No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DESHUN THOMAS,

Petitioner,

VS.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Charles W. Prueter
Counsel of Record
WALLER LANSDEN DORTCH & DAVIS, LLP
1901 Sixth Avenue North, Suite 1400
Birmingham, Alabama 35203
205.226.5735 office | 205.214.8787 fax
charles.prueter@wallerlaw.com

QUESTION PRESENTED

Is a defendant constructively denied the assistance of counsel under *United States v. Cronic*, 466 U.S. 648 (1984), when trial counsel tells the jury that the defendant is "guilty" of the only crime charged and encourages the jury to impose a "substantial sentence"? The Fifth Circuit said no, but precedent from the Ninth and Tenth Circuits says yes.

LIST OF PARTIES

Deshun Thomas, who was the petitioner-appellant below, is the Petitioner. Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division, who was the respondent-appellee below, is the Respondent.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes

Rules

PETITION FOR WRIT OF CERTIORARI

Petitioner Deshun Thomas petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in this ineffective-assistance-of-counsel habeas case.[1]

OPINIONS BELOW

The full Fifth Circuit denied Mr. Thomas's petition for rehearing *en banc* on November 18, 2020. Eleven judges voted against rehearing, and six vote in favor. Judge James E. Graves, joined by Judge Jennifer Walker Elrod, dissented from the denial, showing that the panel opinion was contrary to this Court's opinion in *United States v. Cronic*, 466 U.S. 648 (1984), because trial counsel effectively had "failed to mount a defense." The denial and the dissent from denial are contained in Appendix A and were reported at 980 F.3d 1043 (5th Cir. 2020).

The panel affirmed the district court's denial of habeas relief on July 29, 2020. The panel opinion is contained in Appendix B and was reported at 968 F.3d 352 (5th Cir. 2020).

[1] This petition is prepared under the standards set forth in Sup. Ct. R. 33.2. *See* Sup. Ct. Order (Apr. 15, 2020) ("The document may be formatted under the standards set forth in Rule 33.2 . . . .").

The district court entered judgment denying Mr. Thomas's habeas petition under 28 U.S.C. § 2254 on September 25, 2017. The district court's opinion is contained in Appendix C.

The Texas Court of Criminal Appeals denied Mr. Thomas's application for habeas relief on the findings of the trial court on September 16, 2015. The order is contained in Appendix D.

The Harris County, Texas district court denied Mr. Thomas's application for habeas relief on April 20, 2015. The district court's order is contained in Appendix E.

The Texas Court of Criminal Appeals issued an opinion on direct appeal in Mr. Thomas's criminal case on March 6, 2008, holding that trial counsel's conduct was so outrageous that it fell "well-below professional standards" for purposes of the Sixth Amendment. The opinion is contained in Appendix F.

JURISDICTIONAL STATEMENT

This Petition is being filed within 150 days of the date on which the Fifth Circuit denied Mr. Thomas's petition for rehearing. This Petition therefore is timely. *See* Sup. Ct. R. 13.1 & 30.1; Sup. Ct. Order (Mar. 19, 2020) (extending deadline to file petition for writ of certiorari to 150 days

from date of order denying petition for rehearing). Mr. Thomas invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

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

U.S. Const. amend. VI.

STATEMENT OF THE CASE

I. Trial Counsel's Failure to Mount a Defense at Trial

Mr. Thomas stood accused by the State of Texas of one count of aggravated robbery. Represented by counsel, he went to trial. True enough, Mr. Thomas's trial counsel lodged some objections, cross-examined witnesses, and even filed some motions. But that "assistance" evaporated when, at the close of the guilt–innocence phase of the trial, trial counsel turned on his client and conceded Mr. Thomas's guilt as to the only charge at issue:

> I can assure you I am a long way from being naive. And I'm certainly not a green horn. And so, *as I viewed this evidence, it*

seems really strong to me that this young man is guilty, this person I'm representing is guilty. But before you can be warranted in finding him guilty, you have to believe what Elena Rodriguez says because you can't find him guilty based on what Mr. Collesano said, nor can you find him guilty on the lack of identification by Mr. McCullough [sic].

And we all know that Ms. Flores got like a four-second look, a side view, of this person that fired the shot into Mr. McCullough [sic]. So all I'm saying to you is I would like for you to look at it. *And the way this case stands today, the evidence is pretty persuasive.*

I have been doing this a very long time, more than 30 years, longer than some of you people have been alive. Like I said, I'm a practical person and I'm not going to stand up here and try to divert you from what you think is the right thing to do. All I ask you to do is consider all of this evidence and if you are convinced beyond a reasonable doubt this young man is guilty, then you are required to find him guilty.

And if you have a reasonable doubt, wherever it may come from in this evidence, you are required to have a reasonable doubt and say by your verdict not guilty however. Normally I could be up here for an hour in some cases, but there is not much to say because the case was short. *And like I said, I'm convinced that the evidence is pretty powerful. If I were to argue to you that there is a great room for doubt, you would probably think I'm a moron.* So, I have got to be honest about the way I feel and I have got to be honest with this young man I represent. *The way this case stands, there is a substantial amount of evidence saying he's guilty.*

I would like you to look at all of the evidence, take a look at it, dissect it a little bit. *If you reach a verdict that says he's guilty, that's the way it is.* I appreciate it. Thank you.

[App. F at 1–2 (emphasis added).] The jury followed trial counsel's guidance and convicted Mr. Thomas on the sole count in the indictment. [App. F at 2.]

At the sentencing phase, trial counsel squashed any notion that his earlier concession was part of a strategy to persuade the jury to impose a lighter sentence:

> Ladies and gentlemen, *I know you remember I practically consented to a guilty verdict in this case, because I thought the evidence was overwhelming based on the many years of experience of trying cases.* I can assure you I am not a magician. I cannot generate facts in cases when those facts are not available. I can only defend this case the best way that I can.
>
> *All of the evidence — and I would be a fool if I suggested otherwise, and I'm not — is compelling that this young man deserves a pretty substantial sentence. I'm not talking about of [sic] sentence of 15 years. All of the evidence is compelling.* A young man lost his life, destroyed his mother practically. And so, that has to be taken into consideration. I want you to do that. I could go over all his prior convictions, but I'm not going to do that. You are well aware of that. You are well aware of the facts in this case. I can assure you I'm a fairly wordy individual, but I know I can't deter you from the things you ought to do in this case. *And in this case, I'm convinced, based on all of the facts, he deserves a substantial sentence. That's just life. Part of life.*
>
> All I can do is ask you to consider all of the facts and come up with the sentence. *I certainly can't quarrel with you, whatever you do*. Thank you.

[App. F at 2 (emphasis added).] The jury obliged, imposing a 75-year prison sentence. [*Id.*]

II. The Texas Court of Criminal Appeals' Holding on Direct Appeal That Trial Counsel's Conduct Was "Outrageous" and Deficient Under the Sixth Amendment

In a rare consideration of an ineffective assistance of counsel claim on direct appeal, the Fourteenth Court of Appeals held that Mr. Thomas's trial counsel's closing arguments "amount[ed] to conduct *so outrageous* that no competent attorney would have engaged in it" and that "no plausible basis exist[ed] and *no strategic motivation could explain* why trial counsel fashioned his arguments as he did." [App. F at 4 (emphasis added).] Thus, the court held that the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984) — i.e., whether trial counsel provided deficient assistance — was satisfied here. The court denied relief, however, because Mr. Thomas's appellate counsel had waived arguments about the prejudicial effect of this conduct.

III. Mr. Thomas's Pursuit of Habeas Relief

A. State Court

Based on the same "outrageous" and inexplicable conduct, Mr. Thomas filed a *pro se* habeas petition in state court, asserting a Sixth Amendment ineffective assistance of counsel claim under *Strickland* and its companion, *Cronic*, 466 U.S. 648. Briefly, *Strickland* requires the familiar two-prong inquiry: First, was the defendant's counsel deficient? Second, was

the defendant prejudiced? But under *Cronic*, *prejudice is presumed* in three situations: (1) the complete denial of counsel at a critical stage; (2) if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) where counsel is called up to render assistance under circumstances where competent counsel very likely could not. *See Bell v. Cone*, 535 U.S. 685, 695–96 (2002). Mr. Thomas travels under the second *Cronic* situation.

The state district court denied Mr. Thomas's petition based on his *Strickland* claim but failed to address his *Cronic* claim. [App. E.] The Texas Court of Criminal Appeals adopted the state district court's findings and denied relief without a written order. [App. D.]

B. Federal District Court

Mr. Thomas then turned to the federal courts. He filed a federal habeas petition under 28 U.S.C. § 2254, asserting a *Cronic* claim, among others. The Southern District of Texas applied the deferential standards under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and denied relief. [App. C.] The district found that trial counsel "did not entirely fail to oppose the prosecution's case" but "actively defended Thomas throughout the trial by filing and vigorously arguing

motions to suppress and methodically and thoroughly exposing the weaknesses in the State's case through his cross-examination of the State's witnesses." [App. C at 12.]

C. Fifth Circuit

On appeal, Mr. Thomas was granted a certificate of appealability on his *Cronic* claim, and undersigned counsel was appointed to represent him at the Fifth Circuit. Mr. Thomas acknowledged that trial counsel filed motions and cross-examined witnesses but showed the court that all of that became meaningless — utterly meaningless — when the same attorney who defended Mr. Thomas through trial stood up at the end and said: "[T]his young man is guilty." Mr. Thomas urged the court to reverse because, in his closing and sentencing phase arguments, trial counsel had conceded the only factual issues in dispute. Such concessions, Mr. Thomas demonstrated, amounted to a *Cronic* failure to subject the prosecution's case to meaningful adversarial testing.

Exercising *de novo* review, the panel disagreed and affirmed the federal district court's rejection of Mr. Thomas's *Cronic* claim. [App. B.] The panel held that trial counsel simply made "strategic or tactical concessions" and "strategic decisions" in conducting himself in the closing and sentencing

phase arguments. [App. B at 5, 8 (quotation marks omitted).] The panel reasoned that trial counsel's conduct therefore was outside *Cronic*'s scope.

Mr. Thomas sought rehearing *en banc* on the basis that the panel opinion conflicted with *Cronic* and Fifth Circuit precedent — namely, *Haynes v. Cain*, in which the court had held that, "when analyzing an attorney's decision regarding concession of guilt at trial, courts have found a constructive denial of counsel only in those instances where a *defendant's attorney concedes the only factual issues in dispute*." 298 F.3d 375, 381 (5th Cir. 2002) (emphasis added). Mr. Thomas also pointed out that precedent in the Ninth Circuit and Tenth Circuit was in accord. *See United States v. Swanson*, 943 F.2d 1070, 1073 (9th Cir. 1991) ("A lawyer who informs a jury [in his closing argument] that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute has utterly failed to subject the prosecution's case to meaningful adversarial testing."); *Osborn v. Shillinger*, 861 F.2d 612, 625 (10th Cir. 1988) ("[A]n attorney who adopts and acts upon a belief that his client should be convicted 'fail[s] to function in any meaningful sense as the Government's adversary.'" (quoting *Cronic*, 466 U.S. at 666)).

The court voted against rehearing by a vote of eleven to six. Judge Graves, joined by Judge Elrod, published a dissental, concluding that this is indeed a *Cronic* problem because of trial counsel's closing and sentencing phase arguments:

> [R]egardless of what counsel did earlier at trial, he conceded the only factual issues in dispute when he admitted Thomas' guilt during closing and, thus, abandoned any attempt to subject the prosecution's case to meaningful adversarial testing. . . . [C]ounsel conceded guilt during closing arguments. Thus, there was no opportunity for counsel to rectify his concession during some later portion of the proceedings.
>
> . . . .
>
> That complete abandonment of counsel falls squarely within *Cronic*. When there is a "breakdown of the adversarial process," prejudice is presumed. Cronic, 466 U.S. at 657–58. Counsel's explicit concession of guilt on the only offense and request for a substantial sentence as a result is a breakdown of the adversarial process.

[App. A at 7–8.]

Mr. Thomas, who was born in 1975, has a projected release date of September 26, 2077, according to the Texas Department of Criminal Justice website.

REASONS FOR GRANTING THE WRIT

Mr. Thomas was charged with one offense, and trial counsel conceded that he was guilty of that sole offense. Trial counsel then encouraged the jury

to impose a "substantial sentence," which resulted in a 75-year sentence — in the end, a life sentence for Mr. Thomas. His guilt or not and his punishment were the only ultimate things "in dispute," and trial counsel did not put up a fight on either front.

Yet the Fifth Circuit held that *Cronic* did not apply because trial counsel's conduct comprised "'strategic decisions'" that are outside *Cronic*'s scope. The rule created by the Fifth Circuit conflicts not only with *Cronic* but also with the Ninth Circuit's decision in *Swanson* and the Tenth Circuit's decision in *Osborn*. Review by this Court is necessary to maintain uniformity in federal courts' Sixth Amendment and *Cronic* jurisprudence.

I. *Cronic* Applies When Trial Counsel Concedes the Only Factual Issues in Dispute and Encourages the Jury to Convict the Defendant and Impose a Substantial Sentence

In Sixth Amendment ineffective assistance of counsel cases, the well-known *Strickland* standard requires the defendant to show:

A: deficient performance; *and*
B: prejudice to the accused.

Cronic, which this Court decided on the same day as *Strickland*, creates an exception for egregious cases, like this one. Under *Cronic*, a defendant must show:

> *A+*: deficient performance because trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, *in which case prejudice is presumed*.

See Bell, 535 U.S. at 695-96 ("A trial would be presumptively unfair . . . if 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'" (quoting *Cronic*, 466 U.S. at 659)). Such a failure is "so likely to prejudice the accused that the cost of litigating their effect in the particular case is unjustified." *Cronic*, 466 U.S. at 658. As Judge Graves aptly put it, in this case, "regardless of what counsel did earlier at trial, he conceded the only factual issues in dispute when he admitted Thomas' guilt during closing and, thus, *abandoned any attempt to subject the prosecution's case to meaningful adversarial testing*." [App. A at 7.]

The decisions of the Ninth and Tenth Circuits confirm that trial counsel who concedes the only factual issues in dispute effectively fail to subject the prosecution's case to meaningful adversarial testing. *Swanson* came out of the Ninth Circuit. In *Swanson*, a defendant was on trial for one count of bank robbery. During closing arguments, with language rather similar to that employed by Mr. Thomas's trial counsel here, the defendant's counsel "stated that the evidence against [the defendant] was overwhelming and that he was not going to insult the jurors' intelligence." *Swanson*, 943

F.2d at 1071. The Ninth Circuit thus held that this conduct established the constructive denial of counsel contemplated by *Cronic*:

> A lawyer who informs a jury [in his closing argument] that it is his view of the evidence that there is *no reasonable doubt regarding the only factual issues that are in dispute* has utterly *failed to subject the prosecution's case to meaningful adversarial testing*.

Id. at 1073 (emphasis added). Reversing the conviction, the Ninth Circuit did not mince words: "We strongly suspect that there will be a retrial in this matter. We do not anticipate that defense counsel's indefensible tactic will be repeated." *Id.* at 1076.

Osborn came out of the Tenth. There, after the defendant pleaded guilty, the sole issue at trial was the sentence in a death penalty case. 861 F.2d at 628. Analyzing the defendant's counsel's conduct at the sentencing phase, the Tenth Circuit explained as a matter of law that "an attorney who adopts and acts upon a belief that his client should be convicted 'fail[s] to function in any meaningful sense as the Government's adversary.'" 861 F.2d at 625 (quoting *Cronic*, 466 U.S. at 666). The Tenth Circuit then detailed this outrageous behavior, among other reprehensible deeds, demonstrated by the defendant's counsel:

> Counsel's arguments at the sentencing hearing stressed the brutality of the crimes and the difficulty his client had presented to him. At the beginning of the hearing, counsel referred to the

> difficulty of presenting mitigating circumstances when evidence against a client is overwhelming. In closing, counsel referred to the problems [the defendant's] behavior had created for counsel throughout the representation. *Counsel described the crimes as horrendous. He analogized his client and the co-defendants to "sharks feeding in the ocean in a frenzy; something that's just animal in all aspects.*"

Osborn, 861 F.2d at 628 (quotation marks omitted) (emphasis in original). Although the Tenth Circuit was unable to identify a particular "reason" for counsel's behavior, the court affirmed the district court's finding "that defense counsel turned against" the defendant. *Id.* at 629. The court then held that a "defense attorney who abandons his duty of loyalty to his client and effectively joins the state in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest" and that "[s]uch an attorney, like unwanted counsel, 'represents' the defendant only through a tenuous and unacceptable legal fiction." *Id.* After citing *Cronic*, the court concluded that the defendant "did not receive effective assistance of counsel" because the process by which he pleaded guilty and was sentenced to death was "not adversarial, and therefore was unreliable." *Id.*[2]

[2] In *Haynes*, the Fifth Circuit likewise had explained that "defense counsel must *entirely fail to subject the prosecution's case to meaningful adversarial testing* for the *Cronic* exception to apply." 298 F.3d at 381 (emphasis added). The court also noted that, "when analyzing an attorney's decision regarding concession of guilt at trial, courts have found a *constructive denial of counsel only in those instances where a defendant's attorney concedes the*

Thus, *Cronic* teaches that a defendant's counsel fails to subject the prosecution's case to meaningful adversarial testing when he or she concedes the only factual issues in dispute and effectively joins forces with the prosecution.

II. The Fifth Circuit's Decision Directly Conflicts With the Decisions of the Ninth and Tenth Circuits

Here, the Fifth Circuit held that *Cronic* did not apply even though trial counsel conceded the only factual issues in dispute. At bottom, Mr. Thomas was facing a single count of aggravated robbery at trial, and trial counsel conceded guilt to aggravated robbery during his closing arguments. There is no greater ultimate factual issue to concede than guilt.

In fact, during his closing arguments, trial counsel built up his own credibility:

- "I can assure you I am a long way from being naive. And I'm certainly not a green horn."
- "I have been doing this a very long time, more than 30 years . . . . Like I said, I'm a practical person . . . ."
- "Normally I could be up here for an hour in some cases, but there is not much to say because the case was short."

---

only factual issues in dispute." *Id.* (emphasis added). It is not the role of this Court to resolve an *intra*-circuit split, but *Haynes* adds weight to the inter-circuit split because it bolsters the reasoning of the Ninth and Tenth Circuits, which stands in contrast to the Fifth Circuit's reasoning in this case.

Only to turn around, after trying to earn the jurors' trust, and hammer Mr. Thomas:

- "And so, as I viewed this evidence, it seems really strong to me that this young man is guilty, this person I'm representing is guilty."
- "And the way this case stands today, the evidence is pretty persuasive."
- *"And like I said, I'm convinced that the evidence is pretty powerful. If I were to argue to you that there is a great room for doubt, you would probably think I'm a moron."*
- "The way this case stands, there is a substantial amount of evidence saying he's guilty."
- "If you reach a verdict that says he's guilty, that's the way it is."

He reiterated his concession at the sentencing phase: "I know you remember I practically consented to a guilty verdict in this case, because I thought the evidence was overwhelming based on the many years of experience of trying cases."

Then, continuing at the sentencing phase, trial counsel dispelled any suspicion that he might have conceded guilt to secure a favorable sentence:

- "All of the evidence — and I would be a fool if I suggested otherwise, and I'm not — is compelling that this young man deserves a pretty substantial sentence. I'm not talking about of [sic] sentence of 15 years."
- "I know I can't deter you from the things you ought to do in this case."

- "And in this case, I'm convinced, based on all of the facts, he deserves a substantial sentence. That's just life. Part of life."

So, having turned on Mr. Thomas on the guilt question, trial counsel compounded his betrayal by encouraging the jury to hand down a stiff sentence.[3]

As the Fourteenth Court of Appeals found, "[u]nder the circumstances of this case, no plausible basis exists and no strategic motivation could explain why trial counsel fashioned his arguments as he did." [App. F at 4.] Mr. Thomas's trial counsel conceded the only factual issues in dispute and effectively joined forces with the prosecution, but the Fifth Circuit nevertheless concluded that trial counsel did not fail to subject the prosecution's case to meaningful adversarial testing for purposes of *Cronic*. As a result, the Fifth Circuit's decision conflicts with the decisions of the Ninth and Tenth Circuits.

Granting certiorari in this case would allow this Court to clarify that *Cronic* applies when defense counsel concedes the only factual issues in dispute.

---

[3] The Fifth Circuit reasoned that trial counsel's sentencing "strategy paid off" because, while the State was seeking life, Mr. Thomas only received 75 years. [App. B at 7.] But Mr. Thomas was born in 1975 and has a projected release date of September 26, 2077. In reality, Mr. Thomas received what will amount to a life sentence. There was no "strategy," but even if trial counsel did have one, it did not pay off.

CONCLUSION

Mr. Thomas therefore asks this Court to grant a writ of certiorari on the question presented.

Submitted on March 18, 2021.

s/Charles W. Prueter
Charles W. Prueter
Counsel of Record
WALLER, LANSDEN, DORTCH & DAVIS, LLP
1901 Sixth Avenue North, Suite 1400
Birmingham, Alabama 35203
205.226.5735 office | 205.214.8787 fax
charles.prueter@wallerlaw.com