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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner Sedrick D. Russell respectfully submits the following reply to Respondent the State of Mississippi's brief in opposition to his petition for a writ of certiorari:

REPLY

The State defends the Fifth Circuit's decision but does not offer any new authority or argument for this Court's consideration. Russell's petition already accounts for much of the State's brief. Only a few observations are warranted here:

1. The fact remains that Russell had no communication with a lawyer for the first 14 months after his arrest. The State represents that Russell's "public defender filed two discovery motions, represented petitioner at his arraignment in November 2007, and engaged in plea negotiations." *See* the State's brief ("Opp. Br.") at 2. Russell was in the same room with a lawyer during his preliminary hearing and his arraignment (eleven months apart and two different lawyers that he never saw again), but there is no evidence any lawyer talked to him about his case, and the State does not contend that any did. The two discovery motions were boilerplate,[1] and apparently automatic. There is no evidence at all of any plea negotiations during this time. There is a plea offer in the court's record, but it is dated February 14, 2008.[2]

2. The question then also remains: If a detained criminal defendant has no communication with a lawyer for 14 months after arrest, is prejudice presumed? The State's answer, incredibly, is no: It is enough, according to the State, that Russell had

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

[2] ROA at 417.

a lawyer on paper. ("He was not effectively denied counsel at any time before trial. He had counsel at every point during the pretrial process." *See* Opp. Br. at 17.)

3. The State contends that because the trial judge (who resorted to serving an order on Russell himself at the jail, *see* Pet. App. at 36a) ultimately appointed counsel before trial, Russell "suffered no prejudice from his public defenders' prior performance." Opp. Br. at 19. Setting aside whether Russell can prove actual prejudice (something that is not at issue here), the State's position is outrageous: If the State is right, a criminal defendant could sit in jail for years without talking to a lawyer, so long as he talks to one someday.

4. The State asks the Court to ignore the gross offense to the Sixth Amendment in this case because, according to the State, it "makes a difference" only if Russell exhausted his claim in the state court, which the State says he did not. The State adopts, but does not improve on, the Fifth Circuit's reasoning: Even though Russell's petition plainly could be read as alleging a complete denial of counsel under *Cronic,* because it "was not completely clear" (*i.e.*, because it did not specifically cite *Cronic*), it must be read as alleging only a claim under *Strickland* (even though it did not specifically cite *Strickland* either). *See* at Opp. Br. at 12; Pet. App. at 23a-24a.

5. It is simply not true that Russell "did not allege the facts to support or present a *Cronic* claim." Opp. Br. at 13. He wrote that he "was never contacted by the original court appointed attorney"; that "a court appointed attorney failed to contact the defendant"; and that he was "held in custody without bond … without being contacted by an[y] attorney until approximately (14) months after his arrest."

See Pet. App. at 108a-109a. The Fifth Circuit conceded that Russell's "chief complaint" could be read as a *Cronic* claim. *See* Pet. App. at 23a-24a.

6. The State contends the Fifth Circuit "did not hold that [Russell] had to cite *Cronic* to exhaust his *Cronic* claim." *See* Opp. Br. at 12-13. But what else could Russell have done? The only thing apparently missing from Russell's petition was the word "Cronic." The Fifth Circuit's decision expects a *pro se* habeas petitioner to distinguish between *Strickland* and *Cronic* and clearly choose only one.

7. *Strickland* and *Cronic* are distinct, but they are not inconsistent, and in a case such as this they are compatible. Thus, the Seventh Circuit easily observed that even a petitioner who cites *Strickland* nevertheless may exhaust a claim under *Cronic*, so long as he alleges "facts that amount to a complete denial of counsel." *Reynolds v. Hepp*, 902 F.3d 699, 706 (7th Cir. 2018). Even if Russell had cited *Strickland*, he still would have exhausted a claim under *Cronic* because he alleged facts that amount to a complete denial of counsel.

8. Russell told the state court he waited 14 months to talk to a lawyer about his case. Russell fairly presented his claim. The law does not require that an indigent criminal defendant wait 14 months to talk to a lawyer about his case. 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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