No. 14 – 618
In the Supreme Court of the United States

JEFFREY WOODS, WARDEN, Petitioner

v.

CORY DONALD, Respondent

_____/

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether this Court should take the extraordinary step of peremptory reversal of a habeas grant, and affirmance, where counsel was absent during a portion of the prosecution's case-in-chief in a homicide trial when inculpatory evidence was admitted against the defendant and where the Petitioner highlights no salient dispute of law under *U.S. v. Cronic*, 466 U.S. 648 (1984)?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED

Page

FEDERAL CASES

STATUTES

CONSTITUTION

OPINION BELOW

The opinion of the U.S. Court of Appeals (Pet. App. 1a – 25a) is unreported, and can be found at *Donald v. Rapelje*, 580 Fed. App'x. 277 (6th Cir. 2014).

INTRODUCTION

Cory Donald's attorney missed about fifteen minutes of the prosecution's case-in-chief at his trial for felony murder. He simply was not in the courtroom, and his absence was obvious to everyone. The judge allowed Detective-Sergeant Gary Marcetti to testify about phone calls between the accused defendants on the day of the murder. Marcetti's testimony was inculpatory, as the prosecution relied on those phone calls to link Mr. Donald to his adult co-defendants and tie them all more closely to the planning and commission of the crime. But Donald's attorney flat missed the testimony. He just wasn't there, and Donald was left without counsel during a critical stage under *U.S. v. Cronic*, 466 U.S. 648 (1984). The U.S. District Court granted habeas relief under *Cronic* and the U.S. Court of Appeals affirmed.

This is a fact-bound dispute about whether the testimony presented while Donald's attorney was absent from the courtroom tended to show Donald's guilt. If it did, then *Cronic* clearly applies. No stage of a trial could be more critical than the moment at which inculpatory evidence is presented during the state's case-in-chief, and no federal court has suggested otherwise. Indeed, it follows straightforwardly from what the court said in *Cronic* and the related line of cases. If habeas was improperly granted below, it could only be because both federal courts were mistaken to think the relevant evidence – called "critical" by the State in closing argument – was inculpatory. This Court does not engage in case specific error correction, and there is no reason for it to depart from that practice here. Indeed, it is clear on the face of the

record that there was no mistake—Donald's attorney was absent during a critical stage of criminal proceedings – testimony of a lead detective during the prosecution's case-in-chief that was used to inculpate Donald. The District Court, and the Court of Appeals that reviewed the decision, were right to grant the writ. This Court should deny the State's Petition for Certiorari.

STATEMENT OF THE CASE

1. Cory Donald's trial

Donald, who was 16 years old at the time of the offense, was charged with one count of first-degree felony murder, Mich. Comp. Laws § 750.426(b) and two counts of armed robbery, MCL § 750.529. Two adult co-defendants, Rashad Moore and Dewaine Saine, were also charged with felony-murder and various predicate crimes. Seante Liggins, another adult participant, was also facing mandatory life without parole, but pleaded guilty to second-degree murder and was sentence to 10-20 years in exchange for his testimony against the other defendants. The purported mastermind of the offense, Fawzi Zaya fled the jurisdiction, and later pled guilty to second-degree murder for a 13-30 year sentence.

Donald was tried at the same time as Moore and Saine. Saine and Donald shared a jury; Moore had a separate jury. The prosecution's theory at trial was that Zaya, Moore, Liggins, Saine, and Donald planned to rob Mohammed Makki, and that Moore and Donald entered the house where the robbery and murder occurred. Although Moore was the one who shot Makki, the prosecution argued that Donald was also guilty of first-degree murder under an aiding and abetting theory. 09/25/06, Trial Tr. at 144 – 150; (prosecution's closing argument in which

asserts that Donald guilty under an aiding and abetting theory); 09/26/06, Trial Tr. at 18 - 24 (jury instructions explaining aiding and abetting theory).

The prosecution's case against Donald, presented to his jury, hung on three things: the testimony of Liggins, a participant in the crime, the testimony of Michael McGinnis, a drug runner present during the offense who, according to his testimony at trial, was only able to hear what went on; and evidence about a series of phone calls between the co-defendants. The third evidence was presented through the testimony of Detective Sergeant Gary Marcetti, one of the lead detectives on the case, who introduced evidence about the flurry of phone calls between the co-defendants, which according to the prosecution's closing argument, was the "crucial" evidence tying all of the co-defendants together in aiding and abetting this felony murder. This is the portion of juvenile Donald's homicide trial when his counsel abandoned him.

The evidence at trial was that on November 14, 2005, Fawzi Zaya met with Seante Liggins, Rashad Moore, and Derrick Saine in a parking lot in Detroit. 09/20/06, Trial Tr. at 143. Zaya told Moore that there was a drug dealer named Mohammad Makki that he wanted the men to rob. *Id.* at 146 - 47. Saine and Liggins were also seated in the van where this conversation took place. *Id*. Telephone records showed a number of calls placed between Moore, Saine, and Zaya throughout the day and into the evening. 09/21/06, Trial Tr. at 63, 69 – 82.

According to Liggins' testimony, Liggins, Moore, and Saine later went to a house where they drank heavily. 09/20/06, Trial Tr. at 184 – 85. Cory Donald, who was 16 years old at the time and who was called "Youngin" by the others, was also at the house. *Id*. at 185; 09/25/06, Trial Tr. at 155 (Donald is 16 years old). Liggins testified, that at some point, he saw Donald and Saine together, and inferred that Saine had given Donald a gun based on Donald's movements in the dark. *E.g.*, 09/20/06, Trial Tr. at 162 – 63. After some time, Moore received a phone call and

said, "It's about that time." *Id.* at 159, 161. Liggins and Moore got into the front of a white Taurus; Donald sat in back seat. *Id*. at 164. Moore, while talking on the phone, directs the vehicle to the house of Makki. *Id*. at 164 – 65. Liggins stated that he remained inside the vehicle while Moore and Donald entered the home. *Id*.

Michael McGinnis was the only one to testify as to what occurred inside the house. McGinnis said that he saw a masked man come through the door with a gun. 09/19/06, Trial Tr. at 154. He put his hands up and dropped to the floor, where he could only hear, but not see, what happened next. *Id*. at 155 – 56. McGinnis heard a struggle and heard someone say, "let it go." *Id*. at 156 – 57. He then heard two gunshots. *Id.* at 157. After the gunshots, McGinnis felt someone with a gun to the back of his head search through his pockets. *Id*. While one man stood over McGinnis, he heard another person go downstairs to the basement. *Id*. The man who went to the basement said, "I got shot." *Id*. at 158. The two men then left. *Id*.

According to Liggins, Moore and Donald returned to the vehicle, and Donald told Liggins that Moore had shot him. 09/20/06, Trial Tr. at 179. Liggins drove away and pulled up next to Saine's car. *Id*. at 171. Donald got into Saine's car. *Id*. at 171 – 72. Donald later checked into a hospital. 09/21/06, Trial Tr. at 85. Moore and Liggins were pursued by the police and arrested later that night. 09/20/06, Trial Tr. at 173 – 74. Moore was arrested with the keys to Makki's car, the keys to Makki's house, and $2020 stuffed into his waistband. 09/20/06, Trial Tr. at 25, 09/21/06, Trial Tr. at 88.

During the state's case-in-chief against Donald, the prosecution sought to introduce testimony from one of the two officers in charge of the homicide investigation, Detective-Sergeant Gary Marcetti, and an exhibit diagramming various phone calls that it asserted linked all of the men together on the day of the robbery and murder. 09/21/06, Trial Tr. at 63-82. Calls

were made from the phones of Zaya, Moore, and Saine throughout the day, with increased frequency around the time of the offense. 09/21/06, Trial Tr. at 63, 75.

In a conference outside the presence of the jury, Saine's attorney objected to the introduction of the exhibit. 09/21/06, Trial Tr. at 64-67. Donald's attorney did not object. 09/21/06, Trial Tr. at 67. The judge ruled the exhibit admissible and ordered a brief break before calling both juries back into the courtroom. 09/21/06, Trial Tr. at 68.

When the proceedings resumed approximately twenty minutes later, Donald's attorney was not present in the courtroom. 09/21/06, Trial Tr. at 69. Although the judge initially stated that he would wait for Donald's attorney to return, he did not. *Id*. At no point did the judge inform Donald of his right to counsel or ask for Donald's consent to proceed in the absence of counsel. Donald's attorney returned approximately fifteen minutes later, after the evidence from Detective-Sergeant Marcetti was heard. 09/21/06, Trial Tr. at 80.

The case against Donald was based solely on an "aiding and abetting" theory of felony murder. 09/25/06, Trial Tr. at 144 – 150; 09/26/06, Trial Tr. at 18 - 24. Mich. Comp. Laws § 767.39 states that "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."

In closing arguments to Donald's jury, the prosecutor used the cell phone calls to show that the men worked together to plan and commit the robbery and murder. 09/25/06, Trial Tr. at 128-135. The prosecutor repeatedly referred to these phone calls – introduced into evidence when Donald's counsel was absent – to show that the men were in contact earlier in the day, while driving to the scene of the crime, and after the crime, when Saine joined the group to pick

up Donald and the proceeds of the robbery. 09/25/06, Trial Tr. at 134-135, 140-141, 143-144. The prosecutor argued that these phone calls were proof of the planning of the robbery, the carrying out of the plan, and the subsequent discussion following the robbery, linking *all* the men together, including Mr. Donald. 09/25/06, Trial Tr. at 130-135, 143-144, 149.

The prosecution also used a statement given by Saine, read into the record, to further show Donald's involvement and to reinforce the phone call testimony. 09/25/06, Trial Tr. at 134-140. Saine had told the police that he received a phone call from Donald on the night of the robbery and murder. 09/25/06, Trial Tr. at 134. According to Saine's statement, Donald told him on the phone that he had been shot by Moore and needed to go to the hospital. *Id.* Saine said that he then called Moore, who was unwilling to say why Donald had been shot. *Id.* Saine drove to meet the rest of the men, picked up Donald, and drove him to the hospital. *Id.* In closing arguments, the prosecution used the phone logs to argue that Saine's pick-up location was "a preplanned and prearranged position that he was going to be in to pick up the buddy that he gave the gun to, to pick up the buddy who had the cash, who had been in the basement to get rid of the evidence," referring to Donald. 09/25/06, Trial Tr. at 224.

The jury convicted Cory Donald of one count of felony murder and two counts of armed robbery (Mich. Comp. Laws § 750.316 and Mich. Comp. Laws § 750.529, respectively). 09/26/06, Trial Tr. at 47-48. Donald was sentenced to a mandatory term of life imprisonment without the possibility of parole.

2. Direct Appeal

Donald appealed, arguing that his attorney's absence during a critical stage of the proceedings denied him of the right to effective assistance of counsel. The Michigan Court of Appeals affirmed, in an unpublished *per curiam* decision, Donald's conviction in an appeal that

was consolidated with co-defendant Rashad Moore's appeal. Pet. App. 59a – 74a. The state court of appeals concluded that Donald was not entitled to a presumption of prejudice arising from counsel's absence, because the absence during the state's case-in-chief was not a "critical stage" that held "significant consequences for the accused;" the state court also found that Donald did not meet the burden of establishing that he was prejudiced by counsel's deficient performance under *Strickland.* Pet. App. 62a – 63a. The Michigan Supreme Court denied leave to appeal on October 1, 2008. Pet. App. 58a.

3. The District Court grants habeas relief and the Court of Appeals affirms

Donald filed a petition for Habeas Corpus based on ineffective assistance of counsel, which was granted by the United States District Court for the Eastern District of Michigan. Pet. App. 51a–56a. The U.S. District Court held that the state court erred in not applying *Cronic* in Donald's claim and that the state court decision was an unreasonable application of clearly established federal law. Pet. App. 51a (quoting *Harrington v. Richter*, 562 U.S. 86 (2011)). The District Court described in detail the content of the witnesses' testimony, the prosecution's aiding and abetting theory, and the judge's instructions to the jury, all of which showed that counsel was absent during a "critical stage." Pet. App. 27a – 38a; 47a – 51a. The District Court held, in the alternative, that Donald was entitled to relief under *Strickland* as well. Pet App. 51a – 56a.

The State appealed, and the Court of Appeals affirmed the District Court decision in an unpublished opinion, finding that the intermediate state court decision was contrary to or an unreasonable application of clearly established law of *Cronic*. Pet. App. 3a; 12a – 19a.

Petitioner chose not to seek a petition for rehearing or rehearing *en banc* with the U.S. Court of Appeals.

REASONS FOR DENYING THE WRIT

I. Petitioner Does Not Dispute, And Cannot, That the Taking of Testimony That Goes to Prove the Offense Against the Defendant is a Clearly Established Critical Stage; Petitioner Instead Seeks Summary Reversal for Case-Specific Allegations of Error.

A. This Court has defined "critical stage" for purposes of *Cronic*.

This Court has repeatedly recognized that "[a]n accused's right to be represented by counsel is a fundamental component of our criminal justice system." *Cronic*, 466 U.S. 648, 653 (1984); U.S. CONST. AMEND. VI; *see also Gideon v. Wainwright*, 372 U.S. 335 (1963). The right to the effective assistance of counsel is recognized "because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*, 466 U.S. at 658. The Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 n.25.[1]

Further, this Court has defined a "critical stage," for the purpose of *Cronic*. In *Bell v. Cone*, 535 U.S. 685, 695-96 (2002), this Court stated that a critical stage of a criminal proceeding was one that "held "significant consequences for the accused." *Bell* cited to a significant body of this Court's law in which the Court looked to whether the proceeding is a "critical stage" to apply a presumption of prejudice to counsel's absence. *See, e.g., Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) (holding that arraignment is a critical stage and that a critical stage is one where "[a]vailable defenses may be irretrievably lost, if not then and there asserted,"); *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam) (determining that the "preliminary hearing" in *White* was a critical stage). This body of clearly established Supreme

[1] The *Cronic* Court cited decades of decisions that led it to this conclusion. *See id*. (citing *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612–613 (1972); *Hamilton*, 368 U.S. 52, 55 (1961); *White*, 373 U.S. 59, 60 (1963) (per curiam); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Williams v. Kaiser*, 323 U.S. 471, 475–476 (1945)).

Court case law, summed up by this Court in *Bell*, has allowed lower courts to apply this Court's caselaw when confronted with an individual case.

The cases in which the question of a "critical stage" is debated are often those in which counsel is absent from a non-trial phase of the proceedings. *See, e.g., Hamilton*, 368 U.S. 52 (arraignment); *Wade*, 388 U.S. 218 (post-indictment identification line-ups); *Mempa*, 389 U.S. 128 (sentencing); *Estelle v. Smith*, 451 U.S. 454 (1981) (court ordered psychiatric examination to determine competency to stand trial and future dangerousness). Each of these stages are a point in the criminal proceeding that holds significant consequences and where the substantial rights of a criminal accused may be affected. The Court has further contrasted points that are not critical stages with the state's case against a defendant at trial. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 122-23 (1975) (determining that the probable cause hearing for detention is not a critical stage; and contrasting the standard of proof, formality, and adversarial characteristics with that of a trial); *United States v. Ash*, 413 U.S. 300, 317-18 (1973) (photo array "not analogous to an adversary trial").

B. There is no circuit split on whether taking of inculpatory testimony at trial is critical stage.

Using this Court's clearly established definition of *Cronic* "critical stage," circuit courts of appeals have considered whether *Cronic* "critical stage" presumption of prejudice is triggered during various stages of criminal prosecutions.

Petitioner cannot, and does not, dispute that the taking of testimony at trial that goes to the elements of the charged offense is not a "critical stage." The courts of appeals agree that *Cronic* applies to counsel's absence during the taking of testimony that directly inculpates the defendant. As stated by the Court of Appeals below in an earlier case, "When the government presents evidence probative of a defendant's culpability in criminal activity. . . that portion of a

criminal trial is sufficiently critical to the ultimate question of guilt to trigger the protections of *Cronic*." *Olden v. United States*, 224 F.3d 561, 568 (6th Cir. 2000).

Instead of highlighting a circuit split or legal error, Petitioner's brief surfaces the unsurprising notion that courts will, when applying the same clearly established law, decide differently based on the specifics in any given case. Pet. Cert. at 11 – 17.

Petitioner cites to cases in which courts have declined to automatically apply *Cronic* to counsel's absence during general taking of testimony. *Id.* These cases do not reject the applicability of *Cronic*'s presumption of prejudice in the absence of counsel during the taking of inculpatory testimony. The state mischaracterizes the scope of the relevant question in this case. The question is not whether taking of *any* testimony at *any* time is critical stage; it is whether the taking of inculpatory evidence during the defendant's trial is a critical stage. *See Donald v. Rapelje*, at Pet. App. 15a (stating that the question before the court is "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 trial."). On that question, circuit courts all agree.

In cases where the portion of the proceeding was not significant for the accused, *see Bell*, the courts of appeal have unsurprisingly upheld state court findings that *Cronic* does not apply. *See, e.g.*, *Scherzer v. Ortiz*, 111 Fed. Appx. 78, 83-84 (3rd Cir. 2004) (upholding state court adjudication where testimony that went to an offense that defendant did not stand convicted of).

Petitioner chides the U.S. Court of Appeals for not addressing *Vines v. United States*, 28 F.3d 1123, 1128 (11th Cir. 1994), Pet. Cert. at 13 – 14, yet *Vines* is neither "clearly established law" for purpose of habeas corpus, nor is factually on point with the current case. In *Vines*, the Eleventh Circuit found that the taking of evidence relating to a co-defendant's guilt in the

absence of Vines' counsel was not presumptively prejudicial when Vines' conviction was not based on an accomplice or derivative liability theory; therefore the evidence presented during Vines' counsel's absence went only to the co-defendant's culpability and not to Vines' culpability.

In sum, circuits that have considered the question of whether counsel's absence during trial is "critical stage" under *Cronic* agree and have applied this Court's clearly established law.

C. The agreed-upon question of whether the testimony in this case was inculpatory is a case-specific issue

Given that the circuit courts agree that the taking of inculpatory testimony is a "critical stage," the only question that remains is whether the testimony in this case *was* inculpatory. To answer that question, a court would need to inquire into the specific details of the charges levied against Donald, including the prosecution's theory for its case against Donald, what the witness testified to regarding phone calls between Donald's co-defendants, and how the prosecution referred to this testimony and for what purpose. This case-specific inquiry, addressed on the merits below, *infra* at III., does not merit this Court's review.

II. Petitioner Asks Only for the Extreme and Unusual Remedy of Summary Reversal. Summary Reversal is Not Warranted. Petitioner's Request Only Highlights That Petitioner Actually Seeks What It Believes to be Case-Specific Error Correction.

Petitioner requests that this Court overturn the U.S. Court of Appeals' affirmation of the District Court without briefing on the merits. Pet. for Cert. at 4, 17, 22. Summary reversal is an exceedingly rare disposition. This extraordinary remedy is only appropriate in rare cases where a lower court contravenes clear precedents on an issue of constitutional significance. *See, e.g.*, *Presley v. Georgia*, 558 U.S. 209, 214 (2010) (noting Court's "explicit statement to the contrary"); *Sears v. Upton*, 561 U.S. 945, 945 (2010); *Schweiker v. Hansen*, 450 U.S. 485, 491

(1981) (Marshall, J., dissenting) ("A summary reversal is a rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.") Summary reversal based on perceived misapplication of law to the facts of the case is inconsistent with the role of this Court. *See generally* S. Ct. R. 10 (providing "considerations governing review on certiorari"). This Court "'is not, and has never been, primarily concerned with the correction of errors in lower court decisions.'" *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (quoting the Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949).

In this case, the Court of Appeals acted in accordance with precedent, applied AEDPA's deferential standard, and correctly identified the clearly established law of this Court. The U.S. District Court and the U.S. Court of Appeals applied *Cronic* to counsel's absence during the taking of testimony in the prosecution's case-in-chief. To be sure, this was a case with multiple co-defendants and where prosecution presents an aiding-and-abetting theory, but those facts neither present an issue of constitutional significance, nor do they present an error that might be appropriate occasion for summary reversal.

Even in the event that the Court determines that the U.S. Court of Appeals may have erred in affirming that the absence of counsel occurred during the giving of inculpatory testimony was a critical stage that triggers *Cronic* analysis and that the grant of habeas in these narrow circumstances was appropriate, the fact-specific finding is not such clear error to warrant the rare disposition of summary reversal. Petitioner's request for summary reversal only highlights that it is unhappy with the outcome and seeks to persuade this Court to engage in a "do over" of the application of the correct law to the facts of this case. The Petition for Certiorari should be denied.

III. The U.S. Court of Appeals' Decision Affirming the Grant of the Writ Was Correct And Should Not be Disturbed.

The U.S. Court of Appeals' unpublished opinion in this case affirmed the District Court's grant of the writ and determined that the state court decision was contrary to or an unreasonable application of clearly established federal law. Pet. App. 1a – 21a.

As an initial matter, the Court of Appeals correctly identified this Court's "critical stage" jurisprudence, citing to *Bell*, *Cronic*, as well as *Mempa v. Rhay*, 389 U.S. 128, 134 (1967), in which this Court defined a critical stage as one where "substantial rights of a criminal accused may be affected." Pet. App. 14a – 15a.

From this Court's clearly established law, it was clear to the Court of Appeals that the introduction of evidence tying together Donald and his co-defendants on the night of the crime would "hold significant consequences for the accused," particularly where the prosecution was pursuing an aiding and abetting theory. The Court of Appeals correctly determined that Donald's counsel's absence during this directly inculpatory testimony occurred during a "critical stage." Pet. App. 2a – 3a; 16a.

In this case, counsel was absent during the testimony – direct and cross examination -- of one of the lead detective of the case, during the prosecutor's case-in-chief. During that testimony, the Detective-Sergeant Marcetti presented evidence regarding "a compilation of different phone numbers, record and the connection or nexus between them." Pet. App. 84a. During that testimony, juvenile Donald was abandoned on his own during this portion of the state's case against him at his homicide trial. This stage of a case clearly holds significant consequences for the accused and is a stage in which the substantial rights of the accused were affected. For example, in *U.S. v. Wade*, this Court referred to the trial of a defendant, especially during the presentation of the prosecution's case-in-chief, as an archetypical critical stage.

Wade, 388 U.S. at 227 ("The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution).

The evidence taken during Mr. Donald's attorney's absence was adversarial in nature and involved the taking of testimony by a key prosecution witness. This evidence was probative of Mr. Donald's culpability and was introduced to further implicate Donald and the other defendants in the offense. One obvious sign that the testimony was introduced by the prosecution to secure the homicide conviction against Donald is the prosecution's closing argument to Donald's jury. The State argued in closing that this evidence was "**critical**." The prosecutor stated: "*that's why these phone records are critical,* to show the contact of all the parties to show that this is one conspiracy coming all together. ….. These parties gathered together to do one common action, and that's rob the house on Kendal and take some of the proceeds back to Mr. Zaya who set it all up." 9/25/06 Trial Tr. at 130. Additionally, the state used phone logs to argue that Saine's pickup location was "a preplanned and prearranged position that he was going to be in to pick up the buddy [Donald] that he gave the gun to, and pick up the buddy who had the cash, who had been in the basement to get rid of the evidence." 09/25/06 Trial Tr. at 224. The prosecutor further asserted that these records show that "[the defendants] all know what's going on…" and using the evidence to refute Donald's "mere presence" defense. 9/25/06 Trial Tr. at 130.

The U.S. Court of Appeals also highlighted other evidence that showed the inculpatory nature of the phone records, and demonstrated that this youth's counsel was absent at a critical stage. During the initial investigation, Detective-Sergeant Marcetti took a statement from co-defendant Saine about the content of the calls. 09/21/06 Trial Tr. at 214. In this statement, Saine

said that Donald called Saine to tell him that Moore shot him and asked Saine to pick him up. *Id.* at 214 – 16. The U.S. Court of Appeals correctly noted that "although Donald was not named during his attorney's absence, the jury could infer from the testimony about the phone records considered in context of the other evidence at trial that Donald made one of the phone calls." Pet. App. 18a.

When a criminal prosecution is based on an aiding and abetting theory, as it was here, the importance of having counsel present at all stages of the trial, including during testimony inculpating the defendant's co-defendants, increases exponentially. There was no suggestion in this case that Donald himself actually shot and killed Mr. Makki. Instead, Donald was convicted based on an "aiding and abetting" theory of felony murder. 09/25/06, Trial Tr. at 144 – 150; (prosecution's closing argument in which asserts that Donald guilty under an aiding and abetting theory); 09/26/06, Trial Tr. at 18 - 24 (jury instructions explaining aiding and abetting theory). In Michigan, aiding and abetting is not a separate offense but a legal tool of vicarious liability that allows for a conviction of an individual that "procures, counsels, aids, or abets" a crime as though he directly committed it. Mich. Comp. Laws § 767.39. Using an aiding and abetting theory of criminal liability, a defendant is not only responsible for the offenses he directly intended to aid or commit, but also "those crimes that are natural and probable consequences of the offense he intends to aid or abet." *People v. Robinson*, 715 N.W.2d 44, 52-53 (Mich. 2006). In order to convict a defendant under an aiding and abetting theory, the prosecutor must first show that the principal committed the criminal act and then must prove the defendant's guilt. *People v. Moore*, 679 N.W.2d 41, 48-49 (Mich. 2004); *People v. De Bolt*, 256 N.W. 615, 617 (Mich. 1934); *see also People v. Mackey*, 329 N.W.2d 476, 481 (Mich. Ct. App. 1982).

Accordingly, in Cory Donald's case, the judge instructed the jury that in order to find Donald guilty, the jury must find beyond a reasonable doubt that "the alleged crime was actually committed either by the defendant *or someone else*." 09/26/06, Trial Tr. at 20. Thus, evidence introduced against any co-defendants was directly relevant to Mr. Donald's case, because the state had to prove that the robbery and murder were committed by one or more of Donald's co-defendants and that Donald procured, counseled, aided, or abetted these individuals. Thus, evidence of his co-defendant's guilt, as shown by the phone call testimony from Detective-Sergeant Marcetti, was essential to his own conviction. *See Donald v. Rapelje*, Pet. App. 21a (Guy, J., concurring) ("Donald was charged with aiding and abetting and proof as to the guilt of the principal defendants was very relevant to his guilt or innocence").

In this case, the phone call evidence was used to help establish the culpability of Mr. Donald and his co-defendants and to link the defendants together in criminal conduct; it was, therefore, taken during a critical stage of Donald's trial. *Compare U.S. v. Russell*, 205 F.3d 768, 772 (5th Cir. 2000) (reversing conviction where counsel absent during presentation of evidence against a co-defendant and stating that "[t]he adversary process becomes unreliable when no attorney is present to keep the taint of conspiracy from spreading to the client."). Mr. Donald did not receive the counsel required by the Sixth Amendment, and the Court of Appeals' finding that the state court decision was "contrary to or an unreasonable application of clearly established law" should be upheld.

IV. Petitioner's Other Arguments are Unavailing Attempts to Find a Hook for the Court, but do not Apply in this Case.

A. Because the Sixth Circuit correctly applied *Cronic*, it did not need to reach, and did not reach, an application of *Strickland*; which was argued by the state in its petition to this Court.

The Court of Appeals found that Donald was denied counsel during a critical stage of his trial and applied the *Cronic*. The Court of Appeals did not reach any application of *Strickland*, and it did not need to. Decision or reversal based on the application of *Strickland* is not for this Court in the first instance.

B. Petitioner does not allege, and cannot allege, any other error in the application of this Court's relevant habeas corpus law.

While Petitioner makes reference to this Court's habeas corpus jurisprudence, Petitioner does not allege that this is a case about any other error in the statement of, or interpretation of, this Court's habeas law. Pet. Cert. at 11. Further, Petitioner cannot make such allegations, as the U.S. Court of Appeals correctly cites and applies the relevant uncontested habeas law in its unpublished opinion in this matter. Pet. App. at 10a – 19a.

C. Finally, Petition's citation to cases in which lawyers episodically fall asleep during trial might be interesting, but is irrelevant to this case, which involved the absence of counsel.

Petitioner cites to a few cases involving lawyers who episodically fell asleep, and cites to one Ninth Circuit case from the mid-1980s to say that these cases should be relevant. Pet. Cert. at 15, citing *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984). Any perceived dispute in the standard for "sleeping lawyer" cases might be interesting, but is irrelevant here, where counsel was physically absent during his juvenile client's first-degree murder trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Kimberly Thomas
Counsel of Record
Clinical Professor
Juvenile Justice Clinic

January 26, 2015

No. 14 – 618
In the Supreme Court of the United States

JEFFREY WOODS, WARDEN, Petitioner

v.

CORY DONALD, Respondent

PROOF OF SERVICE

I, Kimberly Thomas, do swear or declare that on this date, January 26, 2015, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 26, 2015

_____
Kimberly Thomas