No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

KYLE KEITH CLARK - PETITIONER

VS.

KEVIN LINDSAY- RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTION PRESENTED

DID THE SIXTH CIRCUIT DEPART FROM THIS COURT'S PRIOR DECISIONS AND CREATE A CONFLICT WITH ITS OWN PRECEDENT AND A SPLIT WITH OTHER CIRCUITS REQUIRING RESOLUTION BY THIS COURT WHEN IT HELD THAT THE TRIAL COURT DID NOT VIOLATE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL IN PROCEEDING WITH DEFENDANT'S COMPETENCY AND CRIMINAL RESPONSIBILITY HEARING, OVER THE PROSECUTION'S OBJECTION, IN THE ABSENCE OF HIS COUNSEL AND WITHOUT SECURING AN ADEQUATE WAIVER OF HIS RIGHT TO COUNSEL, BECAUSE THE TRIAL JUDGE'S ACTION WAS FOUND BY THE SIXTH CIRCUIT TO NOT BE STATE ACTION UNDER *United States v. Cronic,* 466 U.S. 648 (1984)?

The District Court Answered this Question: No.

The Sixth Circuit Answered this Question: No.

The Respondent will Answer this Question: No.

The Petitioner Answers this Question: Yes.

PARTIES INVOLVED

All parties appear in the caption of the case on the cover page.

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The August 23, 2019 Opinion of the Sixth Circuit Court of Appeals is published as *Clark v Lindsay,* 936 F.3d 467 (6th Cir. 2019). [Appendix A]

The May 8, 2018 Eastern District of Michigan Opinion is unpublished. [Appendix B]

The July 1, 2015 Michigan Supreme Court Order is published as *People v Kyle Keith Clark,* 865 N.W.2d 32 (Mich. 2015). [Appendix C]

The June 19, 2014 Michigan Court of Appeals Opinion is unpublished. [Appendix D]

The November 13, 2019 Order Denying Rehearing *En Banc* of the Sixth Circuit Court of Appeals is unpublished. [Appendix E]

The September 29, 2015 Michigan Supreme Court Order Denying Reconsideration is published as *People v Kyle Keith Clark,* 869 N.W.2d 566 (Mich. 2015). [Appendix F]

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this habeas corpus case through its federal question jurisdiction, 28 U.S.C. §§1331, 1343, 2201, and 2002. This action was brought under 28 U.S.C. §2254 and alleged that the petitioner is being confined by respondent in violation of his federal constitutional rights. The petition below was filed within 364 days of the exhaustion of petitioner's state remedies before the Michigan Supreme Court.

The Sixth Circuit had jurisdiction to hear this appeal under 28 U.S.C. §1291, which provides jurisdiction for appeals from final decisions of district courts, and 28 U.S.C. §2253, which provides jurisdiction for appeals in habeas corpus cases.

The U.S. District Court for the Eastern District of Michigan issued its opinion and order [Opinion and Order, Appendix A] denying the petition and a certificate of appealability, and entered a judgment denying the petition for habeas corpus on May 5, 2018. [Appendix B]. The Petitioner filed a timely notice of appeal on June 10, 2018 along with a motion for certificate of appealability. [Notice of Appeal, R 10, Page ID #1480]. On October 16, 2018, the Sixth Circuit issued an order granting in part and denying in part the motion for a certificate of appealability, granting on the single issue raised in this Petition. [Appendix G].

On August 23, 2019, the Sixth Circuit issued a 2-1 decision, captioned as *Clark v Lindsay,* 936 F.3d 467 (6th Cir. 2019), affirming the district court [Appendix A]. On September 5, 2019, Petitioner timely petitioned the Sixth Circuit for rehearing *en banc.* The Sixth Circuit denied the Petitioner's petition for rehearing

en banc on November 13, 2019 [Appendix E].

This jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), and this Petition is filed within 90 days of the Sixth Circuit's denial of rehearing *en banc.*

STATEMENT OF

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const, Amend VI

> 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.

28 U.S.C. 2254

(a)The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1)An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A)the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i)there is an absence of available State corrective process;

or

(ii)circumstances exist that render such process

ineffective to protect the rights of the applicant.

(2)An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3)A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c)An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d)An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1)resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court

of the United States; or

(2)resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1)In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2)If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A)the claim relies on—

(i)a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii)a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B)the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f)If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g)A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h)Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i)The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Introduction

The trial court in this matter, over the initial objection of the Prosecution, conducted the Petitioner's competency and criminal responsibility hearings despite the absence of Petitioner's counsels, who did not appear due to a scheduling mixup. These facts are not disputed; rather, the issue in this case involves the legal import of these uncontested facts.

Procedural History

Petitioner was convicted in the Washtenaw County (Michigan) Circuit Court of Criminal Sexual Conduct, Third Degree, contrary to MCL 75.520(1)(b) and domestic violence, contrary to MCL 750.81(2) following a two day jury trial on August 27-28, 2012. Jury Trial Transcript, R6-11, Page ID #334. On October 2, 2012, Petitioner was sentenced to 120-180 months with the Michigan Department of Corrections. Sentencing Transcript, R 6-12, Page ID #358.

The Michigan Court of Appeals, Docket #313121, affirmed the Petitioner's conviction on June 19, 2014. Michigan Court of Appeals Opinion. Appendix D. The Michigan Supreme Court, Docket #150202, denied leave to appeal on the Petitioner's substantive issues but remanded for resentencing due to a mis-scoring of the sentencing guidelines on July 1, 2015. Michigan Supreme Court Order, Appendix C. The Michigan Supreme Court denied reconsideration on September 29, 2015. Michigan Supreme Court Order Denying Reconsideration, Appendix F. On January 20, 2016, the Washtenaw County Circuit Court resentenced Petitioner

to 120 to 180 months incarceration. Re-Sentencing Transcript, R 6-38, Page ID # 1367.

Petitioner filed his Petition for Habeas Corpus on September 27, 2016. Petition for Habeas Corpus, R 1, Page ID # 1-4. The district court issued its opinion and order [Appendix B] denying the petition and a certificate of appealability, and entered a judgment denying the petition for habeas corpus, on May 5, 2018. Appendix B. The petitioner filed a timely notice of appeal on June 10, 2018 along with a motion for certificate of appealability. Notice of Appeal, R 10, Page ID #1480. On October 16, 2018, the Court issued an order granting in part and denying in part the motion for a certificate of appealability, granting on this single issue and denying on other ones. Order Granting in Part and Denying in Part Motion for Certificate of Appealability, Appendix G.

On August 23, 2019, the Sixth Circuit, in a 2-1 decision published at *Clark v Lindsay,* 936 F.3d 467 (6th Cir. 2019), affirmed the district court's denial of the petition for habeas corpus. Appendix A. Petitioner timely moved for rehearing *en banc* on September 5, 2019, which the Sixth Circuit denied on November 13, 2019. Appendix E.

STATEMENT OF FACTS

The Michigan Court of Appeals provided the following factual background of the case which, though Petitioner disagrees with much of it, accurately represents the jury's findings of fact and provides sufficient factual background for the discussion of the issue herein, which is unrelated to those disputed background

facts:

> Complainant and defendant met when defendant was a teenager and complainant was fifteen plus years older than him. Complainant testified however, that she and defendant did not become intimate until he was of adult age. At the time of complainant's assault, complainant and defendant had lived together for approximately four years and defendant was then living with complainant for what complainant termed a "trial basis." The day before the assault, complainant had given defendant money for gas to drive back a vehicle he intended to purchase that night. Defendant instead bought crack with the money and stayed overnight in a crack house. Complainant texted and called defendant numerous times to determine his whereabouts, but he did not answer. According to the complainant, defendant showed up at their home early the next day banging on the front door. Complainant indicated that she did not want defendant there and that she told him to go away. Defendant did not leave, but instead pushed the door open, breaking the lock. The two argued and defendant went upstairs to sleep in the bed they shared. Complainant left to take her son to school and upon returning got in the shower to get ready for work. After complainant had finishedher shower, and was still in the bathroom, defendant entered and ordered her to perform fellatio on him. Complainant told him she was "done with him" and

basically that their relationship was over. Defendant had also testified to the waning of their relationship and to his plans of moving out. According to the complainant, when she refused to perform oral sex on defendant he grabbed her by her hair and pushed her up the stairs to their bedroom.

Once upstairs, defendant pushed complainant face first onto their bed, spit on her anus and proceeded to anally rape her. Complainant told defendant to stop and defendant choked her until she passed out. When complainant awoke defendant had his arm around her and would not let her go. Defendant's employer called and complainant reached for the phone. Defendant responded by choking her again, but let go when complainant apologized. Defendant and complainant eventually went downstairs. Complainant began to brush her hair for work while defendant heated food. Once defendant's back was turned complainant grabbed her robe and ran out of the house to the vehicle where she had left her keys. She drove to her work and informed her employer of what had happened. Her employer instructed another employee to return home with her. When complainant returned home, defendant was gone. She dressed, called the police and followed a deputy to a hospital where a sexual assault exam was performed. The nurse who performed the exam testified that she did not see any physical injury to complainant's body, including no injury

to her genitalia or anus.

While complainant was gone, defendant left for work. He told his employer of his plans to move out and his employer was supportive of that move. Defendant's theory at trial was that he and complainant had engaged in consensual sex that morning, initiated by complainant. Defendant returned to the home later that morning to gather his belongings and the police were there. Defendant voluntarily spoke with a detective for what he thought were only charges of domestic violence. He explained that he and complainant had an unhealthy relationship that involved a repeated pattern of fighting and then making up. When defendant guessed that he was being interviewed for charges of rape, he declined to further speak with the detective.

After having heard both complainant and defendant testify, the jury chose to believe complainant and found defendant guilty of both third-degree criminal sexual conduct and domestic violence.

Michigan Court of Appeals Opinion, Appendix D, p 1-2.

The Competency Hearing

The issue on which the Sixth Circuit granted a certificate of appealability concerns the competency and criminal responsibility hearing of August 1, 2012, which the court reporter labeled as a "final pretrial." Competency Hearing Transcript, R 6-9, Page ID # 207-213. While the entire seven page transcript is

respectfully recommended to the readers, the applicable portions thereof are summarized below.

At the May 4, 2012 pretrial hearing defense counsel raised concerns regarding Petitioner's mental state, noting that he had experienced mental health issues in the past. Transcript of May 4, 2012, R 6-8, Page ID # 198-199. There were also issues with self-mutilation at the jail which may have been reported by officials as a suicide attempt. Transcript of May 4, 2012, R 6-8, Page ID # 198-199. Defense counsel suggested that a determination of Petitioner's mental state required professional evaluation beyond counsel's ability. Transcript of May 4, 2012, R 6-8, Page ID # 198-199. The trial court noted that it to had seen indications "of some issue where Mr. Clark is un - - not able to present his own - - assist in the presentation of his own defense than that's an issue that needs to be resolved." Transcript of May 4, 2012, R 6-8, Page ID # 200-201. The trial court thus referred Petitioner for both competency and criminal responsibility evaluations. Transcript of May 4, 2012, R 6-8, Page ID # 201.

The August 1, 2012 hearing transcript contains the competency hearing and is remarkable even on its cover page, as it shows Petitioner representing himself, at a competency hearing, with no attorney present. Competency Hearing Transcript, R 6-9, Page ID # 207. As the trial court put it "apparently there was some mix-up in [Petitioner's] attorney's office with regard to which attorney would be here or not, given the fact that the Court moved up the court date in light of the report that the Court received from the Michigan Department of Community Mental Health."

Competency Hearing Transcript, R 6-9, Page ID # 209. According to the trial court one of Petitioner's attorneys, but the court was not sure which, "communicated with the off- - - with my office that they had no objection to accepting the July 2nd, 2012, report where the Petitioner was deemed competent and - - and proceed with this matter pending the trial as is currently scheduled for August 27th." Competency Hearing Transcript, R 6-9, Page ID # 209-210. The prosecution actually objected to the court accepting such a stipulation, indicating that Petitioner needed to have counsel present and apparently had not even seen or read the report nor had the chance to go over it with counsel. Competency Hearing Transcript, R 6-9, Page ID # 210. The prosecution sought a one week adjournment "to protect the Defendant." Competency Hearing Transcript, R 6-9, Page ID # 210.

The Petitioner stated he had gone over "the competency hearing" (but made no mention of seeing or reading any reports) with his counsels and wanted to proceed with trial. Competency Hearing Transcript, R 6-9, Page ID # 211. He had no idea why his attorneys were not present but wanted no more delays. Competency Hearing Transcript, R 6-9, Page ID # 211. Having been lodged for many months since his arrest, despite various motions regarding bond, the Petitioner made it clear that getting to trial was his focus. Competency Hearing Transcript, R 6-9, Page ID # 211. The trial court accepted Petitioner's claim that he had "gone over the competency hearing" with both counsels and set the matter for trial. Competency Hearing Transcript, R 6-9, Page ID # 211-212. The trial court made no further inquires of nor gave any warnings to the Petitioner. Competency

Hearing Transcript, R 6-9, Page ID # 211-212.

Basis of Jurisdiction of the Federal District Court

The district court had subject matter jurisdiction over this habeas corpus case through its federal question jurisdiction, 28 U.S.C. §§1331, 1343, 2201, and 2002. This action was brought under 28 U.S.C. §2254 and alleged that the petitioner is being confined by respondent in violation of his federal constitutional rights. The petition below was filed within 364 days of the exhaustion of petitioner's state remedies before the Michigan Supreme Court.

ARGUMENT AND REASONS FOR GRANTING PETITION

Issue

DID THE SIXTH CIRCUIT DEPART FROM THIS COURT'S PRIOR DECISIONS AND CREATE A CONFLICT WITH ITS OWN PRECEDENT AND A SPLIT WITH OTHER CIRCUITS REQUIRING RESOLUTION BY THIS COURT WHEN IT HELD THAT THE TRIAL COURT DID NOT VIOLATE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL IN PROCEEDING WITH DEFENDANT'S COMPETENCY AND CRIMINAL RESPONSIBILITY HEARING, OVER THE PROSECUTION'S OBJECTION, IN THE ABSENCE OF HIS COUNSEL AND WITHOUT SECURING AN ADEQUATE WAIVER OF HIS RIGHT TO COUNSEL, BECAUSE THE TRIAL JUDGE'S ACTION WAS FOUND BY THE SIXTH CIRCUIT TO NOT BE STATE ACTION UNDER *United States v. Cronic,* 466 U.S. 648 (1984)?

Standard of Review

The review of this Court in decision on a habeas petition which applies the law to the facts is *de novo. Wright v. West,* 505 U.S. 277, 293-94 (1992).

Introduction

The essence of the Sixth Circuit majority's holding below was that there was no error in conducting Petitioner's competency and criminal responsibility hearings

in the absence of his counsels because his counsels were at fault for a scheduling mixup and thus there was no state action as required by the Sixth Circuit under *Maslonka v Hoffer,* 900 F3d 269, 279 (6th Cir. 2018). The dissent would have held that the trial judge's action of holding the hearing was itself the state action. The dissent is, quite simply, correct, as otherwise, a trial judge may gavel the proceedings and allow the prosecution to commence against a defendant accompanied only by an empty chair, so long as the state did not empty that chair. If the majority below is correct, a defendant's counsel could be hit by a bus at lunch and the trial judge could reconvene trial for the afternoon in his absence, so long as the *bus* was not driven by a state actor. This is both wrong and ridiculous, but it *is* the only logical result of the application of the Sixth Circuit's published decision to any and all situations where counsel, for some critical stage or another, fails to show up and the trial court elects to proceed with an empty chair next to the defendant. This is grossly contrary to *United States v. Cronic,* 466 U.S. 648, 658-659 & n. 25 (1984) and requires this Court's intervention to correct.

Questions of Competency and the Absence of Counsel

The transcript of August 1, 2012 contains the trial court's competency "hearing" at which the court simply accepted the results the competency and criminal responsibility reports found. Competency Hearing Transcript, R 6-9, Page ID # 211-212. As seen in the transcript of May 4, 2012, the concerns regarding Petitioner's competency and ability to assist his defense arose not just from his counsel but also from the trial court itself. Transcript of May 4, 2012, R 6-8, Page

ID # 198-201. While the Forensic Center reports indicated that Petitioner was competent and of possessing a sufficient level of understanding of his actions, they were hardly devoid of mental health concerns regarding Petitioner, making the issue anything but moot at the time of the hearing.

The waiver of counsel is a constitutional question where the law requires that "any waiver of the right to counsel be knowing, voluntary and intelligent" *Iowa v. Tovar,* 541 U.S. 77, 88 (2004) *citing Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). A waiver of counsel is intelligent when a defendant "knows what he is doing and his choice is made with eyes open." *Tovar* at 88, *citing Adams v. United States ex rel. McCann,* 317 U.S. 269, 279 (1942).

At the outset of the August 1, 2012 hearing the trial court noted that defense counsel was not present but indicated one or the other of his counsels had apparently called chambers to indicate he was not objecting to the "July 2nd, 2012, report" (using the singular term, though there were two different ones, one for competency and another for criminal responsibility). Competency Hearing Transcript, R 6-9, Page ID # 209-210. Over the prosecution's objection the trial court elected to proceed once Petitioner indicated he had gone over the "competency hearing with both of my attorneys." Competency Hearing Transcript, R 6-9, Page ID # 210-211. There is, in this transcript, exactly nothing that even approaches an effort to obtain any sort of waiver, much less a constitutionally sufficient one, from the Petitioner before proceeding. Competency Hearing Transcript, R 6-9, Page ID # 209-211.

As the Sixth Circuit has held, noting that "every federal court of appeals to take up the question has answered it affirmatively," a competency hearing is indeed a critical stage of proceedings at which a defendant's Sixth Amendment rights attach. *United States v. Ross,* 703 F.3d 856, 874 (6th Cir., 2012). Additionally the Sixth Circuit, directly addressing the question of whether or not a denial of counsel at such a hearing would require automatic reversal without any examination as to prejudice found that it would, as "[w]e see no reason to create an exception to our established rule that complete deprivation of counsel during a critical stage warrants automatic reversal without consideration of prejudice." *Ross* at 874 *citing Van v Jones,* 475 F.2d 292, 311-312 (6th Cir., 2007). The majority below pointedly did not challenge this precedent or find that the competency hearing was somehow not a critical proceeding.

This 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. *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Williams v. Kaiser*, 323 U.S. 471 (1945).

As the Petitioner, at the August 1st hearing, only stated "I've gone over the competency hearing with both of my attorneys," Competency Hearing Transcript, R 6-9, Page ID # 210, there is no evidence he had read or even just *seen* the

competency and criminal responsibility *reports*, much less discussed them with counsel.[1] Despite this, the Michigan Court of Appeals somehow found that the Petitioner had reviewed the competency *report* with his attorneys*,* and the Sixth Circuit majority accepted this, Appendix A, p 7 of 17, though the record completely belies it. Petitioner discussed only the *hearing* with his attorneys, and did not actually see or possess the report.

Not that it would matter. Whether or not Petitioner had a copy of the report, the competency hearing still proceeded with an empty chair next to him, with no counsel to meaningfully test or even just explain what the report said.

While it is abundantly clear that this Petitioner, with a history of mental health problems and having been denied an affordable bond for around 10 months, wanted to proceed immediately to trial, there was nothing even resembling a *Tovar* waiver nor was there, as was present in *Ross,* standby counsel, or any counsel at all, available to assist and represent Petitioner in this critical stage. The assistant prosecutor got this issue exactly right, "to protect the Defendant . . . a week adjournment with the request that Mr. LaCommare and Mr. Cataldo both be present before your Honor next week, to explain who's the attorney, whether or not they've gone over this re-report with their client" was exactly what was required, and APA Hatlem preserved this issue even when Petitioner, uncounseled, could

[1] Nowhere in the record is there any other indication that would even suggest that Petitioner had seen or read the competency and criminal responsibility reports, for the simple reason that he, being incarcerated at the Forensic Center, had no opportunity to do so when the reports were sent to his counsels, who were both utterly absent.

focus only on his present incarceration and desire to go to trial. Competency Hearing Transcript, R 6-9, Page ID # 210-211.

The Michigan Court of Appeals got every aspect of this decision entirely wrong. Its first sentence: "The trial court accepted defendant's representation that he considered the competency report with his attorneys" [Michigan Court of Appeals Opinion, R 6-14, Page ID # 370] is belied by the record, as Defendant only discussed the *hearing*, not the report, much less *both* (competency and criminal responsibility) reports: "I've gone over the competency hearing with both of my attorneys." Competency Hearing Transcript, R 6-9, Page ID # 211. As to the Michigan Court of Appeals finding that trial court "accepted the stipulation that defendant was competent," [Michigan Court of Appeals Opinion, R 6-14, Page ID # 370], no such stipulation is present on the record as, after all, no attorney was even there to make it. Accordingly, the Michigan Court of Appeals holding that "It is evident that defendant was not deprived of his right of counsel during this critical stage of the proceeding" [Michigan Court of Appeals Opinion, R 6-14, Page ID # 370] is a entirely unsupportable. Petitioner had two attorneys and, at the hearing to determine if he himself was even sane enough to proceed to trial (a real question on this record), neither was there. It was a critical stage proceeding and yet the trial court plowed ahead, even after the prosecution's caution, leaving a Petitioner who had two attorneys on paper to have only an empty chair to actually represent him, in a hearing where his own mental state was *the* issue at hand.

This is not a minor point. Petitioner was, at this point, shortly removed from

some actions divorced from anything resembling mental competency, not the least of which were a suicide attempt and self-mutilation events. Transcript of May 4, 2012, R 6-8, Page ID # 198-199. As noted *supra,* even the trial court had stated that Petitioner seemed incapable of assisting in his own defense. Transcript of May 4, 2012, R 6-8, Page ID # 200-201.

This Was a Critical Proceeding

Below the State has argued that the competency hearing and criminal responsibility hearing were not critical proceedings and thus Petitioner had no right to counsel. This is wrong on several fronts. As this Court held in *Pate v. Robinson,* 383 U.S. 375, 384 (1966), "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial." In *Pate,* the petitioner's counsel "insisted that [petitioner's] present sanity was very much in issue," and likewise here defense counsel, and even the trial court, noted the same very real concern. *Pate* at 384*;* Transcript of May 4, 2012, R 6-8, Page ID # 198-199. Petitioner, on his own and in the absence of counsel, could not, under *Pate,* waive the issue of his competence or accede to a report (which he had not even read or seen) regarding same.

Moreover, not only was Petitioner incompetent, under *Pate,* to waive the issue of his competency, under *Kirby v. Illinois,* 406 U.S. 682, 688-689 (1972) the right to counsel attached at arraignment and here the competency hearing and criminal responsibility hearing, occurred, of course, well past that point. The teaching of *Kirby* and *Coleman v. Alabama,* 399 U.S. 1 (1970), is that any

preliminary hearing after arraignment is a critical proceeding. Petitioner thus had a right to counsel and this was a critical proceeding requiring counsel's presence.

Likewise, as this Court noted in *Estelle v. Smith*, 451 U.S. 454, 469-470 (1981), "we have held that the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer 'at or after the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" This is true because, the *Estelle* Court held, "[i]t is central to [the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id., quoting United States v. Wade*, 388 U.S. 218, 226-227 (1967).

Moreover, the August 1, 2012 hearing was not just a criminal responsibility and competency hearing, it was also, as its transcript's title suggests, a final pretrial. Competency Hearing Transcript, R 6-9, Page ID #207-208. This too is a preliminary hearing under *Kirby* and *Coleman* and thus a critical proceeding. There was to be a final pretrial on August 15, 2012, but the trial court held that same would be cancelled and heard instead at the August 1, 2012 hearing where neither counsel for the Petitioner was present. Competency Hearing Transcript, R 6-9, Page ID #212. The absence of counsel was at this pretrial was thus all the more critical where the Prosecution had put a (3 year) plea offer on the table and

Petitioner, lacking the advice of counsel, focused solely on the delay in going to trial. Competency Hearing Transcript, R 6-9, Page ID #211.

Finally, the Petitioner, who was not competent under *Pate* to conduct his own hearing, can rely on the Prosecution's objection because it put the trial court on notice that Petitioner's right to counsel was being disregarded. Competency Hearing Transcript, R 6-9, Page ID #210. As Assistant Prosecutor Hatlem noted, the counsel the trial court had spoken to, Mr. LaCommare, was not even the defense counsel handling the competency issue, and had likely neither read the report or gone over it with his client. Competency Hearing Transcript, R 6-9, Page ID #210. The assistant prosecutor noted that this situation would, at that point, require the presence of counsel to determine whether or not the competency report had been discussed with Petitioner. Competency Hearing Transcript, R 6-9, Page ID # 210. While the State has since said that Petitioner had the competency report and was familiar with same on this record neither the Petitioner nor the Prosecution said that was true and, indeed, the statements of both point to quite the opposite being correct. Indeed, as noted above in footnote 1, Petitioner, located at the Forensic Center, would not have even received the reports, which were sent to his counsels, and his statements give no indication that he had done anything but "gone over the competency hearing" (not the competency report, or anything to do with criminal responsibility at all) with his counsels. Competency Hearing Transcript, R 6-9, Page ID # 211-212.

What Should Have Happened Here, But Did Not

As this Court noted in *Tovar,* "[w]e have not, however, prescribed any formula or script to be read to a defendant who stated that he elects to proceed without counsel." *Tovar* at 89. That said, "the information a defendant must possess in order to make an intelligent election, our decisions indicate, will depend on a range of case- specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." *Tovar* at 88, *citing Johnson v Zerbst,* 304 U.S. 458, 464 (1938). Here the record is unclear as to the education of Petitioner, but very clear as to his mental health issues, and the complexity of the proceeding, which included not only the competency aspect the Petitioner referred to but also the criminal responsibility issue and report.

Accordingly, even if this Court's holding in *Pate* can be gotten around, what should have happened here is that which *Tovar* teaches but the Washtenaw Circuit Court did not do: "[a]s to the waiver of trial counsel, we have said that before a defendant may be allowed to proceed *pro se,* he must be warned specifically of the hazards ahead." *Tovar* at 88-89. This requirement, however, did not arrive with *Tovar* but instead is longstanding in this Court's jurisprudence.

The *Tovar* Court looked to *Faretta v California,* 422 U.S. 806, 835 (1975) as "instructive." *Tovar* at 89. Therein, as the *Tovar* Court noted:

> The defendant in *Faretta* resisted counsel's aid, preferring to represent himself. The Court held that he had a constitutional right to self-

representation. In recognizing that right, however, we cautioned:

> "Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing."

Tovar at 89, *quoting Faretta* at 835.

Applying the rules of *Tovar* and *Faretta* to this case finds the expectations of both Courts were left entirely unmet here. There was no inquiry as to Petitioner's intelligence or competence and, indeed, the latter was both in question and the actual *subject* of the hearing at issue. There was no warning of the "dangers and disadvantages of self-representation" as required by *Faretta,* and, indeed, no *Tovar* inquiry whatsoever. While *Tovar* specifically declined to state what a particular inquiry must entail, it did clearly hold that there must *be* one, *id.* at 88-89, and here there simply was not.

This Was A Structural Error and Reversal is Mandated

The Michigan Court of Appeals, and Respondent and the Sixth Circuit majority below, seemed to all suggest a question of harmlessness in this inquiry. Michigan Court of Appeals Opinion, R 6-14, Page ID # 370; Appendix A, p 7 of 17. As this Court held in *United States v. Cronic,* 466 U.S. 648, 658-659 & n. 25 (1984), "[t]here are, however, circumstances that are so likely to prejudice the accused that

the cost of litigating their effect in a particular case is unjustified." *Id.*

This case in particular fits the most obvious and severe of the cases contemplated by the *Cronic* Court:

> Most obvious of course is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.

Cronic at 659.

As the *Cronic* Court noted, citing a litany of cases, "[t]he 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." *Cronic* at 659, n. 25.

As discussed *supra,* both the undisputed authority of the Sixth Circuit and this Court indicate that a competency hearing and pretrial are critical proceedings. *United States v. Ross,* 703 F.3d 856, 874 (6th Cir., 2012); *Pate v. Robinson,* 383 U.S. 375, 384 (1966). There is thus simply no way to harmonize the complete absence of Petitioner's counsels, and of any effort to obtain the *Tovar* required "knowing, voluntary and intelligent" waiver, *id.* at 88, or to give the required *Faretta* warnings, *id.* at 835, that occurred here with the requirements of this Court's jurisprudence. The Michigan Court of Appeals thus unreasonably applied clearly established law and its decision should be reversed and Petitioner's petition should be granted.

The Lack of "Absence" of State Action

As the readers here will have the benefit of Judge Clay's well-reasoned dissent below, it need not be repeated herein. Simply put, Judge Clay would have held that "a trial court's decision to proceed with the critical stage despite counsel's absence is sufficient to show that a state action 'played a part in preventing adequate representation,' such that *Cronic* applies and the habeas petitioner is entitled to a presumption of prejudice. *Maslonka,* 900 F.3d at 280." Appendix A, p 14 of 17, (Clay, J., *dissenting*).[2]

Judge Clay had this right for the most obvious of reasons. If the trial court is not a "state actor" under *Maslonka,* then all that needs to happen is that defense counsel be late, of his or her own fault, for any reason, and the trial court may gavel proceedings against the defendant to begin despite the empty chair next to him. Obviously enough, this would be *both* a "complete denial of counsel," *Cronic* at 659 and a situation where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* But, regardless, the Sixth Circuit now says, so long as the state did not play a role in counsel not showing up on time, it has somehow played no role despite its judge's decision to proceed without counsel being present. The situation will have totally lost "its character as a confrontation between adversaries" *Cronic* at 657, but, no matter, according to the Sixth Circuit's majority, unless the state happens to have arrested counsel on his way to the

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[2] This Court denied a petition for a writ of certiorari in *Maslonka. Maslonka v. Nagy*, ___ U.S. ___ ; 139 S. Ct. 2664 (2019).

courthouse.

What this means now is that, in the Sixth Circuit, when, whether counsel is asleep or unconscious, *Burdine v. Johnson,* 262 F.3d 336 (5th Cir. 2001), precluded *by the trial judge* from having time to prepare a defense, *Hunt v. Mitchell,* 261 F.3d 575 (6th Cir. 2001), utterly silent and declining to speak, *Patrasso v. Nelson,* 121 F.3d 297 (7th Cir. 1997); *Phillips v. White*, 851 F.3d 567 (6th Cir. 2017), so hateful toward his client he effectively switches sides, *Rickman v. Bell,* 131 F.3d 1150 (6th Cir. 1997), or, for that matter, *dead*, all of this is just fine so long as the state did not knock him unconscious, tape his mouth shut, cause his rancor toward his client or kill him. The trial judge is now free to ignore all of this, so long as he can say it was not the state's fault that counsel checked out, shut up, enlisted in the prosecution or dropped dead.

This is simply wrong. The trial judge is employed by the state, charged by the state with executing its laws, and responsible when he allows a trial to proceed with a defendant sitting alone at his table without a valid *Tover* waiver. That empty chair is exactly what *Cronic* was set forth to avoid and the presumption of prejudice is obvious in our adversarial system when one adversary does not show up and the trial judge decides it is just fine to allow the state to proceed unchecked and untested against the defendant.

This Sixth Circuit majority departed from *Cronic,* the law of other Circuits, and its own case law in reaching this decision. This case is well suited as a vehicle to address this issue, vindicate Judge Clay's dissent, and correct a published case

which will, otherwise, allow a trial judge to proceed with an empty chair next to the defendant so long as he can say that it was not the state that locked the courthouse door and kept counsel away. Such an approach does, and will, completely deprive defendants of counsel and, in doing so, sees the state, in the embodiment of the trial court, enforce the complete absence of counsel for defendants at critical stages of proceedings against them.

RELIEF REQUESTED

WHEREFORE, Petitioner Kyle Keith Clark respectfully submits this Petition and requests that:

A. That this Court grant a writ of certiorari;

B. That this Court grant oral argument in this matter;

C. That this Court, after full consideration, reverse the Sixth Circuit's August 23, 2019 opinion and judgment and the District Court's May 8, 2018 judgment and grant this Petition and order that Petitioner Kyle Keith Clark be released from custody;

D. That this Court grant such other, further, or different relief as the Court may deem just and proper under the circumstances;

Respectfully Submitted:

/s/ Kevin S. Gentry, P53351

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