No. 23-5410

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

BRIEF IN OPPOSITION

LYNN FITCH
Attorney General

ERIN E. RUTHERFORD
Special Assistant
Attorney General
Counsel of Record
JERROLYN M. OWENS
Special Assistant
Attorney General
MISSISSIPPI ATTORNEY
GENERAL'S OFFICE
P.O. Box 220
Jackson, MS 39205-0220
erin.rutherford@ago.ms.gov
(601) 359-3680
Counsel for Respondent

QUESTION PRESENTED

Did the Fifth Circuit err in ruling that petitioner is not entitled to federal habeas relief on his complete-denial-of-counsel claim because (1) petitioner failed to exhaust that claim in state court and (2) the claim is meritless?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provision

Statutes

OPINIONS BELOW

The federal court of appeals' opinion (Petition Appendix (App.) 1a-29a) reversing the district court's grant of federal habeas relief is reported at 68 F.4th 252. The district court's opinion granting habeas relief (App.30a-75a) is reported at 528 F. Supp. 3d 482. The Mississippi Supreme Court's order denying post-conviction relief (App.76a-78a) is unreported. The Mississippi Supreme Court's order denying petitioner's request for discretionary review (App.79a) is reported at 80 So. 3d 111. The Mississippi Court of Appeals' order denying petitioner's motion for rehearing (App.80a) is unreported. The Mississippi Court of Appeals' opinion affirming petitioner's convictions and sentences (App.81a-105a) is reported at 79 So. 3d 529.

JURISDICTION

The court of appeals entered its judgment on May 18, 2023. The petition for a writ of certiorari was filed on August 15, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In 2009, a jury convicted petitioner Sedrick D. Russell of aggravated assault and possessing a firearm as a felon. The trial court sentenced him as a habitual offender to two concurrent life sentences. He challenged those convictions and sentences on direct review, state collateral review, and federal habeas review. After his state-court challenges failed, the district court granted him federal habeas relief. The Fifth Circuit reversed. His petition seeks review of that reversal.

1. In December 2006, Michael Porter went to his girlfriend Lawanda Hawkins' house. App.2a. Petitioner and others were also there. *Ibid*. Petitioner followed Porter

around the house that night, and Porter noticed a 9mm gun in petitioner's pocket. *Ibid*. When Porter went outside to get a bottle of gin from his car, "witnesses saw [petitioner] walk out of the house 'right behind' Porter." *Ibid*. As Porter reached into his car for the liquor, "he was shot twice from behind in the leg with a 9mm pistol." *Ibid*. Nobody saw the shooting. *Ibid*. Petitioner "denied that he shot Porter" and maintained that he left the scene before the shooting with "a friend known only as 'Ron Ron.'" *Ibid*.

2. Police arrested petitioner two days later. App.2a. The public defender's office represented petitioner at his initial appearance and a January 2007 preliminary hearing. App.2a-3a. Petitioner was held without bail and soon began filing pro se speedy-trial motions. *Ibid*. In August 2007, a grand jury indicted him for aggravated assault and possessing a firearm as a felon. App.3a. Petitioner's public defender filed two discovery motions, represented petitioner at his arraignment in November 2007, and engaged in plea negotiations. *Ibid*.

At the arraignment, the trial court set petitioner's trial for March 24, 2008. *Ibid*. Petitioner then filed a pro se speedy-trial motion. App.3a. The court denied that motion but "moved his trial date up to February 11, 2008." *Ibid*. Petitioner's trial did not occur in February. App.4a. Instead, around that time, the trial court allowed the public defender's office to withdraw due to a conflict of interest and appointed a private attorney (Don Boykin) to represent petitioner. *Ibid*. Boykin "promptly filed several motions on [petitioner's] behalf," notified the prosecution of an intent to assert an alibi defense, and sought a mental evaluation of petitioner "because of a letter [petitioner] allegedly sent to Porter" that said "some very strange things about

hearing voices." *Ibid*. The trial court ordered the requested evaluation and continued the trial. *Ibid.* In October, petitioner was deemed competent to stand trial. *Ibid.*

Petitioner's trial began in late January 2009. App.5a. Before trial, the court heard Boykin's motion to reconsider its denial of petitioner's pro se speedy-trial claim. *Ibid*. Petitioner testified that he was prejudiced during the 14 months that the public defender's office represented him because he "received no assistance from his lawyers in locating" his alleged alibi witness, "'Ron Ron.'" *Ibid*. The court denied that motion. *Ibid*. Porter, three police officers, and others testified for the prosecution at trial. *Ibid.* Petitioner testified in his defense and maintained that "'Ron Ron'" had "picked him up" from the scene of the shooting "before Porter was shot." *Ibid*.

The jury convicted petitioner on both charges. App.5a. Due to "four previous convictions," petitioner "was sentenced as a habitual offender to two life sentences without the possibility of parole." *Ibid*.

The Mississippi Court of Appeals affirmed petitioner's convictions and sentences on direct appeal. App.5a-6a, 81a-105a. The court rejected petitioner's speedy-trial claim after weighing the factors articulated in *Barker v. Wingo*, 407 U.S. 514 (1972). App.5a-6a, 89a-93a. The court reasoned that the length of pretrial delay was "presumptively prejudicial," that both sides contributed to the delay, and that petitioner "repeatedly asserted" his speedy-trial right. App.5a-6a; *see* App.90a-91a. But the court held that petitioner did not show prejudice from the delay, ruling that petitioner's claims of pretrial anxiety and a lost alibi witness "lack[ed] support." App.6a (alteration in original); *see* App.91a-93a. Weighing the factors, the court

upheld the trial court's denial of petitioner's speedy-trial motion. App.6a; *see* App.93a. The Mississippi Supreme Court denied discretionary review. App.6a, 79a.

On state post-conviction review, petitioner filed a pro se petition for relief that asserted speedy-trial and ineffective-assistance-of-counsel claims. App.6a; *see* App.108a-113a. His ineffective-assistance charges did not cite *Strickland v. Washington*, 466 U.S. 668 (1984), which holds that a defendant is denied his constitutional right to effective assistance of counsel when his counsel performs deficiently and that performance prejudices the defendant, or *United States v. Cronic*, 466 U.S. 648 (1984), which holds that a defendant is denied his constitutional right to effective assistance of counsel when he is denied counsel at a critical stage of a criminal proceeding. App.23a; *see* App.108a-111a. And the petition alleged the elements only of a *Strickland* claim—deficient performance and prejudice. Petitioner faulted the public defender's and Boykin's performances, "twice labeled his counsel's performance 'deficient,'" and "specifically and repeatedly alleged prejudice from the deficient performance." App.23a-24a; *see* App.6a, 109a-111a. The Mississippi Supreme Court rejected the speedy-trial claim on res judicata grounds and held that the ineffective-assistance claim "fail[ed] to meet both prongs of *Strickland*." App.77a; *see* App.6a.

3. Petitioner next filed a pro se federal habeas petition that reasserted his speedy-trial and ineffective-assistance claims. App.7a. A magistrate judge viewed his ineffective-assistance allegations as *Strickland*-based and recommended dismissing the petition. *Ibid.* After petitioner filed pro se objections, the district court appointed petitioner's current counsel to further prosecute his petition. *Ibid.* Counsel filed

amended objections, claiming (among other things) that the magistrate judge erred in ruling that petitioner "failed to prove prejudice under *Strickland*." *Ibid.*

The district court granted habeas relief on both claims. App.7a-8a; *see* 30a-75a. On the speedy-trial claim, the court's "primary basis" for concluding that "the *Barker* factors supported [petitioner's] speedy-trial claim" was its view that petitioner "had faced a systemic breakdown in the public defender system." App.7a; *see* App.49a-54a. That, in the court's view, caused "delay due to the appointment of [petitioner's] successive counsel" and "frustrated" petitioner's "ability to locate" his alleged "alibi witness" named "Ron Ron." App.8a; *see* App.56a-62a. The court thus ruled that the state court's denial of the speedy-trial claim was "objectively unreasonable." App.8a; *see* App.68a. But the court "limited" its ruling to petitioner's "aggravated-assault conviction" because the lack of "Ron Ron's testimony" would not have prejudiced petitioner's defense on the "felon in possession charge." App.8a; *see* App.64a.

On the ineffective-assistance claim, the district court read petitioner's "habeas complaint" as asserting a *Cronic* claim, not a *Strickland* claim. App.8a; *see* App.68a-75a. Under that view of the claim, the court ruled that petitioner "faced a complete denial of counsel under *Cronic* while he was represented by the public defenders." App.8a; *see* App.72a-75a. That showed (the district court ruled) that the state supreme court's "application" of *Strickland* to petitioner's ineffective-assistance claim was an "erroneous and unreasonable application" of "*Cronic*." App.8a; *see* App.75a. Reasoning that "*Cronic*'s presumption of prejudice" applies to both of petitioner's claims, the district court granted petitioner full habeas relief. App.8a; *see* App.75a.

3. The court of appeals unanimously reversed the district court's grant of habeas relief and rendered judgment for respondent. App.1a-29a.

a. The court of appeals first rejected petitioner's speedy-trial claim. App.10a-21a. The court of appeals began by emphasizing that the district court erroneously applied "de novo review" rather than the deferential view that applies to federal habeas claims under AEDPA. App.10a-11a. The court of appeals ruled that the Mississippi Court of Appeals reasonably applied the four "*Barker* factors" to deny petitioner's speedy-trial claim. App.11a-21. Of note here, the court explained that reasonable jurists could reject petitioner's claim of prejudice from an alleged "lost alibi witness" because that claim "'lack[ed] support' in the record." App.20a (quotation marks and alteration in original). Petitioner's "account of an alibi witness" named "Ron Ron" was "vague and unspecific, as [petitioner] did not even know his last name." *Ibid.* The court of appeals thus concluded, "as the state court did," that "reasonable jurists could reject [petitioner's] unsupported, vague, and changing story about '"Ron Ron."' *Ibid.* After all, the "only evidence" of Ron Ron's "existence" came from petitioner's "own testimony," and he gave "varying explanations over time for how he lost track of 'Ron Ron.'" *Ibid.* In any event, petitioner "testified extensively during his trial about 'Ron Ron,'" so "the jury had an opportunity to consider" the alibi and "rejected it," apparently due to the "more persuasive" "testimony of multiple witnesses who observed [petitioner] immediately before [the victim] was shot." *Ibid.* That showed that "reasonable jurists" could determine that "Ron Ron's" testimony "would not have changed the jury's verdict." App.20a-21a.

b. The court of appeals next rejected the district court's *Cronic* ruling for two independent reasons: lack of exhaustion and lack of merit. App.21a-28a.

First, the panel ruled that the district court erred by granting petitioner habeas relief on a *Cronic* claim that he never exhausted in state court. App.21a-24a.

To start, the panel explained the differences between a *Strickland* claim and a *Cronic* claim. App.21a-22a. Ineffective-assistance-of-counsel claims are "ordinarily evaluated" under *Strickland*'s "two-part test," which requires proving that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." App.21a; *see Strickland v. Washington*, 466 U.S. 668, 687 (1984). Ineffective-assistance claims based on *Cronic* fall within "a very limited exception to the application of *Strickland*'s two-part test." App.22a. That "exception" applies only when "the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was in effect denied any meaningful assistance at all." *Ibid.*; *see United States v. Cronic*, 466 U.S. 648, 659 (1984). Importantly, "[t]o sustain a *Cronic* claim, such denial of counsel must occur at a critical stage of a defendant's proceedings." App.22a; *see* 466 U.S. at 659. And "[v]ery different results flow from whether [a] defendant raises a *Strickland* or *Cronic* claim." App.22a. A *Strickland* claim requires the defendant to "prove prejudice," and "setting aside a conviction under *Strickland*" is decided "on a case-by-case basis." *Ibid.* But on a *Cronic* claim "prejudice is presumed," and a successful claim "requires that the conviction be overturned." *Ibid* (cleaned up).

Next, the panel addressed the "dispute[d]" issue of whether petitioner "pled his ineffective-assistance claim in the state courts under *Strickland* or *Cronic*." App.22a.

The "reviewing courts" had "disagreed" on that point: the state supreme court analyzed the claim under *Strickland* but the district court "discerned a *Cronic* claim." *Ibid.*; *see* App.68a-75a. That distinction "matter[ed]," as the court of appeals observed, "because AEDPA requires exhaustion": A "state prisoner who does not fairly present a claim to a state habeas court—specifying both the legal and factual basis for the claim—may not raise that claim in a subsequent federal proceeding." App.22a. AEDPA's fair-presentment rule "require[s] a state prisoner to present the state courts with the *same claim* he urges upon the federal courts." App.23 (alteration and emphasis in original). Thus, under that fair-presentment rule, the panel "look[ed] to" the "substance" of petitioner's "state habeas petition to ascertain whether he assert[ed] that he received incompetent counsel" (a *Strickland* claim) or no counsel "at all" (a *Cronic* claim). *Ibid.* (alteration in original). If petitioner "did not assert a *Cronic* claim in state court" the district court could not grant him "habeas relief based on *Cronic*." *Ibid.*

Applying the fair-presentment rule, the panel concluded that petitioner's state-court pleading asserted a *Strickland* claim. App.23a-24a. The panel initially noted that petitioner's state-court pleading "mentions neither *Strickland* nor *Cronic*" but chiefly complained that he was "in custody" for "approximately (14) months after his arrest" "without being contacted by an attorney." App.23a. That "could be read," the panel explained, to "alleg[e] poor lawyer-client communication (under *Strickland*) or a complete denial of counsel (under *Cronic*)." App.23a. But the petition "twice labeled his counsel's performance 'deficient'"; "challenged" both "his public defenders' performance" and his later appointed counsel's performance; and "specifically" and

"repeatedly" alleged "prejudice from the deficient performance." App.23a-24a; *see* App.108a-111a. Thus, under the fair-presentment rule, the panel "read" petitioner's "state petition as alleging a *Strickland* claim," as the state supreme court had done. App.24a.

Petitioner's federal-court filings bolstered the conclusion that he pursued only a *Strickland* claim. The panel noted that petitioner alleged the "same" *Strickland* claim that he made in state court by charging his public defenders with "deficient" performance and complaining of "prejudice" due to that performance. App.24a. And his "amended objections" (filed by his appointed counsel) to a magistrate judge's recommendation to dismiss his petition treated his claim "as arising under *Strickland*." *Ibid.*

Because petitioner asserted only a *Strickland* claim—and never presented a *Cronic* claim—in state court, the panel ruled that he never exhausted a *Cronic* claim. *Ibid*. The district court was therefore not allowed to consider that claim. *Ibid.* So the panel held that the district court erred in granting habeas relief on that basis. *Ibid.*

Second, and independently, the panel ruled that petitioner's *Cronic* claim failed on the merits even if he had exhausted it in state court. App.25a-28a.

In evaluating that claim, the court of appeals assessed whether petitioner was "effectively denied counsel" and whether that "denial occurred at a critical stage of the proceedings." App.25a-26a. The court ruled that petitioner was not effectively "denied any meaningful assistance at all." App.26a. His initial lawyers appeared "at his preliminary hearing and arraignment," "filed discovery motions on his behalf," and "engaged in apparent plea bargaining." *Ibid.* Those "efforts" may have been

"perfunctory" and raised attorney-performance concerns. *Ibid.* But his lawyers' actions, "even if inadequate or ineffectual," did not "amount to [a] complete denial of counsel" under *Cronic*. *Ibid.* And even if petitioner were "effectively denied counsel," he failed to prove that occurred at a "critical stage" of the proceedings. *Ibid.* The court of appeals rejected the district court's view that "broadly" construed "the period between the appointment of counsel and the start of trial" as a "critical stage." *Ibid.* The court of appeals explained that "[n]either the Supreme Court nor [the Fifth Circuit] has ever held that the *entire* pretrial period is a critical stage." App.26a-27a (emphasis in original). Instead, this Court's precedents have designated "specific" pretrial events as "critical stages." App.27a. The district court's contrary conclusion that the "whole pretrial period" was a "critical stage" was thus "overreach." *Ibid.*

c. Last, the panel determined that petitioner's ineffective-assistance claim "quickly collapse[d]" when treated "as arising under *Strickland*." App.28a. The state court had rejected petitioner's claim, holding that he "fail[ed] to meet both prongs under *Strickland*." *Ibid.* Under "doubly deferential" AEDPA review, the panel recognized that a failure on either the deficient-performance or prejudice prong doomed the claim. App.28a-29a. At minimum, petitioner had failed to establish prejudice—his prejudice arguments relied on the same lost-alibi-witness argument that failed on his speedy-trial claim. App.29a.

REASONS FOR DENYING THE PETITION

Petitioner seeks review of two questions: (1) whether "a pro se petitioner alleging complete denial of counsel specifically [must] cite *Cronic* to exhaust his claim in the state court," and (2) whether prejudice is presumed "[i]f a detained criminal

defendant has no communication with a lawyer for 14 months after arrest." Pet. ii. This case does not present either question or raise any conflict with this Court's precedents or with the precedents of other circuits. The petition should be denied.

1. The court of appeals correctly ruled that petitioner failed to exhaust his *Cronic* claim. App.21a-24a. Further review of that ruling is not warranted.

a. The court of appeals was correct to rule that petitioner failed to exhaust a *Cronic* claim. *Contra* Pet. 12-15, 16-17.

Under AEDPA, a state prisoner's federal habeas petition "shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A); App.22a. A habeas petitioner must "fairly present[ ]" his "federal claim" in state court before seeking federal habeas relief. *Picard v. Connor*, 404 U.S. 270, 275 (1971). That fair-presentment rule requires a petitioner to "present the state courts with the *same claim* he urges upon the federal courts." App.23a (citing *Lucio v. Lumpkin*, 987 F.3d 451, 464 (5th Cir. 2021) (en banc) (quoting *Picard*, 404 U.S. at 276)) (emphasis in original). The petitioner does not have to "cit[e] book and verse on the federal constitution." *Picard*, 404 U.S. at 278. But he cannot point to the "mere similarity" of claims raised in his state and federal petitions. *Duncan v. Henry*, 513 U.S. 364, 366 (1995). And "[i]t is not enough" to present merely "the facts necessary to support [a] federal claim" in state court. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Rather, a claim made in state court must "reference" a "specific federal constitutional guarantee" and state "the facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). In determining whether a petitioner satisfied the fair-presentment rule, courts look to

the "substance" of the petitioner's state-court pleadings. App.23a (citing *Black v. Davis*, 902 F.3d 541, 546 (5th Cir. 2018)); *accord Picard*, 404 U.S. at 278.

The court of appeals soundly applied the fair-presentment rule in this case to conclude that petitioner failed to exhaust a *Cronic* claim. To start, the panel recognized the key differences between *Strickland* and *Cronic* claims: *Strickland* requires showing "deficient performance" and "prejudice[ ]" (App.21a); *Cronic* requires showing that counsel "in effect" provided no "meaningful assistance at all" at a "critical stage" of the proceedings (App.22a). The panel then analyzed the "substance" of petitioner's state petition to determine whether he asserted "that he received incompetent counsel" (*Strickland*) or no counsel "at all" (*Cronic*). App.23a. The panel observed that the state petition was "not completely clear," that it "mention[ed] neither *Strickland* nor *Cronic*," and that its "chief complaint" could be viewed as either claim. App.23a; *see* Pet. 12. But the petition alleged "deficient" performance (by both petitioner's public defenders and later-appointed counsel) and "specifically" and "repeatedly" alleged "prejudice from the deficient performance." App.23a-24a. Those are the hallmarks of a *Strickland* claim—not a *Cronic* claim, which turns on complete lack of counsel at a "critical stage" and requires no proof of prejudice. The panel thus soundly concluded that petitioner made and exhausted only a *Strickland* claim. *See Picard*, 404 U.S. at 277; App.68a-75a.

b. Petitioner argues that this Court should grant certiorari to decide whether "a pro se petitioner alleging complete denial of counsel specifically [must] cite *Cronic* to exhaust his claim in the state court." Pet. ii; *see* Pet. 12-17. This case does not present that question. The court of appeals did not hold that petitioner had to cite

Cronic to exhaust his *Cronic* claim. App.21a-24a. Nor did that court adopt a rule that a "pro se habeas petitioner" who alleges the "facts" asserted here must "specifically cite[ ] *Cronic*" to "fairly present his claims to a state court." Pet. 12. Petitioner did not allege the facts to support or present a *Cronic* claim. So this case is not a vehicle for addressing the first question identified in the petition.

c. Petitioner's arguments for further review lack merit. Pet. 13-17.

First, petitioner contends that the court of appeals' decision conflicts with this Court's precedents. Pet. 13-14. Petitioner acknowledges that this Court applies a "fair presentment" exhaustion requirement. Pet. 13; *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-49 (1999). As explained, the court of appeals invoked and soundly applied that fair-presentment rule. App.22a-24a. Petitioner claims that "[n]o 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." Pet. 14; *see* Pet. 12. But as explained, the court of appeals imposed no such requirement—which is why petitioner can quote nothing from that court's opinion imposing such a rule. That court's decision turned on a case-specific determination that petitioner made a *Strickland* claim but not a *Cronic* claim. App.23a-24a. Indeed, if the court of appeals had ruled that petitioner had to "cite a specific case" to exhaust a claim then it would have ruled that petitioner failed to exhaust even a *Strickland* claim: petitioner's state post-conviction petition, after all, "mentions neither *Strickland* or *Cronic*." App.23a.

Second, petitioner contends that the court of appeals' decision conflicts with the Seventh Circuit's decision in *Reynolds v. Hepp*, 902 F.3d 699 (7th Cir. 2018).

Pet. 14. That is not so. In *Reynolds*, the Seventh Circuit ruled that a habeas petitioner did not "fairly present[ ]" a *Cronic* claim where he (1) "did not rely on cases addressing the complete denial of counsel," (2) "framed the violation as conflict of interest" under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and (3) "did not allege that he lacked an attorney." 902 F.3d at 706. The Seventh Circuit thus applied the fair-presentment rule to conclude, on the facts before it, that the habeas petitioner failed to exhaust a *Cronic* claim. The court of appeals did the same thing here. It applied the fair-presentment rule to assess the *substance* of petitioner's claim. App.23a-24a. Petitioner did not cite cases addressing the complete denial of counsel (he cited no cases). App.23a, 108a-111a. His state-court pleading did not frame the alleged "violation" as a complete denial of counsel or claim presumptive prejudice—the markers of a *Cronic* claim. Instead, he insisted that his attorneys' performance was "deficient" and "prejudiced" him—a *Strickland claim*. App.109a-111a. He also did not claim that he lacked an attorney; he alleged that his attorney failed to communicate with him. App.109a-111a. The court of appeals' application of the fair-presentment rule squares with the Seventh Circuit's decision in *Reynolds*. App.23a-24a.

Petitioner also contends (Pet. 14) that the decision below conflicts with the Seventh Circuit's statement that "[t]he 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." 902 F.3d at 706. But again, the court of appeals here never held that a petitioner must cite any case by name. It held that petitioner exhausted his *Strickland* claim, App.24a—even though petitioner "mention[ed] neither *Strickland* nor *Cronic*" in his state post-conviction petition, App.23a.

Petitioner further contends (Pet. 14) that the Seventh Circuit rejects the Fifth Circuit's view that "*Strickland* and *Cronic* claims are distinct for exhaustion purposes." App.23a. But in *Reynolds* the Seventh Circuit emphasized that *Cronic* claims are distinct from other ineffective-assistance claims. *See* 902 F.3d at 704-05. As the Seventh Circuit explained, "the argument that [petitioner] was denied counsel altogether is a different legal theory governed by a different legal rule" than the argument (which the petitioner there did make) that the State "denied him the 'effective assistance of counsel' by creating 'an actual conflict of interest' between him and his counsel." *Id.* at 705. And although the Seventh Circuit suggested that "a petitioner could exhaust a denial of counsel claim by describing facts that amount to a complete denial of counsel and citing *Strickland*," *id.* at 706, it recognized that a petitioner must say enough to "fairly present" a complete-denial-of-counsel claim, *id.* at 705—something that the petitioner in *Reynolds* (*see id.* at 705-06) and petitioner here (App.23a-24a) both failed to do.

Third, petitioner contends that "[n]o other circuit court" has required that "a *pro se* habeas petitioner" who asserts petitioner's "facts" must also "specifically cite *Cronic* to satisfy" section 2254(b)(1)'s exhaustion requirement. Pet. 15. But petitioner does not show any other case on similar "facts." And again, the court of appeals here did not rest its holding on petitioner's failure to cite *Cronic*. It rested its holding on a careful assessment of the substance of petitioner's state-court briefing, which showed that petitioner exhausted a *Strickland* claim only. App.23a-24a. The cases that petitioner cites (Pet. 15) show at most that sometimes the exhaustion question is even easier than it is here. *See Black v. Davis*, 902 F.3d 541, 546 (5th Cir. 2018)

(petitioner's filings "[we]re replete with allegations that his trial counsel was incompetent, unreasonable, and rendered deficient performance" and "[e]ven liberally construed" did not "contend he was constructively denied counsel" to support a *Cronic* claim) (quotation marks omitted); *Fusi v. O'Brien*, 621 F.3d 1, 7 (1st Cir. 2010) (state-court petition that "relie[d] exclusively upon the standard two-prong S*trickland* test," cited *Strickland* five times, and never "argue[d] or even impl[ied]" that petitioner was "entitled to a presumption of prejudice" exhausted a *Strickland* claim); *Huntley v. McGrath*, 261 F. App'x 4, 6 (9th Cir. 2007) (state-court briefs that were "devoted exclusively to establishing actual ineffectiveness of counsel and affirmatively proving prejudice under *Strickland*" and made "a passing reference to having received absolutely no assistance of counsel" at a hearing failed to exhaust a *Cronic* claim); *Galvan v. Alaska Dept. of Corrections*, 397 F.3d 1198, 1205 (9th Cir. 2005) (petitioner failed to exhaust a Sixth Amendment-based ineffective-assistance claim where she only asserted a state-law violation in state court). Nothing about these cases undercuts or conflicts with the Fifth Circuit's ruling here.

Last, petitioner argues that until the decision below, the Fifth Circuit had required a habeas petitioner to present only "the substance" of a claim in state court. Pet. 16. But that is all the panel required here. Again, the panel's exhaustion assessment relied on the substance of petitioner's state-court petition. App.23a-24a. That substance revealed a *Strickland* claim by repeatedly claiming deficient performance and prejudice. App. 23a-24a; *accord* App.109a-111a; *supra* 11-12.

In short: In ruling on exhaustion, the court of appeals invoked and soundly applied the correct rule of law. Petitioner has shown no error or conflict of decision,

seeks review of a question that this case does not raise, and at best seeks factbound error correction rather than review of an important and recurring legal question. This Court should deny review on the exhaustion question.

2. The court of appeals rejected petitioner's *Cronic* claim on the alternative ground that the claim lacked merit. App.25a-28a. Further review of that ruling is not warranted.

a. The panel correctly ruled that petitioner's *Cronic* claim is meritless. *Contra* Pet. 18-20.

To prevail on a *Cronic* claim, a petitioner must establish an effective "deni[al]" of "counsel" at a "critical stage" of the proceedings. 466 U.S. at 659. A "critical stage" "denote[s] a step of a criminal proceeding" that holds "significant consequences for the accused." *Bell v. Cone*, 535 U.S. 685, 696 (2002).

Petitioner failed to satisfy either *Cronic* element. He was not effectively denied counsel at any time before trial. *Cronic*, 466 U.S. at 659. He had counsel at every point during the pretrial process. His initial public defenders "made appearances at his preliminary hearing and arraignment," "filed discovery motions on his behalf," and "engaged in apparent plea bargaining." App.26a. Although those "efforts appear[ed] purfunctory" and his defenders may have deficiently failed to "make reasonable investigations in preparation for trial," *ibid.*, that does not amount to a "total[ ]" absence of counsel or an "entire[ ] failure to subject the prosecution's case to meaningful adversarial testing" under *Cronic*. 466 U.S. at 659 & n.25. And petitioner was never denied counsel at any "critical stage" of his criminal proceedings. "Critical stages" include discrete pretrial events: "arraignments," "postindictment

interrogations," "postindictment lineups," "the entry of a guilty plea," and "plea-bargain" negotiation. *Missouri v. Frye*, 566 U.S. 134, 140-41 (2012). Petitioner has never identified any recognized "critical stage" where he was denied counsel before or during his trial. In short, as the court of appeals concluded, petitioner failed to establish "either predicate" of a *Cronic* claim. App.28a; *see* App.25a-28a.

b. Petitioner argues that this Court should review the court of appeals' merits rejection of his *Cronic* claim. Pet. 17-24. None of his arguments withstands scrutiny.

First, petitioner contends that the court of appeals' decision conflicts with this Court's precedents. Pet. 18-20. As explained above, however, the court of appeals soundly applied this Court's precedents to reject petitioner's *Cronic* claim. Petitioner does not identify any decision of this Court that conflicts with the panel's factbound application of those precedents. Petitioner instead contends that this Court's precedents recognize "critical decisions" that counsel must make "pretrial," including decisions on "consultation," "investigation," and "preparation." Pet. 19. But those "critical" pretrial decisions present issues that are evaluated under *Strickland*. *See Cronic*, 466 U.S. at 657 n.20; *Strickland*, 466 U.S. at 692-96. And the panel did just that—it analyzed and rejected petitioner's failure-to-communicate-and-resulting-lost-alibi-witness claim under *Strickland*'s deficiency-and-prejudice test. App.28a-29a.

Second, petitioner contends that the decision below conflicts with the Sixth Circuit's decision in *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003). Pet. 20-21. That is not so. *Mitchell* held that *Cronic* "govern[ed]" petitioner's ineffective-assistance claim where counsel "utterly failed" to provide any assistance before trial. *Id.* at 744.

Counsel had "met" with his client for only "six minutes over the seven-month period before trial," never "visited him once in prison," and was "suspended from practicing law for the month preceding trial." *Id.* at 735, 742, 744. And the petitioner repeatedly requested new counsel, which the trial court denied. *Id.* at 735. So the Sixth Circuit ruled that the petitioner was "denied the presence of counsel during the critical pre-trial stage" and awarded habeas relief under *Cronic*. *Id.* at 742; *see id.* at 741-44.

The facts are materially different in this case, which is why the court of appeals reached a different result. Petitioner was not even arguably deprived of effective assistance for the "entire" period of time preceding his trial. Early in that period petitioner's public defenders performed a few pretrial tasks and "nothing" shows they investigated his case. App.26a. But the trial court here (unlike in *Mitchell*) replaced petitioner's initial counsel well before trial. App.4a. That gave petitioner constitutionally effective representation—and he suffered no prejudice from his public defenders' prior performance. App.18a-21a, 28a-29a. Those circumstances separate petitioner's case from *Mitchell* and *Cronic*'s effective-denial-of-counsel rubric. *Mitchell* also made sweeping statements on "critical" stages when assessing the "critical pre-trial period" involved there. *See* 325 F.3d at 737, 742. But those statements were tied to *Mitchell*'s circumstances. The petitioner there was constructively denied counsel for the entire seven-month period from initial appointment through trial. *See id.* at 742-43. But petitioner here was appointed new counsel who provided him constitutionally effective representation at trial and in the many months leading up to it. App.4a-5a. *Mitchell* recognized that those circumstances would have made all the difference in that case. *See* 325 F.3d at 744

(distinguishing the *Mitchell* petitioner's circumstances from *Morris v. Slappy*, 461 U.S. 1 (1983), which rejected an ineffective-assistance claim involving "replacement counsel"). This case presented different circumstances. There is no conflict of decision.

Third, petitioner contends that the decision below departs from prior Fifth Circuit precedent. Pet. 22-23. But any intra-circuit conflict does not warrant this Court's review. And there is no such conflict.

The decision below does not conflict with Fifth Circuit decisions on "the essentialness of pretrial consultation and investigation." Pet. 22 (citing *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994); *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985); and *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir. 1981)). Those cases show that the public defenders in this case may have performed deficiently by failing to investigate or interview witnesses. But they do not show that any such failures amount to effective denial of counsel under *Cronic*. *Bryant* and *Nealy* analyzed those issues for deficient performance under *Strickland*. *Bryant*, 28 F.3d at 1414-15; *Nealy*, 764 F.2d at 1177. And *Washington* does not hold that an alleged pretrial failure to investigate makes for a *Cronic* claim. That pre-*Strickland*/*Cronic* case rejected a petitioner's deficient-investigation claims, explaining that the "duty to investigate" is "far from limitless" such that "not every breach thereof" means that "counsel has failed to render reasonably effective assistance." 655 F.2d at 1356.

The court of appeals' decision also comports with *Childress v. Johnson*, 103 F.3d 1221 (5th Cir. 1997). *Contra* Pet. 22-23. In *Childress*, the claimant had "stand by" counsel at his plea hearing who was "appointed" to "waiv[e] the defendant's right to a jury trial." 103 F.3d at 1223, 1226. The counsel appointed to that limited role

provided no meaningful assistance whatsoever (effective denial of counsel) at the plea hearing (a critical stage). *Id.* at 1230-32. That established a *Cronic* violation. *Id* at 1232. That does not help petitioner here. Petitioner's public defenders represented him at his preliminary hearing and initial appearance, filed discovery motions, and engaged in plea negotiations. App.26a. He was never denied counsel at a critical stage, as a *Cronic* claim requires. And his public defenders' alleged shortcomings might have been deficient performance under *Strickland*—but that did not prejudice him at trial and he has not sought review of that ruling. *See* App.18a-21a, 28a-29a.

Last, petitioner contends that the decision below "convert[s] the appointment of counsel into a sham" and that "the law does not require that an indigent criminal defendant wait 14 months to talk to a lawyer about his case." Pet. 24; *see* Pet. 23-24. The Fifth Circuit's decision does no such things. Petitioner was not forced to trial without constitutionally effective counsel: he had competent counsel at trial. App.4a-5a. Again, as the court of appeals held, petitioner failed to prove that "deficient performance" by his initial counsel prejudiced his trial under *Strickland*. App.28a; *see* App.18a-21a, 28a-29a. He has not sought review of that ruling. And the panel did not hold that lawyers may permissibly delay in communicating with criminal defendants for months on end. *Contra* Pet. 24. The court of appeals held that, in the circumstances here, petitioner failed to surmount the high bar for a *Cronic* claim. Its decision honored *Cronic* and *Strickland*—and does not warrant further review.

c. Finally: This Court's consideration of petitioner's second question presented—whether prejudice is presumed "[i]f a detained criminal defendant has no communication with a lawyer for 14 months after arrest"—makes a difference only

in this case if petitioner prevails on the first question presented—the exhaustion argument. Pet. ii. Because review is not warranted on the first question, that alone is plenty of reason to deny review on the second question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LYNN FITCH
Attorney General

ERIN E. RUTHERFORD
Special Assistant
Attorney General
Counsel of Record
JERROLYN M. OWENS
Special Assistant
Attorney General
MISSISSIPPI ATTORNEY
GENERAL'S OFFICE
P.O. Box 220
Jackson, MS 39205-0220
erin.rutherford@ago.ms.gov
(601) 359-3680
Counsel for Respondent

November 17, 2023