No. _____

In the Supreme Court of the United States

SEDRICK D. RUSSELL,

Petitioner

v.

J. DENMARK,

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Strickland v. Washington, 466 U.S. 668 (1984), held a criminal defendant alleging ineffective assistance of counsel must prove deficient performance and prejudice. *United States v. Cronic*, 466 U.S. 648 (1984), decided the same day, held that for a complete denial of counsel at a critical stage, prejudice is presumed. The questions presented are:

Must a *pro se* petitioner alleging a complete denial of counsel specifically cite *Cronic* to exhaust his claim in the state court?

If a detained criminal defendant has no communication with a lawyer for 14 months after arrest, is prejudice presumed?

RULE 14(B) STATEMENT

All parties appear in the caption of the case on the cover page.

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

1. *State v. Russell*, No. 07-0-673WSY (Hinds Co., Miss., Circuit Ct.) (judgment following jury verdict entered January 30, 2009)

2. *Russell v. State*, No. 2009-KA-01628-COA (Miss. Ct. App.) (direct appeal) (opinion affirming conviction entered August 16, 2011, and reported at 79 So. 3d 529; motion for rehearing denied November 8, 2011)

3. *Russell v. State*, No. 2009-CT-01628-SCT (Miss.) (order denying petition for writ of certiorari entered February 9, 2012)

4. *Russell v. State*, No. 2009-M-01623 (Miss.) (post-conviction proceedings) (order denying post-conviction relief entered February 13, 2014)

5. *Russell v. Denmark*, No. 3:14-cv-00225 (S.D. Miss.) (federal habeas proceedings) (final judgment granting habeas relief entered March 24, 2021, and reported at 528 F.Supp.3d 482)

6. *Russell v. Denmark*, No. 21-60344 (5th Cir.) (judgment reversing and rendering entered May 18, 2023, and reported at 68 F.4th 252)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sedrick D. Russell respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's opinion (see Appendix ("Pet. App.") 1a) reversing the district court's grant of Russell's petition for habeas relief is reported at 68 F.4th 252.

The district court's opinion (*id.* at 30a) granting Russell's petition for habeas relief is reported at 528 F.Supp.3d 482.

The Mississippi Supreme Court's order (*id.* at 76a) denying Russell's petition for post-conviction relief is unreported.

The Mississippi Court of Appeals's opinion affirming Russell's conviction (*id.* at 81a) is reported at 79 So.3d 529. The Mississippi Court of Appeals's order denying Russell's motion for rehearing (*id.* at 80a) and the Mississippi Supreme Court's order denying Russell's petition for writ of certiorari to review (*id.* at 79a) are unreported.

The Hinds County, Mississippi, Circuit Court's judgment of conviction (*id.* at 106a) is unreported.

JURISDICTION

The Fifth Circuit entered judgment on May 18, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C.A. § 2254(b(1):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C.A. § 2254(d):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

On December 21, 2006, Sedrick Russell was arrested in connection with a shooting. For the next 14 months, he was detained in a Hinds County, Mississippi jail without a lawyer. His trial date came and went. On February 13, 2008, he wrote the trial judge: "I didn't even go to court February 11, 2008, not haveing to mention actuelly going to trial on that date, Nor have a lawyer has came to visit me since my arrest . . . ." *See* Pet. App. 36a.

A jury later convicted Russell of aggravated assault and being a felon in possession of a weapon. After his conviction was affirmed on appeal, he sought post-conviction relief from state and federal courts. His petition filed in the district court, which he handwrote himself, alleged the State obtained his conviction in violation of his right to counsel.

The district court agreed with Russell, concluding that he experienced a "complete denial of counsel" at a "critical stage" of his criminal proceedings, such that prejudice is presumed under *United States v. Cronic*, 466 U.S. 648 (1984). *Id.* at 69a-75a.

The Fifth Circuit reversed, concluding instead not only that the first 14 months of Russell's criminal proceedings were not critical, but also that Russell failed to exhaust a *Cronic* claim in the state court. *Id.* at 23a-29a.

The essential facts are as follows:

For the first 14 months after his arrest, Russell did not have a lawyer.

Russell was arrested and detained on December 21, 2006. *Id.* at 33a. He is indigent.

A lawyer from the Hinds County Public Defender's office named Beth Davis attended his preliminary hearing on January 8, 2007. *Id.* at 34a. That was the first and last time Russell saw Beth Davis. The trial court denied bail, and he returned to jail. *Id.*

Russell was indicted on August 16, 2007. *Id.* Another lawyer from the Hinds County Public Defender's office named Frank Williams attended his arraignment on November 9, 2007. *Id.* at 35a. That was the first and last time Russell saw Frank Williams.

Throughout this time, Russell filed several handwritten motions demanding his right to a speedy trial. *Id.* at 34a-35a. On November 15, 2007, days after his arraignment, he filed a handwritten "Petition to Grievances the Government" in which he additionally complained that "I've been held in (11) months . . . and a lawyer has not yet contacted me." *Id.* at 35a.

On December 21, 2007, the trial judge, addressing Russell's motions for a speedy trial, set a trial date of February 11, 2008. *Id.* at 36a. Tellingly, the trial judge served the order on Russell himself at the jail. *Id.*

The February 11, 2008 trial date came and went. *Id.* Still no lawyer contacted Russell.

On February 13, 2008, Russell, still representing himself, wrote: "I didn't even go to court February 11, 2008, not haveing to mention actuelly going to trial on that date, Nor have a lawyer has came to visit me since my arrest . . . ." *Id.*

On February 14, 2008, the trial judge entered an order "relieving" the public defender's office and appointing a lawyer named Don Boykin counsel. *Id.* at 36a-37a.[1]

On February 28, 2008—14 months after he was arrested on December 21, 2006—Russell met with a lawyer for the first time. *Id.* at 37a.

The State would later blame Russell for the delay, representing that the trial judge appointed Don Boykin only because Russell was "complaining about his public defender." *Id.* at 37a. But Russell did not complain that he did not like his counsel—he complained that he did not have counsel.

There is no evidence that Russell and Frank Williams ever had a private conversation.[2] Frank Williams attended Russell's arraignment on November 9, 2007, but that is the only time the two men were in the same room.

There are two "motions of discovery" signed by Frank Williams in the trial court's record.[3] *Id.* at 3a, 35a. But the motions are boilerplate, apparently issued automatically upon indictment and arraignment. (To the point: No one responded to

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[1] The order referred to a "motion to withdraw" due to a "conflict of interest." There is no such motion in the record. *Id.* at 4a, 37a. "Maybe the 'conflict' was Russell's complaint that his lawyer had not met with him or talked to him for more than a year while he languished in jail." *Id.* at 37a.

[2] See Miss. R. Crim. P. 7.1(a): "The right to be represented shall include the right to consult in private with an attorney or the attorney's agent, without unnecessary delay, after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor."

[3] See record on direct appeal ("ROA") at 386, 390.

the motions. The State produced discovery only after Don Boykin was appointed. *Id.* at 37a.) The motions do not suggest that Frank Williams ever had any conversation with Russell.

Frank Williams did not provide prior notice of withdrawal to Russell, as would be required to withdraw from a lawyer-client relationship in a criminal case.[4]

There is a plea offer addressed to Frank Williams in the trial court's record,[5] *id.* at 3a, but it does not suggest any ongoing negotiations by Frank Williams on Russell's behalf. It is dated February 14, 2008, the same day Don Boykin was appointed.

When Russell met with Don Boykin on February 28, 2008, he told him that he was with a man named Ron Ron at the time of the incident and gave him directions to a house where Ron Ron stayed. *Id.* at 37a. Don Boykin identified the house but, unfortunately, at this point more than 14 months later, Ron Ron could not be found. *Id.* at 38a. On March 27, 2008, Don Boykin filed a motion to dismiss Russell's indictment for failure to provide a speedy trial, arguing that, without counsel, Russell had lost an opportunity to locate an alibi witness. *Id.* The motion reiterated that no lawyer had communicated with Russell between January 8, 2007, his preliminary hearing, and February 28, 2008. *Id.*

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[4] See Miss. R. Crim. P. 7.2(d): "When an attorney makes an appearance for any party in a case, that attorney will not be allowed to withdraw as attorney for the party without permission of the court. The attorney making the request shall give notice to his/her client and to all attorneys in the cause and certify the same to the court in writing. The court shall not permit withdrawal without prior notice to his/her client and all attorneys of record."

[5] ROA at 417.

The trial judge ultimately denied the motion to dismiss. *Id.* at 42a. Relevant here, at the hearing on the motion, a prosecutor cross-examined Russell on his efforts to locate Ron Ron—but not on the fact that for the first 14 months after his arrest he did not have a lawyer.[6] Nothing in the record contradicts that essential fact.

Ten more months later, trial.

Ten more months and a mental evaluation later, trial commenced on January 27, 2009. *Id.* at 39a. The jury heard testimony that on December 19, 2006, Michael Porter was at his girlfriend's house. *Id.* at 31a-33a, 82a-83a. His girlfriend, her sister, and Russell, their cousin, were there. *Id.*

At about 11:00 p.m. Porter went outside to get some gin from his car and, as he leaned in, someone shot him twice in the leg. *Id.*

Porter, his girlfriend, and her sister all testified for the State. No one saw who did it. *Id.* No fingerprints or DNA evidence linked Russell to the shooting.

Porter testified that earlier in the evening he had seen a 9mm gun in Russell's pocket. *Id.* He admitted, however, that, when police had asked, he did not tell them that he, Porter, had had a 9mm gun in his car. *Id.*

Russell testified in his own defense. *Id.* at 33a, 83a. He said that while he was waiting on Ron Ron to pick him up, someone drove by and asked if Porter was inside. *Id.* He said Ron Ron picked him up before the shooting and he learned about it the next day. *Id.*

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[6] ROA at 585-593.

The jury convicted.

The jury convicted Russell of one count of aggravated assault and one count of being a felon in possession of a weapon. *Id.* at 42a. The trial judge sentenced him to two life sentences without parole. *Id.*

The Mississippi Court of Appeals affirmed.

Russell, still represented by Don Boykin, appealed his conviction, arguing the trial judge should have granted his motion to dismiss the indictment for lack of a speedy trial.

The Mississippi Court of Appeals affirmed. The state court blamed Russell for any delay until trial, determining that he "complained about his public defender" and "then requested a mental evaluation." *Id.* at 87a.

The Mississippi Supreme Court denied post-conviction relief.

Russell, representing himself, sought post-conviction relief from the Mississippi Supreme Court. His handwritten petition alleged the State obtained his conviction in violation of his rights to a speedy trial and to counsel.

Relevant to his right to counsel claim, Russell's petition alleged that he "was never contacted by the original court appointed attorney that received an order to withdraw" or "by an[y] attorney until approximately (14) months after his arrest." It asked the state court to find prejudice on the facts presented:

> REASON ONE: The petitioner was denied the EFFECTIVE ASSISTANCE OF COUNSEL . . .

> The petitioner, has motion filed with the Circuit Court indicating that he was never contacted by the original court appointed attorney that received an order to withdraw . . .
>
> The petitioner contends that the records indicates that he was never contacted by the original court appointed attorney named Frank McWilliam.
>
> This court should found it to be deficient, when a court appointed attorney failed to contact the defendant he's assigned to represent.
>
> This court should found prejudice to defendant, when a defendant has been held in custody without bond for (25) months following his arrest and trial, without being contacted by an attorney until approximately (14) months after his arrest . . .

Id. at 108a-109a.

The Mississippi Supreme Court denied Russell's petition. Of his right to counsel claim, the court stated only that Russell failed to meet "both prongs" (deficient performance and prejudice) for an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984):

> The Court further finds that Russell's claims that he received constitutionally ineffective assistance of counsel fail to meet both prongs of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Id. at 77a.

The district court granted post-conviction relief.

Russell, still representing himself, next sought post-conviction relief from the district court. Again, his handwritten petition alleged the State obtained his conviction in violation of his rights to a speedy trial and to counsel.

A magistrate judge's report recommended that the district court dismiss the petition. The report accepted as unrebutted that for the first 14 months after his

arrest Russell did not have counsel,[7] but it reasoned there was no evidence that the State intentionally delayed Russell's trial or that Russell had been prejudiced.

With the assistance of court-appointed counsel, Russell objected to the report and the district court declined to adopt it.

The district court concluded that state courts unreasonably rejected both Russell's claims. It concluded that the Mississippi Court of Appeals, in rejecting Russell's speedy trial claim, unreasonably failed to account for the systemic breakdown in the public defender system in Russell's case. *See Vermont v. Brillon*, 556 U.S. 81, 94 (2009) ("a systemic breakdown in the public defender system could be charged to the State") (citation omitted). *Id.* at 45a-56a.

As for Russell's right to counsel claim, the district observed that "Russell was without an attorney for 14 months while incarcerated pretrial," and "[t]he pretrial period constitutes a 'critical period because it encompasses counsel's constitutionally-imposed duty to investigate the case." *Id.* at 69a-70a. It then concluded that "[b]ecause the record establishes a total absence of counsel during a critical period, the Mississippi Supreme Court should have applied *Cronic*, rather than *Strickland*, to Russell's claim." *Id.* at 75a. Under *United States v. Cronic*, 466 U.S. 658 (1984), for a complete denial of counsel at a critical stage, prejudice is presumed.

[7] ROA at 123.

The Fifth Circuit reversed.

The Fifth Circuit reversed, concluding instead not only that the first 14 months of Russell's criminal proceedings were not critical, but also that Russell failed to exhaust a *Cronic* claim in the state court. *Id.* at 23a-29a.

The Fifth Circuit acknowledged that Russell's petition could be read as alleging a complete denial of counsel under *Cronic*. But because it "was not completely clear," the court construed Russell's claim instead as one for deficient performance under *Strickland*, requiring Russell prove prejudice which, the court concluded, he did not do. *Id.* at 23a-24a. ("[W]e read Russell's state petition as alleging a *Strickland* claim, as the Mississippi Supreme Court did.").

The Fifth Circuit continued that, even if he had clearly invoked *Cronic*, "'[w]e cannot say that Russell was 'effect[ively] denied any meaningful assistance at all." *Id.* at 26a (citation omitted). The court acknowledged that efforts of "the public defenders" were, "[t]o be sure … perfunctory," and "nothing in the record shows that [they] discharged their 'duty to make reasonable investigations' in preparation for trial." *Id.* But even if Russell was effectively denied counsel, it was not at a critical time, because "neither the Supreme Court nor this court has ever held that the *entire* pretrial period is a critical stage." *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision conflicts with decisions of this Court and of other courts and is importantly wrong. A *pro se* habeas petitioner alleging a complete denial of counsel does not have to cite *Cronic* to exhaust his claim in the state court. If an indigent criminal defendant has no communication with a lawyer for 14 months after arrest, prejudice is presumed. The Fifth Circuit's decision reduces the right to counsel pretrial to counsel on paper only. The law does not require that an indigent criminal defendant wait 14 months to talk to a lawyer about his case.

I. A *pro se* habeas petitioner alleging a complete denial of counsel does not have to specifically cite *Cronic* to exhaust his claim in the state court.

Russell's handwritten petition filed in the Mississippi Supreme Court did not cite either *Strickland* or *Cronic*. It did ask the court to find, *i.e.*, presume, prejudice where no lawyer contacted him for 14 months after his arrest. Pet. App. 109a. The Fifth Circuit acknowledged that Russell's petition could be read as alleging a complete denial of counsel under *Cronic*, but because it "was not completely clear," the court construed Russell's claim instead as one for deficient performance under *Strickland*. *Id.* at 23a-24a.

The Fifth Circuit's decision means a *pro se* habeas petitioner alleging Russell's facts does not fairly present his claims to a state court unless he also specifically cites *Cronic*. The decision expects a *pro se* habeas petitioner to distinguish between *Strickland* and *Cronic*, two cases that are not even inconsistent, and clearly choose only one.

No court has required so much of a *pro se* habeas petitioner. The Fifth Circuit's decision conflicts with decisions of this Court, directly conflicts with a decision of the Seventh Circuit, and has no precedent in the circuit courts, including even in the Fifth Circuit.

a. The Fifth Circuit's decision conflicts with decisions of this Court.

28 U.S.C. § 2254(b)(1) requires a habeas petitioner in state custody to "exhaust[] the remedies available in the courts of the State" before obtaining relief from a federal court. "[W]hen a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). For exhaustion purposes, a federal court asks whether the habeas petitioner "fairly presented his claims to the state courts." *Boerckel*, 526 U.S. at 849.

This Court's decisions require simply that a habeas petitioner identify for state courts the right that he claims was violated and how. Thus § 2254(b)(1) barred a habeas petitioner's federal due process claim where he "did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment." *Duncan v. Henry*, 513 U.S. 364, 366 (1995). In *Baldwin v. Reese*, 541 U.S. 27 (2004), this Court held § 2254(b)(1) barred a habeas petitioner's ineffective assistance of counsel claim where his state-court petition did not "alert[]

the [state] court to the alleged federal nature of the claim" and did not "even contain a factual description supporting the claim." *Baldwin*, 541 U.S. at 33.

No decision of this Court requires a habeas petitioner who otherwise sufficiently alleges a violation of a constitutional right to also cite a specific case to support his claim—much less distinguish and choose between two cases that are not even inconsistent.

b. The Fifth Circuit's decision directly conflicts with a decision of the Seventh Circuit.

The Fifth Circuit's decision directly conflicts with *Reynolds v. Hepp*, 902 F.3d 699 (7th Cir. 2018), in which the Seventh Circuit held matter-of-factly: "The fair presentment rule is not so rigid that a pro se petitioner needed to cite *Cronic* or any other denial-of-counsel case by name." *Reynolds*, 902 F.3d at 706.

According to the Fifth Circuit, "*Strickland* and *Cronic* claims are distinct for exhaustion purposes." Pet. App. 23a. But according to the Seventh Circuit, they do not have to be: Like *Cronic*, *Strickland* also expressly holds prejudice is presumed for an actual or constructive complete denial of counsel. Thus, even a habeas petitioner who cites *Strickland* may exhaust a claim under *Cronic*, so long as he alleges "facts that amount to a complete denial of counsel":

> [Thus,] a petitioner could exhaust a denial of counsel claim by describing facts that amount to a complete denial of counsel and citing *Strickland*, which summarized: "Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." 466 U.S. at 692, 104 S.Ct. 2052.

Reynolds, 902 F.3d at 706.

c. There is no precedent in the circuit courts for the Fifth Circuit's decision.

No other circuit court has held a *pro se* habeas petitioner alleging Russell's facts must also specifically cite *Cronic* to satisfy § 2254(b)(1).

The First and Ninth Circuits have held habeas petitioners who in state court alleged only bad lawyering could not later argue no lawyering in federal court. *See Fusi v. O'Brien*, 621 F.3d 1, 7 (1st Cir. 2010) ("[T]he [state-court petition] relies exclusively upon the standard two-prong *Strickland* test, specifically citing that Supreme Court case five times. Instead of arguing for a presumption of prejudice, the [state-court petition] argues at length that Atty. Chambers' deficient assistance caused actual prejudice"); *Huntley v. McGrath*, 261 F. App'x 4, 6 (9th Cir. 2007) ("Huntley's briefs in state court were devoted exclusively to establishing actual ineffectiveness of counsel and affirmatively proving prejudice under *Strickland*") (citing *Galvan v. Alaska Dept. of Corr.*, 397 F.3d 1198, 1205 (9th Cir. 2005) ("[T]he inquiry is not mechanical, but requires examination of what the petitioner said and the context in which she said it.")). *See also Black v. Davis*, 902 F.3d 541, 546 (5th Cir. 2018) ("Black did not present to the district court, in any manner identifiable by that court, a claim that he was constructively denied counsel."). But those decisions are consistent with the Seventh Circuit's decision in *Reynolds*: They stand only for the proposition that a habeas petitioner cannot rely on different theories in the state court and the district court. They do not stand for the proposition that a *pro se* habeas petitioner such as Russell must specifically cite *Cronic* to satisfy § 2254(b)(1). It is enough that he alleges "facts that amount to a complete denial of counsel." *Reynolds*, 902 F.3d at 706.

d. Even the Fifth Circuit's own precedents do not support its decision.

The Fifth Circuit itself previously has required only that a habeas petitioner present "the substance of the federal habeas claim" to a state court. *Adekeye v. Davis*, 938 F.3d 678, 682 (5th Cir. 2019) (quoting *Soffar v. Dretke*, 368 F.3d 441, 465 (5th Cir. 2004)). *See also Ries v. Quarterman*, 522 F.3d 517, 523 (5th Cir. 2008) ("the habeas applicant need not spell out each syllable of the claim before the state court to satisfy the exhaustion requirement'") (quoting *Smith v. Dretke*, 422 F.3d 269, 275 (5th Cir. 2005)). Until now it has been enough that "the petitioner 'asserts the claim in terms so particular as to call to mind a specific right protected by the Constitution or alleges a pattern of facts that is well within the mainstream of constitutional litigation.'" *Johnson v. Cain*, 712 F.3d 227, 231 (5th Cir. 2013) (quoting *Kittelson v. Dretke*, 426 F.3d 306, 315 (5th Cir. 2005) (per curiam) (internal quotation marks omitted)). The requirement that a *pro se* habeas petitioner alleging Russell's facts also specifically cite *Cronic* is a clear departure from even the Fifth Circuit's own precedents.

e. Section 2254(b)(1) does not bar Russell's claim.

Russell fairly presented a claim for ineffective assistance of counsel, and the Mississippi Supreme Court understood the claim's federal nature, because in its review it cited federal law only. Pet. App. 77a.

Russell alleged the same "facts that amount to a complete denial of counsel," *Reynolds*, 902 F.3d at 706, in the state court and the district court. He did not cite either *Strickland* or *Cronic*, but he did not have to. He did not rely on different

theories in the state court and the district court. In both instances he asked the court to find, *i.e.*, presume, prejudice where no lawyer contacted him for 14 months after his arrest. Pet. App. 109a. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed'") (citations omitted).

Russell exhausted the remedies available in the state court before presenting the same claim to the district court. Section 2254(b)(1) does not bar his claim.

II. If an indigent criminal defendant has no communication with a lawyer for 14 months after arrest, prejudice is presumed.

The Fifth Circuit held the Mississippi Supreme Court reasonably rejected Russell's claim under *Strickland* because he did not prove actual prejudice.

It then held Russell's claim failed even under *Cronic* because, the court determined, Russell had counsel, even if only on paper, and so was not "effectively denied any meaningful assistance at all." *Id.* at 26a. The court acknowledged that "nothing in the record shows that Russell's public defenders discharged their 'duty to make reasonable investigations' in preparation for trial," *id.*, but concluded "neither the Supreme Court nor this court has ever held that the *entire* pretrial period is a critical stage." *Id.* at 27a.

In other words, because this Court has never held "the *entire* pretrial period is a critical stage," Russell was not entitled to even a basic consultation with a lawyer for more than a year post-arrest.

The law does not require that an indigent criminal defendant wait 14 months to talk to a lawyer about his case. The law presumes prejudice. The Fifth Circuit's decision conflicts with decisions of this Court, directly conflicts with a decision of the Sixth Circuit, and has no precedent even in the Fifth Circuit.

a. The Fifth Circuit's decision conflicts with decisions of this Court.

"The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Cronic*, 466 U.S. at 654–55 (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)). This Court's decisions mandate a presumption of prejudice in cases of actual or constructive denial of counsel during a critical stage of a criminal proceeding. *E.g.*, *Cronic*, 466 U.S. at 659; *Strickland*, 466 U.S. at 692; *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000) ("In *Cronic*, *Penson*, and *Robbins*, we held that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because 'the adversary process itself' has been rendered 'presumptively unreliable.'") (citing *Cronic*, 466 U.S. at 659; *Penson v. Ohio*, 488 U.S. 75, 88 (1988); *Smith v. Robbins*, 528 U.S. 259 (2000)); *Bell v. Cone*, 535 U.S. 685, 695 (2002) ("A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at 'a critical stage'") (quoting *Cronic*, 466 U.S. at 659).

A critical stage is one that holds "significant consequences for the accused." *Bell*, 535 U.S. at 695-696 ("'a critical stage' … [is] a phrase we used in *Hamilton v. Alabama*, 368 U.S. 52, 54 [] (1961), and *White v. Maryland*, 373 U.S. 59, 60[] (1963) (per curiam), to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused"); *see also id.* at n.3 (citing "other cases"

"where we found a Sixth Amendment error without requiring a showing of prejudice. Each involved criminal defendants who had actually or constructively been denied counsel by government action.").

Of course pretrial decisions hold significant consequences for the accused. This Court's cases speak clearly to critical decisions that must be made pretrial. The most basic, and timely, is what to investigate. In *Powell v. State of Alabama*, 287 U.S. 45 (1932), this Court called "consultation, thorough-going investigation and preparation" "the most critical period of the proceedings." 287 U.S. at 57. In *Strickland*, this Court underlined the importance, and relatedness, of consultation and investigation: "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." 466 U.S. at 691. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *id.*, and generally is afforded "wide latitude," *id.* at 689, but cannot proceed without consulting with the defendant first. *Id.* at 688 (counsel has "particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution").

Clearly, this Court's decisions establish that the right to counsel pretrial includes the right to consultation. Of course, to be meaningful, a consultation must

be timely,[8] but this Court need not decide what is timely to decide this case. Fourteen months after arrest is too long to wait for a consultation. No one can credibly argue the first 14 months of incarceration do not hold serious consequences for the accused.

The Fifth Circuit's decision nevertheless dispenses with pretrial counsel altogether, or at least for the first 14 months after arrest, on the technicality that this Court has never held "the *entire* pretrial period is a critical stage." Pet. App. 27a. If the Fifth Circuit's decision is correct, there is no duty of consultation pretrial at all, even though this Court's decisions plainly say that there is. The Fifth Circuit's decision is wrong. This Court does not have to hold "the *entire* pretrial period is a critical stage" for any fair-minded jurist to conclude from its precedents that a criminal defendant should not have to wait 14 months after arrest to talk to a lawyer.

b. The Fifth Circuit's decision directly conflicts with a decision of the Sixth Circuit.

The Fifth Circuit's decision directly conflicts with *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003), in which the Sixth Circuit held: "The pre-trial period constitutes a 'critical period' because it encompasses counsel's constitutionally imposed duty to investigate the case." *Mitchell*, 325 F.3d at 743.

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[8] Hence Mississippi Rules of Criminal Procedure provide the right to counsel includes "the right to consult in private with an attorney or the attorney's agent, *without unnecessary delay*, after a defendant is taken into custody." Miss. R. Crim. P. 7.1(a) (emphasis added).

This petition does not ask the Court to review the Fifth Circuit's rejection of Russell's speedy trial claim, but the interests at stake overlap. "[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker v. Wingo*, 407 U.S. 514, 532 (1972). "[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious." *Barker*, 407 U.S. at 533.

The habeas petitioner in *Mitchell* alleged that his appointed counsel never visited him in the seven months between his preliminary hearing and trial. *Id.* at 735. During that time, he requested new counsel in six different letters to the court. *Id.* He later learned that his appointed counsel had been suspended for the thirty days immediately preceding his trial. *Id.* The Michigan Supreme Court, with dissents, denied his right to counsel claim under *Strickland*, characterizing it as one of "inadequate preparation" for which he suffered no actual prejudice. *Id.* at 741.

The Sixth Circuit, concluding the state court unreasonably applied *Strickland* instead of *Cronic*, observed that "'critical stage[s]' at which counsel must be present are not limited to formal appearances before a judge." *Id.* at 743 (citing *Bell*, 535 U.S. 685; *Perry v. Leeke*, 488 U.S. 272 (1989) ("absolute right" to consultation before testifying); *Geders v. United States*, 425 U.S. 80 (1986) (right to consultation during overnight recess); *Powell*, 287 U.S. 45 (right to consultation and investigation pretrial)). The court next concluded, directly contrary to the Fifth Circuit, that because "the Supreme Court has repeatedly made clear that there is a duty incumbent on trial counsel to conduct pre-trial investigation, it necessarily follows that trial counsel cannot discharge this duty if he or she fails to consult with his or her client." *Id.* at 744 (citing *Strickland*, 466 U.S. at 691 ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary")).

c. Even the Fifth Circuit's own precedents do not support its decision.

The Fifth Circuit itself previously has acknowledged the essentialness of pretrial consultation and investigation. *See, e.g., Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) ("[W]hen alibi witnesses are involved, it is unreasonable for counsel not to try to contact the witnesses and 'ascertain whether their testimony would aid the defense.'") (citation omitted); *id.* ("[A]n attorney must engage in a reasonable amount of pretrial investigation and 'at a minimum, . . . interview potential witnesses and . . . make an independent investigation of the facts and circumstances in the case.'") (quoting *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985)); *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir. 1981) ("Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel.") (citation omitted).

Until now, the Fifth Circuit has never suggested that existence of counsel, even if only on paper, forecloses a presumption of prejudice. In *Childress v. Johnson*, 103 F.3d 1221 (5th Cir. 1997), the court determined that court-appointed counsel had functioned as "standby counsel rather than full-fledged defense counsel" at a habeas petitioner's arraignments such that a presumption of prejudice applied. *Childress*, 103 F.3d at 1231; *id.* at 1222 ("Childress does not contend that he was entirely without an attorney during his 1946 and 1948 plea hearings . . . . He claims instead that he received no meaningful assistance at all from his court-appointed lawyer, and thus was constructively denied his Sixth Amendment right to counsel."). In such circumstances, the court then wrote, "we are convinced that counsel, though surely

more sentient than a potted plant, was not the advocate for the defense whose assistance is contemplated by the Sixth Amendment." *Id.* at 1231.

Like *Childress*, this is not a case "where defense counsel investigated certain issues but not others; where counsel's trial preparation was 'somewhat casual'; where counsel failed to pursue a challenge based on racial bias in jury selection; and where counsel failed to object to a variation between the indictment and the jury charge." *Id.* at 1229. Russell did not complain "of counsel's errors, omissions, or strategic blunders in the context of an active adversarial representation." *Id.* He complained that he did not have counsel, and it is an unrebutted fact that for the first 14 months after his arrest, outside his preliminary hearing and his arraignment (eleven months apart and two different lawyers that he never saw again), Russell did not see a lawyer.

Unlike in *Childress*, in this case the Fifth Circuit conflated the existence of counsel with assistance of counsel (and even effective assistance of counsel). There is no support for such a departure from the court's own precedent.

d. The law does not require that an indigent criminal defendant wait 14 months to talk to a lawyer about his case.

To summarize, the right to counsel does not end with appointment. It is not limited to formal court appearances. It necessarily includes reasonably timely pretrial consultation and investigation.

But the Fifth Circuit's decision instead makes the right to counsel pretrial a right to counsel on paper only: It is enough that someone with a law license attended Russell's preliminary hearing and later his arraignment (again, eleven months apart

and two different lawyers who never saw Russell again). The Fifth Circuit's decision "convert[s] the appointment of counsel into a sham." *Cronic*, 466 U.S. at 654 (quoting *Avery*, 308 U.S. at 446).

Ultimately, whether the law presumes prejudice "turns on the magnitude of the deprivation of the right to effective assistance of counsel. That is because '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.'" *Flores-Ortega*, 528 U.S. at 482 (quoting *Cronic*, 466 U.S. at 658). This is an extreme case. The law does not require that an indigent criminal defendant wait 14 months to talk to a lawyer about his case.

The Fifth Circuit erred in holding the state court reasonably rejected Russell's ineffective assistance of counsel claim under *Strickland* because he could not prove prejudice. *Cronic*, not *Strickland*, applies. If a detained criminal defendant has no communication with a lawyer for 14 months after arrest, prejudice is presumed under *Cronic*. No fair-minded jurist can disagree.

CONCLUSION

This petition for a writ of certiorari should be granted and the Fifth Circuit's judgment reversed.

Respectfully submitted,

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