No. 21-538

In the Supreme Court of the United States

DENNIS REAGLE, WARDEN,
PENDLETON CORRECTIONAL FACILITY
Petitioner,

v.

RODERICK LEWIS,
Respondent.

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

BRIEF FOR RESPONDENT IN OPPOSITION

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

MICHAEL K. AUSBROOK
P.O. Box 1554
Bloomington, IN 47402
(812) 322-3218
mausbrook@gmail.com

ANDREW J. PINCUS
Counsel of Record
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Respondent

QUESTION PRESENTED

Respondent Lewis's counsel "gave up on Lewis and left him entirely without the assistance of counsel" during a sentencing proceeding in which Lewis faced 130 years in prison. Pet. App. 23a. He failed to conduct any investigation of possible mitigating circumstances; failed to speak on Lewis's behalf at the sentencing hearing; and failed to prepare Lewis to speak or even to inform Lewis that Lewis's statement would be the sole response to the prosecution's presentation.

The question presented is:

Whether the Seventh Circuit correctly concluded in this habeas action that the defense attorney's conduct violated clearly established law set forth in *United States* v. *Cronic*, 466 U.S. 648, 659 (1984), and its progeny—because the attorney "entirely failed to subject" the prosecution's sentencing case "to meaningful adversarial testing" and because Lewis was "complete[ly] den[ied] * * * counsel * * * at a critical stage of the case"—and therefore triggered *Cronic*'s presumption of prejudice in connection with Lewis's ineffective assistance of counsel claim.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

Statutes

TABLE OF AUTHORITIES—continued

Page(s)

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Respondent Roderick Lewis faced a potential sentence of 130 years. His lawyer "did nothing at sentencing other than to announce that [Lewis] might speak on his own behalf." Pet. App. 61a (state trial court finding). The lawyer did nothing to investigate potential arguments for mitigation; did not call a single witness or introduce any evidence; did not speak on Lewis's behalf; did not tell Lewis that any advocacy in the sentencing proceeding would be left to Lewis; and did not prepare Lewis to speak. *Id*. at 65a-66a. As the court below explained in detail, this case involves "the extraordinary situation of a lawyer's total abandonment of his client at the critical sentencing stage." *Id*. at 23a. Lewis was sentenced to a 130-year term.

All four post-conviction courts—the Indiana trial and appellate courts, the federal district court, and the court of appeals—found the lawyer's conduct deficient.

The question here is whether Lewis's ineffective assistance of counsel claim is governed by *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), which requires proof that "the deficient performance prejudiced the defense"; or by *United States* v. *Cronic*, 466 U.S. 648, 658 (1984), which holds that prejudice will be presumed 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 of appeals—recognizing and applying the limited standard prescribed by the Antiterrorism

and Effective Death Penalty Act of 1996 (AEDPA)[1]—correctly held that *Cronic* governs. The "extraordinary situation" presented here, Pet. App. 23a, falls within two of the "circumstances" *Cronic* identified: Lewis's attorney "entirely failed to subject" the prosecution's sentencing case "to meaningful adversarial testing" and Lewis was "complete[ly] den[ied] * * * counsel * * * at a critical stage of the case." 466 U.S. at 659.

Petitioner does not even argue that the court of appeals' decision creates a conflict. To the contrary, that ruling is consistent with decisions by other lower courts and faithfully follows this Court's precedents. Review by this Court is not warranted.

A. Respondent's Conviction and Sentencing.

Respondent Roderick Lewis was convicted of two counts of felony murder for the deaths of Richard Rogers and Sidney Wilson. Lewis did not shoot either Rogers or Wilson, but he participated—together with the shooters—in a plan to steal drugs and money from the house in which they lived. Lewis faced up to sixty-five years in prison on each count. Pet. App. 6a-7a.

With his client facing 130 years of incarceration, Lewis's counsel, Jeffrey 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." Pet. App. 59a (Indiana Court of Appeals opinion). Raff also "'did not prepare [Lewis] to make a statement at sentencing.'" *Id.* at 62a (quoting state trial court's findings of fact).

---

[1] Pub. L. No. 104-132, § 104(2), 110 Stat 1214, 1219 (codified at 28 U.S.C. § 2254(d)(1)).

"The State, on the other hand, presented a number of witnesses, asserted several aggravating circumstances, and asked the court to impose aggravated, consecutive sentences." Pet. App. 59a-60a.

Lewis received the maximum sentence on both counts, to be served consecutively. Pet. App. 60a. He appealed, arguing that the evidence against him was insufficient. His convictions were affirmed on direct review. Pet. App. 83a-90a.

B. State Collateral Review Proceedings.

1. Lewis filed a petition seeking post-conviction relief in Indiana state court on the ground that Raff's conduct during the sentencing phase of the proceeding constituted ineffective assistance of counsel and arguing that—because Raff failed completely to advocate for him—prejudice should be presumed under this Court's decision in *Cronic*. Pet. App. 66a.

Raff and Lewis both testified at the post-conviction hearing. Raff acknowledged that "[h]e made no inquiries about [Lewis's] mental health history, and was not aware that [Lewis] had attempted suicide" while in jail. Pet. App. 62a. Raff "did not ask [Lewis] 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." *Ibid*. Raff acknowledged that "[h]e did not prepare [Lewis] to make a statement at sentencing." *Ibid*.

Lewis testified that "[h]e and Attorney Raff never discussed a plan or evidence for sentencing. * * * 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." Pet. App. 65a-66a.

Lewis's relatives filed affidavits stating:

> [Lewis's] 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.

Pet. App. 65a.

A psychologist testified that, due to that history, Lewis suffered from bipolar disorder, and that "at the time of the murder, [he] was likely already experiencing distorted logic and decision-making." Pet. App. 64a. The psychologist concluded that at the time of the crime Lewis's "maturity level was probably much younger than his chronological age would suggest." *Ibid.*

The state trial court found that "Attorney Raff did nothing at sentencing other than to announce that [Lewis] might speak on his own behalf." Pet. App. 61a. It nonetheless denied relief because "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." Pet. App. 66a. The trial court rejected Lewis's argument, based on *Cronic*, that he was not required to establish prejudice. *Ibid.*

2. The Indiana Court of Appeals affirmed. Pet. App. 55a-82a.

The appellate court stated that "[u]ndoubtedly, Attorney Raff was deficient in his representation of Lewis at the sentencing hearing. * * * 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." Pet. App. 68a. But it agreed with the trial court that Lewis failed to establish prejudice. *Id*. at 69a.

The Court of Appeals rejected Lewis's argument that he was not required to demonstrate prejudice because this case fits within *Cronic*'s second exception in that "counsel failed to subject the State's case to meaningful adversarial testing at the sentencing hearing." Pet. App. 78a. It stated that this Court had never applied *Cronic*'s second exception and that it was "not persuaded that Lewis's claim falls within one of the limited circumstances of extreme magnitude that justify a presumption of ineffectiveness under *Cronic*." *Id*. at 81a (footnote omitted).

C. Federal Collateral Review Proceedings.

Lewis then filed a habeas petition under 28 U.S.C. § 2254 in the District Court for the Southern District of Indiana, based on ineffective assistance of counsel. Pet. App. 9a.

1. The district court denied relief. Pet. App. 47a-54a. It concluded that the state appellate court "correctly found that counsel's performance at sentencing was deficient." *Id*. at 50a. But it held that *Cronic*'s presumption of prejudice did not apply.

The district court recognized that there was "no meaningful distinction" between this case and *Miller* v. *Martin*, 481 F.3d 468 (7th Cir. 2007), in which the Seventh Circuit applied *Cronic* in the context of a

claim that the defendant's counsel effectively abandoned him at sentencing. Pet. App. 52a. But it stated that *Miller* did not "identify any Supreme Court case holding that *Cronic* applies where counsel fails to subject the prosecution's case to meaningful adversary testing at sentencing." *Id.* at 53a. For that reason, the district court concluded that the Seventh Circuit would overrule *Miller*, and declined to apply it in this case.

However, because the district court recognized that "reasonable jurists could disagree" about whether *Cronic* applied in this case, it granted a certificate of appealability on the ineffective assistance of counsel claim. Pet. App. 54a.

2. The court of appeals reversed by a divided vote and remanded with instructions that a writ of habeas corpus be issued, limited to the sentencing phase of Lewis's case. Pet. App. 1a-46a.

The majority, speaking through Judge Wood, began by reviewing the facts and holding of *Cronic*. Pet. App. 10a-11a. It explained that *Cronic* recognized the general rule that prejudice is required to prevail on an ineffective assistance claim, but held that there are certain "'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" Pet. App. 11a-12a (quoting *Cronic*, 466 U.S. at 658). *Cronic* "singled out the following examples": "complete absence of counsel at a critical stage of the trial"; "total failure" by counsel "to subject the prosecution's case to meaningful adversarial testing"; and "other circumstances under which * * * 'the likelihood that a lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate.'" Pet. App. 12a (quoting *Cronic,* 466 U.S. at 659-660).

The court of appeals then reviewed this Court's post-*Cronic* decisions.

It first distinguished *Wright* v. *Van Patten*, 552 U.S. 120 (2008), and *Woods* v. *Donald*, 575 U.S. 312 (2015), from the present case. In *Van Patten*, the habeas petitioner argued that his lawyer's appearance at a plea hearing via speakerphone warranted an assumption of prejudice. In *Woods*, the petitioner argued that *Cronic* applied because his lawyer had been briefly away from the courtroom during testimony about a codefendant. Pet. App. 12a-13a. Both cases thus involved a lawyer's temporary physical absence. But, the court explained, Lewis's claim was that even though his attorney was present, the attorney "did absolutely nothing for him" during the entire sentencing proceeding. Pet. App. 13a. Neither of this Court's cases involved the lawyer's physical absence for the entire sentencing phase of the case. Accordingly, "[n]either *Van Patten* nor *Woods* * * * advances the analysis here." *Ibid*.

Turning to the Court's most recent decision, the court of appeals observed that "*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." Pet. App. 13a. The defendant in *Garza* had signed two plea agreements waiving his right to appeal. After sentencing, Garza nevertheless asked his attorney to file a notice of appeal. The lawyer refused.

Citing *Cronic* and *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000), this Court stated that "if the accused is denied counsel at a critical stage of his trial," or "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing * * * prejudice is presumed when counsel's constitutionally deficient

performance deprives a defendant of an appeal that he otherwise would have taken." Pet. App. 14a (quoting *Garza*, 139 S. Ct. at 744).

Finally, the court below analyzed *Florida* v. *Nixon*, 543 U.S. 175 (2004), pointing out that this Court held *Cronic* did not apply on the facts of that case, but also reaffirmed *Cronic*'s rule that prejudice need not be shown when "'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'" Pet. App. 15a.

The court of appeals emphasized that Section 2254(d)(1)'s requirement of clearly established law does not require "'federal courts to wait for some nearly identical factual pattern before a legal rule must be applied,'" and does not "'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.'" Pet. App. 16a-17a (quoting *Panetti* v. *Quarterman*, 551 U.S. 930, 953 (2007)).

The court concluded that *Cronic*'s presumption of prejudice applies "in 'situations in which counsel has entirely failed to function as the client's advocate'" during a critical stage of the proceedings. Pet. App. 17a (quoting *Nixon*, 543 U.S. at 189). It then turned to applying that rule to the facts of this case.

First, the court of appeals concluded that sentencing qualifies as a "critical stage." Pet. App. 17a-18a (citing *Mempa* v. *Rhay*, 389 U.S. 128, 134 (1967), and *Lafler* v. *Cooper*, 566 U.S. 156, 165 (2012)).

Second, the court agreed with the Indiana Court of Appeals that Lewis's counsel was "clearly deficient." Pet. App. 19a.

Third, the court explained why the state court had erred in holding *Cronic* inapplicable.

It stated that after the state court "noted (accurately) that the *Cronic* exception is a narrow one," it failed to "explain why * * * Lewis had not suffered * * * the actual or constructive *absolute* denial of the assistance of counsel (*Cronic* category one)." Pet. App. 20a. Moreover, the opinion continued, "[n]aturally, someone whose lawyer has left him in the lurch," like Lewis, "will also fail to subject the prosecutor's case to meaningful adversarial testing (*Cronic* category two.)" *Ibid*.

The court of appeals also rejected the Indiana court's reliance on *Bell* v. *Cone*, 535 U.S. 685 (2002), in which this Court concluded that *Strickland*, rather than *Cronic*, applied to the defendant's claim. Assessing the facts of the two cases, it found a "day-and-night difference between the assistance that Cone received during the sentencing phase of his case and that which Lewis got." Pet. App. 21a. "Cone, in a word, had plenty of help":

- Defense counsel gave an opening statement that "call[ed] the jury's attention to 'the mitigating evidence already before them,'" and suggested "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.'" *Id*. at 21a-22a (quoting *Cone*, 535 U.S. at 691).
- Cone's lawyer "cross-examined the state's witnesses and objected to the introduction of gory photographs." *Id*. at 22a.

- And Cone's lawyer "urged the jury to be merciful." *Ibid*.

In the present case, by contrast, Attorney Raff "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." Pet. App. 22a.

The court of appeals rejected the State's suggestion that Raff's strategy was to allow Lewis to speak for himself and 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." Pet, App. 22a.

Finally, the court explained that its decision is entirely consistent with *Woods*, *Cone*, and *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. * * * [C]ounsel in *Nixon* fully informed his client of his proposed strategy, and counsel in *Cone* subjected the prosecution's case to adversarial testing." Pet. App. 23a.

"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," Judge Wood wrote. Pet. App. 23a. "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." *Ibid.*

Judge Brennan dissented. Pet. App. 25a-46a. He stated that "[n]o Supreme Court decision holds that silence at sentencing by defense counsel triggers *Cronic*'s presumption of prejudice;" therefore the majority's "decision avoids AEDPA's confines and expands *Cronic*'s scope." Pet. App. 25a.

The dissent argued that when this Court has not opined on the specific fact-pattern of a given case, "AEDPA's strict standard of review results in great deference to state courts." Pet. App. 25a.

Judge Brennan stated that "*Cronic* is a hard-to-meet exception to the already hard-to-meet standard of *Strickland*," and "[w]hether 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." Pet. App. 33a, 35a. In his view, in light of the limited review permissible under AEDPA, Raff's conduct did not fit into any of the *Cronic* exceptions. Pet. App. 39a-40a.

3. The State filed a petition for rehearing and rehearing en banc. No judge requested a vote, and the petition was denied. Pet. App. 1a-2a.

REASONS FOR DENYING THE PETITION

A. There Is No Conflict.

Petitioner does not allege a conflict among the lower courts—because there is no conflict. Rather, other courts of appeals have reached the same conclusion as the Seventh Circuit in cases similar to this one.

For example, the Fifth Circuit held, applying AEDPA, that virtually identical conduct by defense counsel during a critical stage of the case—a plea hearing—triggered *Cronic*'s presumption of prejudice. In *Childress* v. *Johnson*, 103 F.3d 1221 (5th Cir. 1997), the defendant claimed that he was constructively denied counsel in connection with two previous burglary convictions, and that a 1986 conviction therefore "was unconstitutionally enhanced" based on those prior convictions. *Id.* at 1222.

Counsel representing the defendant in connection with the burglary charges "never investigated the facts" and "never discussed the applicable law with" the client, who entered the plea hearing "unaware of his rights." 103 F.3d at 1223. The lawyer was physically present, but he "took no responsibility for advocating the defendant's interests at a critical phase of the proceeding" and "was the equivalent of standby counsel." *Id.* at 1231.

Relying on *Cronic*, the court of appeals held that the defendant had been constructively denied counsel at a critical stage in both proceedings. 103 F.3d at 1229-1231. It stated that its decision "br[oke] no new ground by declaring that a defense lawyer who fails to actively assist the defendant during a critical stage of the prosecution is not the counsel whose assistance is contemplated by the Sixth Amendment." *Id.* at 1232. As the court put it, "when the defendant can establish that counsel was not merely incompetent but inert, prejudice will be presumed." *Id.* at 1228.[2]

---

[2] This Court's decision in *Lindh* v. *Murphy*, 521 U.S. 320 (1997), indicates that the Fifth Circuit erred in applying AEDPA in *Childress*, because the habeas petition was filed before the statute's effective date. But that circumstance does not undermine the

In non-AEDPA cases, courts of appeals similarly hold that *Cronic* applies when the defendant's lawyer is physically present but fails completely to advocate for the defendant during a critical phase of the criminal case.

United States v. *Collins*, 430 F.3d 1260 (10th Cir. 2005), involved defense counsel's conduct during a competency hearing. The relationship between the defendant and his counsel had deteriorated and the lawyer had filed a motion to withdraw. But he remained the defendant's counsel during the competency hearing. *Id*. at 1263, 1265.

The lawyer spoke at multiple points during the hearing: he alerted the court to "additional information" related to his client, but "stated that he would 'not comment'" about that information, and provided the same no-comment response to a question from the bench. 403 F.3d at 1265.

The Tenth Circuit, in an opinion by then-Judge McConnell, concluded that the competency hearing was a critical stage under *Cronic*, and the defendant had been "constructively denied counsel." 430 F.3d at 1264, 1266. The court explained that the lawyer's "repeated declarations that he would 'not comment'" and his "refusal to present" information "relevant" to the proceedings demonstrated his "failure to serve" as an "advocate." *Id.* at 1266. By simply "[standing] silent," the lawyer "did not engage his legal skills in advocating [his client's] position at his competency hearing,"

---

court of appeals' substantive determination regarding the application of *Cronic* under AEDPA's standards.

and thus "did not subject the prosecution's case to adversarial testing." *Ibid.* *Cronic*'s presumption of prejudice therefore applied. *Ibid.*

Similarly, in *Phillips* v. *White*, 851 F.3d 567 (6th Cir. 2017), the court held that even though the lawyer was present at his client's sentencing, his participation was the equivalent of non-representation. As in the present case, the lawyer "fail[ed] to investigate or present evidence, mitigating or otherwise." *Id.* at 581. He declined to make an opening statement (stating "I have nothing to say your honor"). *Id.* at 572. In contrast to the facts here, the lawyer in *Phillips* did deliver a short closing statement. *Id.* at 581.

The Sixth Circuit concluded that the "sentencing was a presentation by one party, not a contest between adversaries," 851 F.3d at 581, and that the defendant therefore was "effectively deprived * * * of counsel throughout a critical stage of trial," *id.* at 571. Accord, *Harding* v. *Davis*, 878 F.2d 1341, 1342-1343, 1345 (11th Cir. 1989) (stating that "silence of counsel is not per se a prejudicial error under *Cronic*" but "may constitute denial of counsel at a critical stage of trial" and holding that defense counsel's silence during trial warranted a presumption of prejudice).

In sum, the relevant decisions of other courts of appeals strongly support the Seventh Circuit's holding in this case.

B. The Decision Below Is Correct

The court of appeals properly applied this Court's precedents, consistent with the restrictions imposed by AEDPA, in holding that Lewis is entitled to a presumption of prejudice under *Cronic* and its progeny.

1. *The Seventh Circuit Correctly Applied the Law Clearly Established by* Cronic *to the Particular Facts of This Case.*

This Court's decision in *Strickland* established the general standard for ineffective assistance of counsel claims. The defendant must show his lawyer "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687.

Cronic, however, recognized an exception: prejudice will be presumed 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 identified three such circumstances. *Id*. at 659-660 & n.25.

First, and "most obvious" is when "the accused is denied counsel at a critical stage of his trial." *Cronic*, 466 U.S. at 659. Second, when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659-660. Third, when it is highly unlikely that "any lawyer, even a fully competent one, could provide effective assistance." *Ibid.*; accord, *Garza*, 139 S. Ct. at 744 ("no showing of prejudice is necessary 'if the accused is denied counsel at a critical stage of his trial,'" or "'if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing'") (quoting *Cronic*, 466 U.S. at 659).

The court of appeals concluded that this case qualifies for the presumption of prejudice because it presents a "'situation[] in which counsel has entirely failed to function as the client's advocate' during a critical stage of the proceedings." Pet. App. 17a (quoting *Nixon*, 543 U.S. at 189).

Petitioner, invoking the dissent below, asserts (Pet. 3) that the court of appeals "found a fourth exception hidden in *Cronic*'s penumbras." But the court of appeals did no such thing. It stated that for "someone whose lawyer has left him in the lurch," such as Lewis, "there is * * * no operative difference between the first and the second of *Cronic*'s examples." Pet. App. 20a. He suffered "the actual or constructive absolute denial of the assistance of counsel (*Cronic* category one)" and his lawyer "fail[ed] to subject the prosecutor's case to meaningful adversarial testing (*Cronic* category two)." *Ibid*.

The court of appeals therefore found it unnecessary to definitively assign this case to one of these two categories. As we next discuss, both *Cronic* categories apply here.

a. *Lewis's counsel entirely failed to subject the prosecution's sentencing case to meaningful adversarial testing.*

1. *Cronic* stated that prejudice will be presumed if the defendant's "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." 466 U.S. at 659. Here, Raff failed completely to challenge the government's presentation during the sentencing phase of the case. *Cronic*'s presumption of prejudice therefore applies.

The record leaves no doubt that Lewis was abandoned by his counsel for the entire sentencing phase of the case. To begin with, as the post-conviction trial court determined, Raff did nothing to prepare for Lewis's sentencing:

- Raff never met with his client between his conviction and the start of the sentencing hearing. Pet. App. 66a.
- Raff did not ask Lewis about his mental health, do any research into Lewis's mental health history, or submit Lewis for a mental health examination. *Id*. at 62a. (The post-conviction trial court found that Lewis had previously been prescribed mood-stabilizing medication in prison, and found that after trial he was diagnosed with bipolar II disorder. *Id*. at 64a.)
- Raff did not ask his client any questions about his upbringing or his family. *Id*. at 62a. (Through testimony or affidavit at the post-conviction hearing, Lewis and others explained he was abused as a child, and that members of his immediate family suffered from serious mental illnesses and drug addiction. *Id*. at 65a.)
- Raff did not prepare to call a single witness, and did not call any witnesses. *Id*. at 59a.
- Most importantly, Raff did not tell Lewis that he would not advocate for Lewis during the sentencing hearing and that any advocacy would be left to Lewis. *Id*. at 62a, 65a. They "never discussed a plan" for the sentencing hearing, nor did Raff "prepare [Lewis] to speak." *Id*. at 65a-66a.

At the hearing, Raff told the judge he had no witnesses to call, and later declined the judge's invitation to argue for his client. Pet. App. 48a. Raff left Lewis to fend for himself—when facing a potential sentence of 130 years. For the entire sentencing proceeding,

Raff "entirely failed to function as the client's advocate." *Nixon*, 543 U.S. at 189.

2. Citing this Court's statement in *Cone* that "the attorney's failure [to subject the prosecution's case to meaningful adversarial testing] must be complete," 535 U.S. at 697, petitioner asserts that *Cronic* does not apply because "Lewis's counsel competently represented him at trial." Pet. 11.

Cone itself rebuts the contention that this *Cronic* category applies only if defense counsel's failure to engage in adversarial testing extended throughout the entire criminal proceeding. The defendant there based his claim on his lawyer's failures during the sentencing proceeding; he did not assert that the lawyer completely failed to represent him at trial. If petitioner were correct, the *Cone* Court could have disposed of the case in a single paragraph, stating that *Cronic* did not apply because the prosecution's case had been challenged at trial.

But this Court framed the flaw in the defendant's case very differently. It first quoted *Cronic*'s statement that prejudice would be presumed "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." 535 U.S. at 697 (quoting *Cronic,* 466 U.S. at 659). It then stated:

> Here, [the defendant's] argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic,* this difference is not of degree but of kind.

Cone, 535 U.S. at 697.

By identifying the deficiency in the defendant's argument as not asserting "that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole," this Court indicated that a "complete" failure to test the government's case "throughout the sentencing proceeding as a whole" would qualify under *Cronic*. Here, of course, that is precisely what happened to Lewis.[3]

In addition, petitioner's interpretation of *Cronic* and *Cone* makes no sense. It would mean, for example, *Cronic*'s presumption of prejudice would not apply if the defense lawyer was active in pre-trial proceedings but failed entirely to challenge the prosecution's case at trial. Or if she was active at arraignment but at no other phase of the case.

Not surprisingly, other courts of appeals have rejected this reading of *Cone*. For example, in *United States* v. *Collins*, *supra*, the defendant did not challenge his representation during the trial, but the Tenth Circuit nonetheless held that his lawyer's failure to "subject the prosecution's case to adversarial

---

[3] Importantly, the defendant in *Cone* could not make the argument pressed by Lewis and adopted by the court below because the defense lawyer in *Cone* participated to a very substantial degree in the sentencing hearing. He made an opening statement (describing his client's troubled history and asking the jury to show mercy); cross-examined one of the state's two witnesses (successfully introducing into the record his client's military award); and lodged successful objections (for example, to prevent the jury from seeing prejudicial images of the crime). 535 U.S. at 691. The defendant could point only to two discrete instances when the lawyer failed to participate. *Id*. at 697-698. *Cone* thus did not involve anything close to an "entire[]" failure to subject the prosecution's sentencing case to adversarial testing—which is what occurred here.

testing" was sufficient for *Cronic* to apply. 430 F.3d at 1266.

Petitioner also contends (Pet. 11-12) that this Court's decision in *Nixon* supports his erroneous reading of *Cone*. There, the Florida Supreme Court had held that *Cronic*'s presumption of prejudice was "automatically" triggered when, in a capital case, the defense attorney concedes guilt in order to focus on sentencing without the client's express permission. *Nixon*, 543 U.S. at 186-187. This Court reversed, holding that "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent" and it must be evaluated under *Strickland*. *Id.* at 192.

Central to this Court's decision was the fact that the lawyer's decision (not to contest the government's case concerning guilt) was not a product of abandonment—it was part of a genuine strategy that was communicated to the client. *Nixon*, 543 U.S. at 192; see also *id.* at 187 (stressing that counsel "undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy").

Nixon thus turned entirely on the determination that the defendant's counsel did not "fail[] to subject the prosecution's case to meaningful adversarial testing," but rather made a strategic decision that he communicated to his client. *Nixon* accordingly says nothing about the situation presented here—where defense counsel completely "failed to function in any meaningful sense as the Government's adversary." *Cronic*, 466 U.S. at 666.

3. Petitioner half-heartedly argues (Pet. 12-13) that Raff made a strategic decision not to advocate for Lewis at the sentencing and that therefore *Strickland* should apply.

The record precludes that contention. There simply is no evidence that Raff's silence was strategic. To the contrary, Raff's own testimony indicates that his decision resulted from his own biases and his frustration with and antipathy toward his client.

Raff testified that he did not subscribe to the "school of thought" that his client's abusive childhood should be presented as a mitigating circumstance. Pet. App. 62a-63a. As the Indiana Court of Appeals concluded, this led Raff to "determine[] (incorrectly) that there were no mitigating circumstances that he could present to the trial court." *Id*. at 81a n.10.

Raff's decision to abandon Lewis might also have stemmed from the apparent contempt in which he held his client. For example, during his closing argument at trial, Raff described Lewis as a "disgusting and bad person" to the jury, Pet. App. 68a n.5, and included him a group of people he called "just bad, bad people," Opening Brief of Petitioner-Appellant at 4-5, *Lewis* v. *Zatecky*, 993 F.3d 994 (7th Cir. 2021) (No. 20-1642) (quoting Trial Tr. at 406-407). To be sure, the deterioration in the attorney-client relationship arose in part due to Lewis's "dissatisfaction with" Raff, Pet. App. 59a, which he made clear at the sentencing hearing, *id*. at 81a n.10. But a deterioration in communication, no matter how severe, did not relieve Raff of his duty to serve as Lewis's counsel. See *Strickland*, 466 U.S. at 688 ("[C]ounsel owes the client a duty of loyalty, [and] a duty to avoid conflicts of interest.")

Raff stated in his post-conviction testimony that Lewis's "only hope * * * was to make an expression of remorse." Pet. App. 81a n.10. But, as the court of appeals explained, if Raff held that view at the time of the sentencing proceeding, he never shared it with his client, nor was there any evidence he "[took] *some* step" toward executing that strategy. *Id.* at 22a, 23a.

Raff failed to alert Lewis that Lewis would have an opportunity to speak during the sentencing hearing. In addition, he failed to tell Lewis that the *entirety* of his case during sentencing would rest on a statement from Lewis, and that demonstrating genuine remorse would be important.

Petitioner also suggests that this "case is effectively the inverse of *Nixon*" because Raff "focused on guilt rather than sentencing." Pet. 12. But such a "strategy" would be nonsensical. Conceding guilt in order to maintain credibility for subsequent sentencing can make sense. *Nixon*, 543 U.S. at 190-192. But the converse is not true: presenting mitigating evidence in the sentencing phase can have no harmful effect on the already-entered judgment of guilt.

In sum, because Raff completely failed to test the government's case at sentencing, the court of appeals correctly concluded that this case falls within the second *Cronic* exception

b. *Lewis was constructively denied counsel at a critical stage of the proceeding.*

Cronic's presumption of prejudice also applies when "the accused is denied counsel at a critical stage of his trial." *Cronic*, 466 U.S. at 659. The denial of counsel during a critical stage can be actual, such as

when the lawyer is physically absent; or constructive, when the lawyer's "performance" is "so inadequate that, in effect, no assistance of counsel is provided." *Cronic*, 466 U.S. at 654 n.11; accord *Strickland*, 466 U.S. at 692. This case fits squarely within that category.

As already explained, Raff completely failed to challenge the government's case at sentencing, and there was no strategy underlying Raff's complete inactivity. For the entire sentencing proceeding, Raff "failed to function in any meaningful sense as the Government's adversary." *Cronic*, 466 U.S. at 666.

Petitioner asserts that this exception cannot apply "[b]ecause *the State* never denied Lewis counsel." Pet. 11 (emphasis added). To justify his claim that state action is a predicate for the first *Cronic* category, petitioner points to a footnote in *Cone* listing cases, cited by *Cronic*, in which "criminal defendants * * * had actually or constructively been denied counsel by government action." *Cone*, 535 U.S. at 696 n.3.

But that is an erroneous interpretation of this Court's precedent. *Cronic* did not include any "government action" limitation—it stated only that the Court had "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, *or* prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 n.25 (emphasis added). It therefore is clear that *Cone* was referencing a subset of the situations covered by this aspect of *Cronic*, not announcing a new limitation (which in any event would have been dicta because this aspect of *Cronic* was not at issue in *Cone*, see 535 U.S. at 696 ("[r]espondent argues that his

claim fits within the second exception identified in *Cronic*")).

Moreover, this Court's opinion in *Strickland*, pointing to this same footnote in *Cronic*, explicitly recognized that state-caused denials are just one situation that falls within the first *Cronic* exception:

> 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.

Strickland, 466 U.S. at 692 (emphasis added) (citing *Cronic*, 466 U.S. at 659 & n.25). Thus, where, as here, "performance of counsel" is "so inadequate that, in effect, no assistance of counsel is provided," prejudice must be presumed. *Cronic*, 466 U.S. at 654 n.11.

Requiring state action also makes no sense in light of *Cronic*'s rationale. *Cronic* identified "circumstances that are so likely to prejudice the accused that the cost of litigating their effect * * * is unjustified." *Cronic*, 466 U.S. at 658; see also *Van Patten*, 552 U.S, at 125 (question under *Cronic* is "whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time"). That test is satisfied whenever a defendant is "denied counsel at a critical stage of his trial," *Cronic*, 466 U.S. at 659; whether the government is the cause of the denial is irrelevant in assessing the likelihood that the defendant will be prejudiced. The actual or effective denial of counsel at a critical stage, for whatever reason, carries a more-than-sufficient likelihood of prejudice to warrant application of the *Cronic* presumption.

It therefore is not surprising that lower courts have applied the presumption of prejudice based on

effective denial of counsel in circumstances in which the denial did not result from government interference. See, *e.g.*, *United States* v. *Collins*, *supra*; *Phillips* v. *White*, *supra*; pages 12-14, *supra*.

In sum, the court of appeals correctly concluded that Raff simply "gave up on Lewis and left him entirely without the assistance of counsel at the sentencing stage of a felony murder case." Pet. App. 23a. This accordingly is the "[r]are" case that "qualifies" under *Cronic*. *Ibid.*

2. The Court of Appeals' Decision Complies Fully With AEDPA.

The court of appeals also was correct in holding that the Indiana court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law." 28 U.S.C. § 2254(d)(1).

Petitioner, echoing the dissent below, asserts that AEDPA precludes relief here because this Court has not "'held that silence at sentencing by defense counsel triggers *Cronic*.'" Pet. 14 (quoting Pet. App. 46a).

But the statute does not require federal courts to "'wait for some nearly identical factual pattern before a legal rule must be applied.'" *Panetti*, 551 U.S. at 953 (citation omitted). "To the contrary, state courts must reasonably apply the rules 'squarely established' by this Court's holdings to the facts of each case." *White* v. *Woodall*, 572 U.S. 415, 427 (2014). The statute permits federal courts to intervene when state court decisions fail to satisfy that standard.

This Court, and the lower federal courts, recognize that AEDPA permits application of this Court's precedents to new factual settings encompassed within a legal standard previously announced by the Court.

For example, *Penry* v. *Lynaugh* 492 U.S. 302 (1989), held that a death penalty sentencing scheme cannot preclude jurors from giving effect to relevant mitigating evidence. *Penry* involved evidence of mental retardation.

In *Abdul-Kabir* v. *Quarterman*, 550 U.S. 233 (2007) the Court—on habeas—applied *Penry* to evidence of childhood deprivation. And in *Brewer* v. *Quarterman*, 550 U.S. 286 (2007), the Court—again on habeas—applied the same rule to evidence of mental illness. The Court rejected the contention that the mitigating factors in these cases were less severe or of a different type than those in *Penry*, and that therefore *Penry*'s standard should not apply. *Id.* at 294. See also *Williams* v. *Taylor*, 529 U.S. 362 (2000) (granting habeas based on unreasonable application of *Strickland*).

The courts of appeals have followed the same approach. *Jamison* v. *Klem*, 544 F.3d 266, 273-274 (3d Cir. 2008) (observing that, on habeas, "despite the seemingly limitless combinations of acts and omissions that could give rise to a claim of ineffective assistance of counsel, the quality of counsel's representation is measured by the standard set forth in *Strickland*" and applying the same approach under *Brady* v. *United States*, 397 U.S. 742, 755 (1970), and *Boykin* v. *Alabama*, 395 U.S. 238 (1969)); see also *Barnes* v. *Joyner*, 751 F.3d 229 (4th Cir. 2014) (applying *Remmer* v. *United States*, 350 U.S. 377 (1956), in new factual context); *Oliver* v. *Quarterman*, 541 F.3d 329 (5th Cir. 2008) (same); *Ewing* v. *Horton*, 914 F.3d 1027 (6th Cir. 2019) (same); *Garrus* v. *Sec'y of Pennsylvania Dep't of Corr.*, 694 F.3d 394 (3d Cir. 2012) (applying *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), in new factual context); *Budder* v. *Addison*, 851 F.3d 1047

(10th Cir. 2017) (applying *Graham* v. *Florida*, 560 U.S. 48 (2010), in new factual context).

Petitioner does not dispute that the three *Cronic* categories constitute clearly established federal law. The sole question, therefore, is whether the state court acted contrary to that clearly established federal law, or unreasonably applied it, in holding that the *Cronic* categories do not apply to defense counsel's complete abandonment of his client in the sentencing phase of a case. That determination was both an unreasonable application of, and contrary to, clearly established law.

With respect to *Cronic*'s holding that prejudice will be presumed if the defendant's "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," 466 U.S. at 659, nothing in *Cronic* requires that the defense lawyer fail to challenge the prosecution at every phase of the criminal case. For the reasons explained above, that would be an unreasonable interpretation of the decision. See pages 18-20, *supra*. Surely *Cronic* would apply on habeas if a lawyer stated at the commencement of trial that he would not present a defense or cross-examine any witnesses, with no strategic justification or consultation with the defendant—even if the lawyer had vigorously contested the prosecution's position on bail.

Moreover, this Court's analysis in *Cone* confirms that conclusion—because it would have been unnecessary for the Court to base its decision on the limited nature of the defense lawyer's alleged failures during the sentencing proceeding if, as petitioner asserts, failures limited to the sentencing proceeding could never trigger the presumption of prejudice. *Cone* necessarily recognizes that the presumption is triggered by an entire failure of adversarial testing during a

critical proceeding in a criminal case—and no one disputes that sentencing constitutes a critical phase. See also page 8, *supra*.

Finally, the facts here plainly demonstrate an entire failure of adversarial testing in the sentencing proceeding. Petitioner does not seriously dispute that conclusion, and its arguments that Raff's actions were strategic are completely contrary to the record and the state court's findings. See pages 21-22, *supra*.

The same conclusion applies with respect to the *Cronic* principle that prejudice is presumed when "the accused is denied counsel at a critical stage of his trial." 466 U.S. at 659. As explained above, there is no basis for petitioner's contention that this prong of *Cronic* is limited to governmental interference with counsel, and such a limitation would be inconsistent with the basic principle underlying *Cronic*. See pages 23-25, *supra*.

Certainly there can be no dispute that Raff's conduct constituted the effective denial of counsel at a critical stage of the proceeding. See pages 16-18, *supra*.

Petitioner attempts (Pet. 14-15) to analogize this case to *Woods* v. *Donald*, *supra*, but *Woods* in no way resembles this case. The defendant's claim in *Woods* was based on a ten-minute absence of his counsel during testimony regarding other codefendants. 575 U.S. at 314. The Sixth Circuit concluded that this ten-minute interval constituted a "critical stage" of the trial at which defendant had been denied counsel. *Id*. at 315. It is not surprising that this Court faulted the court of appeals for reading *Cronic* at "too high a level of generality." *Id*. at 318.

Here, by contrast, the state court's factual findings establish that Lewis's counsel abandoned him for the entire sentencing proceeding. That dramatic distinction justifies the different outcomes in the two cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

MICHAEL K. AUSBROOK
P.O. Box 1554
Bloomington, IN
47402
(812) 322-3218
mausbrook@gmail.com

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

Counsel for Respondent

DECEMBER 2021