No. _____

In the Supreme Court of the United States

JEFFREY WOODS, PETITIONER

v.

CORY DONALD

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Michigan courts' decision not to extend *Cronic* to cover counsel's brief absence from trial was an "extreme malfunction" entitling the petitioner to habeas relief.

2. Whether the Michigan courts reasonably determined that Donald had not shown *Strickland* prejudice flowing from his counsel's brief absence in a multi-defendant case during the taking of evidence that did not inculpate his client.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Jeffrey Woods, warden of a Michigan correctional facility. The respondent is Cory Donald, an inmate. In the proceedings below, the habeas respondent was Lloyd Rapelje. Woods is Donald's current warden.

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The opinion of the Sixth Circuit Court of Appeals, App. 1a–25a, is reported sub nom. *Donald* v. *Rapelje*, at — F. App'x — (6th Cir. 2014), and is available at 2014 WL 4211202. The opinion of the district court granting habeas relief, App. 26a–57a, is not reported, but is available at 2012 WL 6047130. The order of the Michigan Supreme Court denying leave to appeal, App. 58a, is reported at 756 N.W.2d 87 (Mich. 2008). The opinion of the Michigan Court of Appeals affirming Donald's convictions, App. 59a–74a, is not reported, but is available at 2008 WL 1061551.

JURISDICTION

The Sixth Circuit's opinion was entered on August 26, 2014. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq.*), provides in part:

(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

This Court has never held that the taking of evidence relating only to *other* defendants in a multiple-defendant trial constitutes a critical stage of a defendant's trial. But here, the Sixth Circuit treated a ten-minute absence by Cory Donald's counsel during the taking of evidence that linked other defendants to each other as a violation of *United States* v. *Cronic*, 466 U.S. 648 (1984). Because the Sixth Circuit had to extend the rationale of *Cronic* before it could apply it to the facts of this case, "by definition the rationale was not 'clearly established at the time of the state-court decision.' " *White* v. *Woodall,* 134 S. Ct. 1697, 1706 (2014).

Thirty years ago, this Court held that a criminal defendant seeking to show that his counsel was ineffective was generally required to show that the deficiency had some effect on the reliability of the trial, except under certain extraordinary circumstances. *Cronic*, 466 U.S. at 658–59. Among those circumstances is the complete denial of counsel at a critical stage of his trial. This Court did not, at that time or at any time since, provide a comprehensive definition of what constitutes a "critical stage," although it has, in subsequent cases, answered the question as to particular proceedings.

Here, the Sixth Circuit decided to do what this Court has not done—extend *Cronic* to a situation where counsel is briefly absent during a multi-defendant trial. Donald was one of three defendants jointly tried for the robbery and murder of Mohammed Makki. During trial, the prosecution sought to admit evidence that connected the other

two defendants to each other and to two other co-conspirators. None of it inculpated Donald, and in fact Donald never contested that the other four men were working together in a conspiracy to rob Makki, or that they did in fact rob and kill Makki.

For a mere ten minutes of this testimony—testimony that never once mentioned Donald—Donald's counsel was absent from the courtroom. After Donald's counsel returned, the trial court told him what testimony he had missed, and he told the court, in front of the jury, that he "had no dog in the race and no interest in that."

The Michigan Court of Appeals held that this scenario does not fall under *Cronic*'s presumption of prejudice, and that Donald was not entitled to relief because he could not demonstrate prejudice. The Michigan court cited an Eleventh Circuit case with similar facts, and the Michigan court's holding was consistent with the holdings of several other courts of appeals, including the Sixth Circuit. Then, applying *Strickland* v. *Washington*, 466 U.S. 668 (1984), the court found that Donald suffered no prejudice.

Although the Sixth Circuit was unable to identify a decision of this Court holding that any brief portion of evidence-taking at trial is per se a "critical stage" triggering a presumption of prejudice—let alone one holding that evidence-taking concerning other defendants at a multi-defendant trial is—it nonetheless held that the Michigan Court of Appeals' decision was an unreasonable application of *Cronic*, and that Donald was entitled to habeas relief.

This Court should grant certiorari and reverse.

STATEMENT OF THE CASE

A. Donald and several others conspire to rob Mohammed Makki, who is shot and killed.

One November night Seante Liggins, Rashad Moore, Dewayne Saine, and Cory Donald planned a robbery. Moore drove the other three to a Detroit store to meet with Fawzi Zaya. 9/20/06 Trial Tr. at 142. Moore, Saine, Liggins, and Zaya sat in a van drinking and smoking and discussing "hitting a lick on"—i.e., robbing—Mohammed "Mike" Makki. *Id.* at 144–46. Moore, Saine, and Liggins finished their conversation with Zaya and then went with Donald to a vacant house they frequented. *Id.* at 147–49, 157–58. Moore spoke on his phone a bit, then told the others that it was "about that time." *Id.* at 159, 161. Saine and Donald went behind the vacant house, and when they returned, Donald appeared to be situating a gun on his hip. *Id.* at 161–63. Liggins, Moore, and Donald got into a car—Liggins drove, and Moore directed him to an address in the Detroit suburb of Dearborn. *Id.* at 163–65. All three wore black skull caps and black coats. *Id.* at 165. When they arrived, Donald and Moore went inside, while Liggins waited in the car. *Id.* at 165, 167.

The house belonged to Makki. Michael McGinnis, a friend of Makki, was there at the time. 9/19/06 Trial Tr. at 150. Makki was about to leave for work when a masked man came in with a gun. *Id.* at 154. McGinnis lay face-down on the floor with his hands on his head, but was able to hear and feel what happened. *Id.* at 155–56. First, he heard "like a scuffling, like, two people, kind of like, you know, feet

moving around." *Id.* at 156. Then someone other than Makki said, "[L]et it go, let it go." *Id.* Then, there were two shots. *Id.* at 157.

McGinnis then felt someone rifling through his pockets, saying, "[W]hat you got, what you got." 9/19/06 Trial Tr. at 157. He felt a gun to the back of his head. *Id.* He knew there were two people, because they were talking to each other, and because he could hear one of them going to the basement while he could still feel the other standing over him. *Id.* One of the men whispered to the other, "I got shot, I got shot." *Id.* at 158. The men then left. *Id.*

McGinnis counted to thirty before lifting his head. 9/19/06 Trial Tr. at 158. He then went to the kitchen to find Makki lying on the floor, slumped against the refrigerator, gasping for air. *Id.* Before he died, Makki told McGinnis, "[A]ll this shit don't mean nothing if you're not here to enjoy it." *Id.* at 159. McGinnis then ran to the home next-door, banged on the door, and asked the neighbor to call the police.

In the meantime, Donald and Moore ran back to the car, and Donald told Liggins that Moore had shot him. 9/20/06 Trial Tr. at 168. Liggins saw that both Donald and Moore had handguns. *Id.* at 169. Moore and Donald discussed how much they had stolen—Donald said they got $320, and Moore wanted to go back for more. *Id.* at 170.

The three then met up with Saine. 9/20/06 Trial Tr. at 171–72. Donald got out of the car and into Saine's car. *Id.* at 172–73. Liggins and Moore drove away, and the police arrested them later that night.

Id. at 173–75. Donald checked into the hospital that night. 9/21/06 Trial Tr. at 83–85.

B. The jury hears evidence that does not inculpate Donald for ten minutes in the absence of Donald's counsel.

Donald was charged with one count of first-degree felony murder, Mich. Comp. Laws § 750.316(b) and two counts of armed robbery, § 750.529. Moore and Saine were also charged with felony-murder and various predicate crimes. Liggins and Zaya pleaded guilty to second-degree murder.

Moore, Saine, and Donald were tried together. Two juries were impaneled, Jury 1 for Donald and Saine, and Jury 2 for Moore. On the fourth day of trial, the prosecution sought to admit a chart that compiled telephone records of calls between the cell phones of Moore, Saine, and Zaya. Outside the presence of the juries, Moore and Saine's counsel objected, but Donald's counsel Richard Cunningham declined to object, saying, "I don't have a dog in this race. It doesn't affect me at all." App. 76a–77a. The court ruled that the exhibit was admissible, and then ordered a recess of "about five minutes." App. 77a.

About 23 minutes later, the court went back on the record, and two minutes after that, the juries were brought in. App. 77a–78a. Before resuming testimony, the court said, "Mr. Cunningham stepped away. We'll wait for him. I didn't realize he was not there, so he should be here momentarily." App. 78a. The court then asked the prosecutor if she was going to present the chart that was discussed before the recess, and she said, "Yes, sir." App. 78a. The court

said, "I think that since we already know Mr. Cunningham, it doesn't apply to his client, we'll go ahead and proceed with that and I'll just let him know that that's what we're doing, okay, all right. So if we['re] just talking about that particular matter we have before we had the break, let's go ahead and get it done." App. 78a–79a. The chart was admitted. App. 79a. Ten minutes later, while the witness was being cross-examined, Cunningham walked back into the courtroom. App. 90a.

After cross-examination, and as the prosecutor was beginning redirect, the trial court interjected, "Just for the record here, note Mr. Cunningham is now here, and up until that point we only were discussing the telephone chart that was there, Mr. Cunningham." App. 93a. Cunningham replied, "Yes, your Honor, and as I had indicated on the record, I had no dog in the race and no interest in that." App. 93a. The court added, "I just wanted to have the record reflect that. Okay. Move on." App. 93a.

C. Donald is convicted and unsuccessfully seeks relief in Michigan's appellate courts.

Jury 1 found Donald guilty of one count of first-degree felony murder and two counts of armed robbery. Donald appealed, claiming he was denied the effective assistance of counsel by his attorney's brief absence from trial. Specifically, he argued that he was completely denied counsel at a critical stage of proceedings, and was therefore entitled to relief without a showing of prejudice under *Cronic*.

The Michigan Court of Appeals rejected the argument and held, in relevant part:

> A critical stage is one that holds "significant consequences for the accused." *Bell v Cone,* 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002). In this case, defendant Donald's attorney was absent for a brief portion of the trial during which evidence of telephone records was received. None of the telephone calls were linked to defendant Donald, however, and the telephone record evidence did not directly implicate defendant Donald in the charged crimes. Both before and after the evidence was introduced, defendant Donald's attorney remarked that the evidence did not concern defendant Donald. Under these circumstances, we cannot conclude that defense counsel was absent during a critical stage of the trial. See *Vines v United States,* 28 F3d 1123, 1125–1127 (CA 11, 1994) (declining to hold that counsel was absent during a critical stage of trial within the meaning of *Cronic* where no evidence directly inculpating the defendant was presented while that defendant's counsel was absent). Therefore, defendant Donald is not entitled to a presumption of prejudice arising from counsel's absence. [App. 62a–63a.]

The Michigan Court of Appeals went on to address the claim under the general ineffective assistance of counsel standard found in *Strickland*. The court held that Donald failed to establish

prejudice under *Strickland* and was not entitled to relief. App. 63a.

Donald sought leave to appeal to the Michigan Supreme Court, which that Court denied because it was "not persuaded that the question presented should be reviewed by" it. App. 58a.

D. The district court grants habeas relief, and a divided Sixth Circuit panel affirms.

Donald then filed a petition for habeas relief in the United States District Court for the Eastern District of Michigan. That court held that the Michigan Court of Appeals erred in not applying *Cronic* to Donald's claim, and that this error constituted an "*extreme malfunction*" and therefore "an unreasonable application of clearly established federal law[.]"App. 47a, 51a (quoting *Harrington* v. *Richter*, 562 U.S. 86 (2011)). The district court went on to analyze the claim under *Strickland* and held, in the alternative, that Donald was entitled to relief under that standard as well. Pet App. 51a–56a.

The State appealed, and the Sixth Circuit panel affirmed. The majority held that that the state court's decision was contrary to clearly established federal law regarding what constitutes a "critical stage" for *Cronic* purposes, App. 3a, 12a–17a, and that the Michigan Court of Appeals unreasonably applied *Cronic* in declining to apply it to Donald's claim, App. 3a, 18a–19a. In dissent, Judge Batchelder noted that the Sixth Circuit had earlier determined that there was no clearly established federal law holding that counsel's absence during an

insubstantial portion of trial constituted a deprivation of counsel under *Cronic*. App. 21a–25a, citing *Muniz* v. *Smith*, 647 F.3d 619 (6th Cir. 2011). The Sixth Circuit granted the State's motion to stay the mandate pending its petition for writ of certiorari in this Court.

REASONS FOR GRANTING THE PETITION

I. No clearly established federal law requires a state court to apply *Cronic*, rather than *Strickland*, to a claim concerning defense counsel's brief absence from the courtroom in a multi-defendant trial.

The majority below held that the state court's application of *Strickland* to Donald's claim constituted both an unreasonable application of *Cronic* and was contrary to clearly established federal law. Both of these views are erroneous, as there is no clearly established federal law requiring a state court to apply *Cronic* to these facts.

A. The majority below erred in holding that the state court unreasonably applied clearly established federal law.

It is uncontested that AEDPA governs Donald's habeas petition, and that the state court adjudicated his claim on the merits, requiring Donald to establish entitlement to relief under the difficult standard of 28 U.S.C. § 2254(d). And Donald has never contended that he is entitled to relief under § 2254(d)(2), which addresses unreasonable factual determinations. For these reasons, the sole question presented is whether Donald has shown, under § 2254(d)(1), that the state court's adjudication of the

claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court.

The majority below held that Donald had shown entitlement to relief under the "unreasonable application" prong. "A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision involving an unreasonable application of clearly established federal law." *Williams* v. *Taylor*, 529 U.S. 362, 407–08 (2000) (quotation marks and alterations omitted). But § 2254(d)(1) "does not require state courts to *extend* [Supreme Court] precedent or license federal courts to treat the failure to do so as error." *White*, 134 S. Ct. at 1706.

"[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658. For that reason, this Court has held that, in a typical ineffective-assistance claim, "the burden rests on the accused to demonstrate a constitutional violation." *Id.* But this Court has recognized a small number of "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.*

The courts below accepted Donald's argument that his claim fell within the first of these circumstances: "the complete denial of counsel." *Cronic*, 466 U.S. at 659. "[A] trial is unfair if the accused is denied counsel at a critical stage of his

trial." *Id.* The Sixth Circuit identified the pivotal question as "simply whether at the time of the state court decision the holdings of the Supreme Court clearly established that the taking of evidence during trial, where that evidence inculpates the defendant, is a critical stage of the trial." App. 15a.

As the lower federal courts have recognized, this Court has not, since *Cronic*, laid down "a comprehensive and final one-line definition of 'critical stage.' " *Van* v. *Jones*, 475 F.3d 292, 312 (6th Cir. 2007); see also *United States* v. *Russell*, 205 F.3d 768, 771 (2000) ("Since *Cronic* was announced, various Courts of Appeals have struggled to define the 'critical' stages of trial during which the absence of counsel creates a presumption of prejudice.") (collecting cases). As the District of Minnesota has noted, "[*a*]*ny* approach that *any* court takes will necessarily conflict with numerous judicial decisions." *United States* v. *Sweeney*, 2013 WL 1346123, *4 (D. Minn. April 3, 2013), aff'd 766 F.3d 857 (8th Cir. 2014). Importantly, no decision of this Court has held that a claim of absence of counsel during a brief portion of evidence-taking at trial, particularly during a multi-defendant trial, must be examined under the *Cronic* standard.

The Michigan Court of Appeals cited *Vines* v. *United States*, 28 F.3d 1123 (11th Cir. 1994), in support of its decision not to apply *Cronic* to Donald's claim. In *Vines*, two defendants were tried together for possession of cocaine with intent to distribute and conspiracy to possess cocaine with intent to distribute. *Id.* at 1125. For reasons not mentioned in the opinion, Vines' counsel was excused early during

the first day of trial. *Id.* Neither witness who testified during Vines' counsel's absence testified directly as to Vines or his culpability. *Id.* at 1126.

The Eleventh Circuit rejected Vines' argument that, "under *Cronic* the taking of evidence is a critical stage of trial per se." 28 F.3d at 1128 ("we decline to give birth to a rule that the taking of evidence is necessarily a critical stage of trial."). Rather, the court held that, where "no evidence directly inculpating a defendant is presented while that defendant's counsel is absent, we decline to hold that counsel was absent during a critical stage of trial within the meaning of *Cronic*." *Id.*

The Sixth Circuit did not address *Vines*. The district court attempted to distinguish *Vines* by pointing out that Vines consented to his counsel's absence, while Donald did not. In so doing, the district court misstated the Eleventh Circuit's holding. Although Vines did consent to his counsel's absence, 28 F.3d at 1126 n. 3, that fact played no part in the Eleventh Circuit's analysis, and has no relevance to the question whether evidence taking is a per se "critical stage" under *Cronic*.

Vines is no outlier, especially in multiple-defendant cases like this one. The Third Circuit has upheld as reasonable the New Jersey Superior Court's decision not to apply *Cronic*'s presumption of prejudice to counsel's temporary absence during evidence-taking. *Scherzer* v. *Ortiz*, 111 F. App'x 78, 84–85 (3d Cir. 2004) (panel including Alito, J.). The Tenth Circuit has followed *Vines* and declined to find *Cronic* error where counsel was briefly absent while codefendant's counsel was cross-examining a

prosecution witness. *United States* v. *Evans*, 62 F. App'x 229 (10th Cir.), cert. den. 540 U.S. 1012 (2003). The Eighth Circuit has declined to apply *Cronic* to a case in which counsel left to go to the bathroom during direct examination of a government witness, and was absent for six pages of trial transcript. *Sweeney* v. *United States*, 766 F.3d 857, 860–62 (8th Cir. 2014). (In comparison, the ten minutes of testimony taken during the absence of Donald's counsel spans only a few more pages—about eleven in total. 9/21/06 Trial Tr. at 69–80.)

Courts have also declined to automatically apply *Cronic* in "sleeping-counsel" cases. "[U]nconscious or sleeping counsel is equivalent to no counsel at all." *Javor* v. *United States*, 724 F.2d 831, 834 (9th Cir. 1984). But courts have only applied a presumption of prejudice when they have found that counsel has slept through a "substantial" portion of trial. *Id.* at 833; *Muniz*, 647 F.3d at 623; *Tippins* v. *Walker*, 77 F.3d 682, 686 (2d Cir. 1996) ("Ordinarily, episodes of inattention or slumber are perfectly amenable to analysis under the *Strickland* prejudice test."); *Berryman* v. *Wong*, 2010 WL 289181, *6–7 (E.D. Cal. 2010) (applying *Strickland* where it appeared counsel only slept briefly during trial).

Even in cases with only a single defendant, courts have not consistently applied *Cronic* to the taking of testimony at trial. In *Muniz*, counsel fell asleep while the prosecutor was cross-examining his client. 647 F.3d at 621. The Michigan court applied *Strickland*, not *Cronic*, to the claim, and the Sixth Circuit denied habeas relief, holding that the Michigan court was not only reasonable, but correct,

in light of Muniz' failure to show that his counsel slept for "a substantial portion of his trial." *Id.* at 623–24.

To be sure, the courts have not been unanimous. In *Russell*, the Fifth Circuit held that, where the defendants were charged with conspiracy, counsel's absence during the taking of evidence inculpating the defendant's co-conspirators was *Cronic* error, because, "[t]o the extent that the government continued to build its case of conspiracy, even if against other co-conspirators, this inferentially increased the taint of guilt of Russell." 205 F.3d at 772. But Donald was not charged with conspiracy. In *Green* v. *Arn*, the Sixth Circuit held that "[t]he absence of counsel during the taking of evidence on the defendant's guilt is prejudicial per se and justifies an automatic grant of the writ without any opportunity for a harmless error inquiry. 809 F.2d 1257, 1263 (6th Cir.), vacated on other grounds 484 U.S. 806 (1987), reinstated 839 F.2d 300 (6th Cir. 1988).

But these opinions demonstrate the very core of the Sixth Circuit's error in this case. Indeed, the opinions demonstrate that the question of where to draw the line is a question on which reasonable jurists can differ—and have differed. As courts engage in honest efforts to determine which standard applies to a particular claim, comity and federalism are disserved when an intermediate federal court tars a state court with a finding of "extreme malfunction" merely because the federal court and the state court reached different reasonable conclusions about a point of law.

In a word, the majority *extended Cronic* to cover the facts in this case, and then faulted the state court for failing to do so. Whether such an extension would have been reasonable—or even correct—in a case on direct review does not alleviate the majority's error in granting habeas relief. Cf. *White*, 134 S. Ct. at 1707 ("Perhaps the next logical step . . . would be to hold [as the Sixth Circuit held]; perhaps not. Either way, we have not yet taken that step, and there are reasonable arguments on both sides—which is all [the State] needs to prevail in this AEDPA case.").

This is not to say that the State condones the trial court's resumption of proceedings without Donald's counsel. The court should have waited before resuming testimony. But the question here is only about whether it was reasonable for the state appellate court to consider whether the trial court's actions denied Donald his right to a fair trial before granting him a new trial.

Because no holding of this Court requires the state courts to treat counsel's ten-minute absence during testimony as *Cronic* error, the Sixth Circuit misapplied AEDPA when it granted habeas relief. This Court should grant certiorari and reverse.

B. The state court's decision was not contrary to any clearly established federal law.

A decision is "contrary to" clearly established federal law when "the state court applies a rule that contradicts the governing law set forth in" Supreme Court cases, or when "the state court confronts a set

of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a different result . . . ." *Williams* v. *Taylor*, 529 U.S. 362, 405–06 (2000).

The Sixth Circuit's lead opinion held that the Michigan Court of Appeals' application of *Strickland* to Donald's claim was contrary to clearly established federal law. But the opinion did not identify any decision of this Court that holds that any portion of trial—however short and whatever happens during it—necessarily constitutes a "critical stage" of the proceedings. Instead, the court's analysis consisted of looking at decisions of this Court establishing that *other* portions of criminal proceedings are critical stages, and then extending the reasoning employed in those decisions to cover the taking of testimony at trial. App. 16a (concluding that taking testimony was "similar to" events that this Court had held to be critical stages and "unlike" events this Court had held were not critical stages).

This misapplication of the "contrary to" clause is precisely the approach this Court disapproved in *Williams*. In an opinion in that case, Justice Stevens, writing for himself and three other justices, advanced the view that the "contrary to" clause could be satisfied by "a finding that the state-court 'decision' is simply 'erroneous' or wrong." 529 U.S. at 389 (opinion of Stevens, J.). This Court rejected that interpretation, in part because it would "ensure[ ] that the 'unreasonable application' clause will have no independent meaning." *Id.* at 407.

Because no comprehensive definition or governing case exists, Judge Moore engaged in an

analysis of *Cronic* and other cases of this Court in order to reach the conclusion that any portion of evidence-taking constitutes a critical stage. Her opinion relied in large part on dicta from this Court's decision in *Bell* v. *Cone*, expressing the view that a "critical stage" is one "that held significant consequences for the accused." 535 U.S. 685, 696 (2002). Like the erroneous unreasonable-application analysis, this was simply extending *Cronic* to these facts, followed by a criticism of the state court for not similarly extending *Cronic*.

But AEDPA does not allow a federal court to extend this Court's holding to a particular set of facts, and then grant habeas relief based on a state court's decision not to do so. The lead opinion is in error, and Donald is not entitled to habeas relief.

II. The state court reasonably concluded that Donald had failed to show prejudice flowing from his counsel's brief absence.

The Sixth Circuit did not consider, in the alternative, whether Donald was entitled to relief under the *Strickland* standard governing ordinary claims of ineffective assistance of trial counsel. But considering *Strickland*'s prejudice prong confirms why it does not make sense to presume prejudice here.

The Michigan Court of Appeals, reasonably holding that ten minutes of evidence-taking that did not directly inculpate Donald was not a "critical stage" for *Cronic* purposes, chose instead to analyze the claim under *Strickland*'s standard. App. 62a–63a. The court's holding that Donald failed to show

prejudice was reasonable, in light of the fact that Donald's trial theory was completely consistent with the evidence presented during counsel's absence. Counsel embraced the prosecution's theory that there was a conspiracy to rob Makki, that Moore, Liggins, and Saine were part of the conspiracy, and that they carried out the robbery, killing Makki in the process. The only place where Donald and the prosecution parted ways was in Donald's involvement.

The evidence adduced in counsel's absence did nothing to establish Donald's role in the robbery or in Makki's killing. This is why, both before the evidence was adduced and afterwards, counsel told the court that he was unconcerned by it—that he had "no dog in the race." 9/21/06 Trial Tr. at 67, 83.

The district court held that there was prejudice because Donald was being tried on an aiding and abetting theory, and "[t]he phone-call evidence was pivotal in linking all defendants together." App. 54a. But this misreads the evidence—the testimony taken in counsel's absence did nothing to tie Donald to the other defendants or to the crime—it simply tied the other defendants *to each other*. The district court held that Donald's "defense, that he was 'merely present' during the incident, was being challenged." App. 55a. It was not. In fact, the phone call testimony was equally consistent with Donald's theory of defense and with the prosecution's theory. In other words, Donald had a choice for his defense: he could have argued that none of them committed the crime, or he could contend that even if the other defendants did commit the crime, he did nothing to

aid or abet them. It was not unreasonable to take the latter course.

The district court went on to say that "[c]ounsel missed his opportunity to cross examine Detective Marcetti regarding his client's association in the criminal enterprise. Had he been present, counsel could have objected to some of the testimony, and if overruled, could have requested a limited [sic] instruction as to [Donald]." App. 55a. At *best*, this is pure speculation. The district court does not suggest what additional cross-examination counsel might have done, and the record suggests there would have been no cross-examination about the phone call records. As counsel said twice on the record, the testimony did not affect him; he was not interested in it. The district court also does not suggest which question or answer counsel might have objected to had he been present, or what the basis of the objection might have been, whether it might have been meritorious. Nor does the district court indicate what limiting instruction might have been requested and why.

Further, if counsel had objected, he would have directly undermined himself in the eyes of the jury. Counsel said he was not interested in the testimony, but an objection would have signaled the opposite.

In sum, nothing about Donald's trial would have been different if his counsel had been present during that ten minutes of testimony. It is not reasonable to think that his counsel would have raised any objections or cross-examined the witness at all about the phone call testimony. Because he cannot show

prejudice to the outcome of trial, his claim fails under *Strickland*, as the state court reasonably held.

Certiorari is warranted.

CONCLUSION

The petition for writ of certiorari should be granted and summarily reversed.

Respectfully submitted,

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