# APPENDIX

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File Name: 23a0044p.06

**UNITED STATES COURT OF APPEALS**

FOR THE SIXTH CIRCUIT

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STEVEN LEE MOSS,
*Petitioner-Appellee*,

v.

GARY MINIARD, Warden,
*Respondent-Appellant*.

> No. 21-1655

Appeal from the United States District Court for the Eastern District of Michigan at Flint.
No. 4:18-cv-11697—Linda V. Parker, District Judge.

Argued: October 20, 2022

Decided and Filed: March 17, 2023

Before: COLE, GIBBONS, and BUSH, Circuit Judges.

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## COUNSEL

**ARGUED**: Scott R. Shimkus, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Esthena Barlow, GEORGETOWN UNIVERSITY, Washington, D.C., for Appellee. **ON BRIEF**: Scott R. Shimkus, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellant. Hannah Mullen, Brian Wolfman, Madeline Meth, Radiance Campbell, Caleb Thompson, Lois Zhang, GEORGETOWN UNIVERSITY, Washington, D.C., for Appellee.

GIBBONS, J., delivered the opinion of the court in which BUSH, J., joined. COLE, J. (pp. 17–37), delivered a separate dissenting opinion.

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## OPINION

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JULIA SMITH GIBBONS, Circuit Judge. The Warden appeals the district court's grant of petitioner Steven Moss's habeas petition based on ineffective assistance of counsel analyzed under *United States v. Cronic*, 466 U.S. 648 (1984). The Warden argues that the district court erred in three ways: (1) finding that Moss's untimely petition was entitled to equitable tolling; (2) excusing the procedural default of Moss's ineffective assistance of trial counsel claim based on the ineffective assistance of appellate counsel; and (3) granting Moss habeas relief on his claims, rather than deferring to the state court's adjudication of the issues under *Strickland v. Washington*, 466 U.S. 668 (1984).

Because the state court's denial of Moss's ineffective assistance claims under *Strickland* was not contrary to nor an unreasonable application of clearly established federal law, we defer to its decision that Moss is not entitled to habeas relief. We therefore hold that the district court erred in granting Moss relief and reverse and remand with instructions to deny the petition with prejudice.

## I.

This case arises from an encounter between Steven Moss and "Diego," a paid informant for the Drug Enforcement Agency ("DEA").[1] On November 6, 2012, Moss first met Diego and agreed to purchase ten kilograms of cocaine from him. *People v. Moss*, No. 319954, 2015 WL 3604582, at *1. Two days later, Moss and Diego agreed to meet to complete the deal. *Id.* Thus, on November 9, Moss (accompanied by another man) and Diego (accompanied by an undercover officer driving the van containing the cocaine) met in the parking lot of a Home Depot store. *Id.* After Moss showed the purchase money to Diego, "the men walked to the undercover van where [Moss] was again shown the [drugs]." *Id.* Moss then "took possession of the van keys, got in the driver's seat, and turned on the ignition before the police remotely disabled the van."

[1] We primarily rely on the facts in the Oakland County Circuit Court opinion denying Moss's appeal as of right as well as the transcripts from Moss's entrapment hearing and bench trial. *People v. Moss*, No. 319954, 2015 WL 3604582, at *1 (Mich. Ct. App. June 9, 2015). Under AEDPA, the state court's factual findings are entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1); *see also Phillips v. White*, 851 F.3d 567, 571 (6th Cir. 2017).

*Id.* Moss was arrested and charged with possession with intent to deliver 1,000 or more grams of cocaine and possession of a firearm during the commission of a felony in violation of Michigan law. *Id.*

Moss's first attorney moved to conduct an entrapment hearing. On September 6, 2013, David Steingold began representing Moss.

When the entrapment hearing began ten days later, Steingold attested to minimal pre-trial preparation. Steingold complained to the court about his difficulty obtaining discovery before the hearing and stated that he was unable to consult with Moss's previous counsel or interview or solicit any witnesses. Steingold's pre-hearing actions consisted of meeting with Moss for two hours before the hearing, reviewing Moss's protected record, and persuading him to proceed with a bench trial on the day of the hearing.

Moss was the only witness presented by defense counsel. In his direct examination, conducted by Steingold's stand-in counsel, Lisa Dwyer, Moss testified that he was introduced to Diego through a friend, Bennett. Moss explained that Bennett threatened Moss to induce him to loan Bennett money for selling drugs. The plan was that, using Diego as a middleman, Bennett would sell the drugs, in return for which Moss would receive his original sum plus profit. When Moss met Diego at Home Depot to give him the money to complete the transaction, Diego asked Moss to drive his van across the parking lot to Moss's car, where Diego would collect the money. Moss testified that, after he entered the van and tried to start the ignition, Diego and the van's driver left the scene, and Moss was arrested after he jumped out of the van. The

prosecution cross-examined Moss, using video footage and audio recordings of Moss's meetings and conversations with Diego to challenge his testimony. Steingold conducted Moss's redirect.

Steingold then requested a continuance to contact four witnesses. He explained that he only learned about three of the four during Moss's direct and cross-examination. The court permitted Steingold to contact one witness but denied a continuance, noting that Steingold could have accessed the other three before trial because Moss's previous counsel made a record of their names. Ultimately, Steingold declined to call the witness and acknowledged that he had no others to call without a continuance.

The prosecution presented five witnesses and multiple exhibits. The first witness, Anthony Rodriguez, testified that Moss had invested in Rodriguez's business but then threatened Rodriguez to convince him to buy cocaine with the money Moss gave him, after which Rodriguez reported to a federal agent that Moss had money to buy drugs. Steingold cross-examined Rodriguez. The testimony of the next four witnesses—all DEA agents—detailed that Moss knew about the cocaine located in the van before taking the keys and that the informant Diego was instructed not to pressure Moss into completing the transaction. Steingold cross-examined three of the four agents and objected to portions of their direct testimony.

In closing, Steingold argued that Bennett and Diego entrapped Moss into completing the transaction. The prosecution responded that Moss did not establish entrapment because, even taking Moss's testimony as true, he only demonstrated that he was

presented with an opportunity to make money that he wanted or needed—not that Diego, the government informant, forced him to make the deal.

The court denied Moss's motion to dismiss the charges against him based on entrapment. According to the court, even if it believed Moss's testimony, "nothing . . . would make [it] conclude that [Moss] was entrapped" because "[t]here was nothing to show that Diego forced [Moss] to participate." DE 5-5, Tr., Page ID 654-55. After denial of the motion and upon Steingold's admission that he "was not prepared to go to trial," the court granted Steingold a sixteen-day continuance to prepare for trial. *Id.* at Page ID 657.

During the bench trial, Steingold waived his opening argument and presented no witnesses. He stipulated to the admission of the transcript from the entrapment hearing as substantive evidence. For one of the government's two witnesses, DEA Detective Douglas Stewart, Steingold did not object during his testimony or conduct any cross-examination. Although Steingold cross-examined DEA Special Agent John Hill, Steingold also conceded that Hill's testimony at the entrapment hearing had been admitted as part of the stipulated transcript. Steingold waived his closing argument.

The next day of trial, Steingold failed to appear. Dwyer, appearing in Steingold's place, introduced herself and requested to reduce Moss's bond, which was denied. The court found Moss guilty. Moss was sentenced to consecutive sentences of fifteen to forty-five years in prison on the possession count and two years on the felony firearm count.

### 1. State Court Direct Appeal

Proceeding with Suzanna Kostovski as his appellate counsel, Moss moved to remand his case for a *Ginther*[2] hearing based on ineffective assistance of trial counsel. Kostovski argued that Steingold provided constitutionally ineffective assistance to Moss under *Strickland* by waiving Moss's right to a jury trial and stipulating to the admission of the evidence from the entrapment hearing for use in the bench trial. The Michigan Court of Appeals granted Kostovski's motion to remand, but the trial court ultimately denied Moss's motion for a new trial because Kostovski did not establish that Steingold's performance was constitutionally ineffective under *Strickland*.

On June 9, 2015, the Michigan Court of Appeals affirmed Moss's conviction and sentence. The Michigan Supreme Court denied him leave to appeal that decision on December 22, 2015. Moss did not file a petition for a writ of certiorari at the United States Supreme Court.

### 2. State Collateral Appeal

Nearly two years later, represented by different counsel, Moss filed a state collateral motion for relief from judgment in a Michigan trial court. He requested a new trial and argued that, under *Cronic*, Steingold had constructively abandoned Moss both in the pre-

[2] In Michigan, a *Ginther* hearing is an evidentiary hearing regarding an ineffective assistance of counsel claim. *See People v. Ginther*, 390 Mich. 436 (1973).

trial proceedings and during trial. The Michigan trial court denied the motion. It held that Moss failed to show that his claim for ineffective assistance of counsel was governed by *Cronic* because, given "the overwhelming evidence against [Moss]," trial counsel's strategy to use a stipulated-fact bench trial to expedite an appeal of the court's denial of the motion to dismiss on entrapment grounds did not "fail[] to subject the prosecutor's case to meaningful adversarial testing[.]" DE 5-11, Op. & Order, Page ID 914. Reviewing his ineffective assistance claim instead under *Strickland*, the court concluded that Moss failed to satisfy both the cause and prejudice prongs of the test.

Moss applied but was denied leave to appeal to the Michigan Court of Appeals and was denied leave to appeal to the Michigan Supreme Court.

### 3. Federal Habeas Proceedings

While his state collateral proceedings were still pending, Moss filed a federal habeas petition in the Eastern District of Michigan. The petition raised two claims under *Cronic*: that Steingold abandoned Moss (1) before trial by failing to conduct pre-trial interviews and (2) at trial by failing to subject the prosecution's case to meaningful adversarial testing. Moss argued that his appellate counsel was ineffective for failing to raise these claims on direct appeal, which would excuse their procedural default.

The government moved to dismiss the petition on the grounds that it was barred by the one-year limitations period ending on March 21, 2017. Moss disagreed, contending that the last day of the

limitations period was March 22, 2017, the day on which he moved for collateral relief and tolled his deadline to file a habeas petition.

The district court concluded that Moss's petition was untimely but that he was entitled to equitable tolling because he diligently pursued the litigation and understandably relied on confusing case law. However, the district court denied Moss's petition for habeas relief because it determined that the state court's decision was not contrary to nor an unreasonable application of *Strickland*. Moss moved for reconsideration, arguing that the district court erred by (1)misidentifying *Strickland*'s ineffective-assistance framework as the correct legal standard instead of *Cronic*'s constructive-denial-of-counsel framework, and (2) misapplying *Cronic* and ignoring binding precedent.

On reconsideration, the district court agreed with Moss.[3] It excused Moss's procedural default of his *Cronic* claims because it found that Kostovski was constitutionally ineffective in failing to raise them on direct appeal. Next, the district court reviewed the merits of Moss's *Cronic* claims and found that

[3] The district court concluded that Moss was entitled to habeas relief on his first and third claims, so it declined to reconsider its decision that he was not entitled to habeas relief on his second claim. The Warden only appealed the district court's order on reconsideration. Thus, the district court's earlier denial of relief on the second claim—that Moss was "deprived of his Sixth Amendment right to counsel of choice . . . when he was represented by nonretained Attorney Dwyer without authorization[]"—is not at issue here. *See* DE 18, Op. & Order, Page ID 1677.

Steingold constructively abandoned him. Holding that the "state court unreasonably applied the *Strickland* standard where Petitioner clearly was constructively denied the assistance of trial counsel [under *Cronic*]," the district court granted Moss habeas relief based on his *Cronic* claims. DE 33, Mem. Op. & Order, Page ID 1845. This appeal followed.

## II.

We review de novo the district court's legal conclusions in a habeas corpus proceeding. *DeLisle v. Rivers*, 161 F.3d 370, 380 (6th Cir. 1998) (en banc). "Factual determinations are generally reviewed for clear error, except where the district court has made factual determinations based on its review of trial transcripts and other court records. In such cases, because no credibility determination or findings of fact are required, factual conclusions are reviewed de novo." *Dando v. Yukins*, 461 F.3d 791, 796 (6th Cir. 2006) (internal quotation and citations omitted). Further, whether a claim is barred by a statute of limitations is a question of law subject to de novo review. *Sierra Club v. Slater*, 120 F.3d 623, 630 (6th Cir. 1997).

By contrast, we apply a deferential review to state court habeas determinations under the standard set out by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Id.*; 28 U.S.C. § 2254(d). Under AEDPA, federal courts may grant habeas relief to a petitioner in state custody only if the state court adjudicated the claim(s) on the merits and either:

> (1) the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court . . . or (2) the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(b), (d)(1)–(2); *see Dando,* 461 F.3d at 796.

## III.

On appeal, the Warden argues that Moss's habeas petition is barred by AEDPA's statute of limitations and is not entitled to equitable tolling; that Moss's procedurally defaulted ineffective assistance claims are not excused by ineffective assistance of appellate counsel; and that Moss is not entitled to habeas relief on the merits of his claims. We begin with timeliness.

### 1. Statute of Limitations

AEDPA created a one-year statute of limitations for federal habeas petitions. *See* 28 U.S.C. § 2244(d)(1). The statute of limitations begins to run from the latest of four circumstances; the relevant one in this case is the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* § 2244(d)(1)(A). This limitations period can be tolled for the amount of time in which "a properly filed application for State post-conviction or other collateral

review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2).

The parties agree that Moss's conviction became final on March 21, 2016, when his opportunity to petition the Supreme Court expired. CA6 R. 29, Corr. Appellee Br., at 15; *see* 28 U.S.C. § 2244(d)(1)(A). That day is considered the "day of finality." The Warden argues that Moss's motion was filed the day after AEDPA's one-year limitations period expired, barring his later-filed petition, but Moss maintains that he moved for collateral relief on the last day of the AEDPA limitations period and tolled his deadline to petition for habeas relief. In the alternative, Moss argues that, even if his motion for collateral relief was filed after the limitations period ended, the district court did not err in holding that equitable tolling should apply.

Whether Moss's habeas petition can be tolled by his motion for collateral relief depends on the duration of the § 2244(d) statute of limitations period. To determine the start of a limitations period, we apply "Federal Rule of Civil Procedure 6(a)'s standards for computing periods of time to § 2244(d)'s one-year statute of limitations." *Bronaugh v. Ohio*, 235 F.3d 280, 284 (6th Cir. 2000) (internal citations omitted). Rule 6(a) provides that one must "exclude the day of the event that triggers the period" and "include the last day of the period[.]" Fed. R. Civ. P. 6(a)(1)(A), (C). The rule instructs that, "in computing the applicable period, the day of the relevant event is the zero point from which days are to be counted." *Merriweather v. City of Memphis*, 107 F.3d 396, 399 (6th Cir. 1997) (emphasis omitted). Thus, our precedent and Federal

Rule 6(a) confirm that, although the AEDPA limitations period is triggered on the day of finality, the clock begins to run the following day.

*Bronaugh* illustrates this principle in practice. The last day on which the *Bronaugh* petitioner could have filed a petition for a writ of certiorari was September 9, 1996. The court considered the language of AEDPA and Rule 6(a) before finding that the day of finality was September 9, 1996, and, pursuant to Rule 6(a), "Bronaugh's one-year statute of limitations began to run on September 10, 1996." *Id.* at 285. Thus, the triggering day of finality was excluded in this computation.

*Bronaugh* also informs how we define the limitations deadline. There, we calculated the deadline for the petitioner to file his habeas petition as September 9, 2017—the anniversary of the date of finality. 235 F.3d at 285. Expressed in days, the limitations period thus ran *from and including* September 10, 2016 ("day one," the day following the day of finality) *to and including* September 9, 2017 (day 365). Expressed in years, the limitations period would therefore end on the anniversary of the finality date. Using the anniversary method of Rule 6(a) to compute the limitations period "has the advantage of being easier for petitioners, their attorneys and the courts to remember and apply." *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001).

Here, Moss's one-year statute of limitations was triggered on March 21, 2016, the day of finality, and began to run on March 22, 2016, the following day. So the limitations period ended on March 21, 2017, the

anniversary of the day of finality.[4] Because Moss moved for collateral relief on March 22, 2017, his habeas limitations period had already expired. Moss's petition, ultimately filed in May 2018, was therefore untimely.

### 2. Equitable Tolling

AEDPA's limitations period "is subject to equitable tolling in appropriate cases." *Holland v. Fla.*, 560 U.S. 631, 645 (2010). We grant equitable tolling "sparingly." *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010). Here, however, because the statute of limitations does not present a jurisdictional bar to habeas review, and because we hold that Moss is not entitled to habeas relief for the reasons discussed below, we decline to determine on appeal whether the district court properly tolled Moss's petition. *See Smith v. Ohio Dep't of Rehab. and Corr.*, 463 F.3d 426,

[4] As Moss indicates, this Circuit has made computation errors in unpublished decisions. *See, e.g., Williams v. Wilson*, 149 F. App'x 342, 345 (6th Cir. 2005) (incorrectly extending limitations period by one day); *Liggins v. Vashaw*, No. 20-1037, 2020 WL 3866872, at *1 (6th Cir. Apr. 29, 2020*), cert. denied*, 141 S. Ct. 1274 (2021), *reh'g denied*, 141 S. Ct. 2750 (2021) (same); *Carlyle v. Campbell*, No. 18-1631, 2018 WL 11301139, at *1 (6th Cir. Sept. 26, 2018) (same); *Kirchoff v. Warden, Chillicothe Corr. Inst.*, No. 16-4186, 2017 WL 4863119, at *2 (6th Cir. May 25, 2017) (same). But "an unpublished decision of this Court . . . is not binding authority." *In re Blasingame*, 986 F.3d 633, 637 n.2 (6th Cir. 2021). Further, the one-day miscalculation was harmless and not dispositive in these cases, as each petitioner had longer filing delays. *See Wilson*, 149 F. App'x at 346 (petition months late); *Liggins*, 2020 WL 3866872, at *1 (petition almost two decades late); *Carlyle*, 2018 WL 11301139, at *1 (petition over five years late); *Kirchoff*, 2017 WL 4863119, at *2 (petition months late).

429, n.2 (6th Cir. 2006) (declining to address statute-of-limitations defense on appeal in part because AEDPA's statute of limitations is not jurisdictional); *see also Trussell v. Bowersox*, 447 F.3d 588, 590 (8th Cir. 2006) (holding that, despite probable untimeliness, "because neither the statute of limitations nor procedural default constitutes a jurisdictional bar to our review," the court would, "in the interest of judicial economy, proceed to the merits of [the] petition"). We instead proceed to the merits and the question of procedural default.

### 3. Procedural Default

The Warden argues that the district court erred by excusing Moss's procedural default of his ineffective assistance of trial counsel ("IATC") claim because Moss's appellate counsel was not ineffective on direct appeal. However, Moss maintains that his appellate counsel's failure to raise his meritorious IATC claims under *Cronic* excuses his procedural default.[5]

Because Moss's IATC claims are procedurally defaulted, we may only consider them if Moss shows cause for failing to raise them on direct appeal and demonstrates that he would be prejudiced if they are not considered. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "Ineffective assistance of counsel can

[5] Both parties agree that Moss procedurally defaulted his IATC claims under *Cronic* by failing to raise them on direct appeal, as required by Michigan Court Rule 6.508(D)(3). And Moss could not procedurally default his ineffective assistance of appellate counsel claim because his first opportunity to raise that claim was on post-conviction review. *See Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010).

supply the cause that, together with prejudice, would excuse a procedural default." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). The state court concluded that Moss's underlying IATC claims were not meritorious under *Strickland* and that he therefore did not establish the requisite cause and prejudice to excuse his procedural default. We now evaluate whether the state court's adjudication of Moss's IATC claims warrants AEDPA deference.

For AEDPA's deferential standard to apply, the state-court adjudication must have been "on the merits." 28 U.S.C. § 2254(d). A judgment is typically considered to be "on the merits" if it is "delivered after the court . . . heard and evaluated the evidence and the parties' substantive arguments." *Johnson v. Williams*, 568 U.S. 289, 302 (2013) (quoting Black's Law Dictionary 1199 (9th ed. 2009)). To determine whether the state courts decided an issue on the merits, we review the opinion of "the last state court to issue a reasoned opinion on the issue." *Hoffner v. Bradshaw*, 622 F.3d 487, 505 (6th Cir. 2010) (quoting *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005)). Accordingly, we follow the district court in reviewing the Oakland County Circuit Court opinion denying the motion for relief from judgment as the last state court to issue a reasoned opinion. Because the post-conviction court acknowledged and engaged with both the *Strickland* and *Cronic* tests for ineffective assistance of trial counsel, AEDPA's deferential standard of review applies.

A state court's decision is "contrary to" clearly established federal law if the state court "applies a

rule that contradicts the governing law" as determined by Supreme Court precedent or "the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from" the Supreme Court's precedent. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *see also White v. Woodall*, 572 U.S. 415, 419 (2014). A state court's decision is an "unreasonable application" of federal law if "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Moss argues that the state court's application of *Strickland* was contrary to and an unreasonable application of the clearly established law of *Cronic*. The Warden responds that the state court properly applied the governing law of *Strickland* when rejecting Moss's claims. As discussed below, we agree with the state court that *Strickland* governs Moss's claims.

Ineffective assistance claims may be reviewed under *Strickland* or under *Cronic*. *See Bell v. Cone*, 535 U.S. 685 (2002). While claims reviewed under *Strickland* demand a showing of both deficient performance and prejudice, *Cronic* claims arise when a defendant establishes a level of performance by trial counsel that is "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 695 (citing *Cronic*, 466 U.S. at 658). In other words, prejudice may be presumed when a trial counsel's performance is so grossly deficient that it amounts to an effective denial of counsel. *Id. Cronic*'s presumption-of-prejudice analysis is warranted in two scenarios: (1) when the defendant "is denied the

presence of counsel at 'a critical stage" and suffers "the complete denial of counsel," and (2) when "'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.'" *Id.* at 695-96 (quoting *Cronic*, 466 U.S. at 659).

Moss argues that his claims warrant review under *Cronic* under both scenarios because Steingold constructively abandoned him during pre-trial proceedings and failed to meaningfully test the prosecution's case at trial. However, the complete-denial scenario does not apply to Moss's claims because there is no evidence that Moss's counsel was physically absent throughout an entire phase of the litigation or that a state actor prevented Moss's counsel from adequately representing him. *See Maslonka v. Hoffner*, 900 F.3d 269, 280 (6th Cir. 2018) ("We therefore decline to extend the *Cronic* complete-denial exception to cases where a counsel is physically absent due to the counsel's own failure to be present, without any denial by the state."); *see also Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003) (finding that, "[w]hen counsel is appointed but never consults with his client and is suspended from practicing law for the month preceding trial, and the court acquiesces in the constructive denial of counsel by ignoring the defendant's repeated requests for assistance, *Cronic* governs.") (emphasis added).

As for the second scenario, Moss's argument still fails because Steingold did not entirely fail to subject the prosecution's case to meaningful adversarial testing. *See Bell*, 535 U.S. at 697. Steingold prepared for the entrapment hearing by consulting with Moss for two hours before it began and by reviewing Moss's

"private restricted record." DE 5-2, Tr., Page ID 104. That consultation distinguishes Moss's representation from that rendered by defense counsel in *Mitchell*, where defense counsel spent only six minutes consulting with his client pre-trial and failed to conduct any pre-trial investigation. 325 F.3d at 748. Steingold also objected to and cross-examined the government's witnesses during the entrapment hearing, and requested a continuance to subpoena needed witnesses—a request the court denied—although he ultimately declined to call other witnesses. Further, although Moss's retained counsel, Steingold, did not conduct the entire entrapment hearing, Moss was still represented by Lisa Dwyer in those instances without Moss's objection. *See, e.g., United States v. Dykes*, 460 F. 2d 324, 325 (9th Cir. 1972) (defendant was not deprived of effective representation of counsel because substitute defense attorney was present during jury instructions and defendant did not object to substitute attorney's presence and participation).[6] Ultimately, an "attorney's failure must be complete" rather than failing to act "at specific points," so it cannot be said that Steingold and Dwyer failed to meaningfully challenge the prosecution's case through their actions. *Bell*, 535 U.S. at 697.

But Moss still argues that the prosecution's case was not meaningfully tested at *trial* because Steingold "waived his opening and closing arguments, failed to subpoena, interview, or produce any witnesses, and

[6] As noted *supra* at p.9 n.3, any choice-of-counsel challenge to Ms. Dwyer's representation of Moss during this litigation is not at issue in this appeal.

did not cross-examine or raise objections to one of the government's two witnesses." CA6 R. 29, Corr. Appellee Br., at 38. The Warden responds that Steingold only acted in a limited capacity during trial because the trial court had already denied the motion to dismiss based on entrapment, and Steingold strategically focused on its appeal to the Michigan appellate courts—Moss's only available recourse at that time.

We agree with the Warden. An artificial distinction between Steingold's pre-trial and trial actions overlooks his strategic focus on an entrapment defense. After the court denied the entrapment motion, Steingold chose to focus on the appeal of its denial rather than conduct a protracted trial. The stipulated nature of the bench trial and the lack of further investigation, examination, or cross-examination of witnesses would not have happened but for this strategy crafted in the earlier stages of the litigation. *See 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*") (emphasis added). Steingold's focus on this defense confirms his strategic perspective of the limited value of trial, but it does not demonstrate that he never meaningfully challenged the prosecution's case.

Moss advances one last reason that *Cronic* should govern: even if Steingold's trial behavior was a strategic choice, his inaction at trial was "inexcusable" because Moss had an "almost certainly" viable defense left. CA6 R. 29, Corr. Appellee Br., at 40. Moss argues that he could have testified at trial to challenge his

intent to possess the cocaine or his knowledge of it, leaving his testimony subject to a credibility assessment, or that Steingold could have argued for the application of a lesser offense. In support, Moss points to *Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984), a case in which trial counsel refused to participate during the trial based on his belief that his participation would render his pretrial motions, the denial of which he hoped to appeal, harmless error. 744 F.2d at 1249. Yet Martin's counsel was aware that the only direct evidence against Martin was the testimony of his stepdaughters. The court assessed that Martin was willing to testify before the jury—entitled to make its own credibility determination—that the girls were encouraged to falsify the incident. *Id.* at 1250. Thus, the court held that the counsel's "strategic reasoning, while superficially persuasive," was an "unreasonable tactic since the attorney was aware of a strong defense that he could present without compromising his earlier motions." *Id.*

Unlike *Martin*, Steingold's approach at trial did not deprive Moss of the opportunity to present a defense because no defense was viable or available to him. Unlike the sole direct evidence confronting the defendant in *Martin*, stipulated evidence at Moss's trial included video and audio recordings of his meetings and telephone conversations with Diego, the informant; his own testimony delivered at the entrapment hearing; and witness testimony of the transaction that occurred in the Home Depot parking lot. *People v. Moss*, No. 319954, 2015 WL 3604582, at *1 (Mich. Ct. App. June 9, 2015). Further, the credibility of Moss's testimony at trial would not have been assessed by a jury, like in *Martin*, because Moss

had a bench trial. So the same judge who heard Moss's testimony at the entrapment hearing and still denied the motion would assess his credibility again at trial. Additionally, Moss has not established that he wanted to testify but Steingold prevented him from doing so, nor has he provided evidence showing that Steingold could have argued for a lesser offense.

*Strickland*, not *Cronic*, governs Moss's ineffective assistance claims. The state court's application of this clearly established governing law to deny Moss's claims was reasonable and subject to fair-minded disagreement, so AEDPA deference applies. And in this case, the state court's conclusion that Moss failed to establish the prejudice prong of *Strickland* on his IATC claim is dispositive. *See Dekeyzer v. Harry*, 603 F. App'x 399, 404 (6th Cir. 2015) ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.") (quoting *Strickland*, 466 U.S. at 670). Moss does not argue nor establish that Steingold's behavior prejudiced the outcome of Moss's case. *See Williams v. Burt*, 949 F.3d 966, 975 (6th Cir. 2020) (citing *Strickland*, 466 U.S. at 687) (noting the requirement of a "cause-and-effect relationship between the deficient performance and any prejudice suffered by the defendant."). Fairminded jurists would therefore not disagree that Moss failed to establish ineffective assistance of trial counsel under *Strickland*.

Without a meritorious ineffective assistance of trial counsel claim, the state court reasonably concluded that Moss failed to show cause excusing his procedural default. *See, e.g., Boyd v. Yukins*, 99 F. App'x 699, 705 (6th Cir. 2004) (failure of appellate

counsel to raise unmeritorious ineffective assistance of trial claim cannot excuse procedural default); *see also Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) ("[A]ppellate counsel cannot be found to be ineffective for 'failure to raise an issue that lacks merit.'") (quoting *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001)). There is not a reasonable probability that including an unmeritorious *Cronic* claim would have changed the result of Moss's appeal. *See Hale v. Burt*, 645 F. App'x 409, 415 n.1 (6th Cir. 2016) ("A counsel's 'failure to raise an issue on appeal' does not amount to ineffective assistance unless 'there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.'" (citing *McFarland*, 356 F.3d at 699)). That decision was not contrary to nor an unreasonable application of *Strickland*.

Because the state court's denial of Moss's ineffective assistance claims under *Strickland* was not contrary to nor an unreasonable application of clearly established federal law, we defer to its decision that Moss is not entitled to habeas relief. The district court erred in concluding otherwise.

## IV.

For the foregoing reasons, we reverse and remand with instructions to deny the petition with prejudice.

## DISSENT

COLE, Circuit Judge, dissenting. Steven Moss was sentenced to 15–45 years in prison after an entrapment hearing for which his attorney, David Steingold, arrived entirely unprepared, and a bench trial that lasted only 20 minutes. At every step along the way, from his failure to investigate and interview witnesses to his failure to meaningfully test the prosecution's case, Steingold failed to conduct himself in the manner consistent with effective representation. Because Moss was constructively denied the assistance of counsel in the critical pre-trial and trial phases of his criminal proceedings, I would grant Moss's habeas petition. For that reason, I respectfully dissent.

## I. BACKGROUND

### A. State Proceedings

#### *1. Initial Proceedings*

Moss was convicted of possession with intent to deliver 10 or more kilograms of cocaine and possession of a firearm during the commission of a felony. *People v. Moss*, No. 319954, 2015 WL 3604582, at *1 (Mich. Ct. App. June 9, 2015) (per curiam); Mich. Comp. Laws §§ 333.7401(2)(a)(i) (drug charge), 750.227b (firearm charge). He was arrested after purchasing 10 kilograms of cocaine from a Drug Enforcement Agency

("DEA") informant, known as "Diego." *Moss*, 2015 WL 3604582 at *1–3.

Moss's first attorney, Paul Curtis, who was disbarred during the pendency of Moss's proceedings, filed a "Motion to Conduct an Entrapment Hearing." (Pet., R. 1, PageID 5.) The entrapment defense rested on the premise that Moss's friend Michael Bennett introduced Moss to Diego and pressured Moss into giving Diego money for drug trafficking. *Moss*, 2015 WL 3604582, at *2. Ten days before the entrapment hearing, Steingold began representing Moss. As of the commencement of his representation, Steingold knew that an entrapment hearing was scheduled and that the trial date had been set.

Steingold's deficient representation of Moss started the moment he entered the courtroom. He began by admitting that he was not prepared to conduct the entrapment hearing because "[t]here is a lack of investigation that was done." (Evidentiary Hr'g Tr., R. 5-2, PageID 103.) He asked the court for an additional adjournment because there were "a number of questions that remain[ed] unanswered" after he met with Moss immediately preceding the hearing, and that the one known witness was not present. (*Id.* at PageID 103–04.) Having previously granted Steingold more time, the court denied the request. When Steingold insisted that his lack of preparation was a result of difficulty accessing discovery due to a protection order, and that he "didn't know what [he was] walking into," the court responded that he "shouldn't have taken the case." (*Id.* at PageID 105–06.)

So, despite believing entrapment was Moss's best and only defense, Steingold's hearing preparation consisted solely of one conversation with Moss immediately prior to the start of the hearing during which time he convinced Moss to waive his right to a jury trial and proceed with a bench trial instead. In the ten days before the hearing, Steingold did not speak with Moss until they were both at the courthouse before the hearing, did not conduct any investigation, did not interview any witnesses, did not speak with Moss's previous attorneys, and did not conduct pertinent legal research. All of this substantiates Steingold's own admission that he was not prepared for the hearing.

The hearing nonetheless proceeded. Moss first testified on direct and cross-examination. After Moss's testimony concluded the next day, the judge asked if Steingold had additional witnesses. Steingold again asked for a continuance because there were four other witnesses he could call from "those people referred to in . . . my client's direct and cross-examination," but that he needed to subpoena them to attend the hearing. (Evidentiary Hr'g Tr., R. 5-3, PageID 340.) The judge was incredulous: "[W]hat do you mean subpoena them? If you were intending to call them as witnesses, why didn't you subpoena them already?" (*Id.*) Further interrogating Steingold's preparation, the judge reminded Steingold that he had only mentioned one individual the day before, whereas he now mentioned three additional individuals. In response to the judge's inquiry as to "when . . . [he] discover[ed] all of these witnesses[,]" Steingold responded, "Yesterday during the testimony, your Honor." (*Id.* at PageID 342, 346.) To be precise,

Steingold discovered the witnesses during the government's cross-examination of Moss.

Recognizing that Steingold had not prepared for the hearing, nor had he apparently discussed Moss's anticipated testimony in any detail before Moss took the stand, the judge questioned Steingold regarding a potential attempt "to put an ineffective assistance of counsel with respect to [his] conduct of this on the Record also for appellate purposes[.]" (*Id.* at PageID 342.) Explaining her disbelief, she continued: "Those names were brought up to this court with his first attorney[.] With respect to the fact that they were witnesses to conversations between the defendant and Mr. Bennett. That, I remember, specifically from back then. So, evidently those names were known from the inception." (*Id.* at PageID 348.) Speaking directly to Steingold, she finished, "And now, here we are, they're news to you. How is that possible, I guess, is my first question?" (*Id.*) The judge made clear that Moss's first attorney "didn't get those names out of a hat," and instead "must have gotten them from [Moss]," to which Steingold's only response was that he had not spoken with Moss enough to obtain that information. (*Id.* at PageID 348–49.) Beyond Steingold's complete failure to investigate the case and call witnesses whose names would have been known from even a cursory investigation, he also failed to subpoena the one witness he did know about prior to the hearing. And after asking the court for a continuance twice specifically to have that witness testify, Steingold told the court that he "determined not to call him," without further explanation. (*Id.* at PageID 351.) By contrast, the government called five witnesses during the hearing.

The trial judge denied Moss's motion to dismiss on November 1, finding that Moss had not been entrapped. After the ruling, Steingold eventually moved to reinstate the jury trial he had previously counseled Moss to waive. But when the court denied the request, Steingold instead went to the opposite extreme: agreeing to a stipulated bench trial that conceded Moss's guilt. When the court then indicated that trial would begin immediately, on November 1, Steingold responded that he "frankly was not prepared to go to trial today," even though he had been told on September 6 that trial was scheduled for September 17. (*Id.* at PageID 657.) The judge nevertheless continued trial again until November 18.

Despite the continuance, Steingold remained as unprepared for trial as he had been for the entrapment hearing. The trial took only 20 minutes. During those 20 minutes, Steingold constructively abandoned Moss. He waived both his opening statement and closing argument, and called no witnesses to the stand. He also stipulated to several incriminating facts, including that Moss had purchased 10 kilograms of cocaine, that such amount was inconsistent with personal drug use, as well as to many other facts and exhibits from the entrapment hearing, essentially conceding Moss's guilt. Moss's own version of the events was not mentioned, and he did not take the stand.

At trial, the government presented two witnesses. Steingold did not cross-examine the first witness, nor did he raise any objections during the government's direct examination. Steingold cross-examined the government's second witness, Agent John Hill. But

Steingold questioned Hill only as to his experience and qualifications to serve as an expert witness, and ultimately argued that Hill's testimony was unnecessary because Steingold had already stipulated to the facts that Hill was called to prove. Thus, Steingold's sole action during the 20-minute trial was to concede the central point of guilt—that Moss had purchased the alleged quantity of cocaine with intent to sell it. Even though the government provided closing argument, Steingold did not, simply saying "I have nothing, your Honor." (*Id.* at PageID 694.)

The court found Moss guilty. Steingold did not appear at sentencing, and instead Lisa Dwyer—an attorney who at the time did not work at Steingold's firm, and whom Moss never hired but had been present at portions of the entrapment hearing—appeared in his place. Dwyer spoke only to request the court reduce Moss's bond, which the court denied. The court ultimately sentenced Moss to 15-45 years of imprisonment.

*2. State Direct Appeal*

Moss, acting pro se, appealed his conviction to the Michigan Court of Appeals, though he later hired Suzanna Kostovski as appellate counsel. The court granted his motion to remand so that he could file a motion for a new trial based on ineffective assistance of trial counsel ("IATC"). On remand, the trial court conducted a *Ginther* evidentiary hearing to document Moss's ineffective assistance of counsel claim pursuant to *People v. Ginther*, 212 N.W.2d 922 (Mich. 1973).

Both Moss and Steingold testified at the *Ginther* hearing. In addition to indicating his awareness of the trial date, Steingold said that he moved for a stipulated fact bench trial to expedite the entrapment-defense appeal. He maintained that Moss had asked him, after the entrapment hearing, to seek a jury trial. Moss's appellate counsel, Kostavski, asked why Steingold had not filed an interlocutory appeal in light of Steingold's continued belief in Moss's innocence and knowledge that Moss would be convicted after the stipulated bench trial. Steingold blamed this on the fact that he was not paid his entire fee.

Moss then took the stand. He testified that when he first retained Steingold, he told Steingold about the hearing and trial dates, and thought that Steingold did not seem "concerned that . . . he didn't have enough time or it's such short notice," claiming that Steingold "was pretty much gung-ho with it at first." (*Ginther* Hr'g Tr., R. 5-9, PageID 810.) But that quickly changed. Even though Moss attempted to schedule meetings with Steingold in the short time between the start of the representation and the entrapment hearing, and then before the trial, they never met outside of the courthouse. As a result, Moss lacked information about, and was unprepared for, the entrapment hearing: He did not know that he would have to testify as to his actions and involvement in the underlying charges until the day of the hearing itself. Moss met with Steingold once "about 30 minutes before" the entrapment hearing began, at which point Steingold presented "a thick packet of maybe 40 or 50 pages that had questions that he wanted me [(Moss)] to answer . . . and he told me make sure you answer

these right because we're going to be calling you onto the stand." (*Id.* at PageID 818.)

Moss also discussed how the jury waiver came about. Before the entrapment hearing, the trial judge indicated that she had a jury waiting, presumably because trial was set to start the next day. The court took a short recess, during which, according to Moss, "Steingold pulled [Moss] into the hall" and explained that "Judge Anderson is going to rush [them,]" so Steingold was "going to get a bench trial" to "buy [him] more time because [he was] not ready at th[at] time" for trial. (*Id.* at PageID 812.) When asked whether he understood the consequences of waiving a jury trial—including that the same judge from the entrapment hearing would conduct the bench trial—Moss definitively responded, "No. [Steingold] was just saying that this would be the best course of action because, other than that, he wasn't prepared." (*Id.* at PageID 812–13.) Moss further testified that had he understood this point, he would not have waived a jury trial. But once Moss "found out" that "the judge [who] was going to hear [him] admit the things [he] admitted during the entrapment hearing" would "be the same judge who would decide [his] guilt or innocence," he wanted a jury trial. (*Id.* at PageID 819–20.)

Additionally, Moss disputed why Steingold asked the court to reinstate a jury trial, testifying that it was Steingold who suggested the change. Moss stated that, after the trial judge denied the entrapment defense, Steingold told him they "better have a jury trial[.]" (*Id.* at PageID 813.) As to the stipulations entered during the bench trial, Moss said that he never discussed the trial with Steingold and so did not know about or

understand the stipulations. Moss also testified that his previous attorney had spoken with Moss's witnesses and that Moss explicitly told Steingold about the witnesses, though Steingold never spoke with them.

Last, Moss asserted that Steingold had spoken with another attorney, and that Steingold told Moss both attorneys agreed that "the best way to do it would be an interlocutory appeal." (*Id.* at PageID 816.) But Steingold indicated he would not pursue this course of action unless he received full payment for his services.

After the *Ginther* hearing, the trial court denied Moss's motion for a new trial. Moss appealed, and the Michigan Court of Appeals affirmed Moss's conviction and sentence. On December 22, 2015, the Michigan Supreme Court denied Moss leave to appeal his conviction. Moss did not petition for a writ of certiorari at the Supreme Court, and so his conviction became final on March 21, 2016, 90 days after the Michigan Supreme Court's denial of leave to appeal. *See* Sup. Ct. R. 13(1).

*3. State Collateral Review*

A year and a day later, on March 22, 2017, Moss filed a motion for relief from judgment in a state trial court, thereby pursuing state collateral relief. He argued that he was entitled to a new trial because Steingold had constructively abandoned him, and so provided ineffective assistance of counsel under *United States v. Cronic*, 466 U.S. 648 (1984). The court denied his motion. Moss sought, but was denied, leave

to appeal to both the Michigan Court of Appeals and the Michigan Supreme Court.

### B. Federal Proceedings

In May 2018, while his state collateral appeal was pending, Moss filed a petition for a writ of habeas corpus in the Eastern District of Michigan. Despite finding that Moss was entitled to equitable tolling for his otherwise untimely petition, the district court denied the habeas petition on the merits. Moss filed a motion for reconsideration. The district court partially reversed its decision, conditionally granting Moss's habeas petition on two grounds—IATC under *Cronic* during both the pre-trial and trial phases of his criminal proceedings. Moss was released on bond on January 24, 2022. Miniard, the warden at the prison where Moss was incarcerated, appeals the district court's grant of Moss's habeas petition.

## II. ANALYSIS

Miniard appeals the district court's decision on three grounds: (1) that the petition was untimely and is not entitled to equitable tolling; (2) that the claims were procedurally defaulted and cannot be excused; and (3) that both claims fail on the merits. I take each in turn.

### A. Timeliness

AEDPA contains a one-year statute of limitations, which runs from the latest of four possible dates. 28 U.S.C. § 2244(d)(1). AEDPA also has a tolling provision, such that "[t]he time during which a

properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." *Id.* § 2244(d)(2); *see also Holbrook v. Curtin*, 833 F.3d 612, 615 (6th Cir. 2016). The statute of limitations is subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Where, as here, the facts are not disputed, we review a district court's grant of equitable tolling to excuse the petition's untimeliness de novo. *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010).

I agree with the majority that Moss's federal habeas petition was untimely. But we may nevertheless consider untimely petitions in certain circumstances, such as where the AEDPA statute of limitations is subject to equitable tolling. *Holland*, 560 U.S. at 649. And as I diverge from the majority on the merits of Moss's petition, I necessarily diverge as to the importance of the tolling issue.

Equitable tolling applies if Moss can show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* (quotation marks omitted); *Hall v. Lebanon Corr. Inst.*, 662 F.3d 745, 749–50 (6th Cir. 2011). Equitable tolling is applied "sparingly." *Robertson*, 624 F.3d at 784.

Moss undeniably meets the first prong, as he has been "diligently" pursuing his rights on appeal. He has taken every appeal available to him, including all direct appeals by right, state post-conviction review, and federal post-conviction review. In all the filings involved in these various appeals, he has not missed a

single additional deadline. And in the one instance he was untimely—his state collateral relief petition at issue for the tolling argument—he was only one day late. Miniard's sole argument to the contrary is that "Moss could have avoided the entire question of timeliness by being more diligent in the state courts, specifically by filing his motion for relief from judgment sooner." (Reply Br. 7.) The fact that "filing even one day sooner would have made the difference . . . exemplifies a lack of diligence." (*Id.*) But this argument fails to take into account that we apply equitable tolling only when the filing at issue was untimely. If Miniard's argument were meritorious, the equitable tolling doctrine would be rendered useless.

Finding that Moss meets the first of the two equitable tolling requirements, I move to consider whether an "extraordinary circumstance" excuses the untimely filing. Moss argues that this court's "confusing and contradictory legal landscape" regarding the statute of limitations calculations "created an extraordinary circumstance." (Appellee Br. 27.) Specifically, Moss highlights two points of confusion: (1) that this court sometimes ends the limitations period on the anniversary of the date of finality and at other times on the anniversary of the day after the date of finality, and (2) leap-year ambiguities in our caselaw.

Our caselaw regarding the statute of limitations computation is not a model of clarity. In *Bronaugh v. Ohio*, we stated that the limitations period ended on the anniversary of the date of finality. 235 F.3d 280, 285 (6th Cir. 2000). But several of our panels have misapplied this statute of limitations standard,

instead finding that the statute of limitations ends on the anniversary of the day after the date of finality, thereby extending the statute of limitations by a single day—precisely the amount of time at issue here. *See, e.g., Liggins v. Vashaw*, No. 20-1037, 2020 WL 3866872, at *1 (6th Cir. Apr. 29, 2020), *cert denied*, 141 S. Ct. 1274 (2021), *reh'g denied*, 141 S. Ct. 2750 (2021) (finding the statute of limitations ended on May 27, 2000, when the conviction became final on May 26, 1999); *Carlyle v. Campbell*, No. 18-1631, 2018 WL 11301139, at *1 (6th Cir. Sept. 26, 2018) (finding the statute of limitations ended on August 23, 2012, when the conviction became final on August 22, 2011); *Kirchoff v. Warden, Chillicothe Corr. Inst.*, No. 16-4186, 2017 WL 4863119, at *2 (6th Cir. May 25, 2017) (finding the statute of limitations ended on November 5, 2012, when the conviction became final on November 4, 2011); *Williams v. Wilson*, 149 F. App'x 342, 345 (6th Cir. 2005) (finding the statute of limitations ended on February 11, 2002, when the conviction became final on February 10, 2001).

Not only do various cases contradict each other, but we also calculated timeliness in two different ways in *Bronaugh* itself. There, the direct appeal's date of finality was September 9, 1996. 235 F.3d at 284. Properly applying the rule we had announced earlier in the opinion, we began counting the day after finality as day 1, such that "[a] total of 209 days passed from September 10, 1996 to April 7, 1997," at which point Bronaugh filed an application to reopen his direct appeal and tolled the statute of limitations. *Id.* at 286. The state supreme court dismissed the appeal on January 28, 1998, and so "[o]n January 29, 1998, the one-year period of limitations began to run again." *Id.*

Bronaugh filed his federal habeas petition on June 30, 1998. *Id.* We stated that "a total of 153 days passed," and then combining the 209 days and 153 days, found that only 362 days had passed and the petition was timely. *Id.* at 286–87. We did not, however, calculate the 153 days the same way we did the 209 days. Following the opinion's earlier pronouncement, we would begin counting the day after finality, which would be January 29— but 153 days from January 29 is actually July 1, not June 30 as we found.

In the cases cited in this discussion, the one-day difference between the two approaches was not dispositive because there was more than a one-day difference between the expiration of the statute of limitations and the filing of the habeas petition. *See, e.g., id.* at 286 (calculating that the petition was filed three days prior to the expiration of the statute of limitations, even with the miscalculation); *Liggins*, 2020 WL 3866872, at *1 (petition filed 21 years after the date of finality); *Kirchoff*, 2017 WL 4863119, at *2 (petition filed roughly five months late). So this court has not faced a case where there is a one-day margin of error in calculating the statute of limitations the way there is in the case before us now.

To further complicate the landscape, we have inconsistently applied the calculation in cases where the statute of limitations inquiry falls on a leap year. *See Fortson v. Carter*, 79 F. App'x 121, 123 (6th Cir. 2003) ("Fortson arguably had one additional day . . . in which to file his petition because 2000 was a leap year."); *see also Brown v. Brewer*, No. 2:15-cv-10638, 2016 WL 28988, at *3 (E.D. Mich. Jan 4, 2016) (providing that the limitations period had 366 days

rather than 365 days because of the leap year); *Leon v. Parris*, No. 3:15-cv-0094, 2015 WL 4394327, at *2 n.2 (M.D. Tenn. July 16, 2015) (same).

Miniard argues that neither the inconsistent application of the anniversary method nor the leap-year ambiguity presents an extraordinary circumstance warranting the application of equitable tolling. What this untimeliness comes down to, Miniard claims, is attorney error in miscalculating the deadline, and equitable tolling is not a proper remedy for "a garden variety claim of excusable neglect such as simple miscalculation that leads a lawyer to miss a filing deadline[.]" *Holland*, 560 U.S. at 651–52 (cleaned up).

But our confused caselaw is an extraordinary circumstance, and Moss's counsel's reliance on the unclear landscape resulted in only a one-day delay. Moss therefore satisfies both factors and I would hold that equitable tolling applies to excuse Moss's untimely petition.

Having cleared the first of Moss's two procedural hurdles in the case, I move on to procedural default.

## B. Procedural Default

Procedural default is a "critical failure" that occurs when the petitioner "fail[s] to comply with state procedural law." *Gibbs v. Huss*, 12 F.4th 544, 550 (6th Cir. 2021) (quoting *Trest v. Cain*, 522 U.S. 87, 89 (1997)). It occurs when:

> (1) the petitioner failed to comply with a state procedural rule that is applicable to

> the petitioner's claim; (2) the state courts actually enforced the procedural rule in the petitioner's case; and (3) the procedural forfeiture is an 'adequate and independent' state ground foreclosing review of a federal constitutional claim.

*Willis v. Smith*, 351 F.3d 741, 744 (6th Cir. 2003) (quoting *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986)).

Michigan Court Rule 6.508(D)(3) requires a petitioner to raise an IATC claim on direct appeal. Both parties agree that Moss procedurally defaulted his IATC claims because he raised an IATC claim under *Strickland* and not under *Cronic*. *See Amos v. Renico*, 683 F.3d 720, 733 (6th Cir. 2012) (holding that Michigan Court Rule 6.508(D)(3) "is an independent and adequate state ground sufficient for procedural default that required [petitioner] to raise these claims [of IATC] during his direct appeal").

But we can review a procedurally defaulted claim if "the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law[.]" *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Sutton v. Carpenter*, 745 F.3d 787, 789–90 (6th Cir. 2014). The ineffective assistance of appellate counsel in failing to raise the defaulted issue is a recognized "cause" that can excuse procedural default.[1] *Edwards v. Carpenter*, 529 U.S.

[1] "A separate finding of actual prejudice beyond *Strickland* prejudice is not required." *Avery v. Wainwright*, No. 20-3530, 2022 WL 1498431, at *12 (6th Cir. May 12, 2022) (first citing

446, 451–52 (2000).[2] Therefore, if Moss can show that he received ineffective assistance of appellate counsel because his appellate counsel, Kostovski, failed to raise the IATC *Cronic* claims, then Moss's procedural default is excused. *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000). We review the district court's decision to excuse Moss's procedural default de novo. *See Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir. 2009); *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004).

As a threshold matter, the Sixth Amendment right to counsel guarantees Moss the effective assistance of counsel on his first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396– 97 (1985). Ineffective assistance of appellate counsel is reviewed under the familiar *Strickland* standard: whether appellate counsel (1) performed deficiently such that (2) "there is a reasonable probability that, but for counsel's" deficient performance, "the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *see also Whiting v. Burt*, 395 F.3d 602, 617 (6th Cir. 2005) (applying the *Strickland* standard to a claim of ineffective assistance of appellate counsel).

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*Joseph*, 469 F.3d at 432–63; then citing *Hall v. Vasbinder*, 563 F.3d 222, 237 (6th Cir. 2009); and then citing *Ege v. Yukins*, 485 F.3d 364, 379 (6th Cir. 2007)).

[2] Moss could not have procedurally defaulted his ineffective assistance of appellate counsel claim because it could not have been raised on direct appeal, as state post-conviction review was the first opportunity to review appellate counsel's performance. *See Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010).

Finally, while typically AEDPA only authorizes habeas relief where "the state court's decision was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," 28 U.S.C.§ 2254(d)(1), a lower standard applies to analyzing an ineffective assistance of appellate counsel claim for purposes of establishing cause to excuse a procedural default, *Joseph v. Coyle*, 469 F.3d 441, 459 (6th Cir. 2006). Rather than meeting the AEDPA standard, or reviewing whether the state court's decision regarding the procedural default was reasonable, we instead—solely for the purposes of establishing "cause" under *Coleman*—determine whether there was an independent Sixth Amendment violation under *Strickland*. *See id*. That means that our "level of scrutiny of the ineffective assistance of counsel claim is the same as would be applied in direct review," rather than under AEDPA deference. (Reconsideration Op. and Order, R. 33, PageID 1835 (citing *Joseph*, 469 F.3d at 459).)

Appellate counsel performs deficiently when they fail "to find arguable issues to appeal—that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them." *Smith v. Robbins*, 528 U.S. 259, 285 (2000). This occurs when the issue appellate counsel fails to raise is "clearly stronger than issues that counsel did present." *Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003) (quoting *Smith*, 528 U.S. at 289); *see also Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002).

Prejudice results when there is a reasonable probability that if the unraised claim had been properly raised, petitioner would have succeeded in

court. *See Howard v. Bouchard*, 405 F.3d 459, 485 (6th Cir. 2005). "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome" of the case; petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Joseph, 469 F.3d at 459–60 (quotation marks and citations omitted). When appellate counsel fails to raise a claim that is a "dead-bang winner" and would have changed the result of the appeal, they have provided ineffective assistance of counsel. *See Meade v. Lavigne*, 265 F. Supp. 2d 849, 870 (E.D. Mich. 2003), *aff'd*, 104 F. App'x 461 (6th Cir. 2004).

I would excuse Moss's procedural default because the unraised *Cronic* claims were "clearly stronger" than the *Strickland* claims that Kostovski raised on appeal. "While both *Cronic* and *Strickland* concern Sixth Amendment violations, they are distinct legal claims and the difference between the two 'is not of degree but of kind.'" *Fusi v. O'Brien*, 621 F.3d 1, 6 (1st Cir. 2010) (citation omitted). *Strickland* carries the traditional two-pronged analysis of deficient performance and prejudice, and it applies to specific alleged errors committed throughout counsel's representation. *Strickland*, 466 U.S. at 687, 694. *Cronic*, on the other hand, examines the actual or constructive absence of counsel "at a critical stage" of one's criminal proceeding.[3] *Cronic*, 466 U.S. at 659; *see also Van v. Jones*, 475 F.3d 292, 311–312 (6th Cir.

[3] Both the pre-trial and trial phases are deemed critical stages to which *Cronic* applies. *See Cronic*, 466 U.S. at 659 (trial phase); *Mitchell v. Mason*, 325 F.3d 732, 741–42 (6th Cir. 2003) (pre-trial phase).

2007). Rather than examining specific points of allegedly ineffective representation, under *Cronic* we must consider "counsel's overall representation of" the client during the critical stage, "as opposed to any specific error or omission counsel may have made." *Cronic*, 466 U.S. at 657 n.20. Unlike in *Strickland*, courts do not conduct a prejudice analysis when evaluating *Cronic* claims, because *Cronic* involves "circumstances 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.'" *Bell v. Cone*, 535 U.S. 685, 695, 697 (2002) (quoting *Cronic*, 466 U.S. at 658–69).

There are three circumstances in which an IATC claim is analyzed under *Cronic* instead of *Strickland*: (1) where there is "the complete denial of counsel;" (2) where defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate[.]" *Cronic*, 466 U.S. at 659–60.

Here, the unraised *Cronic* claims were "clearly stronger" than the *Strickland* claims. As the district court correctly explained, both IATC claims were "clearly dead-bang winners," because Steingold's "errors were obvious from the record and leaped out upon even a casual reading of the transcript." (Reconsideration Op. and Order, R. 33, PageID 1836 (citing *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir. 1987)).) But rather than illustrate how Steingold constructively abandoned Moss during both critical stages, Kostovski "neglected the central issue in [Moss's] case" by identifying two specific instances

of ineffectiveness—waiving Moss's right to a jury trial and stipulating to the admission of the evidence from the entrapment hearing at the bench trial. *See Joseph*, 469 F.3d at 460 (quoting *Smith v. Dretke*, 417 F.3d 438, 442–43 (5th Cir. 2005)). These claims sound in *Strickland* instead of *Cronic* and fail to account for the various other clear defects in Steingold's representation.

As I discuss below, I agree with the district court that Moss's ineffective assistance of appellate counsel claim is meritorious and excuses the procedural default. Kostovski performed deficiently in failing to raise a *Cronic* claim "considering the facts she was clearly aware of when she reviewed the trial court record." (Reconsideration Op. and Order, R. 33, PageID 1837.) Since the *Cronic* claims are "clearly stronger" than the *Strickland* "issues that counsel did present," this deficiency was prejudicial. Caver, 349 F.3d at 348 (6th Cir. 2003) (quoting *Smith*, 528 U.S. at 289).

Having cleared the second, and last, procedural hurdle in the case, I now proceed to the merits of the underlying claim, which prove that Moss's *Cronic* claims were meritorious even under AEDPA's heightened deference.

## C. Merits

### *1. Standard of Review*

We review a district court's decision regarding a writ of habeas corpus de novo. *Foust v. Houk*, 655 F.3d 524, 533 (6th Cir. 2011). We also review the district

court's determination that counsel was constitutionally ineffective de novo. *Burton v. Renico*, 391 F.3d 764, 770 (6th Cir. 2004). But under AEDPA, an additional deferential standard applies "with respect to any claim that was adjudicated on the merits in State court proceedings[.]" 28 U.S.C. § 2254(d). When there is an adjudication on the merits, we can only grant habeas relief if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*; *see also Chase v. MaCauley*, 971 F.3d 582, 590 (6th Cir. 2020). Our question on habeas review "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

To determine whether the court adjudicated the issues on the merits, we review the decision from "the last state court to issue a reasoned opinion on the issue[.]" *Hoffner v. Bradshaw*, 622 F.3d 487, 505 (6th Cir. 2010) (quoting *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005)). Here, the last state court to issue a reasoned opinion was the Oakland County Circuit Court opinion denying the motion for relief from judgment after the *Ginther* hearing, because both the Michigan Court of Appeals and Michigan Supreme Court denied Moss's motion for leave to appeal the decision in unexplained one-sentence orders. These one-sentence, unexplained orders cannot be considered reasoned decisions because, put simply,

they contain no reasoning. *See Ylst v. Nunnemaker*, 501 U.S. 797, 804 ("The essence of unexplained orders is that they say nothing."). But the reasoned opinion from the trial court adjudicated the claims on the merits. Though it ultimately applied *Strickland* to the two IATC claims, it discussed the differences between *Cronic* and *Strickland* and concluded that "the record in this case does not reflect a 'complete' failure of counsel." (Op. and Order, R. 5-11, PageID 914.) This is a decision on the merits, so the state court's decision is entitled to AEDPA deference unless its decision is contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established law if "the state court applies a rule that contradicts the governing law set forth" in Supreme Court caselaw or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Court's] precedent." *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). And while "courts of appeals' decisions do not establish new rules, the court may look to such decisions to inform its analysis of whether a legal principle had been clearly established by the Supreme Court." *Avery v. Prelesnik*, 548 F.3d 434, 436–37 (6th Cir. 2008).

*2. Pre-Trial IATC Claim*

As the Supreme Court has unequivocally stated, the pre-trial period is "perhaps the most critical period of the proceedings . . . when consultation, thorough-going investigation and preparation [are] vitally

important" to aid defendants. *Powell v. Alabama*, 287 U.S. 45, 57 (1932). "The pre-trial period constitutes a 'critical period' because it encompasses counsel's constitutionally imposed duty to investigate the case," and without meaningful "pre-trial consultation with the defendant, trial counsel cannot fulfill his or her duty to investigate." *Mitchell v. Mason*, 325 F.3d 732, 743 (6th Cir. 2003) (citing *Strickland*, 466 U.S. at 691). So when counsel does not investigate the case or does not consult with the client before trial, counsel "cease[s] functioning as counsel under the Sixth Amendment," and they are ineffective under *Cronic*. *Phillips v. White*, 851 F.3d 567, 579–80 (6th Cir. 2017).

Steingold constructively abandoned Moss during the pre-trial phase and so provided ineffective assistance of counsel under *Cronic*. Steingold entirely failed to meet his "constitutionally imposed duty to investigate the case." *Mitchell*, 325 F.3d at 743. He did not meet with Moss until the day of the entrapment hearing despite Moss's numerous attempts to schedule a meeting. When they finally did meet, it was only for a brief period immediately before the entrapment hearing.

Steingold did not conduct any investigation prior to the day of the hearing, did not speak to Moss's previous attorneys, did not attempt to find previously known witnesses, and did not subpoena the one witness he was aware of. It is no wonder that Steingold still had "a number of questions that remain unanswered" when the hearing began. (Evidentiary Hr'g Tr., R. 5-2, PageID 104.) The fact that Steingold only learned of three witnesses during the government's cross-examination of Moss—witnesses

that Moss and Moss's previous attorney knew about and would thus be easily uncovered during the pre-hearing investigation—shows precisely what Steingold did to represent Moss prior to the day of the entrapment hearing: virtually nothing. Indeed, Steingold himself admitted to the court that he did not conduct appropriate investigation for the entrapment hearing.

On top of Steingold's failure to advance Moss's defense before the entrapment hearing, he continued to do nothing—no investigation, no additional meetings with Moss—before the trial, a trial that he requested a continuance for because he was unprepared and needed additional time.

All Steingold did in preparation for Moss's case was meet with Moss once before the entrapment hearing. But even the length of this meeting is disputed. While Steingold claims he spent two hours with Moss, Moss indicates that they spent only about 30 minutes together. Regardless of the length, during this meeting Steingold gave Moss 40 to 50 pages with questions for the entrapment hearing, and rather than appropriately prepare Moss to testify for what Steingold believed was Moss's best defense, Steingold simply told Moss that he needed to answer the questions properly while on the stand.

Steingold therefore constructively abandoned Moss during the pre-trial phase. The state court erred when, rather than applying *Cronic* to Steingold's wholesale denial of effective counsel, it instead applied *Strickland*, examining only Steingold's decision not to interview witnesses before trial. In failing to apply the correct standard of this clearly established Supreme

Court precedent, the state court opinion is contrary to, or an unreasonable application of, clearly established law. *See Strickland*, 466 U.S. at 691 (stating that "[c]ounsel has a duty to make reasonable investigations"); *Mitchell*, 325 F.3d at 744 ("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.").

Both Miniard and the majority rely on *Maslonka v. Hoffner*, 900 F.3d 269, 279 (6th Cir. 2018), to argue that *Cronic* cannot apply to either of Moss's IATC claims. But *Cronic* does not require that counsel be "physically absent throughout an entire phase of the litigation or that a state actor prevented Moss's counsel from adequately representing him." (Maj. Op. 12.) "The deprivation can be literal, as when counsel fails to appear, or it can be constructive, as when counsel's performance is so defective that he may as well have been absent." *Phillips*, 851 F.3d at 580. While physically present during the pre-trial phase, Steingold's performance was so defective that he may as well have missed the entire proceeding.

The majority also argues that Moss's pre-trial claim is distinct from *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003), because the *Mitchell* court granted habeas relief on the defendant's *Cronic* claim where counsel only spoke with the defendant for six minutes before the trial and did not conduct any pre-trial investigation. But these are in fact nearly identical cases. Just as counsel did not conduct any pre-trial investigation in *Mitchell*, Steingold did not conduct

any pre-trial investigation for Moss. Regardless of how long Steingold spoke with Moss, it was clearly not a substantive conversation, as Steingold did not uncover witness names that would have been known from a perfunctory investigation or conversation with Moss. Speaking once with the client, whether for 30 minutes or two hours, without doing more at any point prior to the entrapment hearing and trial, constitutes constructive abandonment of a client during the critical pre-trial phase.

I would therefore conclude that the state court's decision is contrary to, or involved an unreasonable application of, clearly established law, and I would grant Moss's habeas motion on the pre-trial IATC claim.

*3. Trial IATC Claim*

Moss also argues that the state court should have applied *Cronic* to his trial IATC claim. Where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," the client has been constructively denied counsel. *Moss v. Hofbauer*, 286 F.3d 851, 860 (6th Cir. 2002) (quoting *Cronic*, 466 U.S. at 659).

Here, Steingold constructively abandoned Moss when he "entirely fail[ed]" to subject the government's case to meaningful adversarial testing during trial. *Id.* The bench trial lasted only 20 minutes. During those 20 minutes, Steingold waived his opening statement, did not put any witnesses on the stand, did not cross-examine one of the government's witness or object during the government's direct examination, and

waived his closing argument by saying "I have nothing, your Honor." (Bench Trial Tr., R. 5-6, PageID 694.) Steingold also stipulated to the main facts and elements of the offense, effectively conceding Moss's guilt.

It is true that Steingold did one thing at trial: he asked some questions of the government's second witness. A closer look at his examination of this witness, Hill, however, reveals that it was no examination at all because it did not subject the government's case to any meaningful adversarial testing. Hill was called as an expert to present evidence that the amount of cocaine at issue was inconsistent with personal use and instead indicated an intent to sell the drugs. But as Steingold insisted, the court did not need an expert to testify to these matters because Steingold had willingly stipulated to the amount of drugs Moss possessed and that the intent to sell that quantity of drugs was apparent. And Steingold only asked questions about Hill's qualifications as an expert. *Cronic* does not ask whether counsel took any action whatsoever. It asks whether counsel took action that "subject[s] the prosecution's case to *meaningful adversarial testing*." *Hofbauer*, 286 F.3d at 860 (emphasis added) (citing *Cronic*, 466 U.S. at 659). The few questions Steingold asked Hill during trial clearly did not test the government's case; it was a cross-examination in name only.

"We presume prejudice in this case because [Steingold's] performance amounted to nonperformance; he essentially ceded the [trial] to the [government.]" *Phillips*, 851 F.3d at 581. And

Steingold's insistence that the court continue the trial date so that he could properly prepare for the trial makes what happened—or did not happen—at trial all the more incredulous.

Miniard argues, and the majority agrees, that "Steingold only acted in a limited capacity during trial because the trial court had already denied the motion to dismiss based on entrapment, and Steingold strategically focused on its appeal to the Michigan appellate courts—Moss's only available recourse at that time." (Maj. Op. 13.) But there are several problems with this argument. For one, it ignores the fact that Steingold did not conduct any investigation prior to the entrapment hearing, and so he was not meaningfully focused on this defense in the first place. For another, he insisted that he was not prepared for trial, and so the judge granted him a 16-day continuance. Telling the court that he "frankly was not prepared to go to trial today" was directly against his interest if he was strategically focused on appealing the court's denial of the motion to dismiss as quickly as possible. (Mot. to Dismiss Tr., R. 5-5, PageID 657.)

"[T]he point is this: Constitutionally effective counsel must develop trial strategy in the true sense—not what bears a false label of 'strategy[.]'" *Ramonez v. Berghuis*, 490 F.3d 482, 489 (6th Cir. 2007). And calling Steingold's approach a strategy or "'a tactical decision' . . . is nonsensical because 'counsel did not even take the first step of interviewing witnesses or requesting records.'" *Foust*, 655 F.3d at 536 (first citation omitted) (quoting *Porter v. McCollum*, 558 U.S. 30, 39 (2009)); *accord Florida v. Nixon*, 543 U.S. 175, 182–84, 191–92 (2004) (holding that counsel

provided effective assistance when he conceded the defendant's guilt during a capital murder trial while maintaining the right to cross-examine the prosecution's witnesses, because this was acceptable strategy to focus his preparation on finding and presenting mitigating evidence during the penalty phase in an attempt to ward off the death penalty). Steingold's choices therefore fell "outside the wide range of professionally competent assistance." *Martin v. Rose*, 744 F.2d 1245, 1249 (6th Cir. 1984) (quoting *Strickland*, 466 U.S. at 690). Ultimately, Steingold's "total lack of participation deprived [Moss] of effective assistance of counsel at trial as thoroughly as if he had been absent. This was constitutional error even without any showing of prejudice." *Id.* at 1250–51.

Moss "is entitled to habeas relief because the state court unreasonably applied the *Strickland* standard where Petitioner clearly was constructively denied the assistance of trial counsel." (Reconsideration Op. and Order, R. 33, PageID 1845.) I agree with the district court that the state court opinion was contrary to, or involved an unreasonable application of, clearly established federal law. The state court should have applied *Cronic* to both of Moss's IATC claims rather than *Strickland*, and both *Cronic* claims are meritorious. Indeed, I would be hard pressed to find a worse dereliction of duty than that of Steingold's representation of Moss.

## III. CONCLUSION

Because I would affirm the district court's decision and grant Moss's habeas petition, I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVEN LEE MOSS,

Petitioner,

v.

Case No. 18-11697
Honorable Linda V. Parker

THOMAS WINN,

Respondent.
_____/

**OPINION AND ORDER**

Petitioner Steven Lee Moss ("Petitioner"), confined at the Saginaw Correctional Facility in Freeland, Michigan, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1.) In his application, filed by counsel, Petitioner challenges his convictions in the Circuit Court for Oakland County, Michigan, for possession with intent to deliver 1,000 or more grams of cocaine in violation of Michigan Compiled Laws § 333.7401(2)(a)(i) and possession of a firearm in the commission of a felony in violation of Michigan Compiled Laws § 750.227b. Petitioner also has filed two motions for summary judgment (ECF Nos. 12, 13) and a motion for release on bond (ECF No. 14). Because the Court concludes that Petitioner is not

entitled to habeas relief, it is denying his application for the writ of habeas corpus and his pending motions.[1]

## I. Background

Petitioner was convicted of the above offenses following a bench trial in the Oakland County Circuit Court. This Court recites verbatim the relevant facts relied upon by the Michigan Court of Appeals when denying Petitioner's direct appeal:

> Defendant's convictions arise from his purchase of 10 kilograms of cocaine from a police undercover informant. After learning that defendant was interested in acquiring a large amount of cocaine and after conducting preliminary surveillance of defendant's activities, the police arranged for defendant to meet their informant. In addition to the police testimony, the prosecution presented evidence of video and audio recordings capturing the meetings and telephone conversations between

[1] In his motion for bond, Petitioner asks to be released while his habeas petition is pending due to the COVID-19 pandemic and the greater risk of severe illness he may face if he contracts the virus as a result of an underlying medical condition. (ECF Nos. 15, 17.) To obtain relief, however, Petitioner must demonstrate (1) "a substantial claim of law based on the facts surrounding the petition" and (2) "some circumstance making the motion for bail exceptional and deserving of special treatment in the interests of justice.'" *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990) (quoting *Aronson v. May*, 85 S. Ct. 3, 5 (1964)); *Clark v. Hoffner*, No. 16-11959, 2020 WL 1703870, at *2 (E.D. Mich. Apr. 8, 2020) (unpublished). For the reasons discussed in this Opinion and Order, Petitioner cannot satisfy the first requirement.

defendant and the informant. The first meeting, on November 6, 2012, lasted approximately 30 minutes and defendant agreed to purchase 10 kilograms of cocaine. At their next meeting on November 7, 2012, defendant and the informant discussed the drug deal, and defendant unsuccessfully attempted to persuade the informant to increase the purchase amount to 40 kilograms. In a restaurant parking lot, the informant showed defendant 10 kilograms of cocaine that were hidden in a compartment of an undercover police van. Defendant was instructed to contact the informant if he wanted to consummate the deal. Defendant contacted the informant on November 8, 2012, and they agreed to meet at a restaurant. They then agreed to transact the drug deal on November 9, 2012, which was when defendant believed he would have all the purchase money. Defendant unsuccessfully attempted to convince the informant to complete the transaction at defendant's house. Defendant also discussed his desire for future transactions with the informant. On November 9, 2012, defendant and the informant met in the parking lot of a Home Depot store, as planned. The informant was accompanied by another undercover officer who drove the van containing the drugs, and defendant also brought an associate with him. After defendant showed that he had the purchase money, which was in a suitcase in his car, the men walked to the

> undercover van where defendant was again shown the product. Defendant took possession of the van keys, got in the driver's seat, and turned on the ignition before the police remotely disabled the van. Defendant fled the vehicle on foot, but was arrested after a brief chase.

*People v. Moss*, No. 319954, 2015 WL 3604582, at *1 (Mich. Ct. App. June 9, 2015) (internal footnote omitted). These facts are presumed correct on habeas review pursuant to 28 U.S.C. § 2254(e)(1). *See Wagner v. Smith*, 581 F.3d 410, 413 (6th Cir. 2009).

Following his conviction, Petitioner filed a direct appeal and requested a remand for a *Ginther* hearing.[2] The matter was remanded, and Petitioner filed a motion for new trial based on ineffective assistance of counsel. After conducting a one-day hearing, the trial court denied Petitioner's motion. Petitioner's convictions were thereafter affirmed on direct appeal, *see Moss*, 2015 WL 3604582, *leave denied* 872 N.W.2d 474 (Mich. 2015).

Petitioner then filed a post-conviction motion for relief from judgment in the trial court. In his motion, Petitioner raised a sentencing claim and the claims he now asserts in his habeas petition. (*See* ECF No. 5-10.) The trial court denied the motion. (ECF No. 11.) The Michigan appellate courts denied Petitioner leave to appeal. (ECF Nos. 13, 14); *see also People v. Moss*, No. 340609 (Mich. Ct. App. Mar. 15, 2018), *leave denied* 503 Mich. 886, 918 N.W.2d 817 (2018).

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[2] *See People v. Ginther*, 212 N.W.2d 922 (1973).

Petitioner then filed the pending application for the writ of habeas corpus, raising the following claims:

> I. Petitioner was deprived of his right to be represented by an attorney who would subject the prosecution's case to meaningful adversarial testing when his attorney agreed to a stipulated fact trial without Petitioner's authorization, conceded that "the crime occurred," and waived opening statement and closing argument.
>
> II. Petitioner was deprived of his Sixth Amendment right to counsel of choice during several critical stages of the proceedings and did not knowingly and intelligently waive his right to be represented by his retained counsel, Steingold, when he was represented by nonretained Attorney Dwyer without authorization.
>
> III. Where the prosecution's case relied solely on witness testimony, counsel's complete failure to conduct pretrial preparatory investigative interviews of any of the prosecution's witnesses constructively deprived Petitioner of his Sixth Amendment right to counsel because counsel was unable to subject the prosecution's case to any meaningful adversarial testing.
>
> IV. Petitioner received ineffective assistance of appellate counsel and has good

> cause for failing to raise the constitutional violations set forth within on direct appeal.

Respondent filed a motion to dismiss arguing that the habeas petition was barred by the one-year limitations period found in 28 U.S.C. § 2244(d)(1). This Court denied Respondent's motion and ordered Respondent to file an answer to Petitioner's claims. *Moss v. Winn*, No. 18-11697, 2019 WL 2523550 (E.D. Mich. June 19, 2019). Respondent thereafter filed an Answer to the Petition. (ECF No. 10).[3] As indicated, Petitioner subsequently filed two motions for summary judgment (ECF Nos. 12, 13) and a motion for release on bond (ECF No. 14).

## II. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes the following standard of review for habeas cases:

> 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

[3] To the extent Respondent again argues in his Answer that the petition is barred by the statute of limitations, this Court rejects those arguments for the reasons stated in its earlier opinion and order denying the motion to dismiss.

> 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.

28 U.S.C. § 2254(d).

A decision of a state court is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000). An "unreasonable application" occurs when "a state-court decision unreasonably applies the law of [the Supreme Court] to the facts of a prisoner's case." *Id.* at 409. A federal habeas court may not "issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411.

AEDPA "imposes a highly deferential standard for evaluating state-court rulings," and "demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal citations omitted). A "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough*

*v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has emphasized "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102. Pursuant to § 2254(d), "a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. *Id.* A "readiness to attribute error [to a state court] is inconsistent with the presumption that state courts know and follow the law." *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002).

A state court's factual determinations are presumed correct on federal habeas review. *See* 28 U.S.C. § 2254(e)(1). A habeas petitioner may rebut this presumption of correctness only with clear and convincing evidence. *Id.* Moreover, for claims that were adjudicated on the merits in state court, habeas review is "limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

When reviewing a claim under AEDPA's deferential standard of review, a federal habeas court must review "the last state court to issue a reasoned opinion on the issue." *Hoffner v. Bradshaw*, 622 F.3d 487, 505 (6th Cir. 2010) (quoting *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005)). The Michigan Court of Appeals and the Michigan Supreme Court denied Petitioner's post-conviction application for leave to appeal in unexplained one-sentence orders. Accordingly, this Court must "look through" those decisions to the Oakland County Circuit Court's opinion denying Petitioner's motion for relief from

judgment, which was the last state court to issue a reasoned opinion. Although the trial court found Petitioner's claims procedurally defaulted pursuant to Michigan Court Rule 6.508(D)(3) based on his failure to show cause and prejudice for not raising the claims on direct appeal, the court also denied the claims on their merits. Thus, AEDPA's deferential standard of review applies to that decision.[4] *See Moritz v. Lafler*, 525 F. App'x 277, 284 (6th Cir. 2013).

## III. Discussion

In his first three claims, Petitioner contends that he was denied the effective assistance of trial counsel. In his fourth claim, Petitioner claims he was denied the effective assistance of appellate counsel due to counsel's failure to raise his remaining claims on direct appeal.

To prevail on his ineffective assistance of counsel claims, Petitioner must show that the state court's adjudication of these claims was contrary to, or an unreasonable application of, *Strickland v.*

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[4] Respondent argues that Petitioner procedurally defaulted his first and third claims because he failed to show cause and prejudice for failing to raise them on his appeal of right, as required by Michigan Court Rule 6.508(D)(3). Petitioner argues in his fourth claim that appellate counsel was ineffective. Ineffective assistance of counsel may establish cause for procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). Given that the cause and prejudice inquiry for the procedural default issue merges with an analysis of the merits of the defaulted claims, it is easier to consider the merits of the claims. *See Akrawi v. Booker*, 572 F.3d 252, 261 (6th Cir. 2009). Petitioner did not procedurally default his ineffective assistance of appellate counsel claim because post-conviction review was the first opportunity he had to raise that claim. *See Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010).

*Washington*, 466 U.S. 668 (1984). *See Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). *Strickland* established a two-prong test for claims of ineffective assistance of counsel: the petitioner must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. The *Strickland* standard applies as well to claims of ineffective assistance of appellate counsel. *See Whiting v. Burt*, 395 F. 3d 602, 617 (6th Cir. 2005).

In his first and third claims, Petitioner argues that he was constructively denied the assistance of counsel because his trial counsel failed to subject the prosecutor's case to meaningful adversarial testing. More specifically, Petitioner maintains that by agreeing to a stipulated fact trial, not conducting pretrial preparatory investigative interviews of the prosecution's witnesses, waiving opening statement and closing argument, and not cross-examining the State's witnesses, counsel conceded Petitioner's guilt. In *Strickland*, the Supreme Court recognized that prejudice is presumed in certain contexts, such as where a defendant has been denied the "actual or constructive … assistance of counsel altogether[.]" 466 U.S. at 692. Where defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," there has been a constructive denial of counsel, and a defendant need not make a showing of prejudice to establish ineffective assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 659 (1984); *see also Moss v. Hofbauer*, 286 F.3d 851, 860 (6th Cir. 2002) (citing Cronic). However, for prejudice to be presumed based on defense counsel's failure to test the prosecutor's case, "the attorney's failure must be complete." *Bell v. Cone*, 535 U.S. 685, 697 (2002).

The trial court rejected Petitioner's ineffective assistance of counsel claims, applying the *Strickland* standard rather than the *Cronic* test. (ECF No. 5-11 at Pg ID 914.) The trial court concluded that, contrary to Petitioner's assertion, "the record d[id] not reflect a 'complete' failure of counsel." (*Id.*) Instead, defense counsel's testimony at the *Ginther* hearing and the record reflected that "given the evidence against Defendant, which included recorded telephone calls between Defendant and the informant and audio/video recordings of Defendant's meetings with the informant, the defense strategy was to focus on an entrapment defense" and, after the trial court denied the motion, to have a stipulated-fact bench trial to expedite an appeal of that decision. (*Id.*)

The trial court concluded that, in light of this strategy and the overwhelming evidence of Petitioner's guilt, defense counsel's decision to waive an opening statement and closing argument and not cross-examine the prosecutor's witnesses during the bench trial could not be deemed ineffective. (*Id.* at Pg ID 915.) Additionally, the trial court found defense counsel's decision to expend his efforts and resources developing the entrapment defense rather than investigating witnesses to challenge Petitioner's factual guilt reasonable in light of this strategy and the overwhelming evidence against Petitioner. (*Id.*) Moreover, the trial court reasoned that Petitioner failed to show that the testimony of any witness who counsel failed to interview would have benefitted Petitioner at trial. (*Id.* at Pg ID 915-16.) This Court cannot conclude that the state court's decision was contrary to or unreasonable application of *Strickland*.

Petitioner compares his case to *Brookhart v. Janis*, 384 U.S. 1, 6-7 (1966). In *Brookhart*, the Supreme

Court held that a criminal defendant did not intelligently and knowingly agree to his counsel conducting a "prima facie" trial, in which no witnesses would be cross-examined or called on the defendant's behalf. *Id.* at 7. After the trial court stated that in such a case a defendant admits his guilt, the defendant interjected that he was "in no way … pleading guilty[.]" *Id.* The Supreme Court held that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances. *Id.* Counsel "can[not] override his client's desire expressed in open court to plead not guilty." *Id.* at 7-8.

However, in *Florida v. Nixon*, 543 U.S. 175 (2004), the Supreme Court held that trial counsel's failure to obtain the petitioner's express consent to a strategy of conceding guilt at the guilt phase of a capital trial did not automatically render counsel's performance deficient. *Id.* at 192. In *Nixon*, in the face of overwhelming evidence of the petitioner's guilt of murder, defense counsel decided to focus on the penalty phase to avoid the death penalty for his client. *Id.* at 179-81. At trial, defense counsel cross-examined prosecution witnesses only when he believed their statements needed clarification and offered no defense. *Id.* at 183. Notably, the *Nixon* Court concluded that the *Strickland* standard governed the analysis of the Petitioner's ineffective assistance of counsel claim, rather than *Cronic*'s presumption-of-prejudice standard. *Id.* at 190-91.

Yet in a subsequent case, where the defendant "vociferously" opposed counsel's similar strategy at every opportunity, the Supreme Court found that the defendant's constitutional rights had been violated. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505, 1509 (2018). The *McCoy* Court reasoned that while "[t]rial

management is the lawyer's province," including decisions as to "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence," a criminal defendant is entitled to "[a]utonomy to decide that the objective of the defense is to assert innocence" and to "insist on maintaining her innocence at the guilt phase of a capital trial." *Id.* at 1508.

Here, unlike *Brookhart* and *McCoy*, trial counsel did not concede Petitioner's guilt over Petitioner's protestations of his innocence. Instead, counsel explained to Petitioner that his only defense to the charges was an entrapment defense and that if the trial court rejected the defense, the most expeditious way to have that decision reviewed, was to proceed with a bench trial at which stipulated facts were offered in light of the overwhelming evidence of his guilt to the charges. (11/21/14 Hr'g Tr. at 20-21, 26-27, ECF No. 5-9 at Pg ID 766-67, 772.) Petitioner never voiced his objections to this trial strategy until he filed his motion for post-conviction relief.[5]

Nor did trial counsel fail to subject the prosecutor's case to meaningful adversarial testing. During a three-day motion hearing concerning Petitioner's entrapment defense, trial counsel called witnesses and extensively cross-examined the prosecution's witnesses. (*See* 9/16/13, 9/17/13 & 9/19/13, ECF Nos. 5-2 to 5-4.) Petitioner acknowledged during the *Ginther* hearing that the testimony from the entrapment hearing—which included defense

[5] Defense counsel did file a motion seeking a jury trial after the trial court denied Petitioner's motion to dismiss, because Petitioner had moved to disqualify the trial court. (11/1/13 Hr'g Tr. at 45-46, ECF No. 5-5 at Pg ID 655-56.) The trial court denied the motion, however. (*Id.*)

counsel's cross-examination—was what was considered during the bench trial. (11/12/14 Hr'g Tr. at 97, ECF No. 5-9 at Pg ID 843.) At a hearing on Petitioner's motion to dismiss, counsel also vigorously argued that the trial court should find that Petitioner had been entrapped. (11/1/13 Hr'g Tr, ECF No. 5-5.)

Petitioner also asserts that trial counsel was ineffective in failing to conduct pretrial preparatory investigative interviews of the prosecution's witnesses. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Nevertheless, "a petitioner cannot show deficient performance or prejudice resulting from a failure to investigate if the petitioner does not make some showing of what evidence counsel should have pursued and how such evidence would have been material." *Hutchison v. Bell*, 303 F.3d 720, 74-49 (6th Cir. 2002) (citing *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997); *Martin v. Mitchell*, 280 F.3d 594, 608 (6th Cir. 2002)). Petitioner has not shown—here or in the state courts—how counsel's pretrial interviews of the prosecution's witnesses would have been beneficial to his defense. Moreover, defense counsel made a strategic decision to focus on the entrapment hearing rather than the fact trial, which again cannot be said to have been an unreasonable strategic decision given the overwhelming evidence of Petitioner's factual guilt.

For these reasons, the Court concludes that Petitioner is not entitled to habeas relief based on his claims that trial counsel rendered ineffective assistance.

Petitioner next claims that he was denied the right to be represented by his counsel of choice when his

retained attorney, David Steingold, had another attorney, Lisa Dwyer, assist and conduct questioning on the first day of the entrapment hearing. (*See* 9/16/13 Hr'g Tr., ECF No. 5-2.) Mr. Steingold also was present during the proceedings. (*Id.* at 3, Pg ID 103.) Ms. Dwyer was present without Mr. Steingold, however, when the bench trial verdict was rendered. (*See* 11/22/13 Trial Tr., ECF No. 5-7.)

An element of a defendant's Sixth Amendment right to counsel is "the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (citations omitted). The Supreme Court has not held, however, that a defendant's right to counsel of choice is necessarily violated when chosen counsel is assisted by or requests stand-in counsel to handle proceedings. Nor has the Supreme Court held that counsel is "absent" in the sense of *Cronic* when stand-in counsel is present. Because no United States Supreme Court precedent deals with the issue of "stand in" counsel in the context of counsel-of-choice or ineffective assistance of counsel claims, the trial court did not engage in an unreasonable application of Supreme Court precedent when it held that Petitioner was not denied his choice of counsel. *See Carroll v. Renico*, 475 F.3d 708, 712-14 (6th Cir. 2007) (petitioner's right to counsel was not denied when co-defendant's counsel stood in for petitioner's counsel during portion of the reinstruction of the jury; co-defendant's attorney objected to conspiracy instruction on behalf of both defendant and co-defendant); *United States v. Dykes*, 460 F. 2d 324, 325 (9th Cir. 1972) (defendant was not deprived of effective representation of counsel because a substitute defense attorney was present when the jury was instructed

where defendant expressed no objection when the substitute attorney introduced himself to the court and explained why defendant's regular attorney could not be present and instructions given were standard).

Notably, Petitioner never objected to Ms. Dwyer's representation during the proceedings. In fact, he did not raise concerns about her representation on direct appeal or during his *Ginther* hearing testimony. Moreover, although a criminal defendant must knowingly and intelligently waive his right to counsel, *see Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the Supreme Court has never required a trial court to ask a defendant whose counsel of choice is not present whether he or she consents to "stand in" counsel, or to insure that the defendant's consent to "stand in" counsel is informed. *Carroll*, 475 F. 3d at 713.

Because Petitioner was represented by "stand in" counsel when his retained counsel was absent (or present, but not conducting the questioning), Petitioner was not actually or constructively denied the assistance of counsel. Therefore, the appropriate standard for reviewing Petitioner's claim concerning Ms. Dwyer's representation is the *Strickland* standard, pursuant to which Petitioner must show that Ms. Dwyer's performance was deficient and that the deficient performance prejudiced his defense. *See Miller v. Leonard*, 65 F. App'x. 31, 34-35 (6th Cir. 2003) (applying *Strickland* standard in rejecting claim that "stand in" counsel was ineffective for failing to object to trial court's supplemental jury instruction). Petitioner has not articulated how Ms. Dwyer performed deficiently or how her representation prejudiced his defense.

For these reasons, Petitioner is not entitled to relief on his second claim.

Lastly, Petitioner argues he was denied the effective assistance of appellate counsel. The Sixth Amendment guarantees a defendant the right to effective assistance of counsel on the first appeal by right. *Evitts v. Lucey*, 469 U.S. 387, 396-397 (1985). However, court appointed counsel does not have a constitutional duty to raise every non-frivolous issue requested by a defendant. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). When evaluating an ineffective assistance of appellate counsel claim, a federal habeas court must defer twice: first to appellate counsel's decision not to raise an issue and secondly, to the state court's determination that appellate counsel was not ineffective. *Woods v. Etherton*, 136 S. Ct. 1149, 1153 (2016) (per curiam) ("Given AEDPA, both Etherton's appellate counsel and the state habeas court were to be afforded the benefit of the doubt.").

For the reasons discussed above, Petitioner's first through third claims are meritless. "[A]ppellate counsel cannot be found to be ineffective for 'failure to raise an issue that lacks merit.'" *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) (quoting *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001)). Petitioner therefore is not entitled to habeas relief based on his fourth claim.

## IV. Conclusion

For the reasons set forth above, the Court holds that Petitioner is not entitled to the writ of habeas corpus. Given this determination, the Court is denying as moot Petitioner's motions for summary judgment and motion for bond. Before Petitioner can appeal

these decisions, he must obtain a certificate of appealability.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this showing, a petitioner must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotes and citations omitted). Jurists of reason could not debate the correctness of this Court's rejection of Petitioner's grounds for habeas relief. Nevertheless, if Petitioner chooses to appeal the Court's decision, he may proceed *in forma pauperis* on appeal because an appeal could be taken in good faith. 28 U.S.C. § 1915(a)(3).

Accordingly,

**IT IS ORDERED** that Petitioner's application for the writ of habeas corpus is **DENIED**.

**IT IS FURTHER ORDERED** that Petitioner's motions for summary judgment and motion for bond are **DENIED AS MOOT**.

**IT IS FURTHER ORDERED** that Petitioner is denied a certificate of appealability but granted leave to proceed in forma pauperis on appeal.

**IT IS SO ORDERED**.

/s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: September 29, 2020

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVEN LEE MOSS,

Petitioner,

Case No. 4:18-CV-11697
v. Honorable Linda V. Parker

GARY MINIARD,[1]

Respondent.
_____/

**OPINION AND ORDER GRANTING IN PART PETITIONER'S MOTION FOR RECONSIDERATION (ECF NO. 21) AND DIRECTING THE CLERK OF THE COURT TO REOPEN THE CASE TO THE COURT'S ACTIVE DOCKET**

Petitioner Steven Lee Moss ("Petitioner") filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, by his attorney David L. Moffitt. Petitioner challenged his conviction for possession with intent to deliver 1,000 or more grams of cocaine in violation of Michigan Compiled Laws § 333.7401(2)(a)(i) and possession of a firearm in the commission of a felony in violation of Michigan Compiled Laws § 750.227b. This Court denied the

[1] The Court amends the caption to reflect that Gary Miniard is now the warden at the prison where Petitioner is incarcerated.

petition on the merits. *Moss v. Winn*, No. 18-11697, 2020 WL 5793268 (E.D. Mich. Sept. 29, 2020). Petitioner has filed a motion for reconsideration, which has been fully briefed. (ECF Nos. 21, 23, 25.) The Court initially scheduled the motion for hearing but due to the lengthy hospitalization of Petitioner's attorney, the hearing was not held at the initially scheduled time. Having reviewed the parties' submissions, the Court concludes that a hearing is unnecessary and is granting in part Petitioner's motion.

As an initial matter, the Court directs the Clerk of the Court to reopen the case to the Court's active docket. Federal courts can order that a habeas petition be reinstated when necessary to adjudicate further issues. *See e.g. Rodriguez v. Jones*, 625 F. Supp. 2d 552, 559 (E.D. Mich. 2009); *See also Watkins v. Haas*, No. 2:10-CV-13199, 2020 WL 8765937, at *2 (E.D. Mich. Aug. 26, 2020)(reopening habeas case after granting motion for reconsideration).

## Standard of Review

The Local Rules for the Eastern District of Michigan provide the following standard for motions for reconsideration:

> Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties and other

> persons entitled to be heard on the motion have been misled but also show that correcting the defect will result in a different disposition of the case.

E.D. Mich. LR 7.1(h)(3). Palpable defects are those which are "obvious, clear, unmistakable, manifest or plain." *Mich. Dep't of Treasury v. Michalec*, 181 F. Supp. 2d 731, 734 (E.D. Mich. 2002). Petitioner cites several reasons why the Court committed a palpable defect when denying his request for habeas relief.

First Petitioner argues that the deferential standard of review found in the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d), should not apply to the constructive denial of counsel claims that he raised in his first and third claims because the trial court judge, on post-conviction review, did not adjudicate those claims on the merits. According to Petitioner, this Court should have reviewed the claims *de novo*.

AEDPA imposes the following standard of review for habeas cases:

> 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.

28 U.S.C. § 2254(d). However, when a state court fails to adjudicate a habeas petitioner's claim on the merits, federal habeas review is not subject to the deferential standard contained in the statute. *Cone v. Bell*, 556 U.S. 449, 472 (2009). Instead, the federal habeas court is required to review the claim *de novo*. *Id.*

Petitioner's claims were raised in his motion for post-conviction relief from judgment. In reviewing a claim under AEDPA's deferential standard of review, this Court must review "the last state court to issue a reasoned opinion on the issue." *Hoffner v. Bradshaw*, 622 F. 3d 487, 505 (6th Cir. 2010) (quoting *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005)). The Michigan Court of Appeals and the Michigan Supreme Court both denied Petitioner's post-conviction application for leave to appeal in unexplained one-sentence orders. Accordingly, this Court looked to the Oakland County Circuit Court opinion denying the motion for relief from judgment, which was the last state court to issue a reasoned opinion, when determining whether that court's adjudication of Petitioner's claims was "contrary to," or "an unreasonable application of" clearly established federal law as determined by the United States Supreme Court. *See Hamilton v. Jackson*, 416 F. App'x. 501, 505 (6th Cir. 2011).

The post-conviction judge in her opinion mentioned that most ineffective assistance of counsel

claims are reviewed under the standard found in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a defendant to show that counsel's performance was deficient, and that the deficient performance prejudiced the defense. (*See* ECF No. 5-11 at Pg ID 913-14.) The judge then stated: "When counsel 'entirely fails to subject the prosecution's case to "meaningful adversarial testing,' however, prejudice is presumed for the purpose of establishing a claim of ineffective assistance of counsel." (*Id.* at Pg ID 914 (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)).) The judge stated further that "the *Cronic* test applies when the attorney's failure is *complete*, while the *Strickland* test applies when counsel failed at specific points of the proceeding." (*Id.* (emphasis in original) (quoting *People v. Frazier*, 733 N.W.2d 713, 721 (2007)).). The trial judge concluded that, contrary to Petitioner's assertion, "the record d[id] not reflect a 'complete' failure of counsel." (*Id.*). Instead, defense counsel's testimony at the *Ginther* hearing[2] and the record reflected that "given the evidence against Defendant, which included recorded telephone calls between Defendant and the informant and audio/video recordings of Defendant's meetings with the informant, the defense strategy was to focus on an entrapment defense" and, after the trial court denied the motion on the entrapment defense, to have a stipulated-fact bench trial to expedite an appeal of that decision. (*Id.*).

Thus, contrary to Petitioner's assertion, the state court did discuss Petitioner's assistance of counsel claims under *Cronic*'s constructive denial of counsel standard and concluded that Petitioner failed to show

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[2] *See People v. Ginther*, 212 N.W. 2d 922 (1973).

trial counsel's complete failure to subject the prosecution's case to meaningful adversarial testing which would entitle Petitioner to a presumption of prejudice on his claims. Whether this determination was reasonable or unreasonable, the state court adjudicated Petitioner's constructive denial of counsel claims on the merits. AEDPA's deferential standard of review therefore applies, and Petitioner is not entitled to *de novo* review on his *Cronic* claims. *Compare Ray v. Bauman*, 326 F. Supp. 3d 445, 459 (E.D. Mich. 2018) (concluding that AEDPA deference did not apply to the petitioner's constructive denial of counsel claim where the post-conviction judge overlooked or misconstrued his *Cronic* argument). The trial judge adjudicated Petitioner's constructive denial of counsel claim on the merits because she "clearly considered the salient feature of [Petitioner's] *Cronic* claim." *Smith v. McDonald*, 597 F. App'x. 911, 913 (9th Cir. 2014). Accordingly, this Court did not commit a palpable defect when reviewing Petitioner's *Cronic* claims under AEDPA's standard of review.

Petitioner next argues that regardless of which standard of review is employed, the Court erred in rejecting Petitioner's constructive denial of counsel claims because trial counsel's decision to stipulate to the use of the testimony from the entrapment hearing as substantive evidence at the bench trial, counsel's related decision to stipulate to Petitioner's guilt at the trial, and counsel's failure to investigate any witnesses or to present any evidence at trial, was *per se* prejudicial. After considering Petitioner's argument, this Court has again reviewed the lower court proceedings, the post-conviction judge's opinion, the pleadings filed by the parties in this case, and the applicable case law, including additional case law not

cited by the parties. Having done so, the Court agrees with Petitioner that it committed a palpable error when denying him habeas relief on his constructive denial of counsel claims, because the post-conviction judge's rejection of Petitioner's *Cronic* claims was unreasonable. In previously rejecting Petitioner's claims, this Court clearly overlooked several salient factual or legal matters regarding the claims, which the Court discusses below.[3]

## Procedural Default

Before addressing Petitioner's underlying claims, however, this Court must address the procedural default issue raised by Respondent in the Answer, which the Court previously declined to reach in light of its conclusion that the claims did not warrant habeas relief. Respondent urged this Court to procedurally default Petitioner's first and third claims because Petitioner failed to show cause and prejudice for failing to raise them on his appeal of right, as required by Michigan Court Rule 6.508(D)(3).

When the state courts clearly and expressly rely on a valid state procedural bar, federal habeas review is also barred unless the petitioner can demonstrate "cause" for the default and actual prejudice as a result of the alleged constitutional violation, or can demonstrate that failure to consider the claim will result in a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991). If the petitioner fails to show cause for the procedural

[3] This Court set forth the factual and procedural background of this case in its prior decision and, therefore, finds it unnecessary to reiterate them here. *See Moss*, 2020 WL 5793268, at *1-2.

default, it is unnecessary for the court to reach the prejudice issue. *Smith v. Murray*, 477 U.S. 527, 533 (1986). However, in an extraordinary case, where a constitutional error has probably resulted in the conviction of one who is innocent, a federal court may consider the constitutional claims presented even in the absence of a showing of cause for procedural default. *Murray v. Carrier*, 477 U.S. 478, 479-80 (1986). However, to be credible, such a claim of innocence requires a petitioner to support the allegations of constitutional error with new reliable evidence that was not presented at trial. *Schlup v. Delo*, 513 U.S. 298, 324 (1995). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998).

Michigan Court Rule 6.508(D)(3) provides that a court may not grant post-conviction relief to a defendant if the motion for relief from judgment alleges grounds for relief that could have been raised on direct appeal, absent a showing of good cause for the failure to raise such grounds previously and actual prejudice resulting therefrom.

The Michigan Supreme Court rejected Petitioner's post-conviction appeal on the ground that "the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Moss*, 918 N.W.2d 817 (Mich. 2018). The Michigan Court of Appeals denied Petitioner's post-conviction appeal in a form order "because the defendant has failed to establish that the trial court erred in denying the motion for relief from judgment." (ECF No. 5-13 at Pg ID 1099.) These orders, however, did not refer to subsection (D)(3) nor did they mention Petitioner's failure to raise his claims on his direct appeal as their rationale for rejecting his

post-conviction appeals. Because the form orders in this case are ambiguous as to whether they refer to procedural default or a denial of post-conviction relief on the merits, the orders are unexplained. *See Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010). This Court must "therefore look to the last reasoned state court opinion to determine the basis for the state court's rejection" of Petitioner's claims. *Id.*

The trial judge, in denying Petitioner's motion for post-conviction for relief, indicated that Petitioner failed to show cause and prejudice for not raising his claims on his appeal of right, as required under Michigan Court Rule 6.508(D)(3). (ECF No. 5-11 at Pg ID 915.) At the conclusion of the opinion, the judge denied the post-conviction motion pursuant to Michigan Court Rule 6.508(D)(3). (*Id.* at Pg ID 917.) Because the court relief on Rule 6.508(D)(3) in denying Petitioner's claims, they are procedurally defaulted under the rule. *See Ivory v. Jackson*, 509 F. 3d 284, 292-93 (6th Cir. 2007). The fact that the trial court may have also discussed the merits of Petitioner's claims in addition to invoking the provisions of Rule 6.508(D)(3) to reject Petitioner's claim does not alter this analysis. *See Northrop v. Horton*, 779 F. App'x 312, 315 (6th Cir. 2019) (citing *Baze v. Parker*, 371 F.3d 310, 320 (6th Cir. 2004) and *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989)). Petitioner's *Cronic* claims are procedurally defaulted.

Petitioner argues in his fourth claim that appellate counsel was ineffective. Ineffective assistance of counsel may establish cause for procedural default of his *Cronic* claim. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). Petitioner could not procedurally default his ineffective assistance of appellate counsel claim because post-

conviction review was the first opportunity he had to raise this claim. *See Guilmette*, 624 F.3d at 291. If Petitioner can show that he received ineffective assistance of appellate counsel that rose to the level of a Sixth Amendment violation, it would excuse his procedural default for failing to raise his claims on his direct appeal in the state courts. *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000).

The Sixth Amendment guarantees a defendant the right to effective assistance of counsel on the first appeal by right. *Evitts v. Lucey*, 469 U.S. 387, 396-397 (1985). A defendant must satisfy *Strickland*'s two-prong test to show the denial of the effective assistance of counsel. *See supra*. With respect to the first prong—deficient performance—the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 687. The defendant must overcome the presumption that, under the circumstances, the challenged action might be sound trial strategy. *Id.* at 689. As to the second prong—prejudice to the defendant's defense—the 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. The *Strickland* standard applies to claims of ineffective assistance of appellate counsel. *See Whiting v. Burt*, 395 F.3d 602, 617 (6th Cir. 2005).

A less stringent standard of review is applied when assessing whether a claim of ineffective assistance satisfies the "cause" requirement of *Coleman*, than when reviewing a freestanding independent ineffective assistance of counsel claim. For purposes of establishing cause under *Coleman*, the question for the federal habeas court is not whether

the state court's decision was unreasonable, but whether there was an independent Sixth Amendment violation under *Strickland*. Stated differently, the level of scrutiny of the ineffective assistance of counsel claim is the same as would be applied on direct review. *See Joseph v. Coyle*, 469 F.3d 441, 459 (6th Cir. 2006).

Strategic and tactical choices regarding which issues to pursue on appeal are "properly left to the sound professional judgment of counsel." *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990). "Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of appellate counsel be overcome." *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002). Appellate counsel, however, may deliver deficient performance and prejudice a defendant by omitting a "dead-bang winner," which is defined as an issue which was obvious from the trial record and would have resulted in a reversal on appeal. *See Meade v. Lavigne*, 265 F. Supp. 2d 849, 870 (E.D. Mich. 2003).

Petitioner's constructive denial of counsel claims are meritorious and provide a basis for granting Petitioner habeas relief. These claims were clearly stronger than the issues raised by appellate counsel on Petitioner's appeal of right. The two constructive denial of counsel claims were clearly dead-bang winners because the errors were obvious from the record and "leaped out upon even a casual reading of the transcript." *Matire v. Wainwright*, 811 F.2d 1430, 1438 (11th Cir.1987). Buttressing this conclusion is the fact that appellate counsel on the appeal of right raised a claim that trial counsel was ineffective for waiving Petitioner's right to a jury trial and then stipulating to the admission of all the evidence from the entrapment hearing as substantive evidence at the

bench trial, but appellate counsel only used the *Strickland* standard for ineffective assistance of counsel claims without mentioning *Cronic*. Appellate counsel also failed to argue that Petitioner was constructively denied the assistance of counsel based on trial counsel's clear omissions. (ECF No. 5-12 at Pg ID 1008-12.)

"While both *Cronic* and *Strickland* concern Sixth Amendment violations, they are distinct legal claims and the difference between the two 'is not of degree but of kind.'" *Fusi v. O'Brien*, 621 F.3d 1, 6 (1st Cir. 2010). The *Strickland* test "requires a case-by-case analysis of whether counsel's deficiencies affected the outcome of a trial, while *Cronic* permits a presumption of prejudice if an actual or constructive denial of counsel occurs during a critical stage of the trial. These claims, while based on similar factual underpinnings, are separate and distinct. A defendant's reliance on one theory in state court does not exhaust the other." *Id.* Appellate counsel in this case clearly failed to raise a *Cronic* claim on Petitioner's appeal of right, did not urge the Michigan Court of Appeals to employ a presumed prejudice standard in reviewing Petitioner's claim, nor did she argue that Petitioner was constructively denied the assistance of counsel, even though appellate counsel had all the facts in front of her. This Court believes that appellate counsel was ineffective for failing to raise a *Cronic* claim considering the facts she was clearly aware of when she reviewed the trial court record. As discussed below, Petitioner's *Cronic* claims are meritorious. Appellate counsel's ineffectiveness in failing to raise these claims on Petitioner's appeal of right excuses the procedural default in this case.

## Analysis

Where defense "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," there has been a constructive denial of counsel, and a defendant need not make a showing of prejudice to establish ineffective assistance of counsel. *Moss v. Hofbauer*, 286 F.3d 851, 860 (6th Cir. 2002) (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)). However, for a presumption of prejudice to arise based on an attorney's failure to test the prosecutor's case, so that reversal based on ineffective assistance of counsel is warranted without any inquiry into prejudice, the attorney's failure to test the prosecutor's case "must be complete." *Bell v. Cone*, 535 U.S. 685, 697 (2002).

Petitioner contends that he was constructively denied the assistance of counsel because his trial counsel, after losing a pre-trial motion to dismiss the charges on the ground of entrapment, agreed to conduct a bench trial at which counsel essentially conceded Petitioner's guilt to the charges by stipulating to the admission of the transcript from the entrapment hearing as substantive evidence without offering any additional evidence on Petitioner's behalf. Counsel also made several statements at the trial that amounted to a stipulation that Petitioner was guilty. Counsel waived opening argument, waived cross-examination of one of the two live witnesses that were called at the trial, and made no closing argument. Although counsel cross-examined DEA Special Agent John Hill to challenge Hill's qualifications as an expert, counsel proceeded to concede the very issue on which Hill was called to testify—that is, that someone with ten kilos of cocaine intended to sell the cocaine. (*See* ECF No. 5-6 at Pg ID 682.) Thus, in taking the

only action that he did during trial, defense counsel conceded the element of intent to deliver in this case.

The trial judge on post-conviction review rejected Petitioner's *Cronic* claims, finding that counsel subjected the case to meaningful testing and that it was valid trial strategy to do a stipulated trial on the transcript from the entrapment hearing so as to preserve the entrapment issue for appeal and to expedite such an appeal. This Court finds this to be an unreasonable application of *Cronic*.

Counsel's decision to stipulate to the admission of the entrapment hearing transcript at trial without advancing any defense, questioning any witnesses, calling any defense witnesses, or even making an argument for acquittal amounted to an abandonment of Petitioner at trial and thus constructively denied Petitioner the assistance of counsel at trial. Counsel's total failure to actively advocate Petitioner's cause amounts to a constructive denial of assistance of counsel. *See Rickman v. Bell*, 131 F.3d 1150, 1154 (6th Cir. 1997).

In *Brookhart v. Janis*, 384 U.S. 1 (1966), the Supreme Court held that a criminal defendant did not intelligently and knowingly agree to his counsel conducting a *prima facie* trial, in which no witnesses would be cross-examined or any witnesses called on the defendant's behalf, because such a trial amounted to the functional equivalent of a guilty plea. *Id.* at 6-7. Likewise, in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), the Supreme Court held that the state trial court violated the defendant's constitutional rights by permitting his counsel to concede that the defendant committed three murders over the defendant's objection during the guilt phase of a capital murder trial, even though counsel reasonably believed that

conceding guilt was the best option that the defendant had to avoid a death sentence. *Id.*, at 1505.

In this case, trial counsel's decision to stipulate to the admission of the entrapment hearing transcript at the bench trial in lieu of an actual trial amounted to a concession of guilt on Petitioner's behalf. Moreover, unlike the trial counsel in *McCoy*, Petitioner's counsel did not agree to a stipulated trial on the transcript believing that Petitioner would receive some substantive benefit from conducting a bench trial, such as a lesser sentence. The only rationale behind counsel's decision to conduct such a trial was to expedite the appeal. (*See* 11/21/14 Hr'g Tr. at 21, ECF No. 5-9 at Pg ID 767.)

In *Martin v. Rose*, 744 F. 2d 1245 (6th Cir. 1984), the Sixth Circuit held that a habeas petitioner had been constructively denied the assistance of counsel, within the meaning of *Cronic*, by trial counsel's refusal to participate in the trial because counsel erroneously believed that participation in the trial would either waive the pretrial motions filed by counsel or render their denial harmless error. "This strategic reasoning, while superficially persuasive, led Martin's counsel to abandon all attempts to defend his client at trial in favor of reversal on appeal, an unreasonable tactic since the attorney was aware of a strong defense that he could present without compromising his earlier motions." *Id.* at 1250. "The attorney's total lack of participation deprived Martin of effective assistance of counsel at trial as thoroughly as if he had been absent. This was constitutional error even without any showing of prejudice." *Id.* at 1250-51.

In Petitioner's case, while trial counsel's decision to do a stipulated trial on the entrapment hearing transcript to expedite the appeal may have been

"superficially persuasive," it led counsel to abandon any efforts to defend Petitioner at trial, in favor of attempting to obtain a reversal of Petitioner's conviction on appeal, which was not forthcoming. Counsel's decision to do so deprived Petitioner of a potential defense. While Petitioner admitted to getting into the van at the Home Depot where the alleged drug transaction took place, he denied handing any money over or seeing anything in the van. (*Id.* at 92-94, Pg ID 838-40.) Petitioner stated further that he did not know that there was a large amount of cocaine in the van. (*Id.*) Petitioner's testimony could have provided the basis for an acquittal or at least a verdict on a lesser offense, as the charge in this case was based on Petitioner possessing over 1,000 grams of cocaine with intent to deliver. If Petitioner had been called to testify before a judge or jury at a full trial, the trier of fact could have heard his testimony that he did not hand over any money or see anything in the van, was unaware of the large amount of cocaine in the van, and the trier of fact would have been able to judge the credibility of the prosecution witnesses and Petitioner in reaching a verdict. "Instead of presenting this defense, which would have required no further preparation, and participating in the trial to hold the government to its burden of proof, [Petitioner's] trial counsel stood mute, offering the [judge] virtually no option but to convict him, in spite of his plea of not guilty." *Martin*, 744 F.2d at 1250 (internal quotation marks omitted).

Moreover, to this day, neither Respondent, Petitioner's trial counsel, the Michigan Court of Appeals in rejecting Petitioner's related *Strickland* claim on the appeal of right, or the trial judge in rejecting Petitioner's *Cronic* claims on post-conviction

review have offered a valid argument as to why or how Petitioner's appeal could be expedited through a stipulated trial on the transcript rather than by conducting a full blown trial, either jury or bench, in which counsel could have cross-examined the witnesses, called defense witnesses on Petitioner's behalf, and argued for a complete acquittal or at least a verdict of guilty on a lesser offense rather than the offense charged.

Compounding the error here is the fact that trial counsel conducted no independent investigation into potential witnesses or defenses, relying instead on the motion to dismiss on entrapment grounds that Petitioner's prior attorney had filed. (Pet. at 4, ECF No. 1 at Pg ID 5.) Notably, counsel stepped into the case approximately ten days before the date of the entrapment hearing and the scheduled trial date. (11/21/14 Hr'g Tr. at 7, 13, ECF No. 5-9 at Pg ID 753, 760.) At the *Ginther* hearing conducted on direct appeal, Petitioner testified that his trial counsel pressured him into waiving his right to a jury trial because counsel said that he would not be prepared and ready to proceed with a jury trial right after the entrapment hearing. (11/21/14 Hr'g Tr. at 84, ECF No. 5-9 at Pg ID 830.)

The Sixth Circuit has at least twice suggested that a defense counsel's failure to investigate or to present witnesses or evidence amounts to a constructive denial of counsel and should lead a court to infer or presume prejudice. *Phillips v. White*, 851 F.3d 567, 579 (6th Cir. 2017) (explaining that "[w]hen [defense counsel] neglected to conduct any mitigation investigation at all or present even existing evidence supporting statutory mitigating factors, he ceased functioning as counsel under the Sixth Amendment."); *Carter v. Bell*,

218 F.3d 581, 595 (6th Cir. 2000) (holding that "the complete failure to investigate, let alone present, existing mitigating evidence is below an objective standard of reasonable representation, and may in fact be so severe as to permit us to infer prejudice"). The Sixth Circuit also has advised that a court should not allow trial counsel's complete failure to investigate to masquerade under "a false label of 'strategy." *Ramonez v. Berghuis*, 490 F.3d 482, 489 (6th Cir. 2007). Indeed, such a "description is nonsensical because 'counsel did not even take the first step of interviewing witnesses[.]'" *Fouse v. Houk*, 655 F.3d 524, 536 (6th Cir. 2011) (quoting *Porter v. McCollum*, 558 U.S. 30, 39 (2009)).

In *Florida v. Nixon*, 543 U.S. 175 (2004), the Supreme Court held that a defense counsel's failure to obtain a criminal defendant's express consent to a strategy of conceding guilt at the guilt phase of a capital trial does not automatically render counsel's performance deficient. Nevertheless, this Court finds Petitioner's case distinguishable from the defendant in *Nixon*. In *Nixon*, defense counsel conceded the defendant's guilt to first-degree murder during the guilt phase of a capital murder trial as part of a strategy to focus on presenting mitigation evidence during the penalty phase of the trial in the hope of sparing the defendant being sentenced to death. *Id.* at 182-84. Unlike Petitioner's counsel, the attorney in *Nixon* "reserved the right to cross-examine witnesses for the prosecution and could endeavor, as [counsel] did, to exclude prejudicial evidence." *Id.* at 188. Counsel in *Nixon* also presented significant mitigation evidence during the penalty phase in an attempt to get the jury to reject the death penalty and impose a life sentence. *Id.* at 183-84.

Here, in comparison, Petitioner's trial counsel undertook no investigation of any witnesses or any possible defenses that could have been raised at trial. Counsel failed to interview the prosecution's witnesses and made no attempt to contact witnesses Petitioner listed as being favorable to his defense. Counsel raised absolutely no defense at trial. Counsel in fact essentially stood mute at trial asking limited questions of only one witness. (*See* 11/18/13 Trial Tr. at 10-13, 17-20, ECF No. 5-6 at Pg ID 678-80, 684-87.) Those questions did not challenge the witness's testimony or credibility and, with respect to some of counsel's questions, focused on an issue that counsel then conceded. (*See id.* at 10-13, Pg ID 678-80.) Counsel's remaining questions related to his frivolous argument about an audio recording that the testimony at the entrapment hearing established never existed. (*Id.* at 17-26, Pg ID 684-93.)

Under the circumstances, counsel's conduct amounted to a complete abandonment of Petitioner at his trial. In insisting on evaluating Petitioner's claim under the *Strickland* standard for ineffective assistance of counsel, the trial judge on post-conviction review "erroneously and unreasonably applied clearly established Supreme Court law set forth in *Cronic*." *Mitchell v. Mason*, 325 F.3d 732, 741 (6th Cir. 2003). Petitioner is entitled to habeas relief because the state court unreasonably applied the *Strickland* standard where Petitioner clearly was constructively denied the assistance of trial counsel. *Id.* at 742. Because Petitioner was constructively denied the assistance of trial counsel, he need not show actual prejudice. Accordingly, Petitioner is entitled to a writ of habeas corpus on his first and third claims.

Because this Court's conclusion that Petitioner is entitled to habeas relief on his first and third claims is dispositive of the petition, the Court considers it unnecessary to reconsider Petitioner's second claim and declines to do so. *See Satterlee v. Wolfenbarger*, 374 F. Supp. 2d 562, 567 (E.D. Mich. 2005); *See also Haynes v. Burke,* 115 F. Supp. 2d 813, 819-20 (E.D. Mich. 2000).

## Conclusion

For the reasons set forth above, the Court concludes that it committed a palpable defect in the evaluation of Petitioner's first and third grounds for habeas relief.

Accordingly,

**IT IS ORDERED** that Petitioner's motion for reconsideration (ECF No. 21) is **GRANTED IN PART** and Petitioner's application for the writ of habeas corpus is **CONDITIONALLY GRANTED**. Petitioner shall be released from state custody unless the State of Michigan commences a new trial within 180 days of the entry of final judgment in this case.

**IT IS SO ORDERED**.

/s/ Linda V. Parker
LINDA V. PARKER
U.S. DISTRICT JUDGE

Dated: September 27, 2021

**Order** Michigan Supreme Court

October 30, 2018

157538

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

V

SC: 157538
COA: 340609
Oakland CC:2013-244474-FC

STEVEN LEE MOSS,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the March 15, 2018 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

[seal] I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 30, 2018 /s/ Larry S. Royster
Clerk

**Court of Appeals, State of Michigan**

**ORDER**

Elizabeth L. Gleicher
Presiding Judge

People of MI v Steven Lee Moss

Docket No. 340609 Deborah A. Servitto

LC No. 2013-244474-FC Jonathan Tukel
Judges

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The Court orders that the motion to waive fees is GRANTED and fees are WAIVED for this appeal only.

The motion to filed an amended application is GRANTED, and the amended application is accepted for filing.

The delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred by denying the motion for relief from judgment.

[seal]

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

March 15, 2018 /s/ Jerome W. Zimmer Jr.
Date Chief Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 2013-244474-FC

v.

Hon. Martha D. Anderson

STEVEN LEE MOSS,
Defendant.

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**OPINION AND ORDER**

This matter is before the Court on Defendant's Motion for Relief from Judgment pursuant to MCR 6.500, *et seq*. Pursuant to MCR 2.119(E)(3), MCR 6.508(A) and MCR 6.508(B), there will be no oral argument.

Following a bench trial, on November 22, 2013, the Court found Defendant guilty of possession with intent to deliver 1,000 or more grams of cocaine, contrary to MCL 333.7401(2)(a)(i), and possession of a firearm during the commission of a felony (felony-firearm), contrary to MCL 750.227b. Consequently, on January 6, 2014, the Court-sentenced Defendant to 15 to 45 years' imprisonment for the possession with intent to deliver cocaine conviction and two years'

imprisonment for the felony-firearm conviction (consecutively to be served), with 53 days' jail credit.

Following Defendant's subsequent appeal, on June 9, 2015, the Michigan Court of Appeals affirmed Defendant's conviction and sentence. *See, People v Moss*, unpublished per curiam opinion of the Court of Appeals dated June 9, 2015 (Docket No. 319954). Thereafter, on December 22, 2015, the Michigan Supreme Court denied Defendant's Application for Leave to Appeal. See, *People v Moss*, Order of the Michigan Court of Appeals dated December 22, 2015 (Docket No. 152082).

Defendant now brings the pending Motion for Relief from Judgment under MCR 6.500, *et seq*.

I.

The Michigan Court of Appeals set forth the facts of this case as follows:

> Defendant's convictions arise from his purchase of 10 kilograms of cocaine from a police undercover informant. After learning that defendant was interested in acquiring a large amount of cocaine and after conducting preliminary surveillance of defendant's activities, the police arranged for defendant to meet their informant. In addition to the police testimony, the prosecution presented evidence of video and audio recording capturing the meetings and telephone conversations between defendant and the informant. The first meeting, on November 6, 2012, lasted approximately 30 minutes and defendant agreed to purchase

10 kilograms of cocaine. At their next meeting on November 7, 2012, defendant and the informant discussed the drug deal, and defendant unsuccessfully attempted to persuade the informant to increase the purchase amount to 40 kilograms. In a restaurant parking lot, the informant showed defendant 10 kilograms of cocaine that were hidden in a compartment of an undercover police van. Defendant was instructed to contact the informant if he wanted to consummate the deal. Defendant contacted the informant on November 8, 2012, and they agreed to meet at a restaurant. They then agreed to transact the drug deal on November 9, 2012, which was when defendant believed he would have all the purchase money. Defendant unsuccessfully attempted to convince the informant to complete the transaction at defendant's house. Defendant also discussed his desire for future transactions with the informant. On November 9, 2012, defendant and the informant met in a parking lot of a Home Depot store, as planned. The informant was accompanied by another undercover officer who drove the van containing the drugs, and defendant also brought an associate with him. After defendant showed that he had the purchase money, which was in a suitcase in his car, the men walked to the undercover van where defendant was again shown the product. Defendant took possession of the van keys, got in the driver's seat, and turned

> on the ignition before the police remotely disabled the van. Defendant fled the vehicle on foot, but was arrested after a brief chase. [*People v Moss*, unpublished opinion per curiam of the Court of Appeals dated June 9, 2015 (Docket No. 319954).]

II.

Post-conviction relief under MCR 6.500, *et seq* is an extraordinary remedy that is appropriate only to prevent manifest injustice. *People v Reed*, 449 Mich 375, 388; 535 NW2d 496 (1995). Defendant has the burden of proving entitlement to the relief requested. MCR 6.508(D). This Court may not grant a motion for relief from judgment that alleges grounds for relief, other than jurisdictional defects, that could have been raised on appeal or in a prior motion, unless the defendant demonstrates both "good cause" for failure to raise the issue and "actual prejudice" from the alleged irregularities that support the claim of relief. MCR 6.508(D)(3). If either "good cause" or "actual prejudice" is lacking. this Court need not address the other prong before denying the motion. *People v Jackson*, 465 Mich 390, 405-06; 633 NW2d 825 (2001).

Under MCR 6.508(D)(3)(a), good cause for failing to raise an issue on appeal may be established by showing that an external factor prevented the defendant from raising the issue earlier or by proving ineffective assistance of appellate counsel. *Reed*, *supra* at 378. Here, Defendant argues that ineffective assistance of appellate counsel excuses his failure to raise on appeal the issues he now raises in this motion for relief from judgment. The standard for ineffective assistance of appellate counsel is the same as that for

trial counsel. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Thus, to prove ineffective assistance of appellate counsel, Defendant must show that appellate counsel's performance fell below an objective standard of reasonableness and that, as a result, Defendant was prejudiced. *People v Pickens*, 446 Mich 298, 302-303, 312-324; 521 NW2d 797 (1994). To establish the prejudice required for an ineffective assistance of counsel claim, Defendant must show a reasonable probability that the outcome would have been different but for counsel's errors. *People v Grant*, 470 Mich 477,486; 684 NW2d 686 (2004).

In a conviction following a trial, "actual prejudice" means that "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." MCR 6.508(D)(3)(b)(i). "Actual prejudice" may also be found where "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(iii).

III.

Defendant first argues that he was denied the effective assistance of counsel at trial because defense counsel failed to subject the prosecution's case to meaningful adversarial testing. Specifically, Defendant contends that defense counsel improperly stipulated to all of the facts necessary to convict him of the charged crimes, that defense counsel failed to cross examine one of the prosecutor's two witnesses, and that defense counsel waived an opening statement and closing argument. Defendant further argues that

defense counsel failed to investigate or interview any potential witnesses before trial.

Most claims of ineffective assistance of counsel are reviewed according to the two- part test set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), under which the defendant has the burden to show (1) that counsel's performance fell below objective standards of reasonableness, and (2) that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error. *Id.* at 687, 690, 694. When counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," however, prejudice is presumed for the purpose of establishing a claim of ineffective assistance of counsel. *United States v Cronic*, 466 ,US 648, 659-660; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Frazier*, 478 Mich 231, 243, n 10; 733 NW2d 713 (2007). "The *Cronic* test applies when the attorney's failure is *complete*, while the *Strickland* test applies when counsel failed at specific points of the proceeding." *Frazier, supra* at 244.

While Defendant argues that the *Cronic* standard applies in this case, the record in this case does not reflect a "complete" failure of counsel. Defense counsel explained at the *Ginther*[1] hearing that, given the evidence against Defendant, which included recorded telephone calls between Defendant and the informant and audio/video recordings of Defendant's meetings with the informant, the defense strategy was to focus on an entrapment defense, which was presented to the Court in a pretrial motion to dismiss. After the Court

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[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

denied the motion to dismiss, the strategy was to have a stipulated-fact bench trial in an attempt to expedite an appeal of the Court's denial of the motion to dismiss on the basis of entrapment.

In light of the overwhelming evidence against Defendant, this Court cannot conclude that defense counsel failed to subject the prosecutor's case to meaningful adversarial testing where counsel made a strategic decision to focus on an entrapment defense rather than a futile attempt to challenge Defendant's factual guilt. *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988), overruled in part on other grounds by *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998) ("Where the evidence obviously points to defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or admit to guilt on some charges but maintain innocence on others.") Therefore, Defendant's ineffective assistance of counsel claims will be reviewed under the *Strickland* standard, rather than the *Cronic* standard.

Defendant argues that defense counsel was ineffective because he waived an opening statement and closing argument at trial and failed to cross-examine one of the prosecutor's witnesses. Again, defense counsel explained at the *Ginther* hearing that the defense strategy centered on the pretrial entrapment hearing and subsequent appeal of the Court's denial of the motion to dismiss on the basis of entrapment. This Court will not second-guess a reasonable decision regarding trial strategy. *People v Putman*, 309 Mich App 240, 248; 870 NW2d 593 (2015). Furthermore, given the overwhelming evidence of Defendant's guilt, Defendant has not shown a reasonable probability that he would have been acquitted had defense counsel performed

differently at trial. *Grant, supra* at 486. Therefore, Defendant has not shown that he was denied the effective assistance of counsel, and he cannot meet the "good cause" or "actual prejudice" standards with respect to this issue. MCR 6.508(D)(3).

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to investigate or interview any of the prosecutor's witnesses before trial. "'[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Grant, supra* at 485, quoting *Strickland*, 466 US at 690-691. Given the evidence against Defendant, counsel's decision to expend efforts and resources on developing the entrapment defense rather than investigating witnesses in an attempt to challenge Defendant's factual guilt was a reasonable one. Furthermore, Defendant has not shown that the testimony of any of the witnesses defense counsel allegedly failed to interview would have benefited him at trial. Therefore, Defendant has not shown that he was prejudiced by defense counsel's performance. *Grant, supra* at 486. Accordingly, Defendant cannot meet the "good cause" or "actual prejudice" standards with respect to this issue. MCR 6.508(D)(3).

Defendant next argues that he was denied his Sixth Amendment right to counsel of his choice. Specifically, Defendant argues that, while he retained attorney David Steingold to represent him with respect to the pretrial and trial proceedings, Mr. Steingold allowed a different attorney, who was not his associate or partner, to question Defendant at the entrapment hearing and to represent Defendant on the second day of his trial. Defendant correctly argues

that an element of a criminal defendant's Sixth Amendment right to counsel is "the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006). Nevertheless, because Defendant does not argue that the Court or any other state actor interfered with his right to counsel of his choice, he has not shown a Sixth Amendment violation. Accordingly, Defendant has not shown that he is entitled to relief with respect to this issue.

Defendant next argues that he was sentenced in violation of *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015) because his minimum sentence range was calculated on the basis of judicially-found facts and his the minimum sentence range would have been lower had judicially-found facts not been considered. Defendant has not met the "good cause" or "actual prejudice" standards with respect to this issue, however, where he has not shown prejudice from the alleged error. This Court first notes that, because Defendant has not specified which offense variables allegedly were scored on the basis of judicially-found facts, he has not met his burden of establishing entitlement to relief from judgment. See *People v Jones*, 201 Mich App 449, 457; 506 NW2d 542 (1993). Furthermore, this Court's review of Defendant's sentence shows that his minimum sentence range would not have changed if the offense variables that appear to this Court to have been scored on the basis of judicially-found facts had not been considered.[2]

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[2] Defendant was assessed 100 points for OV 15 on the basis of facts necessarily found by the fact-finder to convict Defendant of possession with intent to deliver 1,000 or more grams of cocaine.

Therefore, Defendant has not shown that he was prejudiced by the alleged error. *Lockridge*, *supra* at 394-395. Accordingly, Defendant has not met his burden of demonstrating entitlement to relief from judgment with respect to this issue. MCR 6.508(D)(3).

**THEREFORE, IT IS HEREBY ORDERED** that Defendant's Motion for Relief from Judgment, pursuant to MCR 6.500, *et seq*, is **DENIED**, pursuant to MCR 6.508(D)(3).

**IT IS SO ORDERED**.

/s/ Martha D. Anderson
HON. MARTHA D. ANDERSON
Circuit Court Judge

Dated: April 21, 2017

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In addition, Defendant was assessed five points for OV 2 on the basis of facts necessarily found by the fact-finder to convict Defendant of felony-firearm. Even if the remaining offense variable scores were not considered because they were determined in violation of *Lockridge*, Defendant's total OV score still would have placed him at OV Level VI. MCL 777.62.

No. 21-1655

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| STEVEN LEE MOSS, | ) | |
| | ) | [seal] |
| Petitioner-Appellee, | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| GARY MINIARD, WARDEN, | ) | |
| | ) | |
| Respondent-Appellant. | ) | |
| | ) | |

**BEFORE**: COLE, GIBBONS, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Cole would grant rehearing for the reasons stated in his dissent.

**ENTERED BY ORDER OF THE COURT**

**Date:** June 1, 2023 /s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

* Judges Larsen and Davis recused themselves from participation in this ruling.