

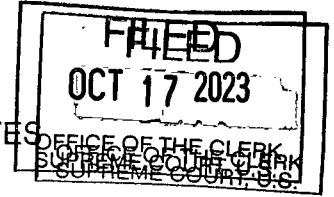
23-5973

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



Richard C. Duerson — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States' Sixth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Richard C. Duerson
(Your Name)

P.o. Box 4000
(Address)

Manchester, Kentucky 40962
(City, State, Zip Code)

n/a
(Phone Number)

QUESTION(S) PRESENTED

- 1.) Has the Supreme Court overruled United States v. Cronin, eliminating the presumption that an accused has suffered Constitutional error without the showing of prejudice, when counsel is either totally absent from, or prevented from assisting the accused during a critical stage of trial?
- 2.) Does the fact that counsel was granted an additional 30 days to meet with accused for pre-trial preparation, because they had not done so, erase the presumption of prejudice, when counsel still fails to meet with the accused in those allocated 30 days?
- 3.) Whether lower Courts should explain why the Cronin analysis does not apply when denying a defendant's "absence of counsel during a critical stage" claim under Strickland?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

5:23-cv-00020-dcr-mas

5:22-cv-00278-dcr-eba

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-9
REASONS FOR GRANTING THE WRIT	10-18
CONCLUSION.....	19

INDEX TO APPENDICES

APPENDIX A

Sixth Circuit Court of Appeals Order, August 11, 2023

APPENDIX B

Eastern District of Kentucky, February 2, 2023, Order

APPENDIX C

February 2, 2023, Report and Recommendation

APPENDIX D

Sixth Circuit Court of Appeals, September 6, 2023, denial

APPENDIX E

Statement of the Case references

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Mitchell v. Mason, 325 F.3d 732 (6th cir. 2003)	11, 16, 18
People v. Davis, 44 Cal. App 5th 564 (2020)	12
Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct 1029 145 Led. 2d 485 (2000)	12
Strickland v. Washington, 466 U.S. 688 (1984)	11, 16
United States v. Branker, 395 F.3d 113 (4th cir. 2005)	11
United States v. Cronin, 466, U.S. 648, 80 Led. 2d 657 (1984)	11, 16
United States v. Gonzalez-Lopez, 548 F.3d 719, 726 (9th cir. 2008)	11
STATUTES AND RULES	

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

[x] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[] reported at _____ (N/A) _____; or,
 [] has been designated for publication but is not yet reported; or,
 [] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[] reported at _____ (N/A) _____; or,
 [] has been designated for publication but is not yet reported; or,
 [] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court
appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 11, 2023.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 6, 2023, and a copy of the order denying rehearing appears at Appendix D.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment: 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 have the Assistance of Counsel for his Defense.

Fifth and Fourteenth Amendment- Due Process clause

Equal Protection

STATEMENT OF THE CASE

- 1.) On September 4, 2019, the petitioner was appointed Elizabeth S. Hughes as counsel under the Criminal Justice Act. Mr. Duerson was arraigned, and faced charges that carried 15 years to LIFE in Federal prison. The trial date was continued from September 30, 2019 to October 28, 2019.
- 2.) On or about October 19, 2019, the petitioner met with Atty. Hughes, less than 2 weeks to the scheduled trial date dating back to September 4, 2019. On this day, a video pertaining to an unrelated case was watched. It was an interview that served as the basis for the search of the petitioner's apartment. Unbeknownst to the petitioner, the time frame had already lapsed to file any suppression motions. No other pertinent discovery was discussed before counsel left on this day.
- 3.) On October 21, 2019, Counsel dropped off six discs of discovery, told the petitioner that she would be back in the morning, had him sign a motion to continue trial, then left. Counsel did not go to see the petitioner the next morning as she stated. The motion to continue trial is appended at Appendix E, pg. 1-4.
- 4.) On October 24, 2019, counsel, Ms. Hughes, told the petitioner that they had court the next day on the 25th and not to worry, that they will get granted a continuous, and that they will have plenty of time to discuss things. Ms Hughes then left on this day.

5.) On October 25, 2019, a motion hearing was held. Appendix E, pgs. 5-17. Counsel admitted that the petitioner had been "on his own". Counsel admitted that she needed time to meet with the petitioner to prepare for trial. Counsel admitted that she was not prepared. The court granted a 30-day continuous. Trial was now scheduled for November 25, 2019 to start.

6.) On November 24, 2019, despite due diligence to aid in pre-trial preparations, is when the petitioner next saw or heard from Ms. Hughes, dating back to the motion hearing held on October 25, 2019. On this day, counsel misled the petitioner into believing that he would win so that he would not inform the court of her prolonged absence. She told him to "trust" her. "you're in good hands", etc.

7.) On November 27, 2019, the petitioner was convicted on all counts and faced 15 years to LIFE.

8.) On February 28, 2020, the petitioner filed a Pro Se motion, Objecting to the Pre-Sentencing Report. Appendix E, pgs. 18-25. The petitioner was forced to file himself because he could not get in touch with counsel. She had made herself unavailable to him, just as she had prior to the trial.

9.) On March 5, 2020, the day before sentencing, counsel met with the petitioner. She wanted to go over the Pre-sentence Report with him. The petitioner told counsel that she had lied to him and railroaded him. He told counsel that she "popped up" the day before sentencing, just as she had done before trial and that he did not trust her, as she had asked him to "trust" her once before. Counsel filed a motion to withdraw. Appendix E, pgs. 26-27. Counsel's motion was granted. Appendix E, pg. 28

10.) On March 6, 2020, the court conducted a hearing, counsel admitted that "the issues Mr. Duerson has with me go back to before the trial, in retrospect, and his belief that I have spent insufficient time with him among other things, without divulging other items." Appendix E, pgs. 29-33.

11.) On May 22, 2020, the petitioner was sentenced to 200 months in Federal prison, with 10 years of supervised release. The petitioner was told by his appellate counsel Jason Rapp, that he could'nt argue trial counsel's absence on Direct Appeal. The conviction was affirmed on direct.

12.) On or about October 20, 2022, the petitioner filed a motion to Vacate under 28 U.S.C. 2255, Pro Se. Appendix E, pgs 34-51. The petitioner stated that he "was denied the presence of counsel during a critical stage, the pre-trial period, leading counsel to be unprepared"etc. The petitioner also stated that after the court granted counsel 30 days to meet with him and prepare

he "did not see counsel again until 11-24-19, dating back to the motion hearing held on 10-25-19" "On this day Ms. Hughes went to get the petitioner's shoe size". Told him that he would win and to "Trust" her. These facts are also corroborated by an Uncontroverted Affidavit that was filed on or about November 11, 2022. Appendix E, pgs. 52-53.

13.) On or about January 2, 2023, the petitioner filed a reply to the governments response to his motion to vacate. The petitioner quoted "The Pre-trial period is indeed a Critical Stage, the denial of counsel during which supports a **Cronic analysis**." "The court has also recognized that without pre-trial consultation with the defendant, trial counsel cannot fulfill his or her duty to investigate." The petitioner asserted that the "Present case demands the **Cronic Analysis**." Appendix E, pgs. 54-57.

14.) On February 2, 2023, A report and recommendation was filed. The Report and Recommendation avoided the discussion of Critical Stage jurisprudence, the Sixth Amendment, or Cronic. It did mention that counsel was granted a 30-day continuous. However, nothing was mentioned about counsel's absence in those 30 days. Appendix C/E, pgs. 58-59.

15.) On February 15, 2023, the petitioner filed objections to the magistrates Report and Recommendation. The petitioner again asserted that "The present case demands the "**Cronic Analysis**", Objection#20 Appended at E, pgs. 60-63.

16.) On February 27, 2023, the District court denied the petitioner's claim. Appendix B/E, pgs. 64-66. The district court stated, that petitioner's counsel Ms. "Hughes requested additional time to ensure that she could thoroughly review discovery with the defendant but as magistrate Judge Atkins correctly noted", "her request for a continuous was granted."

The district court ignores the fact that the reasons behind granting the 30-day continuous is rendered meaningless if there was no actual communication between the petitioner and counsel in those 30 days. The district court denied the claim without any discussion of *Cronic*, the Sixth Amendment, or Critical Stage jurisprudence.

17.) On or about March 22, 2023, the petitioner filed a motion for the issuance of a Certificate of Appealability. He asked "Whether Duerson recieved Ineffective Assistance of Counsel in violation of the Sixth Amendment to the United States Constitution" "Due to Counsel's absence during the Pre-trial Period." He stated, "because the evidence proves that counsel was absent and did not conduct discovery, trial strategy, answer or return calls/mail, or discuss anything pertinent to this case with Duerson, also violated her fiduciary duties in encouraging Duerson to not inform the court by way of false promises, and these facts can not be negated, the district court clearly should have used the *Cronic Analysis*."

"Reasonable jurist, at the very least would debate whether or not the *Cronic Analysis* should have been used." Appendix E, pgs 67-72.

18.) On or about April 4, 2023, the petitioner filed a reply to the government's opposition motion. Appendix E, pgs. 73-74.

The petitioner asserted, "The government glosses over Duerson's point and his actual claim. Duerson continues to assert that his counsel was absent during the pre-trial stage, because counsel was absent during the pre-trial stage, **literally**. Counsel was **literally absent**." "As stated throughout Duerson's filings, this claim demands the **Cronic Analysis**!"

19.) On August 11, 2023, the Sixth Circuit Court of Appeals denied the petitioner's claim, construing it as a simple failure "to fully investigate" "and prepare for trial" claim.

Appendix A/E pgs. 75-76. Again, no discussion of **Cronic**, the Sixth Amendment, or critical stage jurisprudence. There was no mention of counsel's absence within the granted 30 days either.

20.) On or about August 21, 2023, A petition for a panel rehearing and/or rehearing en banc was filed. Appendix E, pgs. 77-83. The petitioner argued that "the denial failed to account for the fact that despite being granted an additional 30 days, I did not have the opportunity to meet with my counsel."

21.) On September 6, 2023, A Sixth Circuit panel denied the petitioner's petition and referred the matter to all active members of the court for further proceedings on the suggestion for en banc rehearing. Appendix E/D, pg. 84

22.) On September 21, 2023, the Panel denied the petitioner's petition for rehearing en banc. Appendix D/E, pg. 85

REASONS FOR GRANTING THE PETITION

The Supreme Court of the United States should Grant certiorari because the United States Court of Appeals entered a decision that is in conflict with, not only their own circuit, their decision is in conflict with other United States Court of Appeals also. The Sixth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and they sanctioned such a departure by the Eastern District of Kentucky, as to call for an exercise of this Court's Supervisory Power. This case clearly meets the criterion of the United States Supreme Court's Rule 10 (A).

The questions presented are a matter of Constitutional Magnitude and National importance; warranting the Granting of a writ of certiorari, concerning Due Process, Equal Protection, and the Right to Counsel under the United States Constitution's Sixth Amendment.

The first question posed before the Court, "Has the Supreme Court overruled United States v. Cronin"; urges a fundamental evaluation of the lower courts' obligation to consider both the Constitutional and national importance of failing to apply the Cronin analysis when reviewing claims of Ineffective Assistance of Counsel. Specifically when counsel is absent during the Pre-trial stage, as in the present case. (see Statement of Case)

This analysis assumes paramount significance, as it determines whether a defendant's Sixth Amendment rights to Effective Counsel have been violated. Furthermore, the lower court's disregard for

this analysis has had severe consequences, circumventing justice and undermining public trust in our legal system.

The precedential case, *Strickland v. Washington*, serves as the foundational authority in assessing claims of Ineffective Assistance of Counsel. The court in *Strickland* established a two-pronged test, requiring a showing of deficient performance and resulting prejudice, to determine if a defendant received constitutionally deficient representation. However, the Chronic Analysis, borne out of *United States v. Cronin*, recognizes that certain circumstances may be so egregious that prejudice is presumed, negating the need to establish it under *Strickland*'s second prong.

In *Mitchell v. Mason* (2003), the Sixth Circuit recognized that "the right to counsel extends to representation during any 'Critical Stage' of the proceedings" and that "the Pre-trial period is indeed a critical stage, the denial of counsel during which supports a chronic analysis." The pre-trial period has been consistently recognized as a "critical stage" by several Circuit Courts, including the Ninth Circuit (*United States v. Gonzalez-Lopez*, 548 F.3d 719, 726 (9th cir. 2008)) and the Fourth Circuit (*United States v. Branker*, 395 F.3d 113 (4th cir. 2005))

The Fourth Circuit in *Branker*, held that the denial of counsel during pre-trial proceedings requires the presumption of prejudice. Likewise, the Ninth Circuit, in *Gonzalez-Lopez* affirmed that prejudice is presumed when counsel is absent during significant pre-trial proceedings. Moreover, the First Circuit in

Gonzalez-Villalonga, explicitly stated that the denial of counsel during critical pre-trial stages violate the Sixth Amendment. In *Roe v. Flores-Ortega* (2000), the Supreme Court highlighted that failure to consult with the defendant about an appeal is an error "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." By extension, this reasoning should apply to pre-trial consultation as well, as it forms the foundation of defense strategy. These cases along with various others from different circuits underscore the necessity to apply the Cronic doctrine in situations similar to that faced by the petitioner.

However, in recent years, lower courts have regrettably overlooked the Cronic Analysis in their review of Ineffective Assistance of Counsel claims. This omission hampers the ability of defendant's to vindicate their rights, particularly in cases where counsel's failures and deceptive conduct infringe explicitly upon Constitutional guarantees. This failure to address these grave Constitutional infringements undermine the integrity of our justice system and prejudices both the accused and society as a whole.

Several recent cases highlight the urgent need for this Court's intervention. For instance, in *People v. Davis* (2020), the California Court of Appeals held that a defendant must still show prejudice under the Strickland standard despite having no assigned counsel during a critical stage of the proceedings. This decision underscores the necessity of clarifying the

appropriate standard to safeguard defendants' Constitutional rights in jurisdictions across the country.

The Supreme Courts' intervention is essential to guarantee national uniformity in the application of Constitutional standards. Differing interpretations of the Strickland analysis by the lower courts undermine the coherence and consistency of our justice system, as defendants' rights should not be dependant on the jurisdiction in which they are tried, or the interpretation a particular Circuit Court chooses to employ at that moment.

The Supreme Court's Grant of Certiorari will ensure equal protection under the law for all defendants throughout the United States, thereby preserving the integrity of our justice system.

2. The Eastern District of Kentucky and the United States Court of Appeals for the Sixth Circuit, harp on the fact that a continuance was given in the present case. It is undeniable that the District Court granted a 30-day continuance for pre-trial consultation between the petitioner and his counsel, as evidenced by the record. However, the unfortunate reality is that despite this extension, the petitioner was unable to consult with his counsel during this critical stage. This crucial point has been consistently raised in all of the petitioner's pleadings, which both lower courts have regrettably overlooked. The fact is, the district court's decision to grant the continuance, based on the assumption that there would be ample opportunity for consultation, is rendered meaningless if there was no communication between the petitioner and his attorney during that period. This was undeniably

a **critical stage** of the trial process. The attorney's failure to meet with the petitioner, deprived the latter of meaningful participation and engagement in his own defense, undermining the fundamental fairness of the proceedings.

By invoking the **Cronic Analysis**, the Court would affirm it's commitment to preserving the integrity of our criminal justice system. Ensuring that defendants' have meaningful access to their attorneys is essential, as it upholds the principles of Due Process, safeguards against wrongful convictions, and maintains public confidence in our legal system. In light of the circumstances presented in this case, the invocation of the **Cronic Analysis** is not only appropriate, but is necessary to rectify the deficiencies in the defendant's legal representation.

The outcome of this case holds immense national importance due to the far-reaching implications it has for individuals' Constitutional rights to Due Process and Effective Assistance of Counsel.

The right to counsel is not merely a Constitutional formality but it is deeply intertwined with the fair and equal application of justice. Denying defendants the assistance of counsel inevitably leads to an imbalance of power, undermines public confidence in the legal system, and erodes the principles of justice that the United States was founded on.

Ensuring that defendants have access to competent legal representation at every stage of the criminal proceedings, including the pre-trial stage, is not only a Constitutional imperative, but also a means to uphold the integrity of our criminal justice

system. Granting a Writ of Certiorari in this case would allow the Supreme Court to resolve the conflict and provide nationwide guidance on this critical issue, thereby safeguarding the Constitutional rights of individuals facing criminal charges.

In light of the Constitutional significance, relevant case law, and it's national importance, it is requested that the Supreme Court of the United States grant a writ of certiorari to address the vital question of, "Does the fact that counsel was granted an additional 30 days to meet with an accused for pre-trial preparation because they had not done so, erase the presumption of prejudice, when counsel still fails to meet with the accused in those allocated 30 days?"

3. The petitioner's claim was denied by the Eastern District of Kentucky and the United States Court of Appeals for the Sixth Circuit without an evidentiary hearing, without any discussion of Croni⁶, the Sixth Amendment, or critical stage jurisprudence, despite the petitioner's **constant** mentioning of "Cronic" and "Critical Stage". This highlights the national and constitutional significance of granting a writ to address the question of whether lower court's should explain why the Cronic Analysis does not apply when denying a defendant's "absence of counsel during a critical stage" claim under Strickland. This issue strikes at the heart of a defendant's fundamental right to counsel and

fair proceedings, necessitating clarification to ensure uniformity and consistency in the administration of justice.

Resolving this question is of national importance because it affects the rights of defendants across the country. The right to Counsel is enshrined in the Sixth Amendment, and any potential infringement on this right compromises the integrity and fairness of our legal system. By granting a writ to determine whether lower courts must provide an explanation for rejecting the Cronic Analysis, the Supreme Court would be serving the national interest in upholding the rights of defendants and ensuring equal access to justice.

Furthermore, this issue has Constitutional implications tied to the fair administration of justice. The Supreme Court has recognized in *Strickland v. Washington* (1984), that a defendant's claim of Ineffective Assistance of Counsel requires a showing of both deficient performance and resulting prejudice. However, the Court also held in *United States v. Cronic* (1984), that certain circumstances may be so critical that prejudice can be presumed without the need for a showing of prejudice. This exception applies to situations where counsel is completely absent during a critical stage of proceedings.

The lower courts currently seem divided on whether they are required to explicitly explain why the Cronic Analysis does not apply when denying an "absence of counsel during a critical stage" claim under *Strickland*. Some courts find it unnecessary while others provide detailed explanations. Given the potential

for inconsistent rulings, this lack of uniformity hampers the ability of both defendants and courts to understand the legal standards guiding these claims. Consequently, granting a writ would serve to establish a clear standard, enhancing judicial efficiency and fairness by fostering predictability and consistent application nationwide.

A recent example highlighting the need for clarification, aside from the present case, is illustrated in *State v. Johnson* (2020), where a lower court denied the defendant's "absence of counsel during a critical stage" claim without providing any explanation for why the Cronic analysis did not apply. Without clear guidance, defendants are left uncertain about the legal requirements, leading to confusion and unequal treatment. Addressing this issue would provide necessary guidance and ensure that defendants' Constitutional rights are zealously protected in a manner consistent with the principles of Due Process and Equal Protection.

The Supreme Court should grant a writ because the petitioner has stated in all pleadings that he did not see his counsel in the 30 days that the court granted for his counsel to meet with him. Not only that, his attorney violated her fiduciary duties to him in misleading him into staying silent by way of false promises, the day before trial was to start. The petitioner's allegations are uncontroverted, no evidentiary hearing was granted as these facts can not be negated, and millions of indigent

defendants across the United States are done the same way as the petitioner in this case. The petitioner's voice has been silenced by both lower courts, as they have consistently side-stepped the petitioner's assertion, that he never met with his counsel. The Supreme Court's intervention is needed to help put an end, and discourage, both, appointed attorney's and lower courts of these kinds of actions.

The Sixth Circuit in Mitchell v. Masbn stated that "The Pre-trial Period constitutes a 'critical period' because it encompasses counsel's constitutionally imposed duty to investigate the case. In Strickland, the United States Supreme Court has explicitly found that trial counsel has a duty to investigate and that to discharge that duty, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. THE COURT HAS ALSO RECOGNIZED THAT WITHOUT PRE-TRIAL CONSULTATION WITH THE DEFENDANT TRIAL COUNSEL CANNOT FULFILL HIS OR HER DUTY TO INVESTIGATE"

The petitioner is in the Sixth Circuit also. The petitioner was denied pre-trial consultation also. However, the petitioner was denied because the lower courts stated that prejudice wasn't proven. The petitioner asks that the Supreme Court grant a writ of certiorari to eliminate this injustice and also other injustices just like this one that occurs everyday with indigent and pro se litigants across this nation. Thank you for your time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Richard O. Jensen

Date: October 16, 2023