

No. _____

In The
Supreme Court of the United States

STEVEN ZAPATA,
Petitioner,

v.

KENTUCKY,
Respondent.

On Petition for Writ of Certiorari
To The Kentucky Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In October 2015 Petitioner Zapata entered an *Alford* guilty plea to the single count of murder charged in the indictment in return for the prosecutor's recommendation of a sentence of twenty-four years of imprisonment. Shortly thereafter but prior to sentencing, Zapata moved to withdraw his guilty plea on the basis that his counsel had advised him he could withdraw his guilty plea at any time prior to sentencing. At the hearing on the withdrawal motion, his court-appointed counsel, Ms. Elleman, explained to the trial court that she could not represent Zapata on the motion. The trial court agreed and without appointing a new counsel for Zapata and without holding an evidentiary hearing denied Zapata's motion to withdraw his guilty plea. On direct appeal, the Kentucky Supreme Court found that Elleman had a conflict of interest that deprived Zapata of the assistance of counsel on his motion to withdraw his guilty plea and that it was error for the trial court not to hold an evidentiary hearing at which Elleman would testified. The Kentucky Supreme Court vacated the judgment and order denying the motion to withdraw the guilty plea, but not the guilty plea itself, and remanded the case to the trial court for further proceedings that may be required. *Zapata v. Commonwealth*, 516 S.W.3d 799 (Ky. 2017).

In November 2017, substitute conflict counsel filed a new motion to withdraw the guilty plea including allegations of ineffective assistance of counsel. At the February 2018 evidentiary hearing conflict counsel confronted Elleman with the 2015 Motion to Enter Guilty Plea, a form motion submitted to the court, which contained on the reverse side a Certificate of Counsel, where defense counsel is instructed to certify in counsel's view such matters as the defendant's understanding of the charge, possible defenses, the plea offer, the motion to enter a guilty plea, his constitutional rights, counsel's advice on the plea as well as counsel's recommendation to the Court that the plea be accepted. The Certificate of Counsel on the motion tendered to the court at the 2015 entry of the guilty plea was unsigned. When asked at the evidentiary hearing why the Certificate was unsigned, Elleman explained she intentionally did not sign the Certificate because she believed Zapata was incompetent to plead guilty. Elleman admitted and the transcript of the plea colloquy confirms that Elleman never informed the court of her deliberate refusal to sign the certificate and never voiced to the court or to Zapata her assessment of Zapata's incompetency to plead guilty. Elleman expressed she had no duty to sign the Certificate or inform the court of her doubts regarding her client's incompetency to plead guilty. The transcript of the plea colloquy revealed that the trial judge never asked Elleman any questions about her appraisal of Zapata's understanding of the matters delineated in the Certificate, but only if Zapata understood an *Alford* plea. Surprisingly, in view of her admitted belief that Zapata was incompetent, Elleman answered yes. The trial court denied the motion to withdraw the guilty plea with no mention of the unsigned Certificate or Elleman's failure to disclosed to the court or to Zapata her belief that Zapata was incompetent to plead guilty.

On appeal the Kentucky Supreme Court addressed the question of the unsigned Certificate of Counsel and Elleman's deliberate refusal to disclose to either the court or client her assessment that Zapata was incompetent to plead guilty by saying that "the better practice is for trial courts to review both motions to enter guilty pleas and certificates of counsel with a defendant's counsel during the

plea colloquy,” but this failure in Zapata’s case did not “render the plea invalid.” *Zapata v. Commonwealth*, ____ S.W.3d ____ (Ky. 2020), Slip Opinion, 10. The *Zapata* court never addressed Elleman’s admitted refusal to inform the court or her client during the plea colloquy of her assessment that Zapata was at the entry of his plea incompetent to plead guilty except to say “we decline to hold either that a signed certificate [of counsel] was a requirement for the entry of Zapata’s guilty plea or that it indicates Elleman abandoned her client.” *Id.*, 8. Although Zapata brought these failures to the attention of the Kentucky Supreme Court via a rehearing petition, the *Zapata* court denied that petition.

The Kentucky Supreme Court’s decision raises the following questions presented:

I. Does the constructive denial of counsel standard under *Cronic v. United States* or the ineffective assistance of counsel standard under *Strickland v. Washington* apply to the entry of a guilty plea where trial counsel fails to inform the trial judge of counsel’s assessment that the client is incompetent to plead guilty and instead allows the guilty plea to proceed and be entered by a potentially incompetent defendant by refusing to sign a court document designed to ascertain counsel’s appraisal of the defendant’s understanding of the guilty plea and instead answers the judge’s few colloquy questions with information that contradicts counsel’s acknowledged belief that the client was incompetent?

A. If the *Cronic* standard applies, does this situation constitute the constructive denial of counsel under *Cronic*?

B. If the *Strickland* standard applies, does this situation constitute ineffective assistance of counsel under *Strickland*?

II. Is a guilty plea validly entered under this Court’s precedents - knowingly, intelligently, and voluntarily, when trial counsel fails to inform the trial judge (intentionally, as occurred here, or even through the failure to investigate competency, as occurs in many other cases) of counsel’s assessment that the defendant is incompetent to enter a plea, thus allowing the guilty plea to go forward and be entered without the trial judge first determining whether counsel’s assessment of present incompetency is sufficient to necessitate a competency evaluation before proceeding with the colloquy and accepting the plea?

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² The proceedings in this case, as with all Kentucky court cases, were video recorded. This transcription was filed in both the trial court and the Kentucky Supreme Court.

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**IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Kentucky Supreme Court of Appeals rendered April 30, 2020.

OPINIONS BELOW

The Kentucky Supreme Court's opinion is found at *Zapata v. Commonwealth*, ____ S.W.3d ____ (Ky. 2020), and is reproduced in slip opinion form at Appendix ("App.") A, 1-28.¹ The Kentucky Supreme Court's order denying Zapata's rehearing petition is unpublished and is reproduced at App. D, 36. The Amended Opinion and Order of the Jefferson Circuit Court is unpublished and is reproduced at App. B, 29-32. The Judgment of Conviction and Sentence of the Jefferson Circuit Court is likewise unpublished and is reproduced at App. C, 33-35.

STATEMENT OF RELATED PROCEEDINGS

- *Zapata v. Commonwealth*, Kentucky Supreme Court, 516 S.W.3d 799 (Ky. 2017). Judgment entered April 27, 2017.²
- *Commonwealth v. Zapata*, Jefferson Circuit Court, Division No., No. 13-CR-002075. Judgment entered December 14, 2015.

JURISDICTION

The date on which the Kentucky Supreme Court decided Petitioner's case was April 30, 2020. *Steven Zapata v. Commonwealth*, ____ S.W.3d ____ (Ky. 2020), App. A, 1-28. A timely

¹ *Zapata v. Commonwealth*, ____ S.W.3d ____, 2020 WL 2091861 (Ky. 2020).

² *Zapata v. Commonwealth*, 516 S.W.3d 799 (Ky. 2017), is reproduced at App. E, 37-39.

petition for rehearing was denied by the Supreme Court of Kentucky on December 17, 2020. *Zapata v. Commonwealth*, Kentucky Supreme Court, No. 2018-SC-000666; App. D, 36.

This Court by Order entered March 19, 2020 extended the deadline to file petitions for writ of certiorari in all cases due on or after the date of that order to 150 days from the date of the lower court's order denying a timely filed petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Six of the United States Constitution provides:

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 defense.

Amendment Fourteen of the United States Constitution provides in pertinent part:

Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Steven Zapata, Petitioner, was indicted in August 2013 by a Jefferson County Grand Jury on one count of murder for his wife's death. Before trial, in May 2015, Zapata moved, pursuant to *Faretta v. California*, 422 U.S. 806 (1975), to be appointed as "co-counsel" to "assist his [counsel]

in his defense.” The trial court granted Zapata’s request to act as hybrid counsel.³

Prior to trial, on October 28, 2015, Zapata entered an *Alford* plea to the single count of murder. The trial court conducted the *Boykin* colloquy⁴ and explained that Zapata was waiving the right to challenge the evidence, cross-examine witnesses, and offer evidence in his defense. The court instructed Zapata that if he entered a guilty plea, “the case is over” and he could not appeal. Zapata agreed that the Commonwealth had evidence to prove that he had killed his wife and went ahead with the guilty plea.

Prior to sentencing, Zapata’s counsel, Angela Elleman, submitted a motion to withdraw that plea, though she explained “undersigned counsel takes no position on this motion.” Zapata filed another motion to withdraw his plea and for an evidentiary hearing. Zapata asserted an evidentiary hearing “is required when, as here, a defendant makes an allegation of ineffective assistance of counsel that cannot be resolved from referral to the record.” At the hearing on the motion, Zapata argued, among other things, that his counsel deceived him when she informed him he could withdraw his guilty plea any time before sentencing with “no problem” and that his plea was not voluntarily entered. The trial court conducted a hearing on the motion, but did not take sworn testimony or allow Zapata to call witnesses or present other evidence.

The trial court denied the withdrawal motion without conducting an evidentiary hearing and instead relied on the fact that Zapata was “a very sophisticated defendant, and all along the way in the course of litigating this matter I [the court] have allowed you to participate and communicate

³ “The Kentucky Constitution guarantees a criminal defendant the right ‘to be heard by himself and counsel.’” *Deno v. Commonwealth*, 177 S.W. 3d 753, 757 (Ky. 2005).

⁴ *Boykin v. Alabama*, 395 U.S. 238, 241-42 (1969).

with me. And I am certain that you knew what you were doing on that date and time.” *Zapata v. Commonwealth*, 516 S.W.3d 799, 800-802 (Ky. 2017); App. E., 38.

On his direct appeal to the Kentucky Supreme Court, Zapata by counsel argued that “he was denied counsel concerning his motion to withdraw his guilty plea.” *Zapata*, 801; *Id.*, 38. The Kentucky Supreme Court agreed and on April 27, 2017:

- (1) vacated the Judgment of Conviction and Sentence entered December 14, 2015, sentencing Zapata to twenty-four years of imprisonment;
- (2) vacated the trial court’s order denying Zapata’s motion to withdraw his guilty plea; and
- (3) remanded Zapata’s case to the court below for further proceedings consistent with the opinion.

Zapata, 516 S.W. 3d at 803; *Id.*, 39.

On remand, the Louisville Metro Public Defender assigned a private attorney as conflict counsel to represent Zapata with regard to challenging anew his guilty plea, should Zapata still wish to do so. On August 16, 2017, in open court, Zapata withdrew his request to proceed as hybrid counsel, despite conflict counsel’s agreement to proceed in that fashion.

On November 27, 2017, Zapata, by counsel, in accordance with the trial court’s instructions, filed a Motion, Pursuant to Kentucky Rule of Criminal Procedure (“RCr”) 8.10, to Withdraw His Plea of Guilty.⁵ The Commonwealth filed a Response and Zapata followed with a Reply as a prelude to a scheduled evidentiary hearing.

⁵ “At any time before judgment the court may permit the plea of guilty or guilty but mentally ill, to be withdrawn and a plea of not guilty substituted.” RCr 8.10, *Withdrawal of plea*.

At the February 9, 2018 evidentiary hearing, both Zapata and his former counsel, Ms. Elleman, testified about the Zapata's entry of his guilty plea in 2015. At the evidentiary hearing, it was revealed that the form Motion to Enter Guilty Plea, which was requested by and submitted to the trial court, although signed and dated by Zapata, had a glaring omission. Ms. Elleman, *intentionally elected* not to complete the Certificate of Counsel on the back side of the Motion to Enter Guilty Plea, leaving that portion of the motion unsigned.

Ms. Elleman testified that she "did not" sign the Certificate of Counsel and "the reason [she] didn't do that" was "because" her "personal opinion was still that Mr. Zapata wasn't competent," even though earlier in the pretrial proceedings "the Court ruled that he was competent." That competency hearing had concluded on January 15, 2015, over nine months before the October 28, 2015 entry of the guilty plea. Ms. Elleman "still had the same concerns that [she] had all along about Mr. Zapata's competency."

Ms. Elleman did not think it was her "obligation," as Zapata's defense counsel, to certify any of the matters in the Certificate of Counsel on the form Motion to Enter Guilty Plea. She explained, "I don't think I can, as an officer of the Court, say I think my client is competent to make this guilty plea if I don't think it is true." When asked why she did not "initial the ones" in the Certificate of Counsel "that were correct," Ms. Elleman replied, "Well, what I can say is I had concerns about his competency and competency extends to competency entering a guilty plea."

As a result of her intentional omission, Ms. Elleman did not certify the following:

To the best of my knowledge and belief, the defendant understands the allegations contained in the indictment and/or any amendments thereto.

I have fully discussed with the defendant the charges and any possible defenses to them and I believe he/she fully understands the charges and possible defenses.

I have reviewed with the defendant the attached “Commonwealth’s Offer on a Plea of Guilty” and the foregoing “Motion to Enter a Plea of Guilty,” and I believe he/she understands these documents.

To the best of my knowledge and belief, his/her plea of “GUILTY” is made freely, knowingly, intelligently and voluntarily.

I have fully explained the defendant’s constitutional rights to him/her and I believe that he/she understands them.

The plea of “GUILTY” as offered by the defendant is consistent with my advice to him/her, and I recommend to the Court that his/her plea be accepted.

[Motion to Enter Guilty Plea, Certificate of Counsel, App. F, 41.]

A signed and dated *Certificate of Counsel* is not a Kentucky requirement for a defendant entering a guilty plea. However, the trial court in Zapata’s case required that the completed form be submitted. Yet Ms. Elleman deliberately elected not to sign off on the Certificate of Counsel and, just as significantly, deliberately did not bring her decision to leave the Certificate of Counsel unsigned to the attention of the trial court during the entry of the guilty plea in 2015 or any time thereafter until confronted with this omission during the February 2018 evidentiary hearing by Zapata’s new counsel.

Just as significant, nowhere in the plea colloquy that occurred on October 28, 2015 did the trial court ever ask Ms. Elleman any questions calculated to generate responses from her that are to be certified to the court in the Certificate of Counsel portion of the Motion to Enter Guilty Plea. Ms. Elleman did not volunteer any of that information during the plea colloquy. [Transcript, Plea Colloquy, App. G, 42-46.] Ms. Elleman testified that she had “absolutely” no obligation to certify the matters in the Certificate of Counsel. Ms. Elleman explained that she had “concerns about [Zapata’s] competency” and that is why she “didn’t sign” the Certificate of Counsel.

Ms. Elleman also never informed Zapata prior to or during the guilty plea proceedings of either her decision to refuse to sign the Certificate of Counsel and her intention not to disclose to the trial judge that she had left the Certificate unsigned. Ms. Elleman also declined to advise Zapata that she believed he was incompetent to plead guilty to this charge of murder.

Following the 2018 evidentiary hearing, the trial court ordered simultaneous briefing. Both parties filed post-evidentiary hearing briefs.

On July 11, 2018, the court below entered an Opinion and Order denying Zapata's motion to withdraw his guilty plea and erroneously designated it "a final and appealable order," even though no sentencing had occurred and no final judgment had been entered. When made aware of this error, the trial court below on July 18, 2018 entered both an Amended Opinion and Order and a Modifying Order that ordered a new presentencing report and scheduled the sentencing.

In denying Zapata's motion to withdraw his guilty plea, the trial court noted that it "held a hearing to determine whether Zapata was misled by his appointed counsel to the degree that he did not, in fact, offer a voluntary, knowing, and intelligent guilty plea." App. B, 31. The trial court again relied on its observations of Zapata "on nearly two dozen occasions" to conclude that Zapata is "an unusually sophisticated criminal defendant, meaningfully participating in both his defense and plea agreement negotiation." On that basis, the trial court found that, "under the totality of circumstances ... Steven Zapata's guilty plea was voluntary, knowing and intelligent," making it well within the trial court's "discretion to deny Zapata's motion to withdraw his guilty plea." App. B, 32.

The trial court's Amended Opinion and Order did not even mention Ms. Elleman's intentional refusal to sign the Certificate, her deliberate election not to inform the court of her refusal to make such a certification or her failure to inform the court of her misgivings about Zapata's

incompetency to plead guilty. Instead, the trial court apparently erroneously reduced Zapata's motion to withdraw his guilty plea to but one claim, that, "[e]ssentially, Zapata's argument is that his Court appointed attorney, Angela Elleman, misled him by advising him that he could withdraw his guilty plea at any time prior to final sentencing," which was Zapata's *pro se* claim in his 2015 motion to withdraw his plea. *Id.*

Zapata's sentencing hearing occurred on November 2, 2018 and he was again sentenced in accordance with the plea agreement to twenty-four (24) years for the offense of murder. The Judgment of Conviction and Sentence was entered on November 14, 2018. App.C, 33-35. A timely notice of appeal was filed on December 12, 2018.

On appeal, the Kentucky Supreme Court affirmed the trial court's denial of Zapata's motion to withdraw his guilty plea. The Kentucky Supreme Court acknowledged that:

As this case demonstrates, the better practice is for trial courts to review both motions to enter guilty pleas and certificates of counsel with a defendant's counsel during the plea colloquy. Any issues or concerns that counsel can be resolved, and a clear record established. In this case, for whatever reason, the trial court did not ask counsel questions about the certificate of counsel. While that did not, in and of itself, render the plea invalid, the better practice for all concerned in future cases is for the trial court to take the time to ask counsel questions about the plea and the documents filed in conjunction therewith.

Zapata (2020), App. A, 10.

The Kentucky Supreme Court did acknowledge Elleman's evidentiary hearing testimony that she did not sign the Certificate of Counsel because she believed Zapata was incompetent to plead guilty. *Id.*, 7. Nevertheless, the Kentucky Supreme Court dismissed without mention that the trial court accepted Zapata's guilty plea without knowing that Zapata's then counsel, Ms. Elleman, believed her client was incompetent to plead guilty and she could not certify any of the matters listed

on the Certificate of Counsel, including, for example, that “[t]o the best of her knowledge and belief,” Zapata’s plea of guilty “is made freely, knowingly, intelligently and voluntarily.”

Instead, the Kentucky Supreme Court emphasized:

Under the facts of this case, we hold that there was no ineffective assistance during plea negotiations, much less ineffective assistance so substantial that it impacted the plea process. Elleman did not “ma[k]e errors so serious that counsel’s performance fell outside the wide range of professionally competent assistance.” But even assuming Elleman was ineffective in her representation of Zapata, her alleged “deficient performance [would not have] so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.”

Zapata (2020), App. A, 15 (cleaned up).

The Kentucky Supreme Court added that “there is no reasonable probability that but for the claimed ineffective assistance, Zapata would have chosen to go to trial and face higher penalties of 20 to 50 years or life imprisonment” rather than the sentence recommendation of 24 years of confinement. *Id.*, App. A, 14.⁶

The Kentucky Supreme Court acknowledged that “Zapata’s claims regarding his abandonment by counsel *repeatedly* return to the fact that Elleman had failed to sign the “Certificate of Counsel,” noting that Zapata “insists that Elleman’s failure to sign the form is indicative of the fact that she had abandoned her client during the plea negotiations and he was unrepresented at that

⁶ This was pragmatically erroneous. At his 2015 guilty plea Zapata was about 55 years old and had been in pretrial confinement since 2013. The guilty plea sentence of 24 years for murder would require Zapata, as a violent offender, to serve 20 years before being eligible for parole. If he received the minimum sentence of 20 years at a trial, Zapata would have to serve 85% of that sentence, 17 years, before parole eligibility. Kentucky Revised Statute (“KRS”) 439.3401(2), (3). If paroled after serving 20 years, Zapata would be in his early seventies. There was no actual or practical advantage for Zapata to take the plea offer. Zapata’s choices were both “similarly dire.” See *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017).

stage of the trial.” *Id.*, App. A, 6. The Kentucky Supreme Court declined to hold that her failure to sign that form “indicates Elleman abandoned her client.” *Id.* at 8.

Zapata filed a timely petition for rehearing on July 21, 2020, which was denied on December 17, 2020. App. D, 36.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On remand from the Kentucky Supreme Court, following the 2018 evidentiary hearing Zapata and the prosecution filed simultaneous briefs. Zapata argued, *inter alia*, that his counsel at the entry of the 2015 guilty plea denied him the effective assistance of counsel and abandoned him by deliberately refusing to sign the Certificate of Counsel and intentionally declining to inform the court of her refusal and deliberately withholding from the court that she had decided not to complete the Certificate because she believed Zapata was incompetent to plead guilty. These claims were supported by evidence produced at the 2018 evidentiary hearing and citations to relevant federal constitutional decisions from this Court. The trial court denied the motion to withdraw the guilty plea without mention of the ineffective assistance of counsel claim, Elleman’s refusal to sign the Certificate, her deliberate decision to withhold that refusal from the trial court, and her belief that Zapata was incompetent to plead guilty, which was the motivation for her calculated acts of concealment. App. B, 29-32.

Zapata appealed to the Kentucky Supreme Court, which affirmed the trial court’s denial of Zapata’s motion to withdraw his guilty plea. The Kentucky Supreme Court acknowledged that “Zapata claims his counsel was ineffective during plea negotiations” and “abandonment by counsel,” but rejected those claims. *Zapata* (2020), App. A, 5, 6.

REASON FOR GRANTING THE WRIT

The Kentucky Supreme in a published opinion decided important federal questions regarding ineffective assistance of counsel and the constructive denial of counsel at the entry of a guilty plea as well as the constitutional validity of a guilty plea in the context of undisputed facts that defense counsel, despite strongly concluding that the defendant was presently incompetent to plead guilty, intentionally withheld and deliberately failed to disclose to both the court and the client her assessment of the accused's incompetency and took no steps to insure the question of the accused's present incompetency to plead guilty would be presented to the trial court for a ruling and a possible new evaluation prior to the court taking the defendant's guilty plea, in a way that conflicts with relevant decisions of this Court, such as *Strickland v. Washington*, *Cronic v. United States*, *Boykin v. Alabama*, *Drope v. Missouri*, *Pate v. Robinson*, and *Godinez v. Moran*.

Although not detected by the trial judge in 2015 when Zapata entered his guilty plea or shortly thereafter during the ensuing proceedings on Zapata's almost immediately filed motion to withdraw his guilty plea, there was a glaring omission on the Certificate of Counsel on the filed motion to enter a guilty plea. When Zapata's counsel, at the request of the court, submitted the completed form motion to enter guilty plea, she intentionally declined to sign the Certificate of Counsel without informing the trial judge of her refusal to sign or her reasons for declining to sign the Certificate. It was only at the February 9, 2018 evidentiary hearing, following a remand from the Kentucky Supreme Court, that Zapata's replacement counsel revealed that the Certificate was not signed and elicited from Elleman that she elected not to sign the Certificate or bring this omission to the trial court's attention because she believed Zapata was incompetent to plead guilty. These facts are undisputed.

The trial court at the 2015 entry of the guilty plea apparently never looked at the reverse side of the form motion or, if he did, he failed to notice the Certificate of Counsel was neither signed nor dated. During the plea colloquy the trial judge never questioned Elleman about any of the matters covered in the unsigned Certificate of Counsel regarding her knowledge and belief of Zapata's

understanding of matters such as the charge, possible defenses, the guilty plea and her recommendation as to the guilty plea. And, as was revealed during the 2018 evidentiary hearing, Elleman never disclosed to Zapata prior to his 2015 guilty plea that she believed he was incompetent to enter a guilty plea or that she would not sign the Certificate of Counsel.

“Before deciding whether to plead guilty, a defendant is entitled to ‘the effective assistance of competent counsel.’” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480-81 (2010), quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970). “Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.” *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012). “[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to the effective assistance of counsel.” *Missouri v. Frye*, 132 S.Ct. 1399, 1406 (2012), quoting *Padilla, supra* at 1486. This Court has “long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” *Padilla*, 130 S.Ct. at 1486.

Zapata’s counsel was representing him during the entry of his guilty plea, in accordance with his plea agreement, ostensibly to ensure that Zapata received the effective assistance of counsel during this critical phase of his criminal case. Nevertheless, although so convinced of Zapata’s incompetence to plead guilty that she could not sign the Certificate of Counsel, Zapata’s counsel stood mute, in word and action, without expressing her concerns about her client’s incompetence to the judge conducting the *Boykin* inquiry or to Zapata himself.

The Kentucky Supreme Court disregarded the impact of these undisputed revelations on Zapata’s claim of ineffective assistance of counsel during the entry of the guilty plea, noting only that “Zapata raises no issues in this appeal concerning that [earlier] competency ruling.” *Zapata*, 7. That

earlier ruling by the trial judge that Zapata was competent to stand trial should not have precluded Elleman from voicing her present belief at the entry of the guilty plea that Zapata was incompetent to plead guilty.

At the time of the prior competency ruling in January 2015, Zapata was apparently intent on pleading not guilty and being tried by a jury. Subsequent to that competency ruling, Elleman negotiated a plea agreement with the prosecution. At that point, in October 2015 Elleman admittedly explained to Zapata the charge and possible defenses, reviewed the prosecution's plea offer and informed Zapata of the constitutional rights he had and would be forfeiting by his plea of guilty. It is likely that in this context Elleman realized that, despite the court's prior competency ruling some nine months earlier, Zapata was incompetent to plead guilty. Yet Elleman kept her strong assessments of her client's present incompetence to herself and deliberately concealed those misgivings from the court.

Ms. Elleman admittedly refused to sign the Certificate of Counsel and elected to not inform the court below of her refusal to sign on the grounds that she believed her client was incompetent to plead guilty, despite the trial court's earlier decision that Zapata was competent to stand trial. But Elleman had a responsibility inherent in her obligation to provide effective assistance of counsel to reveal her present concerns regarding Zapata's incompetence to the trial court.

"A criminal defendant may not be tried unless he is competent, *Pate v. Robinson*, 383 U.S. 375, 378 (1966), and he may not waive his right to counsel or plead guilty unless he does so 'competently and intelligently,' *Johnson v. Zerbst*, 304 U. S. 458, 468 (1938)." *Godinez v. Moran*, 509 U.S. 389, 396 (1993). Competence to plead guilty is measured by the same standard as competence to be tried. *Id.*, 398.

The trial court's earlier ruling that Zapata was competent did not diminish Elleman's duty of disclosure to the court of her firm belief that Zapata was incompetent to plead guilty at that time. "Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways." *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379, 2386 (2008). "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope v. Missouri*, 420 U.S. 162, 181 (1975). If, as Elleman testified, she still had doubts about Zapata's competency, even after the court's earlier competency ruling, she nevertheless had an obligation to Zapata and the court to bring those concerns to the attention of the trial court, not simply to use those unspoken doubts to decline to sign the Certificate and refuse to tell the court and her client of her misgivings.

Elleman's belief that Zapata was incompetent to plead guilty, if presented to the trial judge, would have been entitled to judicial consideration and potentially would have triggered a reevaluation of Zapata's competence. This Court has recognized the significance of a defense attorney's opinions and assessments of the client's competence. "Although [this Court] do[es] not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, [citation omitted,] an expressed doubt in that regard by one with 'the closest contact with the defendant,' [citation omitted,] is unquestionably a factor which should be considered." *Drope v. Missouri, supra*, 420 U. S at 178.

Elleman's "silence" in this situation is "fundamentally at odds with the critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" *Padilla, supra*, 1484, quoting *Libretti v. United States*, 516 U.S. 29, 50-51(1995). Elleman's acts and

omissions in the context of Zapata's entry of his guilty plea were not the result of reasonable professional judgment and denied Zapata the effective assistance of counsel during a critical stage of his criminal proceedings. "A convicted defendant making a claim of ineffective assistance must identify *the acts or omissions of counsel* that are alleged not to have been the result of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984), quoted approvingly in *Padilla*, 1484; (emphasis added).

Zapata's counsel submitted at the trial court's request the form motion to enter a guilty plea, but intentionally refused to sign the Certificate of Counsel and deliberately never informed the judge of her failure. Elleman did this because she believed Zapata was incompetent to plead guilty, but never expressed her concerns to either the judge or Zapata, her client. By these actions and omissions Elleman abandoned Zapata prior to and during the entry of his guilty plea.

It is not as if Elleman chose silence about her view that Zapata was incompetent to plead guilty to pursue another equally reasonable strategy. Elleman did nothing with regard to her belief that Zapata was incompetent to plead guilty. She did not request a new competency hearing based on her assessments of Zapata's present incompetency. Elleman did not even attempt to seek the approval of the trial court to enter a conditional plea of guilty, appealing the trial court's ruling on Zapata's incompetence. RCr 8.09, *Conditional plea*.⁷ Actually, Elleman could have sought the new competency hearing and, if that was denied, sought the trial court's approval to appeal both the earlier competency ruling as well as the denial of a new competency hearing. Elleman did nothing

⁷ "With the approval of the court a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion. A defendant shall be allowed to withdraw such plea upon prevailing on appeal." RCr 8.09, *Conditional plea*.

despite her admitted assessment that Zapata was incompetent to plead guilty. ““The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.”” *United States v. Cronin*, 466 U.S. 648, 656 n.14 (1984), quoting *Polk County v. Dodson*, 454 U. S. 312, 318 (1981). Elleman provided no adversarial testing on the issue of Zapata’s present incompetency to plead guilty.

“[T]his Court has made clear that when deficient counsel causes the loss of an entire proceeding, it will not bend the presumption-of-prejudice rule simply because a particular defendant seems to have had poor prospects.” *Garza v. Idaho*, 139 S. Ct. 738, 747 (2019).

Elleman’s intentional refusal to inform the court of her strong view that Zapata was incompetent to plead guilty deprived Zapata of a proceeding in the form of a second competency hearing as well as the opportunity to appeal the trial court’s competency ruling despite pleading guilty. It matters not that a motion for a new competency hearing would have likely been denied or, if granted, would likely not have resulted in Zapata being found incompetent. It matters not whether the trial court would likely not have approved a conditional guilty plea on any incompetency rulings. It matters not that it may have been unlikely that a Kentucky appellate court would grant relief on any competency issues. Whether these various competency actions by Zapata’s counsel may have had poor prospects is not a legitimate factor in the equation.

“The presumption that counsel’s assistance is essential requires” the conclusion “that a trial is unfair if the accused is denied counsel at a critical stage of his trial.” *United States v. Cronin*, 466 U.S. 648, 659 (1984). The unconstitutional denial of counsel may occur even when a criminal defendant is represented by counsel. “[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes

the adversary process itself presumptively unreliable.” *Id.*

Elleman’s silence and inaction, despite her strong assessment of Zapata’s incompetence to plead guilty, both with regard to the court and her client, were not the conduct and omissions of an advocate for Zapata. “[T]he adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate.’” *Cronic*, 656, quoting *Anders v. California*, 386 U.S. 738, 743 (1967).

When this Court “spoke in *Cronic* of the possibility of presuming prejudice based on an attorney’s failure to test the prosecutor’s case,” this Court “indicated that the attorney’s failure must be complete.” *Bell v. Cone*, 535 US 685, 696-697 (2002). At Zapata’s 2015 entry of his guilty plea, Elleman’s failure to inform both the trial judge or Zapata that she believed Zapata was incompetent to enter a guilty plea constituted a *complete failure* of representation in that proceeding, a critical stage of Zapata’s criminal prosecution. Elleman during that proceeding tendered to the judge a form motion to enter a guilty plea, which she refused, admittedly silently, to sign regarding her evaluations of matters that would have demonstrated her belief that the guilty plea was knowingly, intelligently and voluntarily entered. Admittedly, Elleman answered the court’s brief and limited inquiries as to whether Zapata understood what an *Alford* plea means. Despite her belief Zapata was incompetent to plead guilty, Elleman answered that Zapata understood her explanation of the *Alford* plea. Those four brief answers are incongruous, perhaps disingenuous, with Elleman’s 2018 testimony that due to her belief Zapata was presently incompetent to plead guilty, she could not certify any of the matters listed on the Certificate of Counsel, including that she believed her client understands the prosecution’s plea offer and the motion to enter a guilty plea.

“*Cronic* applies in ‘circumstances that are so likely to prejudice the accused that the cost of

litigating their effect in a particular case is unjustified.” *Woods v. Donald*, 135 S. Ct. 1372, 1378 (2015), quoting *Cronic*, *supra*, 466 U.S., at 658. It is difficult to conceive of circumstances more likely to prejudice an accused than to allow him to plead guilty to a murder charge and a sentence of twenty-four years of imprisonment if he is incompetent to plead guilty.

“It is [this Court’s] responsibility under the Constitution to ensure that no criminal defendant — whether a citizen or not — is left to the ‘mercies of incompetent counsel.’” *Padilla*, 130 S.Ct. at 1486, quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

None of the relevant facts are in dispute. Zapata’s counsel, who represented him at the entry of his 2015 guilty plea, on remand testified at the 2018 evidentiary hearing to the relevant facts regarding her beliefs about Zapata’s competency and what she intentionally did or failed to do. Likewise, the record of the 2015 guilty plea colloquy corroborates Elleman’s 2018 testimony and documents the trial judge’s 2015 inquiries of Elleman and Zapata. Unlike many cases where certiorari is sought, no actual factual disputes can be found in this record. Instead, the record has locked in exactly what Elleman, in her role as Zapata’s counsel in the entry of his 2015 guilty plea, did or did not do and what admittedly motivated her actions and omissions at that time. Without a factual dispute, the legal issues are squarely before this Court devoid of any barriers to merit review. Thus, the crucible is set for deciding the legal issues.

The Kentucky Supreme Court acknowledged that “Zapata claims his counsel was ineffective during plea negotiations” and “asserts that Elleman essentially abandoned his representation during plea negotiations.” *Zapata* (2020), App. A, 5. The *Zapata* court reduced Zapata’s claims to, “[u]nder the facts and circumstances of the case, we decline to hold that a signed certificate was a requirement for the entry of Zapata’s guilty plea or that it indicates Elleman abandoned her client.”

Id., 8. The Kentucky Supreme Court processed all of Zapata’s claims without directly addressing Elleman’s admitted unwavering assessment that Zapata in 2015 was incompetent to plead guilty or her admittedly intentional efforts not to disclose that assessment to the trial court at the entry of Zapata’s guilty plea in 2015. This case provides an excellent vehicle for plenary review.

The 2020 *Zapata* opinion is to be published and will undoubtedly inform criminal defense counsel throughout Kentucky that a defense attorney provides competent representation when he withholds from a trial court during the entry of a guilty plea counsel’s strong belief based on the attorney-client relationship that the accused is incompetent to plead guilty. As a published opinion, appellate courts from other jurisdictions may consider this Kentucky Supreme Court opinion as a persuasive precedent on this issue.

Additionally, in sharp contrast with the *Zapata* opinion, an opinion by this Court could reinforce the requirement that a criminal defense attorney with a strong assessment that the accused is incompetent to plead guilty does not provide effective assistance of counsel or act in the role of an advocate by intentionally declining to express that assessment to the trial court conducting the plea colloquy as well as to the client.

Alternatively, should this Court decline this invitation to grant plenary review, the errors are so clear-cut that summary reversal would be an appropriate alternative. The summary reversal procedure may be used to “correct a clear misapprehension” of federal law. *Brosseau v. Haugen*, 543 U.S. 194, 198 n. 3(2004) (per curiam). As explained above, the Kentucky Supreme Court’s published opinion does not comport with a number of this Court’s well established precedents pertaining to ineffective assistance of counsel, counsel’s failure to act as an advocate, and incompetency to plead guilty or stand trial.

Summary reversal is usually reserved for cases where “the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.” *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting). This case meets that template.

These two remedies should be attractive in the context of this case because either approach would permit this Court to “correct a clear misapprehension” by the *Zapata* court of controlling federal constitutional law precedents in a vehicle where “the facts are not in dispute.”

CONCLUSION

For the above reasons, Petitioner Zapata respectfully requests that this Court should grant this petition for certiorari for plenary review of the decision of the Kentucky Supreme Court. Alternatively, should this Court decline plenary review, on the basis of those same reasons, Zapata requests that this Court summarily reverse the decision of the Supreme Court of Kentucky.

Respectfully submitted,


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