No. 19-6562

In the Supreme Court of the United States

CARLOS J. AVENA,

Petitioner,

v.

KEVIN CHAPPELL, WARDEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Acting Senior Assistant Attorney General
HELEN H. HONG
Deputy Solicitor General
MICHAEL R. JOHNSEN
Supervising Deputy Attorney General
*MICHAEL KATZ
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 269-6072
Michael.Katz@doj.ca.gov
**Counsel of Record*

QUESTION PRESENTED*

Whether the court of appeals erred in declining to grant a certificate of appealability on petitioner's claim that trial counsel was per se ineffective within the meeting of *United States v. Cronic*, 466 U.S. 648 (1984).

---

*Respondent omits the notation "capital case" because, as discussed more fully below, the Ninth Circuit Court of Appeals reversed the judgment of the district court denying habeas relief on a claim alleging ineffective assistance of counsel at the penalty phase, and California has filed no cross-petition. Pet. App. 31. Petitioner is thus not "under a death sentence that may be affected by the disposition of the petition[.]" S.Ct. Rule 14.1(a).

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Avena v. Chappell, No. 14-99004, judgment entered Aug. 8, 2019 (this case below.)

United States District Court for the Central District of California:

Avena v. Chappell, No. CV 96-8034 GHK, judgment entered Mar. 19, 2014 (this case below.)

California Supreme Court:

In re Avena, No. S076118, judgment entered Jan. 12, 2005 (state collateral review).

People v. Avena, No. S004422, judgment entered June 10, 1996 and modified July 18, 1996 (direct appeal).

In re Avena, No. S046608, judgment entered Feb. 5, 1996 (state collateral review).

Los Angeles County Superior Court:

People v. Avena, No. A362244, judgment entered Feb. 12, 1982.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

COURT RULES

STATEMENT

Petitioner Carlos Avena, a California prisoner who was convicted of capital murder and sentenced to death, seeks review of a decision by the Ninth Circuit Court of Appeals granting him penalty-phase habeas relief, but declining to consider an uncertified *Cronic* claim. Pet. App. 1-31.

1. In 1980, Avena shot and killed two men during a carjacking. Pet. App. 4-5. Avena was arrested and convicted by a jury of two counts of first-degree murder, after a trial where the prosecution introduced a recording of an interview in which Avena admitted to shooting the victims. *Id.* at 6, 101. The jury also convicted Avena of several lesser offenses and made "special circumstance" findings of multiple-murder and robbery-murder, qualifying him for death or life in prison without parole. *Id.* at 6, 32. Following the penalty phase of the trial, the jury set the penalty at death. *Id.* at 9, 63.

2. The California Supreme Court affirmed the judgment on direct appeal. Pet. App. 33. The court also denied a habeas corpus petition alleging ineffective assistance of counsel. *Id.* In denying habeas relief, the court rejected Avena's claim that his trial attorney was per se ineffective under *United States v. Cronic*, 466 U.S. 648 (1984). Pet. App. 113-114. The court acknowledged that counsel's "trial representation was minimal, at best," considering that he "waived opening argument at the guilt phase, called no defense witnesses, and did not address either the two murders or the two special circumstance allegations in a brief closing argument." *Id.* at 113.

Instead, the trial attorney "limited himself to commenting on the state of the evidence for the assault with intent to murder charges." *Id.*; *see also id.* at 133. Nonetheless, the California Supreme Court concluded that Avena's attorney was "neither 'totally absent' nor 'prevented' from assisting petitioner at trial." *Id.* at 113. Nor did Avena show that "outside influences prevented [counsel] from providing more vigorous legal assistance." *Id.* The mere allegation that counsel failed to work hard enough was insufficient to support a *Cronic* claim. *Id.* at 113-114.

The California Supreme Court also considered whether Avena had demonstrated prejudice within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984). The court observed that "[a]lthough we are disturbed by how little [Avena's trial counsel] appears to have done at trial, it is undisputed that he was faced with a defendant with no apparent defense who had confessed to two first degree murders as well as a series of other serious crimes." Pet. App. 113-114. In light of that evidence, the court held that Avena had not proven he was prejudiced by his counsel's performance at trial. *Id.*

Two dissenting justices would have found prejudice. Pet. App. 142, 147. One of the dissenting justices would have also found *Cronic* error. *Id.* at 142-147. The other dissenting justice saw "no need to decide whether petitioner is, under *Cronic*, entitled to relief *without* a showing of prejudice" because Avena could show "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Id.* at 147 (emphasis in original).

3. Avena then filed a habeas corpus petition in federal district court, again raising his *Cronic* and *Strickland* claims, among others. Pet. App. 17, 56. The district court denied Avena's habeas petition under the deferential review standard required by the Antiterrorism and Effective Death Penalty Act of 1996. *Id.* at 18, 34-35. In rejecting Avena's *Cronic* claim, the court concluded that the state court "reasonably determined that counsel did not entirely fail to test the prosecutor's case." *Id.* at 58. The district court observed that trial counsel "moved to exclude Petitioner's confession before it was admitted at trial, cross-examined witnesses, requested jury instructions on lesser included offenses, argued that Petitioner lacked any intent to kill [the victims] on the assault with intent to murder charges and argued that Petitioner's crimes were not appropriate for the death penalty." *Id.* As to Avena's *Strickland* claim, the district court held that the California Supreme Court was not objectively unreasonable in denying Avena's guilt and penalty phase ineffective assistance of counsel claims, because there was no reasonable probability that Avena would have enjoyed a different outcome. *Id.* at 47, 56. The district court issued a certificate of appealability only on the penalty-phase *Strickland* claim. *Id.* at 18, 60.

4. The court of appeals reversed, granting habeas relief on the penalty-phase challenge to trial counsel's performance under *Strickland*. Pet. App. 31.

Looking to the evidence developed at the state evidentiary hearing, *id*. at 12-17, the court of appeals concluded that counsel "rendered deficient performance by failing adequately to investigate Avena's good character and social history," *id*. at 21, and that counsel also performed deficiently by failing to investigate Avena's claim of self-defense in a jailhouse killing presented as aggravating evidence during the penalty phase, *id*. at 23. The court of appeals further held that the California Supreme Court had unreasonably determined that counsel's performance did not prejudice Avena. *Id*. at 24-31. It observed that the jury heard "almost nothing about Avena except what the prosecution said of him," and that counsel could have countered the prosecution's presentation with "a wealth of mitigation evidence," including evidence about Avena's difficult childhood, habitual PCP use, and self-defense in the jailhouse killing. *Id*. at 25-28.

After reversing the judgment of the district court on the penalty-phase claims, the court of appeals declined to reach any non-certified issues raised in Avena's briefing. Pet. App. 31.

ARGUMENT

Avena contends that the court of appeals should have expanded the certificate of appealability to include his guilt-phase *Cronic* claim. Pet. 10-13; *see Hohn v. United States*, 524 U.S. 236, 253 (1998) (denial of a certificate of appealability qualifies as a "case" that can be reviewed in this Court). He does not assert that this claim presents any unsettled legal issue of broad

importance or implicates any conflict of authority. Pet. 10-13. The lower courts' decisions correctly applied settled legal principles to the facts of Avena's case. There is no reason for further review.

1. To justify a certificate of appealability under 28 U.S.C. § 2253, a petitioner is required to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). The showing must demonstrate that jurists of reason could debate whether the petition should have been resolved differently or that the issues presented are adequate to deserve encouragement to proceed further. *See Miller-el v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). Where AEDPA's deferential review standard applies, the question is "whether the District Court's application of AEDPA deference … was debatable amongst jurists of reason." *Miller-el*, 537 U.S. at 341. There is no indication that the court of appeals misconstrued or misapplied this standard, nor does the record disclose any ground for reasonable jurists to debate whether the uncertified *Cronic* claim warrants habeas relief.

Avena does not contest that the AEDPA standard governs his guilt-phase *Cronic* claim. *See* Pet. App. 18. Applying AEDPA deference, the district court determined that Avena could not show that the California Supreme Court's adjudication of the *Cronic* claim was contrary to, or an unreasonable application of, this Court's clearly established precedents, or that the decision

was based on an unreasonable factual determination. Pet. App. 56-58; *see* 28 U.S.C. § 2254(d). That conclusion is sound.

Strickland ordinarily governs claims of ineffective assistance of counsel and requires proof of both deficient performance and prejudice to the defense. *Florida v. Nixon*, 543 U.S. 175, 189 (2004). *Cronic* recognized a "narrow exception," *id.*, holding that the Sixth Amendment right to counsel is violated, without any "specific showing of prejudice," where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing[.]" *Cronic*, 466 U.S. at 659. This Court has explained that, to establish a claim under *Cronic* for failure to test the prosecution's case, "the attorney's failure must be complete." *Bell v. Cone*, 535 U.S. 685, 696 (2002). Thus, a claim that counsel failed to oppose the prosecution at certain points in the proceedings, rather than "throughout" the proceedings, is insufficient. *Id.* "For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind." *Id.*

As the California Supreme Court recognized, trial counsel's presentation at the guilt phase was "minimal, at best." Pet. App. 113. Nonetheless, as the court also pointed out, counsel did not *completely* fail to oppose the prosecution's case within the meaning of *Cronic*. During the guilt phase, trial counsel moved to exclude Avena's confession (SER 2165, 2194), cross-examined prosecution witnesses, objected to prosecution evidence (*see, e.g.*, SER 1890, 2059), discussed jury instructions with the court and prosecutor (SER 2473),

and gave a closing argument in which he disputed the lesser offenses (SER 2499-2512; *id.* at 2511 ("As far as those particular four counts are concerned, I don't believe the case has been proven."); *see also* Pet. App. 58, 113).[1] During the state evidentiary hearing on habeas, trial counsel also stated that he put on a minimal guilt-phase defense in order to save his "credibility" for the penalty phase, and then urged the jury to reject the death penalty. Pet. App. 132. Avena cites no case from this Court excusing a showing of prejudice on similar facts, or explains why "the cost of litigating [the] effect" of trial counsel's performance "is unjustified." *Cronic*, 466 U.S. at 658. The claim is therefore properly framed under *Strickland*, not *Cronic*. *See Cone*, 535 U.S. at 696.[2] No reasonable jurist could view that conclusion as contrary to, or an unreasonable determination of, this Court's precedents. *Woods v. Donald*, 135 S.Ct. 1372, 1377 (2015) ("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."). There is no basis for a certificate of appealability on the *Cronic* claim.[3]

---

[1] "SER" stands for the supplemental excerpts of record that respondent lodged in the court below. "ER" stands for the excerpts of record lodged by petitioner below.

[2] Indeed, the court of appeals assessed Avena's similar claims about penalty-phase deficiencies under *Strickland* and granted relief.

[3] Avena does not assert a guilt-phase *Strickland* claim here.

Avena's reliance on *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), Pet. 13, is misplaced. *McCoy* has no bearing on this AEDPA case because that decision was not clearly established authority at the time of the state court's adjudication of Avena's *Cronic* claim. *See Green v. Fisher*, 565 U.S. 34, 37-38 (2011) (§ 2254(d)(1) requires federal courts to measure state-court decisions against this Court's precedents as of the time the state court renders its decision).

In any event, as Avena acknowledges, *McCoy* is not an ineffective-assistance-of-counsel case. Pet. 13; *McCoy*, 138 S. Ct. at 1510-1511 ("[W]e do not apply our ineffective-assistance-of-counsel jurisprudence, *Strickland* … or *Cronic* …, to McCoy's claim[.]"). The capital defendant in *McCoy* "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." *McCoy*, 138 S. Ct. at 1505. He opposed his counsel's strategy to concede guilt "at every opportunity, before and during trial, both in conference with his lawyer and in open court." *Id*. at 1509. This Court decided that counsel's decision to pursue the strategy despite the defendant's expressed opposition violated the defendant's constitutionally protected autonomy right to maintain his innocence. *Id*. at 1509-1511. There is no comparable record here. Though counsel conceded Avena's liability for special-circumstance murder at the guilt phase, Pet. App. 6, 42, Avena has never established that he resisted that strategy. Contrary to Avena's suggestion now, Pet. 12, trial counsel did not remember whether he discussed the concession with Avena,

ER 562-564. Since there is nothing to show that Avena's will was overborne by counsel either before or at trial, as was true in *McCoy*, that case does not affect the assessment of any guilt-phase *Cronic* claim.

To the extent Avena alleges that trial counsel may have deliberately performed ineffectively due to racial prejudice, Pet. 7, 12-13, that remains, at best, a disputed factual issue. Trial counsel, who is now deceased, denied at a deposition that he tried to sabotage any of his cases. ER 577. The district court never resolved—or even addressed—that question. Pet. App. 32-60. That outstanding factual dispute does not provide a basis for further review in this case.

2. In addition, this case is a poor vehicle to consider the underlying Sixth Amendment issues because the petition presents only the question whether the court of appeals erred by not expanding the certificate of appealability. As to the certificate of appealability issue, Avena did not follow the proper procedure to present his uncertified claims to the court of appeals. In the Ninth Circuit, a party may brief issues not encompassed by the certificate of appealability under a separate heading designating them as "Uncertified Issues," which operates as a motion to expand the certificate of appealability. Ninth Cir. R. 22-1(e). Avena did not designate any guilt-phase *Cronic* claim in that way in his opening brief. C.A. Opening Br. 111. After the State noted that the claim was uncertified, C.A. Answer Br. 27 n.2, Avena responded that the *Cronic* claim was a "subset" of his "penalty phase ineffective

assistance of counsel" claim, and that he sought "to remedy the ineffective assistance at penalty that he suffered, regardless of whether it is framed as *Strickland*-type or *Cronic*-type." C.A. Reply Br. 20, 21. In the alternative, "if the *Cronic* claim is outside the district court's *sua sponte* COA," Avena asked the court to expand the certificate of appealability to include it, C.A. Reply Br. 22-24. The court later requested, and the State filed, a supplemental brief on the merits of the issue. C.A. Suppl. Answer Br. The court of appeals subsequently granted Avena relief on his penalty-phase claim. Pet. App. 31. The court then gave no further explanation when it stated at the conclusion of its opinion, "We decline to reach non-certified issues raised in the briefing." *Id.* That procedural record makes this case a particularly poor vehicle for further review.[4]

[4] If the court of appeals accepted Avena's assertion that his *Cronic* claim was a "subset" of his penalty-phase claim, *see* C.A. Reply Br. 20, 21, the request to expand the certificate of appealability arguably became moot once the court granted penalty-phase relief. If the court of appeals declined to address the uncertified claim because Avena waited until his reply brief to ask the court to expand the certificate of appealability, the claim was forfeited. *See Christian Legal Soc'y Chapter of Univ. of Calif. v. Wu*, 626 F.3d 483, 485 (9th Cir. 2010) ("'We review only issues that are argued specifically and distinctly in a party's opening brief.'").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Acting Senior Assistant Attorney General
HELEN H. HONG
Deputy Solicitor General
MICHAEL R. JOHNSEN
Supervising Deputy Attorney General

MICHAEL KATZ
Deputy Attorney General
Counsel for Respondent

Dated: December 23, 2019