NO. 24-6676

IN THE SUPREME COURT OF THE UNITED STATES

LOUIS ANGEL MERCADO,
***Petitioner*,**

v.

RICKY D. DIXON, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,
***Respondents*.**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") permits relief via an "application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court" on a "claim that was adjudicated on the merits in State court proceedings" that "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." 28 U.S.C. § 2254(d)(1). The following question is before this Court:

> **Whether the Supreme Court has applied the presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), to the factual circumstance of defense counsel failing to file an answer brief to the State's appeal?**

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CITATIONS iii

CITATION TO OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS/FEDERAL STATUTES INVOLVED 1

PROCEDURAL HISTORY AND STATEMENT OF CASE AND FACTS 1

REASONS FOR DENYING THE WRIT 6

I. CERTIORARI REVIEW SHOULD BE DENIED BECAUSE NO CLEARLY ESTABLISHED LAW HAS APPLIED THE PRESUMPTION OF PREJUDICE UNDER *CRONIC* TO THE FAILURE OF DEFENSE COUNSEL TO FILE AN ANSWER BRIEF IN A STATE'S APPEAL 6

II. CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THIS CASE IS A POOR VEHICLE TO APPLY *CRONIC* TO THE ABSENCE OF AN ANSWER BRIEF IN A STATE'S APPEAL. 9

CONCLUSION 12

TABLE OF CITATIONS

Cases:

Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1979) 10

Brown v. Davenport, 596 U.S. 118 (2022) 6, 8, 9

Cuyler v. Sullivan, 446 U.S. 335 (1980) 7

Evitts v. Lucey, 469 U.S. 387 (1985) 7

Florida v. Nixon, 543 U.S. 175 (2004) 7

Garza v. Idaho, 586 U.S. 232 (2019) 8

Glebe v. Frost, 574 U.S. 21 (2014) 8

Harrington v. Richter, 562 U.S. 86 (2011) 10

Lockyer v. Andrade, 538 U.S. 63 (2003) 9

Lopez v. Smith, 574 U.S. 1 (2014) 9

Mercado v. Sec'y, Fla. Dep't of Corr., 119 F.4th 1261 (11th Cir. 2024) 1

Oregon v. Kennedy, 456 U.S. 667 (1982) 10

Penson v. Ohio, 488 U.S. 75 (1988) 8

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 8

Shinn v. Kayer, 592 U.S. 111 (2020) 9, 10

State v. Bertelsen, 741 So. 2d 580 (Fla. 4th Dist. Ct. App. 1999) 11

State v. McCormick, 868 So. 2d 512 (Fla. 2004) 11

State v. Mercado, 121 So. 3d 604 (Fla. 5th Dist. Ct. App. 2013) 3, 11

State v. Williams, 322 So. 3d 1148 (Fla. 5th Dist. Ct. App. 2021) 11

Strickland v. Washington, 466 U.S. 668 (1984) 7

United States ex rel. Thomas v. O'Leary, 856 F.2d 1011 (7th Cir. 1988) 8

United States v. Cronic, 466 U.S. 648 (1984) ..... i, 6, 7

Virginia v. LeBlanc, 582 U.S. 91 (2017) 10

White v. Woodall, 572 U.S. 415 (2014) 9

Williams v. Taylor, 529 U.S. 362 (2000) 6

Constitutional Provisions and Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 1

28 U.S.C. § 2254(d)(1) ..... i, 6, 12

FLA. STAT. § 924.051(7) (2013) 10

U.S. Const. amend. V 1

U.S. Const. amend. VI 1

U.S. Const. amend. XIV 1

Rules:

FLA. R. APP. P. 9.140(h)(2) 10

FLA. R. APP. P. 9.141(d) 11

FLA. R. APP. P. 9.330 11

SUP. CT. R. 10 1

SUP. CT. R. 14.1.(g) 1

CITATION TO OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit's opinion affirming the district court's denial of Mercado's habeas petition on October 21, 2024, is published and found at *Mercado v. Sec'y, Fla. Dep't of Corr.*, 119 F.4th 1261 (11th Cir. 2024). The Mandate issued on November 19, 2024.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review a final judgment of the Eleventh Circuit by writ of certiorari. Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, Mercado cannot invoke jurisdiction as a matter of right. Given that Mercado has failed to show a compelling reason for the Eleventh Circuit's decision to be reviewed, this Court should not exercise jurisdiction.

CONSTITUTIONAL PROVISIONS/FEDERAL STATUTES INVOLVED

Mercado is seeking review under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and 28 U.S.C. section 2254.

PROCEDURAL HISTORY AND STATEMENT OF CASE AND FACTS

Mercado alleges that "several strong defense witnesses . . . placed any conviction beyond a reasonable doubt . . . in jeopardy" and that there "was a realistic chance that the State would lose this entire case." (Pet. 6). These allegations are conclusory, argumentative, and lack record support. *See* SUP. CT. R. 14.1.(g). Respondents otherwise generally accept Mercado's statement of the case and facts but would note the following in support of the brief in opposition.

Mercado is serving life imprisonment in the Florida Department of Corrections

after a jury found him guilty on retrial of capital sexual battery. (Pet'r's App. N 2–3, 6, 20). At his first trial, the State of Florida had charged him with three counts of capital sexual battery but two were granted judgments of acquittal. (Pet'r's App. N 3, 18). The trial court granted a mistrial on the remaining count because it had ordered the State to redact a recorded phone call between Mercado and law enforcement based on the invocation of his right to remain silent but the State "played a version of the recording that . . . did not fully comply with the redaction order." (Pet'r's App. N 2–3, 18). On Mercado's motion asserting that the State "goad[ed]" the mistrial "by revealing inadmissible evidence to the jury," the trial court "ruled that the Double Jeopardy Clause barred a retrial." (Pet'r's App. N 2–3, 18).

The State appealed this order to the Fifth District Court of Appeal. (Pet'r's App. N 2–3, 18). Mercado's trial counsel alerted him to the appeal two months later and, upon learning Mercado "could not afford his representation on appeal," trial counsel moved to withdraw from representation in the trial court and appoint the Office of the Public Defender but, without providing "the required affidavit of indigency," his motion was never ruled upon and he unknowingly "remained counsel of record." (Pet'r's App. N 2–4, 18–19). The State first served its initial brief on the Office of the Public Defender but, upon learning that same day that the office had not been appointed, the State emailed the brief to trial counsel. (Pet'r's App. N 4, 19).

In its initial brief, the State "argued that the trial court erred when it barred a retrial because the record established no prosecutorial intent to goad Mercado into moving for a mistrial." (Pet'r's App. N 4). Because neither trial counsel nor the Office

of the Public Defender appeared for him, "no one filed an appellee's brief for Mercado in response to the State's appeal." (Pet'r's App. N 2, 4, 19). The Fifth District Court "reversed and remanded for a retrial," holding "that the trial court's findings of prosecutorial intent to procure a mistrial were 'not supported by the evidence.'" (Pet'r's App. N 2, 4, 19); *see also State v. Mercado*, 121 So. 3d 604, 605–06 (Fla. 5th Dist. Ct. App. 2013). The court "recognized the absence of a response because its opinion noted, 'No Appearance for Appellee.'" (Pet'r's App. N 19); *see also Mercado*, 121 So. 3d at 605.

Trial counsel moved for rehearing, claiming Mercado had received ineffective assistance of appellate counsel and explaining "that he had been unaware that he was Mercado's appellate counsel because he thought that he had withdrawn." (Pet'r's App. N 4–5, 19). The State opposed the motion and argued that Mercado could not demonstrate "prejudice" under the standard for assessing claims of ineffective assistance of counsel because the Fifth District Court "correctly reversed the trial court's order barring retrial." (Pet'r's App. N 5). After the Office of the Public Defender was appointed to replace trial counsel, it moved to recall the mandate based on Mercado's lack of representation. (Pet'r's App. N 5, 19). Both motions were summarily denied. (Pet'r's App. N 5, 19).

Mercado next filed a petition for writ of habeas corpus in the Fifth District Court alleging ineffective assistance of appellate counsel and argued that "his 'complete denial of counsel'" during the State's appeal "entitled him to a presumption of prejudice." (Pet'r's App. N 2, 5, 19). For relief, Mercado requested "'a new appellate

proceeding' in which he would be represented by effective counsel." (Pet'r's App. N 5). The State responded that Mercado was not entitled to a presumption of prejudice and he further could not demonstrate prejudice because he lacked an argument that "would have resulted in affirmance." (Pet'r's App. N 5–6). The Fifth District Court summarily denied this petition. (Pet'r's App. N 6, 19).

After Mercado's retrial, conviction, life sentence, and affirmance on appeal of the judgment and sentence, he pursued another habeas petition in the Fifth District Court and a motion for postconviction relief in the trial court, which were both denied. (Pet'r's App. N 2, 6, 20). Mercado then filed a federal habeas petition and raised, among other claims, "that [trial] counsel was ineffective on appeal of the order barring retrial by not filing an answer brief" and "his complete 'abandon[ment]' on appeal entitled him to a presumption of prejudice." (Pet'r's App. N 6–7, 20). The Middle District of Florida denied the federal habeas petition because the presumption of prejudice had never been applied to the facts of this case, Mercado failed to demonstrate prejudice, and thus "the state court's decision was not contrary to or an unreasonable application of" this Court's precedent. (Pet'r's App. N 7, 20). The district court also granted a certificate of appealability on whether prejudice should be presumed in this circumstance. (Pet'r's App. N 7, 20).

Mercado appealed and the Eleventh Circuit affirmed, holding that "the state court could reasonably have concluded that counsel's failure to file a response brief is not presumptively prejudicial." (Pet'r's App. N 2, 15–16, 21). The Eleventh Circuit remarked that this Court had not applied "a presumption of prejudice . . . to counsel's

failure to file an appellee's brief." (Pet'r's App. N 11). The court further noted that the presumption of prejudice was only applied in appellate proceedings to (1) appellate counsel's refusal to file an initial brief and subsequent withdrawal "after filing a conclusory statement that the appeal had no merit" and (2) "defense counsel's failure to file a notice of appeal despite the defendant's repeated requests that he do so." (Pet'r's App. N 11–12).

The Eleventh Circuit distinguished these cases and cited this Court's case law distinguishing the "denial of counsel altogether on appeal . . . from mere ineffective assistance of counsel on appeal." (Pet'r's App. N 12–14). As Mercado alleged ineffective assistance as an appellee instead of an appellant, the court observed that "[d]ifferent burdens and responsibilities attend the different postures." (Pet'r's App. N 13). Lastly reasoning that only circuit precedent supported the presumption of prejudice, and that such decisions were only mentioned by this Court in dicta, the Eleventh Circuit concluded that there was no clearly established precedent by this Court on this issue and the Fifth District Court "could have reasonably concluded that" the presumption of prejudice was "inapplicable." (Pet'r's App. N 13–16).

On January 15, 2025, Mercado turned over for mailing this petition seeking review from this Court.

REASONS FOR DENYING THE WRIT

I. CERTIORARI REVIEW SHOULD BE DENIED BECAUSE NO CLEARLY ESTABLISHED LAW HAS APPLIED THE PRESUMPTION OF PREJUDICE UNDER *CRONIC* TO THE FAILURE OF DEFENSE COUNSEL TO FILE AN ANSWER BRIEF IN A STATE'S APPEAL.

This Court should decline to accept jurisdiction in this case. Mercado argues that defense counsel's failure to file an answer brief in the state-initiated appeal warrants the "presumption of prejudice" consistent with *United States v. Cronic*, 466 U.S. 648 (1984). But to be entitled to federal habeas relief under AEDPA, Mercado must demonstrate that the state court's failure to apply this presumption of prejudice "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. *See* 28 U.S.C. § 2254(d)(1). Because this Court has never held that the *Cronic* presumption applies to the failure to file an answer brief when the government has initiated an appeal, federal habeas relief is unavailable to Mercado, who thus cannot demonstrate any compelling reason for this Court to grant review.

"Section 2254(d)(1) limits habeas relief to cases where a state-court decision contravenes or unreasonably applies 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Brown v. Davenport*, 596 U.S. 118, 136 (2022). "That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Mercado can identify no such holding here.

To assert that his Sixth Amendment right to effective assistance of counsel was violated, a criminal defendant must ordinarily satisfy the test established by

Strickland v. Washington, 466 U.S. 668 (1984), and prove that "counsel's performance was deficient" and "prejudiced the defense." *Id.* at 687. To demonstrate prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. This Sixth Amendment guarantee to effective assistance of counsel extends to "a first appeal as of right." *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

"*Cronic* recognized a narrow exception" to proving prejudice under *Strickland*. *See Florida v. Nixon*, 543 U.S. 175, 190 (2004). "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Cronic*, 466 U.S. at 659. The denial of counsel may be from total absence or prevention of assistance. *Id.* at 659 n.25. And, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659. Another presumption applies "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 693 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980)).

Prejudice has been presumed twice in the realm of criminal appeals. First, when a criminal defendant appeals his judgment and sentence; appellate counsel alleges in a conclusory fashion that the appeal lacks merit and should not be briefed; and the appellate court permits withdrawal without first reviewing the record, "the

presumption of prejudice must extend . . . to the denial of counsel on appeal." *Penson v. Ohio*, 488 U.S. 75, 77–78, 88 (1988). Second, despite a signed appeal waiver, "prejudice is presumed 'when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken.'" *Garza v. Idaho*, 586 U.S. 232, 237 (2019) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000)). Neither case involves the failure of defense counsel to file an answer brief when the government has initiated an appeal.

In concluding that a prejudice or harmless error analysis was inappropriate, *Penson* cited in a footnote, among other cases, *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011 (7th Cir. 1988), when it remarked that "[a] number of the Federal Courts of Appeals have reached a like conclusion when faced with similar denials of appellate counsel." *Penson*, 488 U.S. at 88–89 n.10. In *Thomas*, the Seventh Circuit held that defense counsel's failure to file an answer brief in a government-initiated appeal "amounted to a complete denial of assistance of counsel during a critical stage" and thus triggered the presumption of prejudice. *Thomas*, 856 F.2d at 1016–17. Mercado first acknowledges that this Court "has never addressed" the *Cronic* presumption when defense counsel fails to file an answer brief. (Pet. 19–20). He next argues that, by citing *Thomas* in *Penson*, this Court "saw no distinction when the appeal was filed by the government." (Pet. 21–22).

But this is not "clearly established Federal law" for AEDPA purposes. "It is not enough that the state-court decision offends lower federal court precedents." *Brown*, 596 U.S. at 136 (citing *Glebe v. Frost*, 574 U.S. 21, 24 (2014)). "This Court's dicta

cannot supply a ground for relief." *Id.* (citing *White v. Woodall*, 572 U.S. 415, 419 (2014)). "Nor can holdings that speak only at a high level of generality." *Id.* (citing *Lopez v. Smith*, 574 U.S. 1, 6 (2014)). At most Mercado's "like conclusion" analysis references mere "dicta" and not a "holding."

Here, the Fifth District Court's decision to reject the *Cronic* presumption does not diverge from any express holding by this Court. *Penson* cannot be expanded to state-initiated appeals because that factual circumstance was not before this Court. *See White*, 572 U.S. at 426 ("[AEDPA] does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error."). *Penson* did not expressly apply the *Cronic* presumption to all appeals notwithstanding the appellate posture. As Mercado raises dicta, circuit court precedent, or extensions of clearly established Federal law, and none avail him to relief under AEDPA, he presents no compelling reason for this Court to grant review.

II. CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THIS CASE IS A POOR VEHICLE TO APPLY *CRONIC* TO THE ABSENCE OF AN ANSWER BRIEF IN A STATE'S APPEAL.

Even if AEDPA authorized this Court to extend *Cronic* and *Penson* to a government-initiated appeal when defense counsel does not file an answer brief, this case would be a poor vehicle for the Court to decide that issue. When "the state court applie[s] 'the correct governing legal principle . . . to the facts of the prisoner's case,'" that decision is not contrary to clearly established Federal law. *See Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). And unless a prisoner shows "that the state court's decision is so obviously wrong that its

error lies 'beyond any possibility for fairminded disagreement,' he cannot demonstrate that the "decision involved an 'unreasonable application of' this Court's precedent." *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). "To meet that standard, a prisoner must show far more than that the state court's decision was 'merely wrong' or 'even clear error.'" *Id.* (quoting *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017)).

Unlike the ebb and flow of a criminal trial where counsel's presence and adversarial testing is required in *Cronic*, or the liberty interest at stake when a defendant must appeal his judgment and sentence in *Penson*, the State's appeal process in Florida poses a closed universe and lesser liberty interest. "[T]he party challenging the . . . order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court." FLA. STAT. § 924.051(7) (2013). And Florida courts have long observed, "In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on appellant to demonstrate error." *Applegate v. Barnett Bank of Tallahassee*, 377 So. 2d 1150, 1152 (Fla. 1979). Unless "good cause" or the type of offense forecloses such relief, incarcerated defendants "must on motion be released on the defendant's own recognizance pending an appeal by the state." FLA. R. APP. P. 9.140(h)(2).

Against this backdrop, Mercado cannot demonstrate that the Fifth District Court's decision not to apply *Cronic* was contrary to or an unreasonable application of this Court's precedent. The State shouldered the burden to reverse the trial court's decision to dismiss the case and bar Mercado's retrial under *Oregon v. Kennedy*, 456

U.S. 667 (1982). The State was bound by the four corners of the record on appeal and relevant decisional law on that issue. The Fifth District Court agreed with the State "that the trial court erred in dismissing the charge because the record fail[ed] to demonstrate any prosecutorial intent to goad Mr. Mercado into moving for a mistrial." *Mercado*, 121 So. 3d at 605. Had trial counsel filed an answer brief or obtained the appointment of the Office of the Public Defender, either attorney would have been bound by the same record. If no argument in good faith could have supported affirmance, then it would be a dubious application of both *Cronic* and *Strickland* to mandate a presumption of prejudice where actual prejudice would otherwise go unproven in a standard ineffectiveness of counsel claim.

These factual circumstances do not warrant a per se second appeal every time counsel fails to answer the State's initial brief.[1] The State still had to prove Mercado's guilt beyond a reasonable doubt at retrial if it persevered on appeal. Mercado also availed himself to mechanisms for rehearing, *see* FLA. R. APP. P. 9.330, and alleging ineffective assistance of appellate counsel, *see* FLA. R. APP. P. 9.141(d). Mercado's sole remedy here would be a renewed appellate proceeding with the defense's opportunity to file an answer brief. Without an argument to demonstrate prejudice under *Strickland* or, a reasonable probability that the result of the appeal would have been

[1] The State is not ensured an automatic reversal when counsel fails to file an answer brief as the State has lost appeals even when the appellee has not filed an answer brief or response. *See, e.g.*, *State v. Williams*, 322 So. 3d 1148 (Fla. 5th Dist. Ct. App. 2021); *State v. Bertelsen*, 741 So. 2d 580 (Fla. 4th Dist. Ct. App. 1999); *see also State v. McCormick*, 868 So. 2d 512 (Fla. 2004). To illustrate the absurdity of Mercado's extension of *Cronic*, these defendants would be entitled to new appeals despite already receiving a favorable disposition.

different, Mercado fails to show a compelling reason for this Court to determine whether the state court unreasonably applied *Cronic* and *Penson* to this case.

In conclusion, this Court should decline to take jurisdiction in this case. As he lists no express holding on the issue of counsel failing to file a brief during the government's appeal, Mercado thus fails to identify any clearly established Federal law that supports AEDPA relief under section 2254(d)(1). And this case is a poor vehicle to assess the application of *Cronic* on such appeals because the State harbored the burden to show reversible error during its initiated appeal.

CONCLUSION

For these reasons, Respondents respectfully ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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