No. 23-444

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rule

INTRODUCTION

The Sixth Circuit's state-action requirement subverts this Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984), and shields defense counsel's worst derelictions of duty from federal post-conviction review. Barely defending this requirement, Respondent instead argues that the Court should deny review because of two purported procedural barriers: Moss's failure to raise his *Cronic* claims on direct appeal and the untimeliness of his habeas petition. Respondent also maintains that the Sixth Circuit's answer to the question presented did not determine the outcome of Moss's claims and quibbles about the nature of the acknowledged circuit split.

None of these assertions presents a legitimate impediment to this Court's review. In fact, answering the question presented is necessary for the Sixth Circuit to correctly determine whether Moss's procedural default may be excused. The timeliness question should be resolved, after this Court's review, by the Sixth Circuit, which pointedly avoided the issue the first time around. And Respondent does not dispute the existence of a circuit split, which, in truth, is metastasizing, not going away.

At the end of the day, what is most telling about the opposition is not what it says, but what it studiously avoids: any serious defense of the Sixth Circuit's merits position—repeatedly advanced in a series of that court's decisions—that a claim of ineffective assistance under *Cronic* can be ignored unless it arises from "state action." That weighty error demands this Court's immediate intervention.

ARGUMENT

I. This case presents an excellent vehicle.

Respondent contends that two threshold issues bar this Court's review of the question presented: Moss's procedural default of his claims and the untimeliness of his habeas petition. BIO 12. Neither issue precludes this Court's review. And this case is a better vehicle than prior cases that presented the state-action issue.

A.1. The procedural default of Moss's claims poses no barrier to review. Quite the opposite: resolution of the question presented is necessary to resolve whether there is cause and prejudice to excuse Moss's procedural default.

Moss's claims under *United States v. Cronic*, 466 U.S. 648 (1984), were procedurally defaulted under Michigan law because he did not raise them on direct appeal. Pet. App. 15a n.5 (citing Mich. Ct. R. 6.508(D)(3)). A habeas petitioner overcomes a state procedural bar if he shows cause and prejudice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In the Sixth Circuit, Moss maintained that the cause for his procedural default was the ineffective assistance of his appellate counsel, Suzanna Kostovski. Pet. App. 15a. The Sixth Circuit rejected this argument, holding in relevant part that because no "state action" hindered his trial counsel's performance, Moss could not state a meritorious *Cronic* claim. Pet. App. 18a; *see infra* at 8-9. Because the Sixth Circuit concluded that Moss's *Cronic* claims are not meritorious, Kostovski's failure to raise them did not render her performance constitutionally deficient or prejudice Moss. Pet. App. 22a-23a. Therefore, Moss could show neither cause nor

prejudice to excuse the procedural default of his *Cronic* claims. *Id.* The Sixth Circuit's *Cronic* state-action requirement thus was dispositive of its cause-and-prejudice analysis. Answering the question presented would resolve whether the procedural default could be overcome, so the state procedural bar is no barrier to review.

This Court has granted review to correct a court's federal substantive-law error made in its cause-and-prejudice analysis. In *Rippo v. Baker*, 580 U.S. 285 (2017) (per curiam), this Court reversed the state court's holding that no cause or prejudice existed to excuse petitioner's procedural default of his federal judicial-bias claim because that court had relied on an erroneous interpretation of the judicial-bias standard. *Id.* at 286 n.*, 287. This Court then remanded for application of the correct standard. *Id.* at 287; *see also Banks v. Dretke*, 540 U.S. 668, 691 (2004) (reaching merits of petitioner's *Brady* claim to determine whether petitioner had demonstrated cause and prejudice).

2. Indeed, Respondent concedes that the Sixth Circuit reached the merits of Moss's *Cronic* claims to uphold the state procedural bar. BIO 18. The salient question, then, is whether Moss could show cause and prejudice on remand if this Court holds that *Cronic* lacks a state-action requirement. He could.

An appellate counsel's ineffectiveness in failing to preserve a procedurally defaulted claim can constitute cause excusing the default. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). This standard is met when the issues not presented on appeal are clearly stronger than the issues that counsel did present. *See Smith v. Robbins*, 528 U.S. 259, 288 (2000). Here, Moss was

denied the effective assistance of appellate counsel when Kostovski failed to bring claims that Steingold abandoned Moss during the critical pre-trial and trial stages of the litigation under *Cronic*. *See* Pet. App. 7a-8a. The district court correctly described these two *Cronic* claims as "clearly dead-bang winners," explaining that Steingold's "errors were obvious from the record and leaped out upon even a casual reading of the transcript." Pet. App. 82a (citation omitted). Yet Kostovski failed to raise them.

Respondent maintains that the unraised *Cronic* claims are "identical" to the *Strickland* claims that Kostovski did raise. BIO 18. That's flatly wrong. The *Cronic* claims first raised in Moss's state post-conviction motion are that Steingold constructively abandoned Moss during the critical pre-trial and trial stages by failing to interview or even identify witnesses, conduct any investigation before trial, or present any defense at trial. Pet. 7; *see also* Pet. 4-6. Steingold's performance at the entrapment hearing was so inept that the judge asked whether he was trying to engineer an ineffective-assistance-of-counsel claim for appeal. Pet. App. 27a (Cole, J. dissenting). On direct appeal, however, Kostovski identified only two specific *Strickland*-type errors, *see* BIO App. 9a, 13a: "waiving Moss's right to a jury trial and stipulating to the admission of the evidence from the entrapment hearing at the bench trial." Pet. App. 44a (Cole, J., dissenting). The state court's rejection of those specific errors as insufficient to state a *Strickland* claim says nothing about how the court would have judged Steingold's overall performance under *Cronic*.

Kostovski's deficient performance also prejudiced the appeal. Pet. App. 44a (Cole, J., dissenting). To establish prejudice, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). As already discussed, Moss's *Cronic* claims are distinct from and stronger than the *Strickland* claims his counsel raised. *See* Pet. App. 82a-83a. At a minimum, there is a reasonable probability that Moss would have prevailed had Kostovski raised the *Cronic* claims on direct appeal because this Court's precedent compels the application of *Cronic* to those claims. *See* Pet. 21; *infra* at 8-10.

B. Respondent is wrong that the untimeliness of Moss's habeas petition precludes this Court's review. *See* BIO 13-14. As just explained, the only question before this Court is whether the Sixth Circuit incorrectly applied a state-action requirement to conclude that Moss had not shown cause and prejudice to excuse his procedural default. *See supra* at 2-3. This Court may exercise its discretion to address one threshold procedural issue rather than another and has preferred to review what the court of appeals relied on below, which here is procedural default. *See, e.g.*, *Lambrix v. Singletary*, 520 U.S. 518, 524-25 (1997). The Court should do so in this case given the importance of the question presented. Then, if Moss prevails on the question presented, this Court would simply remand to the Sixth Circuit to allow it to consider Moss's equitable-tolling claim.

That the Sixth Circuit could well embrace Moss's equitable-tolling claim on remand underscores the suitability of granting review on the question

presented. The only two judges to have definitively analyzed the equitable-tolling issue agreed with Moss. Pet. App. 9a (describing district court's ruling granting equitable tolling); Pet. App. 38a (Cole, J., dissenting). They concluded that Moss had diligently pursued his rights and that the Sixth Circuit's "confused caselaw" on when the filing deadline expired was an extraordinary circumstance warranting one day of tolling. Pet. App. 34a, 38a (Cole, J., dissenting); *see also* Pet. App. 9a. Indeed, the two Sixth Circuit judges who deliberately avoided resolving the tolling issue, Pet. App. 14a-15a, may have done so because the Sixth Circuit's decisions concerning the filing deadline's expiration cannot be reconciled. *See* Pet. App. 35a-38a (Cole, J., dissenting).

C. Respondent gestures to denials of certiorari in prior cases supporting a *Cronic* state-action requirement, *see* BIO 24, but Moss's case presents a better vehicle for reviewing the question presented than either *Maslonka v. Hoffner*, 900 F.3d 269 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 2664 (2019), or *Clark v. Lindsey*, 936 F.3d 467 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 165 (2020). Neither case considered counsel's absence at proceedings that this Court has recognized as critical stages under *Cronic*: *Maslonka* concerned counsel's absence at cooperation meetings in other litigation, 900 F.3d at 274-75, and *Clark* concerned counsel's absence from a competency hearing, 936 F.3d at 469. *Cronic* may not apply to the types of proceedings involved in the earlier cases. On the other hand, Moss "was constructively denied the assistance of counsel in the critical pre-trial and trial phases." Pet. App. 24a (Cole, J., dissenting); *see also*

Pet. App. 90a; *United States v. Cronic*, 466 U.S. 648, 659 (1984); *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975).

II. The circuits are split.

Respondent's efforts to minimize the circuit split all fail. *See* BIO 24-27. He nowhere denies that the Fifth and Ninth Circuits have held that *Cronic* does not require state action. *See Burdine v. Johnson*, 262 F.3d 336, 345 (5th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1120 (2002); *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991). To be sure, the rejection of a state-action requirement in *Chadwick v. Green*, 740 F.2d 897, 901 n.5 (11th Cir. 1984), was not outcome-determinative. *See* BIO 25-26. And we acknowledge that, more recently, in *Hunter v. Moore*, 304 F.3d 1066 (11th Cir. 2002), the Eleventh Circuit applied a state-action requirement to sustain a *Cronic* claim because the defendant had established state interference with counsel's performance. *Id.* at 1071; *see also United States v. Griffin*, 515 F. App'x 820, 823-24 (11th Cir. 2013) (citing *Hunter*, 304 F.3d at 1071, and rejecting a complete-denial *Cronic* claim, in part because the defendant was not denied counsel by government action). These decisions, which align with the Sixth Circuit's misreading of *Cronic*, only deepen the circuit conflict.

Moreover, the Sixth Circuit's requirement that Moss show that state action caused his counsel's deficient performance cannot be squared with decisions of other circuits which, while not expressly addressing the issue, indicate that *Cronic* applies absent state interference with counsel's representation. *See* Pet. 15-16 (citing cases from the First, Second, Third, Fourth, Seventh, and Tenth

Circuits). Respondent is silent as to the substance of those decisions. *See* BIO 26.

Respondent maintains that the split is both "stale" and immature, BIO 24-26, referring to a "paucity of cases" on the state-action issue, BIO 27. For starters, there's nothing stale about it. The Sixth Circuit adopted its state-action rule in 2018 and has rejected *Cronic* claims based on that rule at least three times since then. *See Maslonka v. Hoffner*, 900 F.3d 269, 279-80 (6th Cir. 2018), *cert. denied* 139 S. Ct. 2664 (2019); *Clark v. Lindsey*, 936 F.3d 467, 470 (6th Cir. 2019), *cert. denied* 141 S. Ct. 165 (2020); *White v. Rewerts*, 2022 WL 4374822, at *6 (6th Cir. Sept. 22, 2022) ("White's [*Cronic*] argument is unpersuasive because he does not claim that the state obstructed his access to counsel."); Pet. App. 18a.

And the split is mature. The number of cases expressly analyzing the state-action issue is irrelevant, reflecting only that *Cronic* itself largely settled the question, *see* Pet. 20-21; *United States v. Cronic*, 466 U.S. 648, 662 n.31 (1984); *Burdine*, 262 F.3d at 345 (citing *Cronic*, 466 U.S. at 662 n.31), until the Sixth Circuit began repeatedly rejecting *Cronic* claims on lack-of-state-action grounds. With four circuits taking conflicting positions on a state-action requirement and six others implicitly rejecting one, the circuit conflict is ripe for this Court's review.

III. The decision below is wrong.

Respondent barely defends the Sixth Circuit's state-action requirement on its merits, suggesting only that this Court acknowledged the existence of one by negative implication in *Bell v. Cone*, 535 U.S. 685, 696 n.3 (2002). *See* BIO 27. But *Cronic* itself rejected

that requirement and the erosion of the Sixth Amendment right to assistance of counsel it threatens. *See United States v. Cronic*, 466 U.S. 648, 662 n.31 (1984); *see also Burdine v. Johnson*, 262 F.3d 336, 345 (5th Cir. 2001) (en banc) (holding that a "state action requirement does not flow from the language of *Cronic*").

Respondent is wrong that a state-action requirement was not a "load-bearing premise" of the Sixth Circuit's analysis. BIO 21. The court of appeals relied exclusively on that requirement to reject Moss's *Cronic* claims based on a constructive-absence theory: "[T]he 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." Pet. App. 18a (citing *Maslonka v. Hoffner*, 900 F.3d 269, 280 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 2664 (2019); *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003), *cert. denied*, 534 U.S. 1080 (2005)). Under that rule, a complete-denial-of-counsel claim can be shown in two ways: counsel's physical absence or state interference with his performance. *Id.* Respondent suggests this disjunctive holding creates distance between the state-action requirement and the Sixth Circuit's decision. *See* BIO 22. That's not so. Because Steingold was physically present, the Sixth Circuit relied entirely on Moss's failure to show state interference to reject his argument that Steingold *constructively* abandoned him at the critical pre-trial and trial stages. *See* Pet. App. 18a; *see also* Pet. 22.

To be sure, the Sixth Circuit separately rejected Moss's lack-of-meaningful-testing argument. *See* Pet.

App. 18a-20a. But it did so only after using the state-action requirement to dispose of Moss's complete-abandonment claims, including those derived from Steingold's failure to investigate "any witnesses or any possible defenses." Pet. App. 90a; *see also* Pet. App. 18a. Ignoring Steingold's pre-trial failure infected the court's analysis of everything that followed. *See* Pet. App. 46a-48a (Cole, J., dissenting). The court thus discounted Steingold's wretched performance at the entrapment hearing and his failure to raise any defense while "essentially st[anding] mute at trial." Pet. App. 90a.

Cronic does not require a showing of government interference with counsel because, as this Court has said repeatedly, criminal conviction absent effective assistance of counsel is itself state action prohibited by the Sixth Amendment. *See Cronic*, 466 U.S. at 662 n.31; *Cuyler v. Sullivan*, 446 U.S. 335, 343-45 (1980); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). This Court should grant review and reject the Sixth Circuit's contrary position.

CONCLUSION

The petition for a writ of certiorari should be granted.

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