APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 20-1642

RODERICK V. LEWIS,

Petitioner-Appellant,

v.

DENNIS REAGLE, Warden,
Pendleton Correctional Facility,

Respondent-Appellee.

May 11, 2021

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 1:19-cv-01515-RLY-MPB
RICHARD L. YOUNG, *Judge*.

ORDER

Before

DIANE S. SYKES, *Circuit Judge*
DIANE P. WOOD, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*

Respondent-appellee filed a petition for rehearing and rehearing *en banc* on April 26, 2021. No judge in regular active service has requested a vote on the

petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing *en banc* is therefore DENIED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-1642

RODERICK V. LEWIS,

Petitioner-Appellant,

v.

DUSHAN ZATECKY,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 1:19-cv-01515-RLY-MPB
RICHARD L. YOUNG, *Judge*.

Argued September 30, 2020 –
Decided April 13, 2021

Before SYKES, *Chief Judge*, and WOOD and BRENNAN, *Circuit Judges*.

WOOD, *Circuit Judge*. When has a client charged with a serious crime received not merely inadequate assistance of counsel, but a failure of representation so serious that "counsel has entirely failed to function as the client's advocate"? *Florida v. Nixon*, 543 U.S. 175, 189 (2004). This is the situation the Supreme Court first addressed in *United States v. Cronic*, 466 U.S.

648 (1984). Although such a total breakdown is rare, the Court has never wavered from the recognition that it can occur. In such cases, unlike those presenting more conventional ineffective-assistance claims, the defendant does not need to make an independent showing of prejudice. See *Strickland v. Washington*, 466 U.S. 668 (1984). The failing is so profound that prejudice is inherent in the situation.

In the case before us, Roderick Lewis argues that his is one of the extraordinary cases to which the *Cronic* rule applies. Standing convicted of felony murder, he received literally no assistance from his lawyer during the sentencing stage of the trial. After proceedings in the state courts, which we detail below, he turned to federal court and filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied relief, but it issued a certificate of appealability to Lewis. We conclude that the decision of the last responsible state court was contrary to Supreme Court precedent, insofar as it held that *Strickland*, not *Cronic*, furnished the applicable rule, and it was an unreasonable application of *Cronic*, insofar as it focused on that case.[1] We thus reverse and remand for issuance of the writ, limited to sentencing.

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[1] In order to be fair to the state court, we consider its decision under each of the two distinct branches of section 2254(d)(1), as courts commonly do. See, *e.g.*, *Aki-Khuam v. Davis*, 339 F.3d 521, 529 (7th Cir. 2003) (". . . it is clear that the state trial court proceedings, and the state supreme court review thereof, resulted in a decision contrary to, and involving an unreasonable application of, federal law as determined by the United States Supreme Court[.]"); *Bailey v. Rae*, 339 F.3d 1107, 1118–19 (9th Cir. 2003) (state court's application of a standard "is 'contrary to' clear Supreme Court precedent[] [and] [t]he state court's denial of the *Brady* claim was also objectively 'unreasonable'[.]"); *Pazden v. Maurer*, 424 F.3d 303, 306 (3d Cir. 2005) (the state court's deter-

I

A

We take our account of the underlying facts from the second opinion of the Court of Appeals of Indiana, the last state court to consider this case. See *Lewis v. State* (*Lewis II*), 116 N.E.3d 1144 (Ind. Ct. App. 2018). That court in turn relied on the facts it had reported on direct appeal, see *Lewis v. State* (*Lewis I*), 973 N.E.2d 110 (Table), (Ind. Ct. App. 2012), but we can largely disregard that detail.

The case involved a toxic mixture: drugs, robbery plans, guns, and immaturity. Richard Rogers, then 16 years old, ran a drug house in Fort Wayne, Indiana, with Sidney Wilson, 14 years old. On June 29, 1999, Rogers invited Christopher Hale to visit the drug house, but Hale declined because of tensions with Wilson. Later that evening, Hale, petitioner Roderick Lewis, and Kajuanta Mays came up with a plan to

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mination "was both contrary to, and an unreasonable application of, clearly established law as proclaimed by the Supreme Court."); *Fratta v. Quarterman*, 536 F.3d 485, 502–03 (5th Cir. 2008) ("The district court was thus correct in determining that the CCA's decision was contrary to, and involved an unreasonable application of, clearly established federal law."); *Breakiron v. Horn*, 642 F.3d 126, 139 (3d Cir. 2011) (the state court's ruling "is both contrary to and an unreasonable application of *Strickland*."); *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 285 (3d Cir. 2016) ("We conclude . . . that the [state court]'s decision . . . rested on . . . unreasonable applications of clearly established law, or were contrary to United States Supreme Court precedent."); *Rivera v. Thompson*, 879 F.3d 7, 16–17 (1st Cir. 2018) ("[W]e conclude that . . . the [state court]'s holding was contrary to governing Supreme Court law[.] . . . Thus, the [state court]'s conclusion 'involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States.'").

rob Rogers and Wilson of both drugs and money. They first confirmed that Rogers and Wilson were alone by sending Angela Lawson to the house to buy drugs. Hale then showed up, followed by Lewis and Mays. The group smoked and drank together. Two of them were armed: Lewis had a .38 special revolver, and Hale had a 9 mm firearm.

At one point Hale went upstairs. When he returned, he said "die bitch" and shot Wilson five times, killing him. Rogers and Lewis then each reached for a shotgun. Hale told Lewis to kill Rogers, but Lewis refused, instead handing his revolver to Mays and saying, "if you want it . . . you do it." Mays did not hesitate: he shot Rogers multiple times, fatally. Lewis, Hale, and Mays then collected the drugs and money and fled. They wound up in a hotel where they laughed and partied through the night. Later, Lewis had his uncle bury the murder weapon.

For the next few years, the crime remained unsolved and Lewis traveled around the country, living in Arizona and Indiana. Ultimately, however, investigators in Fort Wayne identified him as a suspect in the 1999 murders. They found him in a prison in May 2009 and interviewed him; on February 25, 2011, the State of Indiana charged him with two counts of felony murder and two counts of robbery. He was arrested on June 27, 2011.

B

At trial, Lewis was represented by Attorney Jeffrey Raff. Raff tried to get Lewis seriously to consider some plea offers, but Lewis was uninterested, perhaps because he did not understand the concept of felony murder and thought that, because he did not shoot either Wilson or Rogers, he was not guilty. If that was

his impression, he was mistaken. The jury found Lewis guilty as charged.

The problems that bring Lewis before us today arose at the sentencing phase. Here is how the Indiana Court of Appeals described Raff's assistance to Lewis at that critical point:

> "Judge I'm going to defer to Mr. Lewis if he has any comments. I don't have anything to add." *Sentencing Transcript* at 23–24. This is the sum total of trial counsel's participation at Lewis's sentencing hearing, at which Lewis was being sentenced for two counts of felony murder and faced a maximum sentence of 130 years in prison. The trial court found no mitigating circumstances—none being asserted by the defense—and sentenced Lewis to the maximum aggregate sentence of 130 years in prison.

Lewis II, ¶ 1. Represented by new counsel, Lewis took a direct appeal, but it was unsuccessful. See *Lewis I*. Acting pro se, Lewis then filed a post-conviction petition in the state court in 2013. Post-conviction counsel amended that petition in October 2016, and the court held an evidentiary hearing on July 7, 2017.

Lewis called Attorney Raff, among others, to testify at that hearing. The state conceded that Raff "basically did not do any advocacy at the sentencing hearing" but argued that he could not have made a difference anyway. Raff himself testified about his normal procedures for preparing for a sentencing hearing. He also described quite a few things that he did *not* do:

> He made no inquiries about Petitioner's mental health history, and was not aware

> that Petitioner had attempted suicide at the Allen County Jail . . . . He did not ask Petitioner about his upbringing or his family members, did not speak to his relatives or friends, and did not have him examined by a mental health professional. He did not prepare Petitioner to make a statement at sentencing, and explained that Petitioner did not take his advice well.

Lewis II, ¶ 16, quoting from the post-conviction court's findings of fact. Essentially Raff thought that Lewis was a hopeless cause, and so there was nothing useful Raff could do. Other witnesses at the post-conviction hearing spoke about evidence that might have had an impact at sentencing, including a psychologist who diagnosed Lewis with bipolar II disorder and discussed his associated substance-abuse problem, physical abuse by his mother's boyfriends, mental disorders in other family members, and his attempted suicide. None of this, it bears repeating, was brought out during the sentencing stage of the trial.

On state post-conviction review, the state appellate court "agree[d] with Lewis that trial counsel's performance at sentencing was clearly deficient." *Lewis II*, ¶¶ 4, 20. Nevertheless, the court held that "our review leaves us with the firm conviction that Lewis was not prejudiced by counsel's deficient performance." *Id.* ¶ 20. It reviewed the following potential mitigating circumstances: Lewis's role as an accomplice; his age; his difficult childhood; and his mental health. None of these could have supported a finding of prejudice, in the court's view, nor was it troubled by his consecutive sentences.

Finally, the court turned to the issue that has survived to reach us: whether the proper standard

for assessing Lewis's case comes from *Cronic*, as Lewis argues, or *Strickland*. If it is *Strickland*, then Lewis's case is over: we 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. (We add that we are not necessarily saying that we would have resolved the prejudice issue the same way. We mean only that we are satisfied that the state court acted within the generous boundaries delineated for it by 28 U.S.C. § 2254(d)(1).) If *Cronic* applies, however, then matters are quite different, because prejudice need not be shown. But the state court found that Lewis's case did not fit within the *Cronic* framework. *Lewis II*, ¶ 39. Its finding of no prejudice for *Strickland* purposes required it to affirm the trial court's denial of post-conviction relief.

After exhausting his state-court remedies, Lewis filed a petition under 28 U.S.C. § 2254 in the federal court. The district court acknowledged that in *Miller v. Martin*, 481 F.3d 468 (7th Cir. 2007), this court had found that the Indiana court had unreasonably failed to apply *Cronic* to an attorney's performance at sentencing, and thus that petitioner Miller was entitled to the issuance of a writ of habeas corpus. *Id.* at 470. But, the court thought, *Miller* had been undermined by two decisions of the U.S. Supreme Court: *Wright v. Van Patten*, 552 U.S. 120 (2008), and *Woods v. Donald*, 575 U.S. 312 (2015). It characterized what happened in Lewis's case as counsel's complete failure to subject the prosecution's case to adversarial testing, and it then concluded that no Supreme Court decision squarely addressed that situation. It thus concluded that the criteria for the issuance of a writ were not met. But the court also recognized that "[r]easonable jurists could disagree about whether

Cronic clearly establishes an exception to *Strickland*'s prejudice requirement" on these facts, and so it issued a certificate of appealability to Lewis limited to this issue.

II

We begin with a review of the Supreme Court's *Cronic* decision and how it fits within the broader context of ineffective-assistance-of-counsel cases. For purposes of section 2254(d), the only relevant law is that which is "clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). Our own decisions, as well as those of other circuits or state courts, are informative only insofar as they may shed light on our understanding of the authoritative Supreme Court precedents.

1. *Cronic*

The underlying facts of *Cronic* involved a common check-kiting scheme, in which defendant Cronic and his co-defendants relayed checks back and forth between two bank accounts (one in Tampa, Florida, and the other in Norman, Oklahoma) in order to create falsely inflated balances in each one. They ran almost $4.8 million through the Tampa bank and $4.6 million through the Norman bank. They ultimately were caught and indicted on federal mail-fraud charges.

Cronic was initially represented by one lawyer, but shortly before trial, that lawyer withdrew from the case. In his place, "[t]he court appointed a young lawyer with a real estate practice" to represent Cronic. It allowed the substitute lawyer only 25 days to prepare for trial, even though the government had been working for over four and a half years on the case and "had reviewed thousands of documents." 466 U.S. at

649. Cronic's co-defendants agreed to testify for the government.

Despite these disadvantages, Cronic's lawyer managed to do a few things. He was able to establish some points favorable to Cronic on cross-examination. He did not, however, put on any defense. In the end, Cronic was convicted on most counts of the indictment and sentenced to 25 years' imprisonment. His trial lawyer filed a timely appeal for him, although two months later Cronic filed a motion asking that a new lawyer be appointed for the appeal.

The court of appeals obliged him, though it declined to appoint the lawyer Cronic had requested. It reversed Cronic's conviction on the basis of several factors: the limited time for investigation and preparation, counsel's lack of experience, the gravity of the charge, the complexity of possible defenses, and counsel's access to witnesses. The Supreme Court reversed. *Id.* at 667.

The Court began its analysis by reiterating the critical role that counsel plays in the criminal justice system and the consequent need to assure counsel's competence:

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.

Id. at 656. It then reaffirmed the general rule, under which "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Id.* at 658.

That said, the Court then spelled out some "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* It singled out the following examples:

- The complete absence of counsel at a critical stage of the trial. *Id.* at 659.
- Counsel's total failure to subject the prosecution's case to meaningful adversarial testing. *Id.*
- Other circumstances under which, "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.

The Court concluded that Cronic had not suffered from an extreme deprivation along the lines of its examples, and so he could prevail only if he could identify specific errors that trial counsel made. *Id.* at 666. That issue, the Court held, could be explored on remand.

In the years since it was decided, *Cronic* has made few appearances in Supreme Court opinions. The district court identified two of those in its effort to distinguish our decision in *Miller*, 481 F.3d 468: *Wright v. Van Patten*, 552 U.S. 120 (2008), and *Woods v. Donald*, 575 U.S. 312 (2015). But neither case offers help in answering the question we face. *Wright v. Van Patten* concerned whether it was clearly established that a defense counsel's appearance at a plea hearing by speakerphone was the equivalent of a complete denial of counsel. The Court ruled that *Cronic* did not go that far. 552 U.S. at 125. Indeed, recent experience

has shown that remote presence is a relatively good substitute for a great many things. The problem for Lewis was not, as in *Van Patten*, that his lawyer's assistance was occurring via telephone or Zoom; it is that his attorney did absolutely nothing for him regardless of format. The Court similarly declined to apply *Cronic* in *Woods v. Donald*, a situation in which defense counsel was briefly absent from his client's joint criminal trial and missed the beginning of a government witness's testimony about codefendants' actions. 575 U.S. at 317–19. Lewis does not allege that his attorney was *physically* absent at any relevant time. Neither *Van Patten* nor *Woods* thus advances the analysis here.

Cronic is far from a dead letter in the Supreme Court. To the contrary, as recently as October Term 2018, in *Garza v. Idaho*, 139 S. Ct. 738 (2019), the Court reaffirmed *Cronic*'s holding. *Garza* was a case in which an attorney in a criminal case failed to file a notice of appeal for a defendant, despite the fact that the defendant asked the attorney to do so. Normally, under those circumstances prejudice is presumed, regardless of how likely an appeal would be to change the result. See *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). But Garza had signed two plea agreements in which he waived his right to appeal. 139 S. Ct. at 742.

Based on those waivers, counsel informed Garza that he was not going to initiate an appeal. Garza sought post-conviction relief in Idaho's state courts, but they ruled that he needed to show both deficient performance and prejudice, and that he had not done so. The Supreme Court reversed.

It began by reiterating that "in certain Sixth Amendment contexts, . . . prejudice is presumed." *Id.* at 744 (quotations omitted). It elaborated as follows:

> For example, no showing of prejudice is necessary if the accused is denied counsel at a critical stage of his trial, *United States v. Cronic*, 466 U.S. 648, 659 (1984), or left entirely without the assistance of counsel on appeal, *Penson v. Ohio*, 488 U.S. 75, 88 (1988). Similarly, prejudice is presumed if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. *Cronic*, 466 U.S. at 659. And, most relevant here, prejudice is presumed when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken. *Flores-Ortega*, 528 U.S. at 484. We hold today that this final presumption applies even when the defendant has signed an appeal waiver.

139 S. Ct. at 744 (cleaned up). With respect to the case before it, the Court underscored that appeal waivers do not inevitably block all further recourse: some matters might fall outside the scope of a waiver, the prosecution might forfeit the benefit of a waiver, or the waiver might be unenforceable on the ground that it was unknowing or involuntary. *Id.* at 744–45. It therefore found that the presumption of prejudice recognized in *Flores-Ortega* applied to Garza's case and remanded for further proceedings.

Years earlier, the Court had also discussed the *Cronic* rule, albeit in the context of a proceeding in which it found that the rule did not apply. The case was *Nixon*, *supra*, 543 U.S. 175 (2004), a capital case that came to the Supreme Court after the Florida Supreme Court resolved the defendant's state post-conviction petition. Before trial, counsel informed his client, Nixon, that he intended to concede guilt at

the outset of the trial, in the hope that this would persuade the jury not to recommend death during the penalty phase. *Id.* at 178. Nixon did not respond one way or the other to this statement, and so counsel followed his planned strategy.

The Florida Supreme Court found that counsel's decision effectively to concede guilt without having Nixon's express consent to do so amounted to constitutionally ineffective performance, and that such a concession of guilt triggered the *Cronic* presumption of prejudice. *Id.* at 188–89. The Supreme Court held that the state court erred in both respects. At least in a case such as Nixon's, where counsel fully informed the client of his proposed trial strategy and the client raised no objection, counsel was entitled to proceed as planned. Moreover, in a passage that is relevant to our case, it found that this was not an occasion for presumed prejudice:

> *Cronic* recognized a narrow exception to S*trickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense. *Cronic* instructed that a presumption of prejudice would be in order in circumstances that 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. The Court elaborated: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.*, at 659; see *Bell v. Cone*, 535

> U.S. 685, 696–697 (2002) (for *Cronic*'s presumed prejudice standard to apply, counsel's failure must be complete). We illustrated just how infrequently the surrounding circumstances [will] justify a presumption of ineffectiveness in *Cronic* itself. In that case, we reversed a Court of Appeals ruling that ranked as prejudicially inadequate the performance of an inexperienced, underprepared attorney in a complex mail fraud trial. 466 U.S., at 662, 666.

543 U.S. at 190 (cleaned up). See also *Kansas v. Ventris*, 556 U.S. 586, 591 (2009) (citing *Cronic* for the proposition that the right to counsel "ensur[es] that the prosecution's case is subjected to 'the crucible of meaningful adversary testing'").

Although it is possible, as the Supreme Court itself did in *Cronic* and as the district court here did, to identify particular circumstances in which the *Cronic* rule will apply, we must take the Court at its word when it says that it is simply offering illustrations of the rule announced by the Court. We have cautioned before that "[j]udicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 462 (1978)). More to the point, the Supreme Court itself has expressly stated that section 2254(d)(1) does not demand a clone in prior law. *Williams v. Taylor*, 529 U.S. 362, 407–09 (2000). As the Court has put this point, section 2254(d)(1) does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied" nor does it "prohibit a federal court from

finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (cleaned up). Instead, "state courts must reasonably apply the rules squarely established by [the Supreme Court]'s holdings to the facts of each case." *White v. Woodall*, 572 U.S. 415, 427 (2014). As applied here, that means that we must pay heed to *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." *Nixon*, 543 U.S. at 189. Implicit in this formulation is the need to show that this extreme failure occurred during a critical stage of the proceedings. Lewis has done just that.

2. Critical Stage

Before proceeding to apply these principles to Lewis's case, we confirm that the Supreme Court has emphasized for years the "critical nature of sentencing in a criminal case[.]" See *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). The Court reconfirmed that the Sixth Amendment right to counsel exists during the sentencing phase in *Lafler v. Cooper*, 566 U.S. 156 (2012):

> The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see *Glover v. United States*, 531 U.S. 198, 203–204 (2001); *Mempa v. Rhay*, 389 U.S. 128 (1967), and capital cases, see *Wiggins v. Smith*, 539 U.S. 510, 538 (2003). Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because "any amount of [additional] jail time

> has Sixth Amendment significance." *Glover*, *supra*, at 203.

566 U.S. at 165. This passage relates only to the question whether the Sixth Amendment applies at all to proceedings before and after trial; it does not address the distinction between a *Strickland* claim and a *Cronic* claim; hence, the reference to prejudice is of no moment.

To the extent a court of appeals decision is relevant, we think it helpful to explain why our en banc decision in *Schmidt v. Foster*, 911 F.3d 469 (7th Cir. 2018), has no bearing on whether the sentencing phase in Lewis's case was a "critical phase" for Sixth Amendment purposes. In *Schmidt*, before defendant Schmidt's trial on first-degree intentional homicide charges began, the trial court had to make a decision about whether to admit evidence relating to a defense of adequate provocation. It decided to hold an *ex parte*, *in camera* examination of Schmidt to help it assess whether he could pursue this defense. Schmidt's lawyer was present for that examination, but the court admonished counsel not to say anything, and the lawyer complied. The trial court ultimately decided to disallow the defense; Schmidt was convicted; and after proceedings that need not detain us, he argued in a petition under section 2254 that he had suffered a complete deprivation of counsel at a critical phase and thus was entitled to relief under *Cronic*.

Bearing in mind the highly deferential approach to state-court rulings that section 2254(d) requires, the en banc court rejected Schmidt's argument. After canvassing the relevant cases, the court first held that the Supreme Court had never had the occasion to consider the unusual circumstances that Schmidt's case presented: a deprivation of counsel during a *pre-*

trial, *in camera*, *examination* that related to the admissibility of evidence. 911 F.3d at 480. Moreover, the en banc court viewed the course of events through a broader lens than Schmidt had urged. That broader perspective showed that counsel was able to help Schmidt in several ways with respect to the proposed evidence: he filed a notice of the provocation defense, he argued for its application in court hearings, he briefed the law, he submitted a detailed offer of proof, and he gave the court a witness list. The fact that counsel was barred from offering assistance during the *in camera* hearing, the court said, did not render the rest of counsel's assistance meaningless. Or at least, the court held, the state courts were entitled to view the case this way, and that was enough to require denial of the writ.

In our case, unlike *Schmidt*, the Supreme Court has spoken specifically to the question whether the phase in question—sentencing—is a "critical" one. As we noted earlier, the answer is an unambiguous yes. And as we will see below, the other distinction between Lewis's case and Schmidt's is the degree of help that counsel offered—significant for Schmidt, nonexistent for Lewis.

III

We do not need to decide for ourselves whether trial counsel's performance at sentencing was deficient. We have only to defer to the finding of the Indiana Court of Appeals in *Lewis II*, to which we referred at the outset of this opinion. That court described counsel's performance as "clearly deficient," and we agree with that assessment. Where we part company is with *Lewis II*'s approach to *Cronic*. The court began by reviewing the three situations that *Cronic* itself had mentioned and that we noted earlier:

(1) a complete denial of counsel at a critical stage of trial; (2) the entire failure to subject the prosecution's case to meaningful adversarial testing; and (3) a situation in which counsel is called upon to render assistance under circumstances where even competent counsel could not do so. *Lewis II*, ¶ 38. In the state court, Lewis stressed the second of those three considerations, but the court did not confine its analysis to that situation. Rightly so, we think—as we noted earlier, judicial opinions are not statutes and should not be treated in such a rigid way.

But nothing turns on whether we see *Cronic* as establishing three exclusive categories, or as stating a principle and offering three illustrations. In the end, the state court simply noted (accurately) that the *Cronic* exception is a narrow one, rarely applied by the Supreme Court. Without another word, it then turned to *Strickland*, which it read as confining presumed prejudice in various ways. 466 U.S. at 692–93. It did not explain why, in the case before it, Lewis had not suffered exactly the fate the *Strickland* Court had mentioned: the actual or constructive *absolute* denial of the assistance of counsel (*Cronic* category one). Naturally, someone whose lawyer has left him in the lurch that way will also fail to subject the prosecutor's case to meaningful adversarial testing (*Cronic* category two). In cases such as Lewis's, there is thus no operative difference between the first and the second of *Cronic*'s examples.

The closest the state court came to supporting its conclusion that *Cronic* does not apply to Lewis's case is in the following passage:

> Moreover, since *Cronic* was decided in 1984, the U.S. Supreme Court has never applied the second exception [*i.e.* lack of

> adversarial testing] to relieve a convicted defendant of the need to prove prejudice, nor has the Indiana Supreme Court. In *Bell* [*v. Cone*, 535 U.S. 685 (2002)], the Court simply spoke of "the *possibility* of presuming prejudice based on an attorney's failure to test the prosecutor's case" where the attorney's failure is complete. *Bell*, 535 U.S. at 696–97 (emphasis supplied). Ultimately, the Court concluded in *Bell*: "The aspects of counsel's performance challenged by respondent—the failure to adduce mitigating evidence and the waiver of closing argument—are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components." *Id.* at 697–98.
>
> We are not persuaded that Lewis's claim falls within one of the limited circumstances of extreme magnitude that justify a presumption of ineffectiveness under *Cronic*. The post-conviction court, therefore, correctly determined that Lewis was required to establish prejudice under *Strickland*.

Lewis II at ¶¶ 42, 43.

Entirely missing from the state court's brief discussion is an acknowledgment of the day-and-night difference between the assistance that Cone received during the sentencing phase of his case and that which Lewis got. Cone, in a word, had plenty of help. The sentencing hearing was a separate part of Cone's trial. The state opened by telling the jury that it planned to prove four aggravating factors that would justify the death penalty. Defense counsel responded in his own opening statement by calling to the jury's attention

"the mitigating evidence already before them", and by suggesting that Cone "was under the influence of extreme mental disturbance or duress, that he was an addict whose drug and other problems stemmed from the stress of his military service, and that he felt remorse." 535 U.S. at 691. Counsel also urged the jury to be merciful. Already, we note, Cone received far more than Lewis did. But that was just the start for Cone—there was much more. His lawyer cross-examined the state's witnesses and objected to the introduction of gory photographs. He chose to waive final argument because this prevented the state from arguing in rebuttal. It is hardly a surprise that the Supreme Court did not regard Cone's lawyer's performance as either the equivalent of a total lack of counsel, or the "entire" failure to subject the prosecutions' case to meaningful adversarial testing. It was neither.

Let's take another look at Attorney Raff's "assistance" during the *entire* sentencing phase. In essence, it was nothing but a statement that he was bowing out. He uttered two short sentences: "Judge, I'm going to defer to Mr. Lewis if he has any comments. I don't have anything to add." This went beyond a failure to conduct adversarial testing; it was an announcement of abandonment. The state suggests that Raff did have a strategy, and that was to allow Lewis to speak for himself in the hope that he *might* express remorse. This has the flaw of having no support in the record. Raff never communicated any such strategy to Lewis, and so Lewis had no guidance from counsel about what he might do with his allocution when he had the chance to speak. This theory also conflicts with Raff's testimony at the post-conviction hearing. He never said that he was trying to guide Lewis in this way. Instead, he said that he thought that there were no

mitigating factors in Lewis's case. Actually, he had no idea one way or the other, because he never asked Lewis about his mental-health history and he never requested Lewis's medical records. He did not try to prepare Lewis for the hearing because he found Lewis "difficult" and "angry." It is of no moment that four jurists (whom we presume were acting in good faith) disagreed with *Cronic*'s application. The question is an objective one and does not rest "on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did . . . ." *Williams*, 529 U.S. at 409–10.

Contrary to the dissent's assertions, our opinion in no way conflicts with the holdings in *Woods v. Donald*, *Cone*, or *Nixon*. None of these cases involved the total absence of counsel (or its functional equivalent) at a critical stage. That is what we have here. By contrast, in *Woods* counsel was briefly absent during the testimony of a co-defendant. As discussed earlier, counsel in *Nixon* fully informed his client of his proposed strategy, and counsel in *Cone* subjected the prosecution's case to adversarial testing. Today's outcome faithfully follows *Cronic*, because we are faced with the extraordinary situation of a lawyer's total abandonment of his client at the critical sentencing state.

IV

If Raff was going to fall back to a plea for mercy, or an effort to convince Lewis to demonstrate remorse, he had to take *some* step in that direction. He did not. Instead, he gave up on Lewis and left him entirely without the assistance of counsel at the sentencing stage of a felony murder case. Rare though *Cronic* cases may be, we think that this one qualifies.

We therefore REVERSE the judgment of the district court and REMAND this case for the issuance of a writ of habeas corpus, limited to the sentencing phase of petitioner Roderick Lewis's case.

BRENNAN, *Circuit Judge*, dissenting. If this were a direct appeal, I might join the majority opinion. All can agree Roderick Lewis's counsel should have done more on his behalf at sentencing. Such minimal involvement occurred at a critical stage in a criminal case. But Lewis's appeal comes to us as a collateral attack on a state court judgment under the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). In his petition for a writ of habeas corpus, Lewis contends his counsel's silence at sentencing requires us to apply the presumption of prejudice described in *United States v. Cronic*, 466 U.S. 648 (1984), to an ineffective assistance of counsel claim otherwise governed by *Strickland v. Washington*, 466 U.S. 668 (1984). AEDPA requires that we grant habeas relief to Lewis only when the Supreme Court has answered the specific question of whether *Cronic*—and not *Strickland*—applies, and the state court has issued a decision contravening that answer. 28 U.S.C. § 2254(d)(1).

No Supreme Court decision holds that silence at sentencing by defense counsel triggers *Cronic*'s presumption of prejudice. Three courts have declined Lewis's invitation to apply *Cronic* in this novel circumstance. Despite the stringent standards of AEDPA, our court accepts the invitation. This decision avoids AEDPA's confines and expands *Cronic*'s scope, reading it too generally and combining its exceptions. Review of Lewis's habeas petition should end with AEDPA, so I respectfully dissent.

I. AEDPA Review

AEDPA's strict standard of review results in great deference to state courts. The grant of Lewis's habeas petition lacks the requisite precision under 28 U.S.C.

§ 2254(d)(1), neglecting the critical importance of comity to our federal habeas system.

A. AEDPA's Strictures

AEDPA deference is more than a judicial guidepost; it is a Congressional mandate. *See Woodford v. Garceau*, 538 U.S. 202, 206 (2003). "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)). By its plain text, AEDPA precludes a federal court from granting a state prisoner's habeas petition unless the state court's merits adjudication "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[.]" 28 U.S.C. § 2254(d)(1) (emphases added). "If this standard is difficult to meet, that is because it was meant to be." *Harrington*, 562 U.S. at 102.

Section 2254(d)(1)'s "contrary to" and "unreasonable application of" clauses have independent meaning. *Bell v. Cone*, 535 U.S. 685, 694 (2002); *see also Williams v. Taylor*, 529 U.S. 362, 404–05 (2000). A federal court may grant habeas relief under the "contrary to" clause "if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." *Cone*, 535 U.S. at 694. For example, if a state court applies *Strickland* when it should apply *Cronic*, we may issue the writ as the state court judgment is "contrary to" Supreme Court precedent. *Cf. id.* at 698 (rejecting a

petitioner's claim that *Cronic*, not *Strickland*, should apply and noting "we find no merit in respondent's contention that the state court's adjudication was *contrary to* our clearly established law" (emphasis added)). Under the "unreasonable application of" clause, a federal court may grant habeas relief "if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Id.* at 694. So if a state court applies *Strickland* to the facts of a case "in an objectively unreasonable manner[,]" we may issue the writ. *Id.* at 699.

Under either clause of § 2254(d)(1), a petitioner's habeas claim is measured against the last reasoned state-court decision on the merits. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). To grant relief, that state court's decision must be "contrary to" or an "unreasonable application of" Supreme Court precedent, not our own. *Glebe v. Frost*, 574 U.S. 21, 24 (2014) (per curiam) ("[C]ircuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" (quoting 28 U.S.C. § 2254(d)(1)).

Standing alone, AEDPA exudes deference. But for ineffective assistance of counsel claims, "[t]he federal courts as a whole engage in 'doubly deferential' review" under AEDPA. *Wilborn v. Jones*, 964 F.3d 618, 620 (7th Cir. 2020), *cert. denied*, No. 20-913, 2021 WL 666799 (U.S. Feb. 22, 2021) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). We layer deference upon deference in these cases because federal courts must give "both the state court and the defense attorney the benefit of the doubt." *Burt v. Titlow*, 571 U.S. 12, 15 (2013). Even without AEDPA, ineffective assistance of counsel claims remain difficult to prove as "counsel is strongly presumed to have

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. "That hill is even steeper" for claims governed by AEDPA. *Myers v. Neal*, 975 F.3d 611, 620 (7th Cir. 2020). As the Supreme Court said recently, AEDPA takes on a "special importance" when a state prisoner asserts the ineffectiveness of his counsel. *Shinn v. Kayer*,141 S. Ct. 517, 523 (2020).

B. The Majority Opinion's Application of AEDPA

The majority opinion holds that the Court of Appeals of Indiana's decision in *Lewis v. State*, 116 N.E.3d 1144 (Ind. Ct. App. 2018) (*Lewis II*), is both "contrary to" and an "unreasonable application of" Supreme Court precedent under § 2254(d)(1). In its only specific reference to the text of that standard, it states: "We conclude that the decision of the last responsible state court was contrary to Supreme Court precedent, insofar as it held that *Strickland*, not *Cronic*, furnished the applicable rule, and it was an unreasonable application of *Cronic*, insofar as it focused on that case." Majority Op. at p. 2 (footnote omitted). But these clauses are distinct, with each having independent meaning. *Cone*, 535 U.S. at 695 ("[Section] 2254(d)(1)'s 'contrary to' and 'unreasonable application' clauses have independent meaning."). Implicit within an "unreasonable application of" Supreme Court precedent is that the state court applied the correct legal rule but did so unreasonably to the facts at hand. Conversely, if a state court applies the incorrect rule, its decision is "contrary to" Supreme Court precedent from the start and we need not reach the reasonability of its application. For the majority opinion, *Lewis II* is worthy of correction under both clauses.

AEDPA requires more precision. *Cone* teaches that if a state court applies *Strickland* when it should apply *Cronic* (or vice versa), that error implicates the "contrary to" clause of § 2254(d)(1). *See Cone*, 535 U.S at 698. This is because "[f]or purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind." *Id.* at 697 (footnote omitted). Admittedly, the Supreme Court has not always followed this procedure when engaging with *Cronic*. *Compare Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (per curiam) (rejecting *Cronic*'s application under the "unreasonable application of" clause), *with Woods v. Donald*, 575 U.S. 312, 317–18 (2015) (per curiam) (rejecting *Cronic*'s application under both the "contrary to" and "unreasonable application of" clauses). That may be because, in these cases, the Supreme Court has denied relief, not granted it. In other words, whether a state court's decision was "contrary to" or an "unreasonable application of" Supreme Court precedent did not matter. The petitioner's claim failed either way. When a petitioner's claim succeeds, however, and a federal court on habeas review overrules a state court's decision, precision is a must. Otherwise, we disregard AEDPA's text and do not respect the independent meaning of each clause.[1]

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[1] The majority opinion collects several cases to support consideration of the state court's decision under both clauses of § 2254(d)(1). Maj. Op. at p. 2 n.1. But among the cases cited are rulings that recognized the independent meaning of each clause, even if the state court decision at issue in the end violated both. In *Bailey v. Rae*, the Ninth Circuit explained the distinct clauses, and gave independent reasoning under each. 339 F.3d 1107, 1111–12, 1118–19 (9th Cir. 2003). *Pazden v. Maurer* is much the same. 424 F.3d 303, 311–12, 319 (3d Cir. 2005), as is *Breakiron v. Horn*, 642 F.3d 126, 131, 139 (3d Cir. 2011). To the extent these

To be sure, the "contrary to" clause might be an easier path for a habeas petitioner than the "unreasonable application of" clause. *But see Williams*, 529 U.S. at 405 ("The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 495 (1976)). An "unreasonable application" means more than just error: "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Or as this court has said, "[w]e must deny the writ if we can posit arguments or theories that could have supported the state court's decision, and if fairminded jurists could disagree about whether those arguments or theories are inconsistent with Supreme Court holdings." *Kidd v. Lemke*, 734 F.3d 696, 703 (7th Cir. 2013). To grant Lewis habeas relief under the "unreasonable application of" clause, the state court's application of *Strickland*, not *Cronic*, must be unreasonable; that is how the Supreme Court approached *Cone*, and that is how to ensure the independent meaning of the two clauses. *See Cone*, 535 U.S. at 698.

Yet even if the state court unreasonably applied *Cronic*, the implication of the majority opinion is that no "fairminded jurist could disagree" that *Cronic* should supplant *Strickland* here. On direct review, four jurists disagreed with *Cronic*'s application; two more did so under AEDPA.[2] Although this numerical

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cases correctly state the law, they recognize that the two clauses differ.

[2] One judge from the Allen County Superior Court, three judges from the Court of Appeals of Indiana, one judge from the

disparity does not alone doom Lewis's appeal, it shows that under the majority opinion, this would be the only court that has embraced *Cronic*, doing so under both clauses of § 2254(d)(1). If AEDPA is satisfied here, the clause under which the state court's decision is purportedly incorrect should be specified as one or the other.

Animating AEDPA's strictness is a faith in comity. "AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Titlow*, 571 U.S. at 19. Indeed, "AEDPA's requirements reflect a 'presumption that state courts know and follow the law.'" *Woods*, 575 U.S. at 316 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)). That means "[w]hen reviewing state criminal convictions on collateral review, federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Woods*, 575 U.S. at 316. This is particularly so when state courts adjudicate ineffective assistance of counsel claims:

> Especially where a case involves such a common claim as ineffective assistance of counsel under *Strickland*—a claim state courts have now adjudicated in countless criminal cases for nearly 30 years—"there is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned . . . than his neighbor in the state courthouse."

U.S. District Court for the Northern District of Indiana, and myself.

Titlow, 571 U.S. at 19 (quoting *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976)). AEDPA review is so rigorous for *Strickland* claims because comity demands it. *See Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998) ("Federal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." (internal quotation marks omitted)).

Comity's force here is not just in principle, but in practice. The Indiana state courts have worked on Lewis's case for some time and have a significant interest in this litigation. In 2012, Lewis went to trial in the Allen County Superior Court for his role in a crime committed 13 years earlier in 1999. *Lewis II*, 116 N.E.3d at 1148–50, ¶¶ 6–12. After his conviction and sentencing, Lewis directly appealed, challenging the sufficiency of the evidence against him. *Lewis v. State*, 973 N.E.2d 110, No. 02A03-1201-CR-18, 2012 WL 3777134 (Ind. Ct. App. 2012) (unpublished table decision) (*Lewis I*). In 2013, Lewis filed a pro se post-conviction petition, and in 2016, post-conviction counsel amended that petition. *Lewis II*, 116 N.E.3d at 1150, ¶ 14. In 2017, the Allen County Superior Court held an evidentiary hearing. *Id.* In 2018, that court, in a "lengthy order[,]" denied Lewis relief and, as relevant in this appeal, also rejected *Cronic*. *Id* at 1150–53, ¶¶ 16–17. In the decision at issue here, *Lewis II*, the Court of Appeals of Indiana affirmed that denial of relief later in 2018, *id.* at 1160, ¶¶ 45–46, with the Indiana Supreme Court ultimately denying leave to transfer in 2019. *Lewis v. State*, 124 N.E.3d 41 (Ind. 2019) (unpublished table decision). This procedural history shows that Lewis's case has received thorough consideration by various Indiana courts, not to mention the district court here. AEDPA makes clear "that state courts are the principal forum for asserting

constitutional challenges to state convictions." *Harrington*, 562 U.S. at 103.

All of this is true even before accounting for the "special importance" of AEDPA to ineffective assistance of counsel claims adjudicated by state courts. *Shinn*, 141 S. Ct. at 523. Absent from the majority opinion's treatment of Lewis's claim is recognition of the "doubly deferential" nature of the review this court must conduct. *Mirzayance*, 556 U.S. at 123. Because "state courts know and follow the law[,]" *Woods*, 575 U.S. at 316 (internal quotation marks omitted), they understand that the scope of *Cronic* has been significantly curtailed; indeed, that is why they declined to apply it here. *Lewis II*, 116 N.E.3d at 1159, ¶ 43 ("We are not persuaded that Lewis's claim falls within one of the limited circumstances of extreme magnitude that justify a presumption of ineffectiveness under *Cronic*." (footnote omitted)). All told, the type of claim the petitioner makes requires him to overcome AEDPA, surpass *Strickland*, and trigger *Cronic*. That is quite the gauntlet. In fact, it is one of the most doctrinally difficult challenges a state prisoner can make in this area of law. AEDPA's text, along with its directive of deference, instructs that we must give independent meaning to each clause of § 2254(d)(1).

II. The Narrow Scope of *Cronic*

The Supreme Court and this court narrowly construe and rarely apply *Cronic*. The majority opinion expands *Cronic*'s scope and unsoundly combines its first and second exceptions.

A. *Cronic* Defined

Cronic is a hard-to-meet exception to the already hard-to-meet standard of *Strickland*. Under *Strickland*,

an ineffective assistance of counsel claim requires a showing that the attorney's performance was not only deficient, but also prejudicial. 466 U.S. at 687. Deficiency occurs when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Proving prejudice requires that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *Strickland* sets a high bar, which makes *Cronic*'s presumption of prejudice an appealing option for litigants. *Cf. Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task.").

With *Cronic*'s strength, though, comes its rarity. *See*, *e.g.*, *Florida v. Nixon*, 543 U.S. 175, 190 (2004). Under *Cronic*, courts may presume prejudice only when there are "circumstances that 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 (footnote omitted). But even *Cronic* itself did not result in this presumption of prejudice. *Id.* at 666. Instead, the Supreme Court in *Cronic* pronounced three exceptions to *Strickland* that permit the presumption of prejudice:

> 1. When there has been a "complete denial of counsel[,]" because "a trial is unfair if the accused is denied counsel at a critical stage of his trial.";
>
> 2. "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."; and

> 3. "[W]hen 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."

466 U.S. at 659–60 (footnote omitted). When a defendant's case presents one of these three circumstances, *Cronic* is triggered, prejudice is presumed, and *Strickland*'s second prong is satisfied.

Cronic's narrowness derives not just from its result, but from its reasoning. Whether called "illustrations," "examples," "circumstances," "scenarios," or "situations," what matters is that each operates as an exception to the onerous *Strickland* standard, and that there are three—and only three—of them. *See*, *e.g.*, *Cone*, 535 U.S. at 695 (identifying "three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified'" (quoting *Cronic*, 466 U.S. at 658)); *Reynolds v. Hepp*, 902 F.3d 699, 705 (7th Cir. 2018) (same). That *Cronic* is triggered in only three ways reflects the narrowness with which its presumption should be applied.

Recently, this court endorsed this understanding of *Cronic* in *Schmidt v. Foster*, an en banc decision declining under AEDPA to presume prejudice when a trial judge conducted an *ex parte*, *in camera* examination without defense counsel's active participation. 911 F.3d 469, 478 (7th Cir. 2018) (en banc). This court began its analysis in *Schmidt* by noting that *Cronic* and its progeny "come with two caveats." *Id.* at 479. First, *Cronic*'s presumption of prejudice is "narrow"

and "arises only when the denial of counsel is extreme enough to render the prosecution presumptively unreliable." *Schmidt*, 911 F.3d at 479. And second, because the Supreme Court has spoken only generally about *Cronic*, "the 'precise contours' of these rights 'remain unclear.'" *Schmidt*, 911 F.3d at 479 (quoting *Woods*, 575 U.S. at 318). That means "[s]tate courts therefore enjoy broad discretion in their adjudication of them." *Schmidt*, 911 F.3d at 479 (footnote and internal quotation marks omitted). *Schmidt* recognized the three exceptions of *Cronic* and rejected applying the first—"the complete denial of counsel during a critical stage." 911 F.3d at 478 & n.2, 480. Because Schmidt's counsel had assisted him before, during a recess, and after the *in camera* examination, he did not suffer the "complete" deprivation of counsel necessary to presume prejudice under *Cronic*'s first exception, even though the trial court prevented his counsel from speaking during the in chambers hearing. *Id.* at 480–85.[3]

Although *Schmidt*'s outcome may not control, and these facts differ, this court's reasoning is instructive. Bound by AEDPA, this court engaged in a comprehensive examination of *Cronic* and cases interpreting it to decide that "[n]o clearly established holding of the Supreme Court mandate[d]" the presumption of prejudice for an *ex parte*, *in camera* examination without defense counsel's active participation. 911 F.3d at 481. In doing so, this court rejected an attempt to generalize what, under AEDPA, must be specific: "If we must take several dissimilar decisions and reduce them to blanket principles in order to arrive at a general proposition applicable here, the proposition

[3] *Schmidt* assumed that the *ex parte*, *in camera* examination was a "critical stage." 911 F.3d at 480.

is 'far too abstract to establish clearly the specific rule' [petitioner] needs." *Id.* at 483–84 (quoting *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam)). Relevant here, this court also observed that "the Supreme Court has never addressed a case like [Schmidt's]." *Schmidt*, 911 F.3d at 485. So "[w]ithout clearly established law mandating relief, we [could not] grant it under AEDPA." *Id.*

B. *Cronic* Applied

The Supreme Court rarely applies *Cronic*, and when it does, it reads the decision narrowly. Since *Cronic*'s advent nearly 40 years ago, the Supreme Court has applied it only once to presume prejudice. *See Penson v. Ohio*, 488 U.S. 75, 88 (1988) (holding that "the presumption of prejudice must extend as well to the denial of counsel on appeal" when the granting of an attorney's motion to withdraw had left the petitioner "entirely without the assistance of counsel on appeal"). Although the majority opinion is correct that the Supreme Court recently cited *Cronic* in *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019), the Supreme Court has not applied *Cronic* to grant relief since *Penson*.

This court has followed the Supreme Court's lead, reading *Cronic* narrowly and applying it rarely. *See*, *e.g.*, *Schmidt*, 911 F.3d at 479. Lewis musters only two cases where this court applied *Cronic*'s presumption on habeas review. *Miller v. Martin*, 481 F.3d 468, 473 (7th Cir. 2007) (post-AEDPA); *Patrasso v. Nelson*, 121 F.3d 297, 305 (7th Cir. 1997) (pre-AEDPA). Other circuit courts have taken this same guarded approach. *See*, *e.g.*, *United States v. Roy*, 855 F.3d 1133, 1144 (11th Cir. 2017) (en banc) ("The difficulty of carrying that 'very heavy' burden and the 'very narrow' scope of the *Cronic* exception are evident from the fact that

the Supreme Court has repeatedly refused to find it applicable.").

Exceptions by their nature are narrow, so it is no surprise that the Supreme Court has limited *Cronic* to the three described above. *See*, *e.g.*, *Cone*, 535 U.S. at 695. When the Court has not specifically listed the three exceptions, it has still denied relief. *See*, *e.g.*, *Woods*, 575 U.S. at 317–18, 319. This court has read *Cronic* the same way. *See Schmidt*, 911 F.3d at 478 & n.2. Even in *Miller*, when this court applied *Cronic*'s presumption, it did so within the three-exception framework. *Miller*, 481 F.3d at 472–73. *Patrasso* applied *Cronic*'s second exception, too. 121 F.3d at 303–05. Neither the Supreme Court nor this court has adopted the broad reading of *Cronic* in the majority opinion. For the majority opinion, "[a]lthough it is possible, as the Supreme Court itself did in *Cronic* and as the district court here did, to identify particular circumstances in which the *Cronic* rule will apply, we must take the Court at its word when it says that it is simply offering illustrations of the rule announced by the Court." Maj. Op. at p. 14. But the Court in *Cone* and this court in *Schmidt* did not read *Cronic* so expansively, as we recently acknowledged. *Cf. Fayemi v. Ruskin*, 966 F.3d 591, 594 (7th Cir. 2020) ("We have been told not to extend *Cronic* on collateral review.").

If adopted in future cases, this broad conception of *Cronic* could swallow *Strickland*'s prejudice prong. For example, if *Cronic* is read this broadly, several Supreme Court cases should have come out differently. Counsel would have triggered *Cronic* by conceding guilt in a capital case (*Nixon*), failing to affirmatively mount some case for life imprisonment in a capital case's penalty phase (*Cone*), and being absent during certain trial testimony concerning a

codefendant (*Woods*). That each request to presume prejudice in these cases failed should give pause before applying such an expansive reading of *Cronic*.

Even where the majority opinion does engage with the three exceptions, it makes general under *Cronic* what must be specific under AEDPA. The majority opinion combines *Cronic*'s first and second exceptions. *See* Maj. Op. at p. 18 ("In cases such as Lewis's, there is thus no operative difference between the first and the second of *Cronic*'s examples."). Rather than "nothing" turning on whether *Cronic* established three exclusive categories, *id*. at 17, its three exceptions have independent meaning, like the two clauses of § 2254(d)(1). *Cf. Cone*, 535 U.S. at 685. *Schmidt* recognized this three-exception framework and rejected applying *Cronic*'s first exception for complete denial of counsel at a critical stage. *Schmidt*, 911 F.3d at 478 & n.2, 480, 485. As we stated there, "only once in the thirty-plus years since *Cronic* has the Court applied the presumption of prejudice it described in a critical-stage case." *Id.* at 479 (citing *Penson*, 488 U.S. at 88). And in no case since *Cronic* has the Supreme Court applied the presumption of prejudice described in the second exception.[4] Yet despite the strictures of AEDPA, the rarity of *Cronic*, and the narrowness with which that case has been applied, the majority opinion finds Lewis's claim strong enough to fit both exceptions.

This court should not backtrack from the understanding of *Cronic* endorsed in *Schmidt*. According to the majority opinion, *Schmidt* differs in its "critical stage" and "degree of help that counsel offered." Maj.

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[4] No Supreme Court case since *Cronic* appears to have applied its third exception, either.

Op. at pp. 15, 17. But *Schmidt*'s relevance here is in its mode of analysis. That en banc decision teaches three lessons about *Cronic*: it is narrow in its rule, it gives state courts "broad discretion" in adjudicating the application of its exceptions, and it has three—and only three—exceptions. *Schmidt*, 911 F.3d at 478 & n.2.

These lessons led this court in *Schmidt* to address that *Cronic*-based habeas petition with the requisite particularity under AEDPA. Generalizing *Cronic* did not win the day there and should not do so here. *Id.* at 483–84 ("If we must take several dissimilar decisions and reduce them to blanket principles in order to arrive at a general proposition applicable here, the proposition is far too abstract to establish clearly the specific rule [petitioner] needs." (internal quotation marks omitted)). As AEDPA required, *Schmidt* considered whether the Supreme Court had ever addressed a claim like that raised by the petitioner. It had not, so this court denied relief. *Id.* at 485. Because the same is true here, *Schmidt* should guide us to reject Lewis's habeas petition.

III. Supreme Court Treatment of *Cronic* and AEDPA

The Supreme Court has never confronted the novel circumstances presented by Lewis's claim. That should be enough to preclude habeas relief under AEDPA. The majority opinion emphasizes one case—*Cone*, where the Supreme Court declined to presume prejudice—at the expense of the rest of *Cronic*'s progeny.

A. What AEDPA Means for Cases Invoking *Cronic*

Looking through AEDPA's lens, we may grant habeas relief only when the Supreme Court has answered the "specific question" of whether *Cronic*—

and not *Strickland*—applies and the state court has issued a decision "contrary to" this answer. *Woods*, 575 U.S. at 317 (quoting *Lopez*, 574 U.S. at 6); 28 U.S.C. § 2254(d)(1).

Lewis cannot meet this heavy burden imposed by AEDPA. A direct appeal would be a lighter lift, as it would turn on whether his lawyer's silence at sentencing fell within *Cronic*. AEDPA, however, constricts our review and requires that we ask whether the Supreme Court has held that silence at sentencing triggers the presumption of prejudice—the "specific question." *Woods*, 575 U.S. at 317 (internal quotation marks omitted). This difference is dispositive: A tour through four Supreme Court cases addressing *Cronic*—*Cone*, *Nixon*, *Van Patten*, and *Woods*—demonstrates that the Supreme Court has never presumed prejudice based on the type of claim Lewis brings. That is "[a]ll that matters here[.]" *Id.* at 319.

Time and again, the Supreme Court has declined to apply *Cronic*. In *Cone*, the Court considered and rejected an argument that *Cronic's* second exception for lack of meaningful adversarial testing applied when counsel failed to "mount some case for life [imprisonment]" in a capital case's penalty phase. *Cone*, 535 U.S. at 696 (internal quotation marks omitted). In *Nixon*, the Court, outside the strictures of AEDPA, again rejected application of *Cronic*'s second exception by holding that a concession of guilt in a capital case "does not rank as a failure to function in any meaningful sense as the Government's adversary." *Nixon*, 534 U.S. at 190 (quoting *Cronic*, 466 U.S. at 666 (footnote omitted)).[5] In *Van Patten*, the

[5] The standard the majority opinion quotes when invoking *Cronic* to grant relief is from *Nixon*, 543 U.S. at 189. Maj. Op. at

Court denied *Cronic*'s first exception because its own precedents "do not clearly hold that counsel's participation by speakerphone should be treated as a 'complete denial of counsel,' on par with total absence." *Van Patten*, 552 U.S. at 125. And in *Woods*, the Court's most recent engagement with *Cronic*, it avoided presuming prejudice, without mentioning a specific exception, because it had "never addressed whether the rule announced in *Cronic* applies to testimony regarding codefendants' actions"—as in whether counsel's absence during that testimony triggers the presumption of prejudice. *Woods*, 575 U.S. at 317.

The Supreme Court has been reluctant to presume prejudice under *Cronic*. We should be as well. Of course, rare does not mean never. What matters under AEDPA is that the Court has never answered, let alone affirmatively, the question of whether silence at sentencing by defense counsel triggers *Cronic*. *See Van Patten*, 552 U.S. at 126 ("Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, it cannot be said that the state court unreasonably applied clearly established Federal law." (alterations and internal quotation marks omitted)). This is so regardless of the clause under which the majority opinion proceeds. *See Woods*, 575 U.S. at 317 ("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." (internal quotation marks omitted)). As the Court said in its last engagement with *Cronic* under AEDPA, "[a]ll that matters here, and all that should have mattered to the Sixth Circuit, is that we have not held that *Cronic* applies to the

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pp. 1, 14. The Court in *Nixon* declined to presume prejudice under *Cronic*. *Nixon*, 543 U.S. at 190.

circumstances presented in this case. For that reason, federal habeas relief based upon *Cronic* is unavailable." *Id.* at 319. So it is here for this court.

B. Correctly Applying AEDPA to *Cronic* in this Case

Under either clause of § 2254(d)(1), the majority opinion's broad reading of *Cronic* cuts against applying it on these facts. Such expansive treatment of *Cronic* comes closer to de novo review, which AEDPA does not permit.

Lewis II is neither "contrary to" nor an "unreasonable application of" Supreme Court precedent concerning *Cronic*. To implicate the "contrary to" clause, a state court decision must apply the wrong legal rule or deviate from a factually indistinguishable case. *See Cone*, 535 U.S. at 694. If the majority opinion proceeds under that clause, it commits the same errors the Supreme Court corrected in *Woods*, 575 U.S. at 317 (noting that the Sixth Circuit's application of *Cronic* was "doubly wrong"). First, as in *Woods*, the majority opinion relies upon cases that are only "similar to" Supreme Court precedent, which means "the state's court's decision is not 'contrary to' the holdings in those cases." *Id.* But 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*. Second, the majority opinion "frame[s] the issue at too high a level of generality." *Woods*, 575 U.S. at 318. As discussed, no Supreme Court case holds that silence at sentencing triggers *Cronic*'s presumption of prejudice. *Cf.*, *e.g.*, *id.* at 317–19; *Van Patten*, 552 U.S. at 124–26; *Nixon*, 543 U.S. at 190-93; *Cone*, 535 U.S. at 693–98; *but see Penson*, 488 U.S. at 88-89. In sum, like the petitioner in *Woods*, Lewis

cannot show that *Lewis II* was "contrary to" Supreme Court precedent.

The fate of Lewis's claim is the same under the "unreasonable application of" clause of § 2254(d)(1). Under that clause, the broader the rule, the more room state courts have to apply it. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."). For our purposes, the broader the majority opinion reads *Cronic*, the more room *Lewis II* has to apply it. *Cf.* Maj. Op. at p. 14. This means that *Lewis II* must be "not merely wrong" or "even clear error." *Woods*, 575 U.S. at 316 (quoting *Woodall*, 572 U.S. at 419). Rather, it must be so objectively unreasonable that no "fairminded jurist" could reach its conclusion. *Kidd*, 734 F.3d at 703. The question then remains: Is *Lewis II* that wrong?

It is not. Given that the Supreme Court almost never applies *Cronic*, the Court of Appeals of Indiana's similar reticence is reasonable. The majority opinion faults *Lewis II* for its scant reasoning, despite the "broad discretion" conferred to state courts interpreting *Cronic*. *Woods*, 575 U.S. at 318 (internal quotation marks omitted). True, the state appeals court could have said more.[6] But perhaps *Lewis II*'s cursory treatment of *Cronic* shows how obviously it does not apply. *Cf. White v. Woodall*, 572 U.S. 415, 427 (2014) ("[R]elief is available under § 2254(d)(1)'s unreasonable-application clause if, and only if, it is *so obvious* that a clearly established rule applies to a

[6] Like the Indiana Court of Appeals, I also "note that Attorney Raff's lack of advocacy at the sentencing hearing appears to have been, at least in part, invited by Lewis, who expressed clear disdain for counsel." *Lewis II*, 116 N.E.3d at 1160 n.10, ¶ 43 n.10.

given set of facts that there could be no 'fairminded disagreement' on the question[.]" (quoting *Harrington*, 562 U.S. at 103) (emphasis added)). The opposite does not hold true: It is not "so obvious" that *Cronic*, and not *Strickland*, should apply here. *White*, 572 U.S. at 427.

Under either clause, the majority opinion's analysis of *Lewis II* comes closer to de novo review than the "doubly deferential" standard mandated under AEDPA for ineffective assistance of counsel claims. *Mirzayance*, 556 U.S. at 123; *cf. Harrington*, 562 U.S. at 101 ("Here it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA."). In *Lewis II*, the Court of Appeals of Indiana considered, and rejected, Lewis's assertion of *Cronic*'s second exception for lack for meaningful adversarial testing. 116 N.E.3d at 1159, ¶¶ 42–43 Ostensibly under AEDPA review, the majority opinion nevertheless crafts a hybrid rule—combining *Cronic*'s first and second exceptions—to cover Lewis's claim. *See* Maj. Op. at p. 18. For the majority opinion, *Cone* supports this proposition: Lewis's lawyer did less than the lawyer in *Cone*, which means *Cronic* should apply. *See id.* at pp. 18–21. But *Cronic*'s trigger is not so general, and *Cone*'s lesson is not so simple. If Lewis is to secure relief, he must fit within one of *Cronic*'s three exceptions, which *Cone* itself recognized. *Cone*, 535 U.S. at 696.

What is more, *Cone* is not the only benchmark by which to measure the merits of Lewis's claim under *Cronic*. The majority opinion rejects *Van Patten* and *Woods* because "Lewis does not allege that his attorney was *physically* absent at any relevant time. Neither *Van Patten* nor *Woods* thus advances the analysis here." Maj. Op. at p. 11. But if only constructive

absence cases were relevant to our analysis, then the majority opinion would have little, let alone recent, affirmative support. *Herring v. New York*, 422 U.S. 853, 864–65 (1975) (presuming prejudice when a state law barred summation of the evidence); *Ferguson v. Georgia*, 365 U.S. 570, 571, 596 (1961) (presuming prejudice when a state law barred elicitation of client's trial testimony); *see also Schmidt*, 911 F.3d at 481. Instead, *Van Patten* and *Woods* serve as further examples of the only thing that matters in this appeal: No Supreme Court case has held that silence at sentencing by defense counsel triggers *Cronic*. On that ground, Lewis's petition should fail.

IV. Conclusion

Cronic's scope is narrow, AEDPA review is narrow, and AEDPA review of a *Cronic* case is especially narrow. Bound by AEDPA, I would reject Lewis's habeas petition because no Supreme Court case has applied *Cronic* to the novel circumstances presented by his claim. I respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

[Filed: March 20, 2020]

No. 1:19-cv-01515-RLY-MPB

RODERICK LEWIS,

Petitioner,

v.

DUSHAN ZATECKY,

Respondent.

ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Roderick Lewis filed this petition for a writ of habeas corpus alleging that his counsel failed to subject the State's case to meaningful adversarial testing at sentencing following his murder convictions in Indiana state court.

I. Background

Mr. Lewis was convicted of felony murder for the deaths of 16-year-old Richard Rogers and 14-year-old Sidney Wilson during a robbery. *Lewis v. State*, 116 N.E.3d 1144, 1149 (Ind. Ct. App. 2018). Throughout proceedings, Mr. Lewis butted heads with his counsel (Jeffrey Raff) because Mr. Lewis believed he was not guilty of murder if he did not personally fire the fatal shots. *Id.*; *see also* dkt. 7-2 at 29 (trial counsel

testifying that "[Mr. Lewis] was difficult. I remember him being an angry fellow").

As the sentencing hearing began, the following exchange ensued:

> MR. RAFF: Judge I know that Mr. Lewis will have some comments and I know the State has witnesses or appear to have witnesses. I will defer my comments possibly until later in the hearing.
>
> COURT: Do you have witnesses to say something?
>
> MR. RAFF: I do not have any witnesses to present.

Sent. Tr. 4.

The State presented statements from several of the victim's family and argued for the statutory maximum: consecutive 65-year sentences. Sent. Tr. 5–23. When the court again invited trial counsel to argue, counsel responded, "Judge I'm going to defer to Mr. Lewis if he has any comments. I don't have anything to add." Sent. Tr. 23–24. Mr. Lewis proceeded to argue for his innocence and complain about the terms of plea offers that were made to him. Sent. Tr. 24–30.

The trial court found no mitigating circumstances and sentenced Mr. Lewis to consecutive 65-year terms. Sent. Tr. 30–34. Mr. Lewis raised an unrelated claim on appeal, and the Indiana Court of Appeals affirmed. Dkt. 5-3.

On post-conviction review, Mr. Lewis argued (among other things) that counsel failed to subject the State's case to meaningful adversarial testing at sentencing. Following a hearing, the trial court denied relief. Mr. Lewis raised the same claims on appeal. The Indiana

Court of Appeals accurately summarized counsel's performance:

> Undoubtedly, Attorney Raff was deficient in his representation of Lewis at the sentencing hearing. Lewis faced a maximum sentence of 130 years, essentially a life sentence. Although present, Attorney Raff did nothing for his client at sentencing aside from indicate that Lewis would speak on his own behalf at the conclusion of the hearing.

Lewis, 116 N.E.3d at 1153; *see also* dkt. 7-2 at 4 (prosecutor acknowledging at post-conviction hearing that "Mr. Raff basically did not do any advocacy at the sentencing hearing"). Despite finding that counsel had done nothing at sentencing, the Indiana Court of Appeals applied *Strickland v. Washington*, 466 U.S. 668 (1984), not *United States v. Cronic*, 466 U.S. 648, 659 (1984), to Mr. Lewis's claim. *Lewis*, 116 N.E.3d at 1158–59. The Indiana Court of Appeals found that Mr. Lewis suffered no prejudice from counsel's deficient performance and therefore affirmed the denial of post-conviction relief. *Lewis*, 116 N.E.3d at 1160. The Indiana Supreme Court denied leave to transfer. Dkt. 5-5 at 6.

Mr. Lewis then filed a 28 U.S.C. § 2254 petition in this court. Dkt. 1.

II. Applicable Law

A federal court may grant habeas relief to a person in custody pursuant to the judgment of a state court only if the petitioner demonstrates that he is in custody "in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). Where a state court has adjudicated the merits of a peti-

tioner's claim, a federal court cannot grant habeas relief unless the state court's adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "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." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

"The decision federal courts look to is the last reasoned state-court decision to decide the merits of the case." *Dassey v. Dittmann*, 877 F.3d 297, 302 (7th Cir. 2017) (en banc). If the last reasoned state court decision did not adjudicate the merits of a claim, or if the plaintiff can overcome § 2254(d)'s bar, federal habeas review of that claim is *de novo*. *Thomas v. Clements*, 789 F.3d 760, 766–68 (7th Cir. 2015).

III. Discussion

The Indiana Court of Appeals correctly found that counsel's performance at sentencing was deficient, and Mr. Lewis does not argue *Strickland* prejudice. Mr. Lewis's claim thus hinges on whether Supreme Court precedent has clearly established a presumption of

prejudice when counsel does not advocate for a defendant at sentencing.

Cronic identified three exceptions to *Strickland*'s prejudice requirement: (1) where there has been a "complete denial of counsel" at "a critical stage of [defendant's] trial"; (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) where "although counsel is available," circumstances are such that there is little chance that "any lawyer, even a fully competent one, could provide effective assistance." *Cronic*, 466 U.S. 659–60. Mr. Lewis relies on the second exception, arguing that counsel failed to subject the prosecution's case to meaningful adversarial testing at sentencing. The respondent denies that the Supreme Court has clearly established such a rule for purposes of § 2254(d)(1).

According to the respondent, abandonment only at sentencing is not enough to trigger *Cronic*'s presumption; instead, counsel must fail to subject the State's case to meaningful adversarial testing at all stages of a defendant's proceedings. Respondent points to *Florida v. Nixon*, where the Supreme Court held that no *Cronic* exception applied where counsel in a capital case conceded the defendant's guilt and focused entirely on the sentencing stage of proceedings. 543 U.S. 175, 180–92 (2004).

Mr. Lewis counters with *Miller v. Martin*, where the Seventh Circuit held that the Indiana Court of Appeals should have applied *Cronic*, not *Strickland* to the petitioner's claim that counsel effectively abandoned him at sentencing. 481 F.3d 468, 472–73 (7th Cir. 2007). There is no meaningful distinction between this case and *Miller*. Ordinarily, that would end the analysis. *See Reiser v. Res. Funding Corp.*, 380

F.3d 1027, 1029 (7th Cir. 2004) ("In a hierarchical system, decisions of a superior court are authoritative on inferior courts. . . . [D]istrict judges must follow the decisions of this court whether or not they agree."). But intervening Supreme Court decisions have undermined *Miller* in two ways: narrowing the *Cronic* exceptions and bolstering § 2254(d)(1)'s "clearly established Federal law" provision.

Indeed, less than one year after *Miller*, the Supreme Court decided *Wright v. Van Patten*, holding that neither *Cronic* nor any other Supreme Court precedent clearly established an exception to *Strickland* where counsel appeared for the defendant's change-of-plea hearing by speakerphone. 552 U.S. 120, 126 (2008) (per curiam) ("Because our cases give no clear answer to the question presented, let alone one in [the petitioner's] favor, it cannot be said that the state court unreasonably applied clearly established Federal law." (cleaned up)).

Similarly, in *Woods v. Donald*, the Supreme Court held that neither *Cronic* nor any other Supreme Court precedent clearly established an exception to *Strickland* where counsel was absent from the petitioner's joint trial with two co-defendants for 10 minutes of testimony because counsel had announced about the testimony, "I don't have a dog in this race. It does not affect me at all." 575 U.S. 312, 314, 318–19 (2015). In denying habeas relief, the Supreme Court emphasized the importance of clearly established Supreme Court precedent: "All that matters here, and all that should have mattered to the [court of appeals], is that we have not held that *Cronic* applies to the circumstances presented in this case. For that reason, federal habeas relief based upon *Cronic* is unavailable." *Id.* at 319.

Miller does not identify any Supreme Court case holding that *Cronic* applies where counsel fails to subject the prosecution's case to meaningful adversarial testing at sentencing. 481 F.3d at 472 ("Some uncertainty exists with regard to the appropriate standard for evaluating claims of ineffective assistance of counsel when counsel's efforts appear particularly lacking."). Indeed, Mr. Lewis identifies no such case either. *Miller* instead relies on *Patrasso v. Nelson*, 121 F.3d 297 (7th Cir. 1997), a case applying pre-AEDPA standards. 481 F.3d at 472; *cf. id.* at 473 (concluding that *Bell v. Cone*, 535 U.S. 685 (2002), did not undermine *Patrasso*).

Given the Supreme Court's post-*Miller* emphasis on clearly established federal law, and because 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 court "is 'powerfully convinced' that the Seventh Circuit would overrule [*Miller*] at the first opportunity." *Lewis v. Gaylor, Inc.*, 914 F. Supp. 2d 925, 927 (S.D. Ind. 2012) (quoting *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987)).

And here, because the Indiana Court of Appeals did not unreasonably apply or issue a decision contrary to clearly established federal law, Mr. Lewis cannot overcome 28 U.S.C. § 2254(d)(1)'s limitation on habeas relief. His petition is therefore denied.

IV. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, the prisoner must first obtain a certificate of appealability. *See* 28 U.S.C.

§ 2253(c)(1). Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts requires the district court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Reasonable jurists could disagree about whether *Cronic* clearly establishes an exception to *Strickland*'s prejudice requirement when counsel fails to subject the prosecution's case to meaningful adversarial testing at sentencing. Accordingly, a certificate of appealability shall issue as to Mr. Lewis's ineffective assistance of counsel claim.

V. Conclusion

Mr. Lewis's petition for a writ of habeas corpus is denied, but a certificate of appealability is granted.

IT IS SO ORDERED.

Date: 3/20/2020

/s/ Richard L. Young, Judge
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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APPENDIX D

IN THE COURT OF APPEALS OF INDIANA

[Filed: December 21, 2018}

Court of Appeals Case No. 18A-PC-767

RODERICK VANDRELL LEWIS,

Appellant-Defendant,

v.

STATE OF INDIANA,

Appellee-Plaintiff

Appeal from the Allen Superior Court

Trial Court Cause No. 02D05-1305-PC-84

The Honorable FRANCES C. GULL, *Judge*

ATTORNEYS FOR APPELLANT

Stephen T. Owens
Public Defender of Indiana
Anne C. Kaiser
Deputy Public Defender
Katherine Province
Deputy Public Defender Indianapolis, Indiana

ATTORNEYS fOR APPELLEE

Curtis T. Hill, Jr.
Attorney General of Indiana
James B. Martin
Deputy Attorney General Indianapolis, Indiana

Case Summary

ALTICE, *Judge*.

"Judge I'm going to defer to Mr. Lewis if he has any comments. I don't have anything to add." *Sentencing Transcript* at 23-24. This is the sum total of trial counsel's participation at Lewis's sentencing hearing, at which Lewis was being sentenced for two counts of felony murder and faced a maximum sentence of 130 years in prison. The trial court found no mitigating circumstances—none being asserted by the defense—and sentenced Lewis to the maximum aggregate sentence of 130 years in prison.[1]

On direct appeal, appellate counsel presented only a sufficiency challenge, which this court rejected. Appellate counsel felt constrained by trial counsel's failure to argue any mitigating circumstances at sentencing. Had trial counsel made an adequate record at sentencing, appellate counsel would have challenged the sentence as inappropriate under Ind. Appellate Rule 7(B). Appellate counsel, however, chose not to raise this issue to avoid hindering Lewis's future pursuit of post-conviction relief based on trial counsel ineffectiveness.

After this court affirmed his convictions on direct appeal, Lewis sought post-conviction relief. He challenged the effectiveness of both trial and appellate counsel related to sentencing. The post-conviction court denied relief, and Lewis now appeals.

We agree with Lewis that trial counsel's performance at sentencing was clearly deficient. After a

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[1] The sentencing range for murder is forty-five to sixty-five years, with the advisory sentence being fifty-five years. Ind. Code § 35-50-2-3(a).

thorough review of the record and applicable case law, however, we conclude that no prejudice resulted from the deficient performance. In other words, there is not a reasonable probability that Lewis's sentence would have been different if counsel had proffered the mitigating circumstances raised at the post-conviction hearing. Further, with regard to appellate counsel, we conclude that counsel was not ineffective.

We affirm.

Facts & Procedural History[2]

The underlying facts supporting Lewis's convictions were set out in detail on direct appeal, and we draw from those. On June 29, 1999, Christopher Hale had a discussion with sixteen-year-old Richard Rogers, who operated a drug house in Fort Wayne with fourteen-year-old Sidney Wilson. Rogers invited Hale to visit the drug house, but Hale declined due to problems he was having with Wilson. Rogers indicated that he would talk with Wilson and quash it.

Later that evening, Hale, Lewis, and Kajuanta Mays agreed on a plan to rob Wilson and Rogers of their drugs and money. First, they verified that Wilson and Rogers were alone by sending Angela Lawson to the house to buy drugs. As planned, Hale then went into the drug house followed later by Lewis and Mays, so that it would appear they were all there by happenstance. They all smoked and drank with Wilson and Rogers inside the house. Lewis was armed with a .38

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[2] Oral argument was held at the Walker Career Center at Warren Central High School in Indianapolis on December 4, 2018. We thank the staff for our warm welcome and the students for their professionalism and attentiveness throughout the argument. We also wish to recognize the exceptional briefing and argument provided by counsel for Lewis and the State.

special revolver, and Hale, who Lewis described as a violent person, was armed with a nine-millimeter firearm.

Hale went upstairs to use the restroom and as he returned down the stairs, he stated "die bitch" and shot Wilson five times, including in his chest, abdomen, and back. *Trial Transcript* at 97. Rogers and Lewis both reached for a shotgun that was in the room, and Hale then turned out the lights and ordered Rogers to sit down. Hale told Lewis to kill Rogers, which Lewis refused to do. Lewis handed his revolver to Mays and stated, "if you want it . . . you do it." *Trial Transcript* at 304. Mays proceeded to brutally shoot Rogers multiple times, including several times in the head from a distance of six to eighteen inches. Lewis, Hale, and Mays collected the victims' drugs and money and ran to a nearby house, where they split up the proceeds of the robbery. Mays had taken the shotgun from the drug house also. Eventually, with Lawson's help, they arranged for a ride to a hotel. The men then hung out in the hotel room with Lawson and sat around laughing and talking about the shootings. At some point that night, Lewis engaged in sex or oral sex with Lawson at the hotel. Later, Lewis had his uncle bury the revolver that had been used to kill Rogers.

The crime remained unsolved for quite some time, and Lewis lived in Arizona and Indiana over the next several years. He continued to be involved in drugs and crimes as a gang member until at least 2007. Between 2002 and 2006, Lewis committed five misdemeanors (resisting law enforcement, driving without a license, and disorderly conduct (Indiana 2002); assault and unlawful imprisonment (Arizona 2005)) and three felonies (possession of cocaine (Indiana 2002), theft (Arizona 2004), and burglary (Arizona

2006)). Lewis violated probation more than once, and he was released to parole in Arizona in March 2011.

In the meantime, investigators in Fort Wayne eventually identified Lewis as a suspect in the 1999 double murder. They located him in an out-of-state prison and interviewed him on May 21, 2009. Lewis gave a statement detailing his involvement with Hale and Mays in the robbery turned murder.[3]

On February 25, 2011, the State charged Lewis with two counts of felony murder and two counts of robbery. He was arrested in Indiana on June 27, 2011. Jeffrey Raff, an experienced criminal defense attorney, represented Lewis throughout the trial proceedings. Lewis rejected plea offers from the State — contrary to Raff's recommendations—because Lewis could not grasp the concept of felony murder and believed he was not guilty of murdering Wilson and Rogers because he did not shoot either of them.

The case proceeded to a jury trial on November 29-30, 2011. The jury found him guilty as charged. At the beginning of the sentencing hearing on January 5, 2012, Lewis made clear his dissatisfaction with Attorney Raff and his lack of desire to consult with Attorney Raff about sentencing issues. Thereafter, Attorney Raff presented no witnesses, made no argument on Lewis's behalf, and made no sentencing recommendation. He simply allowed Lewis to make his own statement, which spanned about six pages of the transcript. The State, on the other hand, presented a number of witnesses, asserted several aggravating circumstances, and asked the court to impose

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[3] Lewis had previously admitted his involvement in the crime during an interview with a Fort Wayne Police Detective in 2002, but no charges were filed at the time.

aggravated, consecutive sentences. At the conclusion of the sentencing hearing, the trial court imposed maximum sixty-five-year sentences for the felony murder convictions and ordered them to be served consecutively.[4] The trial court noted several aggravating circumstances (criminal history, gang membership, and the senseless, horrific nature of the offenses) and found no mitigating circumstances. In support of consecutive sentences, the trial court indicated that there were two victims and that Lewis had an aggravated criminal record.

Lewis pursued a direct appeal with new counsel, Stanley Campbell. Attorney Campbell challenged the sufficiency of the evidence. We affirmed the convictions in a memorandum decision. *See Lewis v. State*, No. 02A03-1201-CR-18 (Ind. Ct. App. Aug. 31, 2012), *trans. denied*. We noted that all participants in a robbery that results in killing by one robber are deemed equally guilty of murder, regardless of which participant actually killed the victim. Based on the evidence presented at trial, we determined the "jury could have reasonably inferred . . . that Lewis possessed the requisite intent to participate in the robberies, that he was an accomplice to the robberies and murders, and that the killings of Rogers and Wilson were probable and natural consequences of the actions of Lewis, Hale, and Mays." *Slip op*. at 7.

On May 6, 2013, Lewis filed a pro se petition for post-conviction relief, which was amended by post-conviction counsel on October 31, 2016. An evidentiary hearing was held on July 7, 2017. Lewis argued that Attorney Raff failed to advocate on Lewis's behalf at

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[4] Judgments of conviction were not entered on the robbery counts.

sentencing, which resulted in Lewis receiving a de facto life sentence. Lewis argued that there were several available mitigating circumstances that should have been asserted at sentencing. Specifically, Lewis was eighteen when he committed the crimes, he acted as an accomplice, he has mental health issues, and he had a difficult upbringing. Additionally, Lewis claimed that Attorney Campbell was ineffective for failing to challenge the sentence as inappropriate on direct appeal.

At the post-conviction hearing, Lewis called Attorney Raff and clinical psychologist Dr. James Cates as witnesses. He also testified on his own behalf and introduced several exhibits, including the affidavit of Attorney Campbell. The State acknowledged that Attorney Raff "basically did not do any advocacy at the sentencing hearing" but argued that "what Mr. Raff could have come up with would have had limited mitigating value and would probably not have made a difference in the outcome." *Post-Conviction Transcript* at 4.

The post-conviction court denied relief on March 15, 2018, with a lengthy order. The trial court made the following findings of fact regarding the evidence presented at the post-conviction hearing:

> 8. Attorney Raff did nothing at sentencing, other than to announce that Petitioner might speak on his own behalf. Attorney Raff testified at the post-conviction hearing, in relevant part, as follows. In preparation for Petitioner's sentencing, he would have reviewed Petitioner's criminal history, had personal contact with him, and reviewed the pre-sentence investigation report. He believed that no mitigators were available in this case.

He made no inquiries about Petitioner's mental health history, and was not aware that Petitioner had attempted suicide at the Allen County Jail . . . . He did not ask Petitioner about his upbringing or his family members, did not speak to his relatives or friends, and did not have him examined by a mental health professional. He did not prepare Petitioner to make a statement at sentencing, and explained that Petitioner did not take his advice well. He would have asked whether any family members wanted to speak or write on Petitioner's behalf. Petitioner had a very poor character and very bad criminal history. He expected that Petitioner would receive consecutive sentences, one for each victim, of at least 55 years each. He could not identify any mitigators that he could argue with a straight face. He saw no indication that Petitioner had mental health issues, but rather "he just had a pretty extensive history of being a gangster basically." Young age could be a mitigator, but Petitioner was in his late 20s by the time of his sentencing, and "his criminal history negated any mitigator he might arguably have had because of his youth at the time of the offense." He suspected that a defendant's status as an accomplice had no weight as a mitigator. As to a defendant's difficult upbringing, Attorney Raff testified:

> I was not of the school of thought that said that my client was not well treated when he was five or six, therefore that explains to some extent his robbing these people with

> a gun. I think there's got to be some realistic relationship between the upbringing and the conduct.

Attorney Raff saw no nexus between any possible mitigating factor and anything in Petitioner's conduct and speech.

9. Attorney Campbell stated by affidavit, in relevant part, that his ability to challenge Petitioner's sentence was hindered by trial counsel's (Raff's) failure to present evidence and argument in favor of a mitigated sentence; Attorney Campbell would have challenged the sentence as inappropriate under Indiana Appellate Rule 7(B) if Attorney Raff had made a record at sentencing regarding Petitioner's mental health issues and troubled family background; the sufficiency of evidence argument was not a strong issue, and the Appellate Rule 7(B) challenge would have been a stronger issue, particularly if a record had been developed at sentencing.

10. Psychologist James A. Cates, Ph.D., testified at the post-conviction hearing, in relevant part, as follows. He interviewed Petitioner in 2016 and administered several psychological tests . . . . He learned that Petitioner's mother was a drug abuser, she had abusive men in the home, and she was diagnosed with bipolar disorder; that Petitioner was physically abused by his mother and her boyfriends; and that his housing situation was unstable. Dr. Cates diagnosed Petitioner with "bipolar II disorder" and noted that he also exhibited antisocial personality traits. Dr. Cates was the first clinician

who formally diagnosed Petitioner with bipolar disorder . . . . "Bipolar II" is a slightly less severe degree of bipolar disorder than "bipolar I," not involving any reported full manic episodes. Bipolar disorder is not always apparent, and indeed people with that disorder "can go through periods where their mood is absolutely stable." Dr. Cates believed that, at the time of the murder, Petitioner was likely already experiencing distorted logic and decision-making from bipolar disorder. The effect of bipolar disorder upon Petitioner's behavior around the time of the crime would depend on whether he was in a depressed phase or a hypomanic/manic phase, but there were several possibilities:

> [Y]ou could potentially see increased impulsivity, you could see increased disruption in his thought processes, his ability to think through the consequences of actions. You could see . . . auditory/visual hallucinations, you could see delusions, all those are potential.

Petitioner had had a substance abuse problem, which could have resulted from efforts at self-medication for bipolar disorder. Consistent with the diagnosis of bipolar disorder, Petitioner's medical records from the Arizona Department of Corrections indicated that he was prescribed mood-stabilizing drugs. At the time of the crime, Petitioner's "maturity level was probably much younger than his chronological age would suggest." Numerous children who live in traumatized situations

do not evidence a conduct disorder. Up to the age of 18, around the time of the offense, Petitioner had displayed no conduct disorder. During the time when Petitioner was admittedly a gang member, from the ages of 13 to 26, he would have been more likely to derive his values from the gang, rather than anything in society that might have been opposed to the gang's values.

11. Relatives of Petitioner stated by affidavit, in relevant part, that his mother was addicted to drugs; his father was mostly absent and did not help to raise him; he had an unstable home life; he and his mother were physically abused by the mother's boyfriends; at the age of nine, he witnessed one boyfriend stabbing another; he began using and selling drugs at an early age; members of his family suffer from mental illnesses including bipolar disorder, schizophrenia, depression, and substance abuse disorder; his mother has been diagnosed with bipolar disorder and is deemed "seriously mentally ill" by the State of Arizona; and he tried to commit suicide in his late teens.

12. Petitioner testified at the post-conviction hearing, in relevant part, as follows. He and Attorney Raff never discussed a plan or evidence for sentencing. Attorney Raff never asked him about his mental health history or his family and personal background, and did not discuss having anyone speak on his behalf at sentencing. He told the probation officer who prepared his pre-sentence investigation report (PSI) that he did not have mental

> health issues (although he had been diagnosed with bipolar disorder) because he was nervous and scared. However, if Attorney Raff had asked him about his mental health, of course he would have told him about the previous treatment. Attorney Raff did not prepare him to speak at sentencing, and he did not meet with him between the time he was convicted and the time he was sentenced. He was admitted twice to Parkview Behavioral Health in 2002, and was first told that he had bipolar disorder while in the Arizona Department of Correction in 2004 or 2005. He attempted suicide in the Allen County Jail in 2002.

Appendix Vol. III at 30-34 (citations to record omitted).

In its conclusions, the post-conviction court addressed each of the potential mitigating circumstances and determined that Attorney Raff erred in certain regards. Regardless, the court concluded that Lewis was not prejudiced by the alleged deficient performance because "[e]ven if Attorney Raff had done everything that Petitioner now wishes he had done, there would have been little or (more likely) no effect on the sentence." *Id*. at 41. The post-conviction court's conclusions will be set out more fully below, but it ultimately concluded, based on lack of prejudice, that Lewis did not receive ineffective assistance of trial or appellate counsel. Additionally, the post-conviction court rejected Lewis's argument, based on *U.S. v. Cronic*, 466 U.S. 648 (1984), that he did not have to establish prejudice. Lewis now appeals the denial of his petition for post-conviction relief.

Standard of Review

In a post-conviction proceeding, the petitioner bears the burden of establishing grounds for relief by a preponderance of the evidence. *Bethea v. State*, 983 N.E.2d 1134, 1138 (Ind. 2013). "When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment." *Id*. (quoting *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004)). In order to prevail, the petitioner must demonstrate that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. *Id*. Although we do not defer to a post-conviction court's legal conclusions, we will reverse its findings and judgment only upon a showing of clear error, *i.e.*, "that which leaves us with a definite and firm conviction that a mistake has been made." *Id*. (quoting *Ben–Yisrayl v. State*, 729 N.E.2d 102, 106 (Ind. 2000)).

A petitioner will prevail on a claim of ineffective assistance of counsel upon a showing that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the petitioner. *Id.* To satisfy the first element, the petitioner must demonstrate deficient performance, which is "representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the 'counsel' guaranteed by the Sixth Amendment." *Id*. (quoting *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002)). The second element requires a showing of prejudice, which is "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*. at 1139. "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Kubsch v. State*, 934 N.E.2d 1138,

1147 (Ind. 2010) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). Because a petitioner must prove both deficient performance and prejudice to prevail on a claim of ineffective assistance of counsel, the failure to prove either element defeats such a claim. *See Young v. State*, 746 N.E.2d 920, 927 (Ind. 2001).

Trial Counsel's Effectiveness

Undoubtedly, Attorney Raff was deficient in his representation of Lewis at the sentencing hearing. Lewis faced a maximum sentence of 130 years, essentially a life sentence. Although present, Attorney Raff did nothing for his client at sentencing aside from indicate that Lewis would speak on his own behalf at the conclusion of the hearing. Lewis argues that at a minimum Attorney Raff should have proffered several mitigating circumstances and argued against maximum, consecutive sentences.[5] *See McCarty v. State*, 802 N.E.2d 959, 969 (Ind. Ct. App. 2004) (concluding, in a multiple-felony case, that "[c]ounsel's failure to

[5] In sum, Lewis asserts that "[i]nstead of humanizing Lewis and presenting evidence of his difficult upbringing, his youth, and his mental illness and substance addiction, [Attorney] Raff displayed rancor toward [Lewis]." *Appellant's Brief* at 28. Lewis continues: "[Raff's] comments during closing argument that his client was a disgusting and bad person with a disgusting lifestyle, coupled with his silence at sentencing, betrayed his duty of loyalty to his client and left the jury and sentencing court with a horrible impression of Lewis." *Id*. Moreover, Lewis observes that it was the trial court's duty to determine the weight of proffered mitigating circumstances, making Attorney Raff's decision to unilaterally remove available mitigators from consideration improper. "While Raff had the discretion to weed out weaker arguments from stronger ones, his silence communicated to the court that there were no possible mitigators and that his client deserved the maximum sentence." *Appellant's Reply Brief* at 5.

investigate and present to the court numerous potentially mitigating circumstances constituted deficient performance"), *trans. denied*. Although we agree that trial counsel was deficient, our review leaves us with the firm conviction that Lewis was not prejudiced by counsel's deficient performance. In this regard, we address each potential mitigating circumstance below.

Role as Accomplice

Lewis contends that his role as an accomplice in the murders was both relevant and mitigating. Our Supreme Court has observed:

> While an accomplice may be found guilty of the crime largely executed by his principal, it does not follow that the same penalty is appropriate. Justice Frankfurter has written, "[T]here is no greater inequality than the equal treatment of unequals." *Dennis v. United States*, 339 U.S. 162, 184, 70 S.Ct. 519, 526, 94 L.Ed. 734, 749 (1949) (dissenting opinion).

Martinez Chavez v. State, 534 N.E.2d 731, 735 (Ind. 1989); *see also Brown v. State*, 10 N.E.3d 1, 5 (Ind. 2014) (revising inappropriate sentence from 150 years to 80 years in part because defendant acted as an accomplice in murders).

Although Lewis acted as an accomplice, the evidence establishes that his role in the murders was substantial and that he was actively involved before, during, and after the horrific murders of a fourteen-year old and sixteen-year old. Before, Lewis planned the robbery of two young drug dealers with Hale and Mays. He took his own gun to the robbery and was aware that Hale, a person he knew to be violent, was armed with a gun. During the crime, as Wilson was

being shot, Lewis reached for the shotgun to keep it away from Rogers. Lewis also handed his own gun to Mays, who was unarmed, and invited him to shoot Rogers if he wished. Mays proceeded to shoot Rogers in the head multiple times from a close distance. After, Lewis fled with his cohorts, taking the shotgun with him. The three divided the drugs and money and then spent the night in a hotel essentially celebrating and laughing about the evening's events. Considering the totality of his involvement, we agree with the trial court that Lewis's role as an accomplice was not deserving of mitigating weight.

Age

The murders were committed shortly after Lewis turned eighteen years old. He argues that his age, "while not legally excusing his behavior, was relevant to contextualize his behavior during and after the crime occurred." *Appellant's Brief* at 25.

In addressing the appropriateness of a sixteen-year-old defendant's 150-year sentence in *Brown*, the Supreme Court stated:

> We take this opportunity to reiterate what the United States Supreme Court has expressed: Sentencing considerations for youthful offenders—particularly for juveniles—are not coextensive with those for adults. *See Miller v. Alabama*, [567] U.S. [460], [480,] 132 S.Ct. 2455, 2469, 183 L.Ed.2d 407 (2012) (requiring the sentencing judge to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison" (footnote omitted)). Thus, both at initial sentencing and on appellate review it is necessary to

> consider an offender's youth and its attendant characteristics.

Brown, 10 N.E.3d at 6-7.

Though not identified as a statutory mitigating circumstance, it is well established that a defendant's youth may be a significant mitigating factor in some circumstances. *See Smith v. State*, 872 N.E.2d 169, 178 (Ind. Ct. App. 2007), *trans. denied*.

> Focusing on chronological age is a common shorthand for measuring culpability, but for people in their teens and early twenties it is frequently not the end of the inquiry. There are both relatively old offenders who seem clueless and relatively young ones who appear hardened and purposeful.

Ellis v. State, 736 N.E.2d 731, 736 (Ind. 2000).

The record shows that Lewis was not a clueless eighteen-year-old. By his own admission, he had been a gang member for several years before the crime. He actively planned and participated in the robbery turned double murder and seemed unaffected by the horrific results. Further, any diminished culpability due to his age is overshadowed by his continued involvement in criminal conduct and gang life for many years thereafter. Any weight given this mitigator would be exceedingly minimal under the circumstances.

Difficult Childhood

With minimal investigation, Lewis argues that Attorney Raff would have learned of additional mitigating evidence, including his difficult childhood. In this regard, Lewis presented evidence at the post-conviction hearing that he was raised by a drug-

addicted mother who suffers from bipolar disorder and has been deemed seriously mentally ill by the State of Arizona. Lewis was physically abused by his mother's boyfriends and, at the age of nine, he witnessed one boyfriend stabbing another. Lewis began using and selling drugs at an early age and eventually dropped out of school and took to the streets.

Our Supreme Court has indicated that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)). Evidence of a difficult childhood, however, generally "warrants little, if any, mitigating weight." *Id*.

Mental Health

The final mitigating factor advanced by Lewis at the post-conviction hearing was his mental illness. Specifically, Lewis had attempted suicide, was treated with mood-stabilizing drugs while incarcerated in Arizona, and has suffered from substance abuse and bipolar disorder. Dr. Cates opined that, at the time of the murders, Lewis may have been experiencing distorted logic and decision making, and his maturity level was likely much younger than his actual age.

Several factors bear on the weight, if any, that should be given to mental illness at sentencing.

> These factors include: (1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment;

> (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime.

Weeks v. State, 697 N.E.2d 28, 30 (Ind. 1998). Here, Dr. Cates diagnosed Lewis in 2016 with Bipolar II, a less-severe form of the disorder. There is no evidence that Lewis was suffering from this disorder in 1999, which makes establishing a nexus between the crime and Lewis's mental state rather difficult. The extent to which Lewis would have been unable to control his behavior due to the disorder is similarly unclear, and his behavior before, during, and after the murders suggests that he was in control of his faculties. The weight attributable to this mitigator, if any, would have been extremely low under the circumstances.

Consecutive Sentences

Additionally, Lewis argues that Attorney Raff should have argued against consecutive sentences in light of the available mitigating circumstances. Lewis does not dispute that the aggravating circumstance of multiple victims generally suffices to support consecutive sentences. Indeed, "when the perpetrator commits the same offense against two victims, enhanced and consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person." *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003).

Lewis notes that consecutive sentences, however, are not always required where there are multiple murder victims. For example, in *Holsinger v. State*, 750 N.E.2d 354 (Ind. 2001), the Court reversed a sentence of two consecutive sentences of life in prison without parole after finding several sentencing errors. The

Court chose to resentence the defendant with an independent consideration of the aggravating and mitigating factors. In mitigation, the Court observed that the defendant was nineteen when he participated in the murders (and robberies), he had a troubled childhood, his co-defendant was the instigator/leader of the criminal episode, and he had no juvenile or criminal history. *Id.* at 363-64. Despite finding that the "aggravating circumstances outweighed the mitigating circumstances by a sufficient magnitude that the maximum sentence of 65 years for murder should be imposed on each count", the Court ordered the sentences on the two murder counts to be served concurrently. *Id.* at 365; *see also Brown*, 10 N.E.3d at 4-8 (revising inappropriate sentence from 150 years to 80 years for two counts of murder and one count of robbery where defendant was only 16 years old, was an accomplice/not the mastermind, the murders were not particularly heinous, and defendant's only violent juvenile offense was a battery).

Although consecutive sentences are not always a given when there are multiple murder victims, concurrent sentences are undoubtedly the exception. We cannot agree with Lewis that the facts of this case lend themselves to making concurrent sentences appropriate. As discussed above, although Lewis was relatively young and acted as an accomplice, his culpability was great. Moreover, unlike in *Brown*, these murders were particularly heinous. The victims were fourteen and sixteen years old and were each shot multiple times in senseless acts of violence. In fact, Lewis callously provided the murder weapon to Mays for the purpose of killing Rogers if Mays wanted

to. After leaving the victims to die,[6] the trio, along with Lawson, partied into the night and laughed about their crimes. In addition to the nature and circumstances of the murders, we find relevant Lewis's substantial criminal behavior in the subsequent years and his continued association with Hale and Mays.

Prejudice

The post-conviction court determined that even if Attorney Raff had done everything that Lewis now wishes he had done, "there would have been little or (more likely) no effect on the sentence." *Appendix Vol. III* at 41. The court noted that consecutive sentences were supported by the aggravating circumstance of multiple victims, the second of which was killed after Lewis handed his gun to Mays. The court opined, "it is inconceivable that Attorney Raff could have presented any evidence or argument that would have altered the Court's decision" regarding consecutive sentences. *Id*. The court continued:

> [I]t is at least conceivable that Attorney Raff could have obtained an aggregate sentence of less than 130 years (but at least 110 years) for Petitioner by presenting mitigating evidence. In view of the weakness of the available mitigating evidence, however, there is no reasonable probability that Petitioner would have received a sentence of less than 130 years. There would have been no basis for an argument that Petitioner's participation as an accomplice was entitled to any mitigating weight. His age of 18 at the time of the

[6] The evidence at trial indicated that one of the victims was still alive for a period of time after being shot and he moved around the house, leaving a trail of blood.

> offense would have lost all or most of the limited significance it did possess in view of his age of 30 at the time of sentencing. His difficult childhood would have warranted "little, if any, mitigating weight", particularly in view of the lack of evidence connecting his bad childhood with his later decision to take part in an armed robbery. His bipolar disorder, also not shown to have any nexus with his crimes, would likewise have deserved little weight, if any, as a mitigating factor. Although the Court would have had discretion to give some modest weight to these claimed mitigators, and accordingly to impose an aggregate sentence slightly below the maximum possible, there is no reasonable probability that the Court would actually have done so under the circumstances of Petitioner's case. *See Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006), quoting *Strickland*, 466 U.S. at 687 (a "reasonable probability" is a probability "sufficient to undermine confidence in the outcome"). Petitioner's defense therefore did not suffer prejudice from Attorney Raff's failure to present mitigating evidence and argument at sentencing.

Appendix Vol. III at 41-42 (some citations omitted).

"The dispositive question in determining whether a defendant is prejudiced by counsel's failure at sentencing to present mitigating evidence is what effect the totality of the omitted mitigation evidence would have had on the sentence." *McCarty*, 802 N.E.2d at 967 (citing *Coleman*, 741 N.E.2d at 702). Thus, on review, we determine whether there is a reasonable probability that the trial court would have imposed a lesser

sentence had it been fully informed of the mitigating evidence. *McCarty*, 802 N.E.2d at 969.

We agree with the post-conviction court that there is not a reasonable probability that presentation of the omitted mitigating evidence would have affected Lewis's sentence. While Attorney Raff certainly should have proffered the mitigators at sentencing, the meager weight of those simply could not withstand the overwhelming weight of the aggravating circumstances. Without recounting everything above, we observe that this was a senseless and horrific crime, resulting in the death of two teenage boys, and Lewis, an active participant at all stages, seemed to be unfazed by his involvement in the killings. For at least the next eight years, Lewis continued his criminal behavior and was convicted in both Arizona and Indiana of several felonies and misdemeanors.[7] Although Lewis gave a detailed statement to detectives, he never grasped that he was culpable for the killings and his statement at sentencing was not reflective of true remorse. The post-conviction court's determination regarding lack of prejudice was not clearly erroneous.

U.S. v. Cronic

Lewis argues that this is a rare case in which prejudice is presumed due to trial counsel's effective abandonment of his client during a critical stage in the proceedings. This argument is based on *U.S. v. Cronic*, 466 U.S. 648 (1984).

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[7] Lewis reported that his role in the Gangster Disciples, of which he was a member from age thirteen to age twenty-six, was "selling drugs, robbing people, and beating people up." *Post-Conviction Exhibits* at Petitioner's Exhibit B (PSI report).

In *Cronic*, the U.S. Supreme Court identified three situations implicating the right to counsel that involved circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id*. at 658-659. First and "[m]ost obvious . . . is the complete denial of counsel" at a critical stage of trial. *Id*. at 659. Secondly, the Court noted "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id*. Finally, the Court included cases "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not". *Bell v. Cone*, 535 U.S. 685, 696 (2002) (citing *Cronic*, 466 U.S. at 659-662).

Lewis argues 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. We do not agree that Lewis's claim is controlled by *Cronic* rather than *Strickland*.

The U.S. Supreme Court has emphasized the narrowness of *Cronic's* exceptions.

> The Court has relieved defendants of the obligation to make this affirmative showing [of prejudice] in only a very narrow set of cases in which the accused has effectively been denied counsel altogether: These include the actual or constructive denial of counsel, state interference with counsel's assistance, or counsel that labors under actual conflicts of interest.

Weaver v. Massachusetts, 137 S. Ct. 1899, 1915, 198 L. Ed. 2d 420 (2017); *see also Kimmelman v. Morrison*, 477 U.S. 365, 382 n.6 (1986) (noting the "few contexts" where prejudice is presumed are "where counsel is either totally absent or prevented from assisting the accused during a critical stage of the proceeding" and "where counsel is burdened by an actual conflict of interest").

Strickland and *Cronic* were issued the same day, and *Strickland* also addressed the concept of presuming prejudice in certain contexts:

> Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.[8]

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[8] Similarly, in discussing the second exception in *Cronic*, the Court cited a case in which defense counsel was precluded by a protective order from effectively cross examining a key prosecution witness. *Cronic*, 466 U.S. at 659 (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). Because this was a "constitutional error of the first magnitude", no showing of lack of prejudice could cure it. *Id*. (quoting *Davis*, 415 U.S. at 318). The Court observed: "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id*. at 659 n. 26.

> One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. [P]rejudice is presumed when counsel is burdened by an actual conflict of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."
>
> Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence.

Strickland, 466 U.S. at 692-93 (citations omitted).

Moreover, since *Cronic* was decided in 1984, the U.S. Supreme Court has never applied the second exception to relieve a convicted defendant of the need to prove prejudice, nor has the Indiana Supreme Court.[9] In *Bell*, the Court simply spoke of "the

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[9] We acknowledge that the Seventh Circuit has applied the second *Cronic* exception in cases similar to Lewis's. *See Miller v. Martin*, 481 F.3d 468, 472 (7th Cir. 2007); *Patrasso v. Nelson*, 121 F.3d 297, 303-05 (7th Cir. 1997). These decisions, however, are not binding upon us. *See Ind. Dep't of Public Welfare v. Payne*, 622 N.E.2d 461, 468 (Ind. 1993) ("Although U.S. Supreme Court decisions pertaining to federal questions are binding on state courts, lower federal court decisions may be persuasive but have non-binding authority on state courts.").

possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case" where the attorney's failure is complete. *Bell*, 535 U.S. at 696-97 (emphasis supplied). Ultimately, the Court concluded in *Bell*: "The aspects of counsel's performance challenged by respondent—the failure to adduce mitigating evidence and the waiver of closing argument—are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland's* performance and prejudice components." *Id*. at 697-98.

We are not persuaded that Lewis's claim falls within one of the limited circumstances of extreme magnitude that justify a presumption of ineffectiveness under *Cronic*.[10] The post-conviction court, therefore, correctly determined that Lewis was required to establish prejudice under *Strickland*.

Appellate Counsel's Effectiveness

Briefly, Lewis also argues that his appellate counsel, Attorney Campbell, was ineffective for failing to challenge his sentence as inappropriate on direct appeal. Deficient performance will be found where the unraised issue on appeal was "significant and obvious from the face of the record" and was "clearly stronger"

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[10] We note that Attorney Raff's lack of advocacy at the sentencing hearing appears to have been, at least in part, invited by Lewis, who expressed clear disdain for counsel. Lewis, a difficult, angry client, indicated at the sentencing hearing, "I really don't want to discuss nothin' with Jeffrey Raff any further." *Sentencing Transcript* at 5. In preparing for the sentencing hearing, Attorney Raff determined (incorrectly) that there were no mitigating circumstances that he could present to the trial court. He believed "the only hope [for Lewis] was to make an expression of remorse". *Post-Conviction Transcript* at 15. In this vein, Lewis gave a lengthy statement at sentencing. The statement, however, veered off from any true expression of remorse.

than the issue raised. *Timberlake v. State*, 753 N.E.2d 591, 606 (Ind. 2001). A reviewing court, however, "should not find deficient performance when counsel's choice of some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997). If deficient performance is established, we then examine whether the issue that appellate counsel failed to raise would have been clearly more likely to result in reversal or an order for a new trial. *Id*.

Attorney Campbell acknowledged that the sufficiency argument presented on direct appeal was not a strong issue and that a challenge to the sentence would have been a stronger issue *if* the record had been properly developed at the sentencing hearing. Attorney Campbell, however, felt that his hands were tied by Attorney Raff's failure to proffer any mitigating circumstances below. Had Attorney Raff made a proper record, Attorney Campbell averred that he would have challenged the 130-year sentence as inappropriate. Additionally, Attorney Campbell believed that challenging the sentence on direct appeal with an undeveloped record might hinder Lewis's ability to pursue a post-conviction claim of ineffective assistance of trial counsel. Attorney Campbell's assessment of the sentencing issue and determination not to raise it on direct appeal were reasonable and did not constitute deficient performance.

Judgment affirmed.

Riley, J. and Bradford, J., concur.

APPENDIX E

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

IN THE COURT OF APPEALS OF INDIANA

No. 02A03-1201-CR-18

RODERICK VANDRELL LEWIS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

August 31, 2012

Appeal from the Allen Superior Court
Cause No. 02D06-1102-MR-2
The Honorable FRANCES C. GULL, *Judge*

ATTORNEY FOR APPELLANT:

Stanley L. Campbell Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

Gregory F. Zoeller Attorney General of Indiana

Andrew R. Falk Deputy Attorney General
Indianapolis, Indiana

MEMORANDUM DECISION –
NOT FOR PUBLICATION

BROWN, *Judge*

Roderick Vandrell Lewis appeals his convictions for two counts of felony murder.[1] Lewis raises one issue, which we restate as whether the evidence is sufficient to sustain his convictions. We affirm.

The facts most favorable to Lewis's convictions follow. On June 29, 1999, Christopher Hale had a conversation with sixteen year old Richard Rogers in the presence of Angela Lawson during which Rogers asked Hale to visit a drug house in Fort Wayne, Allen County, Indiana, operated by Rogers and fourteen year old Sidney Wilson. Hale declined because he and Wilson were having problems, and Rogers stated that he "would talk to [Wilson] to squash it." Transcript at 83. Sometime later in the evening, Hale, Lewis, and Kajuanta Mays asked Lawson to visit the drug house and inform them who was inside, and Hale gave Lawson twenty dollars. Lawson went to the house, bought a rock of crack cocaine, returned to the men, and informed them that Rogers and Wilson were the only persons in the house. Hale, Lewis, and Mays decided to visit the house and obtain drugs. Lewis knew of the men's intentions to take the drugs they wanted and that he "was going to get something out of it." *Id.* at 361. Lewis, Hale, and Mays planned for Hale to arrive at the house first and for Lewis and Mays to arrive later so that it would appear to be happenstance that all three men were at the house at

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[1] Ind. Code § 35-42-1-1 (Supp. 1997) (subsequently amended by Pub. L. No. 17-2001. § 15 (eff. Jul. 1. 2001): Pub. L. No. 151-2006. § 16 (eff. Jul. 1. 2006): Pub. L. No. 173-2006. § 51 (eff. Jul. 1. 1006): Pub. L. No. 1-2007. § 230 (eff. Mar. 30. 2007)).

the same time so that Wilson and Rogers would not believe that the men meant to harm them.

At some point, the three men entered the house and started smoking and drinking with Wilson and Rogers. Lewis was armed with a .38 special revolver, and Hale, who Lewis described as a violent person who had had a lot of problems with people, was armed with a nine millimeter firearm. Hale stated that he had to use the restroom and went upstairs, and Wilson and Rogers sat downstairs. While Wilson was sitting on a couch, Hale walked down the stairs and stated "die bitch" while shooting his nine millimeter at Wilson. *Id.* at 97. Hale shot Wilson five times, including in his chest, abdomen, left armpit, left leg, and the middle of his back. Rogers and Lewis both "started going for" a shotgun that was in the room, and Hale turned out the lights in the room and told Rogers to "sit down mother f----r." *Id.* at 304, 354. Hale told Lewis to kill Rogers, and Lewis stated that he would not do it, handed his .38 revolver to Mays, and stated "if you want it . . . you do it." *Id.* at 304. Mays then shot Rogers five or six times, including several times in the head from a distance of six to eighteen inches.

Lawson, who was returning to the house to purchase additional drugs, observed Lewis, Hale, and Mays running away from the house. Lewis took the shotgun from the house with him. Lewis, Hale, Mays, and Lawson entered another house, went into the basement, and Lewis, Hale and Mays split up the money and drugs they had taken from the drug house. The men gave Lawson some drugs to pay a person for a ride to a hotel. Lawson arranged for a ride, and the driver was given approximately seven rocks of crack, which the driver recognized to be from the house of Wilson and Rogers. Lewis, Hale, Mays, and Lawson

entered a hotel room, and the men "were sittin around laughin' and talkin" and discussing and describing the shootings. *Id*. at 97. At some point that night, Lawson and Lewis had sex or oral sex. At some point, Lewis's uncle buried the .38 revolver and it was later exhumed. Lewis went to Arizona and returned to Indiana, and in March 2001 police stopped Lewis, Hale, and Mays and discovered the revolver in their vehicle.

On February 25, 2011, the State charged Lewis with Count I, felony murder for the death of Rogers; Count II, felony murder for the death of Wilson; Count III, robbery of Rogers as a class A felony; and Count IV, robbery of Wilson as a class A felony. A jury found Lewis guilty on all counts. The court sentenced Lewis to sixty-five years each for his convictions under Counts I and IL merged Count III into Count I and Count IV into Count II, and ordered the sentences under Counts I and II to be served consecutive to each other for an aggregate sentence of 130 years.

The issue is whether the evidence is sufficient to sustain Lewis's convictions. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. *Jones v. State*, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt *Id.* If there is substantial evidence of probative value to support the conviction, it will not be set aside. *Id.*

Lewis maintains that the evidence was insufficient to support his felony murder convictions and the underlying robbery. Lewis acknowledges that he had some notion that Hale and Mays intended to rob

Rogers and Wilson of their drugs and money but contends that the evidence was insufficient for a jury to have determined from his actions or words that he possessed the intent to assist Hale and Mays in a robbery, that he aided, induced, or caused Hale or Mays to shoot and kill Rogers and Wilson, or that the deaths of Rogers and Wilson were a natural and probable consequence of any robbery attempt. The State argues that Lewis's conduct before the crimes took place, his active involvement in the crimes, his refusal to stop his companions from committing the offenses, and his conduct after the robbery and murders all permitted the jury to conclude that Lewis was an accomplice in the crimes and that the jury could reasonably have concluded that violence and murder would be the natural and probable consequence of a robbery based upon the fact that Lewis and his companions were armed and that there was bad blood between Wilson and Hale.

Ind. Code § 35-42-1-1 provides that a person who "kills another human being while committing or attempting to commit . . robbery . . . commits murder, a felony." Ind. Code § 35-42-5-1 provides that "[a] person who knowingly or intentionally takes property from another person or from the presence of another person . . . by using or threatening the use of force on any person . . . or . . . by putting any person in fear . . . commits robbery, a Class C felony." "However, the offense is a Class B felony if it is committed while armed with a deadly weapon or results in bodily injury to any person other than a defendant, and a Class A felony if it results in serious bodily injury to any person other than a defendant." Ind. Code § 35-42-5-1.

The Indiana Supreme Court has held that [a]ll participants in a robbery or attempted robbery which

results in killing by one robber are deemed equally guilty of murder, regardless of which participant actually killed the victim." *Williams v. State*, 706 N.E.2d 149, 157 (Ind. 1999), *reh'g denied*, *cert. denied*, 529 U.S. 1113, 120 S. Ct. 1970 (2000). In Indiana there is no distinction between the responsibility of a principal and an accomplice. *Wise v. State*, 719 N.E.2d 1192, 1198 (Ind. 1999). A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person has not been prosecuted for the offense. Ind. Code § 35-41-2-4. The factors that are generally considered to determine whether one person has aided another in the commission of a crime include: (1) presence at the scene of the crime; (2) companionship with another engaged in a crime; (3) failure to oppose the commission of the crime; and (4) the course of conduct before, during, and after the occurrence of the crime. *Wieland v. State*, 736 N.E.2d 1198, 1202 (Ind. 2000).

A person's intent "may be determined from their conduct and the natural consequences thereof' and "intent may be inferred from circumstantial evidence." *Coleman v. State*, 546 N.E.2d 827, 831 (Ind. 1989), *reh'g denied*. It is within the province of the jury to draw an inference of knowledge or intent from the facts presented. *Whatley v. State*, 908 N.E.2d 276, 284 (Ind. Ct. App. 2009) (citing *Gibson v. State*, 515 N.E.2d 492, 496 (Ind. 1987)), *trans. denied*. *See also Hampton v. State*, 961 N.E.2d 480, 487 (Ind. 2012) ("[T]he *mens rea* element for a criminal offense is almost inevitably, absent a defendant's confession or admission, a matter of circumstantial proof"); *Kondrup v. State*, 250 Ind. 320, 323-324, 235 N.E.2d 703, 705 (1968) ("[T]he intent to commit a felony may be inferred from the circumstances which legitimately permit it.").

The evidence reveals that Hale, Mays, and Lewis planned to visit the drug house, that Lewis was aware of the plan to rob Wilson and Rogers, that Lewis knew that he was going to get something out of it, that Lawson was sent to the house to determine who was present there, that Lewis helped to plan the men's staggered arrival at the house so that Wilson and Rogers would not realize the men intended any harm, that Lewis took his .38 revolver with him to the house, that Lewis knew that Hale took his nine millimeter to the house, that Lewis reached for the shotgun after Wilson had been shot to prevent Rogers from reaching it, that Lewis handed Mays his .38 revolver to shoot Rogers, that Lewis took the shotgun from the house, that Lewis later split the drugs and money taken from the house with Hale and Mays, and that Lewis had his uncle bury the .38 revolver. The jury heard testimony that Lewis knew that Hale had had previous altercations with Wilson and Lewis's testimony that drug dealing was le]xtremely dangerous" and that, if someone were to attempt to take drugs from a drug dealer, shootings and killings could happen and happened all the time. *See* Transcript at 365.

To the extent that Lewis points to his own testimony that he intended only to visit the drug house to smoke dope and have a good time and not to commit a robbery, we note that we do not judge the credibility of the witnesses and look only to the probative evidence supporting the verdict and the reasonable inferences therein. *See Jones*, 783 N.E.2d at 1139. Based upon the evidence presented at trial, the jury could have reasonably inferred from the evidence presented that Lewis possessed the requisite intent to participate in the robberies, that he was an accomplice to the robberies and murders, and that the killings of Rogers and Wilson were probable and natural consequences

of the actions of Lewis, Hale, and Mays. Based upon our review of the record, we conclude that evidence of probative value exists from which the jury could have found that Lewis committed the charged offenses beyond a reasonable doubt.

For the foregoing reasons, we affirm Lewis's convictions.

Affirmed.

FRIEDLANDER, J., and PYLE, J., concur.