No. 18-7208

In the Supreme Court of the United States

NICHOLAS MASLONKA, PETITIONER

v.

JOHN CHRISTENSEN, WARDEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

Dana Nessel
Michigan Attorney General

Fadwa A. Hammoud
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
HammoudF1@michigan.gov
(517) 335-7628

Scott Shimkus
Assistant Attorney General
Criminal Appellate Division

Attorneys for Respondent

QUESTIONS PRESENTED

1. Does *Cronic* apply to the performance of a state criminal defendant's counsel during the defendant's cooperation in an unrelated federal investigation where the only link was a state plea agreement?

2. Does a federal appellate court suspend the writ of habeas corpus by remanding to the district court for resolution of a habeas petitioner's unresolved habeas claims?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Nicholas Maslonka, a Michigan prisoner. The respondent named below was Bonita Hoffner, the now-retired warden of the Lakeland Correctional Facility where Maslonka previously resided. Noah Nagy is the new warden at Lakeland. Maslonka has since transferred to the Central Michigan Correctional Facility, where John Christensen is warden.

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OPINIONS BELOW

The Sixth Circuit's opinion reversing the district court's conditional grant of Maslonka's petition for writ of habeas corpus is reported at 900 F.3d 269. See also Pet. App. A-2. The Sixth Circuit's order denying Maslonka's petition for rehearing en banc is not reported but is attached to Maslonka's petition for writ of certiorari as A-1. The district court's opinion and order conditionally granting Maslonka's habeas petition is not reported but is available at 2017 WL 2666103. See also Pet. App. A-3.

The Macomb County Circuit Court's order denying Maslonka's second motion for relief from judgment is not reported. The Michigan Supreme Court's order denying Maslonka's application for leave to appeal from the denial of his first motion for relief from judgment is reported at 821 N.W.2d 166. The Michigan Court of Appeals' order denying Maslonka's delayed application for leave to appeal from the denial of his first motion for relief from judgment is not reported. The Macomb County Circuit Court's order denying Maslonka's first motion for relief from judgment is not reported.

JURISDICTION

The State accepts Maslonka's statement of jurisdiction as accurate and complete and agrees that this Court has jurisdiction over the petition.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

INTRODUCTION

Maslonka attempts to get this Court's attention by raising the issue of a circuit split on a narrow issue. But his claim misses the mark. Before answering whether state action is required to presume prejudice under *Cronic*, this Court must first address the predicate question of whether Maslonka's federal cooperation was even a critical stage of his state prosecution for armed robbery such that he was entitled to the effective assistance of counsel in the first place. It was not. Therefore, *Cronic* is inapposite and the issue of a possible circuit split need not be addressed.

Moreover, any alleged split is not mature. While Maslonka cites cases from several circuits, only one of those cases speaks to the issue of whether state action is required to presume prejudice under *Cronic*. That case, from the Fifth Circuit, was decided in 2001 and has been cited since then by only three other courts for the state-action issue. In fact, one of those cited cases was from the same petitioner to enforce the Fifth Circuit's judgment. In short, any alleged split has limited ongoing significance.

Maslonka also appends a two-paragraph claim to his petition contending that the Sixth Circuit suspended the writ of habeas corpus in this case by remanding to the district court to resolve Maslonka's sole remaining habeas claim: ineffective assistance of counsel. Without identifying them, Maslonka argues that he has other unresolved claims that should be addressed in the district court. But because essentially all of his dozens of claims raised in his habeas petition rested on the already-resolved ineffective-assistance-of-trial-counsel claim, the only claim left for resolution

is his ineffective-assistance-of-appellate-counsel claim (which, coincidentally, also rests on his trial-counsel claim).

Thus, this Court should deny certiorari because both of Maslonka's claims are insubstantial and do not warrant this Court's review.

STATEMENT OF THE CASE

After robbing a bank for drug money, Maslonka was apprehended and charged in the state courts with armed robbery as a fourth-felony habitual offender. (1/20/09 Proceedings Tr. at 2.) Shortly thereafter, DEA agents approached Maslonka about assisting in a federal narcotics investigation. (3/10/17 Evid. Hr'g Tr. at 167.) The DEA had intercepted jail calls between Maslonka and the target of the federal investigation, Paul Delgado. (*Id*. at 166.) Maslonka agreed to cooperate. (*Id*. at 168.)

The state courts appointed an attorney, Salle Erwin, for Maslonka for his armed-robbery case. (1/20/09 Proceedings Tr. at 2.) Steve Fox, the state prosecutor, also learned of Maslonka's cooperation in the federal investigation and offered Maslonka a plea agreement: if he fully cooperated with federal authorities, including testifying before a grand jury and at trial, if necessary, Maslonka could plead guilty to armed robbery with no habitual-offender sentencing enhancement in the state case. (*Id*. at 4.) Based on the parties' guidelines calculations, that would have meant a minimum prison sentence between 81 and 135 months. (*Id*. at 3–4.) The trial court made clear that it did not entertain specific sentencing agreements. (*Id*. at 7.)

Erwin advised Maslonka that he held the keys to this case—she strongly encouraged him to cooperate. (3/9/17 Evid. Hr'g Tr. at 9, 24.) And Maslonka did

cooperate, at least to an extent. He met with DEA and task-force agents several times, went on several ride-alongs, and met with an Assistant United States Attorney at least once prior to the grand-jury proceeding. (3/10/17 Evid. Hr'g Tr. at 135, 169.) According to the federal authorities, the cooperation required of Maslonka was not limited whatsoever; he had to tell them everything he knew about Delgado and his operation. (*Id*. at 133, 167–68.) However, Maslonka was not a target of the federal investigation, he was not arrested, and he was not charged. (*Id*. at 131.) He was a witness. (*Id*.)

Given that Maslonka was a witness in the federal case, not a defendant, Erwin was not otherwise involved in Maslonka's federal cooperation. (3/9/17 Evid. Hr'g Tr. at 20–21.) She did not represent him in those dealings, did not obtain a written cooperation agreement with the federal authorities, and did not attend meetings between the agents and Maslonka. (*Id*. at 21.) Her job was to work with the *state* prosecutor. (*Id*. at 20–21.) Erwin was present, however, when the agents met with Maslonka at the state courthouse. (*Id*. at 10.)

The day for the grand-jury proceeding came, but Maslonka's cooperation abruptly ceased. *Why* Maslonka stopped cooperating is in dispute between Maslonka and the federal authorities. The federal authorities, including an AUSA, attested that during preparation outside the grand-jury room Maslonka became belligerent, refused to answer some questions, and offered different answers to questions he had answered previously, whereas Maslonka claimed that the agents and AUSA started asking him about friends and family, whom Maslonka thought were off the table.

(3/10/17 Evid. Hr'g Tr. at 21–23, 136, 174–75, 201.) Regardless of the reason, the result was the same: Maslonka did not testify before the grand jury. (*Id.* at 136.)

Fox learned of Maslonka's failed cooperation and accordingly modified the earlier plea agreement. (4/15/09 Plea Tr. at 3.) Rather than dropping the habitual-offender enhancement entirely, Fox reduced it from fourth to third. (*Id.*) Fox was clear that the agreement would not get any better than that, regardless of why Maslonka's cooperation broke down. (3/10/17 Evid. Hr'g Tr. at 89.) Maslonka accepted that agreement and pled guilty to armed robbery. (4/15/09 Plea Tr. at 4.) Erwin sought a downward departure at sentencing based on Maslonka's troubled past with narcotics, but the trial court sentenced him in the middle of the state sentencing guidelines to 15 to 25 years' imprisonment. (5/28/09 Sentence Tr. at 12, 19.)

Following his conviction and sentence, Maslonka filed an application for leave to appeal in the Michigan Court of Appeals and a motion for relief from judgment in the trial court. In both proceedings, Maslonka claimed he was entitled to specific performance of the earlier plea agreement in which the habitual-offender enhancement would have been dropped in return for his cooperation in the federal case. The state trial court denied the motion for relief from judgment and the Michigan Court of Appeals denied the application for leave to appeal. (11/3/10 Macomb Cir. Ct. Order at 5; 8/10/11 Mich. Ct. App. Order at 1.) The Michigan Supreme Court also denied Maslonka's application for leave to appeal from the denial of his direct appeal. *People* v. *Maslonka*, 806 N.W.2d 739 (Mich. 2011) (unpublished table decision).

Maslonka then sought leave to appeal the denial of his motion for relief from judgment in the Michigan Court of Appeals and the Michigan Supreme Court; both courts denied Maslonka's applications. (3/23/12 Mich. Ct. App. Order at 1); *People* v. *Maslonka*, 821 N.W.2d 166 (Mich. 2012) (unpublished table decision).

Maslonka subsequently filed a second motion for relief from judgment, claiming ineffective assistance of trial counsel regarding the plea negotiations, entitlement to withdraw his plea because he lacked sufficient notice of the charges, and ineffective assistance of appellate counsel. The state trial court denied the motion on state procedural grounds because Maslonka had already filed one motion for relief from judgment and did not establish any grounds to excuse his failure to raise the instant claims in an earlier proceeding. (12/11/12 Macomb Cir. Ct. Order at 1–4.) Maslonka did not appeal that decision to either the Michigan Court of Appeals or the Michigan Supreme Court, nor could he do so under Mich. Ct. R. 6.502(G)(1).

Rather, Maslonka filed his habeas petition in which he raised over 40 claims. Distillation of those claims reveal six basic categories: (1) denial of counsel during plea negotiations, (2) ineffective assistance of trial counsel during plea negotiations, (3) entitlement to plea withdrawal, (4) entitlement to resentencing on the earlier plea agreement, (5) actual innocence of the armed robbery, and (6) ineffective assistance of appellate counsel. The first four claims all rested on Maslonka's complaints about Erwin.

Following several rounds of briefing and a two-day evidentiary hearing, the district court conditionally granted Maslonka habeas relief on his ineffective-

assistance-of-trial-counsel claims. The district court ordered the State to reoffer Maslonka the earlier plea agreement as if he had fully complied with the federal authorities as he had agreed—but failed—to do. Pet. App. A-3 at 32. Specifically, the district court concluded that Erwin was absent from every stage of Maslonka's cooperation, violating *United States* v. *Cronic*, 466 U.S. 648 (1984), and that she was ineffective under *Strickland* v. *Washington*, 466 U.S. 668 (1984). (*Id*. at 19, 30–31.)

The Sixth Circuit reversed, concluding that *Strickland*, not *Cronic*, was the proper framework for the issues presented in this case. Pet. App. A-2 at 15. The Sixth Circuit noted that "Maslonka's counsel was involved throughout the pre-trial period, just not at the federal cooperation meetings," and that no state action prevented Erwin's participation in the federal proceedings, therefore *Cronic* did not apply. *Id*. at 11. The Sixth Circuit further assumed without deciding that Erwin's performance was deficient under *Strickland*, but that Maslonka failed to demonstrate prejudice because there was no reasonable probability that Erwin could have convinced Maslonka to cooperate at the grand-jury proceeding, and because Fox testified that Erwin could not have changed his mind about the last, best plea agreement (reduction from fourth to third habitual). *Id*. at 13–14. The Sixth Circuit therefore reversed the conditional habeas grant and remanded to the district court to consider Maslonka's only remaining claim—ineffective assistance of appellate counsel.[1] *Id*. at 16.

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[1] While Maslonka's actual-innocence claim also remained, that claim could only serve to excuse Maslonka's procedural defaults, which both the district court and Sixth Circuit elected not to enforce anyway. Freestanding actual-innocence claims are not cognizable on federal habeas review. *Herrera* v. *Collins*, 506 U.S. 390, 400 (1993). Thus, resolution of that claim is unnecessary.

The Sixth Circuit further denied Maslonka's motion for rehearing en banc. Pet. App. A-1.

REASONS FOR DENYING THE PETITION

I. The alleged circuit split regarding any state-action requirement for *United States* v. *Cronic*, 466 U.S. 648 (1984), is inapposite where Maslonka's cooperation in a federal narcotics investigation was not a critical stage of his state prosecution for armed robbery.

Maslonka first claims that his case merits this Court's review because the Sixth Circuit opinion in this case created a split among the circuits regarding whether state action is required to presume prejudice under *United States* v. *Cronic*, 466 U.S. 648 (1984), for the complete denial of counsel, whether actual or constructive. But his claim fails for several reasons.

First, regardless of any state action, *Cronic* does not apply in this case because the federal proceedings were not critical stages of Maslonka's state prosecution for armed robbery and thus Maslonka was not entitled to the assistance of his state-appointed counsel for his federal cooperation.

Second, there is no mature split as Maslonka claims, given that only one of his cited cases addresses the state-action issue, was issued nearly twenty years ago, and has not been extensively cited for that proposition since. Thus, this Court should deny certiorari for this claim.

A. Maslonka's federal cooperation was not a critical stage of his state prosecution and thus he was not entitled to counsel for his federal cooperation, rendering *Cronic* inapplicable.

The Sixth Amendment right to counsel does not attach until formal proceedings are initiated against a defendant, including a formal charge, preliminary hearing, indictment, information, or arraignment. *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977). Arrest is insufficient to trigger the Sixth Amendment right to counsel. See *Moran* v. *Burbine*, 475 U.S. 412, 428–31 (1986). Once the right to counsel attaches, a defendant is entitled to effective assistance from counsel. Generally, to establish that counsel was ineffective, a petitioner must demonstrate that counsel's performance was objectively unreasonable and that he was prejudiced by counsel's action or inaction. *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984).

In limited circumstances, however, prejudice may be presumed. *Cronic* identified three such situations: (1) a "complete denial of counsel," including instances where counsel was actually or constructively absent from a "critical stage" of the proceedings; (2) if defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing[;]" and (3) when "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." 466 U.S. at 659–60.

Once the right attaches, though, criminal defendants are entitled to have counsel present "at all 'critical' stages of the criminal proceedings." *Montejo* v. *Louisiana*, 556 U.S. 778, 786 (2009). A "critical stage" is one that holds "significant consequences for the accused," or is essential "to protect the fairness of the trial itself." *Bell* v. *Cone*,

535 U.S. 685, 696 (2002); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 239 (1973). If counsel is denied during those stages, prejudice is presumed. *Cronic*, 466 U.S. at 659.

But, here, Maslonka was not entitled to counsel for his federal cooperation because no federal proceedings were initiated against him. He was a *witness* in the federal proceedings, not a target or defendant, and he was not arrested, charged, or indicted. As a result, he was not entitled to the assistance of counsel—let alone that of his *state*-appointed counsel—for his federal cooperation. See *Moran*, 475 U.S. at 428–31; *Brewer*, 430 U.S. at 398.

Further, Maslonka's federal cooperation was not a critical stage of his state prosecution. The only potential critical stages in his state prosecution were the state-court proceedings regarding Maslonka's prosecution for armed robbery. Those included meetings with the *state* prosecutor for plea negotiations or *state* law enforcement for any investigation related to the armed robbery, and court appearances, including pretrial hearings, the formal plea proceeding, and sentencing. And for *those* proceedings the record establishes that Erwin was present for all but one, during which she was in another court and when she next appeared and apologized, the state trial court "more than accepted" her apology. (2/9/09 Hr'g Tr. at 2–3; 2/13/09 Proceedings Tr. at 2.) And, regardless, nothing happened at that proceeding: the matter was simply adjourned. (2/9/09 Proceedings Tr. at 3.)

Maslonka's meetings, ride-alongs, etc., with the DEA for the *federal* investigation were not "critical stages" of Maslonka's *state* prosecution at which Maslonka was entitled to have his state-appointed counsel represent him. In any event, Erwin *did*

meet with the federal authorities when they were at the county courthouse. (3/9/17 Evid. Hr'g Tr. at 10.) Indeed, the Sixth Circuit aptly noted that Erwin "was involved throughout the pre-trial period, just not at the federal cooperation meetings." Pet. App. A-2 at 11. Maslonka therefore alleged failures "in particular instances," evaluated under *Strickland*, rather than wholesale portions, evaluated under *Cronic*. *Id.*

Thus, because Erwin was present for the critical stages of Maslonka's *state* prosecution—the only proceedings at which Maslonka's right to counsel attached—the Sixth Circuit correctly concluded that *Cronic* does not apply in this case. This Court need go no further to determine that the petition for certiorari should be denied on this claim. Even though this was not the basis for the Sixth Circuit's decision, Pet. App. A-2 at 9 ("[W]e will assume without deciding that Maslonka's attempted cooperation with federal authorities was part of the critical stage of his state plea negotiations . . . ."), the State expressly relied on this argument below and presses it forward here. So the issue about whether state action is required to trigger a *Cronic* claim need not be answered.

B. Any circuit split regarding whether state action is required to prevent defense counsel from assisting a criminal defendant for *Cronic* to govern an ineffective-assistance-of-counsel claim is inapposite in this case.

While Maslonka characterizes the Sixth Circuit's opinion as creating a split among the circuits once it is determined that *Cronic* applies, his argument merely challenges the correctness of the Sixth Circuit's opinion regarding the necessity of

state action for a *Cronic* violation. But the propriety of the Sixth Circuit's *reasoning* is not relevant, whether resulting in a circuit split or otherwise, for three reasons.

First, the factual circumstances in each of Maslonka's cited cases from other circuits differ drastically from the facts of this case. The Second, Fourth, Fifth, Ninth, and Eleventh Circuit cases all concerned the defense attorneys' performances at an undisputedly critical stage: trial. *Tippins* v. *Walker*, 77 F.3d 682 (2d Cir. 1996); *United States* v. *Ragin*, 820 F.3d 609 (4th Cir. 2016); *Burdine* v. *Johnson*, 262 F.3d 336 (5th Cir. 2001); *Javor* v. *United States*, 724 F.2d 831 (9th Cir. 1984); *Harding* v. *Davis*, 878 F.2d 1341 (11th Cir. 1989). In fact, all but one of those cases, *Harding*, dealt with counsel sleeping or otherwise being unconscious during portions of the trials. In *Harding*, the court applied *Cronic* to counsel's essential refusal to participate during the jury trial, where he did not give an opening statement, did not cross-examine any witnesses, and did not raise any objections, including when the court granted the prosecution's motion for a directed verdict of guilty. 878 F.2d at 1344. Maslonka also cited a Seventh Circuit case, *Miller* v. *Martin*, 481 F.3d 468 (7th Cir. 2007), which concerned counsel's performance during sentencing—another undisputed critical stage. And, finally, Maslonka's cited Eighth Circuit case, *McGurk* v. *Stenberg*, 163 F.3d 470 (8th Cir. 1998), dealt with counsel's failure to advise the defendant of his right to a jury trial, resulting in a bench trial instead.

None of those cases remotely resemble this case. Maslonka's case concerns proceedings that were not even part of his state prosecution for armed robbery, let alone critical stages of those proceedings. Maslonka's federal cooperation was an entirely

different affair, initiated by a different sovereign, for a different purpose. The federal cooperation and state prosecution were linked only by the state prosecutor's willingness to negotiate a plea based on that cooperation. Erwin was not absent from, or unconscious during, any of the critical stages at issue in Maslonka's cited cases. As this Court noted in *Woods* v. *Donald*, 135 S. Ct. 1372, 1377 (2015), holding that *Cronic* did not apply to counsel's physical absence during trial testimony related only to the petitioner's codefendant, "none of those cases dealt with circumstances like those present here."

Indeed, Erwin was present for and engaged in each critical stage of the state prosecution, save for one pretrial that was adjourned due to her excusable absence. She participated in pretrial hearings, the plea colloquy (substituted for trial in this case), and sentencing—all the critical stages at issue in Maslonka's above-cited cases. In that way, those cases are inapposite in this case.

Second, to the extent any circuit split exists, it is not a mature split. Only *Burdine*, issued in 2001, speaks to the state-action issue outlined in the Sixth Circuit's decision here.[2] In *Burdine*, defense counsel fell asleep during various portions of voir dire and trial. 262 F.3d at 340. Because Burdine was convicted in 1987 and *Cronic* issued in 1984, the state argued that *Cronic* constituted a "new rule" under *Teague* v. *Lane*, 489 U.S. 288 (1989) that could not be applied retroactively to Burdine's case. *Id.* at 341. As part of the *Teague* argument, the state contended that prejudice could be presumed under *Cronic* only if state action prevented defense counsel from

[2] Maslonka mistakenly cites *Burdine* as being issued in 2011. Pet. at 6.

assisting the defendant. *Id*. at 345. The Fifth Circuit rejected the state's arguments, noting that *Cronic* was concerned with the effect of counsel's absence, not the cause of it. *Id*.

But according to Westlaw, of the 228 cases to cite *Burdine* as of the date of this filing, only three addressed the headnote regarding the Fifth Circuit's state-action analysis, one of which was another action filed by Burdine to enforce the Fifth Circuit's judgment in his own case. And the other two cases, *Schmidt* v. *Foster*, 911 F.3d 469, 502 (7th Cir. 2018) and *Garza* v. *Thaler*, 909 F. Supp. 2d 578, 608 (W.D. Tex. 2012), only cite *Burdine* as generally applying *Cronic* to situations in which counsel's absence is complete, whether by sleeping or otherwise. In short, *Burdine*'s state-action conclusion has only been rarely cited so any claim that the Sixth Circuit's decision in this case creates a mature split is unsupported by the cases. Maslonka's argument is a non-starter.

Third, even if this Court disagrees with the Sixth Circuit's reasoning that state action is required for a *Cronic* violation, the Sixth Circuit's conclusion remains sound: *Cronic* does not apply in this case, whether it is because no state action prevented Erwin's assistance or because the federal cooperation was not a critical stage of Maslonka's state prosecution. A reviewing court may affirm the lower-court decision "if it is correct for any reason, even a reason different from that relied upon by the [lower] court." *Taylor* v. *McKee*, 649 F.3d 446, 450 (6th Cir. 2011).

As a consequence, regardless of the reason, the Sixth Circuit correctly determined that Maslonka's ineffective-assistance claim falls under *Strickland*, not *Cronic*.

II. The Sixth Circuit did not suspend the writ of habeas corpus in remanding to the district court to resolve Maslonka's sole remaining habeas claim—ineffective assistance of appellate counsel.

Maslonka's second brief claim is that the Sixth Circuit impermissibly suspended the writ of habeas corpus by limiting the remand to the district court to resolve only Maslonka's ineffective-assistance-of-appellate-counsel claim when Maslonka has additional unresolved claims remaining from his habeas petition. While it is true that the Sixth Circuit remanded only for the district court to resolve the ineffective-assistance-of-appellate-counsel claim, it did not "suspend" the writ.

In his original habeas petition, Maslonka raised literally dozens of claims, each of which may be digested into the following categories: (1) denial of counsel during plea negotiations, (2) ineffective assistance of trial counsel during plea negotiations, (3) entitlement to plea withdrawal, (4) entitlement to resentencing on the earlier plea agreement, (5) actual innocence of the armed robbery, and (6) ineffective assistance of appellate counsel. The first four of those claims rested on Maslonka's contention that Erwin failed to perform her duties as his trial counsel. In holding that Maslonka failed to carry his burden of establishing ineffective assistance of trial counsel, the Sixth Circuit resolved all those claims, leaving only two claims unresolved from these

six categories of claims: ineffective assistance of appellate counsel and actual innocence.[3]

As noted in footnote 1 above, Maslonka's actual-innocence claim could only serve as a reason to excuse his procedural defaults. But because the district court and the Sixth Circuit did not enforce the defaults anyway, the actual-innocence claim is moot. It cannot independently entitle Maslonka to habeas relief. *Herrera* v. *Collins*, 506 U.S. 390, 400 (1993).

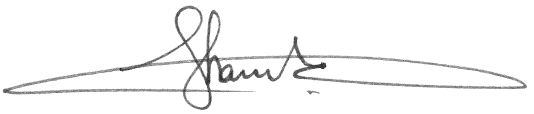
Therefore, the only claim remaining is ineffective assistance of appellate counsel. The Sixth Circuit appropriately remanded to the district court to resolve that claim.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

Dana Nessel
Michigan Attorney General



Fadwa A. Hammoud
Solicitor General
Counsel of Record

Scott Shimkus
Assistant Attorney General
Criminal Appellate Division

Attorneys for Respondent

Dated: April 2019

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[3] To be clear, Maslonka has not identified what other claims remain from his habeas petition.

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
vs. Case No. 2009-0045-FC

NICHOLAS PAUL MASLONKA,
Defendant.
_____/

OPINION AND ORDER

Several motions are pending before the Court (1) defendant's motion for relief judgment; (2) defendant's motion for an evidentiary/*Ginther* hearing; and (3) defendant's motion to compel discovery, for a page limit increase, and for immediate consideration.

Defendant pled guilty to one count of armed robbery, contrary to MCL 750.529. The Hon. Diane M. Druzinski sentenced defendant to a term of 15 to 25 years' incarceration on June 8, 2009. Judge Druzinski appointed attorney Kathryn Simmons to represent defendant in appellate proceedings. Simmons subsequently filed a motion to withdraw, which was granted. Judge Druzinski then appointed attorney Donald Cook to serve as defendant's appellate counsel.

Cook brought a motion captioned "Motion to Enforce Promises Made in Exchange for Cooperation by the Defendant Cites Included." Given the procedural posture of this case, Judge Druzinski treated this motion as a motion for relief from judgment and denied the motion in an *Opinion and Order* issued on November 3, 2010. Defendant then brought a motion for a *Ginther* hearing concerning Simmons and a motion for a *Ginther* hearing concerning Cook, both of which were denied in an

Opinion and Order issued May 2, 2011. In this *Opinion and Order*, and pursuant to defendant's request, the Court also vacated the appointment of appellate counsel Cook. Attorney Gerald Ferry was then appointed as defendant's appellate counsel.

Defendant next filed an application for leave to appeal on July 11, 2011. The Court of Appeals denied his application for leave to appeal, finding lack of merit in the grounds presented. Defendant then filed the pending motions, essentially attempting to once again revisit the effectiveness of his various attorneys throughout these proceedings.

The Court shall first address defendant's motion for relief from judgment. Motions for relief from judgment are governed by Subchapter 6.500 of the Michigan Court Rules. Generally speaking, "one and only one motion for relief from judgment may be filed with regard to a conviction." MCR 6.502(G)(1). The exception to this rule is that "[a] defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion." MCR 6.502(G)(2). "A defendant may not appeal the denial or rejection of a successive motion." MCR 6.502(G)(1).

In support of this motion, defendant contends that two recent U.S. Supreme Court cases establish that a guilty plea does not abrogate claims of ineffective assistance of counsel which occurred prior to the plea. Defendant further contends that these cases establish that competent representation is required during the plea negotiation process. Defendant then goes on to raise various arguments pertaining to

the allegedly ineffective assistance of his attorney during the plea proceedings, along with arguments concerning the allegedly ineffective assistance of his appellate attorneys.

The prosecution has filed a response to defendant's motion, noting that this is defendant's second motion for relief from judgment. The prosecution denies that defendant's arguments are based on a retroactive change in law or newly discovered evidence. Accordingly, the prosecution requests that the Court "return without filing the defendant's successive motion for relief from judgment as required by MCR 6.502(G)(1)."

The two U.S. Supreme Court cases cited by defendant are *Lafler v Cooper*,_ US_; 132 S Ct 1376; 182 L Ed 2d 398 (2012), and *Missouri v Frye*, _US_; 132 S Ct 1399; 182 L Ed 2d 379 (2012). Neither case appears to have any bearing on defendant's motion for relief from judgment. Both of these cases involved situations where ineffective assistance of counsel deprived the defendants therein of the benefit of a plea agreement. In the pending case, on the other hand, defendant actually did plead guilty. As such, this case is readily distinguishable from both *Lafler* and *Frye*.

Furthermore, while defendant makes the conclusory assertion that "these companion case[s] have opened a whole new field of constitutional plea bargaining law that are [sic.] controlling here," defendant has not explained how the actual holdings of *Lafler* or *Frye* constitute a retroactive change in the law as applied to defendant's case. While a retroactive change in law is grounds for a successive motion for relief from judgment, the change in law obviously must be relevant to the circumstances of

the movant's case. Since neither *Lafler* nor *Frye* have any apparent bearing on the disposition of defendant's case, defendant's successive motion for relief from judgment is properly denied.

Because defendant's motion for relief from judgment is properly denied for the aforementioned reasons, defendant's additional motions - for an evidentiary/*Ginther* hearing and to compel discovery, for a page limit increase, and for immediate discovery - are moot. These motions are therefore denied.

For the reasons set forth above, defendant's motion for relief from judgment is DENIED. Defendant's motion an evidentiary/*Ginther* hearing is DENIED. Defendant's motion to compel discovery, for a page limit increase, and for immediate discovery is DENIED. Pursuant to MCR 2.602(A)(3), this case remains closed.

IT IS SO ORDERED.

James Biernat, Jr.
JAMES M. BIERNAT, JR. Circuit Judge

JMB/kmv

DATED: 12/11/2012

cc: Michael Servitto, Assistant Prosecuting Attorney

Nicholas Paul Maslonka, #367872
In Pro Per
Carson City Correctional Facilities
10274 Boyer Road Carson City, MI 48811