No. 19-7674

In the Supreme Court of the United States

KYLE K. CLARK, PETITIONER

v.

KEVIN LINDSAY, WARDEN

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does *United States* v. *Cronic*, 466 U.S. 648 (1984) govern if counsel is absent from a competency hearing but communicates his position to the court prior to the hearing, and the petitioner does appear and agrees with his counsel?

2. Are the circuits divided on whether "state action" is required to trigger *Cronic*'s presumption of prejudice?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those listed in the caption. The petitioner is Kyle Clark, a Michigan prisoner. The named respondent, Kevin Lindsey, was the warden of the correctional facility in which Clark previously resided. The acting warden of Clark's current facility is Bob Vashaw.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provisions

OPINIONS BELOW

The district court's opinion and order denying Clark's habeas petition is not reported but is available at 2018 WL 2117681. See also Pet. App. B. The Sixth Circuit's order granting a limited certificate of appealability is not reported. But see Pet. App. G. The Sixth Circuit's opinion affirming the district court's denial of habeas relief is reported at 936 F.3d 467. See also Pet. App. A. The Sixth Circuit's order denying Clark's petition for rehearing en banc is not reported. But see Pet. App. E.

The Michigan Court of Appeals' opinion affirming Clark's convictions and sentences is not reported but is available at 2014 WL 2795855. See also Pet. App. D. The Michigan Supreme Court's order denying Clark's application for leave to appeal, aside from ordering resentencing, is reported at 865 N.W.2d 32. See also Pet. App. C. The Michigan Supreme Court's order denying Clark's motion for reconsideration is reported at 869 N.W.2d 566. See also Pet. App. F. The Michigan Court of Appeals' opinion affirming Clark's amended sentence is not reported but is available at 2017 WL 2882546. Clark did not seek leave to appeal that decision to the Michigan Supreme Court.

JURISDICTION

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

CONSTITUTION 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

Clark asserts that he went entirely unrepresented by counsel at a competency hearing prior to his sexual-assault trial, and that, as a result, he is entitled to a presumption of prejudice under *United States* v. *Cronic*, 466 U.S. 648 (1984). He also claims that the circuits are sharply divided over whether a government actor must prevent, interfere with, or otherwise be responsible for counsel's absence during a critical stage, coined as "state action," to trigger *Cronic*'s presumption of prejudice. Neither of these questions presents a significant issue for this Court.

First, Clark's counsel called the trial court before the competency hearing and stated that he did not have any objections to the report finding Clark competent to stand trial. Counsel did not appear at the hearing due to a scheduling error, but the trial court outlined counsel's communication on the record, and Clark himself affirmed that he had discussed the report with his counsel and that he agreed to proceed to trial. As every state and federal court to consider this claim has concluded, this is a far cry from the complete absence or deprivation of counsel under *Cronic*. Nothing from this Court's precedent requires a different result.

Second, Clark takes issue with the Sixth Circuit's reasoning that "state action" must prevent counsel from assisting his client for *Cronic* to apply and alleges a circuit split on the issue. But there is no split, let alone a meaningful one. And the Sixth Circuit did not even need to reach this issue as Clark was not deprived of counsel. The Sixth Circuit's decision in this case was sound under existing law in any event.

Thus, this Court should deny certiorari because Clark's claims are insubstantial and do not merit this Court's review.

STATEMENT OF THE CASE

Clark chokes and rapes his girlfriend.

H.M. dated Clark for about four years.[1] (8/27/12 Trial Tr. at 172, R. 6-10, Page ID #256.) The relationship was on and off, and during the summer of 2011 it was off again but they nonetheless decided to live together on a trial basis. (*Id*. at 173, Page ID #257.) The living arrangement continued into October—until Clark attacked H.M. (*Id*. at 176, Page ID #257.)

On October 12, 2011, H.M. went to work as usual while Clark claimed he was going to purchase a vehicle but needed gas money, so he stopped at H.M.'s workplace to get money from her. (*Id*. at 177–78, Page ID #258.) After a few hours, H.M. called Clark to find out where he was and when he finally responded he was curt and vague about his whereabouts but said he was on his way home. (*Id*. at 179, Page ID #258.) H.M. followed the call with a text message telling Clark she could tell he was lying and that she did not want him to come home because her son was there. (*Id*. at 181, Page ID #259.)

The next morning, just before 7:00 a.m., H.M. awoke to Clark pounding on the front door. (*Id*. at 182, Page ID #259.) H.M. had locked the door and Clark did not have a key; she told him to go away and that they were done. (*Id*.) H.M. went back to the living room when she heard a loud cracking sound—Clark had broken through the front door. (*Id*. at 183, Page ID #259.) Photographs admitted at trial showed the

[1] The State refers to the complainant by her initials to protect her privacy given the sexual nature of this case.

broken door. (*Id*. at 183–84, Page ID #259.) Clark and H.M. argued in the living room for several minutes before Clark announced that he was going to sleep as he proceeded upstairs to their bedroom. (*Id*. at 185, Page ID #260.)

H.M. took her son to school and then returned home to get ready for work. (*Id*. at 186, Page ID #260.) Clark was still asleep in the bedroom and H.M. thought it best not to wake him, so she took a shower. (*Id*.)

After getting out of the shower, H.M. stayed in the bathroom, unclothed, to apply lotion—but when she looked up into the mirror, she saw Clark standing behind her. (*Id*. at 187, Page ID #260.) He demanded that she perform fellatio on him. (*Id*. at 188, Page ID #260.) H.M. refused and repeated that they were done. (*Id*. at 188–89, Page ID #260–61.) Clark grabbed H.M. by her hair and forced her upstairs to the bedroom. (*Id*. at 189–90, Page ID #261.) H.M. pleaded with Clark to stop but he did not relent. (*Id*. at 190, Page ID #261.)

Once in the bedroom, Clark pushed H.M. face-first onto the bed. (*Id*. at 191, Page ID #261.) He then spit on her anus, held her down, and anally raped her. (*Id*. at 191–92, Page ID #261.) Again, Clark did not heed H.M.'s pleas for him to stop. (*Id*. at 192, Page ID #261.) She screamed, but Clark wrapped his left arm around her throat until she passed out. (*Id*. at 193, Page ID #262.)

When she awoke, she was still in the bed with Clark, his arm around her. (*Id*. at 194, Page ID #262.) She tried to move but Clark told her she was not going anywhere. (*Id*.) Clark's cellphone rang and H.M. sprang for it, hoping to get help from

whoever was on the phone, but Clark started choking her again. (*Id.* at 195, Page ID #262.) She apologized and begged him to stop; that time, he did. (*Id.*)

Clark had them go back downstairs where he told H.M. to give him her phone. (*Id.* at 196, Page ID #262.) Reluctantly, she did, and then continued to get ready for work so she could get out of the house. (*Id.* at 197, Page ID #263.) But when she started brushing her hair, Clark said, "I don't know where you think you're going, we're going to have fun today." (*Id.*) Clark then went into the kitchen and started microwaving some food, with his back turned to her. (*Id.* at 198, Page ID #263.)

H.M. saw her opportunity to escape. She feigned light conversation with him as she retrieved her robe from the bathroom and then ran out the front door. (*Id.* at 198–99, Page ID #263.) Her keys were already in her car, so she started it up and sped away. (*Id.* at 199, Page ID #263.) She drove to work and told her boss the broad strokes of what happened, withholding what, to her, were embarrassing details. (*Id.* at 199–200, Page ID #263.) Her boss advised her to go back home, get some clothes, and then call the police. (*Id.* at 200, Page ID #263.) He sent someone with her in case Clark was still home at the time, though thankfully he was not. (*Id.*) Her boss's trial testimony echoed H.M.'s account. (*Id.* at 279–80, Page ID #283.)

H.M. changed her clothes, found her phone in the living room, and then called the police. (*Id.* at 201–02, Page ID #264.) A deputy responded and H.M. recounted the day's events—all while Clark left multiple voicemails on her phone apologizing for hurting her. (*Id.* at 202–03, Page ID #264.)

After speaking with the police, H.M. drove herself to the hospital where a certified Sexual Assault Nurse Examiner (SANE) performed an examination. (*Id*. at 203, 258 Page ID #264, 278.) The SANE did not identify any visible injuries on H.M., but she noted that was not unusual in the case of a sexual assault because the body is "pliable," and the level of force used may not produce an injury. (*Id*. at 262–63, Page ID #279.) H.M. did complain of discomfort in her anal area, from the rape, and her head, from "all the crying." (*Id*. at 264, Page ID #279.) The SANE also outlined H.M.'s account of the rape to her, which substantially paralleled H.M.'s trial testimony. (*Id*. at 260–61, Page ID #278–79.)

At trial, Clark contradicted nearly every detail of H.M.'s account. He denied breaking into the house, claiming the door had been broken a week prior and that he simply walked inside. (8/28/12 Trial Tr. at 78–79, R. 6-11, Page ID #308.) He denied pushing H.M. up the stairs after her shower, instead claiming that *she* approached *him* in their bed and initiated the sexual encounter. (*Id*. at 82–83, Page ID #309.) He denied having anal intercourse with her or that the intimacy was rough or violent in any way. (*Id*. at 83–84, Page ID #309.) He also claimed that H.M. did answer the phone call from his boss but that it occurred while they were back downstairs after the sexual encounter;[2] they verbally fought; and then H.M. stormed out of the house claiming that Clark would go to jail. (*Id*. at 87–88, Page ID #310.)

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[2] Clark's boss, Jeff Greaves, testified that H.M. answered a phone call from him that morning shortly before 8:00 a.m., though H.M. did not recall saying anything to him. (8/27/12 Trial Tr. at 242, R. 6-10, Page ID #274; 8/28/12 Trial Tr. at 58–59, R. 6-11, Page ID #303.)

After weighing all the evidence, the jury convicted Clark of third-degree criminal sexual conduct and domestic violence. (*Id*. at 183, Page ID #334.) The trial court sentenced Clark to 10-to-15 years' imprisonment for his criminal-sexual-conduct conviction and 93 days in jail for his domestic-violence conviction. (10/3/12 Sentencing Tr., R. 6-12, Page ID #358.)

Before trial, Clark and his counsel agree to the competency report.

Upon receiving a report from what was then the Michigan Department of Community Health regarding Clark's competency evaluation, the trial court called a hearing on August 1, 2012. (8/1/12 Final Pretrial Tr., R. 6-9, Page ID #209.) Due to an apparent scheduling error, neither of Clark's two attorneys appeared at the hearing, though Clark did. (*Id*.) But the trial court noted that one of Clark's attorneys had contacted the court and indicated the defense had no objection to the report's finding of competency, which Clark affirmed on the record:

> THE COURT: Mr. Clark, apparently there was some mix-up in your 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.
>
> I'm not sure if the Prosecutor had any communication with either of the attorneys of record. 'Cuz I know their office didn't communicate with my office.
>
> [PROSECUTOR]: No, your Honor, they--they failed to com--communicate with us on a regular basis as it is.
>
> THE COURT: What I can state for the record is what was communicated was that, and again I'm not sure if it was Mr. Cataldo or Mr. LaCommare, but *they communicated with the off--with my office that they had no objection to accepting the July 2nd, 2012 report where the*

Defendant was deemed to be competent and--and proceed with this matter pending the trial as currently scheduled on August 27th.

Um, do the People have a position regarding this issue?

[PROSECUTOR]: Yes, your Honor, I would object to the Court accepting that stipulation because Mr. LaCommare, who's the individual I understand talked to your staff, as I thought about it, he stated that he wasn't covering the competency portion of it and, therefore he wasn't familiar with it and yet he wants this Court to accept the stipulation to that report. I would presume he hasn't read it or I would presume that he's not familiar with it or is not in a position to stipulate it or go over it with his client. So I think to protect the Defendant in this position I would--what I would ask for is 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, and at that point our office would be willing to stipulate to it. But, I think at this point it would be a failure of the system to allow stipulation to that report.

THE COURT: Mr. Clark?

[CLARK]: Ah, yes, your Honor, *I've gone over the competency hearing with both of my attorneys and spoke in length with it (sic) and I believed it was deemed that we would proceed with trial on August 27th*.

Um, I'm sorry that my attorneys aren't present in this courtroom today. Um, there's nothin' I can do about that. I'm incarcerated and--but I feel that, ah, in length (sic) of everything that trial should proceed to--on August 27th without a--a doubt. It's been nine months, 10 months in August now, and I been waiting patiently for a trial. I'd appreciate it if there would be no further delays in this trial.

[PROSECUTOR]: There was not--

[CLARK]: And furthermore, I would a--um ask the trial, you know, be scheduled for the 27th and I understand I have another pretrial for the 15th, which is--I mean, I've already been to two pretrials, your Honor on this, um, subject, what is another pretrial gonna accomplish in this matter--is--it--doesn't make any sense to me. I--I'd like to just proceed with trial if possible, your Honor.

[PROSECUTOR]: That's fine. That's total--if he's seen the report, your Honor, then that's totally fine.

> THE COURT: Very well. *Given the representations of Mr. Clark that have been placed on the record that he's met with both of these attorneys to go over the report and accepting the stipulation then, the Court will deem the Defendant competent*, the matter will proceed to trial on Monday, August 27th, 2012 at 8:30.
>
> There's a final pretrial which is still scheduled for August 15th, 2012. We're gonna move that up to today. At this point if the parties believe they need an additional final pretrial I'll leave it up to you to make that decision.

Id. at Page ID #209–12 (emphasis added). The trial then proceeded as scheduled without any objections to the competency finding from Clark or either of his attorneys.

The Michigan appellate courts affirm Clark's convictions.

Following his conviction and sentence, Clark filed a claim of appeal in the Michigan Court of Appeals. He claimed, among other things, that his counsels' absence from the competency hearing violated his Sixth Amendment right to counsel at a critical stage of the proceedings and that prejudice should have been presumed under *Cronic*.

The Michigan Court of Appeals rejected Clark's claim on the merits. Relying on a Sixth Circuit direct-appeal case, *United States* v. *Ross*, 703 F.3d 856, 873–74 (6th Cir. 2012), the Michigan Court of Appeals proceeded under the impression that the competency hearing was a critical stage. *People* v. *Clark*, No. 313121, 2014 WL 2795855, at *4 (Mich. Ct. App. June 19, 2014). Yet, the court held that the facts belied Clark's claim because his attorneys had informed the trial court that they did not object to the competency report and Clark affirmed his agreement on the record:

> Here, defendant was granted a competency evaluation prior to trial due to his history of mental health issues, mental state in jail, and self-harming behavior in jail. At an August 1, 2012 hearing, the trial court noted that defendant's counsel was not present likely due to a "mix-up in your 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." However, the trial court stated that defendant's attorney had communicated with the court "that they had no objection to accepting the July 2nd, 2012, report where the defendant was deemed to be competent ... and proceed with this matter pending the trial." Plaintiff objected to accepting the competency report until defendant responded that he went over the competency report with both of his attorneys and spoke about it at length before deciding to proceed to trial. The trial court accepted defendant's representation that he considered the competency report with his attorneys and accepted the stipulation that defendant was competent. *It is evident that defendant was not deprived of his right of counsel during this critical stage of the proceedings*.

Id. (emphasis added). In other words, the state court affirmed Clark's convictions and sentences based on its conclusion that he was not deprived of counsel at this proceeding.

Clark then filed an application for leave to appeal in the Michigan Supreme Court, where he raised the same claims that he raised in the Michigan Court of Appeals. The Michigan Supreme Court reversed the Michigan Court of Appeals' judgment in part based on a sentencing-guidelines score for Clark's criminal-sexual-conduct conviction and remanded for resentencing; the Court otherwise denied Clark leave to appeal because the Court was not persuaded that the questions presented should have been reviewed. *People* v. *Clark*, 865 N.W.2d 32 (Mich. 2015) (unpublished table decision). The Court also denied Clark's motion for reconsideration. *People* v. *Clark*, 869 N.W.2d 566 (2015) (unpublished table decision).

The trial court subsequently imposed the same sentence for Clark's criminal-sexual-conduct conviction, given that his minimum sentence of 10 years' imprisonment still fell within the amended sentencing guidelines. (1/20/16 Sentencing Tr., R. 6-38, Page ID #1366–67.) The Michigan Court of Appeals affirmed Clark's sentence. *People* v. *Clark*, No. 332216, 2017 WL 2882546, at *4 (Mich. Ct. App. July 6, 2017). Clark did not seek leave to appeal that decision in the Michigan Supreme Court.

The federal courts deem the state appellate decisions reasonable.

Rather than pursuing further relief in the state courts, Clark filed a petition for federal habeas relief. Among several claims, he raised the same *Cronic* claim that he had raised in the state courts. The district court held that "[t]he Michigan courts' decisions were neither contrary to clearly established federal law nor unreasonably applied federal law," given Clark's own statements that he consulted with his attorneys prior to the competency hearing and the corroboration from his counsel, as recounted by the trial court. (5/8/18 Op. & Order, R. 8, Page ID #1474.)

The Sixth Circuit affirmed on two grounds. *Clark* v. *Lindsey*, 936 F.3d 467, 470 (6th Cir. 2019). The first is the state-action ground at issue in this petition, where the Sixth Circuit noted that "no Supreme Court case has ever found structural error unless the State was responsible for counsel's absence." *Id.* (citing *Maslonka* v. *Hoffner*, 900 F.3d 269, 279 (6th Cir. 2018)). The Sixth Circuit reasoned that that "did not remotely happen" in this case, given that "Clark's attorneys had a scheduling mix-up," which was "mitigated by the attorneys' earlier communication with Clark and the judge about the competency report . . . ." *Id.*

The second ground for affirmance had nothing to do with state action. Rather, the Sixth Circuit rightly acknowledged that "no Supreme Court case has found structural error where the lawyers and the court and the client in fact communicated about the point at hand." *Id.* The court pointed to the "two most analogous habeas cases about 'counsel's absence,' " to support its decision: *Wright* v. *Van Patten*, 552 U.S. 120, 121 (2008) (counsel present only on speakerphone) and *Woods* v. *Donald*, 575 U.S. 312, 315, 317–18 (2015) (counsel absent during testimony regarding codefendants). In those cases, this Court rejected the application of *Cronic*'s presumption of prejudice because "none of [the Court's] cases required automatic prejudice" in either circumstance. *Clark*, 936 F.3d at 470–71. The Sixth Circuit further highlighted this Court's admonition in *Woods* that the state courts " 'enjoy broad discretion' where 'the precise contours of [a] right remain unclear," noting that "the state court's decision in today's case fits that description—and warning—to a tee." *Id.* at 471 (quoting *Woods*, 575 U.S. at 318). Thus, *Cronic* could not apply in this case. *Id.*

Clark therefore had to demonstrate actual prejudice, which he could not. *Id.* Indeed, aside from Clark's own vitiating statements on the record, Clark did not argue "that he lacked competence or that the report erred in any way." *Id.* Hence, "[t]he attorneys' physical absence, all in all, did not hurt Clark's defense." *Id.*

In sum, because this Court "has never applied automatic prejudice based on an attorney's mere physical absence for some period of time," the Sixth Circuit held that there is "plenty of room for 'fairminded disagreement' over today's fact pattern." *Id.* at 472. "That's all [the court] need[ed] to know," and so the court affirmed. *Id.*

REASONS FOR DENYING THE PETITION

I. *Cronic* does not govern this case, regardless of any state action.

This Court need not reach Clark's question presented regarding any state action under *Cronic* because there are at least two independent grounds precluding relief. First, this Court has never held that a competency hearing is a critical stage such that counsel's presence is required under the Sixth Amendment. Second, both Clark and the trial court had the benefit of defense counsel's input prior to the competency hearing in this case and, thus, Clark did not go unrepresented at the hearing. These two bases alone warrant denial of Clark's petition for certiorari.

A. A habeas petitioner faces a purposely high burden to establish ineffective assistance of trial counsel and a narrow threshold for presumptive prejudice.

The Sixth Amendment right to counsel attaches when formal proceedings are initiated against the defendant, including a formal charge, preliminary hearing, indictment, information, or arraignment. *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977). At that point, the defendant is 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); *accord Schneckloth* v. *Bustamonte*, 412 U.S. 218, 239 (1973).

Typically, to establish that counsel provided ineffective assistance during a critical stage, the petitioner must demonstrate that counsel's performance was objectively unreasonable and that the petitioner was prejudiced by counsel's action or

inaction. *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). Both prongs must be satisfied to establish ineffective assistance; if a petitioner cannot satisfy one prong, the other need not be considered. *Id.* at 697.

With respect to performance, "[j]udicial scrutiny of counsel's performance must be highly deferential . . . [b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Yet the reviewing court is required not simply to give the attorney the benefit of the doubt, but to affirmatively entertain the range of possible reasons counsel may have had for proceeding as he did. *Cullen* v. *Pinholster*, 563 U.S. 170, 196 (2011). The *Strickland* standard "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Harrington* v. *Richter*, 562 U.S. 86, 110 (2011).

With respect to the prejudice prong, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* That "requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Pinholster*, 563 U.S. at 189 (quoting *Richter*, 562 U.S. at 112). Reviewing courts must determine, based on the totality of the evidence before the factfinder, "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. "[A] verdict or

conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696.

But on habeas review, a petitioner "must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance." *Bell*, 535 U.S. at 698–99. The question on habeas review "is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Knowles* v. *Mirzayance*, 556 U.S. 111, 123 (2009); *accord Richter*, 562 U.S. at 101 ("The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable."). "[R]eliance on 'the harsh light of hindsight' to cast doubt on a trial that took place" years ago "is precisely what *Strickland* and AEDPA seek to prevent." *Richter*, 562 U.S. at 89.

Accordingly, ineffective-assistance claims adjudicated on the merits in the state court are entitled to double deference on habeas review. This Court has stressed that the "standards created by *Strickland* and § 2254(d) are both 'highly deferential,' . . . and when the two apply in tandem, review is 'doubly' so . . . ." *Id.* at 105 (cleaned up). "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d)." *Id.* And because the *Strickland* standard is general, "a State court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles*, 556 U.S. at 120. "If this standard is difficult to meet, that is because it was meant to be." *Richter*, 562 U.S. at 102.

As this Court explained in *Cronic*, prejudice may be presumed in certain limited circumstances. The presumption attaches only when counsel's errors "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. The *Cronic* Court identified three such situations: (1) the "complete denial of counsel," including situations where counsel was absent at a "critical stage" of the proceedings; (2) situations where defense counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) situations where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *Id*. at 659–60.

B. This Court has never held that a competency hearing is a critical stage—which is fatal to his claim on habeas review.

Clark's ineffective-assistance claim fails before it even gets off the ground because this Court has never held that a competency hearing is a critical stage at which counsel's presence is required. The unique dictates of AEDPA require such a holding, and therefore the absence of that holding is fatal to Clark's claim. Though the Sixth Circuit did not rely on this reasoning, 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).

A petitioner is not entitled to habeas relief on a claim adjudicated on the merits in the state courts unless the adjudication "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 involved an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1) & (2). "[C]learly established Federal law" is limited to authority from this Court that "squarely addresses" the claim at issue and provides a "clear answer." *Wright*, 552 U.S. at 125–26.

Indeed, this Court has warned against interpreting its cases broadly. See *Nevada* v. *Jackson*, 569 U.S. 505, 512 (2013) ("By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.' " (quoting § 2254(d)(1))); see also *Lopez* v. *Smith*, 574 U.S. 1, 5–6 (2014) (noting that the Court's precedents need to address "the specific question presented" in a habeas case). Further, a habeas court is prohibited from "refin[ing] or sharpen[ing] a general principle of Supreme Court jurisprudence into a specific legal rule that [the] Court has not announced." *Marshall* v. *Rodgers*, 569 U.S. 58, 64 (2013). If none of the Court's cases have confronted "the specific question presented" in the case at hand, "the state court's decision could not be contrary to any holding from this Court." *Woods*, 575 U.S. at 317 (cleaned up).

In this case, Clark fails to identify any decision from *this Court* holding that a competency hearing is a critical stage of the proceedings at which counsel's presence is required absent a formal waiver. Even if a federal circuit court has identified such a hearing as a critical stage, "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court," and "therefore cannot form the basis for habeas relief under AEDPA." *Parker* v. *Matthews*, 567 U.S. 37, 48 (2012).

Neither *Cronic* nor any other decision from this Court has held that a pretrial competency hearing is a critical stage.

On this point, it is important to note that Congress set this bar in the interests of comity, finality, and federalism with respect to state-court merits adjudications of constitutional claims. *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000) ("There is no doubt Congress intended AEDPA to advance these doctrines. Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts.") Without clear guidance from this Court outlining precisely what actions do and do not offend the Constitution, the state courts remain free to reasonably interpret and apply the founding text and this Court's related decisions. *Id*. at 436–37.

Moreover, the "narrow context" of a habeas case is not the means by which this Court can address the question of whether a competency hearing is a critical stage of a prosecution. *Woods*, 575 U.S. at 319. Rather, as in *Woods*, "[a]ll that matters here, and all that should have mattered to the Sixth Circuit, is that we have not held that *Cronic* applies to the circumstances presented in this case." *Id*.

Thus, absent any on-point authority from this Court, Clark's claim fails from the outset.

C. Defense counsel communicated with Clark and the trial court prior to the competency hearing, removing this case from *Cronic*'s "total absence" jurisprudence.

Regardless of the critical-stage or state-action issues, the Sixth Circuit's decision in this case rested on an equally viable, independent reason for this Court to

deny certiorari: Clark's counsel communicated with Clark and the trial court prior to the competency hearing. This is yet another scenario this Court has not addressed in any of its holdings, precluding any room for habeas relief, and otherwise vitiating any application of *Cronic*.

As the Sixth Circuit noted, this Court has never confronted the issue presented in this case where counsel inadvertently failed to attend a pretrial hearing but communicated with the court and client prior to the hearing. *Clark*, 936 F.3d at 470. Again, without such a holding from this Court, habeas relief may not lie.

This Court's cases support that outcome. The Sixth Circuit pointed to *Wright*, in which counsel was on speakerphone with the court and parties, including the defendant, but was not physically present. This Court held that "[n]o decision of this Court, however, squarely addresses the issue in this case, . . . or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context," because participation by speakerphone was not "on par with total absence." *Wright*, 552 U.S. at 125. The petitioner retorted that counsel would have performed *better* had he been physically present, but this Court rejected that argument, reasoning that "[t]he question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time." *Id*.

It is true that Clark's counsel was not on the phone during the competency hearing in this case, but the reasoning from *Wright* nonetheless applies. While there might be a question about what Clark's counsel would have done differently if either

of them had been present at the competency hearing, even so Clark was not *deprived* of counsel at the hearing. He still had the benefit of his counsel's advice and guidance going into the hearing, and he indicated his concurrence with that advice on the record. (8/1/12 Final Pretrial Tr., R. 6-9, Page ID #210–11.) Moreover, neither counsel nor Clark thereafter objected to the trial court's finding of competency, cementing their acquiescence. As in *Wright*, this was not "on par with total absence." 552 U.S. at 125.

Woods is also instructive. In that case, the petitioner's counsel was absent during trial testimony that pertained only to the codefendants and had told the court that he "had no dog in the race," so he had no issue with the court proceeding without him. *Woods*, 575 U.S. at 314. This Court rejected any application of *Cronic* because none of the Court's cases had confronted that specific scenario. *Id*. at 317. In fact, this Court even rejected the notion of "similar" cases being sufficient: "if the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings in those cases." *Id*. The Court further warned against interpreting its precedents "at too high a level of generality," noting that "where the precise contours of a right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *Id*. at 318 (cleaned up).

Similarly, here, Clark's counsel had previously communicated to the trial court that there was no objection to the competency report and, thus, there was no issue in the court proceeding without Clark's counsel being physically present at the competency hearing. Both the trial court and Clark had the benefit of counsel's input on the

issue, putting everyone on the same page. Because this Court has not otherwise defined the "precise contours" of this issue, and even a "similar" case will not suffice, the Michigan Court of Appeals necessarily could not have defied clearly established Federal law in declining to apply *Cronic* to this situation.

Strickland, rather than *Cronic*¸ therefore governs this case, and Clark cannot demonstrate actual prejudice. He agreed with his counsel's advice—on the record—and has never challenged his competency such that there is any reasonable probability that his counsel's presence at the competency hearing would have changed the outcome of the proceeding. See *Wiley* v. *Sowders*, 669 F.2d 386, 389 (6th Cir. 1982) (noting that a petitioner "can hardly complain that his counsel was ineffective if he freely and knowingly consented to the trial strategy.").

Thus, this Court should deny certiorari.

II. While Clark teases a circuit split over the role of state action in the deprivation of counsel under *Cronic*, no such split exists—and, even if it did, the Sixth Circuit's decision was otherwise sound.

A circuit split can be an enticing reason for this Court to take a case. Recognizing this, Clark attempts to conjure the specter of a split on the Sixth Circuit's state-action rationale by citing two cases from outside the circuit. But even a brief investigation reveals this to be nothing more than an illusion. And even if it appears that such a split truly exists, the Sixth Circuit's decision remains correct for unrelated reasons.

A. Clark has not identified any meaningful circuit split on the state-action rationale.

While Clark alludes to a circuit split in his question presented and argument heading to pique this Court's interest, he does not make any affirmative arguments for a split in the body of his petition. He merely cites various cases with one-line summaries, leaving this Court to, at best, *infer* a split. (See Pet. at 30.) What's more, Clark cites only *two cases* from outside the Sixth Circuit: *Patrasso* v. *Nelson*, 121 F.3d 297 (7th Cir. 1997) and *Burdine* v. *Johnson*, 262 F.3d 336 (5th Cir. 2001). (Pet. at 30.) But they are ultimately of no moment. Both cases are factually distinguishable from this case, and only *Burdine* touches on the notion of state action.

In *Patrasso*, the Seventh Circuit faulted counsel because "his performance at sentencing was practically non-existent." 121 F.3d at 303. Even though the prosecution presented evidence of aggravating factors, defense counsel "made no effort to contradict the prosecution's case or to seek out mitigating factors." *Id*. at 304. In short, counsel "entirely failed to represent his client," leaving the defendant "without a defense at sentencing . . . ." *Id*. Accordingly, the Seventh Circuit applied *Cronic* and issued the writ for a new sentencing hearing. *Id*.

That situation in *Patrasso* significantly differs from Clark's case. First, this Court *has* held that sentencing is a critical stage, whereas there is no such decision regarding competency hearings. See *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977). Second, Clark's counsel weighed in on the competency report prior to the hearing, at which Clark himself affirmed that he spoke with his attorneys and agreed to proceed to trial. *Patrasso* is therefore inapposite.

Burdine is also distinguishable. There, defense counsel fell asleep during various portions of voir dire and trial—undisputedly critical stages, see *Gomez* v. *United States*, 490 U.S. 858, 873 (1989)—unlike the competency hearing in this case. *Burdine*, 262 F.3d at 340. Further, in *Burdine*, the state argued that *Cronic* constituted a "new rule" that could not be retroactively applied to Burdine's case under *Teague* v. *Lane*, 489 U.S. 288 (1989), because *Cronic* called for presumptive prejudice only if state action prevented defense counsel from assisting the defendant. *Id*. at 345. The Fifth Circuit rejected the state's argument, noting that *Cronic* was concerned with the effect of counsel's absence, not the cause of it. *Id*. In Clark's case, however, the State did not present a state-action argument, nor was it the sole rationale the Sixth Circuit relied upon in reaching its conclusion.

As this Court held in *Woods*, *Cronic* could not apply to counsel's physical absence during trial testimony related only to the petitioner's codefendant because "none of [the Court's prior] cases dealt with circumstances like those present here." 575 U.S. at 317. Similarly, *Burdine* and *Patrasso* bear scant resemblance to Clark's case and thus cannot create a circuit split.

In any event, to the extent Clark *suggests* a split amongst the circuits—since he never directly argues such in his petition—it is far from mature. *Patrasso* is of no moment because it does not speak to the state-action issue. Turning then to the Fifth Circuit's decision in *Burdine*, of the 235 cases to cite *Burdine* as of the date of this filing, only four addressed the Fifth Circuit's state-action analysis from that case. Of those four cases, one was another action filed by Burdine to enforce the Fifth Circuit's

judgment in his prior case. That leaves three, two of which cite *Burdine* only as generally applying *Cronic* to situations in which counsel's absence is complete, whether by sleeping or otherwise, despite Westlaw flagging them under the state-action headnote from *Burdine*. See *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 a single, unpublished, district-court opinion remains: *Knoller* v. *Miller*, No. 12-cv-0996-JST, 2014 WL 3107770 (N.D. Cal. July 3, 2014). Aside from its lack of precedential value even within its own district, let alone the Ninth Circuit at large, *Knoller* does not aid Clark's cause. In that case, the trial court precluded defense counsel from raising any further objections to the prosecutor's rebuttal closing argument. *Knoller*, 2014 WL 3107770, at *8. The district court concluded that *Cronic*'s presumption of prejudice did *not* apply because the petitioner failed to identify an analogous case from this Court. *Id*. at *17. Further, the citation to *Burdine* only came in a block quotation from the intermediate state appellate court; it was not an independent citation from the federal district court. *Id*. at *13. And even within the block quote, the state court's analysis *aligned* with the Sixth Circuit's state-action analyses in *Maslonka* and *Clark*. The state court noted that in *Bell* v. *Cone*, 535 U.S. 685, 696 n.3 (2002), this Court recognized that each of the Court's cases in which prejudice had been presumed "involved criminal defendants who had actually or constructively been denied counsel by government action." *Id*. *Knoller* is therefore inapposite.

In short, *Burdine*'s state-action conclusion has not remotely proliferated such that the Sixth Circuit's decision in this case creates a mature split. Clark's allusion to a split is a non-starter and therefore does not warrant this Court's review.

B. Regardless of any alleged disagreement on the state-action rationale, the Sixth Circuit correctly held that *Cronic* is not the proper metric in this case.

To whatever limited extent any other courts have rejected the state-action analysis the Sixth Circuit employed in this case, the Sixth Circuit's reasoning stands on the right side of the law. In *Bell* v. *Cone*, this Court outlined the cases in which the Court had contemplated presumptive prejudice "where the accused [wa]s denied the presence of counsel at a critical stage," including *Cronic* itself. 535 U.S. at 696 n.3. Even *this* Court then acknowledged that "[e]ach involved criminal defendants who had actually or constructively been denied counsel *by government action*." *Id.* (emphasis added). Thus, the Sixth Circuit's reasoning in this case was justified based on this Court's own precedent.

But even if this Court disagrees, the Sixth Circuit's *conclusion* remains sound. *Cronic* does not apply in this case, whether it is because no state action prevented Clark's counsel's presence at the competency hearing, Clark's counsel communicated with the trial court beforehand, *or* the competency hearing was not a critical stage at all. All these reasons, independently and collectively, provide a foundation to deny certiorari in this case. See *Taylor*, 649 F.3d at 450 (holding that 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.").

Hence, regardless of the reason, the Sixth Circuit correctly determined that Clark's ineffective-assistance claim falls under *Strickland*, not *Cronic*, and that Clark cannot demonstrate actual prejudice. This Court should therefore deny certiorari.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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