No. 14-618

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

REPLY BRIEF

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INTRODUCTION

In his brief in opposition, Donald leads by explaining that this Court set forth a general definition of a *Cronic* "critical stage" in *Bell* v. *Cone*, 535 U.S. 685 (2002), and that this general definition allows courts to decide specific claims on a case-by-case basis. He thus implies that the Sixth Circuit's adjudication of his claim was a reasonable application of this general rule to specific facts.

Donald's argument regarding why the Sixth Circuit was correct would have been well suited to a brief on direct appeal from the state courts. But this case arises from a habeas petition filed under § 2254 and is subject to the restrictions of that statute. The important question, therefore, is not whether the state court was right or wrong, but whether the state court's decision was contrary to or an unreasonable application of any clearly established federal law. The correct question is whether any precedent of this Court required the Michigan courts to analyze the circumstances here—the brief absence of one defendant's counsel from the taking of evidence that inculpated other defendants, but not him—under *Cronic* instead of under *Strickland*. The state court did not misapply *Cronic*, *Bell*, or any other holding of this Court in denying relief. The Sixth Circuit therefore erred in granting habeas relief.

Given the serious nature of the Sixth Circuit's error, the State would welcome full briefing and oral argument, but it would be in keeping with this Court's recent practice to summarily reverse where, as here, the error is plain from the petition-stage papers.

ARGUMENT

I. The state court reasonably held that counsel's brief absence in a multi-defendant trial did not occur during a critical stage.

In his brief in opposition, Donald reveals in one sentence the core of the court of appeals' error: "This body of clearly established Supreme Court case law, summed up by this Court in *Bell* [v. *Cone*, 535 U.S. 685 (2002)], has allowed lower courts to apply this Court's caselaw when confronted with an individual case." Br. in Opp. 9. It is precisely this leeway to apply a broad principle that confirms that the decision below violated AEDPA and merits certiorari and reversal.

When this Court sets out a general standard, it not only allows lower federal courts to apply the standard case by case, it also allows state courts to do the same. As this Court said in *Yarborough* v. *Alvarado*, some rules are specific, and applications "may be plainly correct or incorrect," while "[o]ther rules are more general, and their meaning must emerge in application over time." 541 U.S. 652, 664 (2004). When, as here, the rule laid down is a general one, courts are granted considerable leeway "in reaching outcomes in case-by-case determinations." *Id.*

Donald appears to argue that the leeway afforded by a general rule inures to the benefit of the Sixth Circuit. That misses the point of AEDPA. This is a habeas case, and a federal habeas court considering a claim that was adjudicated on the merits in state court does not focus on whether a constitutional violation occurred, as it would on de novo review. Instead, it asks whether the state court acted contrary to or

unreasonably applied clearly established federal law in adjudicating the claim. *Harrington* v. *Richter*, 131 S. Ct. 770, 785–86 (2011). All leeway, all "deference and latitude," *id*. at 785, all flexibility in determining what is and is not a critical stage under *Cronic*—runs in favor of the Michigan Court of Appeals, not the Sixth Circuit.

In adjudicating Donald's claim on the merits, the Michigan Court of Appeals recited the *Cronic* standard, the *Bell* definition of "critical stage," and considered the facts of the case in relation to counsel's ten-minute absence.[1] Pet. App. 60a–63a. Based on its analysis of the evidence that was introduced during counsel's absence, as well as counsel's statements that the evidence presented did not concern Donald, the state court reasonably concluded that this short absence did not occur during a critical stage of the trial. Pet. App. 62a–63a.

Donald also criticizes the State for referring to *Vines* v. *United States*, 28 F.3d 1123 (11th Cir. 1994), pointing out that it is not "clearly established federal law." Br. in Opp. 10. This criticism misunderstands the significance of clearly established federal law, and misses the State's point in citing *Vines*. The State does not bear the burden of showing that the state court's decision was consistent with clearly established federal

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[1] Donald places the length of absence at "about fifteen minutes." Br. in Opp. 1. The district court said the same. Pet. App. 36a. The Sixth Circuit called it 17 minutes. Pet. App. 18a, 24a. To the extent it is relevant, it bears noting that the trial record is clear: counsel was absent for only about ten minutes of testimony. Pet. App. 82a (counsel's absence noted at 11:25 a.m., before testimony began), 94a (counsel's return noted at 11:35 a.m.).

law, nor is the State required to show that a habeas grant violated clearly established federal law. Rather, under AEDPA, it is Donald's burden to show that the state court's decision ran afoul of clearly established federal law. 28 U.S.C. § 2254(d)(1). *Vines* is significant because the Michigan Court of Appeals cited it, and it is persuasive because it demonstrates that reasonable jurists can hold and indeed *have* held that the brief absence of counsel need not be analyzed under *Cronic*.

What is important is not whether there is any clearly established federal law that agrees with the Michigan Court of Appeals' disposition of Donald's claim. What is important is whether there is any Supreme Court precedent that *cannot* be reconciled with the state-court decision. There is none, and certiorari and reversal are warranted.

II. Summary reversal is warranted because the Sixth Circuit's disposition clearly violated AEDPA and offended comity and federalism by overturning a valid state-court criminal conviction.

Donald also criticizes the State for seeking summary reversal, claiming that this is "extreme and unusual," "exceedingly rare" and an "extraordinary remedy." Br. in Opp. 11. To be clear, the State welcomes a grant of certiorari followed by full briefing and argument. But this case is a strong candidate for summary reversal because the Sixth Circuit plainly contravened AEDPA and this Court's precedent interpreting AEDPA, and threw out a valid state conviction, offending the principles of comity and federalism AEDPA was enacted to protect.

Perhaps summary reversal is an unusual remedy, but this Court has seen fit to apply it under the unusual circumstances presented here, when a lower federal court has failed to properly defer to a state-court judgment affirming a state-court criminal conviction. See *Glebe* v. *Frost*, 135 S. Ct. 429 (2014); *Lopez* v. *Smith*, 135 S. Ct. 1 (2014); *Marshall* v. *Rodgers*, 133 S. Ct. 1446 (2013); *Parker* v. *Matthews*, 132 S. Ct. 2148 (2012); *Coleman* v. *Johnson*, 132 S. Ct. 2060 (2012); *Wetzel* v. *Lambert*, 132 S. Ct. 1195 (2012); *Hardy* v. *Cross*, 132 S. Ct. 490 (2011); *Bobby* v. *Dixon*, 132 S. Ct. 26 (2011); *Cavazos* v. *Smith*, 132 S. Ct. 2 (2011); *Bobby* v. *Mitts*, 131 S. Ct. 1762 (2011); *Felkner* v. *Jackson*, 562 U.S. 594 (2011); *Swarthout* v. *Cooke*, 562 U.S. 216 (2011); *Wilson* v. *Corcoran*, 562 U.S. 1 (2010); *Thaler* v. *Haynes*, 559 U.S. 43 (2010); *McDaniel* v. *Brown*, 558 U.S. 120 (2010). Even in pre-AEDPA habeas cases, this Court has been willing to reverse summarily when a federal court has erroneously granted habeas relief. See *Wong* v. *Belmontes*, 558 U.S. 15 (2009); *Bobby* v. *Van Hook*, 558 U.S. 4 (2009).

What is truly an extreme, unusual, and extraordinary remedy is the grant of habeas relief itself. *Richter*, 131 S. Ct. at 786, quoting *Jackson* v. *Virginia*, 443 U.S. 307, 332 n. 5 (1979) (STEVENS, J., concurring). But here, the Sixth Circuit's affirmance of habeas relief for Donald was not unlike the erroneous habeas grants cited above.

Donald's argument that this case does not merit summary reversal does not address the question presented. Again, the question is not whether Donald's counsel's brief absence entitled him to relief under *Cronic*. If that were the question, summary reversal

would be inappropriate, because it would not present a case in which "the law is settled and stable," *Schweiker* v. *Hansen*, 450 U.S. 485, 491 (1981) (MARSHALL, J., dissenting), or where this Court has made "explicit statement[s] to the contrary," *Presley* v. *Georgia*, 558 U.S. 209, 214 (2010). The question here is whether the Sixth Circuit misapplied AEDPA in holding that the state court's decision was contrary to and an unreasonable application of clearly established federal law. On that question, the law is clear: in the absence of any holding from this Court requiring otherwise, the state court's decision was reasonable, and must be upheld on habeas review. Because the Sixth Circuit failed to properly defer to the Michigan court's reasonable application of *Cronic* and *Bell* v. *Cone*, certiorari and summary reversal are appropriate.

III. Donald's merits discussion further highlights the Sixth Circuit's error in granting habeas relief.

In his brief in opposition, Donald explains why he believes the Sixth Circuit majority was correct in holding as it did. Br. in Opp. 13–16. Tellingly, only the first and last sentences of this discussion show any acknowledgement of the fact that this case did not come to the Sixth Circuit on direct appeal. This is significant because this is a habeas case that should have been decided under AEDPA's standard, which is "difficult to meet . . . because it was meant to be," *Richter*, 131 S. Ct. at 786, and which "some federal judges find too confining, but . . . all federal judges must obey." *White* v. *Woodall*, 134 S. Ct. 1697, 1701 (2014).

Plainly Donald, one federal district judge, and two federal circuit judges feel that counsel's brief absence constituted a *Cronic* violation for which no prejudice need be shown. Just as plainly, the State and three state appellate judges feel that it did not constitute a *Cronic* violation.[2] But habeas relief does not lie for claims on which this Court has not ruled, and on which reasonable jurists can disagree. Habeas relief only properly issues when "the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White*, 134 S. Ct. at 1702, quoting *Richter*, 131 S. Ct. at 786–787. Because there *is* room for fairminded disagreement on whether counsel's brief absence constituted a *Cronic* violation, habeas relief should have been denied. This Court should grant certiorari and reverse.

IV. Certiorari is warranted, despite Donald's claims to the contrary.

Donald raises several other counterarguments to the petition, none of which undermine the case for certiorari and reversal.

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[2] The dissenting circuit judge, Batchelder, J., did not directly address the question whether counsel's brief absence was a *Cronic* violation, but properly confined her dissent to the question presented—whether any clearly established federal law dictated that counsel's brief absence was a *Cronic* violation. Pet. App. 21a–25a.

A. The *Strickland* analysis is relevant to whether this petition merits certiorari.

Donald criticizes the State's discussion of *Strickland* as an "unavailing attempt[ ] to find a hook for the Court." Br. in Opp. 16. But the discussion is necessary to the petition. The question whether *Cronic* or *Strickland* applies to Donald's claim matters because Donald prevailed under *Cronic*, but he would not prevail under *Strickland*. In short, the standard matters. Thus, the Sixth Circuit's error in holding that the state court unreasonably failed to apply *Cronic* was dispositive, which underscores the need for certiorari and reversal.

B. Donald's arguments about whether the testimony inculpated him highlight the lack of clearly established law as to what counts as a critical stage.

Throughout his opposition, Donald repeatedly asserts that the telephone-record evidence was inculpatory. Based on this assertion, he characterizes the critical stage at issue as the "taking of inculpatory evidence at trial." Br. in Opp. 9; see also, e.g., Br. in Opp. 1, 10, 11, 12, 13, 16. But as already explained, this Court has not defined what constitutes a critical stage under *Cronic*. A critical stage could be defined at any of a number of levels of generality, such as:

- the trial as a whole,
- a trial segment taking evidence,
- a trial segment taking inculpatory evidence,

- a trial segment taking inculpatory evidence by a particular witness, or

- a trial segment taking inculpatory evidence by a particular witness as to a particular defendant in a multi-defendant trial.

The level of generality matters when a defendant argues, as here, that he suffered a *Cronic* violation in the form of a "complete denial of counsel" at that critical stage. 466 U.S. at 659. Because no Supreme Court case tells state courts which level of generality they must choose, the Michigan Court of Appeals did not unreasonably apply clearly established federal law by deciding not to apply the "complete denial" test at the lowest possible level of generality.

In any event, it is at least ironic for Donald to claim that the taking of this evidence was a *critical* stage of his trial when his defense theory was that this testimony was *irrelevant*—that even if the other defendants committed the crime, he did not aid or abet them. Pet. App. 55a ("Petitioner's defense" was "that he was 'merely present' during the incident."). This defense theory is why Donald's counsel stated, both before and after this testimony was taken, that it was irrelevant to Donald. Pet. App. 82a ("I don't have a dog in this race. It doesn't affect me at all."), 97a ("[A]s I had indicated on the record, I had no dog in the race and no interest in that."). And while Donald asserts that the prosecution called the evidence "critical" in closing argument, Br. in Opp. 1, the prosecutor referred to the telephone records as "critical" only with respect to codefendant Saine, not to Donald. 9/25/06 Trial Tr. at 130–31. Further, in his own closing argument, Donald's counsel reminded the jury that

there was "not one bit of testimony about a cell phone from Cory Donald. Not one bit of evidence that he called any of these other guys or that they called him. You have Fawzi's records, you have Moore's records, you have Saine's records, and none of them would indicate a call to or from Cory Donald." *Id.* at 168. See also Pet. App. 63a (Michigan Court of Appeals agreeing that "the telephone record evidence did not directly implicate defendant Donald in the charged crimes").

C. "Sleeping counsel" cases should be treated like "absent counsel" cases.

Donald also criticizes the State for citing "sleeping counsel" cases, and for citing *Javor* v. *United States*, 724 F.2d 831, 834 (9th Cir. 1984), which Donald disparages as "one Ninth Circuit case from the mid-1980s." Br. in Opp. 17. But Donald merely asserts, and does not explain why sleeping counsel cases should be treated differently from absent counsel cases. *Javor* was not a fluke of one circuit. The Fifth Circuit sitting *en banc* rejected Texas's argument that sleeping counsel is somehow distinguishable from absent counsel, concluding, "[t]he unconscious attorney is in fact no different from an attorney that is physically absent from trial . . . ." *Burdine* v. *Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (*en banc*); accord *Strickland* v. *Washington*, 466 U.S. 668, 703 n. 2 (1984) (BRENNAN, J., concurring); *United States* v. *DiTommaso*, 817 F.2d 201 (2d Cir. 1987).

Sleeping counsel *is* absent counsel, in every way that matters. Donald does not advance any reason to distinguish between the two—perhaps because no legally relevant distinction exists. The fact that courts

do not uniformly apply *Cronic* in sleeping counsel cases only underscores the reasonableness of the Michigan Court of Appeals in declining to apply it in this case. And because that decision was reasonable, Donald was not entitled to habeas relief. Certiorari and reversal are merited.

CONCLUSION

The petition for writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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Dated: FEBRUARY 2015