No. 23-444

In the Supreme Court of the United States

STEVEN LEE MOSS, PETITIONER

v.

GARY MINIARD, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is this case an appropriate vehicle for this Court to review whether "state action" is required to presume prejudice under *United States* v. *Cronic*, 466 U.S. 648 (1984), where the habeas petition is independently barred by both the statute of limitations and an inexcusable procedural default?

2. Given that the central cases on which the petitioner relies are decades old, are the circuits currently divided on whether "state action" is required to trigger *Cronic*'s presumption of prejudice where a defendant is completely denied the assistance of counsel?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those listed in the caption. The petitioner is Steven Moss, a Michigan prisoner who is presently on federal bond pending appeal. The named respondent, Gary Miniard, was the warden of the Saginaw Correctional Facility, where Moss was held in State custody prior to his release on bond. The warden of the Saginaw Correctional Facility is now Adam Douglas.

RELATED CASES

Respondent identifies two additional related cases from those listed in the petition:

- Michigan Court of Appeals, *People of the State of Michigan* v. *Steven Lee Moss*, No. 319954, Opinion issued June 9, 2015 (affirming conviction on direct appeal).

- Michigan Supreme Court, *People of the State of Michigan* v. *Steven Lee Moss*, No. 152082, Order issued December 22, 2015 (denying leave to appeal on direct appeal).

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The district court's opinion and order initially denying Moss's habeas petition is not reported but is available at 2020 WL 5793268. Pet. App. 54a–71a. Upon Moss's motion for reconsideration, the district court issued an opinion and order granting Moss's habeas petition, which is not reported but is available at 2021 WL 4437913. Pet. App. 72a–91a. The Sixth Circuit's opinion reversing the district court's grant of habeas relief is reported at 62 F.4th 1002. Pet. App. 1a–53a. The Sixth Circuit's order denying Moss's petition for rehearing en banc is not reported. Pet. App. 104a.

The Michigan Court of Appeals' opinion affirming Moss's convictions on direct appeal is not reported but is available at 2015 WL 3604582. Br. in Opp. App. 2a–16a. The Michigan Supreme Court's order denying Moss's application for leave to appeal is reported as a table decision at 872 N.W.2d 474. Br. in Opp. App. 1a. The Oakland Circuit Court's opinion and order denying Moss's state postconviction motion for relief from judgment, in which he raised the ineffective-assistance-of-trial-counsel claim at issue in his petition, is not reported. Pet. App. 94a–103a. The Michigan Court of Appeals' order denying Moss's application for leave to appeal from the trial court's decision is not reported. Pet. App. 93a. The Michigan Supreme Court's order denying Moss's subsequent application for leave to appeal is reported as a table decision at 918 N.W.2d 817. Pet. App. 92a.

JURISDICTION

The State accepts Moss's statement of jurisdiction as accurate and complete and agrees that this Court has jurisdiction over the petition.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

INTRODUCTION

Moss challenges the Sixth Circuit's holding that prejudice can be presumed from ineffective assistance of counsel under *Cronic* only if "state action" hindered counsel's ability to represent the defendant. At a quick glance, this may appear to be an enticing carrot. But a closer look reveals it to be nothing more than a stick painted orange.

First, Moss must overcome two procedural hurdles to pave the way for habeas review: timeliness and procedural default. Yet his petition devotes just three sentences to the former and none to the latter, and he fails on both counts. These barriers render this case a poor vehicle to address any merits claims, let alone the limited "state action" issue.

Second, even if Moss could clear these two independent procedural hurdles, he does not demonstrate any need for this Court's intervention on the "state action" question. Indeed, the Sixth Circuit's decision below did not hinge on a lack of state action. That principle governs only under the "complete denial" scenario of *Cronic*, and although Moss did allege that scenario, he also argued entitlement to relief based on his counsel's alleged failure to subject the prosecution's case to "meaningful adversarial testing." State action plays no role in the latter scenario.

Nor is the "state action" issue dividing the circuits. This Court has previously rejected such petitions, and like Moss, none of those petitioners could identify a mature split. At best, any split is stale given that most of Moss's cited cases are decades old. Additionally, and tellingly, those cases have sat idle with

nearly nonexistent citation in later decisions on the "state action" principle.

This Court should therefore deny certiorari.

STATEMENT OF THE CASE

Moss was charged with possession of narcotics with intent to deliver, along with felony firearm, when he purchased 10 kilograms of cocaine from undercover police, after unsuccessfully attempting to purchase four times that amount:

> Defendant's convictions arise from his purchase of 10 kilograms of cocaine from a police undercover informant. After learning that defendant was interested in acquiring a large amount of cocaine and after conducting preliminary surveillance of defendant's activities, the police arranged for defendant to meet their informant. In addition to the police testimony, the prosecution presented evidence of video and audio recordings capturing the meetings and telephone conversations between defendant and the informant. The first meeting, on November 6, 2012, lasted approximately 30 minutes and defendant agreed to purchase 10 kilograms of cocaine. At their next meeting on November 7, 2012, defendant and the informant discussed the drug deal, and defendant unsuccessfully attempted to persuade the informant to increase the purchase amount to 40 kilograms. In a restaurant parking lot, the informant showed defendant 10 kilograms of cocaine that were hidden in a compartment of an undercover police van.

> Defendant was instructed to contact the informant if he wanted to consummate the deal. Defendant contacted the informant on November 8, 2012, and they agreed to meet at a restaurant. They then agreed to transact the drug deal on November 9, 2012, which was when defendant believed he would have all the purchase money. Defendant unsuccessfully attempted to convince the informant to complete the transaction at defendant's house. Defendant also discussed his desire for future transactions with the informant. On November 9, 2012, defendant and the informant met in the parking lot of a Home Depot store, as planned. The informant was accompanied by another undercover officer who drove the van containing the drugs, and defendant also brought an associate with him. After defendant showed that he had the purchase money, which was in a suitcase in his car, the men walked to the undercover van where defendant was again shown the product. Defendant took possession of the van keys, got in the driver's seat, and turned on the ignition before the police remotely disabled the van. Defendant fled the vehicle on foot, but was arrested after a brief chase.

Br. in Opp. App. 2a–4a.

In defense, Moss claimed entrapment. He filed a motion to dismiss the charges on that basis, and the trial court held an evidentiary hearing, after which the trial court denied the motion.

Trial counsel recognized that the evidence against Moss was overwhelming, including audio and video recordings of Moss arranging the cocaine purchase with the informant. Br. in Opp. App. 11a. So, counsel advised Moss to proceed with a bench trial, not a jury trial, and to stipulate to most of the facts at the trial to expedite an appeal of the entrapment defense. *Id.* Thus, at trial, Moss's counsel waived his opening statement and closing argument, and cross-examined only one of the prosecution's two witnesses.

Unsurprisingly, and, in a sense, as planned, Moss was convicted at trial. The trial court sentenced him to 15 to 45 years' imprisonment for his possession-with-intent-to-deliver conviction and a consecutive two-year prison term for his felony-firearm conviction.

On direct appeal, Moss challenged the denial of his entrapment motion and his trial counsel's effectiveness in recommending a bench trial with stipulated facts. Br. in Opp. App. 4a, 9a. The Michigan Court of Appeals denied both claims. *Id.* First, the court determined that the entrapment defense was meritless because Moss was a willing participant in the drug deal and was not subject to undue pressure from either his friend who introduced him to the informant or the informant himself. *Id.* at 6a–9a. Second, his ineffective-assistance claim failed because the trial court credited counsel's testimony over Moss's testimony at an evidentiary hearing where counsel testified to his strategy of recommending a bench trial to expedite an appeal on the entrapment defense—a strategy with which Moss agreed. *Id.* at 11a–14a. Ultimately, the Michigan Court of Appeals held that

counsel's decision was reasonable and strategic under the circumstances. *Id*. at 13a–14a.

The Michigan Supreme Court denied Moss's application for leave to appeal on December 22, 2015. Br. in Opp. App. 1a.

Moss's time to file a petition for writ of certiorari with this Court expired 90 days later, on March 21, 2016.

One year and one day later, on March 22, 2017, Moss filed a motion for relief from judgment in the state trial court. There, he again claimed ineffective assistance of trial counsel but this time asserted his claim under *United States* v. *Cronic*, 466 U.S. 648 (1984), from which prejudice could be presumed if Moss could establish deficient performance. The trial court disagreed and instead evaluated the claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984). Pet. App. 100a. The trial court determined that counsel's decision to recommend a stipulated-facts bench trial was strategic to litigate the entrapment defense on appeal—Moss's only conceivable avenue to relief. *Id*. The trial court therefore denied the claim both on the merits and under Mich. Ct. R. 6.508(D)(3) because Moss could have raised the *Cronic* claim on direct appeal but did not do so, and he failed to show good cause and actual prejudice for that failure, including through ineffective assistance of appellate counsel. *Id*. at 100a–101a.

The Michigan Court of Appeals denied Moss's application for leave to appeal on March 15, 2018. Pet. App. 93a. The Michigan Supreme Court also denied leave to appeal on October 30, 2018. Pet. App. 92a.

While his application for leave to appeal was pending before the Michigan Supreme Court, Moss filed his habeas petition, through counsel, on May 30, 2018. (5/30/18 Pet., R. 1.)

The State filed a motion to dismiss because the petition was untimely given that Moss filed his motion for relief from judgment in the state trial court one day after the habeas limitations period had already expired. (12/10/18 Mot. to Dismiss, R. 4.) In response, Moss contended that his counsel had believed he had an extra day to file the motion for relief from judgment because 2016 was a leap year. (3/8/19 Resp., R. 8.) The district court agreed with the State that the petition was untimely, but granted Moss equitable tolling due to his counsel's mistaken date calculation. (6/19/19 Op. & Order, R. 9.)

The district court ordered the State to file an answer to the petition, which the State did, maintaining its statute of limitations argument, asserting procedural default, and arguing that Moss's claims lacked merit. (8/19/19 Resp., R. 10.)

The district court ruled that the petition lacked merit and denied the claims. Pet. App. 54a–71a. The court elected to bypass the procedural-default argument and skip to the merits. *Id*. at 62a n.4. The court also denied a certificate of appealability. *Id*. at 71a.

Moss then filed a motion for reconsideration, reiterating his position that the ineffective-assistance claims fell under *Cronic* rather than *Strickland*. (10/29/20 Mot. For Reconsideration, R. 21.) The State opposed. (1/25/21 Resp., R. 23.) The district court

initially intended to hold oral argument on the motion, but ultimately ruled on the pleadings alone.

This time, the district court found the claims procedurally defaulted but excused the defaults because of ineffective assistance of appellate counsel. Pet. App. 78a–83a. Then, addressing the merits, the district court reversed course and conditionally granted habeas relief on reconsideration. *Id.* at 84a–90a. The court ruled that Moss's trial counsel provided ineffective assistance in two related ways: (1) agreeing to a stipulated-fact bench trial to expedite the case to a direct appeal so that counsel could dispute the trial court's ruling on the entrapment motion, and (2) not conducting an "independent investigation into potential witnesses or defenses, relying instead on the motion to dismiss on entrapment grounds that Petitioner's prior attorney had filed." *Id.* at 85a–90a.

The district court held that both claims qualified for presumed prejudice under *Cronic* because Moss was "constructively denied the assistance of trial counsel," that is, "counsel's conduct amounted to a complete abandonment of Petitioner at his trial." *Id.* at 90a. The court conditionally granted habeas relief on this basis and gave the State 180 days to commence a new trial. *Id.* at 91a.

The Sixth Circuit reversed. Pet. App. 3a. The court began with the timeliness of Moss's petition. *Id.* at 11a–14a. The court agreed Moss's petition was untimely, but it did not engage with whether equitable tolling applied. *Id.* at 14a–15a.

The Sixth Circuit instead moved on to procedural default and the merits of the *Cronic* claim. *Id.* at 15a.

The court found that Moss procedurally defaulted his ineffective-assistance claim under *Cronic*, and Moss agreed. *Id.* at 15a n.5. Accordingly, to forge the path to habeas relief, Moss had to demonstrate good cause and actual prejudice to excuse the default. *Id.* at 15a. Although he alleged ineffective assistance of appellate counsel to excuse the default, he failed to meet his burden. *Id.* at 15a–16a. In reaching that conclusion, the Sixth Circuit analyzed the merits of Moss's *Cronic* claim under the Antiterrorism and Effective Death Penalty Act (AEDPA) deference. *Id.* at 16a–18a.

Moss argued that two scenarios under *Cronic* applied to his case: (1) he was constructively denied counsel at a critical stage, and (2) his counsel failed to subject the prosecution's case to meaningful adversarial testing. *Id.* at 18a. The Sixth Circuit addressed each contention in turn. *Id.*

The Sixth Circuit first rejected the constructive-denial claim "because there is no evidence that Moss's counsel was physically absent throughout an entire phase of the litigation or that a state actor prevented Moss's counsel from adequately representing him." *Id.* (citing *Maslonka* v. *Hoffner*, 900 F.3d 269, 280 (6th Cir. 2018), and *Mitchell* v. *Mason*, 325 F.3d 732 (6th Cir. 2003)).

The Sixth Circuit further rejected Moss's claim under the "meaningful adversarial testing" scenario, which had nothing to do with "state action." *Id.* The court reasoned that "[trial counsel] prepared for the entrapment hearing by consulting with Moss for two hours before it began and by reviewing Moss's 'private restricted record.' " *Id.* at 18a–19a. This distinguished

Moss's case from others where counsel did next to nothing. *Id*. at 19a.

Even for his part at trial, the Sixth Circuit agreed that Moss's counsel "acted in a limited capacity . . . because the trial court had already denied the motion to dismiss based on entrapment, and [trial counsel] strategically focused on its appeal to the Michigan appellate courts—Moss's only available recourse at that time." *Id*. at 20a. "An artificial distinction between [trial counsel's] pre-trial and trial actions overlooks his strategic focus on an entrapment defense." *Id*. "The stipulated nature of the bench trial and the lack of further investigation, examination, or cross-examination of witnesses would not have happened but for this strategy crafted in the earlier stages of the litigation." *Id*.

In addition, the Sixth Circuit concluded that counsel's actions did not deprive Moss of a viable defense. *Id*. at 20a–21a. This was because "stipulated evidence at Moss's trial included video and audio recordings of his meetings and telephone conversations with Diego, the informant; his own testimony delivered at the entrapment hearing; and witness testimony of the transaction that occurred in the Home Depot parking lot." *Id*. at 21a.

Thus, the Sixth Circuit concluded, "*Strickland*, not *Cronic*, governs Moss's ineffective assistance claims." *Id*. at 22a. And because "Moss does not argue nor establish that [trial counsel's] behavior prejudiced the outcome of Moss's case," he could not meet the strictures of the *Strickland* test. *Id*. The state-court decision was therefore reasonable under clearly established federal law. *Id*.

Without a meritorious trial-counsel claim, the Sixth Circuit held that appellate counsel could not have provided ineffective assistance to excuse the procedural default. *Id.* at 22a–23a. The court thus reversed the habeas grant and remanded with instructions to deny the habeas petition with prejudice. *Id.* at 23a.

The Sixth Circuit further denied rehearing en banc. *Id.* at 104a. While Judge Cole would have granted rehearing for the reasons stated in his dissent, "[n]o judge . . . requested a vote on the suggestion for rehearing en banc." *Id.*

REASONS FOR DENYING THE PETITION

I. Regardless of any "state action" requirement under *United States* v. *Cronic*, habeas review is barred in this case because Moss has not overcome two separate procedural barriers.

Before addressing whether "state action" is required for an ineffective-assistance claim under *Cronic*, this Court should consider the integrity of this case as a proper vehicle for that question because Moss first faces two procedural hurdles. One: timeliness. Two: procedural default.

While neither hurdle is jurisdictional and need be overcome for this Court to *deny* relief on the merits, Moss *must* overcome them for this Court to *grant* relief. See *Lambrix* v. *Singletary*, 520 U.S. 518, 525 (1997) (citing 28 U.S.C. § 2254(b)(2)). He cannot do so.

A. Moss's habeas petition was untimely.

To begin, Moss's habeas petition was untimely under AEDPA's statute of limitations, 28 U.S.C. § 2244(d), and Moss is not entitled to any tolling. This alone precludes habeas relief in this case. Moss dedicates three sentences to timeliness in his petition to this Court, none of which include affirmative arguments for the petition being timely. See Pet. at 18–19.

AEDPA governs the filing date for habeas petitions filed after AEDPA's effective date of April 24, 1996. *Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997). AEDPA provides for a one-year statute of limitations after finalization of direct review. § 2244(d)(1)(A). In this case, "[t]he parties agree that Moss's conviction became final on March 21, 2016, when his opportunity to petition the Supreme Court expired." Pet. App. 12a.

The question then became how to calculate the deadline for Moss's habeas petition. Under Federal Rule of Civil Procedure 6(a), for computing periods of time, and Sixth Circuit precedent holding that the "one year" in § 2244(d)(1) falls on the anniversary of the date of finality,[1] Moss had until March 21, 2017, to file his habeas petition or to continue his state proceedings to toll the habeas limitations period. *Id*. at 12a–14a.

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[1] The anniversary approach is consistent with multiple other circuits. See, e.g., *United States* v. *Marcello*, 212 F.3d 1005, 1009–10 (7th Cir. 2000); *Moore* v. *United States*, 173 F.3d 1131, 1135 (8th Cir. 1999); *Rogers* v. *United States*, 180 F.3d 349, 355, n.13 (1st Cir. 1999); *Flanagan* v. *Johnson*, 154 F.3d 196, 200–02 (5th Cir. 1998); *Mickens* v. *United States*, 148 F.3d 145, 148 (2d Cir. 1998).

There are two roads for tolling: statutory tolling under § 2244(d)(2), and equitable tolling, see *Holland* v. *Florida*, 560 U.S. 631, 634–35 (2010). Neither applies here.

First, the Sixth Circuit correctly held that statutory tolling is not applicable because Moss filed his state postconviction motion for relief from judgment *after* the habeas limitations period had already expired. Pet. App. 14a. Moss filed his state motion for postconviction relief on March 22, 2017—one day past the deadline. *Id*. When the habeas statute of limitations expires, a postconviction motion "does not reset the date from which the one-year statute of limitations begins to run." *Johnson* v. *Hendricks*, 314 F.3d 159, 161–62 (3d Cir. 2002); see also *Keeling* v. *Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 460 (6th Cir. 2012), and *Vroman* v. *Brigano*, 346 F.3d 598, 602 (6th Cir. 2003) (same). "A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day." *United States* v. *Locke*, 471 U.S. 84, 101 (1985).

Moss filed his habeas petition on May 30, 2018. By that time, and absent statutory tolling, more than 14 months had passed since the statute of limitations had expired on March 21, 2017. His petition was therefore untimely.

Second, the petition could not be equitably tolled. Moss contended below that equitable tolling should apply because his counsel believed he had an extra day to file the state postconviction motion due to 2016 being a leap year. Counsel thus erroneously believed he had 366 days, rather than 365 days, to file the state postconviction motion. The Sixth Circuit elected not to

analyze this question, instead skipping ahead to reverse the habeas grant on the merits. Pet. App. 14a–15a. But, again, Moss's habeas petition *must* be timely for this Court to grant habeas relief, which, at this point, means he must establish entitlement to equitable tolling. To his detriment, he cannot.

Equitable tolling is available in habeas challenges to state convictions only when a litigant can show " '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.' " *Holland*, 560 U.S. at 649 (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). Here, even if Moss could meet the first prong, he cannot meet the second.

This Court has been clear that a "garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling." *Holland*, 560 U.S. at 651–52 (cleaned up). The Court reiterated that principle in *Maples* v. *Thomas*, 565 U.S. 266 (2012). There, the Court highlighted the difference between "a claim of attorney error, however egregious, and a claim that an attorney had essentially abandoned his client," reasoning that the latter would be an extraordinary circumstance to justify equitable tolling while the former would not. *Id.* at 282–83 (citing Justice Alito's concurrence in *Holland*).

Here, counsel had no reason, and certainly not an extraordinary one, to believe he had an extra day to file Moss's state postconviction motion to toll the habeas limitations period. Contrary to Moss's argument below, a leap year is relevant only when the limitations period *includes* the leap day, February 29. That

is the sole scenario in which a typical year of 365 days is extended to 366 days. The limitations period in this case, however, did *not* include the relevant leap day—February 29, 2016. Rather, Moss's habeas clock began ticking *after* the leap day, on March 21, 2016, and ran until March 21, 2017. That period was thus a standard year with 365 days, not a leap year with 366 days. Moss's counsel's error was therefore "a simple miscalculation" insufficient to invoke equitable tolling.

The district court abused its discretion in granting equitable tolling because it mistakenly believed that Moss's counsel had cited cases in which courts had applied a 366-day period of limitations that did not include a leap day, and that counsel was therefore justified in being confused on the rule. In truth, counsel cited no cases in support of his error. Counsel's error was not justified by inconsistent rulings by various courts—it was "a simple miscalculation" of the sort this Court has already held does not justify equitable tolling. *Holland*, 560 U.S. at 651–52.

Accordingly, Moss is not entitled to either statutory or equitable tolling, and his petition remains untimely.

B. Moss procedurally defaulted his ineffective-assistance-of-trial-counsel claim.

Next, Moss's ineffective-assistance-of-trial-counsel claim is procedurally defaulted, and the default cannot be excused. As the Sixth Circuit recognized, Moss has conceded that his claim is procedurally defaulted. Pet. App. 15a n.5. Thus, the default *must* be excused to clear the path for habeas review and relief.

But Moss fails on this front as well. In fact, Moss's petition does not even touch on procedural default.

A procedural default is "a critical failure to comply with state procedural law." *Trest* v. *Cain*, 522 U.S. 87, 89 (1997). Under this doctrine, "a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez* v. *Ryan*, 566 U.S. 1, 9 (2012). A state prisoner who fails to comply with a state procedural rule waives the right to federal habeas review absent cause for noncompliance and actual prejudice from the alleged constitutional violation, or a fundamental miscarriage of justice.[2] *Coleman* v. *Thompson*, 501 U.S. 722, 748–50 (1991).

To establish cause, a petitioner must show some external impediment frustrated his ability to comply with the state's procedural rule. See, e.g., *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986). This can include attorney error for failure to properly raise the claim under state procedural rules. *Id*. "Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution." *Edwards* v. *Carpenter*, 529 U.S. 446, 451 (2000).

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[2] Moss has never asserted a fundamental miscarriage of justice as a reason to excuse the default. Even if Moss did so, that claim would fail. A fundamental miscarriage of justice is based on actual innocence, *Dretke* v. *Haley*, 541 U.S. 386, 393 (2004), which is axiomatically untrue in this case where Moss has always proclaimed entrapment—an affirmative defense inherently admitting to the criminal activity but claiming legal excuse. See *United States* v. *Russell*, 411 U.S. 423, 435 (1973).

In this case, Moss first raised his ineffective-assistance claim under *Cronic* in his state postconviction motion for relief from judgment. The state trial court found a procedural default from that posture because Moss could and should have first raised that claim in his direct appeal. Moss blamed his appellate counsel for that oversight, but the trial court rejected his claim as insufficient to establish good cause and actual prejudice for his tardy *Cronic* claim. Pet. App. 97a–98a, 103a.

Moss similarly asserted ineffective assistance of appellate counsel to excuse his procedural default on habeas review. The district court agreed, but the Sixth Circuit reversed. While the Sixth Circuit analyzed the underlying *Cronic* claim to conclude that it was meritless, such that appellate counsel could not have been ineffective, there is a shorter path to that conclusion.

On his direct appeal, Moss's appellate counsel *did* assert ineffective assistance of trial counsel, but he did so solely under *Strickland*, not *Cronic*. Yet, the grounds for trial counsel's alleged deficiencies were virtually identical between Moss's direct appeal and his state postconviction motion. The only difference was the legal framework in which the claims were presented.

The differentiating factor between *Strickland* and *Cronic* is whether prejudice is evaluated or presumed, respectively. But counsel's performance must be evaluated under both cases and, here, Moss challenged his counsel's performance on direct appeal *and* in his postconviction motion. On direct appeal, the Michigan Court of Appeals held that "under the circumstances, defense counsel's decision to recommend a bench trial

was within the purview of trial strategy . . . and did not fall below an objective standard of reasonableness . . . ." Br. in Opp. App. 13a. That holding would have been the same even if appellate counsel had *also* raised the claim under *Cronic*. And because the performance prong failed, relief was precluded regardless of prejudice, presumed or not.

Further, even if Moss's trial-counsel claims did fall under *Cronic*, he would still need to show *actual* prejudice for his appellate-counsel claim to excuse the procedural default. See *Weaver* v. *Massachusetts*, 582 U.S. 286, 305 (2017) (holding that prejudice must be shown even for a structural-error claim raised in the context of ineffective assistance of counsel); see also *Ambrose* v. *Booker*, 684 F.3d 638, 649 (6th Cir. 2012) ("Having shown cause, petitioners must show actual prejudice to excuse their default, even if the error is structural.").

Yet, here, Moss cannot demonstrate actual prejudice from his appellate counsel's failure to frame his trial-counsel claim on direct appeal under *Cronic* rather than *Strickland*. Again, even if appellate counsel had done so, there is no reasonable probability that the Michigan Court of Appeals would have granted Moss relief on that claim because the court had already rejected the argument that trial counsel's performance was deficient. Br. in Opp. App. 12a–14a. The Michigan Court of Appeals therefore would have lacked any basis to presume prejudice under *Cronic*. Moreover, the Michigan Court of Appeals was presented with and passed on another opportunity to address the claims under *Cronic* when Moss filed his application for leave to appeal from the denial of his

state postconviction motion. Moss did not prevail there either.

Consequently, Moss's appellate counsel provided effective assistance. The procedural default cannot be excused and therefore habeas review is barred. See *Davila* v. *Davis*, 582 U.S. 521, 527 (2017) ("[A] federal court may not review federal claims that were procedurally defaulted in state court.").

Due to not one but *two* procedural barriers—*both* of which Moss must overcome to obtain habeas relief from this Court—this case presents a poor vehicle to review Moss's question presented solely concerning his merits claim under *Cronic*.

II. The Sixth Circuit has not created or contributed to a circuit split—let alone a mature split—on the question of whether "state action" is required to trigger *Cronic*'s presumption of prejudice for an ineffective-assistance-of-counsel claim.

Even getting to the merits of Moss's question presented, there is no ruckus amongst the circuits for this Court to quell. Moss points to decades-old cases to cobble together what he purports to be a circuit split, but it is at best a stale one. Nor did "state action" even play a significant role in the Sixth Circuit's decision in this case. And, at the end of the day, the Sixth Circuit was correct that *Cronic* does not govern Moss's ineffective-assistance claim.

A. "State action" had little to do with the Sixth Circuit's *Cronic* analysis in this case.

The sole premise of Moss's petition for writ of certiorari is that the Sixth Circuit incorrectly required "state action" for Moss to establish ineffective assistance of counsel under *Cronic*. But it is not, as Moss purports it to be, the load-bearing premise without which the Sixth Circuit's reasoning comes crashing down. Rather, the "state action" requirement composed but one, supplemental part of the Sixth Circuit's analysis. Indeed, it was a single paragraph. See Pet. App. 18a.

There are several ways to satisfy *Cronic* such that prejudice may be presumed from trial counsel's ineffective assistance. Counsel's errors must be "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. The *Cronic* Court identified three situations in which a defendant is entitled to a presumption of prejudice: (1) the "complete denial of counsel," including situations where counsel was actually or constructively absent at a "critical stage" of the proceedings; (2) situations where defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) situations where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *Id*. at 659–60.

In *Maslonka* v. *Hoffner*, the petitioner sought habeas relief under the "complete denial of counsel" scenario of *Cronic*, alleging his counsel failed to attend

federal-cooperation meetings as part of his state plea negotiations. 900 F.3d at 279–80. The Sixth Circuit surveyed this Court's holdings under the "complete denial" scenario and found that "each of the cases the Supreme Court cited for this proposition 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 (emphasis in original). Accordingly, the Sixth Circuit "emphatically reject[ed] the theory that a counsel's mere physical absence from a critical stage of a proceeding, based on the counsel's own failure to be present rather than any *denial* by the state, can constitute a constructive denial of counsel under *Cronic*." *Id*. (emphasis in original).

That narrow holding comprises the entirety of Moss's petition seeking this Court's review. Pet. at 10–11. To be sure, Moss did allege a "complete denial" of counsel under *Cronic* in this case, and the Sixth Circuit did cite *Maslonka* in denying relief under that scenario (again, in a single paragraph). Pet. App. 18a. But even the *Maslonka* citation did not exclusively point to state action. That was only one piece: "However, the complete-denial scenario does not apply to Moss's claims because there is no evidence that Moss's counsel was physically absent throughout an entire phase of the litigation *or* that a state actor prevented Moss's counsel from adequately representing him." *Id*. (emphasis added). The disjunctive puts even more distance between the Sixth Circuit's decision and the question presented in Moss's petition. One more thing: the dissent seemed to distinguish *Maslonka*, noting that Moss's counsel was physically present at the relevant critical stages, though finding his

performance deficient during those proceedings. See Pet. App. 49a.

In another step away from *Maslonka*, Moss did not solely rely on the "complete denial" scenario in this case to garner review under *Cronic*. Moss *also* claimed that his trial counsel failed to subject the prosecution's case to "meaningful adversarial testing," such that *Cronic* should apply. Pet. App. 18a ("Moss argues that his claims warrant review under *Cronic* under *both* scenarios because Steingold constructively abandoned him during pre-trial proceedings and failed to meaningfully test the prosecution's case at trial." (emphasis added)). The "state action" principle identified in *Maslonka* does not speak to the "meaningful adversarial testing" scenario in *Cronic*. Indeed, the Sixth Circuit spent considerably more time dispelling this point below without *any* reference to *Maslonka* or "state action" generally. See Pet. App. 18a–22a.

Given these distinctions, the Sixth Circuit held that "*Strickland*, not *Cronic*, governs Moss's ineffective assistance claims." *Id.* at 22a. This is because Moss had pointed to failures at "specific points" rather than a "complete" failure of counsel. *Id.* at 19a. That comports with clearly established federal law: "When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete," rather than "at specific points." *Bell* v. *Cone*, 535 U.S. 685, 696–97 (2002). "For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind." *Id.* at 697.

The minor reference to "state action" in the Sixth Circuit's decision significantly militates against any need for this Court's intervention.

B. Any alleged circuit split is not mature.

Assuming this Court finds the petition timely, excuses the procedural default, *and* determines that the Sixth Circuit's decision below significantly hinged on "state action"—none of which are warranted—Moss's allusion to a circuit split is a non-starter. Contrary to Moss's assertion, the circuits are hardly "divided" on the "state action" issue. See Pet. at 10. At best, any alleged split is not mature.

At the outset, Respondent notes that this Court has *twice* denied certiorari on this same issue in the last four years. See *Maslonka* v. *Nagy*, 139 S. Ct. 2664 (2019), and *Clark* v. *Lindsey*, 141 S. Ct. 165 (2020). The alleged circuit split was not true then and it is not true now. Moss attempts to distinguish this case from those, Pet. at 18, but the only basis for his distinction is that *Maslonka* and *Clark* concerned undefined "critical stages" whereas the critical stages at issue in this case are clear. *Id*. Those were not the only hiccups in *Maslonka* and *Clark*, however. Both petitioners in those cases alleged a circuit split on the "state action" issue, and in both cases, Respondent dispelled the alleged split. Further, both cases shared similar foundational cases as those on which Moss relies to erect such a split. But, as in *Maslonka* and *Clark*, it is nothing more than a house of cards.

The primary case in common with *Maslonka*, *Clark*, and, now, *Moss*, is *Burdine* v. *Johnson*, 262

F.3d 336 (5th Cir. 2001). It is true that *Burdine* explicitly rejected a state-action requirement for *Cronic* to apply. 262 F.3d at 345. But that holding has not fractured the country. Of the 263 cases to cite *Burdine* as of the date of this filing, Westlaw flags only two that addressed the Fifth Circuit's state-action analysis. One of those two cases was another action filed by Burdine to enforce the Fifth Circuit's judgment in his prior case. The other cites *Burdine* only as generally applying *Cronic* to situations in which counsel's absence is complete, whether by falling asleep or otherwise, despite Westlaw flagging it under the state-action headnote from *Burdine*. See *Schmidt* v. *Foster*, 911 F.3d 469, 502 (7th Cir. 2018). This hardly creates a raft of differing treatment of the state-action issue.

Moss points to only one other case that explicitly rejected any necessity of state action: *United States* v. *Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991). Pet. at 12–13. The reach of that case is even more limited than in *Burdine*. Of the 417 cases to cite *Swanson*, only *one* even mentions state action in the *Cronic* context, and that was *Burdine*. Notably, though, the *Swanson* citation in *Burdine* came in a footnote in the dissent, unrelated to the state-action discussion. See *Burdine*, 262 F.2d at 395 n.33 (Barksdale, J., dissenting) (citing *Swanson* in a string citation for "additional instances" of presumed prejudice). *Swanson* is thus even less compelling than *Burdine*.

Moss also cites *Chadwick* v. *Green*, 740 F.2d 897 (11th Cir. 1984), but his reliance backfires. See Pet. at 13–14. *Chadwick* opined 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." 740 F.2d at 901. But the Eleventh Circuit noted that the "*Cronic* and [*Strickland* v.] *Washington* opinions are not entirely in accord on this point" in that *Strickland* "apparently places at least some significance on whether government interference was involved." *Id.* at 901 n.5. Regardless, the Eleventh Circuit found that any difference in approaches "ha[d] no effect on the outcome of this case," because, state action aside, "the petitioner ha[d] failed to show circumstances that would warrant a presumption of prejudice." *Id.* *Chadwick* is thus inapposite.

Moreover, and significantly, any alleged split is stale. The cases to which Moss points are, almost exclusively, decades old. Though age may not diminish the value of a case or its reasoning, the fact that these are the only such cases Moss could find that even discuss a state-action requirement, let alone reach differing conclusions on the matter, reveals that there is no nationwide point of contention calling for this Court's resolution. See Pet. at 11–16. Moss's three primary cases are from 2001 (*Burdine*), 1991 (*Swanson*), and 1984 (*Chadwick*). And his collateral cases range from 1986 to 2010, with one outlier in 2021 in which the Seventh Circuit merely remained neutral on the topic. See *Lewis* v. *Zatecky*, 993 F.3d 994 (7th Cir. 2021); *United States* v. *Moussaoui*, 591 F.3d 263, 290 (4th Cir. 2010); *United States* v. *Collins*, 430 F.3d 1260, 1265 (10th Cir. 2005); *Appel* v. *Horn*, 250 F.3d 203, 206, 215–16 (3d Cir. 2001); *United States* v. *Mateo*, 950 F.2d 44, 49 (1st Cir. 1991); *Sanders* v. *Lane*, 861 F.2d 1033, 1037 (7th Cir. 1988); and *United States* v. *Sanchez*, 790 F.2d 245, 254 (2d Cir. 1986).

The paucity of cases on this issue speaks volumes—and not in Moss's favor. In short, the state-action issue has not percolated to any meaningful apex worthy of this Court's review.

C. In any event, the Sixth Circuit correctly held that *Cronic* is not the proper metric in this case.

To whatever minor extent any other courts have rejected the limited state-action analysis the Sixth Circuit employed in this case, the Sixth Circuit's reasoning stands on the right side of the law. In *Bell* v. *Cone*, this Court outlined the cases in which the Court had contemplated presumptive prejudice "where the accused [wa]s denied the presence of counsel at a critical stage," including *Cronic* itself. 535 U.S. at 696 n.3. Even *this* Court then acknowledged that "[e]ach involved criminal defendants who had actually or constructively been denied counsel *by government action*." *Id.* (emphasis added). Thus, the Sixth Circuit's reasoning in this case was justified based on this Court's own precedent.

Even if this Court disagrees with the Sixth Circuit's reasoning that state action is required for a *Cronic* violation under the "complete denial" scenario, the Sixth Circuit's ultimate conclusion remains sound: *Cronic* does not apply in this case for a myriad of other reasons. A reviewing court may affirm the lower-court decision "if it is correct for any reason, even a reason different from that relied upon by the [lower] court." *Taylor* v. *McKee*, 649 F.3d 446, 450 (6th Cir. 2011).

Hence, regardless of the basis, the Sixth Circuit correctly determined that Moss's ineffective-assistance claim falls under *Strickland*, not *Cronic*, and that Moss cannot demonstrate actual prejudice. This Court should deny certiorari.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Dated: JANUARY 2024

BRIEF IN OPPOSITION APPENDIX
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Order **Michigan Supreme Court**
Lansing, Michigan

Robert P. Young, Jr.,
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Richard H. Bernstein
Joan L. Larsen,
Justices

December 22, 2015
152082

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v SC: 152082
COA: 319954
Oakland CC: 2013-244474-FC
STEVEN LEE MOSS,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the June 9, 2015 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 22, 2015 *Larry S. Royster*
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 9, 2015

v

No. 319954
Oakland Circuit Court
LC No. 2013-244474-FC

STEVEN LEE MOSS,

Defendant-Appellant.

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(*i*), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 15 to 45 years' imprisonment for the drug conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from his purchase of 10 kilograms of cocaine from a police undercover informant. After learning that defendant was interested

in acquiring a large amount of cocaine and after conducting preliminary surveillance of defendant's activities, the police arranged for defendant to meet their informant. In addition to the police testimony, the prosecution presented evidence of video and audio recordings capturing the meetings and telephone conversations between defendant and the informant. The first meeting, on November 6, 2012, lasted approximately 30 minutes and defendant agreed to purchase 10 kilograms of cocaine. At their next meeting on November 7, 2012, defendant and the informant discussed the drug deal, and defendant unsuccessfully attempted to persuade the informant to increase the purchase amount to 40 kilograms. In a restaurant parking lot, the informant showed defendant 10 kilograms of cocaine that were hidden in a compartment of an undercover police van. Defendant was instructed to contact the informant if he wanted to consummate the deal. Defendant contacted the informant on November 8, 2012, and they agreed to meet at a restaurant. They then agreed to transact the drug deal on November 9, 2012, which was when defendant believed he would have all the purchase money. Defendant unsuccessfully attempted to convince the informant to complete the transaction at defendant's house. Defendant also discussed his desire for future transactions with the informant. On November 9, 2012, defendant and the informant met in the parking lot of a Home Depot store, as planned. The informant was accompanied by another undercover officer who drove the van containing the drugs, and defendant also brought an associate with him.[3] After defendant

[3] The associate, Lamar Kendrick, was also charged for his participation in the transaction. He pleaded guilty to conspiracy to

showed that he had the purchase money, which was in a suitcase in his car, the men walked to the undercover van where defendant was again shown the product. Defendant took possession of the van keys, got in the driver's seat, and turned on the ignition before the police remotely disabled the van. Defendant fled the vehicle on foot, but was arrested after a brief chase.

I. ENTRAPMENT

Defendant argues that the trial court erred in denying his motion to dismiss on the basis of entrapment. We disagree. We review de novo the trial court's determination whether the police entrapped a defendant, but review the trial court's findings of fact for clear error. *People v Vansickle*, 303 Mich App 111, 114-115; 842 NW2d 289 (2013). A finding of fact is clearly erroneous if this Court is left with a firm conviction that the trial court made a mistake. *Id*. at 115.

Defendant has the burden of proving the defense of entrapment by a preponderance of the evidence. *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002); *People v Akhmedov*, 297 Mich App 745, 752; 825 NW2d 688 (2012). "Entrapment occurs if (1) the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances or (2) the police engage in conduct so reprehensible that the court cannot tolerate it." *Vansickle*, 303 Mich App at 115 (citation omitted). The police do not engage in entrapment by merely providing a defendant with the opportunity to commit the crime. *Johnson*, 466 Mich at 498. In

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deliver 1,000 or more grams of cocaine, MCL 750.157a, and possession with intent to deliver 1,000 or more grams of cocaine.

determining whether defendant was impermissibly induced by the police to commit criminal activity, this Court should consider the following factors:

> (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical lawabiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted. [*Id*. at 498-499.]

Defendant argues that the police entrapped him by exploiting his friendship with Michael Bennett, who introduced him to the paid police informant, Diego. Defendant's friendship exploitation claim is twofold: (1) that Bennett appealed to defendant's sympathy, claiming to be in danger because he owed people money, and (2) that because of their friendship, Bennett knew that defendant was vulnerable because he

was in danger of losing his West Bloomfield home, and Bennett used that information to pressure defendant into participating in drug trafficking. We agree with the trial court that the record does not support defendant's claim that he was unduly pressured into purchasing the drugs or that he was an unwilling participant.

Defendant is correct in his argument that entrapment occurs when "investigative enforcement measures extend beyond a tolerable level when *by design* the government uses continued pressure [or] appeals to friendship or sympathy[.] *People v Jamieson*, 436 Mich 61, 89; 461 NW2d 884 (1990). However, defendant's arguments are inconsistent with the evidence presented at the entrapment hearing. Initially, defendant overstates the depth of his friendship with Bennett as indicated by the evidence. According to defendant's testimony, he originally talked to Bennett, whom defendant believed was imprisoned for a drug offense, on the telephone while Bennett was in federal prison with defendant's cousin; they met "face to face" in April 2011. As the trial court aptly observed, defendant's testimony indicated that he had only sporadic and limited contact with Bennett from April 2011 until Bennett introduced defendant to Diego in November 2012. During that period, Bennett would often stop by defendant's rental properties, they would have brief meetings, and they left the rental properties on occasion and ate together. Bennett had never been to defendant's primary residence, and defendant did not know where Bennett lived or much about his upbringing. Defendant described Bennett as an "acquaintance and borderline friend." An acquaintance relationship is not sufficient to support a

defendant's claim of entrapment. *People v Juillet*, 439 Mich 34, 66-67; 475 NW2d 786 (1991). In addition, defendant's testimony that he ultimately agreed to participate in the drug transaction because he needed the money to save his West Bloomfield residence suggests that he was not motivated because of his friendship with Bennett, but by his own opportunity for profit.

Regarding Bennett's alleged relentless pressuring, defendant testified that Bennett approached him about obtaining drugs in April 2012, and continuously pressured him until he finally agreed in November 2012. Defendant explained that Bennett first broached the subject by asking a general question about where to obtain drugs to a group of people who were at one of defendant's rental properties. Thereafter, Bennett continued to ask defendant about participating in a drug deal whenever he stopped by defendant's properties. As the trial court relevantly observed, defendant "didn't have to tell Mr. Bennett where [he] was located when Mr. Bennett would call and want to see him, especially after the discussions of—of dealing in drugs came about." Defendant's own testimony established that he chose to expose himself to the allegedly drug-dealing Bennett, "a borderline friend," which belies his claim that he was under unwanted, persistent pressure to participate in a drug deal.

Furthermore, after agreeing to participate in the drug deal, defendant met Bennett and Diego at a restaurant and discussed the drug transaction. Notably, defendant brought more than $230,000 for the drug deal (while, according to defendant, Bennett contributed $39,000), Bennett left shortly after introducing

defendant to Diego, and Bennett did not attend any further meetings between defendant and Diego. In the recorded interactions that followed, defendant was observed and heard discussing the purity of the drugs with Diego, being shown drugs in a hidden compartment in a van, seeking to purchase a greater quantity, contacting Diego, and inviting Diego to transact the drug deal at defendant's residence. A special agent for the Drug Enforcement Administration, who observed the interactions, testified that defendant did not appear to be nervous during the meetings and phone conversations, and it did not appear that this was defendant's first time being involved in a drug transaction. The evidence further showed that defendant voluntarily met with Diego, acted of his own free will, and was never threatened. Consequently, the record does not support defendant's claim that, through an informant, the police placed undue pressure on him to buy drugs. It supports the trial court's finding that defendant was a willing participant.

Defendant's suggestion that his opportunity to save his primary residence was a sufficient inducement to commit the crime also lacks merit. Defendant testified that the drug deal would provide him an additional $90,000 to help save his primary residence. The evidence disclosed, however, that defendant owned numerous rental properties, including a hall and several rental houses, but he claimed to be unaware of any of the values of those properties. He admitted that, for various reasons, he did not put any of those properties up for sale. Moreover, as the trial court found, "if his sole purpose was to keep his house from being foreclosed upon, one wonders why he couldn't work with the bank with a substantial

payment [more than $230,000] toward his mortgage to save his home." Defendant and a witness also testified that defendant gave the witness a substantial amount of money to invest in a shrimp business during this period that he was in danger of losing his house.

In sum, defendant failed to establish by a preponderance of the evidence that either Bennett or Diego placed excessive pressure on him, that Bennett made a sufficient emotional plea to induce him to engage in the criminal activity, or that a friendship between defendant and Bennett was otherwise exploited to induce defendant to commit the crime. Further, no excessive consideration was provided to defendant. The police actions were insufficient to induce or instigate an otherwise unwilling average person, similarly situated to defendant, to commit the crime. Rather, the facts indicate that defendant was simply offered an opportunity to commit the crime, which is insufficient to support a finding of entrapment. *Johnson*, 466 Mich at 498. Consequently, the trial court did not clearly err in finding that defendant was not entrapped.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that the trial court erred by denying his motion for a new trial based on ineffective assistance of counsel. Defendant argues that defense counsel was ineffective for recommending that defendant waive his right to a jury trial. We disagree.

We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A claim alleging ineffective assistance of counsel presents a

mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of law are reviewed de novo, and a trial court's findings of fact, if any, are reviewed for clear error. *Id*. To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *Id*. at 290.

A criminal defendant has the ultimate authority to make certain fundamental decisions regarding his case, including the decision whether to waive a jury. *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983). The record shows that defendant's jury waiver complied with MCR 6.402(B), and was knowing and voluntary. Defendant acknowledged during the *Ginther*[4] hearing that he was questioned about his decision to waive a jury to ensure that it was a voluntary decision. Defense counsel testified that he explained "exactly" what a jury waiver meant to defendant. The colloquy between defendant and defense counsel during the waiver proceeding reveals that defendant understood his right to a jury trial, including the difference between a bench and jury trial, and voluntarily waived that right. Specifically, defendant acknowledged his understanding that, by waiving his right to a jury, "the Judge will be the fact finder and will make all the findings necessary[.]" Thus, the record belies defendant's claim that he would not have

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[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

waived his right to a jury had he known that it meant that the trial court would be the trier of fact.

The decision to recommend a jury or bench trial is within the purview of trial strategy, *People v Davenport (After Remand)*, 286 Mich App 191, 197; 779 NW2d 257 (2009), which this Court does not second-guess. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Defendant claims, however, that defense counsel's advice was improperly based on his lack of preparedness to proceed to trial. Defendant testified that on the first day of the entrapment hearing, defense counsel told him that he was "get[ting] a bench trial" because counsel was not prepared to proceed to trial immediately after the entrapment hearing and needed to "buy [] more time." In contrast, defense counsel testified that he had strategic reasons for recommending a bench trial and, had trial started immediately, he "would have been prepared for the trial." Counsel explained that he and defendant had discussed that there was only one defense to the charges, which was entrapment, and that the entrapment issue could not be argued at trial. Counsel advised defendant that if he did not prevail at the entrapment hearing, defendant should immediately appeal the decision. A stipulated-fact bench trial was the most expeditious in that regard, especially given that "the prosecution had obviously overwhelming evidence" against defendant. In counsel's opinion, it "would have been a bit of a charade and a waste of time to impanel and go through a jury[.]" According to defense counsel, defendant understood that he lacked any other defense, knew that he would likely be convicted at trial, agreed with counsel's strategy, and

never expressed any dissatisfaction with counsel's representation.

As the trial court below observed, resolution of this claim depended on how the court resolved the conflicting accounts of defense counsel and defendant. The trial court determined that defendant was not credible. This Court gives deference to a trial court's superior ability to judge the credibility of witnesses who appeared before it. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). Moreover, as the trial court observed, other aspects of the record supported defense counsel's testimony. The parties' testimony discloses that defense counsel, who was defendant's fifth attorney, agreed to represent defendant with full knowledge that a trial was imminent. Although trial was forthcoming, both the prosecutor and defense counsel advised the court that, at the time of the entrapment hearing, neither had information that the trial was scheduled to immediately follow the entrapment hearing. Therefore, defense counsel would not have had any reason to make that representation to defendant. In addition, upon filing his appearance, defense counsel requested and was granted an adjournment to prepare for the entrapment hearing. As the trial court noted, the record reveals that defense counsel was present and prepared for the three-day entrapment hearing and much of the same evidence and testimony from the entrapment hearing presumably would be presented at trial. In light of this record, and affording deference to the trial court's superior ability to evaluate credibility, we reject defendant's claim that he agreed to forego his right to a jury trial because defense counsel told defendant that he was not prepared to proceed with a jury trial. Rather, the

decision was a tactical choice, which this Court will not second-guess. *Russell*, 297 Mich App at 716.

Defendant complains that by recommending a bench trial, defense counsel improvidently allowed defendant's testimony at the entrapment hearing, wherein defendant admitted his involvement in the drug offense, to be available to the same judge who tried the case. Contrary to what defendant argues, however, defense counsel did not stipulate to the admission of defendant's testimony at trial, and the record discloses that it was not admitted or considered at trial. The trial court expressly stated that it did not consider defendant's entrapment hearing testimony at trial, and that its determination of defendant's guilt was based solely on the testimony, facts, and exhibits that were admitted at the trial. The trial court also recognized the prohibition against considering a defendant's testimony at an entrapment hearing as substantive evidence. In a bench trial, it is presumed that the trial court can ignore inadmissible evidence when rendering its decision. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001) (citation omitted). A review of the trial court's findings of fact and conclusions of law at the bench trial establishes that defendant's entrapment hearing testimony did not affect the trial court's verdict, which instead was clearly based on the evidence properly presented at trial.

In sum, under the circumstances, defense counsel's decision to recommend a bench trial was within the purview of trial strategy, *Davenport (After Remand)*, 286 Mich App at 197, and did not fall below an objective standard of reasonableness, *Armstrong*, 490 Mich at 289-290. "The fact that trial counsel's strategy

may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

III. SCORING OF OFFENSE VARIABLES

Lastly, defendant argues that the trial court improperly scored OV 14 and OV 19 of the sentencing guidelines. Again, we disagree. When reviewing a trial court's scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

A. OV 14

MCL 777.44(1)(a) directs a score of 10 points if "[t]he offender was a leader in a multiple offender situation." The entire criminal transaction should be considered. MCL 777.44(2)(a). The evidence indicates that defendant arranged a large drug transaction with a police informant. Lamar Kendrick accompanied defendant to the prearranged location for the buy. Kendrick remained in the car with the keys and the purchase money. Another person, Jay Smith, was at defendant's house, waiting for him to return with the drugs so that Smith could purchase a portion. The evidence supports the trial court's finding that more than one offender was involved in this criminal episode, and that defendant, the person who negotiated

the transaction, was the leader. Therefore, the trial court did not err in assessing 10 points for OV 14.

B. OV 19

OV 19 must be scored at 10 points if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49. In assessing points under OV 19, a court may consider the defendant's conduct after the completion of the sentencing offense. *People v Smith*, 488 Mich 193, 200; 793 NW2d 666 (2010). A defendant interferes with the administration of justice by "oppos[ing] so as to hamper, hinder, or obstruct the act or process of administering judgment of individuals or causes by judicial process." *People v Hershey*, 303 Mich App 330, 343; 844 NW2d 127 (2013). This Court has specifically recognized that a defendant's conduct of "fleeing from police contrary to an order to freeze," is sufficient to support a score of 10 points under OV 19. *Id.* at 343-344.

In this case, there was evidence that after defendant put the undercover van in reverse to leave, a detective stopped the van with a remote control kill switch and pulled the police vehicle behind the van. The detective and other officers were in fully marked police gear. Defendant exited the vehicle and "attempted to run approximately twenty feet" into "a berm, a grassy area." The detective identified himself as a police officer, ordered defendant to the ground, pulled his weapon, and "again ordered to the ground, which he *finally* complied." (Emphasis added.) Although defendant ultimately complied with the detective's command to stop and get on the ground, there was evidence that defendant initially disobeyed the

directive, causing the detective to pull his weapon and "again" order defendant to the ground. Given that defendant initially disregarded a direct order from the police, a preponderance of the evidence supports that he interfered with the administration of justice. *Id*. at 343-344. Accordingly, the trial court did not err in assessing 10 points for OV 19.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood