No. 20-1218

In the Supreme Court of the United States

DEMETRIUS WILLIAM EDWARDS AND BRYANT ROYSTER,
PETITIONERS

v.

SHERRY BURT, WARDEN AND KEVIN LINDSEY, 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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QUESTION PRESENTED

In *United States* v. *Cronic*, this Court held that courts may presume that a criminal defendant was prejudiced if counsel was completely denied at a "critical stage" of trial. 466 U.S. 648 (1984). On habeas review, 28 U.S.C § 2254(d)(1) precludes relief for claims that a state court has rejected on the merits unless that merits adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" decisions from this Court. For *Cronic*-based claims, that means that habeas relief cannot be granted unless this Court has "held that *Cronic* applies to the circumstances presented in" the case at bar. *Woods* v. *Donald*, 575 U.S. 312, 319 (2015).

Here, the petitioners' counsel was not present when the trial court judge visited the crime scene to evaluate the lighting at the time of day that the eyewitness said she saw the petitioners commit a murder. The last reasoned state court decision found that *Cronic*'s presumption of prejudice was inapplicable in this circumstance and determined that any error was harmless. The question presented is:

> Was the state court's decision contrary to, or an unreasonable application of, clearly established federal law when this Court has never held that *Cronic* applies to a crime scene viewing by a trial court judge?

PARTIES TO THE PROCEEDING

Petitioners Demetrius Edwards and Bryant Royster are prisoners being held in custody in the Michigan Department of Corrections. Respondents Sherry Burt and Kevin Lindsey are wardens of facilities within the Michigan Department of Corrections.

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OPINIONS BELOW

The Sixth Circuit's opinion affirming the district court's order denying habeas relief to both petitioners, App. at 1a–28a, is not reported but available at 823 F. App'x 326. The district court's opinion and order denying habeas relief to petitioner Edwards, App. at 29a–71a, is not reported but available at 2018 WL 3436727. The district court's opinion and order denying habeas relief to petitioner Royster, App. at 73a–116a, is not reported but available at 2018 WL 3436966. The Michigan Supreme Court's order denying Edwards's application for leave to appeal, App. at 117a, is reported at 870 N.W.2d 68. The Michigan Supreme Court's order denying Royster's application for leave to appeal, App. at 119a, is reported at 870 N.W.2d 67. The Michigan Court of Appeals' opinion affirming both petitioners' convictions, App. at 121a–147a, is not reported but available at 2015 WL 1069275.

JURISDICTION

The State agrees that this Court has jurisdiction to consider the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

And 28 U.S.C. § 2254 provides:

> (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[.]

INTRODUCTION

In 2013, in a Michigan state court, the petitioners sat trial together for murdering Cedell Leverett in the parking lot of a mall. During trial, the judge (sitting as the finder of fact) visited the crime scene to confirm that the lighting was as the eyewitness had described it. Neither petitioners' counsel was present at the visit. Was this a "critical stage" of trial at which the deprivation of counsel requires automatic reversal under *United States* v. *Cronic*, 466 U.S. 648, 658 (1984)? Maybe. Was it unreasonable for a state court to conclude that it was not a critical stage and review for harmlessness? No.

In *Cronic*, this Court stated that the complete denial of counsel at a "critical stage" of trial is "so likely to prejudice the accused" that prejudice is presumed and reversal is automatic. 466 U.S. 648, 658 (1984). But since *Cronic* was decided, this Court has not

explained in detail what constitutes a critical stage requiring automatic reversal.

The petitioners here suggest that this Court should answer that question now. Or, at least, they want this Court to declare that the specific circumstances of their case warrant *Cronic*'s presumption of prejudice. But that is something this Court cannot do—at least not on collateral review. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) forbids it.

On collateral review, AEDPA limits the body of law that a federal habeas court may look to before granting a habeas petition. That body of law includes only the holdings of this Court. For *Cronic*-based claims, unless this Court has held that the absence of counsel at the specific stage at issue requires automatic reversal, a state court decision denying relief cannot be contrary to any decision of this Court. *Woods* v. *Donald*, 575 U.S. 312, 317–18 (2015). And because the "precise contours" of *Cronic* remain unclear, the state court decision cannot be an unreasonable application of any decision of this Court.

This Court has never held—either before or after *Cronic*—that a judge's solo crime-scene visit without counsel's presence amounts to a critical stage requiring automatic reversal. The Sixth Circuit therefore correctly denied habeas relief.

The petitioners complicate an uncomplicated case by suggesting that courts all over the country are confused about how to apply *Cronic*. They contend that because some courts (including the Sixth Circuit below) are improperly limiting *Cronic*'s holding by

looking to this Court's decision in *Satterwhite* v. *Texas*, 486 U.S. 249 (1988)—a post-*Cronic* case on direct review holding that some deprivations of counsel are subject to harmless-error analysis. But the petitioners do not point to a single case that addressed a *Cronic*-based claim under AEDPA's deferential standard of review. There is no circuit split involving the ultimate issue here.

But even if there was, this would not be the ideal case to consider the issue. The state court determined that the petitioners' claims were defaulted. Finding that the petitioners did not contemporaneously object to the claim, the Michigan Court of Appeals invoked an adequate and independent state rule to reject their claim that they were denied the right to counsel. This default precludes habeas relief. Although the Sixth Circuit rejected this default argument, the State would assert it again in this Court. This added wrinkle renders this case a poor vehicle to review the question presented.

In sum, the Sixth Circuit correctly decided this case below, there is no circuit split, and the case presents a poor vehicle for review. This Court should therefore deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

On September 24, 2010, Cedell Leverett was shot and killed in the parking lot of a mall in Harper Woods, Michigan. App. at 122a–123a. Petitioners Demetrius Edwards and Bryant Royster were charged and tried together for the murder.

The shooting and investigation

On the night of the murder, Edwards, Royster, Devante Smith, and Jaisaun Holt went together to the Eastland Mall. App. at 122a–123a. Leverett was also at the mall, sitting in the driver's seat of a Mercedes that was parked in the valet area. App. at 123a. Deborah Gaca, an employee at the mall, happened to be near the entrance at the time of the shooting. App. at 4a. Gaca testified that shortly before 9:00 p.m. she saw a man get out of a car and run towards the valet area, holding a gun. App. at 123a. Another man stood outside the driver's side of that car and yelled, "Pop him and pop that m-----f----- good." *Id*. The first man shot into the Mercedes four times, killing Leverett. *Id*. The shooter ran back toward the other car, which was already backing out, and fled. *Id*. At trial, Gaca identified Edwards as the shooter and Royster as the encouraging driver. *Id*.

In addition to Gaca's testimony, other evidence established petitioners as the perpetrators. About a week after the shooting, Edwards was running from a fight at a different mall. App. at 124a. While doing so, he threw a gun under a car in the parking lot. *Id*. A security officer saw this and arrested Edwards. *Id*. Forensic tests showed that the gun that Edwards tossed had fired the shell casings and bullet fragments left at the earlier shooting scene—as well as those left inside Leverett. *Id*. Surveillance video from the Eastland Mall captured Edwards and Royster at the mall around the time of the shooting. App. at 123a. And Edwards—who had been sentenced for an unrelated armed-robbery conviction just the day before—was equipped with a GPS tether, which placed him at the scene. App. at 122a–123a.

Deonte Smith, the brother of Devante, one of the petitioners' companions that night, was interviewed by police. App. at 123a. He stated that he saw all four companions after the shooting and that "they" told him that they saw a man at the Eastland Mall walking around with a diamond watch and $12,000 to $15,000 cash. App. at 123a–124a. Edwards told Deonte that he tried to rob the man; Edwards admitted that he shot the man because he had reached for something. App. at 124a. Other people present during this conversation told Edwards that he was stupid for coming away empty-handed. *Id.*

Holt, the fourth companion, was also interviewed by police. App. at 123a. He stated that Edwards wanted Leverett's glasses, so "he hit him" before Royster drove them away. *Id.* Holt claimed that Edwards shot Leverett after Leverett brandished a firearm. *Id.* But the police did not find a weapon at the scene. *Id.* They did find over $3,000 in Leverett's pocket. *Id.* They also recovered a diamond watch and sunglasses from a person who had been with Leverett earlier that day and was at the mall after the shooting. App. at 124a. Leverett's daughter saw Leverett wearing a diamond watch and sunglasses earlier that day. *Id.*

The trial

Petitioners waived their right to a trial by jury. App. at 129a. At the ensuing bench trial, the judge at one point stated that he would visit the crime scene with petitioners' attorneys. App. at 4a. The attorneys indicated that their clients wished to be present at the scene, so the judge canceled the visit. *Id.* But two days

later, the judge described for the record that he, the petitioners' attorneys, the prosecutor, and Gaca had gone to the Eastland Mall to view the scene. App. at 5a. The parties agreed to ask Gaca two questions about her location at the time of the shooting, and her answers were placed on the record. *Id.*

Immediately after placing that visit on the record, the judge then stated: "And I will say that the night before I, myself, went out just to look at the lighting around the place. I went at approximately 10:00 P.M. to see what it looked like, the lighting was like at the mall from the area where we were standing yesterday." *Id.* The judge asked whether there was "[a]nything else to put on the record regarding" his unaccompanied visit, to which both defense attorneys replied, "No." *Id.*

Along with finding Edwards guilty of two firearms offenses, the judge found both Edwards and Royster guilty of first-degree felony murder and sentenced them to life in prison without eligibility for parole. App. at 6a.

Direct appeal

Edwards and Royster separately appealed, each raising several different claims related to both crime-scene visits. App. at 121a, 135a–139a, 145a–147a. The Michigan Court of Appeals consolidated the appeals and issued a single opinion affirming their convictions. App. at 121a.

Addressing Edwards's claims first, the court noted that he had waived his challenges to the crime-scene visit with counsel present. App. at 135a–136a. The

court then stated that "even if the issue were not waived, our review would be for outcome determinative error since Edwards failed to object to *either visit* or the alleged testimony below." App. at 136a (emphasis added). After this statement, the court determined that no Michigan caselaw addressed whether a fact-finder's view of a crime scene *during a bench trial* amounted to a "critical stage of a criminal proceeding" where a defendant has the right to attend with counsel. App. at 136a–137a (emphasis added). Instead, the court "[a]ssum[ed]," without deciding, that the right extended to bench trials. App. at 137a. "[E]ven if the court's [solo crime-scene] viewing were improper, it did not violate Edwards's substantial rights." App. at 138a. The court noted that the judge's solo visit was merely to confirm the lighting at the scene—a fact "of little consequence in light of the other incriminating evidence, especially the surveillance video, tether, and forensic evidence." *Id.*

At the end of its analysis, the Michigan Court of Appeals also noted that Edwards had cited *Cronic* and that he argued that any error in the independent crime-scene visit was structural. App. at 138a–139a. Pointing to Michigan and federal authorities, the court found that " 'an absence of counsel at a critical stage may, under some circumstances, be reviewed for harmless error.' " App. at 138a (quoting *People* v. *Murphy*, 750 NW2d 582, 586 (2008) (Markman, J., concurring)).

Later in its opinion, the Michigan Court of Appeals discussed Royster's challenges to the judge's solo crime-scene visit. App. at 145a–146a. Addressing a claim that the judge essentially became a witness

during the visit and that he should have been subject to cross-examination, the Michigan Court of Appeals noted that "Royster lodged no objection on this novel theory (*or on any other ground*) below." App. at 145a (emphasis added). The court therefore indicated that it was reviewing "for outcome determinative error that adversely affected the proceedings or resulted in the conviction of an innocent defendant." *Id*. It determined that Royster could not meet that standard because "even assuming error," there was a "mountain of incriminating evidence against him" that was not undermined by the judge's solo visit to view the lighting at the scene. App. at 145a–146a.

Both petitioners applied for leave to appeal that decision, but the Michigan Supreme Court denied their applications. App. at 117a, 119a.

Federal habeas proceedings

Petitioners then sought federal habeas relief. In separate opinions, the district court denied all of their claims. App. at 70a, 115a. With respect to their claim that they were denied counsel at a critical stage when the judge conducted his solo visit, the district court first noted that "neither defendant objected" to the visit and that, accordingly, the Michigan Court of Appeals had reviewed the claims under the "plain error standard." App. at 61a, 107a. Therefore, the court found, the claims were procedurally defaulted. App. at 61a, 107a. The court also pointed out the importance of the default rule here: if counsel had objected, "the trial court could have simply disregarded any observations made during the second visit, thereby curing any error." App. at 65a, 111a. In other words,

reversing the convictions would "create a windfall for counsel's failure to voice an objection when [s]he was invited to do so." App. at 65a, 111a.

Although it found the claim procedurally barred, the district court also discussed the merits. App. at 63a–65a, 108a–111a. The court cited *Cronic*'s rule that the complete denial of counsel at a critical stage requires automatic reversal, but it also quoted *Satterwhite*'s decree that harmless-error analysis applies, even if counsel is absent during a critical stage, " 'where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial.' " App. at 63a–64a, 108a–110a. The court then determined that the judge's solo visit was "inconsequential" and that it was "reasonable to conclude that the . . . visit was not a critical stage of the proceedings requiring automatic reversal had an objection been made." App. at 64a–65a, 110a–111a.

The district court granted a certificate of appealability to the petitioners on their claims that they were denied their right to counsel during the judge's solo crime-scene visit. App. at 70a, 115a. In a consolidated appeal, the Sixth Circuit affirmed. App. at 2a, 28a.

Before addressing the merits, the Sixth Circuit rejected the State's argument that the claim was procedurally defaulted. App. at 10a–12a. To bar federal habeas review, the Sixth Circuit stated, a state court that enforces a procedural rule must "clearly and expressly" do so. App. at 11a (quotations and citations omitted). The Sixth Circuit found that it was unclear whether the state court enforced a procedural rule here because, even though it stated that it was reviewing for "outcome determinative error," the Michigan

Court of Appeals nevertheless went on to discuss *Cronic*'s automatic reversal rule. App. at 12a. Because the discussion of the rule from *Cronic* was "not framed as a prong of Michigan's plain error review," and was not "cast as an alternative holding," the Sixth Circuit concluded that it was "unable to say on which ground or grounds the state court relied in rejecting the claim of a *per se* violation of the Sixth Amendment." *Id.*

Turning to the merits, the Sixth Circuit observed that "[t]here is no dispute that the Supreme Court has never held that the absence of counsel during a crime scene view by the fact-finder—whether a judge or jury—constitutes a complete denial of counsel at a critical stage of the criminal proceeding for which prejudice must be presumed." App. at 17a. Thus, the court concluded, the Michigan Court of Appeals' decision rejecting the *Cronic* claim could not be contrary to any holding of this Court. *Id.*

The Sixth Circuit also concluded that the state court's decision was not an unreasonable application of this Court's precedents. App. at 18a. Noting that the state court found that the crime-scene viewings were a "critical stage," the Sixth Circuit said that such a finding does not necessarily demand automatic reversal under *Cronic*. App. at 21a. This Court sometimes uses "critical stage" to refer more broadly to a stage where the right to counsel attaches but where harmless-error analysis is permissible. App. at 22a. So prejudice must be presumed only if the state court used "critical stage" "as a short-hand for *Cronic* error." App. at 22a–23a. Looking at the state court's opinion, the Sixth Circuit said that it could only determine that the state court found a right to counsel, not

necessarily a *Cronic* error. App. at 23a. The Sixth Circuit noted that this approach is consistent with this Court's decision in *Satterwhite* and that this Court "has not addressed how *Cronic*'s rule of presumed prejudice fits with *Satterwhite*'s description of Sixth Amendment violations that constitute structural error." App. at 24a–25a.

The Sixth Circuit then determined that it would not have been objectively unreasonable for the Michigan Court of Appeals to conclude that the solo crime-scene visit was not a "critical stage" under *Cronic*. App. at 26a. Because the visit was limited to observing the lighting of the scene, it was not a proceeding "where 'defenses may be [ ] irretrievably lost'. . . or one where 'rights are preserved or lost.' " App. at 26a (quoting *Hamilton* v. *Alabama*, 368 U.S. 52, 54 (1961), and *White* v. *Maryland*, 373 U.S. 59, 60 (1963)). Therefore, it would have been reasonable to conclude that the denial of counsel at the solo crime scene visit "was not a 'complete' denial of counsel." App. at 27a. All told, and noting that this Court's decisions did not clearly answer the question, the Sixth Circuit determined that "a fairminded jurist could conclude that a presumption of prejudice was not warranted" in this circumstance. App. at 27a–28a.

Petitioners sought rehearing en banc, which the Sixth Circuit denied. They then filed the instant petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE PETITION

I. This Court has never held that a crime-scene viewing is a critical stage where prejudice is presumed.

Essential to reviewing a claim on federal habeas review is discussing the highly deferential limitations imposed by AEDPA. Those limitations were not overcome in this case.

When a state court adjudicates a claim on the merits, habeas relief is prohibited unless the decision was "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court decision is contrary to clearly established federal law if "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams* v. *Taylor*, 529 U.S. 362, 412–13 (2000). And a state court decision unreasonably applies clearly established federal law if "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoners' case." *Id*. at 413.

Important to this case is the common clause—"clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "Clearly established federal law for purposes of §2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions." *White* v. *Woodall*, 572 U.S. 415, 419 (2014) (internal quotations

and citations omitted). Where no cases from this Court address " 'the specific question presented' " by the case at hand, the state court's decision cannot be contrary to clearly established federal law. *Woods* v. *Donald*, 575 U.S. 312, 317 (2015) (quoting *Lopez* v. *Smith*, 574 U.S. 1, 6 (2014)). And "where the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *Woodall*, 572 U.S. at 424 (internal quotation marks and citations omitted).

"If this standard is difficult to meet, that is because it was meant to be." *Harrington* v. *Richter*, 562 U.S. 86, 102 (2011). The state court's decision "must be objectively unreasonable, not merely wrong; even 'clear error' will not suffice." *Woodall*, 572 U.S. at 419 (internal quotation marks and citation omitted). To obtain relief under AEDPA, the state court's decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103.

A. The state court's decision was not contrary to *Cronic*.

Here, petitioners argue that the Michigan Court of Appeals unreasonably applied this Court's holding in *Cronic*. In *Cronic*, this Court recognized that there are some circumstances where the accused is denied the right to counsel "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S. at 658. In those cases, no prejudice showing is required and reversal is automatic. *Id*. at 659–60. The *Cronic* Court listed

three scenarios where a presumption of prejudice is appropriate, including "the complete denial of counsel . . . at a critical stage of . . . trial." *Id.* at 659. Notably, *Cronic* did not involve a claimed deprivation of counsel at a critical stage, and the Court ultimately declined to find that the specific claim before it warranted a presumption of prejudice. *Id.* at 662, 663–66.

Although the petitioners claim that the trial judge's unaccompanied crime-scene visit was a *Cronic* violation that requires automatic reversal, they do not cite a single Supreme Court case holding that a view of the crime scene is a critical stage of trial. And, like the habeas petitioner in *Donald*, that dooms their claim.

In *Donald*, this Court reversed the Sixth Circuit's decision granting habeas relief on a *Cronic*-based claim. 575 U.S. at 313. During the state-court trial in that case, the defendant's attorney was absent for about 10 minutes while the government sought to introduce evidence regarding phone calls among the defendant's several accomplices who were being tried jointly. *Id.* at 314. The state court rejected a claim that the defendant was denied the right to counsel during his attorney's brief absence. *Id.* But the Sixth Circuit granted habeas relief, ruling that the state court's decision was contrary to and an unreasonable application of *Cronic* because introducing the phone call evidence was a "critical stage" that required automatic reversal. *Id.* at 315.

Not so fast, this Court said. Noting that "AEDPA's standard is intentionally difficult to meet," *id.* at 316 (internal quotations and citations omitted), the *Donald* Court held that habeas relief was not appropriate

because none of this Court's prior cases confronted "the specific question presented by this case," *id.* at 317 (internal quotes and citations omitted). Because this Court had never held that prosecution testimony about other defendants was a critical stage, and because the "precise contours" of *Cronic* "remain unclear," the state court's refusal to apply *Cronic* to the circumstances did not require federal habeas relief. *Id.* at 318–19 (internal quotation marks and citations omitted).

The specific question presented here is similar: Has this Court ever held that a trial-court judge's unaccompanied crime scene visit to gather minimal information amounts to a critical stage of trial requiring a presumption of prejudice? It has not. Thus, the Michigan Court of Appeals' decision to apply harmless-error analysis to deny the claim was not contrary to clearly established federal law.

B. The state court's decision was not an unreasonable application of *Cronic*.

Moreover, the "precise contours" of *Cronic* still "remain unclear," *Donald*, 575 U.S. at 318, so the state court's decision was not an unreasonable application of clearly established federal law. Indeed, *Cronic* did not elaborate on what constitutes a critical stage. In *Bell* v. *Cone*, the Supreme Court simply noted that a critical stage is "a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused." 535 U.S. 685, 695–96 (2002). In addition, the Court has stated that a critical stage is one "where rights are preserved or lost," *White* v. *Maryland*, 373 U.S. 59, 60 (1963), and where

"[a]vailable defenses may be irretrievably lost, if not then and there asserted," *Hamilton* v. *Alabama*, 368 U.S. 52, 54 (1961).

None of those definitions apply here. The crime-scene visit did not hold significant consequences for the petitioners. The only factor observed during the visit was the lighting, which did not affect the significantly strong remaining evidence against them. The crime-scene visit did not hold significant consequences for them. Nor was it a stage where any rights or defenses were lost. Indeed, had the petitioners wished to assert any defenses or raise any objections regarding the judge's solo crime-scene visit, they could have done when the judge described the visit for the record and gave counsel the opportunity to comment. None of the petitioner's rights were precluded simply because counsel was not present at the visit. Like in *Donald*, a fairminded jurist could conclude that the presumption of prejudice was not warranted in this situation.

C. The state court's decision was not contrary to or an unreasonable application of *Geders* v. *United States*.

Petitioners try to circumvent this clear-cut application of *Donald* by arguing that this Court has held that denial of the right at issue here is entitled to automatic reversal. But the decision they point to—*Geders* v. *United States*, 425 U.S. 80 (1976)—undisputedly had nothing to do with crime-scene visits.

In *Geders*, the federal trial court recessed trial for the night in the middle of the defendant's testimony.

Id. at 82. Over an objection, the court instructed the defendant not to discuss the case with anyone overnight—including his own attorney. *Id.* This Court held that "an order preventing [the defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment." *Id.* at 91. It reversed, without discussing whether the defendant could show prejudice.[1] *Id.* The *Geders* Court limited its holding, specifically stating, "We need not reach, and we do not deal with limitations imposed in other circumstances." *Id.*

Arguing that the state court's decision on the question of counsel's absence during the judge's solo visit was an unreasonable application of *Geders*, the petitioners completely reframe the deprivation that occurred here. They argue: "If prejudice is presumed when counsel is denied over an overnight recess during which *nothing* happens, as in *Geders*, then prejudice must be presumed when counsel is denied over an overnight recess during which the factfinder evaluates key inculpatory evidence." Pet. at 20–21. Contrary to petitioners' assertions, they were not denied counsel during an overnight recess. Unlike the defendant in *Geders*, the petitioners here were free to consult their attorneys as they wished.

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[1] In *Cronic*, this Court cited *Geders* as an example of a case where it had "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." 466 U.S. at 659 n.25.

Instead, counsel was not given the opportunity to attend the judge's solo crime-scene visit. Nor was the prosecution. To say that the presumption of prejudice is warranted where a defendant is denied his right to consult counsel during an overnight recess says nothing about whether that presumption is due during a crime-scene visit. Simply put, they are different questions. And because *Geders* did not confront "the specific question presented by this case," *Donald*, at 317 (internal quotes and citations omitted), the Michigan Court of Appeals' decision was not contrary to, or an unreasonable application of, that precedent.

D. The state court's "critical stage" language did not foreclose a harmless-error analysis.

The petitioners also attempt to circumvent this straightforward application of *Donald* by pointing out that the Michigan Court of Appeals found that the judge's solo crime-scene visit was a "critical stage" and that, therefore, reversal should have been automatic. Pet. at 19. Petitioners are incorrect.

First, although "a state court's interpretation of state law. . . binds a federal court sitting in habeas corpus," *Bradshaw* v. *Richey*, 546 U.S. 74, 76 (2005) (per curiam), a state court's interpretation of *federal* law imposes no such constraint. Whether a judge's solo crime-scene visit amounts to the deprivation of counsel at a critical stage and requires automatic reversal under the Sixth Amendment is a question of federal law. It is the role of the federal court to determine whether structural constitutional error occurred; more specifically, it is the role of a federal

habeas court to determine whether it was unreasonable for the state court to find that no structural constitutional error occurred.

Second, the Michigan Court of Appeals did *not* find that the solo visit was a critical stage; rather, it "assum[ed]"—without deciding—that the right to attend a crime-scene viewing during a bench trial is a critical stage just as it is during a jury trial. App. at 137a. Indeed, when the court went on to analyze the specific claim at issue here, it started its analysis by stating, "[E]ven if the court's [solo visit] were improper. . .." App. at 138a. This qualifying language suggests that the court was not definitively finding that the solo visit was a critical stage.

Third, even ignoring the qualifying language in the state court's opinion, reversal need not be automatic because the phrase "critical stage" does not necessarily mean a critical stage under *Cronic*. As the Sixth Circuit discussed in detail, App. at 21a–25a, this Court has used the phrase to refer more broadly to proceedings where the right to counsel attaches but the denial of counsel is still subject to harmless-error analysis.

For example, in *Coleman* v. *Alabama*, this Court held that a defendant was denied his right to counsel at a "critical stage," yet it held that harmless-error analysis applied. 399 U.S. 1, 11 (1970). And in *United States* v. *Wade*, this Court analyzed whether a pretrial lineup was a "critical stage[ ] at which the accused has the right to the presence of his counsel," but it remanded the case to the district court to determine whether harmless error occurred. 388 U.S. 218, 227, 242 (1967).

This multi-layered understanding of the phrase "critical stage" is consistent with this Court's post-*Cronic* decision in *Satterwhite*. In that case, this Court considered whether reversible constitutional error occurred when a criminal defendant was subjected to a psychiatric evaluation without any notice provided to his attorney. 486 U.S. at 252. The Court held that the defendant was denied the right to counsel but then stated that "not all constitutional violations amount to reversible error." *Id.* at 256–57. Without citing *Cronic*, the *Satterwhite* Court found that automatic relief was only appropriate in "cases in which the deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding." *Id.* at 257. But "where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial," harmless-error analysis applies. *Id.* at 257–58. Conducting a harmless-error analysis under *Chapman* v. *California*, 386 U.S. 18 (1967), the *Satterwhite* Court found that the evidence related to the psychiatric evaluation was "critical" to the prosecution's case when it was admitted at sentencing; therefore, it was not harmless beyond a reasonable doubt. 486 U.S. at 260.[2]

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[2] Although the interplay between *Cronic* and *Satterwhite* has not been addressed by this Court, other courts have sought to harmonize the two decisions. See, e.g., *United States* v. *Owen*, 407 F.3d 222, 227–28 (4th Cir. 2005) (citing *Satterwhite* and other decisions from this Court and finding that harmless-error analysis is appropriate where the error complained of "did not cast systematic doubt on the subsequent proceedings and did not affect and contaminate the entire trial") (internal quotation marks omitted); *People* v. *Murphy*, 750 N.W.2d 582, 586 (Mich. 2008) (Markman, J., concurring) (stating that *Satterwhite* is best understood as "carving out an exception to the general rule of

Here, even if the state court definitively found that the judge's solo visit was a critical stage, and even if that determination somehow binds this Court, the erroneous deprivation of counsel did not contaminate the entire criminal proceeding. The solo visit was limited to the judge's observation of the crime-scene's lighting at night. As the Sixth Circuit highlighted, "the judge's observation was not directly inculpatory." App. at 27a. And as the Michigan Court of Appeals found, "[t]hat fact was of little consequence." App. at 138a. Indeed, the judge's minor observation that the area was well-lit at night was so insignificant that none of the three attorneys present voiced their thoughts about it on the record despite explicitly being given the opportunity to do so. App. at 5a. More to the point, Gaca had already testified about the shooting, detailing the lighting conditions at the time. App. at 4a. In other words, the Sixth Amendment violation here was "limited to the erroneous admission of particular evidence at trial." *Satterwhite*, 486 U.S. at 257–58. Automatic reversal was not required.

Because the Sixth Circuit correctly applied this Court's precedents to its decision denying habeas relief, this Court should deny the petition for a writ of certiorari.

Cronic." Where "the effect of the absence of counsel can be sufficiently separated from the entire proceeding," Justice Markman reasoned, "then it may be reviewed for harmless error under *Satterwhite*.")

II. The petitioners do not identify any decision that conflicts with the one below; there is no circuit split.

Although the petitioners point out that other courts have struggled with interpreting the interplay between *Cronic* and *Satterwhite*, that is not the ultimate issue here. The petitioners do not point to any case holding that automatic reversal is required on habeas review when a deprivation of counsel occurs during a stage that this Court has never specifically identified as a "critical" under *Cronic*. And that is because *Donald* precludes any such holding.

In fact, the cases that the petitioners identify as the source of a circuit split show just how undisputedly correct the Sixth Circuit's opinion was here. The petitioners first cite *Musladin* v. *Lamarque*, a case in which the habeas petitioner argued that the trial court's failure to consult with defense counsel before responding to a jury note violated his right to counsel. 555 F.3d 830, 835 (9th Cir. 2009). After discussing the interplay between *Cronic* and *Satterwhite*, the court found that *Cronic* was directly on point when analyzing a claim that counsel was absent at a critical stage. *Id*. at 836–38. Because *Cronic* has not been overruled by this Court, the Ninth Circuit determined that *Cronic*'s automatic-reversal rule is binding on a federal habeas court. *Id*. at 838. The Ninth Circuit then determined that it would have found that the petitioner was denied counsel at a critical stage and entitled to automatic reversal—*if it were reviewing the claim de novo*. *Id*. at 842. The court went on:

> . . . AEDPA permits us to grant [the petitioner]'s request for relief only if the state

> court's decision was "contrary to, or an unreasonable application of," the *Cronic* standard. 28 U.S.C. §2254(d)(1). Specifically, we must find that a state court would be objectively unreasonable in holding that a mid-deliberations communication to the jury does no more than refer the jury back to the original jury instructions is not a "critical stage" under *Cronic*.
>
> This we cannot do. . . . Accordingly, we are not free to hold that the state court's decision to require a demonstration of prejudice resulting from the denial of counsel here was objectively unreasonable.

Id. at 842–43. Just as the Sixth Circuit found that it was not objectively unreasonable for the state court to find that a judge's solo crime-scene visit does not require automatic reversal, the Ninth Circuit found that a judge's response to a jury note without first consulting defense counsel does not require automatic reversal. There is no conflict.

Next, the petitioners identify *Burdine* v. *Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc), as further support for its purported circuit split. Pet. App. at 25a, 26a. But *Burdine* was a pre-AEDPA case, and the Fifth Circuit expressly stated that it was applying "pre-AEDPA standards." 262 F.3d at 374. It was therefore not limited to looking at only the holdings of this Court before granting relief, *Woodall*, 572 U.S. at 419, as the Sixth Circuit below was. That other federal courts may have a different take on the contours of *Cronic* under a different standard says nothing of whether it would have decided the instant case differently.

Sensing that this may not demonstrate a circuit split, the petitioners then suggest that the Sixth Circuit's own precedent establishes a circuit split. Pet. at 25a, 26a. But they ignore the applicable standard yet again. In *Van* v. *Jones*, the Sixth Circuit expressly noted that "[n]o state court ever addressed the claim that [a defendant's consolidation] hearing was a critical stage of the criminal proceeding." 475 F.3d 292, 297 (6th Cir. 2007). AEDPA's deferential limitations were thus not applicable. Indeed, the *Van* court never cited AEDPA, making its lengthy discussion about what constitutes a critical stage under *Cronic* largely irrelevant to the Sixth Circuit's decision in this case. It certainly does not evidence a circuit split.

At bottom, this Court in *Donald* made clear that habeas relief is not available on a *Cronic*-based claim unless this Court has already determined that the specific stage at issue is a critical stage warranting automatic reversal. The Sixth Circuit followed that precedent, and the petitioners do not identify any other court of appeals that would have decided this case differently. There is no circuit split.

III. This case presents a poor vehicle for review because the petitioners' claims are procedurally defaulted.

The Sixth Circuit addressed the merits of the petitioners' claims after rejecting the State's argument that the claims were procedurally defaulted. The State would raise the argument again in this Court, creating an obstacle to navigate before even reaching the merits.

A federal habeas court may not address the merits of a claim if the petitioner "failed to follow applicable state procedural rules in raising the claims." *Sawyer* v. *Whitley*, 505 U.S. 333, 338 (1992). In other words, if a state court relies on an "adequate and independent state law ground," habeas relief is barred absent a showing of cause and prejudice. *Wainwright* v. *Sykes*, 433 U.S. 72, 86–87 (1977). See also *Murray* v. *Carrier*, 477 U.S. 478 (1986) ("*Wainwright* v. *Sykes* plainly implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he had not personally waived that claim.").

The petitioners here failed to comply with a state procedural rule that requires defendants to contemporaneously object to a constitutional error in the trial court. See *People* v. *Carines*, 597 N.W.2d 130, 138–39 (Mich. 1999) (adopting the plain-error standard for reviewing unpreserved constitutional errors). The Michigan Court of Appeals relied on that adequate and independent state procedural rule, citing *Carines* and stating that it was reviewing the claim "for outcome determinative error" because the petitioners did not object to the judge's solo visit. App. at 136a, 145a. Even the Sixth Circuit found that the state court's analysis "seem[ed]" to procedurally bar the claims. App. at 11a–12a.[3]

The Sixth Circuit determined, though, that the state court's discussion of *Cronic* muddied up the

[3] Petitioners have not suggested that counsel's constitutional ineffectiveness, nor any other reason, serves as cause to excuse the default.

waters. App. at 12a. Because it was not clear whether the *Cronic* discussion was part of the plain-error analysis, the Sixth Circuit found that the Michigan Court of Appeals had not "clearly and expressly" relied on a state procedural rule. *Id*. But it was certainly clear that the state court was reviewing the unpreserved claim for plain error—the court said so. App. at 136a, 145a. And it was clear that the state court denied the claim without repudiating the plain error review standard. App. at 138a, 145a–146a. Had the court stopped at this point, there would be no question that the claim was procedurally defaulted. The court's subsequent one-paragraph discussion of *Cronic* addressing the merits of the petitioners' constitutional claim, App. at 138a–139a, does not somehow render the prior analysis less clear.

Because the Michigan Court of Appeals relied on a state procedural rule to reject the petitioners' claims that they were denied the right to counsel, this Court cannot grant habeas relief. This case therefore presents a poor vehicle to review the question presented in this petition.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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