 142 S. Ct. at 1521 n.1 (collecting cases). And "[i]ncluded among those irregular or erroneous proceedings whose judgment could not be avoided by habeas corpus were those based upon insufficient evidence or mistaken facts." Dallin H. Oaks, *Habeas Corpus in the States: 1776–1865*, 32 U. Chi. L. Rev. 243, 262 (1965) (analyzing state-court precedent in the nineteenth century).

Not until "the middle of the twentieth century" did the Court say that the mere occurrence of a constitutional error during the underlying criminal proceedings—the very sort of thing that could be addressed on direct appeal—could permit reopening a final criminal judgment. *Edwards*, 141 S. Ct. at 1568–69 (Gorsuch, J., concurring) (citing *Brown v. Allen*, 344 U.S. 443 (1953)); *see Davenport*, 142 S. Ct. at 1521–22. *Brown* permitted a remedy diametrically opposed to the writ's historical purposes. And in our federal system, it also promised to upend state sovereignty: By turning federal habeas corpus practice into the functional equivalent of an appeal, *Brown*, 344 U.S. at 540 (Jackson, J., concurring in result), it held out the possibility of every federal district judge sitting in judgment on state court colleagues, *Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991).

2. Ever since, Congress and the Supreme Court have taken continuous steps to "return[] the Great Writ closer to its historic office." *Davenport*, 142 S. Ct. at 1523. The same is true with respect to courts' exercise of discretion under the law-and-justice standard. It was not until the publication of the Revised Civil Statutes in 1874 that the term "law and justice" first appeared in the language of the federal habeas statute. Section 761 of the Revised Statutes provides that "[t]he court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon dispose of the party as *law and justice* require." Rev. Stat. § 761 (1874) (emphasis added).

Shortly after the 1870s revisions, the Supreme Court analyzed the new statute when it decided *Ex parte Royall*, 117 U.S. 241 (1886). There, Royall was indicted by a Virginia grand jury on the charge of selling a "coupon without a license" in

violation of an 1884 act of Congress. *Id.*at 242. Royall petitioned the Circuit Court for Virginia for habeas relief while the prosecution against him was pending and before the trial court had entered a judgment. *Id.* at 250. By requiring courts to "dispose of the party as law and justice require," the Court observed, Congress has furnished courts with "discretion as to the time and mode in which [they] will exert the powers conferred upon [them]." *Id.* at 251. Accordingly, the Supreme Court held that while the Circuit Court had authority to discharge Royall "in advance of his trial" and in the absence of a criminal judgment, it was "not bound" to do so—especially considering that "discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states." *Id.* And after all, Royall was already receiving the very thing the habeas writ was *traditionally* used to help secure—a full-scale criminal trial. Subsequent cases show the same interest in exercising discretion consistent with traditional habeas practice. *See, e.g.*, *Munaf v. Geren*, 553 U.S. 674, 693 (2008).

3. The panel opinion here recognized the importance of historical practice. Law and justice *could* require relief, the panel reasoned, if the petitioner's claim raised the type of error that is "deeply rooted in the Great Writ's history." Panel Op. at 18 n.5. That is, if the court that convicted the petitioner *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." *Id.* (quoting Friendly, *supra*, at 151). If the judgment violated the Double Jeopardy Clause, for example. *See supra* at 9.

A trial error like Crawford's *Ake* claim lacks a connection to the historic scope of the writ. *Davenport*, 142 S. Ct. at 1521; *see, e.g.*, *Nielsen*, 131 U.S. at 184. Crawford contends (at 23) that he "was denied the raw materials integral to the building of an effective defense because he did not have his own expert to assist with his defense and the cross-examination of the State's experts." These allegations would not void the judgment. *Nielsen*, 131 U.S. at 184; *see Davenport*, 142 S. Ct. at 1521–22. At bottom, the *Ake* argument is that the jury did not have all the facts, but an error "based upon insufficient evidence or mistaken facts" was historically outside the reach of a habeas court. Oaks, *supra*, at 262. It is, instead, just the sort of thing that could and should be addressed in any direct appeal, or a "writ of error." *Ex parte Siebold*, 100 U.S. at 375.

Crawford's ineffective-assistance-of-counsel claims are of the same ilk. He contends (at 28) that any constitutionally adequate defense lawyer would have "obtain[ed] and present[ed] expert testimony to support the insanity defense," or (at 24), that any constitutionally adequate appellate counsel would have raised the lack of that evidence on appeal. Though couched in terms of the constitutional right to counsel recognized by the Supreme Court, these arguments again point only to the sort of "mere error" at trial that historically provided no grounds for habeas relief.

Other *Strickland* claims might be different; for example, if the alleged deficient performance is counsel's failure to raise the Double Jeopardy Clause as a bar to the judgment of conviction. *See, e.g.*, *United States v. Slape*, 44 F.4th 356, 359 (5th Cir. 2022) (considering and rejecting an IATC claim premised on Double Jeopardy);

Neal v. Cain, 141 F.3d 207, 214 (5th Cir. 1998) (similar); *Murphy v. Puckett*, 893 F.2d 94, 95 (5th Cir. 1990) (affirming grant of habeas relief where respondent conceded defense counsel was ineffective for failing to raise a meritorious Double Jeopardy defense). If such a claim were proved, the federal court could conclude that law and justice require habeas relief because the ineffective assistance claim rests upon a more fundamental constitutional problem—a Double Jeopardy violation that means the convicting court lacked jurisdiction to proceed entirely. That *would* historically have warranted relief because it meant the judgment was void. *See supra* at 9; Panel Op. at 18 n.5. But Crawford admittedly presses nothing like that argument here.

C. Looking to factual innocence—or lack thereof—aligns with precedent recognizing its weight in any equitable balance.

Although habeas is concerned with the lawfulness of detention, rather than "the guilt or innocence of [the] petitioner[]," *Ex parte Quirin*, 317 U.S. 1, 25 (1942), a convicted prisoner's factual innocence has long carried weight in the equitable balance. As one jurist put it, "the possibility that an error may have caused the conviction of an actually innocent person" is "the ultimate equity on the prisoner's side." *Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 256 (1973) (Powell, J., concurring) (observing that "[h]abeas corpus indeed should provide the added assurance for a free society that no *innocent* man suffers an unconstitutional loss of liberty" (emphasis added)). Factual innocence, after all, bears on "the moral culpability of the defendant," and "that moral dimension" appropriately "engages [a court's]

equitable sensibilities." *Pacheco v. Habti*, 62 F.4th 1233, 1244 (10th Cir. 2023), *cert. denied*, 143 S. Ct. 2672 (2023); *accord* Panel Op. at 18.

Because innocence matters to equity, court-made doctrines have long incorporated it as a basis for allowing a petitioner to pursue claims that would otherwise be procedurally improper. The miscarriage-of-justice doctrine, for example, holds that if a prisoner's claim was procedurally defaulted in state court and he could not show "cause and prejudice," a federal court may nevertheless hear the claim if "[a] constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

More specifically, innocence is a central consideration in Supreme Court precedent addressing the law-and-justice standard. Take *Stone v. Powell*, 428 U.S. 465 (1976), which held that "a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494. Innocence mattered to that holding. The Court observed that the evidence "sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." *Id.* at 490. If a state prisoner shows he was convicted based on evidence obtained in violation of the Fourth Amendment, there is a constitutional violation underlying the conviction, to be sure; as Crawford's amici might put it, the conviction is "tainted by constitutional error." Br. of Federal Pub. Defenders at 5. But the Court in *Powell* reasoned that excluding such evidence "deflects the truthfinding process and often frees the guilty." 428 U.S. at 490.

By contrast, the Court held in *Withrow v. Williams*, 507 U.S. 680 (1993), that a *Miranda* violation could warrant federal habeas relief because, *inter alia*, the unreliability of involuntary confessions means such claims are *not* "divorced from the correct ascertainment of guilt." *Id.* at 692. Whatever the merits of that conclusion in a particular case, the difference between innocence and guilt mattered in the Court's law-and-justice inquiry. So too here, where the question is not whether law and justice ever require relief for a category of constitutional violations, but whether law and justice require relief for a particular state prisoner based on his particular habeas claims. *Cf. Ramirez*, 142 S. Ct. at 1731 ("[A state prisoner] is never entitled to habeas relief. He must still 'persuade a federal habeas court that law and justice require [it].'" (quoting *Davenport*, 142 S. Ct. at 1524)).

To be sure, some of the equitable doctrines that turned on actual innocence have been reinforced and supplemented by AEDPA. *See Edwards*, 141 S. Ct. at 1571 n.5 (Gorsuch, J., concurring) (explaining that "AEDPA creates only additional conditions to relief; it did not do away with the discretion afforded courts in the habeas statute, or the various rules this Court has formulated in the exercise of that discretion"). AEDPA incorporated requirements derived from actual-innocence doctrines in 28 U.S.C. sections 2244(b)(2) and 2254(e)(2), which apply to second-or-successive petitions and new evidence, respectively. For petitions previously governed by the abuse-of-the-writ doctrine, Congress codified an even stricter version of the cause-and-prejudice doctrine and its miscarriage-of-justice exception. 28 U.S.C. § 2244(b). Such a petition is generally treated as second-or-successive, *see Banister v. Davis*, 140 S. Ct. 1698, 1706 (2020), and it "shall be dismissed" at the

outset unless "it falls within one of two narrow categories—roughly speaking, if it relies on a new and retroactive rule of constitutional law or if it alleges previously undiscoverable facts that would establish [the convicted prisoner's] innocence." *Id.* at 1704 (paraphrasing 28 U.S.C. § 2244(b)(2)).

Crawford argues (at 44) that factual innocence cannot be part of the law-and-justice inquiry because Congress elsewhere adopted actual-innocence showings for overcoming procedural bars, and it could have done so "in all cases had Congress thought such a requirement appropriate." That argument evokes the canon *expressio unius est exclusio alterius*, or "the expression of one thing implies the exclusion of another." *In re Bourgeois*, 902 F.3d 446, 447–48 (5th Cir. 2018). It is unavailing for at least two reasons.

First, the argument ignores historical context, which forecloses applying the *expressio unius* canon to the federal habeas statutes. The Great Writ has never been comprehensively defined by statutes, as the Supreme Court has recognized again and again. *See, e.g.*, *Edwards*, 141 S. Ct. at 1571 n.5 (Gorsuch, J., concurring) (citing *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam)). Equitable doctrines exist alongside AEDPA's statutory limitations. *See Ramirez*, 142 S. Ct. at 1731; *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). Indeed, even Crawford's amici acknowledge that actual innocence retains a place in court-created doctrines. *See* Br. of Habeas Scholars at 20 (citing *McQuiggin*, 569 U.S. at 386). Viewed in the light of this history, AEDPA's incorporation of requirements derived from the actual-innocence doctrine in sections 2244(b)(2) and 2254(e)(2) cannot be read to preclude reference to the

petitioner's factual innocence elsewhere, as if to express one such requirement were to exclude all others.

Second, this argument overreads AEDPA as if it were a comprehensive regulation. It is not. Congress enacted AEDPA primarily to streamline federal habeas proceedings, not to address the relief a federal court could order if a petitioner was successful at the end of those proceedings. *See, e.g.*, *Davenport*, 142 S. Ct. at 1523 (explaining that AEDPA furthered the project of "separating the meritorious needles from the growing haystack" of habeas petitions). As Respondents have explained, "[f]ederal habeas statutes 'leave[] unresolved many important questions about the scope of available relief,'" Resp. Supp. Br. at 49 (quoting *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008)), and "[f]ederal courts have long exercised their equitable authority to adjust the *substantive scope* of the writ," *id.* at 49–50 (citing, *e.g.*, *Holland v. Florida*, 560 U.S. 631, 646 (2010)). The habeas statutes do not express and codify every habeas doctrine.

In AEDPA Congress did not touch statutory provisions governing habeas *relief* except to specify circumstances under which it "*shall not* be granted." 28 U.S.C. § 2254(b) ("shall not be granted unless . . ."); *id.* § 2254(d) ("shall not be granted with respect to . . ."); *see Richter*, 562 U.S. at 100–01 ("A state court's determination that a claim lacks merit *precludes federal habeas relief* so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." (emphasis added)). There is a difference between foreclosing consideration by a federal habeas court, *e.g.*, 28 U.S.C. § 2244(b) (claims in a second-or-successive habeas petition), and disallowing habeas relief at the conclusion of the habeas

proceedings, *e.g. id.* § 2254(b), (d). AEDPA did not change section 2243's "law and justice" provision, so there is no reason to read it as a prohibition on such considerations.

II. Crawford Cannot Overcome the Relitigation Bar.

Crawford's habeas claims were raised and rejected in the Mississippi courts, so section 2254(d) bars their relitigation in federal court unless Crawford can show that the state court's review "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." 28 U.S.C. § 2254(d)(1). As Respondents have ably explained, Crawford cannot make that showing. *See* Resp. Supp. Br. at 21–48. The panel correctly recognized as much. *See* Panel Op. at 5–13. So even if the Court disagrees as to how a federal habeas court's discretion in granting relief is to be exercised, denial is mandatory here. The Court therefore must affirm the judgment of the district court.

Conclusion

The Court should affirm the judgment of the district court denying habeas relief.

Respectfully submitted.

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Certificate of Service

On September 6, 2023, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,241 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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