No. 19-7674

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

PETITIONER'S RESPONSE TO STATE'S BRIEF IN OPPOSITION

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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The May 8, 2018 Eastern District of Michigan Opinion is unpublished.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The June 19, 2014 Michigan Court of Appeals Opinion is unpublished.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The November 13, 2019 Order Denying Rehearing *En Banc* of the Sixth Circuit Court of Appeals is unpublished.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.

REPLY 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 chair was still empty. While the State spends a lot of its space in opposition trying to discuss anything but that actual fact, there is no question that Petitioner's competency hearing was held in the absence of counsel. Moreover, no matter how many times the State repeats the mantra that Petitioner saw and discussed with his counsels the competency report, the record here indicates that simply did not happen. Petitioner acknowledged having discussed the "competency hearing" with his counsels but there is nothing in this record to suggest Petitioner has ever even *seen* the competency report (indeed, with him being confined to the Forensic Center and his counsel not showing up to the hearing with it, there is no way this could have happened). Faced with this, the State first tries to ignore this fact and then strives to create a novel acceptable procedure for representation at a competency hearing, where counsel could phone in ahead of time and just stipulate to whatever the report might say, but this is foreign to this Court's jurisprudence and the Sixth Amendment. The State's excuses for what happened here cannot dispel this basic fact - the chair reserved for Petitioner's counsel was empty as he endeavored, with his questionable sanity, to navigate the competency hearing himself.

What the Record Actually Shows - Not What the State Claims

The lynchpin of the State's position is that Petitioner somehow, somewhere, had the opportunity to meaningfully consult with his (absent) counsel regarding the competency report. This is simply not what the record indicates, no matter how

hard the State tries to avoid it and how many times the State claims otherwise. When the competency hearing began, the Petitioner stated: "I've gone over the competency hearing with both of my attorneys," Competency Hearing Transcript, R 6-9, Page ID # 210. Nowhere in the record is there even any mention of Petitioner seeing, much less discussing with his counsels, the competency report. No amount of repetition by the State that he somehow did can change this record and the entirety of the State's argument, that Petitioner was somehow not denied counsel just because he discussed something with his counsels beforehand, falls apart on this record.[1]

Phoning It In *Before* the Hearing Is Not Representation

The State relies on *Wright v Van Patton,* 552 U.S. 120 (2008) for the idea that counsel participating in a plea hearing by speaker phone was not the same as being totally absent and, indeed, this Court did so hold. But *Wright* is not at all analogous, much less controlling, on this case because here counsel did not contemporaneously participate in the competency hearing, *or participate at all.* Here, unlike *Wright,* "counsel was totally absent," *Wright* at 125, while in *Wright* counsel was present, heard the judge's and prosecution's statements, and had the opportunity to reply to them and represent his client. In *Wright* counsel was contemporaneously present and able to participate in the plea hearing, whereas

[1] The competency hearing was also the final pretrial and the State had a three year offer on the table to Petitioner. Exactly no one, and nothing in this record, has even suggested Petitioner had any assistance of counsel in assessing this offer.

here Petitioner's counsel merely called in ahead of time and said he could not bother to be there due to some scheduling error. The petitioner in *Wright* had the benefit of counsel *during* the plea hearing. Petitioner here had neither the presence of nor benefit of counsel during the competency hearing.

Petitioner's Request To Proceed Cannot Be Relied Upon

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." To be sure, Petitioner, long incarcerated, just wanted to get to trial, but, unfortunately, he lacked the advice of counsel in making such statements and, indeed, on this record, had no idea what the competency report, which his counsel tried to somehow stipulate to by phone ahead of time, even said. Petitioner's statements, made without counsel and while his competency was still *the* question, cannot be relied on under *Pape.*

The Question of State Action

Amazingly, or perhaps not, given how tough it would be to defend, the State barely mentions the rationale of the Sixth Circuit's majority here, namely that *Maslonka v Hoffer,* 900 F3d 269 (6th Cir. 2018), *cert denied, Maslonka v. Nagy,* ___ U.S. ___ ; 139 S. Ct. 2664 (2019), requires state action in denying counsel's presence for *United States v. Cronic,* 466 U.S. 648 (1984) to apply, and that there was no state action here, thus avoiding the application of *Cronic.* As Judge Clay correctly noted below in dissent, "The majority overlooks a crucial component of *Maslonka,*

which recognized the ample case law demonstrating that a trial judge's actions can serve as the role of the state in denying counsel." *Clark v Lindsay,* 936 F.3d 467, 475 (6th Cir. 2019) (Clay, J. dissenting). The Sixth Circuit's decision, of course, is published, and it is now the law of that Circuit that, whenever a trial judge gavels a proceeding to begin in the absence of counsel, there is simply no state action in denying counsel. Whether counsel is late coming back from lunch, in the restroom, or dead of a heart attack, the Sixth Circuit now says it is no problem, proceedings can continue, and somehow only *Strickland v Washington* 466 U.S. 668 (1984) applies to counsel's absence, despite this Court's teaching in *Cronic,* so long as it was not the State that kept counsel out of the courtroom. This is simply wrong. *Cronic* teaches that "[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. *Cronic* speaks to counsel being 1) totally absent or 2) prevented from assisting the accused. The former was certainly present here and the latter occurred when the trial judge, over even the prosecution's objection, pushed the hearing forward in the absence of counsel based on the phone message of (an unnamed) counsel to an unnamed member of the trial court's staff.

Cronic requires the presence and assistance of counsel. Petitioner here got an empty chair and, apparently, a "while you were out" phone message note to the trial judge. That is exactly the situation *Cronic* speaks to, the total absence of counsel that "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 without inquiry into the actual conduct of the trial." *Cronic* at 659-660. An empty chair is hardly a "fully competent" counsel, and no counsel can provide anything resembling effective assistance by calling in his position to the judge's staff and leaving his client with only that empty chair to represent him.

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:

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