No. 23-___

IN THE

Supreme Court of the United States

STEVEN LEE MOSS,
Petitioner,
v.
GARY MINIARD, WARDEN,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sixth Amendment provides a criminal defendant with "the right to the effective assistance of counsel," *Buck v. Davis*, 580 U.S. 100, 118 (2017) (citations omitted), not just the presence of a lawyer in the courtroom. Typically, claims of ineffective assistance are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a reviewing court to find both deficient performance by counsel and prejudice—that is, a reasonable probability that the result would have been different but for counsel's errors—before it can find that the defendant was denied effective assistance of counsel. *Id.* at 694. Under *United States v. Cronic*, 466 U.S. 648, 658-60 (1984), however, prejudice to the defendant is presumed in rare circumstances. One of those circumstances is when the defendant suffers a complete denial of counsel—actual or constructive—at a critical phase of the proceedings. *Id.* at 659; *Strickland*, 466 U.S. at 692.

Following its own precedent, the Sixth Circuit held below that when counsel is "physically present," a defendant cannot suffer a complete denial of counsel under *Cronic* unless counsel's ineffectiveness was caused by a state actor.

The question presented is whether, when counsel is physically present, state action is required before a court may find a complete denial of counsel under *Cronic*.

PARTIES TO THE PROCEEDINGS

The petitioner (the petitioner-appellee below) is Steven Lee Moss. The respondent (the respondent-appellant below) is Gary Miniard, the current warden of Central Michigan Correctional Facility.

RELATED PROCEEDINGS

Circuit Court for the County of Oakland, Michigan:

People of the State of Michigan v. Steven Lee Moss, No. 2013-244474-FC (Apr. 21, 2017)

Court of Appeals for the State of Michigan:

People of the State of Michigan v. Steven Lee Moss, No. 340609 (Mar. 15, 2018)

Supreme Court of Michigan:

People of the State of Michigan v. Steven Lee Moss, No. 157538 (Oct. 30, 2018)

United States District Court for the Eastern District of Michigan, Southern Division:

Moss v. Winn, No. 18-11697 (Sept. 29, 2020)

United States District Court for the Eastern District of Michigan, Southern Division:

Steven Lee Moss v. Gary Miniard, No. 4:18-CV-11697 (Sept. 27, 2021)

United States Court of Appeals for the Sixth Circuit:

Steven Lee Moss v. Gary Miniard, No. 21-1655 (Mar. 17, 2023)

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Petitioner Steven Moss respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, Pet. App. 1a, is available at 62 F.4th 1002. The opinion of the United States District Court for the Eastern District of Michigan, Pet. App. 72a, is available at 2021 WL 4437913. The Sixth Circuit's order denying panel rehearing and rehearing en banc, Pet. App. 104a, is unpublished.

JURISDICTION

The Sixth Circuit entered judgment on March 17, 2023. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on June 1, 2023. Pet. App. 104a. On July 7, 2023, Justice Kavanaugh extended the time to file this petition for a writ of certiorari to and including October 27, 2023. *See* No. 23A6. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.

INTRODUCTION

A criminal trial is designed to be a "confrontation between adversaries." *United States v. Cronic*, 466

U.S. 648, 657 (1984). In that confrontation, the Sixth Amendment guarantees the defendant the right to a lawyer who will meaningfully test the case against him. *Id.* at 656. Without that assistance, a "serious risk of injustice infects the trial," *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980), and the proceeding becomes akin to a "sacrifice of unarmed prisoners to gladiators," *Cronic*, 466 U.S. at 657 (citation omitted).

When Petitioner Steven Lee Moss faced trial before a Michigan court, he was completely unarmed. Moss's counsel, David Steingold, failed him at every turn, from Steingold's total lack of pre-trial investigation, Pet. App. 24a, all the way through to his absence at sentencing, Pet. App. 6a. Though Steingold was (mostly) physically present in the courtroom, the representation he provided was the equivalent of having no lawyer there at all. Moss therefore sought post-conviction relief under *Cronic* based on Steingold's ineffective assistance of counsel.

To show ineffective assistance of counsel, a defendant typically must (1) identify particular "acts or omissions of counsel" that were deficient, and (2) show that those errors prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 690 (1984). In *United States v. Cronic*, this Court recognized a "narrow exception" to the *Strickland* standard, "instruct[ing] 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.'" *Florida v. Nixon*, 543 U.S. 175, 190 (2004) (quoting *Cronic*, 466 U.S. at 658). One circumstance that warrants a presumption of prejudice is when the defendant has suffered a

complete denial of counsel, whether actual or constructive. *See Strickland*, 466 U.S. at 692.

The Sixth Circuit, however, has established its own reading of *Cronic*. In its view, a constructive denial of counsel—that is, when counsel is physically present in the courtroom but nevertheless wholly ineffective—occurs only when *the state* caused the denial. *See, e.g.*, *Maslonka v. Hoffner*, 900 F.3d 269, 279 (6th Cir. 2018). Because the state played no role in Steingold's grossly derelict conduct, the Sixth Circuit panel majority below ruled that *Cronic* did not apply to Moss's conviction, Pet. App. 18a, and rejected his claim for postconviction relief, Pet. App. 23a.

The Sixth Circuit's rule creates a conflict among the circuits on whether state action is required. The Fifth, Ninth, and Eleventh Circuits all have expressly rejected a state-action requirement. *See, e.g.*, *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc); *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991); *Harding v. Davis*, 878 F.2d 1341 (11th Cir. 1989).

The Sixth Circuit's rule also defies this Court's precedent, which recognizes that the denial of counsel violates the Sixth Amendment no matter its source. *See Cronic*, 466 U.S. at 662 n.31. To hold otherwise is deeply damaging to the rights of individuals like Moss, whose claims for postconviction relief are barred even when their counsel denied them the effective assistance that the Sixth Amendment demands.

This Court should step in, mend the circuit conflict, and reject the Sixth Circuit's misguided understanding of *Cronic*.

STATEMENT OF THE CASE

I. Factual background and state-court proceedings

In 2012, petitioner Steven Lee Moss met a paid DEA informant in front of a Home Depot. Pet. App. 3a. After resisting several months of pressure and threats, Moss had agreed to lend money to the informant, who, Moss was led to believe, would use the loan to deal drugs and return significant profits to Moss. Pet. App. 4a.

The informant gave Moss the keys to his van. Pet. App. 3a. After Moss entered the van and sat in the driver's seat, the police arrested him. Pet. App. 3a-4a. He was charged under Michigan law with possessing one or more kilograms of cocaine with intent to deliver and possessing a firearm while committing a felony. Pet. App. 4a. Moss claimed entrapment, maintaining that he had been pressured and threatened into giving the informant the money to purchase drugs. Pet. App. 4a.

David Steingold began representing Moss ten days before his scheduled entrapment hearing. Pet. App. 25a. During those ten days, Steingold "did not conduct any investigation, did not interview any witnesses, did not speak with Moss's previous attorneys, and did not conduct pertinent legal research." Pet. App. 26a. Despite Moss's multiple attempts to consult with Steingold, Pet. App. 30a, Steingold did not meet Moss until the day of the hearing, Pet. App. 25a, when he convinced Moss to waive his right to a jury trial without explaining to Moss the consequences of doing so, Pet. App. 30a. Steingold did not so much as ask Moss what had

happened until Moss was on the witness stand. D. Ct. ECF 5-2 at 6 (Dec. 10, 2018).

Entrapment hearing. At the entrapment hearing, Steingold admitted to the judge that he was not prepared and had not conducted any investigation, Pet. App. 4a, 25a, leading the judge to comment that he "shouldn't have taken the case" if what he described was true, D. Ct. ECF 5-2 at 6 (Dec. 10, 2018). Steingold also did not discover the names of three witnesses until Moss testified about them, prompting the judge to ask: "How is that possible, I guess, is my first question?" Pet. App. 27a. Ultimately, Steingold called no witnesses but Moss, Pet. App. 27a, having "never asked [Moss] anything about the questions he was going to ask" before the hearing, D. Ct. ECF 5-2 at 6 (Dec. 10, 2018). Steingold's wretched performance prompted the judge to ask Steingold whether he was purposely trying to establish a record of ineffective assistance for appeal. Pet. App. 27a. The judge then rejected Moss's entrapment motion—an unsurprising result in light of Steingold's utter failure to try to substantiate the defense. Pet. App. 28a.

Trial. At trial, though physically present, Steingold again effectively did nothing. He had already "agreed to conduct a bench trial at which counsel essentially conceded [Moss]'s guilt to the charges by stipulating to the admission of the transcript from the entrapment hearing as substantive evidence without offering any additional evidence on [Moss]'s behalf." Pet. App. 84a. He made neither an opening nor a closing statement, Pet. App. 6a, 28a; he "made several statements at the trial that amounted to a stipulation that [Moss] was guilty," Pet. App. 84a; he presented no witnesses, Pet. App. 6a; and

he waived cross-examination of one of the two live prosecution witnesses, Pet. App. 6a, 28a. When cross-examining the other government witness, a DEA agent, Steingold said the agent's testimony was unnecessary because Steingold had "willingly stipulated to the amount of drugs Moss possessed and that the intent to sell that quantity of drugs was apparent." Pet. App. 51a. The trial lasted only twenty minutes, and, with the result preordained, Moss was convicted on both counts. Pet. App. 28a-29a. Moss, a first-time offender, D. Ct. ECF 5-8 at 29-30 (Dec. 10, 2018), was sentenced to consecutive terms of fifteen to forty-five years on the possession count and two years on the firearms count, Pet. App. 6a.

Direct appeal. Proceeding with a new lawyer, Moss argued on appeal that his conviction was invalid because of Steingold's constitutionally ineffective assistance. Pet. App. 7a. His counsel raised this claim under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), which requires the defendant to show prejudice resulting from counsel's errors. *See* Pet. App. 7a.

Despite Steingold's complete failure to advocate for Moss, Moss's appellate counsel did not bring an ineffective-assistance claim under *United States v. Cronic,* 466 U.S. 648 (1984), which applies when the pervasiveness of counsel's failure makes prejudice so likely that it can be presumed. Pet. App. 7a. The circumstances in which *Cronic* applies include when "the accused is denied counsel at a critical stage of his trial" or when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659.

The Michigan Court of Appeals upheld Moss's conviction and sentence, and the Michigan Supreme Court denied leave to appeal. Pet. App. 7a.

State collateral proceedings. In 2017, Moss filed a motion for post-conviction relief in Michigan state court. Pet. App. 7a. Under *Cronic*, as just explained, prejudice to the defendant is presumed when counsel has "failed to function in any meaningful sense as the Government's adversary." *Cronic*, 466 U.S. at 666. Moss argued that Steingold had failed by not conducting any pre-trial preparation and by raising "absolutely no defense" at trial. Pet. App. 90a. This nonperformance, Moss maintained, amounted to a complete denial of counsel at a critical stage of the proceeding. Prejudice could therefore be presumed under *Cronic*, entitling him to a new trial. Pet. App. 7a-8a. The trial court denied the motion, holding that *Cronic* did not apply and that Moss also could not show prejudice as required by *Strickland*. Pet. App. 8a. Both the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal. Pet. App. 8a.

II. Federal habeas proceedings below

District court ruling. In 2018, Moss filed a federal habeas petition in the Eastern District of Michigan, Pet. App. 33a, which had jurisdiction under 28 U.S.C. § 2241(a). Moss alleged that Steingold had rendered ineffective assistance of counsel under *Cronic* by constructively abandoning him both before and during trial. Pet. App. 8a. Though Moss had procedurally defaulted his *Cronic* claim by not raising it on direct appeal as required by Michigan law, he argued that his appellate counsel was ineffective in

failing to raise that claim, thereby excusing the default. Pet. App. 8a.

The district court ruled that although Moss's lawyer had filed the habeas petition one day beyond the statute of limitations, Moss was entitled to equitable tolling. Pet. App. 59a n.3; D. Ct. ECF 9 at 8 (June 19, 2019). The court denied Moss's petition on the merits, however, ruling that the state court reasonably applied *Strickland* to Moss's claims. Pet. App. 64a.

On Moss's motion for reconsideration, the district court then granted Moss's habeas petition, holding that "the state court unreasonably applied the *Strickland* standard where [Moss] clearly was constructively denied the assistance of trial counsel" under *Cronic*. Pet. App. 90a. In particular, the court noted Steingold's stipulation to the entrapment-hearing transcript, his failure to call or question witnesses, and his lack of any argument for acquittal at trial as reasons why Moss had been completely denied counsel under *Cronic*. Pet. App. 85a. Because Moss's *Cronic* claim was "clearly [a] dead-bang winner[]," Pet. App. 82a, the court also held that Moss's appellate counsel was ineffective in failing to argue his claim under *Cronic*. Pet. App. 82a-83a. Moss was released from prison in January 2022. D. Ct. ECF 62 at 3 (Apr. 13, 2023).

Sixth Circuit ruling. A divided panel of the Sixth Circuit reversed. Pet. App. 2a-3a. The majority declined to decide whether Moss was entitled to equitable tolling given its rejection of Moss's claim on its merits. Pet. App. 14a-15a. On that score, the majority held that *Cronic* did not apply to Moss's claim. Pet. App. 22a. In *Cronic*, this Court described

three scenarios in which prejudice should be presumed. 466 U.S. at 659-60. Moss maintained that two of those scenarios applied and entitled him to relief: (1) the complete denial of counsel, and (2) defense counsel's "fail[ure] to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659; *see* Pet. App. 18a. The Sixth Circuit rejected both arguments.

Relevant here, the court held that the absence of state action precluded a finding that Moss was completely denied counsel. Pet. App. 18a-20a. The panel majority held that the state court's decision to apply *Strickland* was therefore reasonable and entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pet. App. 22a. Under AEDPA, federal courts considering habeas petitions must defer to state-court decisions adjudicated on the merits unless they are (1) "contrary to, or involved an unreasonable application of, clearly established Federal law" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d).

Finally, the Sixth Circuit majority held that because Moss had no claim under *Cronic*, Moss's appellate counsel had not been constitutionally ineffective in raising Moss's claim only under *Strickland*. Pet. App. 22a-23a. The court therefore reversed the district court's grant of habeas relief.

Judge R. Guy Cole dissented. Pet. App. 24a. He first found that Moss was entitled to one day of equitable tolling on his habeas petition because of confusion in Sixth Circuit precedent on when the limitations period runs in the particular

circumstances presented by Moss's claim. Pet. App. 34a-38a. On the merits, Judge Cole would have affirmed the district court's grant of habeas relief under *Cronic* because of Steingold's grossly deficient representation at both the pre-trial and trial phases of Moss's case. Pet. App. 24a. He explained that "[a]t every step along the way, from his failure to investigate and interview witnesses to his failure to meaningfully test the prosecution's case, Steingold failed to conduct himself in the manner consistent with effective representation." Pet. App. 24a. "Indeed," Judge Cole wrote, "I would be hard pressed to find a worse dereliction of duty than that of Steingold's representation of Moss." Pet. App. 53a.

Moss sought rehearing and rehearing en banc, which the Sixth Circuit denied. Pet. App. 104a.

REASONS FOR GRANTING THE WRIT

I. The circuits are divided on the question presented.

Most ineffective-assistance-of-counsel claims are governed by *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a defendant to show prejudice in addition to deficient performance by counsel. But this Court has held that in limited circumstances counsel's adversarial failure is so obviously harmful that prejudice can be presumed. *United States v. Cronic*, 466 U.S. 648, 658 (1984). One of those circumstances is when there is a complete denial of counsel, whether actual *or constructive*. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Constructive denial occurs when counsel is physically present in the courtroom but his participation is "on par with total absence." *Wright v. Van Patten*, 552

U.S. 120, 125 (2008). When that happens, the trial "loses its character as a confrontation between adversaries" and violates the defendant's Sixth Amendment right to counsel. *Cronic*, 466 U.S. at 656-57.

This Court has observed that deficiencies attributable to a "source external to trial counsel does not make it any more or less likely that [the defendant] received the type of trial envisioned by the Sixth Amendment." *Cronic*, 466 U.S. at 662 n.31. Yet, as we now explain, the circuit courts are divided over whether, in cases where assistance of counsel has been constructively denied, *Cronic* requires that state action caused counsel's deficiency.

A. The Fifth, Ninth, and Eleventh Circuits reject a state-action requirement.

In the Fifth, Ninth, and Eleventh Circuits, state action is not required to find a constructive denial of counsel under *Cronic*.

Fifth Circuit. In *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1120 (2002), the en banc Fifth Circuit held that *Cronic* does not impose a state-action requirement. "While state responsibility for counsel's absence may be relevant in examining the fairness of a trial," the court emphasized that "state action is not and has never been a prerequisite for invoking *Cronic* to presume prejudice." *Id.* at 347. The court explained that a "state action requirement does not flow from the language of *Cronic*" because, in *Cronic* itself, "the [Supreme] Court [] directly dispelled the State's proposed state action requirement when it dismissed the idea that *the cause* of a Sixth Amendment deficiency should control

whether a presumption of prejudice was warranted." *Id.* at 345 (emphasis in original). The court further reasoned that a state-action requirement "would require shifting [*Cronic*'s] emphasis from the fairness and reliability of criminal proceedings to the culpability of a state in distorting the adversarial process." *Id.* at 347.

Other Fifth Circuit decisions are consistent with *Burdine*. In *Childress v. Johnson*, the defendant maintained that "he received no meaningful assistance at all" at his plea hearings "and thus was constructively denied his Sixth Amendment right to counsel." 103 F.3d 1221, 1222 (5th Cir. 1997). The Fifth Circuit agreed, finding a constructive denial of counsel because the defendant's attorney took "no responsibility for advocating the defendant's interests at a critical phase of the proceeding." *Id.* at 1231; *see also United States v. Job*, 387 F. App'x 445, 451 (5th Cir. 2010) (holding that a closing argument that concedes the defendant's guilt "might raise a genuine issue on whether *Cronic* should apply"); *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992) (presuming prejudice where the defendant "was unaware of the presence of counsel, counsel did not confer with [defendant] whatsoever, and as far as the transcript is concerned, counsel made no attempt to represent his client's interests"). In these cases, relief was considered appropriate in the absence of state action.

Ninth Circuit. In *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991), the Ninth Circuit rejected a state-action requirement, holding that a defendant need not show that the deprivation of counsel "resulted from governmental action." *Id.* at 1074 (presuming prejudice because counsel's concession of

central elements of the case constituted "abandonment of the defense of his client at a critical stage"). The Ninth Circuit has emphasized that prejudice should be presumed when counsel's misconduct is so egregious that it cannot qualify as "assistance of counsel." *See Frazer v. United States*, 18 F.3d 778, 782, 785 (9th Cir. 1994), *overruled on other grounds by Mayfield v. Woodford*, 270 F.3d 915, 924-25 (9th Cir. 2001) ("[T]he assistance to which a defendant is entitled must be 'effective,' unhindered either by the state or by counsel's Constitutionally deficient performance.") (citation omitted); *see also Javor v. United States*, 724 F.2d 831, 834-35 (9th Cir. 1984) (presuming prejudice under *Cronic* where counsel was "physical[ly] present" and provided adequate assistance during some parts of trial but slept through a substantial portion of it).

Eleventh Circuit. The Eleventh Circuit has explained that *Cronic* "expressly refused to attach any significance to whether the alleged ineffectiveness was because of 'external constraints,' such as the denial of a continuance, or was caused by defense counsel's own actions." *Chadwick v. Green*, 740 F.2d 897, 900-01 (11th Cir. 1984) (citing *Cronic*, 466 U.S. at 658 n.31). Thus, the Eleventh Circuit has held that counsel's own actions may amount to a constructive denial of counsel, regardless of whether state action was involved. *Smith v. Wainwright*, 777 F.2d 609, 620 (11th Cir. 1985) (holding that counsel's decision "to stand silent and not participate in a defendant's trial may constitute ineffective assistance of counsel under the *Cronic* standard"); *Harding v. Davis*, 878 F.2d 1341, 1345 (11th Cir. 1989) (presuming prejudice where counsel sat silently throughout trial and as the judge directed a verdict).

Cronic therefore applies in the Eleventh Circuit when there is "the actual or constructive denial of counsel, government interference with counsel's assistance, or a conflict of interest," without any suggestion that government interference—that is, state action—is required in the complete-denial context. *Ramos v. Dep't of Corr.*, 575 F. App'x 845, 846 (11th Cir. 2014) (emphasis added); *see also Purvis v. Crosby*, 451 F.3d 734, 741 (11th Cir. 2006) (same).

B. The Sixth Circuit requires state action.

In contrast, the Sixth Circuit in the majority decision below imposed an additional requirement: to invoke *Cronic* when counsel is physically present in the courtroom, state action must be the cause of counsel's ineffectiveness. Pet. App. 18a.

The court relied on its decision in *Maslonka v. Hoffner*, 900 F.3d 269 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 2664 (2019), which first established the circuit's state-action requirement. The Sixth Circuit imposed this requirement after observing that the decisions cited in *Cronic* as examples of a complete denial of counsel all "involved a state statute's or state actor's *denying* the physical presence of counsel during a critical stage or otherwise placing limits on counsel's representation of a criminal defendant." *Id.* at 279-80 (emphasis in original). The court therefore concluded that state action is required to find a constructive denial of counsel. *Id.* at 279. The Sixth Circuit also has applied *Maslonka* to find a state-action requirement even when counsel is physically absent. *Clark v. Lindsey*, 936 F.3d 467, 470 (6th Cir. 2019) ("To warrant automatic prejudice, a state law or state actor

must prevent counsel's presence or limit his representation."), *cert. denied*, 141 S. Ct. 165 (2020).

C. Other circuits' *Cronic* rulings underscore the need for review.

Other circuits have not definitively ruled on whether state action is required to invoke *Cronic*, but their rulings underscore the need for this Court's review.

1. The Seventh Circuit has grappled with the state-action question, identifying what it views as the source of confusion about whether state action is required, but has not conclusively resolved it. That court explained that while *Cronic* at one point indicates that prejudice may be presumed in some instances when there is "government denial or interference with counsel," at another point it states that "the source of the constraint on counsel's performance—government as opposed to counsel himself—is irrelevant in deciding whether to presume prejudice." *Sanders v. Lane*, 861 F.2d 1033, 1037 (7th Cir. 1988). "[W]e are [therefore] left to wonder," the Seventh Circuit observed, "what the criteria are for determining whether to presume prejudice or to require a showing of prejudice." *Id.*

The Seventh Circuit has still not decided which reading of *Cronic* is correct. But it recently found a constructive denial of counsel in the absence of state action. In *Lewis v. Zatecky*, 993 F.3d 994 (7th Cir. 2021), the court explained that even though the defendant's counsel physically appeared at sentencing and "uttered two short sentences," the defendant "suffered exactly the fate" that this Court identified as presumptively deficient representation in *Cronic*: "the

actual or constructive absolute denial of the assistance of counsel." *Id.* at 1005-06. The court emphasized that it was "pa[ying] 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.'" *Id.* at 1003 (citation omitted).

2. The First, Second, Third, Fourth, and Tenth Circuits, though not expressly addressing the state-action issue, have granted relief under *Cronic*—or noted that relief could be granted under *Cronic*—when the defendant was constructively denied counsel and state action had not caused counsel's deficiency. *See United States v. Mateo*, 950 F.2d 44, 49 (1st Cir. 1991) (presuming prejudice when counsel's actions at the sentencing hearing did not provide any "meaningful" representation); *United States v. Sanchez*, 790 F.2d 245, 254 (2d Cir. 1986) ("[C]ounsel's silence may amount to a violation of a defendant's Sixth Amendment rights."); *Appel v. Horn*, 250 F.3d 203, 206, 215-16 (3d Cir. 2001) (presuming prejudice when counsel attended competency hearing but did not investigate or provide information to the court at the hearing relevant to the defendant's competency); *United States v. Moussaoui*, 591 F.3d 263, 290 (4th Cir. 2010) (indicating that prejudice might be presumed if "counsel's advice was so lacking that it amounted to none at all"); *United States v. Collins*, 430 F.3d 1260, 1265 (10th Cir. 2005) (finding that the defendant was constructively denied counsel when his attorney remained almost completely silent at his competency hearing).

* * *

Given the disharmony in the circuits just discussed, and the importance of the question

presented to ensuring criminal defendants' Sixth Amendment right to effective assistance of counsel, *see Cronic*, 466 U.S. at 654, this Court should take up the question presented now.

II. This case presents an excellent vehicle for reviewing the question presented.

This petition presents an excellent vehicle for this Court's review. The Sixth Circuit's holding rests squarely on the state-action requirement whose validity is posed in the question presented. Pet. App. 18a (holding that *Cronic*'s "complete-denial scenario" did not apply to Moss's claims because there was no evidence "that a state actor prevented Moss's counsel from adequately representing him"). No antecedent issues or other impediments prevent the Court from addressing the state-action question.

If this Court agrees that state action is required, Moss's ineffective-assistance claim would be at its end. But if the Court adopts the view that "state action is not and has never been a prerequisite for invoking *Cronic* to presume prejudice," *Burdine v. Johnson*, 262 F.3d 336, 347 (5th Cir. 2001) (en banc), Moss should prevail on his ineffective-assistance-of-counsel claim. The state court's decision would not be entitled to AEDPA deference because Moss was constructively abandoned when his counsel failed to investigate the case before trial and did nothing useful during trial. Pet. App. 46a-52a (Cole, J., dissenting); *see infra* at 21-22. Therefore, applying *Strickland* instead of *Cronic* was "contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1). *See* Pet. App. 50a, 53a (Cole, J., dissenting); *see also Mitchell v. Mason*, 325 F.3d 732,

748 (6th Cir. 2003) (holding that because an ineffective-assistance-of-trial-counsel claim was improperly evaluated under *Strickland*, the decision deserved no deference under AEDPA). At a minimum, if this Court were to reverse, the lower courts would have to reexamine the AEDPA deference question on remand.

Moss's case is a better vehicle than previous cases before this Court seeking to present the state-action question. *See Maslonka v. Nagy*, 139 S. Ct. 2664 (2019); *Clark v. Lindsey*, 141 S. Ct. 165 (2020). In *Maslonka*, the absence of counsel did not occur during a critical stage of his state-court proceedings. *See* Br. in Opp'n at 10, *Maslonka v. Nagy*, No. 18-7208 (Apr. 26, 2019), *cert. denied*, 139 S. Ct. 2664 (2019). Rather, it arose while Maslonka was an unindicted witness in a federal grand-jury proceeding separate from his own, *id.*, and thus *Cronic* was likely not applicable for that reason. Similarly, *Clark* was a poor vehicle because the denial of counsel occurred during a competency hearing—a phase of proceedings that this Court has never found to be a critical stage. Br. in Opp'n at 16-17, *Clark v. Lindsey*, No. 19-7674 (Feb. 10, 2020), *cert. denied*, 141 S. Ct. 165 (2020). Unlike those cases, Moss's case unambiguously concerns "critical phase[s]" of the proceeding. *See* Pet. App. 46a-47a, 50a (describing how Steingold constructively abandoned Moss during the critical pre-trial and trial phases); *Cronic*, 466 U.S. at 659 (recognizing trial is a critical phase); *Mitchell*, 325 F.3d at 741-42 (recognizing same for pre-trial phase).

The potential untimeliness of Moss's habeas petition is no barrier to this Court's review. The panel majority declined to reach whether Moss was entitled

to equitable tolling. Pet. App. 14a-51a; *but see* Pet. App. 34a-38a (Cole, J., dissenting) (explaining why equitable tolling applies). If this Court grants review and reverses, as Moss urges, the Sixth Circuit would simply take up the tolling issue on remand.

III. The Sixth Circuit's decision is wrong.

A. Reading a state-action requirement into *Cronic* undermines the Sixth Amendment right to assistance of counsel.

As this Court has repeatedly recognized, "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984); *see, e.g.*, *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000); *United States v. Morrison*, 449 U.S. 361, 364 (1981). With the aid of effective counsel, a defendant can put the prosecution's case through the "crucible of meaningful adversarial testing," ensuring that the trial is a fair match between the state and the defense. *Cronic*, 466 U.S. at 656. Without effective counsel, the adversarial process is undermined at its core. *See id.* at 656-57 (emphasizing that the assistance of effective counsel "underlies and gives meaning to the Sixth Amendment"). And the mere physical presence of counsel cannot satisfy the right. *See id.* at 654. "To hold otherwise 'could convert the appointment of counsel into a sham.'" *Id.* (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)).

Yet, under the Sixth Circuit's rule, defendants like Moss can stand trial with counsel who are present in the courtroom but have "failed to function in any meaningful sense as the Government's adversary,"

Cronic, 466 U.S. at 666, without offending the Sixth Amendment. In those cases, where "no actual 'Assistance' … is provided, then the constitutional guarantee has been violated." *Id.* at 654. And defendants have lost their right to effective counsel just as completely as if a judge—through "state action"—had barred counsel from speaking to their clients or advocating on their behalf. It is no surprise, then, that this Court has never held that constructive-denial claims under *Cronic* require state action when counsel is physically present.

The Sixth Circuit based its state-action rule on a footnote in *Cronic* that noted that "[t]he Court has 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. The decisions the Court cited for this proposition were cases in which a state statute or actor placed limits on counsel's representation of the defendant. The Sixth Circuit therefore concluded that applying *Cronic* to other cases, including ones in which counsel was deficient in the absence of state action, would "extend" the scope of *Cronic*'s complete-denial category. *Maslonka v. Hoffner*, 900 F.3d 269, 279-80 (6th Cir. 2018).

But that reading of *Cronic* has never been adopted by this Court. To the contrary, in *Cronic* itself, this Court observed that "[t]he fact that the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment." 466 U.S. at 662 n.31. In other words, what matters is the deficiency itself, not

what caused it. The stark clash between the Sixth Circuit's state-action requirement and this Court's holdings on the right to counsel deserves immediate review.

B. Moss's case warrants application of *Cronic.*

Cronic "[m]ost obvious[ly]" applies when a criminal defendant suffers a "complete denial of counsel" at a critical stage of the proceedings. 466 U.S. at 659. That is precisely what happened to Moss. Steingold's misconduct was not about particular mistakes or failures at specific points; it was a start-to-finish failure that "amounted to a complete abandonment." Pet. App. 90a. During both the pre-trial period and the trial itself, Steingold completely failed as both an advocate for his client and an opponent to the prosecution.

This Court has long recognized that the pre-trial period is "perhaps the most critical period of the proceedings … when consultation, thorough-going investigation and preparation [are] vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). "[C]ritical stages" include any "pretrial procedures that would impair [the] defense on the merits if the accused is required to proceed without counsel." *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975). And the trial itself is, of course, a critical stage. *Cronic*, 466 U.S. at 659. "[T]he 'core purpose' of the Sixth Amendment's guarantee of counsel is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" *United States v. Gouveia*, 467 U.S. 180, 188-89 (1984) (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)).

Here, as the district court explained, Steingold's "total failure to actively advocate [Moss's] cause amount[ed] to a constructive denial of assistance of counsel." Pet. App. 85a. "Despite believing entrapment was Moss's best and only defense," Steingold did no preparation for the entrapment hearing and consulted with Moss only once, just before the start of the hearing itself, and then only to convince Moss to waive his right to a jury trial. Pet. App. 26a. Steingold's performance at the entrapment hearing was so inept that the judge asked whether he was trying to engineer an ineffective-assistance-of-council claim for appeal. Pet. App. 27a. Steingold then agreed to a "stipulated bench trial that conceded Moss's guilt." Pet. App. 28a.

At the trial, Steingold

> essentially conceded Petitioner [Moss's] guilt to the charges by stipulating to the admission of the transcript from the entrapment hearing as substantive evidence without offering any additional evidence on Petitioner's behalf. Counsel also made several statements at the trial that amounted to a stipulation that Petitioner was guilty. Counsel waived opening argument, waived cross-examination of one of the two live witnesses that were called at the trial and made no closing argument.

Pet. App. 84a.

In sum, Moss suffered an all-encompassing failure by counsel that left him defenseless throughout the entire proceeding. That is exactly when *Cronic*'s presumption of prejudice applies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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