

NO:

**In the
Supreme Court of the United States**

NICHOLAS MASLONKA,

Petitioner,

v.

JOHN CHRISTENSEN,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

FEDERAL DEFENDER OFFICE

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QUESTIONS PRESENTED FOR REVIEW

1. Is there a requirement that state action contribute to counsel's absence from a critical stage of the proceedings in order for there to be a constructive denial of the Sixth Amendment right to counsel under *Cronic v. United States*?
2. Did the Court of Appeals suspend the writ of habeas corpus by limiting the remand in this matter.

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.¹

¹ The name of Respondent has been changed to reflect that Mr. Maslonka was recently transferred to the Mid Michigan Correctional Facility

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PETITION FOR WRIT OF CERTIORARI

Nicholas Maslonka respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's order denying rehearing and rehearing *en bancis* included in the Appendix at A-1. The Sixth Circuit's opinion reversing the district court's grant of a conditional writ of habeas corpus is included in the Appendix at A-2. The district

court's Order granting a conditional writ of habeas corpus is included in the Appendix at A-3.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The court of appeals issued an order denying a Mr. Maslonka's timely petition for rehearing *en banc* on September 19, 2018. ,This petition is filed within 90 days of that order and so this petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article I, Section 9, clause 2 of the United States Constitution provides:

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

STATEMENT OF THE CASE

Nicholas Maslonka's best chance at a favorable resolution of state bank robbery charges against him was to cooperate with federal agents and prosecutors in an unrelated drug investigation. His appointed counsel was aware of the federal interest in his cooperation and that that a favorable plea agreement from the state depended on his cooperation being successful. However, she did not attend any of the meetings Mr. Maslonka had with federal agents and prosecutors, never discussed with Mr. Maslonka the details of his cooperation, and failed to attend when Mr. Maslonka was to be called as a witness before the federal grand jury. Ultimately,

the Assistant United States Attorney, who had previously prepped Mr. Maslonka for grand jury testimony decided not call Mr. Maslonka as a grand jury witness. As a result, the state prosecutor withdrew the plea offer that had been extended contingent on Mr. Maslonka's successful federal cooperation and Mr. Maslonka pleaded guilty pursuant to a less favorable offer.

On habeas review, the district court, after holding an evidentiary hearing, concluded that "counsel's physical absence at every stage of petitioner's cooperation constituted a complete denial of counsel" and "[b]ecause petitioner was deprived of the assistance of counsel at a critical stage of the proceedings, automatic reversal of his conviction is required, without any showing of prejudice." A-3 at 19, 20. The district court granted a conditional writ of habeas corpus based on its finding that Mr. Maslonka was denied his Sixth Amendment right to counsel by counsel's absence during a critical stage of the proceedings relying on *United States v. Cronin*, 466 U.S. 648, 659 n.25 (1984) . The district court also found that Mr. Maslonka had demonstrated counsel's deficient performance and resulting prejudice to establish a violation of his Sixth Amendment right to the effective assistance of counsel under *Strickland v. Washington*, 104 S.Ct 2052 (1984). Because it granted the writ based on Mr. Maslonka's Sixth Amendment claims regarding trial counsel, the district court declined to address Mr. Maslonka's remaining claims.

On appeal the Sixth Circuit reversed. In doing so, the court "emphatically reject[ed] the theory that counsel's mere physical absence from a critical stage of the

proceeding, based on the counsel's own failure to be present rather than any *denial* by the state, can constitute a constructive denial of counsel under *Cronic*." A-2 at 10. In remanding the case, the Sixth Circuit limited the district court to considering Mr. Maslonka's unresolved claims regarding the effective assistance of his appellate counsel, precluding review of his other unresolved claims.

ARGUMENT

This Court should grant a writ of certiorari on the question of whether or not state action is required for there to be a constructive denial of counsel under *Cronic* to resolve a conflict created between the opinion in this case and those of the other Circuits on this important question of federal law. This Court should also grant a writ of certiorari with respect to the scope of the remand because the limited remand in this case so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power to correct what amounts to a suspension of the writ in this case.

I. The Court Should Issue A Writ To Resolve The Conflict Between The Circuit's Created By The Sixth Circuit's Rejection Of The Theory That There Can Be A Constructive Denial Of Counsel Without State Action.

In this case, the Sixth Circuit "emphatically reject[ed] the theory that counsel's mere physical absence from a critical stage of the proceeding, based on the counsel's own failure to be present rather than any *denial* by the state, can constitute a

constructive denial of counsel under *Cronic*.” (Op. p. 10). This Court in *Cronic* rejected this very argument, finding “[t]he fact that the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment.” *Cronic*, 466 U.S. at 662, n. 31. Instead, the Court “has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, *or* prevented from assisting the accused during a critical stage of the proceeding.” *Id.* at 659 n.25 (emphasis added); *see also Strickland v. Washington*, 466 U.S. 668, 692 (1984) (“Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance.”)

. Likewise, the Fifth Circuit in *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2011) confronted and rejected this exact argument, finding it did not square with either the language or spirit of *Cronic*. “Reading *Cronic* to impose [] a prerequisite” of state action “would require shifting the opinion’s emphasis from the fairness and reliability of criminal proceedings to the culpability of a state in distorting the adversarial process.” *Id.* at 347. *Burdine* presumed prejudice where counsel was unconscious or asleep during a substantial portion of trial.

The Second, Fourth and Ninth Circuits have similarly held where counsel slept or was unconscious for substantial portions of trial, without any state action, a presumption of prejudice may be applied. *Tippins v. Walker*, 77 F.3d 682 (2nd Cir.

19996); *United States v. Ragin*, 820 F.3d 609 (4th Cir. 2016); *Javor v. United States*, 724 F.3d 831, 834 (9th Cir. 1984).

The Seventh Circuit has held counsel's non-participation at sentencing to warrant a presumption of prejudice, without requiring any state action. *Miller v. Martin*, 481 F.3d 468 (7th Cir. 2007). The Eighth Circuit has presumed prejudice where counsel failed to inform the defendant of his right to a trial by jury without any requirement of state action. *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998). The Eleventh Circuit, as well, has applied a presumption of prejudice in the absence of any state action where counsel failed to object when a trial judge directed a verdict against his client. *Harding v. Davis*, 878 F.2d 1341 (11th Cir.1989).

The Sixth Circuit's "emphatic rejection" of the theory that prejudice may be presumed without state action has created a split between the Circuits on this important issue. The Court should grant a writ of certiorari to resolve the split between the Circuits that this case has created.

II. The Court Should Grant A Writ Of Certiorari Because The Circuit's Limited Remand In This Case Amounts To A Suspension Of The Writ.

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *See* U.S. Const., Art. I, § 9, cl. 2. It is "uncontroversial" that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation of relevant law.'" *Boumediene v. Bush*, 553 U.S. 723, 779 (2008) (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

In this case, Mr. Maslonka petitioned for a writ of habeas corpus raising numerous claims of violations of his constitutional rights beyond the denial of his Sixth Amendment right to counsel. Because the district court granted a conditional writ based upon its Sixth Amendment claims relating to counsel's performance during plea negotiation stage, the trial court considered it unnecessary to address Maslonka's remaining claims. Appendix 3 at p. 32. The Sixth Circuit reversed the grant of the writ and remanded with instruction to the district court "to consider only Maslonka's ineffective-assistance-of-appellate-counsel claims." Appendix 2 at p. 16. In doing so, the Sixth Circuit has foreclosed from review Mr. Maslonka remaining unresolved claims.

CONCLUSION

The petition should be granted.

Respectfully Submitted,

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EASTERN DISTRICT OF MICHIGAN**

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December 18, 2018

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CERTIFICATE OF SERVICE

I certify that on December 18, 2018, in accordance with Sup. Ct. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed In Forma Pauperis, (3) Certificate of Compliance with Word Count Limitations, (4) Declaration Verifying Timely Filing, and (5) Certificate of Service were served by mail within three days upon Counsel for Respondent:

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DECLARATION VERIFYING TIMELY FILING

Petitioner Nicholas Maslonka, through undersigned counsel, and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter was sent through the United States Postal Service by first-class mail, postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing, addressed to the Clerk of the Supreme Court of the United States, on December 18, 2018, which is timely pursuant to the rules of this Court.

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