No. 20-1218

IN THE

Supreme Court of the United States

DEMETRIUS WILLIAM EDWARDS AND
BRYANT LAMONT ROYSTER,
Petitioners,

v.

SHERRY L. BURT, WARDEN, AND
KEVIN LINDSEY, WARDEN,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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The trial court's constitutional violation should have been corrected under the clearly established law of this Court. In *United States* v. *Cronic*, this Court held that reversible constitutional error occurs "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. 648, 659 n.25 (1984). That rule applies when counsel is denied "during a long overnight recess in the trial." *Geders* v. *United States*, 425 U.S. 80, 91 (1976). When the judge made an independent, nighttime visit to the crime scene during an overnight recess in Demetrius Edwards's and Bryant Royster's bench trial, unbeknownst to and unaccompanied by their attorneys, a presumptively prejudicial constitutional error occurred. This error entitled Mr. Edwards and Mr. Royster to habeas relief—and a new trial—without any showing of prejudice. That the state and federal courts got this easy case wrong shows that certiorari is warranted so that this Court can restate what its decisions make clear: depriving a criminal defendant of counsel during a critical stage of his trial gives rise to a presumption of prejudice, entitling him to habeas relief.

In its opposition, the State misses the real issues. Michigan argues that AEDPA bars habeas relief for deprivations of counsel during crime-scene visits, but admits that this is a "different question[]" that "says nothing" about deprivations during an overnight recess (whatever occurred during it). Opp. 19. It acknowledges that "other courts have struggled with interpreting the interplay between *Cronic* and *Satterwhite*," but asserts "that is not the ultimate issue here," Opp. 23—when in fact it is, despite Michigan's efforts to reframe things. And, finally, it argues that this Sixth Amend-

ment claim was procedurally defaulted, but the Sixth Circuit properly rejected that argument and it presents no obstacle to granting certiorari.

I. THE STATE COURTS AND SIXTH CIRCUIT MISAPPLIED THIS COURT'S CLEAR PRECEDENTS, IN DECISIONS DEMONSTRATING THE NEED FOR THIS COURT TO INTERVENE

Since *Cronic*, state and federal courts alike have increasingly misapplied its clear rule. This case is emblematic. The trial judge denied Mr. Edwards and Mr. Royster their right to counsel during an overnight recess when he took a solo nighttime visit to the crime scene. This denial was reversible constitutional error "without any showing of prejudice," *Cronic*, 466 U.S. at 659 n.25—counsel was "totally absent" and "prevented from assisting the accused," *id.*, "during a long overnight recess in the trial," *Geders*, 425 U.S. at 91. Yet the state court required Mr. Edwards and Mr. Royster to prove prejudice, which the Sixth Circuit upheld on habeas review.

Michigan's opposition barely engages with these errors or the trend they epitomize. Instead, it tries to reframe the issue more favorably for AEDPA deference, working to tee up a quick denial. Forget *Geders*, Michigan tells the Court; forget that this deprivation occurred during an overnight recess, a circumstance that this Court has clearly held is presumptively prejudicial. Instead, Michigan says, look at what happened during that overnight recess—a crime-scene visit—and deny the petition because, under AEDPA, this Court has not held that a crime-scene visit is a critical stage.

But *Geders* did not limit its holding based on what occurred during the overnight recess. Indeed, in

Geders, *nothing* happened during the overnight recess, and still this Court found reversible constitutional error without inquiring into prejudice. The greater constitutional violation must include the lesser. If deprivations of counsel during an overnight recess when *nothing* happens require automatic reversal, then deprivations of counsel during an overnight recess when *something* happens certainly do, too—particularly when that "something" is the factfinder's unsupervised review of inculpatory evidence. Another case might present the question (on direct appeal) whether *any* crime-scene visit constitutes a critical stage at which deprivations of counsel are presumptively prejudicial. But this case only concerns a crime-scene visit during an overnight recess, and this Court's precedent has already clearly established the law for overnight recesses writ large. The lack of Supreme Court precedent separately addressing crime-scene visits in isolation is no bar to habeas relief—and certainly it is no bar to certiorari review.

Since Michigan can neither contest nor overcome *Geders*'s holding, it tries to avoid the actual facts of this case, claiming that Mr. Edwards and Mr. Royster "were not denied counsel during an overnight recess" because they "were free to consult their attorneys as they wished." Opp. 18. This argument parodies the right to counsel, which, "[o]f all the rights that an accused person has, … is by far the most pervasive for it affects his ability to assert any other rights he may have." *Cronic*, 466 U.S. at 654. That right is not fulfilled just because a criminal defendant and his lawyer who are excluded from criminal proceedings *together* could hypothetically consult each other during their mutual absence. *See, e.g.*, *United States* v. *Hamilton*, 391 F.3d 1066, 1069 (9th Cir. 2004) (holding that "the

district court violated [the defendant's] rights under the Sixth Amendment by permitting the presentation of evidence against him during the suppression hearing while neither [he] nor his counsel was present"). Michigan cannot seriously dispute that Mr. Edwards's and Mr. Royster's counsel were "totally absent" and "prevented from assisting" them—including by asserting their other constitutional rights—at the judge's clandestine visit during the overnight recess. *Cronic*, 466 U.S. at 659 n.25.

Ultimately, Michigan admits that its arguments are mistargeted. It writes, "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." Opp. 19. Exactly right. But the former question arises here, where Mr. Edwards and Mr. Royster were deprived of counsel during an overnight recess that included a crime-scene visit. Whether AEDPA bars habeas relief to state prisoners deprived counsel during a crime-scene visit "says nothing" about deprivations of counsel during overnight recesses, whatever occurred during them. If the denial of counsel had occurred during a crime-scene visit *not* during an overnight recess, then the clearly established law of *Geders* would not apply. That is not this case, and so Michigan cannot avoid *Geders*. Instead, the material facts of *Geders*—a deprivation of counsel during an overnight recess—are present here. And the *distinguishing* fact—that here the factfinder considered inculpatory evidence during the overnight recess, while in *Geders* nothing happened overnight—only makes this presumptively prejudicial constitutional violation more damning. That the state courts and the Sixth

Circuit got even this clearly established application of *Cronic* wrong proves that the Court needs to intervene to set things right.

II. This Case Is An Ideal Vehicle To Address The Question Presented

Michigan also argues that, no matter the merits of this petition, the Court should not grant certiorari because this case is a poor vehicle. Michigan mischaracterizes the opinions below and the petition's arguments. First, this case is a good vehicle precisely because the state court assumed that Mr. Edwards and Mr. Royster were deprived of counsel at a critical stage, cleanly presenting the question whether deprivations of counsel during a critical stage can be reviewed for harmless error. And second, there was no procedural default because the state court did not clearly and expressly rely on a state procedural rule as its ground for rejecting the Sixth Amendment claim, as the Sixth Circuit correctly held.

A. This Case Cleanly Presents The Question Whether Deprivation Of Counsel During A Critical Stage Requires A Presumption Of Prejudice

Michigan admits that the state court "'assum[ed]'" that Mr. Edwards and Mr. Royster were denied counsel during a critical stage. Opp. 20 (brackets in original). This assumption was necessary only because the factfinder was the judge—the state court explained that "it is well established that when the fact-finder is the jury, the viewing constitutes a critical stage," but that no Michigan authority addressed a judicial factfinder's crime-scene viewing (although "[s]everal federal courts have held … that the same principles ap-

ply"). Pet. App. 136a-137a. While the State goes on to argue about the scope of the state court's critical-stage determination, and to argue that federal courts need not defer to that determination anyway, *see* Opp. 19-20, those arguments are beside the point. This case does not merit certiorari review to determine once and for all what is a critical stage. It merits certiorari review to set the lower courts straight that the denial of counsel at a stage that *is* critical—as the state court assumed here—is a reversible constitutional error "without any showing of prejudice." *Cronic*, 466 U.S. at 459 n.25. By assuming that the visit occurred during a critical stage, the state-court decision cleanly severs the separate, complex question of what constitutes a critical stage from the question presented: whether *Cronic* meant what it said and the deprivation of counsel during any critical stage, however defined, gives rise to a presumption of prejudice.

True enough, there should be no need for the Court to take up this question, given that it "has uniformly found constitutional error without any showing of prejudice" in these circumstances, 466 U.S. at 659 n.25, crystallizing that uniform practice into an unequivocal rule in *Cronic*. But some courts of appeals and state courts cannot or will not get this clear holding right. Michigan attempts to downplay the lower courts' missteps by pointing out that the cases cited that adhere to this rule arose outside AEDPA. This observation means little. *Burdine* v. *Johnson*, 262 F.3d 336, 338 (5th Cir. 2001), was not an AEDPA case, but the en banc Fifth Circuit held that "the Supreme Court's Sixth Amendment jurisprudence compels the presumption that counsel's unconsciousness prejudiced the defendant," citing *Cronic*. State courts must do what "the Supreme Court's Sixth Amendment jurisprudence

compels," *id.*, even—especially—on habeas review under AEDPA. *Musladin* v. *Lamarque*, 555 F.3d 830, 838 (9th Cir. 2009), on the other hand, did arise under AEDPA but clearly stated that the rule of *Cronic*—that when a defendant is denied counsel at a critical stage, reversal is automatic—"applie[d] in proceedings governed by AEDPA." And while that case denied relief under AEDPA because this Court had not clearly established whether "mid-deliberation communications with the jury" were a critical stage, *id.* at 839, 843, that issue does not arise here. Instead, as explained, the state court assumed the stage was critical but nonetheless applied harmless error review. Given that assumption, these and other courts, *see* Pet. 26 n.3, would have resolved Mr. Edwards's and Mr. Royster's Sixth Amendment habeas claim differently than the Sixth Circuit panel did, and differently than other courts of appeals would, all despite *Cronic*'s crystal clear rule.

B. The Claim Is Not Procedurally Defaulted

Michigan is wrong that Mr. Edwards's and Mr. Royster's Sixth Amendment claim is procedurally defaulted, and that the State's re-raising of this question would present any meaningful obstacle to certiorari. This Court's precedent is clear that "federal courts on habeas corpus review … will presume there is no independent and adequate state ground for a state court decision when … 'the adequacy and independence of any possible state law ground is not clear from the face of the opinion.'" *Coleman* v. *Thompson*, 501 U.S. 722, 734-735 (1991). Therefore, a state court must "clearly and expressly" rely on a state procedural rule as grounds for rejecting a claim. *Id.* Not so here. The state court raised the procedural rule but then addressed the claim's merits directly, without cabining its

discussion within plain-error review or as an alternative holding. *See* Pet. App. 135a-139a, 145a-146a. It may be true that, "[h]ad the court stopped" before turning to the merits, "there would be no question that the claim was procedurally defaulted." Opp. 27. But the court did not stop. Even if its discussion of the merits "does not somehow render the prior analysis [of the procedural rule] less clear," *id.*, that merits analysis *does* render less clear "which ground or grounds the state court relied in rejecting the claim," as the Sixth Circuit concluded. Pet. App. 12a. Swiftly rejecting Michigan's procedural default argument at the merits stage for the same reasons the Sixth Circuit did is no obstacle to certiorari.

III. At Minimum, The Court Should Summarily Reverse The Sixth Circuit's Misapplication Of *Cronic* And *Geders*

This Court should grant certiorari to set right the state and lower federal courts' widespread misapplication of *Cronic*'s simple, one-sentence rule. At minimum, the Court should summarily reverse the Sixth Circuit's misapplication of *Cronic* in this case to these facts, as clearly established by *Geders*. Summary reversal of this "clear misapprehension" of this Court's decisions is appropriate. *Tolan* v. *Cotton*, 572 U.S. 650, 659 (2014); *see, e.g.*, *Christeson* v. *Roper*, 574 U.S. 373 (2015); *Porter* v. *McCollum*, 558 U.S. 30 (2009).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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