Oral argument not yet scheduled

No. 21-1655

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

Steven Moss,

Petitioner-Appellee,

v.

Gary Miniard,

Respondent-Appellant.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Case No. 4:18-cv-11697-LVP-DRG (Parker, J.)

# CORRECTED RESPONSE BRIEF FOR PETITIONER-APPELLEE STEVEN MOSS

Radiance Campbell
Caleb Thompson
Lois Zhang
Student Counsel

Hannah Mullen
Brian Wolfman
Madeline Meth
GEORGETOWN LAW
APPELLATE COURTS IMMERSION CLINIC
600 New Jersey Ave., NW, Suite 312
Washington, D.C. 20001
(202) 661-6582

May 11, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit Case Number: 21-1655 Case Name: Steven Moss v. Gary Miniard

Name of counsel: Hannah Mullen

Pursuant to 6th Cir. R. 26.1, Steven Moss
*Name of Party*
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on May 12, 2022 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Hannah Mullen

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ........ iii
STATEMENT REGARDING ORAL ARGUMENT ........ 1
INTRODUCTION ........ 2
STATEMENT OF THE ISSUES ........ 3
STATEMENT OF THE CASE ........ 3
I. Legal background ........ 3
II. State court proceedings ........ 6
III. Federal court proceedings ........ 16
SUMMARY OF THE ARGUMENT ........ 19
STANDARD OF REVIEW ........ 21
ARGUMENT ........ 21
I. Moss's petition is not time-barred. ........ 21
A. Moss's motion for relief from judgment was timely ........ 22
B. If Moss's petition wasn't timely, the district court did not err in granting equitable tolling. ........ 25
II. The district court's grant of Moss's habeas petition should be affirmed. ........ 29
A. The ineffective assistance of Moss's appellate counsel excuses the procedural default of his *Cronic* claims. ........ 29
1. Appellate counsel rendered deficient performance ........ 30
2. That deficient performance prejudiced the appeal. ........ 33
B. Under clearly established law, Moss's trial counsel was constitutionally ineffective. ........ 34
1. Moss's trial counsel was constructively absent during the pre-trial and trial stages of his defense. ........ 34

2. The state court's decision was contrary to clearly established federal law. ....... 41

CONCLUSION ....... 43

CERTIFICATE OF COMPLIANCE .......

DESIGNATION OF RELEVANT DOCUMENTS .......

CERTIFICATE OF SERVICE .......

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Baldwin Cnty. Welcome Ctr. v. Brown*,
466 U.S. 147 (1984)....27

*Bronaugh v. Ohio*,
235 F.3d 280 (6th Cir. 2000)....22, 23

*Brown v. Brewer*,
2016 WL 28988 (E.D. Mich. Jan. 4, 2016)....27

*Burton v. Renico*,
391 F.3d 764 (6th Cir. 2004)....21

*Byrd v. Skipper*,
940 F.3d 248 (6th Cir. 2019)....4

*Caver v. Straub*,
349 F.3d 340 (6th Cir. 2003)....30, 38

*Ceasor v. Ocwieja*,
655 F. App'x 263 (6th Cir. 2016)....14

*Chase v. MaCauley*,
971 F.3d 582 (6th Cir. 2020)....21

*Chinn v. Jenkins*,
2016 WL 815015 (S.D. Ohio. Mar. 2, 2016)....28, 29

*Clutter v. Meko*,
2017 WL 5514684 (6th Cir. 2017)....28

*Fortson v. Carter*,
79 F. App'x 121 (6th Cir. 2003)....27

*Fortson v. Eppinger*,
2016 WL 11259032 (N.D. Ohio 2016)....24

*Foust v. Houk*,
655 F.3d 524 (6th Cir. 2011) ....................................................................39

*Fusi v. O'Brien*,
621 F.3d 1 (1st Cir. 2010)................................................................5, 6, 33

*Griffin v. Rogers*,
399 F.3d 626 (6th Cir. 2005) ....................................................................27

*Hall v. Lebanon Corr. Inst.*,
662 F.3d 745 (6th Cir. 2011) ....................................................................25

*Hall v. Vasbinder*,
563 F.3d 222 (6th Cir. 2009) ....................................................................21

*Holland v. Fla.*,
560 U.S. 631 (2010).................................................................................25

*Howard v. Bouchard*,
405 F.3d 459 (6th Cir. 2005) ....................................................................33

*Joseph v. Coyle*,
469 F.3d 441 (6th Cir. 2006) ...................................................31, 32, 33, 42

*Kirchoff v. Warden, Chillicothe Corr. Inst.*,
2017 WL 4863119 (6th Cir. 2017) ............................................................24

*Leon v. Parris*,
2015 WL 4394327 (M.D. Tenn. July 16, 2015) ......................................28, 29

*Martin v. Rose*,
744 F.2d 1245 (6th Cir. 1984)..................................................38, 39, 40, 43

*Maslonka v. Hoffner*,
900 F.3d 269 (6th Cir. 2018) ....................................................................37

*McFarland v. Yukins*,
356 F.3d 688 (6th Cir. 2004) ....................................................................30

*Menominee Indian Tribe of Wis. v. United States*,
577 U.S. 250 (2016)....................29

*Miller v. Admin. Office of Courts*,
448 F.3d 887 (6th Cir. 2006)....................25

*Mitchell v. Mason*,
325 F.3d 732 (6th Cir. 2003)....................5, 35, 36, 38, 42

*Moss v. Hofbauer*,
286 F.3d 851 (6th Cir. 2002)....................38

*Nassiri v. Mackie*,
2018 WL 6437870 (W.D. Mich. 2018)....................24

*People v. Adams*,
2007 WL 3171259 (Mich. Ct. App. Oct. 30, 2007)....................33,34

*People v. Ginther*,
390 Mich. 436 (1973)....................14

*People v. Reid*,
2005 WL 2861968 (Mich. Ct. App. Nov. 1, 2005)....................34

*Phillips v. White*,
851 F.3d 567 (6th Cir. 2017)....................35, 38

*Powell v. Alabama*,
287 U.S. 45 (1932)....................35

*Raglin v. Mitchell*,
2017 WL 1313852 (S.D. Ohio. Apr. 10, 2017)....................28

*Ramonez v. Berghuis*,
490 F.3d 482 (6th Cir. 2007)....................39

*Robertson v. Simpson*,
624 F.3d 781 (6th Cir. 2010)....................21

*Rodriguez-Penton v. United States*,
905 F.3d 481 (6th Cir. 2018) .....4

*Sherwood v. Prelesnik*,
579 F.3d 581 (6th Cir. 2009) .....28

*Strickland v. Washington*,
466 U.S. 668 (1984) .....3, 4, 13, 35

*United States v. Cronic*,
466 U.S. 648 (1984) ..... 3, 5, 13, 15, 30, 32, 37, 38

*United States v. Hurst*,
322 F.3d 1256 (10th Cir. 2003) .....24

*United States v. Marcello*,
212 F.3d 1005 (7th Cir. 2000) .....24

*Van v. Jones*,
475 F.3d 292 (6th Cir. 2007) .....5

*Wainwright v. Sykes*,
433 U.S. 72 (1977) .....30

*Williams v. Birkett*,
895 F. Supp. 2d 864 (E.D. Mich. 2012) .....28

*Williams v. Wilson*,
149 F. App'x 342 (6th Cir. 2005) .....24

**Statutes**

28 U.S.C. § 2244(d)(1) .....16

28 U.S.C. § 2244(d)(1)(A) ..... 19, 22, 23, 24, 25, 26, 28

28 U.S.C. § 2244(d)(2) .....16, 25

28 U.S.C. § 2254(d) .....2, 18, 21, 41

28 U.S.C. § 2254(d)(1)....................20, 41

Mich. Comp. L. § 333.7401(2)(a)(i)....................6

Mich. Comp. L. § 750.027b....................6

**Other Authorities**

Sup. Ct. R. 13(1)....................15, 22

Fed. R. Civ. P. 6(a)....................23, 25

Fed. R. Civ. P. 6(a)(1)(A)....................22

Mich. Ct. R. 6.508(D)....................16

Mich. Ct. R. 6.508(D)(3)....................15, 29

## STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary because the district court correctly granted Moss's habeas petition and the briefing is sufficient to determine the issues raised on appeal.

## INTRODUCTION

Steven Lee Moss was convicted of attempting to purchase drugs from an undercover police informant after a trial that lasted twenty minutes. His lawyer, David Steingold, did not conduct any investigation into the case, perform necessary legal research, or find and interview any witnesses. At trial, Steingold waived both his opening and closing statements, did not produce any witnesses, and stipulated to all of the prosecution's claims, including that the crime occurred. Moss was found guilty and sentenced to 15 to 45 years in prison.

The state courts upheld Moss's conviction on direct appeal and collateral review. The district court, however, held that Steingold's conduct deprived Moss of his Sixth Amendment right to counsel and that the state court's decision to the contrary is not entitled to deference under 28 U.S.C. § 2254(d). The State is flatly wrong that a lawyer who fails to investigate, interview any witnesses, or subject the prosecution's case to meaningful adversarial testing at trial has done his job. The State's threshold arguments—that Moss's habeas petition was untimely and that procedural default should have prevented the district court from reaching the merits of his Sixth Amendment claim—also fail. This Court should affirm.

## STATEMENT OF THE ISSUES

**I.** Whether Moss's habeas petition was timely filed or, alternatively, whether the district court properly equitably tolled the filing period for one day because Moss was diligent throughout the litigation and the confused state of the law was outside of his control.

**II.** Whether the district court correctly granted Moss's habeas petition where his trial counsel failed to investigate the case, prepare for trial, or subject the prosecution's case to meaningful adversarial testing because

**A.** Appellate counsel was ineffective in failing to raise the claims that trial counsel constructively abandoned Moss before and during trial, thus excusing their procedural default; and

**B.** The state court unreasonably applied clearly established federal law by analyzing trial counsel's failures under *Strickland v. Washington*, 466 U.S. 668 (1984), rather than under *United States v. Cronic*, 466 U.S. 648 (1984).

## STATEMENT OF THE CASE

### I. Legal background

The Supreme Court has articulated two distinct frameworks for evaluating whether a defendant was deprived of his Sixth Amendment right to trial counsel: one laid out in *Strickland v. Washington*, 466 U.S. 668 (1984), and the other in *United States v. Cronic*, 466 U.S. 648 (1984). Because those

frameworks are key to understanding this case, we briefly summarize them before delving into the facts and procedural history.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a court asks whether counsel rendered constitutionally inadequate assistance because (1) counsel's performance was unreasonably deficient, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See id.* at 698-99. The *Strickland* standard thus assumes that counsel was present throughout the trial-court proceedings and asks whether, while representing his client, counsel committed errors serious enough to fall beneath the Sixth Amendment's constitutional floor of effective assistance.

Courts apply the two-part *Strickland* inquiry to specific failures by trial counsel that occurred as the proceedings unfolded. For example, in *Byrd v. Skipper*, 940 F.3d 248 (6th Cir. 2019), this Court held that counsel was constitutionally inadequate where he misunderstood the law and, as a result, gave inaccurate advice to his client about the likelihood of acquittal and failed to provide informed advice about the risks of trial. *Id.* at 255, 257-58. Counsel was undeniably present and attempting to represent his client—but his performance fell below what the Sixth Amendment requires. *See also, e.g.*, *Rodriguez-Penton v. United States*, 905 F.3d 481, 487 (6th Cir. 2018).

*United States v. Cronic*, 466 U.S. 648 (1984), confronts a different problem: the wholesale failure of trial counsel "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Id.* at 656. Under *Cronic*, the Sixth Amendment is violated by the physical or constructive absence of counsel at "a critical stage of [the accused's] trial." *Id.* at 659; *see id.* at 654 n.11; *Van v. Jones*, 475 F.3d 292, 311-12 (6th Cir. 2007). As relevant here, both the pre-trial period and the trial itself are "critical stages" in which counsel's absence deprives the defendant of his Sixth Amendment right to effective assistance. *See Mitchell v. Mason*, 325 F.3d 732, 741-42 (6th Cir. 2003) (pre-trial); *Cronic*, 466 U.S. at 659 (trial).

Unlike *Strickland*, then, *Cronic* requires a court to consider "counsel's overall representation of [the client]" during a critical stage, "as opposed to any specific error or omission counsel may have made." *Cronic*, 466 U.S. at 657 n.20. The two standards also differ because, when counsel abandons a client under *Cronic*, "[n]o specific showing of prejudice [i]s required." *Id.* at 659. In light of these differences, ineffective-assistance-of-trial-counsel claims brought under *Strickland* and *Cronic* are considered to be "distinct legal claims." *Fusi v. O'Brien*, 621 F.3d 1, 6 (1st Cir. 2010). "[T]he difference between the two is not of degree but of kind." *Id.* (quotation marks omitted).

For the purposes of federal habeas review, therefore, "[a] defendant's reliance on one theory in state court does not exhaust the other." *Id.*

## II. State court proceedings

**The arrest.** On November 9, 2012, Petitioner-Appellee Steven Lee Moss met Louis Fernando Velez-Pavas—a paid informant for the Drug Enforcement Agency (DEA) going by the alias "Diego"—in front of a Home Depot. (Opinion & Order, RE 5-12, PageID ## 918-919, 987 n.2.) There, Diego gave Moss the keys to his van. (*Id*. Page ID ## 918-919.) After Moss entered the van and sat in the driver's seat, the police arrested him. (*Id*.; *see also* Tanscript, RE 5-2, PageID # 164.) Moss was charged with possession with intent to deliver 1,000 or more grams of cocaine, *see* Mich. Comp. L. § 333.7401(2)(a)(i), which was in the van, and possession of a firearm during the commission of a felony, *see* Mich. Comp. L. § 750.027b. (Motion for Relief from Judgment, RE 5-10, PageID # 867; *see also* Opinion, RE 33, PageID # 1825.)

**Pre-trial.** On March 13, 2013, Moss's first attorney filed a motion to conduct an entrapment hearing. (Opinion, RE 5-12, PageID # 1032.) Several other lawyers represented Moss before David Steingold joined the case on September 6, 2013, ten days before the entrapment hearing was to be held. (*Ginther* Hearing, RE 5-9, PageID # 754; *see* Transcript, RE 5-2, PageID # 103.)

In the ten days before the hearing, Steingold did not meet or consult with Moss. (Transcript, RE 5-2, PageID # 104.) He did not investigate. (*Id.* PageID # 103.) He did not summon or interview any witnesses, even though many were known to him in advance. (Transcript, RE 5-3, PageID ## 340-341.) He did not speak to any of Moss's previous lawyers. (*Id.* PageID # 349.) He did not conduct relevant legal research. (*Id.* PageID ## 379-380.) Indeed, he admitted that he did not prepare for the entrapment hearing whatsoever. (Transcript, RE 5-2, PageID ## 106-107, 219; Transcript, RE 5-3, PageID ## 340-341, 349.)

All Steingold did before the entrapment hearing was, on the day of the hearing itself, persuade Moss to proceed with a bench rather than a jury trial. (Transcript, RE 5-2, PageID ## 230-231.)

**Entrapment hearing**. Steingold was unprepared for the entrapment hearing. He began by asking the court for more time to prepare, admitting that "there is a lack of investigation that was done," that he "was not prepared at all" and "ha[d]n't had the opportunity to go through it." (Transcript, RE 5-2, PageID ## 103, 107; Transcript, RE 5-3, PageID # 349.) "[W]e didn't know what we were walking into," Steingold said. The court replied that, if that were true, then Steingold "shouldn't have taken the case." (Transcript, RE 5-2, PageID # 106.) Later in the hearing, Steingold

stated that he was "doing the best [he] can to muddle through." (Transcript, RE 5-3, PageID # 349.)

Steingold presented only one witness at the entrapment hearing: Moss. (Transcript, RE 5-2, PageID # 102; Transcript, RE 5-3, PageID # 268.) Moss testified that he faced months of pressure to deal drugs from Michael Bennett, a man he knew through his incarcerated cousin. (Transcript, RE 5-2, PageID # 176.) Moss himself had no criminal record. (Transcript, RE 5-8, PageID ## 742-743.) Moss was struggling financially, and his home was facing foreclosure, but he nonetheless refused Bennett every time he brought up the topic. (Transcript, RE 5-2, PageID ## 110, 124.)

After Moss rebuffed several of Bennett's offers to deal drugs, Bennett changed his approach. Bennett asked Moss to loan him money, promising that he would invest it and return a profit. (Transcript, RE 5-2, PageID ## 141, 146.) Moss was skeptical, but he was also desperate: He had "no more financial moves" left to try to save his home, and was "sad, depressed, [and] wasn't sleeping good." (*Id.* PageID # 144.) When Bennett promised that he would be able to give Moss "an extra ninety thousand … in two to three days," Moss agreed to lend him the money. (*Id.* PageID # 149.)

The two men met up a few days later. Bennett introduced Moss to "Diego"—as indicated above, actually Louis Fernando Velez-Pavas, a paid

DEA informant—and they agreed that, when they next saw each other, Moss would "bring the money and Mr. Bennett would leave" with it. (Transcript, RE 5-2, PageID # 152.) Bennett would then use the money to deal drugs and return Moss's money to him, plus profit, "in two or three days." (*Id.*)

In the interim, Moss wavered on his commitment to the plan. After a bizarre encounter with Diego that left Moss "really scared," Moss told Bennett that he didn't "think [he could] do this." (Transcript, RE 5-2, PageID ## 155, 158.) Bennett responded forcefully, telling Moss that, if Moss didn't lend him the money, the other parties to the transaction "might hurt me … and you're going to get hurt too." (*Id.* PageID # 158.) Bennett also invoked the impending foreclosure of Moss's home, asking Moss "I mean, what kind of man are you? What kind of dad are you? Gonna just let your daughter get put on the streets?" (*Id.*)

Moss gave in. On November 9, 2012, he went to the parking lot of a Home Depot with $272,000 in cash. (Transcript, RE 5-2, PageID # 208.) He intended to meet Bennett to hand him the money as planned, but Bennett was nowhere to be found. (*Id*. PageID # 162.) Soon afterward, Diego called Moss to say he was present, and they should meet. (*Id*.)

But Diego didn't seem interested in taking the cash. Instead, Diego tried to get Moss to step into a van parked nearby: "[H]e kept saying 'Come on,

come on[], get in, get in.'" (Transcript, RE 5-2, PageID # 163.) When Moss wasn't interested in the van, Diego "threw [him] the keys" and asked Moss to drive the van across the parking lot to Moss's car, where the money was waiting. (*Id.* PageID # 164.) When Moss "went and got in the driver's side," Diego and the van's driver "took off running in the other direction." (*Id.*) Spooked, Moss "jumped out of the vehicle" and went to return to his car. "[T]he next thing [he] kn[e]w," the "police pulled up" and arrested him. (*Id.*)

The prosecution's witnesses told a different story. (Transcript, RE 5-3, PageID # 268.) They suggested that the police learned that Moss was interested in acquiring a large amount of cocaine and *then* arranged for him to meet their informant. (*See id.* at ## 371-372.) In the government's version, Moss was the one actively pursuing the deal. In the Home Depot parking lot, they posited, Moss showed Diego that he brought money to purchase drugs, then got into the van—knowing it contained drugs—and tried to drive away. (Opinion, RE 18, PageID ## 1674-1675.)

Throughout the entrapment hearing, the trial judge expressed concern about Steingold's lack of preparation. She inquired about his failure to subpoena any witnesses: "[T]hose names were known from the inception. And now, here we are, they're news to you. How is that possible?" (Transcript, RE 5-3, PageID # 348.) She threatened him with contempt of

court. (*Id.* PageID # 571.) At one point, she asked Steingold if he was deliberately "trying to put an ineffective assistance of counsel with respect to [his] conduct of this on the Record … for appellate purposes." (*Id.* PageID ## 342-343.) In the absence of any witnesses or evidence to support Moss's version of events, the judge denied the motion to dismiss on entrapment grounds. (Transcript, RE 5-5, PageID # 655.)

Steingold then realized that the same judge would be presiding over Moss's trial. He belatedly sought the jury trial that he had earlier persuaded Moss to relinquish. The court refused. (Transcript, RE 5-5, PageID # 657.) Steingold also attempted to have the judge disqualified. The court denied his motion. (Transcript, RE 5-4, PageID ## 608-609.) When the court prepared to adjourn for the trial the next day, Steingold was surprised, and "frankly" admitted that he "was not prepared to go to trial." (Transcript, RE 5-5, PageID # 657.) The court gave him an additional 16 days to prepare for the trial. (*Id.* PageID 665.)

**Trial.** Steingold returned for trial. Despite the 16-day continuance, he was unprepared. He waived his opening argument. (Transcript, RE 5-6, PageID # 670.) He did not produce any witnesses. (*Id.* PageID # 693.) He stipulated to every claim the government made, including to all of the evidence it had introduced during the entrapment hearing and that "the crime occurred."

(*Id*. PageID ## 670, 699.) Moss's version of events was never mentioned, not once. Of the two witnesses the government produced, Steingold did not cross-examine one of them at all, nor raise any objections during direct. (*Id*. PageID ## 671-674.) As to the other, DEA Agent Hill, he briefly voir dired him as to his credentials as an expert and cross-examined him—before arguing that Hill's testimony wasn't necessary to the prosecution because Steingold had already stipulated that Moss intended to purchase cocaine. (*Id.* PageID ## 677-684, 689.) Steingold waived his closing argument, saying "I have nothing, Your Honor." (*Id.* Page ID # 694.) From start to finish, the trial lasted twenty minutes. (*Ginther* Hearing, RE 5-9, PageID # 853.)

The next day, Steingold did not show up. Instead, a lawyer named Lisa Dwyer took his place. (Transcript, RE 5-7, PageID # 698.) Other than to introduce herself and request to make an argument seeking to reduce Moss's bond (the court denied that request), Dwyer did not speak. (*Id.* PageID # 711.) With no resistance from Moss's lawyers, the court found Moss guilty. (*Id.* PageID # 710.)

**Sentencing.** Steingold reappeared for the sentencing hearing. (Transcript, RE 5-8, PageID # 715.) He presented a few objections to the presentence report: that Moss did not have a history of substance abuse, was once injured while at work, and was honorably discharged from the military. (*Id.* PageID

## 715-724.) As Steingold admitted, none of those objections was relevant "to the [Michigan sentencing] guidelines." (*Id.* PageID # 715.)

The judge sentenced Moss to 15 to 45 years in prison. (Transcript, RE 5-8, PageID # 744.)

**Appeal as of right.** Acting pro se, Moss appealed his conviction to the Michigan Court of Appeals (Docket Sheet, RE 5-1, PageID # 90.) He later hired Suzanna Kostovski as his appellate counsel. (*Id*. PageID # 100.) Kostovski filed a brief arguing that Moss received ineffective assistance of counsel. (Opinion and Order, RE 5-12, PageID ## 980-1013.) She also asked that the case be remanded to the trial court for an evidentiary hearing to determine whether Moss was denied effective assistance of counsel. (*Id.* PageID ## 1019-1021.)

Kostovski argued that Steingold was constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for two reasons: Steingold waived Moss's right to a jury trial, and Steingold stipulated to the use of all evidence from the entrapment hearing as substantive evidence at the bench trial. (Opinion and Order, RE 5-12, PageID ## 1008-1009; Opinion, RE 33, PageID # 1836.) Kostovski did not raise an abandonment-of-counsel claim under *United States v. Cronic*, 466 U.S. 648 (1984).

The Michigan Court of Appeals granted the motion to remand. (Opinion and Order, RE 5-12, PageID # 1029.) The trial court then held an evidentiary hearing under *People v. Ginther*, 390 Mich. 436 (1973). A *Ginther* hearing "allows a defendant to proffer facts or evidence in support of his ineffective assistance of counsel claim." *Ceasor v. Ocwieja*, 655 F. App'x 263, 271 (6th Cir. 2016). At the *Ginther* hearing, Kostovski focused her questions to Moss and Steingold on the argument that Steingold was ineffective under *Strickland* for waiving Moss's right to a jury trial and stipulating to the admission of all the evidence from the entrapment hearing. (*Ginther* Hearing, RE 5-9, PageID ## 747-855.) She also mentioned that the trial was twenty minutes long, Steingold asked only one witness a few questions, and Steingold waived both opening and closing arguments. (*Id*. PageID # 853.)

The trial court denied Moss's motion for a new trial. (Opinion and Order, RE 5-12, PageID ## 1041-1042.) The trial court found that "no credible evidence exists to overcome the presumption" that Moss knowingly and intelligently waived his right to a jury trial and that Kostovski failed to establish that Steingold's performance "fell below an objective standard of reasonableness, or that but for Mr. Steingold's alleged deficient performance, a different result would have been reasonably probable" under the *Strickland* standard. (*Id.*)

On June 9, 2015, the Michigan Court of Appeals affirmed Moss's conviction and sentence. (Opinion and Order, RE 5-12, PageID # 918.) The Michigan Supreme Court denied Moss leave to appeal on December 22, 2015. (Order, RE 5-14, PageID # 1311.) Moss did not file a petition for a writ of certiorari at the U.S. Supreme Court, so his conviction became final 90 days later, on March 21, 2016. *See* Sup. Ct. R. 13(1).

**State collateral appeal.** Moss then retained David Moffitt as counsel to handle a state-court collateral motion for postconviction relief. On March 22, 2017, Moss filed a motion for relief from judgment in a Michigan trial court. (Motion for Relief from Judgment, RE 5-10, PageID ## 862-886.) Moss requested a new trial, arguing, among other things, that Steingold constructively abandoned him under *United States v. Cronic*, 466 U.S. 648 (1984), by failing to conduct pre-trial investigative interviews of the prosecution's witnesses, agreeing to a stipulated fact trial, conceding that "the crime occurred," and waiving opening and closing arguments. (Motion for Relief from Judgment, RE 5-10, PageID ## 868-872, 879-884.)

The Michigan trial court denied Moss's motion under Michigan Court Rule 6.508(D)(3), which requires a petitioner to raise constitutional claims on direct appeal or else demonstrate both "'good cause' for failure to raise the issue and 'actual prejudice' from the alleged irregularities that support the

claim of relief" to avoid procedurally defaulting those claims. (Opinion and Order, RE 5-11, PageID ## 912, 917.) The court held that Moss failed to show that appellate counsel's performance, in failing to raise a *Cronic* claim, was constitutionally inadequate. It reasoned that, "[g]iven the overwhelming evidence against [Moss]," trial counsel made a "reasonable decision regarding trial strategy" that—reviewed under the *Strickland* standard—did not prejudice the outcome of the trial. (*Id*. PageID # 915.)

Moss applied and was denied leave to appeal to the Michigan Court of Appeals on March 15, 2018 and the Michigan Supreme Court on October 30, 2018. (Opinion, RE 5-13, PageID # 1099; Order, RE 5-15, PageID # 1384.)

**III. Federal court proceedings**

Moss's conviction became final on March 21, 2016, when his opportunity to petition the U.S. Supreme Court for certiorari expired. The one-year statute of limitations for federal habeas petitions, set out at 28 U.S.C. § 2244(d)(1), began to run the next day, March 22, 2016. Moss filed his state collateral motion for postconviction relief under Michigan Court Rule 6.508(D) one year later, on March 22, 2017, which tolled the time for his federal habeas petition. *See* 28 U.S.C. § 2244(d)(2); (Opinion, RE 5-13, PageID # 1185.)

While the state collateral proceedings were pending, Moss filed a federal habeas petition in the Eastern District of Michigan. (Habeas Petition, RE 1, PageID # 1.) Moss brought two claims under *Cronic*: that Steingold abandoned him before trial by failing to conduct pre-trial interviews and that Steingold abandoned him at trial by failing to subject the prosecution's case to meaningful adversarial testing. (*Id.* PageID ## 21-25, 29-34). He also argued that his appellate counsel was ineffective for failing to raise these *Cronic* claims on direct appeal, thus excusing their procedural default. (*Id.* PageID ## 34-36.)

The State moved to dismiss on timeliness grounds, arguing that the one-year limitations period ended on March 21, 2017. (Motion to Dismiss, RE 4, PageID ## 76-78.) Moss disagreed, arguing that, because 2016 was a leap year, the limitations period contained 366 days and ended on March 22, 2017 (the day he filed his motion for collateral relief). (Reply to Motion to Dismiss, RE 8, PageID ## 1482-1491.) The district court determined that Moss's petition was untimely by one day but nonetheless denied the motion to dismiss. It held that Moss was entitled to one day of equitable tolling because he had diligently pursued his litigation and he had understandably relied on confusing case law. (Opinion, RE 9, PageID # 1507.)

On the merits, the district court denied Moss's application for a writ of habeas corpus, holding that, under 28 U.S.C. § 2254(d), it could not "conclude that the state court's decision was contrary to or [an] unreasonable application of *Strickland*." (Opinion, RE 18, PageID # 1683.) The district court emphasized trial counsel's "strategy" in light of the "evidence of Petitioner's guilt" and the purported unlikeliness that testimony of witnesses would have benefitted Moss at trial. (*Id.*)

Moss filed a motion for reconsideration. As relevant here, Moss argued that the district court palpably erred when it (1) misidentified the correct legal standard, applying a *Strickland* ineffective-assistance-of-counsel framework when it should have applied the *Cronic* constructive-denial-of-counsel framework; and (2) misapplied the *Cronic* standard and ignored binding precedent. (Motion for Reconsideration, RE 21, PageID # 1697-1698.)

The district court agreed that it had committed a palpable error when it denied Moss habeas relief on his *Cronic* claims. The court held that Moss's procedural default of his *Cronic* claims should be excused because Kostovski was constitutionally ineffective in failing to raise them on direct appeal. (Opinion, RE 33, PageID # 1837.) On the merits, Steingold constructively abandoned Moss at trial by "stipulat[ing] 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." (*Id.* PageID # 1839.) The court also stressed that trial counsel "conducted no independent investigation into potential witnesses or defenses" and that Moss had a "potential defense" that Steingold failed to advance. (*Id.* PageID ## 1843, 1845.) Therefore, "the state court unreasonably applied the *Strickland* standard where Petitioner clearly was constructively denied the assistance of trial counsel," and Moss was entitled to a writ of habeas corpus on his *Cronic* claims. (*Id.* PageID # 1845.)

Moss was released on bond on January 24, 2022. (Order, RE 51, PageID ## 1988-1989.)

## SUMMARY OF THE ARGUMENT

**I.** Moss's petition is not time-barred. This Court has used two contradictory methods to calculate the 28 U.S.C. § 2244(d)(1)(A) limitations period: one starts the period on the day that the petitioner's conviction becomes final, and another starts it the next day. Federal Rule of Civil Procedure 6(a) instructs that the latter approach is correct, and, under that approach, Moss's petition was timely. And even if Moss's petition was one day late, the district court did not err in granting one day of equitable tolling. Moss diligently pursued his claims throughout his litigation, and the confused state of the law was an extraordinary circumstance.

**II.** The district court properly granted habeas relief.

**A.** Moss's *Cronic* claims are not procedurally barred. The *Cronic* claims are clearly stronger than the *Strickland* claims that Moss's appellate counsel presented on direct appeal, so it was constitutionally deficient performance for her to fail to raise them. But for that deficient performance, there is a reasonable probability Moss's appeal would have succeeded. And so, the district court correctly held that her deficient performance and the prejudice to Moss's appeal excuses the procedural default of his *Cronic* claims.

**B.** The state court's decision holding that Steingold was not constitutionally ineffective unreasonably applied clearly established federal law and is therefore not entitled to deference under 28 U.S.C. § 2254(d)(1). Before trial, Steingold failed to investigate the case, perform necessary legal research, or interview or subpoena any witnesses. Then, at trial, he waived his opening and closing statements, stipulated to every fact that the government requested (including that the crime occurred), and entirely failed to cross-examine one of the government's two witnesses. Steingold constructively abandoned Moss before and during trial in violation of *Cronic*, and the state court's decision to the contrary is not entitled to deference. The district court properly granted Moss's habeas petition.

## STANDARD OF REVIEW

**I.** This Court reviews a district court's decision to grant equitable tolling de novo when, as here, the facts are undisputed. *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010).

**II. A.** When evaluating whether appellate counsel provided ineffective assistance for the purpose of excusing the procedural default of an underlying claim, this Court reviews a district court's decision de novo. *See Hall v. Vasbinder*, 563 F.3d 222, 236 (6th Cir. 2009).

**B.** This Court also reviews de novo the district court's determination that trial counsel was constitutionally ineffective. *Burton v. Renico*, 391 F.3d 764, 770 (6th Cir. 2004). When a state court holds that trial counsel was not ineffective, a federal court may grant habeas relief if that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *see Chase v. MaCauley*, 971 F.3d 582, 590 (6th Cir. 2020).

## ARGUMENT

### I. Moss's petition is not time-barred.

The district court held that Moss's petition was untimely but that the one-year limitations period should be equitably tolled for one day. (Opinion, RE 9, PageID # 1507.) Moss's petition was, in fact, timely under this Circuit's

case law. But if it was untimely, the district court correctly granted equitable tolling.

**A. Moss's motion for relief from judgment was timely.**

Once a state court of last resort has upheld the conviction of a criminal defendant on direct review, that defendant has 90 days to petition the Supreme Court for certiorari. Sup. Ct. R. 13(1). If the defendant chooses not to file a petition, his conviction becomes final at "the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The next day, the one-year limitations period for filing a habeas petition in federal court begins to run. *See id.*; Fed. R. Civ. P. 6(a)(1)(A).

The text of 28 U.S.C. § 2244(d)(1)(A) and Federal Rule of Civil Procedure 6(a) is clear: The limitations period is one year long and runs from the day after a petitioner's conviction becomes final. But this Circuit has, apparently inadvertently, articulated two contradictory views on how to calculate the one-year limitations period.

**1.** In *Bronaugh v. Ohio*, 235 F.3d 280 (6th Cir. 2000), the Court started the one-year limitations period a day early. There, the last day on which the petitioner could have sought certiorari in the Supreme Court was September 9, 1996, so his conviction became final on that day. *Id.* at 285. Looking to September 9 as the key date—instead of September 10, the day after the

petitioner's conviction became final and the first day of the limitations period—this Court calculated that the last day to file a habeas petition was September 9, 1997. *Id.*

In holding that Moss's petition was untimely, the district court followed *Bronaugh*'s example. Moss's last day to file for certiorari was March 21, 2016, so the district court believed that the one-year limitations period expired on March 21, 2017. (*See* Opinion, RE 9, PageID ## 1503, 1506.) As such, the court held that Moss's state-court postconviction motion—filed on March 22, 2017—did not toll the limitations period because it had already expired a day earlier. (*Id.* PageID # 1506). The State similarly assumes that the limitations period ran out on March 21, 2017. *See* Opening Br. 19.

But *Bronaugh* is wrong that the one-year statute of limitations ends on the anniversary of the final day to seek certiorari. Federal Rule of Civil Procedure 6(a) instructs that when computing a "time period," a court should "exclude the day of the event that triggers the period." The triggering event for the 28 U.S.C. § 2244(d)(1)(A) one-year limitations period is finality: here, "the expiration of the time for seeking" certiorari. According to Rule 6(a), then, the one-year period begins *the next day*. By instead looking to the final day to seek certiorari, *Bronaugh*—and the district court—pulled up one day short.

**2.** This Circuit's second approach to calculating the one-year limitations period gives Rule 6(a) its due. In *Williams v. Wilson*, 149 F. App'x 342 (6th Cir. 2005), the petitioner's conviction became final on February 10, 2001. *Id.* at 345. The 28 U.S.C. § 2244(d)(1)(A) limitations period began to run the next day, on February 11, 2001, and the Court correctly calculated the habeas petition to be due on February 11, 2002—one day later than under *Bronaugh*. *Id.* at 345.

The confusion about how to properly calculate the § 2244(d)(1)(A) one-year limitations period stretches beyond *Bronaugh* and *Wilson*. There is an unacknowledged, entrenched inter- and intra-circuit split regarding when the period ends. *Compare, e.g.*, *United States v. Marcello*, 212 F.3d 1005, 1009-10 (7th Cir. 2000) (calculating from the date of finality); *Nassiri v. Mackie*, 2018 WL 6437870, at *2 (W.D. Mich. 2018) (same) *with United States v. Hurst*, 322 F.3d 1256, 1261-62 (10th Cir. 2003) (calculating from the first day of the limitations period); *Kirchoff v. Warden, Chillicothe Corr. Inst.*, 2017 WL 4863119, at *2 (6th Cir. 2017) (same); *Fortson v. Eppinger*, 2016 WL 11259032, at *20 (N.D. Ohio 2016) (same).

This Court should clarify that the *Wilson* approach is correct and the *Bronaugh* approach is wrong. And properly applying the *Wilson* approach, Moss's habeas petition was timely. Moss's conviction became final on March

21, 2016, when the time to seek certiorari expired. (Opinion, RE 9, PageID # 1503.) The one-year 28 U.S.C. § 2244(d)(1)(A) limitations period began running the next day, on March 22, 2016. *See* 28 U.S.C. § 2244(d)(2); Fed. R. Civ. P. 6(a). This gave Moss until March 22, 2017, to file his federal habeas petition, or to file for state-court collateral review and thereby toll the statute of limitations for filing that petition. And on March 22, 2017, Moss filed a motion for relief from judgment in Michigan state court. (Opinion, RE 9, PageID # 1501.) He later filed his federal habeas petition while the state-court collateral-review proceedings were pending, rendering that petition timely. (Habeas Petition, RE 1, PageID # 1); *see* 28 U.S.C. § 2244(d)(2).

### B. If Moss's petition wasn't timely, the district court did not err in granting equitable tolling.

If Moss's petition was not timely, then the district court properly granted equitable tolling. Equitable tolling is justified when a petitioner shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Fla.*, 560 U.S. 631, 649 (2010) (quotation marks omitted); *Hall v. Lebanon Corr. Inst.*, 662 F.3d 745, 749-50 (6th Cir. 2011). As the district court correctly held, Moss meets both requirements.

**1.** The State does not even attempt to argue that Moss was not reasonably diligent. *See* Opening Br. 20-24; *Holland*, 560 U.S. at 653. Any such argument

is therefore forfeited. *See Miller v. Admin. Office of Courts*, 448 F.3d 887, 893 (6th Cir. 2006).

The district court explained that Moss demonstrated diligence because he had never before missed a filing deadline, and he missed the 28 U.S.C. § 2244(d)(1)(A) deadline by only one day. (Opinion, RE 9, PageID # 1507.) Sure enough, in the years of state-court litigation preceding the filing of Moss's federal habeas petition, Moss met every court deadline. (*See* Order, RE 5-13, PageID ## 1184-1196.) This is true for the dozens of court filings under multiple lawyers at the various stages of Moss's case. And, here, if his habeas petition was late at all, it was late by only one day.

**2.** On equitable tolling, the district court was correct to hold that the confused state of this Circuit's law was an extraordinary circumstance. Indeed, the decision is even more correct than it appears because the Circuit's law on timeliness is even more confusing than the district court realized. As explained above (at 21-25), the district court did not appreciate that the Court's cases lay out two contradictory methods for calculating the 28 U.S.C. § 2244(d)(1)(A) limitations period. In light of the compounding confusion generated by the *Bronaugh* and *Wilson* lines of authority *and* the leap-year ambiguities discussed below, this Court should affirm the district court's grant of equitable tolling.

The state of this Circuit's law is so unclear that Moss could have reasonably calculated three different potential deadlines—March 21, March 22, or March 23—depending on which of this Court's cases he relied. For starters, there were two possible deadlines for Moss's habeas petition: March 21, 2017 under the *Bronaugh* approach and March 22, 2017 under the *Wilson* approach. And there was even more risk of confusion because, as the district court explained, 2016 was a leap year. (Opinion, RE 9, PageID ## 1504, 1507.) This Court, and district courts in this Circuit, have given petitioners an extra day to file in leap years. *See, e.g.*, *Fortson v. Carter*, 79 F. App'x 121, 123 (6th Cir. 2003); *Brown v. Brewer*, 2016 WL 28988, at *3 (E.D. Mich. Jan. 4, 2016). Thus, under the *Wilson* approach and taking into account that 2016 was a leap year, it would have been reasonable to believe that the deadline for Moss's petition was March 23, 2017—one day *after* Moss filed.

That confusing and contradictory legal landscape created an extraordinary circumstance. As this Court has explained, a petitioner with "excusable ignorance of the limitations period" is entitled to equitable tolling. *Griffin v. Rogers*, 399 F.3d 626, 636 (6th Cir. 2005); *see also Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984). For example, a petitioner is entitled to equitable tolling when his counsel reasonably relies on case law that is unexpectedly overruled, thereby shortening the statutory limitations

period. *Sherwood v. Prelesnik*, 579 F.3d 581, 588-89 (6th Cir. 2009); *see also Clutter v. Meko*, 2017 WL 5514684, at *1 (6th Cir. 2017) (collecting cases). More generally, courts give "equitable consideration to the confused state of the law." *Raglin v. Mitchell*, 2017 WL 1313852, at *17 (S.D. Ohio. Apr. 10, 2017). When, as here, the law is "less than crystal clear," *Chinn v. Jenkins*, 2016 WL 815015, at *9 (S.D. Ohio. Mar. 2, 2016), and "a petitioner relies on a legally erroneous holding in determining when to file a federal habeas petition," equitable tolling is appropriate. *Williams v. Birkett*, 895 F. Supp. 2d 864, 870 (E.D. Mich. 2012).

The State's contrary arguments are unconvincing. First, the State characterizes the law as insufficiently confusing to justify equitable tolling. On the State's understanding, Moss could not have reasonably interpreted the Circuit's cases to suggest a March 22, 2017 filing deadline because the one-year limitations period did not include February 29, 2016 (the leap day). Opening Br. 21. But the State does not realize that, as explained above (at 21-25), the *Wilson* line of cases—and a correct interpretation of 28 U.S.C. § 2244(d)(1)(A) in light of Federal Rule of Civil Procedure 6(a)—suggest that Moss's petition was timely. Moreover, the State's proposed distinction regarding the leap-year cases is not expressly articulated in the decisions themselves. In *Leon v. Parris*, 2015 WL 4394327 (M.D. Tenn. July 16, 2015), for

example, a district court noted simply that "[b]ecause 2012 was a leap year, with 29 days in February, the Court calculated the one-year limitation period as comprising 366 days." *Id.* at *2 n.2.

Second, the State argues that a petitioner's own mistake of law cannot constitute extraordinary circumstances warranting equitable tolling. Opening Br. 23-24. But this case does not present a "garden variety" attorney error resulting in a missed filing deadline. *See Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 257-58 (2016). Rather, Moss filed his petition pursuant to on-point (albeit conflicting) Sixth Circuit precedent. And when a petitioner reasonably relies on circuit case law that is "less than crystal clear," that is "not a situation like that in *Menominee Indian Tribe* where the claimed extraordinary circumstance was a mistake of law by the litigant." *Chinn*, 2016 WL 815015, at *9. The district court did not err by granting Moss one day of equitable tolling.

## II. The district court's grant of Moss's habeas petition should be affirmed.

### A. The ineffective assistance of Moss's appellate counsel excuses the procedural default of his *Cronic* claims.

The district court properly reached Moss's *Cronic* claims, even though they were not raised on direct appeal, as required by Michigan Court Rule 6.508(D)(3). (Opinion, RE 5-11, PageID ## 912, 916.) When, as here, a habeas petitioner procedurally defaults a claim in state court, a federal habeas court

will nonetheless consider that claim when the petitioner can demonstrate, under *Wainwright v. Sykes*, 433 U.S. 72 (1977), that there was "cause" for him not to follow the procedural rule and that he was prejudiced by the constitutional error. *Caver v. Straub*, 349 F.3d 340, 346 (6th Cir. 2003). Moss meets that test because he was denied the effective assistance of appellate counsel when Kostovski failed to raise a constructive denial of counsel claim under *United States v. Cronic*, 466 U.S. 648 (1984), on direct appeal. *See McFarland v. Yukins*, 356 F.3d 688, 712 (6th Cir. 2004).

**1. Appellate counsel rendered deficient performance.**

An appellate counsel's performance is constitutionally deficient when the issues not presented in the appeal are "clearly stronger than issues that counsel did present." *Caver*, 349 F.3d at 348 (quoting *Smith v. Robbins*, 528 U.S. 259, 289 (2000)). On direct appeal, Kostovski did not bring a claim under *Cronic* that Steingold abandoned Moss during the pre-trial or trial stages of the litigation. Instead, she argued only that Steingold was constitutionally ineffective under *Strickland* for two specific errors in judgment: recommending that Moss waive his right to a jury trial and stipulating to the use at trial of all evidence from the entrapment hearing. (Opinion, RE 33, PageID # 1836; Opinion, RE 5-12, PageID ## 1008-1012.)

The unraised *Cronic* claims were clearly stronger than the *Strickland* claims that Kostovski raised on direct appeal. The district court correctly described the two *Cronic* ineffective-assistance-of-trial-counsel claims in this case as "clearly dead-bang winners," explaining that Steingold's "errors were obvious from the record and leaped out upon even a casual reading of the transcript." (Opinion, RE 33, PageID # 1836 (quotation marks omitted).) As discussed below (at 34-40), Steingold was constructively absent during not one, but *two* critical stages of the criminal trial: the pre-trial investigation and the trial itself. He failed to conduct any pre-trial investigation, did not interview any potential defense witnesses, did not interview the prosecution's witnesses, stipulated to all the facts necessary to convict Moss, waived his opening and closing statements, and declined to cross-examine one of the prosecution's two witnesses. (Opinion, RE 33, PageID ## 1838, 1842-1843.)

Kostovski's failure to raise the *Cronic* claims is especially egregious in light of defense counsel's "constitutional obligation to investigate and understand the law." *Joseph v. Coyle*, 469 F.3d 441, 460 (6th Cir. 2006) (emphasis removed). Kostovski knew that Steingold had abdicated his responsibilities during the pre-trial and trial stages of the litigation. She discussed his failures in detail at the *Ginther* hearing. (*See Ginther* Hearing,

RE 5-9, PageID ## 810, 812-816, 821, 844, 846-847, 851-855). But instead of properly framing the ineffective-assistance-of-trial-counsel argument as constructive abandonment under *Cronic*, she picked out two individual failures and argued that they met the *Strickland* test. She thereby "neglected the central issue" of the case and evinced a "misunderstanding [that] could have been corrected with minimal legal research." *Joseph*, 469 F.3d at 460.

The State offers only one argument that Kostovski was not constitutionally ineffective: that the unraised *Cronic* claims and the raised *Strickland* claims are "identical." Opening Br. 31. On the State's understanding of the unraised *Cronic* claims, they "argu[e] that defense counsel was ineffective for recommending that defendant waive his right to a jury trial." *Id.* To the contrary, as already explained (at 30), the *Cronic* claims are that Steingold constructively abandoned Moss during the pre-trial and trial stages of the defense. Unlike the *Strickland* claims that Kostovski raised on direct appeal, the *Cronic* claims do not critique specific errors, such as Steingold's recommendation that Moss waive his right to a jury trial. Rather, they focus on Steingold's complete failure to "act[] in the role of an advocate." *Cronic*, 466 U.S. at 656 (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)). The *Cronic* claims "are separate and distinct" from the *Strickland*

claims, and the difference between them "is not of degree but of kind." *Fusi v. O'Brien*, 621 F.3d 1, 6 (1st Cir. 2010).

#### 2. That deficient performance prejudiced the appeal.

There is a reasonable probability that if Kostovski had raised the *Cronic* claims on direct appeal, Moss would have prevailed. *See Howard v. Bouchard*, 405 F.3d 459, 485 (6th Cir. 2005). A reasonable probability is less than a preponderance of the evidence, as "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Joseph*, 469 F.3d at 459 (citing *Strickland*, 466 U.S. at 693). "Instead, a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 459-60 (quotation marks omitted).

The State argues that Moss cannot show prejudice because the Michigan Court of Appeals rejected Kostovski's arguments that Steingold was ineffective under *Strickland*. Opening Br. 32. But, again, the unraised *Cronic* claims are different in kind from the raised *Strickland* claims. And there is a reasonable probability that Moss's appeal would have come to a different result but for Kostovski's omission. Moss's *Cronic* claims are meritorious, as discussed below (at 34-40), and are of the kind accepted by the Michigan Court of Appeals. In *People v. Adams*, 2007 WL 3171259 (Mich. Ct. App. Oct. 30, 2007), trial counsel was constructively absent under *Cronic* when he was

physically present in the courtroom but "did not participate in the trial by way of examination, argument, or taking stances on district court rulings." *Id*. at *2. Similarly, in *People v. Reid*, 2005 WL 2861968 (Mich. Ct. App. Nov. 1, 2005), defense counsel's failure to ask for a curative instruction or to request a cautionary statement be read to the jury regarding improper questions and responses "raise[d] serious doubts as to the effectiveness of trial counsel" under *Cronic*. *Id.* at *7 n.4. At a minimum, there is a reasonable probability that Moss would have prevailed in the Michigan Court of Appeals had Kostovski raised the *Cronic* claims.

### B. Under clearly established law, Moss's trial counsel was constitutionally ineffective.

#### 1. Moss's trial counsel was constructively absent during the pre-trial and trial stages of his defense.

Steingold was functionally absent during two critical stages of Moss's defense: the pre-trial stage and the trial itself. The district court correctly held that, during these critical stages, Moss was denied his constitutional entitlement to effective counsel.

**1.** First, Steingold was constructively absent during the pre-trial proceedings. The pre-trial period is "perhaps the most critical period of the proceedings" because "consultation, thorough-going investigation and preparation [are] vitally important" to building a successful trial strategy.

*Powell v. Alabama*, 287 U.S. 45, 57-60 (1932); *see Mitchell*, 325 F.3d at 742-44. As a result, the Sixth Amendment imposes a duty on trial counsel to investigate a case before trial. *Strickland*, 466 U.S. at 691; *Mitchell*, 325 F.3d at 742-44. When counsel fails to investigate or consult with his client during the pre-trial period, he "cease[s] functioning as counsel under the Sixth Amendment" in violation of *Cronic*. *Phillips v. White*, 851 F.3d 567, 579 (6th Cir. 2017).

Here, Steingold did nothing to advance Moss's defense during the pre-trial period. He did not meet or consult with Moss until the day of the entrapment hearing. (Transcript, RE 5-2, PageID # 104.) That failure alone is sufficient to find constructive denial of counsel under *Cronic* because "without pre-trial consultation with the defendant, trial counsel cannot fulfill his or her duty to investigate." *Mitchell*, 325 F.3d at 743.

To make matters worse, Steingold repeatedly admitted to not doing any pre-trial investigation. (Transcript, RE 5-2, PageID ## 103, 106-107.) He did not find any defense witnesses or interview any of the prosecution's witnesses—a failure the state trial court emphasized. (Transcript, RE 5-3, PageID ## 340-341.) He was not prepared to conduct the entrapment hearing or the trial, did not speak to any of Moss's previous lawyers, did not know the trial was scheduled for the day after the entrapment hearing, and did not

conduct relevant legal research. (Transcript, RE 5-2, PageID ## 106-107, 219-20; Transcript, RE 5-3, PageID ## 349, 380; Transcript, RE 5-5, PageID # 657.) At one point, Steingold appeared to forget Moss's name. (Transcript, RE 5-2, PageID # 103.) Steingold's lack of preparation was so complete that the trial court accused him of deliberately trying to establish the basis for an ineffective-assistance-of-counsel claim on appeal. (Transcript, RE 5-3, PageID # 342-343.)

In *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003), this Court held that the Sixth Amendment is violated when, as here, defense counsel was constructively absent during the pre-trial stage because he failed to consult with his client or conduct any pre-trial investigation. *See id.* at 748. On the State's telling, *Mitchell*'s holding relied on facts not present here, such as counsel's suspension from the practice of law for a month before the trial and the trial court's ignoring defendant's requests for his counsel to be replaced. Opening Br. 49. But *Mitchell* nowhere suggests that its holding turned on those idiosyncratic facts. Rather, *Mitchell* held that "trial counsel cannot discharge [his or her constitutional duty to conduct pre-trial investigation] if he or she fails to consult with his or her client" before trial. *Mitchell*, 325 F.3d at 744. Steingold did just that. (Transcript, RE 5-2, PageID # 104.) Whatever the reasons for their absences, Steingold and the attorney

in *Mitchell* provided precisely the same amount of assistance for their clients during the pre-trial period—none.

Trying a different tack, the State also argues that *Cronic* does not condemn Steingold's constructive absence because the government did not interfere with his ability to represent Moss. Opening Br. 45-46. But *Cronic* applies when counsel "was either totally absent, *or* prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 n.25 (emphasis added). That absence can be literal, as when counsel fails to appear, or it can be constructive, as when counsel's performance is "so inadequate that, in effect, no assistance of counsel is provided." *Id.* at 654 n.11.

*Maslonka v. Hoffner*, 900 F.3d 269 (6th Cir. 2018), provides the State with no support. There, this Court held that counsel's voluntary failure to be *physically* present at federal cooperation meetings—where he was otherwise "involved throughout the pre-trial period" and no state actor "played a part in preventing adequate representation"—did not rise to the level of abandonment of counsel under *Cronic*. *Id.* at 280. The *Maslonka* panel did not (and could not) overrule decades of precedent holding that when counsel fails to provide any assistance to a defendant during a critical stage in the litigation, the defendant has been denied his Sixth Amendment right to

counsel. *See, e.g.*, *Cronic*, 466 U.S. at 654 n.11, 659; *Phillips*, 851 F.3d at 580-81; *Mitchell*, 325 F.3d at 742-44; *Caver*, 349 F.3d at 352.

**2.** Steingold's constructive absence during the pre-trial period is sufficient to establish a violation of Moss's Sixth Amendment rights. *See Mitchell*, 325 F.3d at 742-44. But Steingold also abandoned Moss at a second critical stage: the trial itself. There, Steingold "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Moss v. Hofbauer*, 286 F.3d 851, 860 (6th Cir. 2002) (quoting *Cronic*, 466 U.S. at 659); *see Martin v. Rose*, 744 F.2d 1245, 1250 (6th Cir. 1984). Steingold waived his opening and closing arguments, failed to subpoena, interview, or produce any witnesses, and did not cross-examine or raise objections to one of the government's two witnesses. (Opinion, RE 33, PageID ## 1844-1845.)

As to the government's other witness, DEA Agent Hill, Steingold voir dired him and briefly cross-examined him, but Steingold had already stipulated to the elements of the crime to which Hill was testifying and conceded that Hill's testimony had already been accepted at the entrapment hearing. (Transcript, RE 5-6, PageID ## 670, 677-683.) The only objection that Steingold raised to Hill's testimony was that his own stipulations had rendered Hill's testimony "unnecessary"—the opposite of adversarial testing and the functional equivalent of not cross-examining Hill at all. (*Id.*

PageID ## 684, 689, 691.) Indeed, Steingold stipulated to everything that the prosecution wanted, including that "the crime occurred." (*Id.* PageID ## 669-670.) Steingold might as well have "stood mute" given his complete failure to subject the prosecution's case to "meaningful adversarial testing." *Martin*, 744 F.2d at 1250.

The State tries to characterize Steingold's abandonment of Moss at the pre-trial and trial stages as strategic. According to the State, Steingold knew that "the evidence against Moss was overwhelming" and entrapment was "the only defense he … deemed viable." Opening Br. 35, 45.

That argument is dead in the water. When a trial counsel "d[oes] not even take the first step of interviewing witnesses or requesting records," that failure cannot be excused as a "tactical decision." *Foust v. Houk*, 655 F.3d 524, 536 (6th Cir. 2011). Such a determination would be "nonsensical" because, without a reasonable investigation, it is "impossible" for counsel to form a "fully informed decision with respect to … strategy." *Id.* In other words, "in the absence of a full investigation," trial counsel cannot possibly "develop trial strategy in the true sense." *Ramonez v. Berghuis*, 490 F.3d 482, 489 (6th Cir. 2007). Because he did not conduct any independent investigation or interview any witnesses, Steingold had no way of knowing if the "evidence

against Moss was overwhelming," as the State claims, and was not entitled to craft a trial strategy around that unfounded assumption. Opening Br. 54.

In any event, even if Steingold *had* prepared, and his abandonment of his client at trial *was* a deliberate and viable strategy, his failure to subject the prosecution's case to meaningful adversarial testing would still have been inexcusable if he could have presented a viable alternative defense. *See Martin*, 744 F.2d at 1250. Such a defense was almost certainly available. As the district court pointed out, at the entrapment hearing, Moss denied handing over any money to Diego or knowing that there was cocaine in the van when he was arrested. (*See* Opinion, RE 33, PageID ## 1841-1842.) At trial, Moss himself could have testified to this, and the trier of fact could have assessed his credibility, as well as the credibility of government witnesses testifying to the contrary under cross-examination. At the very least, Steingold might have argued for a lesser offense. (*Id.*) But Steingold did not even consider that option.

Moreover, Steingold's purported strategy makes no sense. There was no reason to believe that a comprehensive adversarial process at trial would have hindered or delayed Moss's hypothetical appeal on the entrapment issue. (Opinion, RE 33, PageID # 1842.) The State's efforts to construct a

permissible strategic justification for Steingold's total abandonment of Moss at the pre-trial and trial stages of his defense all fail.

#### 2. The state court's decision was contrary to clearly established federal law.

The State also argues that, because the state trial court decided Moss's collateral-review motion on its merits, its decision is entitled to deference under 28 U.S.C. § 2254(d). Opening Br. 43. Not so. As just explained, Steingold constructively abandoned Moss by not conducting any pre-trial investigation, failing to prepare for trial, and failing to subject the prosecution's case to meaningful adversarial testing at trial. The state court's contrary determination unreasonably applied the clearly established principles of *Cronic* to the facts of Moss's case and is thus not entitled to deference. *See* 28 U.S.C. § 2254(d)(1).

Moss's collateral-review motion before the state trial court argued that, under *Cronic*, Steingold abandoned Moss by "fail[ing] to investigate or interview any of the prosecutor's witnesses before trial" and "waiv[ing] [his] opening and closing argument and fail[ing] to cross-examine one of the prosecutor's witnesses." (Motion for Relief from Judgment, RE 5-11, PageID # 915.) But the state court analyzed Moss's Sixth Amendment claims under *Strickland*, rather than *Cronic*, because it determined that the record "does not reflect a 'complete' failure of counsel." (*Id*. PageID # 914.)

By applying *Strickland* rather than *Cronic*, the state court made the same error that this Court confronted in *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003). There, the Michigan Supreme Court evaluated an ineffective-assistance-of-trial-counsel claim under *Strickland*, even though the defendant had been "complete[ly] deni[ed] counsel at a critical stage of the proceedings." *Id.* at 741. This Court concluded that using *Strickland* instead of *Cronic* was an erroneous and unreasonable application of the clearly established Supreme Court law set forth in *Cronic*, and, as a result, the Michigan Supreme Court's decision was not entitled to deference under 28 U.S.C. § 2254(d)(1). The state court made an identical error here, and the district court was correct to refuse to defer to it.

The state court also unreasonably applied *Cronic* because it made excuses for Steingold and "minimize[d] [his] deficiency." *Joseph*, 469 F.3d at 461. The court generously characterized Steingold's absence during the pre-trial and trial stages as a "strategy … to have a stipulated-fact bench trial in an attempt to expedite an appeal" of the entrapment issue and assumed that the evidence against Moss was "overwhelming." (Opinion, RE 5-11, PageID # 914.) But, as already explained (at 39-40), *Cronic* forecloses any characterization of Steingold's egregious deficiencies as a strategic decision. In any event, even if Steingold was acting according to deliberate tactics, he

nonetheless rendered ineffective assistance of counsel because his choices fell "outside the wide range of professionally competent assistance." *Martin*, 744 F.2d at 1249 (quoting *Strickland*, 466 U.S. at 690).

**CONCLUSION**

This Court should affirm the district court's judgment.

Respectfully submitted,

/s/ Hannah Mullen
Hannah Mullen
Brian Wolfman
Madeline Meth
GEORGETOWN LAW
APPELLATE COURTS IMMERSION CLINIC
600 New Jersey Ave., NW, Suite 312
Washington, D.C. 20001
(202) 661-6582

Radiance Campbell
Caleb Thompson
Lois Zhang
Student Counsel

Counsel for Petitioner-Appellee

May 11, 2022

## CERTIFICATE OF COMPLIANCE

This document complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i)'s type-volume limitation because it contains 9,172 words, excluding parts of the brief exempted by Rule 32(f).

The brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionally spaced typeface using Palatino Linotype, 14-point, in Microsoft Word.

May 12, 2022

/s/ Hannah Mullen
Hannah Mullen

**DESIGNATION OF RELEVANT DOCUMENTS**

Under Sixth Circuit Rules 28(b) and 30(g), Appellees designate the following filings in the district-court record as entries relevant to this appeal:

| Description of entry | Docket No. | PageID |
|---|---|---|
| Habeas Petition | RE 1 | 1-66 |
| State's Motion to Dismiss the Habeas Petition | RE 4 | 70-83 |
| Docket Sheet | RE 5-1 | 88-100 |
| Entrapment Hearing Volume One | RE 5-2 | 101-266 |
| Entrapment Hearing Volume Two | RE 5-3 | 267-575 |
| Entrapment Hearing Volume Three | RE 5-4 | 576-610 |
| Hearing on Entrapment Motion to Dismiss | RE 5-5 | 611-667 |
| Bench Trial Volume One | RE 5-6 | 668-695 |
| Bench Trial Volume Two | RE 5-7 | 696-712 |
| Sentencing Hearing | RE 5-8 | 713-746 |
| *Ginther* Hearing | RE 5-9 | 747-861 |
| Moss's Motion for Relief from Judgment | RE 5-10 | 862-909 |

| | | |
|---|---|---|
| Michigan Circuit Court Opinion and Order Denying Motion for Relief from Judgment | RE 5-11 | 910-917 |
| Michigan Court of Appeals Opinion and Order on Direct Appeal | RE 5-12 | 918-1098 |
| Michigan Court of Appeals Order Denying Leave to Appeal | RE 5-13 | 1099-1310 |
| Michigan Supreme Court Order Denying Leave to Appeal | RE 5-14 | 1311-1383 |
| Michigan Supreme Court Order Denying Leave to Appeal | RE 5-15 | 1384-1475 |
| Moss's Reply to State's Motion to Dismiss | RE 8 | 1480-1499 |
| District Court Opinion Denying Motion to Dismiss | RE 9 | 1500-1508 |
| District Court Opinion Denying Habeas Petition | RE 18 | 1673-1691 |
| Moss's Motion for Reconsideration | RE 21 | 1696-1728 |
| District Court Opinion Granting Habeas Petition | RE 33 | 1825-1846 |
| District Court Order Granting Motion for Bond | RE 51 | 1984-1990 |

**CERTIFICATE OF SERVICE**

I certify that on May 12, 2022, I filed this brief with the Clerk of the Court electronically via the CM/ECF system. All participants in this case are registered CM/ECF users and will be served electronically via that system.

May 12, 2022

/s/ Hannah Mullen

Hannah Mullen