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

REPLY BRIEF OF PETITIONER

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Indiana seeks summary reversal of a patently incorrect decision that contravenes the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and this Court's precedents, not plenary review of a challenging criminal procedure issue bedeviling lower courts. Accordingly, the existence of a circuit conflict is irrelevant. This case warrants the Court's attention, albeit briefly, because the decision below is so obviously wrong.

Lewis does not even purport to defend the hybrid rule for applying *United States v. Cronic*, 466 U.S. 648 (1984), created by the decision below—a tacit admission that courts may not presume prejudice without choosing an established *Cronic* category. Instead, Lewis misapplies AEDPA (and misreads *Cronic*) in his own way. He argues that a state court that in fact found no prejudice *could have* presumed prejudice under two different *Cronic* categories, but he cites no case *requiring* state courts to do so—which is the standard for habeas relief. And Lewis's effort to fit this case into two *Cronic* categories commits the same fundamental error as the Seventh Circuit, which as Lewis notes, conveniently "found it unnecessary to definitively assign this case to one of these two categories." Opp. 16. Bottom line: This case does not fit a *Cronic* category, so it is not a *Cronic* case. The Court should grant the petition, vacate the

decision below, and summarily affirm the district court.

I. Like the Seventh Circuit, Lewis Misapplies AEDPA

In his attempt to defend the decision below, Lewis answers the wrong question. He explains only how the state court *could have* presumed prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), not why it was *required* to. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006) (holding that a state court's refusal to extend Supreme Court decisions to a new category of conduct was not contrary to or unreasonable under clearly established law). According to Lewis, the state court could have determined that he was "denied counsel at a critical stage of his trial," *Cronic*, 466 U.S. at 659, even though counsel was present and allowed to assist. Opp. 22–25. And, he contends, the state court could have concluded that "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," *Cronic*, 466 U.S. at 659, even though counsel competently represented Lewis at trial and invited Lewis to make a sentencing statement. Opp. 16–22.

For support, Lewis relies only on (1) circuit court decisions in non-AEDPA cases, and (2) *Bell v. Cone*, 535 U.S. 685, 696–98 (2002), which deemed an AEDPA claim to be a *Strickland v. Washington*, 466 U.S. 668 (1984), case, not a *Cronic* case. Opp. 12–14, 18–20, 27–28. This is no support at all. Under AEDPA, circuit courts do not make clearly established federal law, only the Supreme Court does. *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam) (citing *White v. Woodall*, 572 U.S. 415, 419

(2014)). The Court has repeatedly reversed circuit courts for applying *Cronic* to habeas review of state criminal cases in novel circumstances, just as the Seventh Circuit did here. *See Woods*, 575 U.S. at 319; *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (per curiam); *Cone*, 535 U.S. at 702.

Nor may Lewis rely on counterfactuals in dicta from *Cone*. There, the Court's *holding* refused to presume prejudice under *Cronic* because "the failure to adduce mitigating evidence and the waiver of closing argument . . . are plainly of the same ilk as other specific attorney errors [the Court has] held subject to *Strickland*'s performance and prejudice components." *Cone*, 535 U.S. at 697–98. Those are the same types of errors that Lewis has alleged, App. 69a–75a, making this a *Strickland* case, not a *Cronic* case. Lewis speculates that the Court would have reversed the state court in *Cone* if counsel had done nothing at sentencing. Opp. 19 & n.3, 27–28. But "'clearly established Federal law . . . includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions.'" *Woods*, 575 U.S. at 316 (quoting *Woodall*, 572 U.S. at 419). Indiana courts were not compelled to presume prejudice here just because this Court *might have* reached a different result under different facts in *Cone*. *See* Opp. Opp. 19 & n.3, 27–28.

Finally, under AEDPA, Lewis (like the Seventh Circuit majority, App. 4a, 16a–17a), also suggests that Indiana courts "unreasonably applied" clearly established federal law, Opp. 25–29 (citing *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)). But as this Court has made clear, unreasonable-application

analysis applies when a state court "correctly identifies the governing legal rule." *Williams v. Taylor*, 529 U.S. 362, 407–08 (2000). Lewis's argument, in contrast, has always been that the state courts applied the wrong rule (*i.e.*, they applied *Strickland* when they should have applied *Cronic*), not that they unreasonably applied the correct rule. He thus raises a contrary-to claim, not an unreasonable-application claim. In any event, refusing to extend a Supreme Court precedent to a new category of claim cannot, without effectively gutting AEDPA, amount to an "unreasonable application" of that precedent.

In sum, neither the Seventh Circuit nor Lewis cited a case where this Court "confront[ed] 'the specific question presented by this case.'" *Woods*, 575 U.S. at 317 (quoting *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam)). Accordingly, "the state court's decision could not be 'contrary to' any holding from [the] Court." *Id.* (quoting *Smith*, 574 U.S. at 6).

II. Like the Seventh Circuit, Lewis Misreads *Cronic*

Even apart from AEDPA deference, the decision below whiffed on the correct legal standard for Lewis's ineffective-assistance claim. Under *United States v. Cronic*, courts presume prejudice from ineffective assistance of counsel only when: (1) "the accused is denied counsel at a critical stage of his trial"; (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) "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. 648, 659–60 (1984). This case falls into none of these categories.

In state court, Lewis argued that the second category applied. App. 78a. But now he argues that both the first *and* second categories apply. Opp. 22, 25. Assignment to *one* of the three categories prescribed by the Supreme Court is necessary, however, particularly in an AEDPA case, lest the *Cronic*/*Strickland* analysis degenerate into an unbounded impressionistic muddle.

Here, neither category 1 nor 2 applies, and as the dissent below explained, the majority "craft[ed] a hybrid rule—combining *Cronic*'s first and second exceptions—to cover Lewis's claim." App. 45a. Lewis concedes as much, yet never embraces the hybrid rule, apparently agreeing that lower courts must choose a *Cronic* category. Opp. 16. But in choosing *both* the first *and* second categories, he replicates the "failure to assign" problem and confirms that, in fact, *no* category fits.

As the Court explained in *Cronic*, the first category does not apply unless counsel was "totally absent[] or prevented from assisting the accused during a critical stage of the proceeding." 466 U.S. at 659 n.25 (collecting cases). The Court reiterated this point in *Bell v. Cone*, observing that the cases cited in *Cronic* "[e]ach involved criminal defendants who had actually or constructively been denied counsel by government action." 535 U.S. 685, 696 n.3 (2002) (collecting cases). Here, Lewis's counsel was present at the sentencing hearing and the government did not

prevent him from defending Lewis, so this category does not apply. Still, Lewis declares that "there is no basis for petitioner's contention that this prong of *Cronic* is limited to governmental interference with counsel." Opp. 28. But that is *exactly* what *Cronic* and *Cone* say—"denied counsel by government action." *Cone*, 535 U.S. at 696 n.3 (citing *Cronic*, 466 U.S. at 659 n.25). Lewis cites no cases where the Court presumed prejudice when counsel was present and unencumbered by the government from assisting. *See* Opp. 22–25. The state court was correct to conclude that *Cronic* and *Cone* mean what they say.

Neither does the second *Cronic* category—complete failure to contest the government's case—apply. That category requires presumption of prejudice only when "'counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.'" *Cone*, 535 U.S. at 697 (quoting *Cronic*, 466 U.S. at 659 (emphasis added by Court)). Here, Lewis's counsel competently tested the prosecution's case at trial, which alone defeats the argument for "entire" failure. Lewis does not cite any case to the contrary, offering only hypothetical circumstances where the Court might one day extend *Cronic*. Opp. 27.

In sum, the only way to "apply" *Cronic* is to rewrite it by combining the "critical phase" component of its first category with the "failure to test" component of its second category—which is exactly what the Seventh Circuit did. But *Cronic* does not supply a list of factors to be mixed and matched. Rather, it identifies three well-defined ineffective-assistance circumstances where courts presume prejudice, and counsel's failure to subject the prosecution's case to

adversarial testing at *one* stage of the proceedings is not one of them. Accordingly, *Strickland*, not *Cronic*, applies here.

CONCLUSION

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

Respectfully submitted,

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Dated: January 4, 2022