No. _____

IN THE
Supreme Court of the United States

DENNIS REAGLE,
Warden, Pendleton Correctional Facility,
Petitioner,

v.

RODERICK LEWIS
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

While *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requires an ineffective-assistance claimant to prove both deficient performance and prejudice, in *United States v. Cronic*, 466 U.S. 648, 658 (1984), the Court suggested that some "circumstances. . . are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." The Court has applied *Cronic* to presume prejudice only once—where counsel's withdrawal left the defendant "entirely without the assistance of counsel on appeal." *Penson v. Ohio*, 488 U.S. 75, 88 (1988).

Here, Roderick Lewis brought an ineffective-assistance claim directed at his counsel's failure at sentencing to say anything more than that Lewis would speak on his own behalf. An Indiana court rejected this claim, finding no prejudice and presuming none under *Cronic*. The Seventh Circuit concluded that the state court's no-prejudice determination was reasonable, but nevertheless concluded that the state court should have applied *Cronic* and granted habeas relief.

The question presented is:

Did the Seventh Circuit misapply 28 U.S.C. § 2254 in holding that the failure to apply *Cronic* violated "clearly established Federal law, as determined by the Supreme Court of the United States"?

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The State of Indiana, on behalf of Dennis Reagle, Warden of Pendleton Correctional Facility, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 3a–46a) is reported at *Lewis v. Zatecky*, 993 F.3d 994 (7th Cir. 2021). The Order of the United States Court of Appeals for the Seventh Circuit denying the State's petition for rehearing and rehearing en banc (App. 1a–2a) is not reported. The order of the United States District Court for the Southern District of Indiana denying Lewis's petition for a writ of habeas corpus and granting a certificate of appealability (App. 47a–54a) is not reported. The decision of the Indiana Court of Appeals upholding the denial of Lewis's petition for post-conviction relief (App. 55a–82a) is available at *Lewis v. State*, 116 N.E.3d 1144 (Ind. Ct. App. 2018). The decision of the Indiana Court of Appeals affirming Lewis's conviction (App. 83a–90a) is available at *Lewis v. State*, 973 N.E.2d 110 (Ind. Ct. App. 2012).

JURISDICTION

The Seventh Circuit panel entered judgment on April 13, 2021, App. 3a, and denied rehearing en banc on May 11, 2021, App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, provides in relevant part:

> (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.

INTRODUCTION

Strickland v. Washington, 466 U.S. 668 (1984), held that an ineffective-assistance claim requires showing that (1) counsel performed deficiently—*i.e.*, "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"—and (2) "the deficient performance prejudiced the defense." *Id.* at 687. *United States v. Cronic*—decided the same day as *Strickland*—explained that this standard "presume[s] that the lawyer is competent to provide the guiding hand that the defendant needs," and therefore places the burden "on the accused to demonstrate a constitutional violation." 466 U.S. 648, 658 (1984).

In *Cronic*, however, the Court suggested that some "circumstances . . . are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* It identified exactly three categories of such exceptional circumstances: (1) when "the accused is denied counsel at a critical stage of his trial"; (2) when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659–60.

In the split decision below, the Seventh Circuit found a fourth exception hidden in *Cronic*'s penumbras and faulted the state court for not finding it too. According to the majority, the state court should have recognized that, in addition to these three situations,

Cronic applies even where a defendant receives counsel throughout the proceeding (and thus is not "denied counsel" at any stage under exception 1) and whose counsel competently contests his guilt (and thus has not "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" under exception 2): *Cronic* applies, according to the majority, where counsel fails to provide meaningful adversarial testing at a critical *stage* of the trial, even if the *whole* trial does not lack for adversarial testing. *See* App. 17a–23a (finding *Cronic* applicable because sentencing is a "critical phase"); App. 45a (criticizing the majority for "craft[ing] a hybrid rule—combining *Cronic*'s first and second exceptions").

Because the state court did not discover this newfound "hybrid" exception, the Seventh Circuit concluded that its decision to apply *Strickland* instead of *Cronic* was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), and therefore not entitled to the deference ordinarily required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). App. 21a. The majority therefore applied de novo review, concluded that Lewis made out an ineffective-assistance claim under *Cronic*, and granted habeas relief (a new state sentencing hearing). App. 23a–24a.

As Judge Brennan explained in dissent, the majority's decision conflicts with this Court's precedents. App. 26a. It is contrary to the Court's cases applying AEDPA generally. *See, e.g.*, *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam); *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (per curiam); *Bell v.*

Cone, 535 U.S. 685, 694 (2002). And it conflicts with the Court's cases analyzing *Cronic* specifically. *See Woods*, 575 U.S. at 318; *Florida v. Nixon*, 543 U.S. 175, 189–90 (2004); *Cone*, 535 U.S. at 697–98. The Court has found *Cronic* applicable only once, App. 37a—in *Penson v. Ohio*, 488 U.S. 75, 88 (1988), where an attorney's withdrawal left the defendant "entirely without the assistance of counsel on appeal"—and has repeatedly reversed circuit courts for applying *Cronic* in novel circumstances on habeas review, *see Woods*, 575 U.S. at 319; *Van Patten*, 552 U.S. at 126; *Cone*, 535 U.S. at 697, 702. It should do the same here.

STATEMENT OF THE CASE

I. State Court Proceedings

When Roderick Lewis was 18 years old, he and two confederates robbed and murdered two teenagers in Fort Wayne, Indiana. App. 57a–59a. Lewis's counsel, an "experienced criminal defense attorney," represented him at trial and at sentencing. App. 59a. At sentencing, counsel's goal "was really one-fold." Post-Conviction Hr'g. Tr. 15; *see also* App. 61a–63a. He thought that, with two victims, Lewis "was starting out of the box with consecutive sentences of 55 years each." Post-Conviction Hr'g. Tr. 15; *see also* App. 62a. And despite his efforts, counsel "couldn't identify anything . . . that indicated a mitigator that [he] could argue with a straight face." Post-Conviction Hr'g. Tr. 15; *see also* App. 62a. He "felt that the only hope [Lewis] had was to make an expression of remorse." Post-Conviction Hr'g. Tr. 15–16. So counsel invited Lewis to make a statement: Lewis did so, but the court nevertheless sentenced him to the maximum 130 years. App. 59a–60a.

Lewis then took a direct appeal. His new appellate counsel chose not to challenge his sentence and presented only a sufficiency challenge to his conviction, which the Indiana Court of Appeals rejected. App. 82a, 84a.

Lewis then pursued state post-conviction proceedings, contending his counsel was ineffective at sentencing for failing to argue for concurrent sentences or to present mitigating evidence, including Lewis's age, difficult childhood, mental health struggles, and role as an accomplice. App. 56a, 69a–75a. In addition to arguing that his claim met *Strickland*'s prejudice prong, Lewis asked the state courts to presume prejudice under *Cronic*. App. 77a–78a. He contended "that his claim fits within the second exception identified in *Cronic* because counsel failed to subject the State's case to meaningful adversarial testing at the sentencing hearing." App. 78a.

The Indiana post-conviction trial court rejected Lewis's claim, and the Indiana Court of Appeals affirmed. App. 56a–57a. The Court of Appeals agreed that Lewis's counsel had performed deficiently at sentencing, App. 68a–69a, but was "not persuaded that Lewis's claim falls within one of the limited circumstances of extreme magnitude that justify a presumption of ineffectiveness under *Cronic*," App. 81a. Observing that this Court "has emphasized the narrowness of *Cronic*'s exceptions," App. 78a, and "has never applied the second exception to relieve a convicted defendant of the need to prove prejudice," App. 80a, the Court of Appeals concluded that "Lewis was required to establish prejudice under *Strickland*," App. 81a.

And applying *Strickland*, the Court of Appeals concluded that Lewis was not prejudiced by his counsel's performance because "there is not a reasonable probability that presentation of the omitted mitigating evidence would have affected Lewis's sentence." App. 77a. It observed "that this was a senseless and horrific crime, resulting in the death of two teenage boys"; that "Lewis, an active participant at all stages, seemed to be unfazed by his involvement in the killings"; and that "[f]or at least the next eight years, Lewis continued his criminal behavior and was convicted in both Arizona and Indiana of several felonies and misdemeanors." App. 77a. Considering these facts, it concluded "the meager weight of those [mitigators] simply could not withstand the overwhelming weight of the aggravating circumstances." App. 77a.

II. Federal Habeas Corpus Proceedings

Next, Lewis filed a federal habeas petition, which argued that the state court's refusal to presume prejudice under *Cronic* was contrary to clearly established federal law. App. 49a; *see* App. 50a (noting that Lewis did "not argue *Strickland* prejudice"). The district court denied Lewis's petition. "[B]ecause no Supreme Court decision has held that *Cronic* applies when counsel fails to subject the prosecution's case to meaningful adversarial testing at sentencing," the state court "did not unreasonably apply or issue a decision contrary to clearly established federal law," and thus Lewis could not "overcome 28 U.S.C. § 2254(d)(1)'s limitation on habeas relief." App. 53a.

A split panel of the Seventh Circuit reversed. The majority concluded that *Cronic*'s three presumed-prejudice exceptions are simply "illustrations," App.

16a, of the broader principle underlying "*Cronic*'s core holding"—"that a showing of prejudice is not necessary in 'situations in which counsel has entirely failed to function as the client's advocate,'" App. 17a (quoting *Florida v. Nixon*, 543 U.S. 175, 189 (2004)). The majority thus determined that the state court's decision to apply *Strickland* rather than *Cronic* was contrary to clearly established federal law: The performance of Lewis's counsel at sentencing amounted to "an announcement of abandonment," App. 22a, and *Cronic* must apply to "a lawyer's total abandonment of his client at the critical sentencing state [sic]," App. 23a. Notably, the majority reached this determination even though it expressly concluded that it "cannot say that the Indiana Court of Appeals was unreasonable when it found that Lewis had not been *prejudiced* by his attorney's substandard performance" under *Strickland*. App. 9a (emphasis in original).

Judge Brennan dissented: Because "[n]o Supreme Court case has held that silence at sentencing triggers *Cronic*," App. 46a, the state court's decision was "neither 'contrary to' nor an 'unreasonable application of' Supreme Court precedent concerning *Cronic*," App. 43a, and AEDPA accordingly bars Lewis's claim.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit misinterpreted *Cronic* and misapplied AEDPA. This Court should grant certiorari to clarify, yet again, that the exceptions to *Strickland*'s prejudice requirement and AEDPA's relitigation bar are narrow. In *Cronic*, the Court outlined just three circumstances where courts should presume that a counsel's deficient performance was prejudicial. This case involves none of them. Because the

Court has never applied *Cronic* in a case like this, the state court's decision could not be contrary to clearly established federal law. The Seventh Circuit's expansive reading and application of *Cronic* squarely conflicts with this Court's precedents—both its decisions applying *Cronic* specifically and its decisions applying AEDPA generally.

I. The Seventh Circuit Impermissibly Expanded *Cronic* to Grant Lewis Relief

This is a *Strickland* case, not a *Cronic* case. The difference between the two rules "is not of degree but of kind." *Bell v. Cone*, 535 U.S. 685, 697 (2002). *Strickland* applies when the "government is not responsible for, and hence not able to prevent, attorney errors." *Strickland v. Washington*, 466 U.S. 668, 693 (1984); *see also United States v. Cronic*, 466 U.S. 648, 666 n.41 (1984) ("Should respondent pursue claims based on specified errors made by counsel on remand, they should be evaluated under the standards enunciated in *Strickland*."). Because the "purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding," the Court has long held that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 691–92. Accordingly, under *Strickland*, a defendant must prove that his "counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688–89, 694.

Cronic, meanwhile, applies when "circumstances . . . are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S. at 658. In *Cronic*, the problem was caused not by attorney error but by the state court's refusal to postpone the criminal trial as long as defense counsel had requested: The trial court had "appointed a young lawyer with a real estate practice to represent respondent, but allowed him only 25 days for pretrial preparation, even though it had taken the Government over four and one-half years to investigate the case and it had reviewed thousands of documents during that investigation." *Id.* at 649. The question in *Cronic* was whether this circumstance justified presuming prejudice "without inquiry into counsel's actual performance at trial." *Id.* at 662.

In answering this question, the Court first acknowledged the general rule that "the burden rests on the accused to demonstrate a constitutional violation," including prejudice. *Id.* at 658. It then outlined three circumstances in which "[n]o specific showing of prejudice [is] required": (1) when "the accused is denied counsel at a critical stage of his trial"; (2) when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659–60. Applying this framework, the Court briefly observed that the first two exceptions plainly did not apply, *see id.* at 662, and determined the third

did not apply because the circumstances facing defense counsel were not sufficiently severe, *id.* at 663–66. Accordingly, the Court did not presume prejudice and remanded the case for application of *Strickland*. *Id.* at 666–67.

As in *Cronic* itself, the state court here was right to apply *Strickland* and refuse to presume prejudice. The third, impossible-circumstances exception obviously does not apply here; nor does the first exception, for it applies only when "the accused is *denied counsel* at a critical stage of his trial," *Cronic*, 466 U.S. at 659 (emphasis added). Because the State never denied Lewis counsel, this exception is not implicated. *See Cone*, 535 U.S. at 696 n.3 (noting that the first *Cronic* exception applies only to "criminal defendants who had actually or constructively been denied counsel by government action").

Accordingly, Lewis invoked only the second *Cronic* exception—where counsel fails to subject the case to meaningful adversarial testing—and the state court correctly deemed it inapplicable. App. 78a. As the Court reiterated in *Cone*, for the second *Cronic* exception to apply "the attorney's failure must be complete." 535 U.S. at 697. It applies only where "'counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.'" *Id.* (quoting *Cronic*, 466 U.S. at 659 (emphasis added by Court)). Here, Lewis's counsel competently represented him at trial, which means any failure on his part was not "complete" and thus that the second *Cronic* exception is inapplicable.

Indeed, it was precisely for this reason that the Court refused to presume prejudice in *Nixon*, even though counsel had "acknowledged Nixon's guilt and

urged the jury to focus on the penalty phase" in his opening statement and closing argument at the guilt phase of the criminal trial. *Florida v. Nixon*, 543 U.S. 175, 175, 182 (2004)). There the lower court had "first presumed deficient performance, then applied the presumption of prejudice that . . . *Cronic* . . . reserved for situations in which counsel has entirely failed to function as the client's advocate." *Id.* at 189. This Court reversed because the lower court "misunderstood *Cronic* and failed to attend to the realities of defending against a capital charge." *Id.* at 189–90 (citation omitted). The Court concluded that counsel "may reasonably decide to focus on the trial's penalty phase." *Id.* at 191. If counsel does, and his "strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." *Id.* at 192. Accordingly, *Nixon* shows that complete failure under *Cronic* means failure at *all* critical stages of a trial, not just one.

Lewis's case is thus effectively the inverse of *Nixon*: His counsel focused on guilt rather than sentencing. Counsel could not convince Lewis to plead guilty, which he believed was Lewis's best option. Post-Conviction Hr'g. Tr. 17–18; App. 59a, 61a–63a. Counsel also thought that Lewis's insistence on a jury trial "would have taken off the table the opportunity to argue acceptance of responsibility." Post-Conviction Hr'g. Tr. 15; *see also* App. 61a. So, by having to defend Lewis's innocence, counsel had to sacrifice one of the only two sentencing arguments that he believed were available. As in *Nixon*, counsel did not completely fail to test the prosecution's case.

Regardless whether Lewis's counsel had the best reading of the situation, this Court has repeatedly held that attorney errors—even extremely serious errors—cannot themselves justify *Cronic*'s presumption of prejudice. In *Cone*, for example, the Court refused to presume prejudice because "the failure to adduce mitigating evidence and the waiver of closing argument . . . are plainly of the same ilk as other specific attorney errors [the Court has] held subject to *Strickland*'s performance and prejudice components." 535 U.S. at 697–98. The errors Lewis alleges—failure to present mitigating evidence and recommend concurrent sentences, App. 69a–74a—are of the same type. It was not too difficult to measure the effect of these alleged deficiencies. *See Strickland*, 466 U.S. at 692. Indeed, the state court did so and held that Lewis was not prejudiced. App. 8a–9a, 77a. Lewis did not challenge this determination on habeas review, App. 50a, and even the Seventh Circuit majority conceded that this determination was not unreasonable, App. 9a.

Cronic does not require state courts to presume prejudice in cases that fall outside the three scenarios it mentioned; much less does it require state courts to "presume" prejudice after reasonably concluding that no prejudice in fact exists.

II. The Seventh Circuit Disregarded AEDPA to Grant Lewis Relief

AEDPA makes this a remarkably straightforward case. A federal court cannot grant habeas relief on a claim rejected by a state court unless the state court's decision is "contrary to," or "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). A state-court decision meets this demanding requirement only if "the state court applies a rule different from the governing law set forth in [the Court's] cases" or "decides a case differently than [the Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). Further, "clearly established" federal law "'includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions.'" *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam) (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)). Unless the Court has "confront[ed] 'the specific question presented by this case,'" then "the state court's decision could not be 'contrary to' any holding from [the] Court." *Id.* at 317 (quoting *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam)).

Here, the Seventh Circuit should have answered this simple question: Has the Supreme Court "held that silence at sentencing by defense counsel triggers *Cronic*"? App. 46a. The answer is no. This Court has never applied *Cronic* when counsel decided to rely on his client's sentencing statement because he believed that the only available mitigating factor was remorse; indeed, the Court has never applied *Cronic* to any situation where counsel was present at sentencing.

The Seventh Circuit did not cite a single case that compelled the state court to apply *Cronic* instead of *Strickland*. Like the Sixth Circuit in *Woods v. Donald*, the Seventh Circuit read *Cronic* "at too high a level of generality," *Woods*, 575 U.S. at 318 (citing *Lopez*, 574 U.S. at 5–6), and failed to "identify[] any decision from this Court directly in point," *id.* at 315. There the

Sixth Circuit had cited decisions it considered sufficiently similar, this Court explained that "if the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings in those cases." *Id.* at 317. And as Judge Brennan pointed out below, "the Sixth Circuit in *Woods* at least had affirmative case law to rely on. None of the decisions cited in the majority opinion granted relief under *Cronic*." App. 43a.

"All that matters here, and all that should have mattered to the [Seventh Circuit], is that [this Court has] not held that *Cronic* applies to the circumstances presented in this case." *Woods*, 575 U.S. at 319. The state court's conclusion that *Cronic* does not apply here was correct on the merits; it was certainly not foreclosed by an on-point decision of this Court. And for "that reason, federal habeas relief based upon *Cronic* is unavailable" here. *Id.* The Seventh Circuit contravened this Court's precedents in concluding otherwise.

CONCLUSION

The Court should grant the petition and summarily affirm the district court's judgment.

Respectfully submitted,

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Dated: October 8, 2021