No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

_____

KYLE KEITH CLARK - PETITIONER

VS.

KEVIN LINDSAY- RESPONDENT

INDEX OF APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: August 23, 2019

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Re: Case No. 18-1640*, Kyle Clark v. Kevin Lindsey*
Originating Case No. : 2:16-cv-13485

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. David J. Weaver

Enclosures

Mandate to issue.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0213p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KYLE K. CLARK,

Petitioner-Appellant,

v.

KEVIN LINDSEY, Warden,

Respondent-Appellee.

No. 18-1640

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:16-cv-13485—Stephen J. Murphy, III, District Judge.

Argued: June 28, 2019

Decided and Filed: August 23, 2019

Before: NORRIS, CLAY, and SUTTON, Circuit Judges.

COUNSEL

ARGUED: Kevin S. Gentry, GENTRY NALLEY, PLLC, Howell, Michigan, for Appellant. Rebecca A. Berels, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Kevin S. Gentry, GENTRY NALLEY, PLLC, Howell, Michigan, for Appellant. Rebecca A. Berels, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

SUTTON, J., delivered the opinion of the court in which NORRIS, J., joined. CLAY, J. (pp. 7–14), delivered a separate dissenting opinion.

OPINION

SUTTON, Circuit Judge. A Michigan jury convicted Kyle Clark of criminal sexual assault and domestic violence. In his direct appeal, Clark argued that his convictions should be set aside based on a Sixth (and Fourteenth) Amendment violation that allegedly arose when a scheduling error prohibited his lawyers from being physically present at his competency hearing. The Michigan Court of Appeals rejected the claim on the ground that the attorneys nonetheless were able to communicate with Clark and the court about the competency report—and all agreed that he no longer would challenge his competence. Clark filed a § 2254 habeas petition raising the same claim. The district court denied the petition. Because no U.S. Supreme Court case requires a different result, we affirm.

The State of Michigan charged Kyle Clark with criminal sexual assault and domestic violence in 2011. Before trial, Clark agreed to undertake a psychological examination to determine his competence to stand trial. The report concluded that Clark was competent. Clark went over the report with his two attorneys, and the three agreed that Clark would no longer challenge his competence to be tried. His legal team communicated the point to the trial judge, and the court set a date for Clark formally to agree to be tried. A scheduling mix-up interfered. On the date of the hearing, each of Clark's two attorneys mistakenly thought the other would attend the hearing. The end result was a hearing with just Clark, the prosecutor, and the trial judge present. The judge communicated his understanding, based on a prior message from Clark's counsel, that Clark would no longer challenge his competence to be tried. Consistent with all of these communications, Clark agreed to be tried, and the hearing ended. In the criminal trial, which occurred about four weeks later, a jury found Clark guilty on both counts and sentenced him to 10 to 15 years' imprisonment.

On direct appeal, Clark argued that the State deprived him of his right to counsel at the competency hearing. The Michigan Court of Appeals disagreed, noting Clark's communication with his attorneys and his attorneys' communication with the trial court. *People v. Clark*, No. 313121, 2014 WL 2795855, at *4 (Mich. Ct. App. June 19, 2014) (per curiam).

In this § 2254 habeas action, Clark does not challenge his competence to be tried. He instead claims that the physical absence of his attorneys from the competency hearing automatically requires the verdict to be undone and automatically requires his release from jail on the ground that the absence of counsel amounted to a structural error in the proceeding. The district court denied the petition, holding that no Supreme Court case calls for automatic prejudice in this situation. We agree.

AEDPA establishes the framework for resolving this case. In reviewing Clark's petition, we may not grant relief unless the state's decision on that claim contradicted or unreasonably applied U.S. Supreme Court precedents. 28 U.S.C. § 2254(d)(1). That means the state court must have applied Supreme Court holdings in an "objectively unreasonable" way, as "even clear error will not suffice" to overturn a state court decision in this setting. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quotation omitted).

The state court reasonably denied Clark's claim of structural error. According to the U.S. Supreme Court, a defendant can show a Sixth Amendment violation without the need to prove prejudice when there is a "complete denial of counsel" at, or counsel is "totally absent" from, a "critical stage of the proceedings." *United States v. Cronic*, 466 U.S. 648, 658–59 & n.25 (1984). At least two limitations accompany the *Cronic* rule—each applicable here.

One is that no Supreme Court case has ever found structural error unless the State was responsible for counsel's absence. *See Maslonka v. Hoffner*, 900 F.3d 269, 279 (6th Cir. 2018). To warrant automatic prejudice, a state law or state actor must prevent counsel's presence or limit his representation. *Id.*; *cf. Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928–29 (2019). That did not remotely happen. The State did not prevent Clark's attorneys from attending the hearing. All that happened was that Clark's attorneys had a scheduling mix-up, one mitigated by the attorneys' earlier communication with Clark and the judge about the competency report and earlier decision not to challenge his competence any longer. *Cronic*'s presumption of prejudice simply does not apply in this setting.

A second limitation is that no Supreme Court case has found structural error where the lawyers and the court and the client in fact communicated about the point at hand. *Cronic* itself

did not involve "a claim based on counsel's absence." *Woods*, 135 S. Ct. at 1377. In the two most analogous habeas cases about "counsel's absence," the Court denied relief each time. In *Wright v. Van Patten*, the defendant's attorney was physically absent from a plea hearing but participated by speakerphone. 552 U.S. 120, 121 (2008) (per curiam). The Court denied relief because none of its cases required automatic prejudice in that setting—where the defendant's lawyer could communicate with the court, just not in a face-to-face way. *Id.* at 125–26. In *Woods v. Donald*, the defendant's attorney was gone for about ten minutes of trial testimony about other defendants. 135 S. Ct. at 1375, 1377–78. The Court again denied relief because none of its cases made clear that such a situation warranted automatic prejudice. *Id.* at 1377–78. In doing so and in reversing a contrary decision of our court, the Supreme Court reminded the lower federal courts that state courts "enjoy broad discretion" where "the precise contours of [a] right remain unclear." *Id.* at 1377 (quotation omitted). The state court's decision in today's case fits that description—and warning—to a tee.

Two of our own cases bolster this conclusion. In *Makidon v. Elo*, the defendant pleaded guilty while his attorney was not in the courtroom. 3 F. App'x 409, 412 (6th Cir. 2001) (per curiam). But the defendant had talked to his attorney about the charge against him and told the court that he wished to plead guilty without his attorney. *Id.* On those facts, we denied the defendant's § 2254 *Cronic* claim. *Id.* In *United States v. Brika*, the defendant's attorney was absent when the judge instructed the jury. 416 F.3d 514, 523–26 (6th Cir. 2005). On direct review, we declined to presume prejudice because Brika's counsel had seen and debated the proposed instructions with the court before the judge instructed the jury. *Id.*

Keep in mind, moreover, exactly what is at stake. A failure to grant automatic prejudice for a Sixth Amendment violation under *Cronic* does not mean the defendant has no recourse. Quite to the contrary. The defendant still may show that his attorneys provided ineffective assistance—a well-paved route for proving a Sixth Amendment violation. To prevail on that claim, Clark must establish that his attorneys performed deficiently *and* prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Clark cannot obtain relief on that ground. Sure, he might be able to establish that his lawyers' failure to attend his competency hearing fell below the performance expected of

reasonable attorneys. But he could not show actual prejudice from the error. Clark's attorneys got confused about who would be where when. Even so, they told the judge before the hearing that they did not object to the report and that Clark wanted to go to trial as scheduled. At the hearing, the court explained the attorneys' position and asked Clark for his thoughts. Clark confirmed that he "spoke [at] length" about "the competency hearing with both of [his] attorneys" and that he wanted to go ahead with trial. R. 6-9 at 4–5. The court found that Clark had reviewed the report with his attorneys and accepted its competency finding. Clark indeed makes no argument today that he lacked competence or that the report erred in any way. The attorneys' physical absence, all in all, did not hurt Clark's defense.

The dissent claims that two of *our* cases require relief. But we may *grant* habeas relief under AEDPA only if the state court contradicted or unreasonably applied the *Supreme Court's* decisions. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 381–82 (2000). A Sixth Circuit decision is not a U.S. Supreme Court decision.

What's more, the Sixth Circuit decisions are not helpful even on their own terms. Neither decision addresses the state-action requirement that links the U.S. Supreme Court's decisions and thus neither decision offers a holding on what it means when a state court proceeds without counsel present due to no misconduct by the State. *See French v. Jones*, 332 F.3d 430 (6th Cir. 2003); *Caver v. Straub*, 349 F.3d 340 (6th Cir. 2003). The case that does address the point head on, our decision in *Maslonka*, comes out the other way. There, the federal agents and Assistant U.S. Attorney, no less state actors than a trial judge, met and discussed plea deals with Maslonka in the absence of his counsel. 900 F.3d at 274–75. And yet there, we rejected the *Cronic* automatic prejudice claim due to the absence of state action interfering with the client's consultations with his lawyers. All told, the Supreme Court's cases in this context require more active involvement—say failing to appoint counsel, denying the opportunity to cross-examine witnesses, denying a chance to make a closing argument, or denying an attorney access to his client—by a state law or state actor to find structural error. *See id.* at 279–80. In this case, the trial court's decision to proceed with Clark's competency hearing despite the attorneys' scheduling error, but with assurance from the attorneys and from Clark that they had reviewed the report and did not object, does not meet that threshold.

Even setting aside the state action problem, this case differs from *French* and *Caver* in other ways. In *French*, the court, without prior warning or discussion, gave the jury a non-standard instruction before the defendant's attorneys returned from a recess. 332 F.3d at 434. In *Caver*, the court, again without prior warning or discussion, wrote the jury a note and reinstructed the jury while the defendant's counsel was absent. 349 F.3d at 351–52. *Brika* distinguished both of those cases on the ground that the lawyer in *Brika* spoke to the court about the jury instructions beforehand. 416 F.3d at 525. That is today's case, which is akin to *Brika* because one of Clark's attorneys talked to the court about the competency hearing in advance and told him they had no objection to the report's finding. All of this shows at a minimum that the Michigan Court of Appeals did not contradict or unreasonably apply the U.S. Supreme Court's decisions in this area.

Clark objects, featuring the "totally absent" language in *Cronic*. But that language must be read in the context of other language—that *Cronic* acknowledged only a "narrow" structural-error exception, *Florida v. Nixon*, 543 U.S. 175, 190 (2004), that applies in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," *Cronic*, 466 U.S. at 658. The U.S. Supreme Court has never applied automatic prejudice based on an attorney's mere physical absence for some period of time, leaving plenty of room for "fairminded disagreement" over today's fact pattern. *Woods*, 135 S. Ct. at 1376 (quotation omitted). That's all we need to know. The Michigan Court of Appeals reasonably rejected Clark's claim.

We affirm.

DISSENT

CLAY, Circuit Judge, dissenting. This case comes to us on habeas review after the trial court held a competency hearing in Petitioner Kyle Clark's criminal trial, despite defense counsel's failure to appear for the proceeding. The majority holds that despite this failure, Clark was not deprived of his right to counsel. Because this holding conflicts with the Supreme Court's directive in *United States v. Cronic* that constitutional error has occurred "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding," I respectfully dissent. 466 U.S. 648, 659 n.25 (1984).

I. Background

The State of Michigan initiated criminal proceedings against Clark for criminal sexual assault and domestic violence in 2011. In a May 2012 pretrial hearing, defense counsel raised concerns about Clark's mental status, and the trial court referred Clark for a competency hearing. The trial court scheduled a competency hearing on August 1, 2012, at which the parties would discuss a report from the Michigan Department of Community Mental Health recommending that Clark be found competent.

What happened next is unclear, despite the majority's attempt to present the facts as straightforward. When the parties gathered for the hearing on August 1, 2012, Clark's attorneys were absent. The trial court discussed the attorneys' absence with Clark and the prosecution. The trial judge initially stated that Clark's attorneys had not communicated with him, but later reversed course and stated that there had been some form of communication:

> THE COURT: Mr. Clark, apparently there was some mix-up in your attorney's office with regard to which attorney would be here or not, given the fact that the Court moved up the court date in light of the report that the Court received from the Michigan Department of Community Mental Health.
>
> I'm not sure if the Prosecutor had any communication with either of the attorneys of record. 'Cuz I know their office didn't communicate with my office.
>
> [THE PROSECUTION]: No, your Honor, they—they failed to communicate with us on a regular basis as it is.

> THE COURT: What I can state for the record is what was communicated was that, and again I'm not sure if it was Mr. Cataldo or Mr. LaCommare, but they communicated with the off—with my office that they had no objection to accepting the July 2nd, 2012 report where the Defendant was deemed to be competent and—and proceed with this matter pending the trial as is currently scheduled on August 27th.

(R. 6-9, Final Pretrial Transcript, PageID # 210–211.)[1] The prosecution initially objected to the court proceeding without Clark's attorneys present to explain "whether or not they've gone over this . . . report with their client." (*Id.* at PageID # 210.) In fact, the prosecution expressed doubt that the defense attorney who spoke with the trial court had gone over the competency report at all, stating:

> I would object to the Court accepting that stipulation because Mr. LaCommare [one of Clark's attorneys], who's the individual I understand talked to your staff, . . . stated that he wasn't covering the competency portion of it, and[] therefore he wasn't familiar with it and yet he wants this Court to accept the stipulation to that report. I would presume he hasn't read it or I would presume that he's not familiar with it or is not in position to stipulate it or go over it with his client. So I think to protect the Defendant in this position I would . . . ask for [] a week adjournment with [the] request that Mr. LaCommare and Mr. Cataldo both be present before your Honor next week, to explain who's the attorney, whether or not they've gone over this report with their client, and at that point our office would be willing to stipulate to it. But, I think at this point it would be a failure of the system to allow stipulation to that report.

(*Id.*) Clark then stated, "I've gone over the competency hearing with both of my attorneys and spoke in length with it [sic] and I believed it was deemed that we would proceed with trial on August 27th." (*Id.* at PageID # 210–11.) The trial court then deemed Clark competent, based on "the representations of Mr. Clark that have been placed on record that he's met with both of these attorneys to go over the report and accepting the stipulation." (*Id.* at PageID # 212–13.)

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[1]The majority suggests that the trial judge heard directly from Clark's counsel before the hearing, yet the nature of this supposed communication is entirely unclear from the trial judge's statements. Op. at 2 ("The judge communicated his understanding, based on a prior message from Clark's counsel, that Clark would no longer challenge his competence to be tried."). Instead, at the competency hearing, the trial judge relayed his second-hand understanding of the situation based on the fact that one of Clark's attorneys had apparently "communicated . . . with [his] office" that they would not attend the hearing and did not object to accepting the report. The obvious impropriety of proceeding in such circumstances prompted even the prosecution to object, out of concern for Clark's constitutional rights.

The case proceeded to trial, and Clark was found guilty and sentenced to 10 to 15 years' imprisonment. The Michigan Court of Appeals affirmed Clark's conviction, finding that he was not deprived of the right to counsel at his competency hearing because "the trial court accepted defendant's representation that he considered the competency report with his attorneys and accepted the stipulation that defendant was competent." (R. 6–14, Mich. Ct. App. Opinion, PageID # 370.)

Clark filed this habeas action in the Eastern District of Michigan on September 27, 2016. After the district court denied Clark's request for habeas relief and declined to issue a certificate of appealability, this Court granted a certificate of appealability on the issue of whether Clark's Sixth Amendment right to counsel was violated when the trial court held Clark's competency hearing without his counsel present.

II. Clark's deprivation of the right to counsel

The Sixth Amendment guarantees a defendant the right to counsel at all critical stages of the criminal process. *Iowa v. Tovar*, 541 U.S. 77, 87 (2004). In determining whether Clark's constitutional right to counsel was violated, one important point must be addressed at the outset. The majority repeatedly relies on Clark's statements at the competency hearing to the effect that he had previously discussed the competency hearing with his attorneys. But because Clark made those statements before his competency had been determined, we cannot rely on them in determining whether Clark's right to counsel was violated. *Cf. Pate v. Robinson*, 383 U.S. 375, 384 (1966) ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."). This also explains why *Makidon v. Elo*, cited by the majority, has no bearing on this case: in *Makidon*, which involved a plea hearing rather than a competency hearing, the Court relied heavily on the fact that "Makidon told the trial court that he had no further questions for counsel, that he had decided how to proceed with the advice of counsel, and that he affirmatively wished to proceed despite counsel's absence from the courtroom." 3 F. App'x 409, 412 (6th Cir. 2001). Moreover, the Court in *Makidon* found that the defendant "knowingly and voluntarily waived his counsel's presence from the plea hearing." *Id.* In contrast, Clark's statements to the effect that he had discussed the hearing with his attorneys and wished to move forward occurred

at Clark's own competency hearing—before his competency had been established—so it would defy logic for this Court to rely on Clark's statements in reaching its decision.

The Michigan Court of Appeals held that Clark's attorneys' failure to appear at his competency hearing did not deprive Clark of the representation he was due. The court based this finding on the fact that one of Clark's attorneys purportedly communicated his absence and acceptance of the report to the trial court before the hearing, and "[t]he trial court accepted [Clark's] representation that he considered the competency report with his attorneys and accepted the stipulation that [Clark] was competent." (R. 6-14, Mich. Ct. App. Opinion, PageID # 370.)

Clark argues that the Michigan Court of Appeals' decision directly contradicts the Supreme Court's decision in *Cronic*. In that case, the Supreme Court stated that "[t]he presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." 466 U.S. at 659. In other words, the Supreme 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." *Id.* at 659 n. 25. In cases where counsel was "totally absent" during a critical stage of criminal proceedings, *Cronic* directs courts to bypass the *Strickland* analysis of whether a defendant was prejudiced by counsel's deficient performance.

The majority relies on this Court's decision in *Maslonka v. Hoffner*, 900 F.3d 269 (6th Cir. 2018). In *Maslonka*, this Court considered whether *Cronic* applied when a defendant's attorney failed to appear during federal cooperation meetings between Maslonka and federal agents, which we assumed without deciding were critical stages of the proceedings. In addressing the petitioner's deprivation of counsel argument, this Court stated that "a counsel's mere physical absence from a critical stage of a proceeding, based on the counsel's own failure to be present rather than any denial by the state," is not sufficient to constitute denial of counsel under *Cronic*. *Id.* at 279. Instead, this Court determined that *Cronic* only applies if the state "played a part in preventing adequate representation." *Id.* at 280.

The majority overlooks a crucial component of *Maslonka*, which recognized the ample case law demonstrating that a trial judge's actions can serve as the role of the state in denying counsel. *Id.* For example, the Court in *Maslonka* compared that case to the earlier Sixth Circuit case *Mitchell v. Mason*, in which the Sixth Circuit affirmed a grant of habeas relief to a state prisoner under *Cronic*. *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003). In *Mitchell*, the Court found that *Cronic* applied when the trial court had refused to appoint new counsel despite knowing that the defendant's counsel was not providing representation. *Id.* at 741–42. *Maslonka* explained that "in *Mitchell* the 'trial court repeatedly ignored Mitchell's entreaties for counsel who would properly prepare a defense,' meaning that some state actor . . . played a part in preventing adequate representation." *Maslonka*, 900 F.3d at 280 (quoting *Mitchell*, 325 F.3d at 744). Similarly, in *French v. Jones*, 332 F.3d 430 (6th Cir. 2003), this Court affirmed a district court's grant of habeas to a state court prisoner under factual circumstances similar to Clark's. The trial court in that case gave a supplemental jury instruction to deadlocked jurors while French's counsel was absent. *Id.* at 434. This Court found that French had been denied his right to counsel at a critical stage of the proceedings, and that he was thus entitled to a presumption of prejudice under *Cronic*. *Id.* at 436–39. This Court reached the same conclusion under nearly identical facts in *Caver v. Straub*. 349 F.3d 340, 350 (6th Cir. 2003) ("[U]nder *Cronic* . . . if Petitioner's trial counsel was, indeed, absent during the re-instruction, a structural error occurred in the trial court proceeding, and either relief from judgment or a writ of habeas corpus could be properly granted on this ground. Any conclusion otherwise would be an unreasonable application of clearly established federal law as stated in *Cronic*.").

The critical difference between *Maslonka* on the one hand and *Mitchell*, *French*, and *Caver* on the other is the involvement of the trial court in the denial of counsel. In *Maslonka*, the alleged deprivation of counsel occurred when Maslonka's counsel did not attend cooperation meetings with federal authorities, which this Court assumed without deciding were "part of the critical stage of his state plea negotiations because his more-favorable state plea offer hinged on that federal cooperation." *Maslonka*, 900 F.3d at 279. Federal cooperation meetings are not a stage of proceedings at which the trial court judge would normally be present, so the trial judge played no role in sanctioning Maslonka's counsel's absence at those meetings. In contrast, the deprivations of counsel in *Mitchell*, *French*, and *Caver* each involved active participation by the

trial court. In each case, the trial court knew of counsel's absence and decided to continue with proceedings without them. In *Mitchell*, the most extreme of the three cases, Mitchell's counsel made "no effort to consult with the client" and was suspended from practicing law before the trial, yet the trial court denied Mitchell's repeated requests for a new attorney. *Mitchell*, 325 F.3d at 744. Similarly, in *French* and *Caver*, the trial court issued new jury re-instructions despite knowing that the defendants' attorneys were not present. *French*, 332 F.3d at 436–39; *Caver*, 349 F.3d at 350.

Together, these cases demonstrate that when a trial court proceeds with a critical stage despite knowing that a defendant's counsel is not present, *Cronic* governs. In other words, a trial court's decision to proceed with the critical stage despite counsel's absence is sufficient to establish that a state actor "played a part in preventing adequate representation," such that *Cronic* applies and the habeas petitioner is entitled to a presumption of prejudice. *Maslonka*, 900 F.3d at 280. The majority's holding to the contrary renders *Maslonka* inconsistent with this Court's earlier published cases. The facts of this case are more similar to *Mitchell*, *French*, and *Caver* than to *Maslonka*. Just as in *Mitchell*, *French*, and *Caver*, the trial court in this case chose to continue with Clark's competency hearing, despite its extensive conversation with Clark and with the prosecution noting the obvious fact that Clark's attorneys were absent. The trial court ostensibly made this decision because one of Clark's attorneys called the trial court or the trial court's chambers before the hearing to let the trial court know that Clark's attorneys would not be in attendance. By allowing counsel to call ahead and assert that they would not attend the competency hearing and then deciding Clark's competency in their absence, rather than requiring Clark's counsel to appear at the competency hearing and state their position on the record, the trial court "played a part in preventing adequate representation" for Clark. *Maslonka*, 900 F.3d at 280. Thus, this case is one in which "some state actor . . . played a part in preventing adequate representation," not one in which the lack of representation was attributable only to "the counsel's own failure to be present." *Id.* at 279–80. *Cronic* therefore governs. Clark suffered a "complete denial of counsel [at his competency hearing, which] mandates a presumption of prejudice." *French*, 332 F.3d at 436 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)). And as the Supreme Court explained in *Brecht v. Abrahamson*, 507 U.S. 619, 629–30 (1993),

"deprivation of the right to counsel . . . requires automatic reversal of the conviction because [it] infect[s] the entire trial process."[2]

The majority glosses over a crucial distinction when it asserts that the dissent relies on the fact that "*our* cases require relief," rather than Supreme Court cases, as is required under AEDPA. Maj. Op. at 5. As the Supreme Court has explained, "an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent." *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013); *see also Tolliver v. Sheets*, 594 F.3d 900, 916 n.6 (6th Cir. 2010) ("We are bound by prior Sixth Circuit determinations that a rule has been clearly established."). *Mitchell*, *French*, and *Caver* all found it clearly established under the Supreme Court's precedent in *Cronic* that when the trial court proceeds with a critical stage of criminal proceedings despite defense counsel's total absence, the defendant's right to counsel has been violated. We are thus bound by our previous decisions in *Mitchell*, *French*, and *Caver* concluding that, under AEDPA, a state court directly contradicts *Cronic* when the state court finds no deprivation of counsel despite counsel's total absence under analogous scenarios. To adhere to these decisions, as we must, is not to measure the state court's decision against Sixth Circuit precedent, which would be improper under AEDPA—instead, it is to respect Sixth Circuit precedent interpreting the scope of the Supreme Court's decision in *Cronic*. *Mitchell*, *French*, and *Caver* are all AEDPA cases holding that *Cronic* governs when the trial court proceeds with a critical stage despite defense counsel's total absence.

In sum, the Michigan Court of Appeals rendered a decision that "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States" in *Cronic*, when it held that Clark's Sixth Amendment right to counsel was not violated at his

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[2]The majority claims that this case is more like our decision in *United States v. Brika*, 416 F.3d 514, 525–26 (6th Cir. 2005), than like *Mitchell*, *French*, and *Caver*, because in *Brika*, the trial court discussed its proposed actions with defense counsel before providing jury re-instruction in counsel's absence. In *Brika*, the trial court engaged in a "fairly lengthy" discussion directly with defense counsel before providing jury re-instruction in counsel's absence. *Id.* at 521. In contrast, in this case, the trial court apparently did not speak directly with defense counsel at all; at best, Clark's counsel communicated their intentions with the trial court's "office." Moreover, the contents and nature of the communication in this case are entirely unknown, outside of the trial court's confusing second-hand statements. Thus, while this distinction may have had some persuasive value in *Brika*, it does not hold water in this case.

competency hearing. 28 U.S.C. § 2254(d). Clark's attorneys were totally absent at the competency hearing, and *Cronic* explains that the Supreme Court finds "constitutional error without any showing of prejudice when counsel was . . . totally absent" during the proceeding at issue. *Cronic*, 466 U.S. at 659 n.25. The Michigan Court of Appeals' decision thus directly contradicted *Cronic*, which this Circuit's precedent demonstrates applies in this case. Because Clark was denied counsel at a critical stage of the proceedings, he is entitled to habeas corpus relief. For all of the foregoing reasons, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-1640

KYLE K. CLARK,

Petitioner - Appellant,

v.

KEVIN LINDSEY, Warden,

Respondent - Appellee.

FILED
Aug 23, 2019
DEBORAH S. HUNT, Clerk

Before: NORRIS, CLAY, and SUTTON, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Kyle K. Clark's petition for a writ of habeas corpus is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KYLE K. CLARK,

Petitioner,

Case No. 2:16-cv-13485

HONORABLE STEPHEN J. MURPHY, III

v.

SHAWN BREWER,

Respondent.
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS [1] AND DENYING CERTIFICATE OF APPEALABILITY

Through counsel, Petitioner Kyle Clark filed a petition for writ of habeas corpus. He challenges his convictions for third-degree criminal sexual conduct and domestic violence on three grounds: (1) the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963); (2) his right to counsel was violated during a competency hearing; and (3) ineffective assistance of defense counsel. Respondent argues that Clark's claims are meritless. The Court will deny Clark's petition and will deny him a certificate of appealability.

BACKGROUND

Clark's convictions arose from an assault of victim, H.M., in their home in Saline, Michigan. The Michigan Court of Appeals extensively reviewed the circumstances leading to Clark's conviction. *See People v. Clark*, No. 313121, 2014 WL 2795855, at *1–2 (Mich. Ct. App. June 19, 2014), *rev'd in part*, *People v. Clark*, 498 Mich. 858 (2015). Specifically, Clark and H.M. lived together for a number of years, the two argued, and then H.M. attempted to end the relationship. At that point, Clark pushed H.M. upstairs to the bedroom, choked her, and anally raped her.

Appendix B

A jury in Washtenaw County Circuit Court convicted Clark of third-degree criminal sexual conduct, Mich. Comp. Laws § 750.520b(1)(b),[1] and domestic violence, Mich. Comp. Laws § 750.81(2). On October 3, 2012, Clark was sentenced to 10 to 15 years for third-degree criminal sexual conduct conviction and 93 days for the domestic violence conviction.

Clark appealed his conviction challenging the scoring of his sentence. The Michigan Court of Appeals affirmed Clark's conviction and sentence. *People v. Clark*, No. 313121, 2014 WL 2795855 (Mich. Ct. App. June 19, 2014), *rev'd in part*, *People v. Clark*, 498 Mich. 858 (2015). Clark sought leave to appeal in the Michigan Supreme Court, but the Michigan Supreme Court vacated the sentence and remanded the case to the trial court for resentencing based on the scoring of his sentence. *People v. Clark*, 498 Mich. 858 (2015). The Michigan Supreme Court denied leave to appeal in all other respects. *Id.*

The trial resentenced Clark on January 29, 2016. He received 10 to 15 years' imprisonment for the third-degree criminal sexual conduct conviction. He filed an appeal in the Michigan Court of Appeals, which affirmed the sentence. *People v. Clark*, No. 332216, 2017 WL 2882546 (Mich. Ct. App. July 6, 2017). Clark did not seek leave to appeal in the Michigan Supreme Court.

Clark then filed his petition for a writ of habeas corpus raising three claims: (1) the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963); (2) his right to counsel was violated during a competency hearing; and (3) ineffective assistance of defense counsel.

[1] The Michigan Court of Appeals cited Mich. Comp. Laws § 750.520b(1)(b) (use of force), but that provision is not applicable to the facts of Petitioner's case. The use of force section is Mich. Comp. Laws § 750.250b(1)(f).

STANDARD OF REVIEW

The Court reviews the case under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, a state prisoner is entitled to a writ of habeas corpus only if he can show that the state court's adjudication of his claims—

> (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; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d).

A state court's decision is "contrary to" clearly established law if: (1) it "applies a rule that contradicts the governing law set forth" in Supreme Court cases, or (2) it "confronts" a set of materially indistinguishable facts from those of a decision of the Supreme Court but "nevertheless arrives at a result different from that precedent." *Mitchell v. Esparza*, 540 U.S. 12, 15–16 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)).

A state court's decision is an "unreasonable determination" if it correctly identifies the "governing legal principle" from the Supreme Court, but "unreasonably applies that principle to the facts" of the case. *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (quoting *Williams*, 529 U.S. at 413). The decision cannot be merely incorrect or erroneous, but must be "objectively unreasonable." *Id.* at 520–21 (citation omitted); *see also Williams*, 529 U.S. at 409.

If the state court determined that a claim lacks merit, that finding "precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state

court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Section 2254(d) serves as a "guard against extreme malfunction in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 102–03 (internal quotation omitted). A state prisoner must show, therefore, that "the state court's ruling on the claim" was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103. Federal courts may review only whether the state court's decision comports with clearly established federal law as determined by the Supreme Court at the time the state court rendered its decision. *See Greene v. Fisher*, 565 U.S. 34, 38 (2011).

State courts' citation to or even awareness of Supreme Court cases is not necessary so long as "neither the reasoning nor the result of the state-court decision contradicts" Supreme Court cases. *Early v. Packer*, 537 U.S. 3, 8 (2002). Moreover, lower federal courts "may be instructive in assessing the reasonableness of a state court's resolution of an issue." *Stewart v. Erwin*, 503 F.3d 488, 493 (6th Cir. 2007) (citing *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003)).

Finally, a federal habeas court must presume the correctness of state court factual determinations. *See* 28 U.S.C. § 2254(e)(1). A petitioner may rebut this presumption only with clear and convincing evidence. *Id.*

DISCUSSION

I. Alleged *Brady* Violation

Clark first claims that the prosecution failed to disclose potentially exculpatory evidence. In particular, the sexual assault nurse examiner took three colposcope images

of the victim's genitalia and anus during the post-assault examination. The prosecution did not turn over the images. Clark argues that this failure violated *Brady v. Maryland* and that, in denying the claim, the Michigan Court of Appeals applied the incorrect standard.

The Due Process Clause requires the prosecution to disclose to the defense favorable evidence that is material to a defendant's guilt or punishment. *Brady*, 373 U.S. at 87. For *Brady* purposes, evidence is "material" if, had the evidence been disclosed, "there is a reasonable probability that . . . the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469–70 (2009). A reasonable probability means "the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith v. Cain*, 565 U.S. 73, 75–76 (2012) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)); *see also United States v. Augurs*, 427 U.S. 97, 109–10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.").

To demonstrate a *Brady* violation, therefore, three elements must be shown: (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) "that evidence must have been suppressed by the State, either willfully or inadvertently;" and (3) "prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). The petitioner bears the burden of establishing each of these three elements. *Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000).

In Clark's case, Pamela Federoff, a sexual assault nurse examiner at St. Joseph Mercy Hospital in Ann Arbor, examined H.M. on the date of the incident. ECF 6-10, PgID 277. Federoff performed a physical examination of H.M. and observed no visible injuries.

Id. at 279. Federoff also took three images using a colposcopy machine, which magnifies the genital area to allow detection of injuries invisible to the naked eye. *Id.* at 278. Federoff produced a report that was forwarded to law enforcement, given to her director, and kept as part of the hopsital's medical records. *Id.* at 282. The colposcope images, however, were not included in the report, but were maintained on the computer in the locked sexual-assault nurse-examiner room. *Id.* Federoff also testified that she was qualified to take images with the colposcopy machine, but not qualified to evaluate the images. *Id.* at 281.

During a discussion outside the presence of the jury, the prosecutor stated that neither the Sheriff's Department nor the prosecutor's office received the images. *Id.* at 286. Defense counsel asked to review the images and retain somone to testify about them. *Id.* The trial court denied the request finding no indication that the images presented any evidentiary value. *Id.*

The Michigan Court of Appeals denied Clark's appeal on the claim under *Brady* because there was no evidence that the prosecutor or law enforcement possessed the images, and, regardless, the evidence was not material because the evidence the images may present was merely speculation. *Clark*, 2014 WL 2795855, at *2.

Clark's showing fails to show the three elements of a *Brady* violation. First, there is no evidence that the images were favorable to Clark's case. At most, it can be said that the images contained *potentially* exculpatory evidence. "Mere speculation" about the exculpatory value of images is insufficient to establish the materiality or exculpatory nature of the images. *See Wood v. Bartholomew*, 516 U.S. 1, 6 (1996); *Thorne v. Timmerman-Cooper*, 473 F. App'x 457, 466–67 (6th Cir. 2012). Moreover, there is no evidence that the State willfully or inadvertently suppressed the images. Clark, therefore,

fails to show that the state court's decision was contrary to or an unreasonable application of *Brady*. Nor has Clark shown that the state court applied an incorrect standard by evaluating the claim under *Brady*.

Finally, the trial court did not err in denying a continuance or adjournment in the case. Trial courts possess broad discretion in granting or denying such a motion. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *see also Morris v. Slappy*, 461 U.S. 1, 11 (1983) (recognizing that trial courts have "broad discretion" in matters related to continuances). When a habeas petitioner challenges the denial of a request for continuance, the Court must find both an abuse of discretion and that the decision was "so arbitrary and fundamentally unfair that it violates constitutional principles of due process." *Bennett v. Scroggy*, 793 F.2d 772, 774–75 (6th Cir, 1986). The trial court neither violated Clark's constitutional rights nor abused its discretion by denying the motion for a continuation because the evidentiary value of the images was based merely on speculation.

II. Right to Counsel Claim

Clark's second claim relates to his attorney's absence during a competency hearing. The Sixth Amendment guarantees a right to the assistance of counsel in all criminal prosecutions and by its "plain wording" encompasses "counsel's assistance whenever necessary to assure meaningful 'defence.'" *United States v. Wade*, 388 U.S. 218, 225 (1967). The right to counsel extends to all critical stages of a judicial proceeding. *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984). A competency hearing is a "critical stage." *United States v. Amir*, 644 F. App'x 398, 400 (6th Cir. 2016).

A criminal defendant may waive the right to counsel so long as the waiver is "knowing, voluntary, and intelligent." *Iowa v. Tovar*, 541 U.S. 77, 88 (2004). The waiver

must be "done with sufficient awareness of the relevant circumstances." *Id.* at 81 (quotation omitted). The petitioner carries the burden of proving that he "did not competently and intelligently waive" his right to the assistance of counsel. *Id.* at 92.

Here, Clark both consulted with his attorneys—albeit not in person—and subsequently waived his right to counsel during the competency hearing. Prior to trial, the trial court referred Clark for a competency evaluation. The Center for Forensic Psychiatry found Clark competent to stand trial. ECF 6-17, PgID 516–20. Clark's counsel failed to appear at a hearing to determine Clark's competence because of a "mix-up in [counsel's] office." ECF 6-8, PgID 209. The trial court indicated that defense counsel made no objection to the competency report, stipulated to Clark's competency, and agreed that the trial should proceed as scheduled. *Id.* at 209–10. The prosecutor initially objected to Clark proceeding without counsel during the hearing.

Clark responded that he reviewed the competency report with both of his attorneys, spoke with them at length about it, and wished to proceed to trial as scheduled. *Id.* at 210–11. Clark specifically requested no further delays. *Id.* at 211. The prosecutor withdrew his objection, the trial court accepted Clark's representation and the stipulation as to Clark's competency, and then the trial court directed the trial to proceed as scheduled. *Id.* at 211–12.

On direct appeal, the Michigan Court of Appeals denied Clark's claim finding that Clark had the benefit of counsel, consulted his attorneys at length about the report, and indicated a willingness to proceed without counsel's presence. *Clark*, 2014 WL 2795855, at *4.

The Michigan courts' decisions were neither contrary to clearly established federal law nor unreasonably applied federal law. Clark's own testimony demonstrates that he consulted with his attorneys about the competency report. He then clearly and cogently indicated his desire to proceed to trial. Separately, Clark's attorney indicated that he consulted with Clark and they agreed not to contest the competency determination. Counsel was not "prevented from assisting [Clark] during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 n.25. Furthermore, Clark validly waived his right to have counsel at the hearing. His testimony evinces "an intentional relinquishment or abandonment of a known right or privilege." *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (quotation omitted).

III. Ineffective Assistance of Counsel Claim

Finally, Clark seeks habeas corpus relief on the ground that his attorney provided ineffective assistance. In particular, Clark identifies his attorney's failure to ask that Detective Thomas Sinks's videotaped interview of Clark be played for the jury and his failure to move to exclude to allegedly biased jurors.

Strickland v. Washington provides the "clearly established law" for evaluating ineffective assistance of counsel claims under the AEDPA. *See Williams v. Taylor*, 529 U.S. 362, 390–91 (2000). The two-pronged *Strickland* test requires a showing of deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show that counsel's performance was deficient, a petitioner must establish that counsel's performance was "outside the wide range of professionally competent assistance." *Id.* at 690. The deficiency prong "requires a showing that counsel made

errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687.

A federal court may grant habeas relief only if the state-court decision unreasonably applied the *Strickland* standard for evaluating ineffective-assistance-of-counsel claims. *Knowles v. Mirzayance*, 556 U.S. 111, 122–23 (2009). "The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Id.* at 123 (internal quotation omitted). Federal courts, therefore, apply a "doubly deferential" review of state court decisions. *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011).

Clark first argues that counsel was ineffective for failing to move to play Detective Sinks's videotaped interrogation of Clark. Detective Sinks testified that, during the interview, Clark acknowledged having anal sex with H.M., but the detective's police report noted only vaginal and oral sex. In response to a defense question on the discrepancy, Detective Sinks stated that his report was a brief summary and he would defer to the recording of the interrogation for "100% accuracy." *Clark,* 2014 WL 2795855, at *5. Neither side moved for the jury to hear the recording. On direct appeal, the Michigan Court of Appeals granted Clark's request to expand the record to include the unplayed interview recording. *Id.* The Michigan Court of Appeals reviewed the recording and found that Clark admitted to having sex the morning of the incident; specifically, when asked by police whether Clark and H.M. had "traditional sex, vaginal sex or –", Clark cut off the officer answered "yeah, everything." *Id.* When asked directly whether Clark and H.M. ever had anal sex, Clark responded "yes, we had." *Id.* When the officers pressed further and

asked when the last time Clark and H.M. had anal sex, Clark asked whether he needed an attorney and whether H.M. accused him of rape. *Id.*

The Michigan Court if Appeals reasonably applied *Strickland*. The state court observed that Clark did not deny anal intercourse and the jury could reasonably have concluded that "everything" included anal intercourse. Moreover, the state court found that trial counsel may have been concerned about Clark's ambiguous statements and the possibility that Clark's request for an attorney or question about rape accusations could impute guilt. *Id.* at *6. The state court further found that defense counsel challenged the credibility of the officer and that the recording did not refute unequivocally the officer's testimony. *Id.* As the Michigan Court of Appeals correctly found, defense counsel's conduct was well within the bounds of professional competence.

Second, Clark argues that defense counsel was ineffective for failing to move to excuse for cause "Juror S" and "Juror H." He argues that counsel should have moved to exclude Juror S because she lived across the street from Detective Sinks and to exclude Juror H, a doctor, because the daughter of a prosecution witness was her patient. The Michigan Court of Appeals found no ineffective assistance of counsel because counsel could have reasonably determined that each of these jurors would approach the trial with an open mind and decide the case based upon the evidence presented. *Clark*, 2014 WL 2795855, at *6. The state court relied upon Juror S's testimony that her relationship with Detective Sinks would not impact her ability to be fair and impartial and Juror H's testimony that she would not be comfortable if her patient were involved with the trial, but there was no indication of her patient's involvement. *Id.*

The selection of jurors is a matter of trial strategy, and courts rarely second-guess those decisions. *Miller v. Francis*, 269 F.3d 609, 616 (6th Cir. 2001). The record presents no evidence that counsel lacked strategic reasons for declining to excuse Jurors S and H. Moreover, to succeed on his claim that counsel was ineffective based on failure to exclude jurors, Clark must show that a juror was *actually* biased against him. *See Hughes v. United States*, 238 F.3d 453, 458 (6th Cir. 2001). Petitioner has not met the burden. Accordingly, the Court finds that the state court reasonably applied *Strickland*.

IV. Certificate of Appealability

To appeal the Court's decision, Clark must obtain a certificate of appealability. To obtain a certificate of appealability, a petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To demonstrate this denial, Clark must show that reasonable jurists could debate whether the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). Courts must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997). Here, jurists of reason could not debate the Court's denial of Clark's claims. The Court denies a certificate of appealability.

ORDER

WHEREFORE, it is hereby **ORDERED** that Petitioner's petition for a writ of habeas corpus is **DENIED**.

IT IS FURTHER OREDRED that the Court **DENIES** Petitioner a certificate of appealability.

SO ORDERED.

s/ Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: May 8, 2018

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on May 8, 2018, by electronic and/or ordinary mail.

s/ David Parker
Case Manager

Order

Michigan Supreme Court
Lansing, Michigan

July 1, 2015

Robert P. Young, Jr.,
Chief Justice

150202

Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 150202
COA: 313121
Washtenaw CC: 11-001541-FC

KYLE KEITH CLARK,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the June 19, 2014 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals, we VACATE the sentence of the Washtenaw Circuit Court, and we REMAND this case to the trial court for resentencing. Had Offense Variable (OV) 3, MCL 777.33, not been scored, the correct guidelines range was 84 to 140 months, rather than the range of 87 to 145 months on which the defendant's sentence was based. Therefore, the defendant is entitled to relief under the rationale of *People v Francisco*, 474 Mich 82 (2006). In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

s0624p

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 1, 2015

Clerk

Appendix C

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2014
v	No. 313121 Washtenaw Circuit Court
KYLE KEITH CLARK, Defendant-Appellant.	LC No. 11-001541-FC

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of criminal sexual conduct, third degree (CSC III), MCL 750.520b(1)(b) (use of force), and domestic violence, MCL 750.81(2). He was sentenced to serve concurrent jail terms of 10 to 15 years for the CSC III conviction and 93 days for the domestic violence conviction. We affirm.

I. BACKGROUND

Complainant and defendant met when defendant was a teenager and complainant was fifteen plus years older than him. Complainant testified however, that she and defendant did not become intimate until he was of adult age. At the time of complainant's assault, complainant and defendant had lived together for approximately four years and defendant was then living with complainant for what complainant termed a "trial basis." The day before the assault, complainant had given defendant money for gas to drive back a vehicle he intended to purchase that night. Defendant instead bought crack with the money and stayed overnight in a crack house. Complainant texted and called defendant numerous times to determine his whereabouts, but he did not answer. According to the complainant, defendant showed up at their home early the next day banging on the front door. Complainant indicated that she did not want defendant there and that she told him to go away. Defendant did not leave, but instead pushed the door open, breaking the lock. The two argued and defendant went upstairs to sleep in the bed they shared. Complainant left to take her son to school and upon returning got in the shower to get ready for work. After complainant had finished her shower, and was still in the bathroom, defendant entered and ordered her to perform fellatio on him. Complainant told him she was "done with him" and basically that their relationship was over. Defendant had also testified to the waning of their relationship and to his plans of moving out. According to the complainant,

when she refused to perform oral sex on defendant he grabbed her by her hair and pushed her up the stairs to their bedroom.

Once upstairs, defendant pushed complainant face first onto their bed, spit on her anus and proceeded to anally rape her. Complainant told defendant to stop and defendant choked her until she passed out. When complainant awoke defendant had his arm around her and would not let her go. Defendant's employer called and complainant reached for the phone. Defendant responded by choking her again, but let go when complainant apologized. Defendant and complainant eventually went downstairs. Complainant began to brush her hair for work while defendant heated food. Once defendant's back was turned complainant grabbed her robe and ran out of the house to the vehicle where she had left her keys. She drove to her work and informed her employer of what had happened. Her employer instructed another employee to return home with her. When complainant returned home, defendant was gone. She dressed, called the police and followed a deputy to a hospital where a sexual assault exam was performed. The nurse who performed the exam testified that she did not see any physical injury to complainant's body, including no injury to her genitalia or anus.

While complainant was gone, defendant left for work. He told his employer of his plans to move out and his employer was supportive of that move. Defendant's theory at trial was that he and complainant had engaged in consensual sex that morning, initiated by complainant. Defendant returned to the home later that morning to gather his belongings and the police were there. Defendant voluntarily spoke with a detective for what he thought were only charges of domestic violence. He explained that he and complainant had an unhealthy relationship that involved a repeated pattern of fighting and then making up. When defendant guessed that he was being interviewed for charges of rape, he declined to further speak with the detective.

After having heard both complainant and defendant testify, the jury chose to believe complainant and found defendant guilty of both third-degree criminal sexual conduct and domestic violence.

II. *BRADY* VIOLATION

Defendant first argues that his constitutional right to due process was violated when images of the complainant's exterior genitalia and anus taken during a colposcope examination by a sexual assault nurse examiner (SANE) were not produced. We disagree. Defendant argues the evidence demonstrated that the complainant had no signs of traumatic injury, and thus would have proven that defendant did not forcibly assault her. The nurse testified that she was trained to use the colposcope to take pictures, but not trained to evaluate the images it produced. The nurse explained that the colposcope images went onto a disk and that she gave the disk to her SANE coordinator. Further, that after she turned the disk over to her coordinator, she no longer had access to it and did not know whether the disk was sent to law enforcement. Her testimony was that she visually examined the complainant's entire genital area as well as the body and observed no physical injury. During a sidebar conference, the prosecutor indicated that she did not know about the colposcope images.

Defendant bases his constitutional argument on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Under *Brady*, the suppression by the prosecution of evidence

favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Id*. at 87. "[T]he components of a 'true *Brady* violation,' are that: (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142; ___ NW2d ___ (2014) citing *Brady*, 373 US at 87.[1]

Where evidence is suppressed, the proper considerations are whether (1) suppression was deliberate, (2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993), overruled on other grounds by *People v Grissom*, 492 Mich 296, 319; 821 NW2d 50 (2012). At trial, the prosecution denied the suppression of the colposcope images. There is no evidence that the colposcope images were suppressed by plaintiff. There was no evidence presented to demonstrate the images were in the possession of plaintiff or law enforcement. The nurse testified that she turned the images over to her coordinator. Defendant filed an initial discovery demand requesting all photographs and scientific evidence. The focus of discovery is whether fundamental fairness to the defendant, in preparing his defense, required that he have access to the requested information. *People v Walton*, 71 Mich App 478, 481-482; 247 NW2d 378 (1976). While both parties were surprised that the nurse would not be able to testify to the images nor had them with her, the trial court reminded that the nurse's report did indicate that there were images, that defendant received the report without the images and there was no further request for discovery. Even so, defendant has not presented evidence as to how he could have used the images. He has also not offered proof that the prosecutor concealed or destroyed the images. Thus absent speculation, we cannot find that the images were material. Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, i.e., "if the undiscovered evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *People v Harris*, 261 Mich App 44, 49-50; 680 NW2d 17 (2004) (citations and internal quotation marks omitted). Given the nurse's testimony that she did not observe any external injury to the anus or genitalia, it appears the images were cumulative in that they would have only confirmed that the nurse did not see any injuries during her examination of the complainant. Thus, admission of the images would not have put the whole case in such a different light as to undermine confidence in the verdict. *Harris*, 261 Mich App at 49-50.

III. MRE 702

Next, defendant argues that the testimony of the SANE who examined the complainant was improper expert testimony as it was not subjected to scrutiny required of scientific data. Again, we disagree. This Court reviews a trial court's determinations concerning the

[1] In *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998), this Court added the requirement that defendant demonstrate reasonable diligence in producing the evidence at trial. Most recently in *People v Chenault*, 495 Mich 142; ___ NW2d ___ (2014), our Supreme Court struck down this added requirement of defendant diligence, and overruled *Lester* holding "that a due diligence requirement [was] not supported by *Brady* or its progeny." *Chenault*, 495 Mich at 146.

qualifications of a proposed expert witness to testify for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). An abuse of discretion occurs when the decision results in an outcome outside the range of principled outcomes. *Id.* The admission of expert testimony is also reviewed for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

MRE 702 provides for the admission of expert opinion that results from "scientific, technical, or other specialized knowledge," and must assist the trier of fact. Specifically, MRE 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In order to determine whether expert testimony is admissible under MRE 702, a searching inquiry is mandated. The inquiry is not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from the data. *Gilbert v DaimlerChrysler Co*, 470 Mich 749, 782; 685 NW2d 391 (2004). An expert's opinion testimony is limited to the expert's area of expertise. *People v Jones*, 95 Mich App 390, 394; 290 NW2d 154 (1980) (citations omitted). Testimony is inadmissible under MRE 702 where the subject of the proffered testimony is far beyond the scope of an individual's expertise because an expert who lacks "knowledge" in the field at issue cannot assist the trier of fact. *Gilbert*, 470 Mich at 789.

Defendant objected when plaintiff asked the nurse, "Based on your training and experience as a sexual assault nurse is it typical for a victim of sexual assault to present with injuries?" Defendant argued that the witness was not qualified to speak as to the specifics of the facts of the case. The trial court overruled the objection, stating that the nurse "conducted thirty to forty of these. That certainly gives her (indiscernible) in which she can make those kinds of (indiscernible)." Plaintiff then asked the nurse, "Based on your training and experience as a sexual assault nurse examiner . . . do you need injuries for a sexual assault?" She responded, "there does not need to be visible injury present to say that a sexual assault did not occur." She explained that bodies are pliable and different force is used on different body parts.

Although it is not clear on the record before us that the trial court did not explicitly state that the nurse was an expert in sexual assault examination, the trial court did consider the nurse's credentials as the basis to give the requested opinion. The trial court had heard testimony that the nurse's experience included working 12 and a half years as an RN at a hospital, the past 10 years in the emergency room. She was certified for five years as a sexual assault nurse examiner after receiving 40 hours of didactic training, experiencing a ride along with police, and having been supervised during speculum examinations with evidence collection. She performed 30 to 40 examinations in five years.

MRE 702 provides that an expert may be qualified "by knowledge, skill, experience, training, or education." In light of the nurse's experience and training as a certified SANE, the trial court allowing her to give an expert opinion was not an abuse of discretion.

IV. THE RIGHT TO COUNSEL

Next, defendant argues that he was deprived of his right to counsel during his competency hearing. After a review of the record, we conclude otherwise. The Sixth Amendment of the United States Constitution[2] guarantees a criminal defendant facing incarceration the right to counsel at all critical stages of the criminal process. *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Williams*, 470 Mich 634, 641-642; 683 NW2d 597 (2004), citing *Maine v Moulton*, 474 US 159, 170; 106 S Ct 477; 88 L Ed 2d 481 (1985). *US v Ross*, 703 F3d 856, 873-874 (CA 6, 2012) explained that every federal court that has considered the issue has found that a competency hearing is a critical stage of the criminal process. A trial is unfair if the accused is denied counsel at a critical stage of his trial. The Supreme Court has 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 US at n 25.

Here, defendant was granted a competency evaluation prior to trial due to his history of mental health issues, mental state in jail, and self-harming behavior in jail. At an August 1, 2012 hearing, the trial court noted that defendant's counsel was not present likely due to a "mix-up in your attorney's office with regard to which attorney would be here or not, given the fact that the court moved up the court date in light of the report that the Court received from the Michigan Department of Community Mental Health." However, the trial court stated that defendant's attorney had communicated with the court "that they had no objection to accepting the July 2nd, 2012, report where the defendant was deemed to be competent . . . and proceed with this matter pending the trial." Plaintiff objected to accepting the competency report until defendant responded that he went over the competency report with both of his attorneys and spoke about it at length before deciding to proceed to trial. The trial court accepted defendant's representation that he considered the competency report with his attorneys and accepted the stipulation that defendant was competent. It is evident that defendant was not deprived of his right of counsel during this critical stage of the proceedings.

V. EFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that his trial counsel was deficient in not requesting that the jury hear a recording of a police officer interviewing defendant that would have contradicted the officer's trial testimony, and in failing to exclude two possibly biased jurors from the jury. We disagree. A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This right to counsel encompasses the

[2] US Const, Am VI.

effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish a claim of ineffective assistance of counsel a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *Taylor*, 275 Mich App at 186. See also *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Defendant must also show that the resultant proceedings were fundamentally unfair or unreliable. *Odom*, 276 Mich App at 415. The effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defense counsel's decisions are presumed to be sound trial strategy, *Taylor*, 275 Mich App at 186, and a reviewing court is not to substitute its judgment of what is good trial strategy with the benefit of hindsight, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Regarding the taped interview of defendant, Detective Sinks testified that defendant acknowledged having anal sex with the complainant. Defendant questioned why the detective only noted vaginal and oral sex in his police report with no mention of anal sex. The detective stated that his report was just a brief synopsis of his interview and that he would defer to the recording of the interview for "100% accuracy." Neither party requested a playing of the recording. Defendant's counsel did not object or motion the trial court for not having the opportunity to hear or receive a copy of the recording. For purposes of this appeal, we granted defendant's request to expand the record to include the unplayed recording of defendant's interview with Detective Sinks. During the interview, defendant was asked when the last time was that he and the complainant had sex and defendant responded that they had sex the morning of the incident. The police then began to ask "do you guys have traditional sex, vaginal sex or -" and was cut off by the defendant who answered "yeah, everything." Defendant was then asked for an explanation of what 'everything' meant and responded "oral sex, you know vaginal, you know everything." The police then directly asked "you've ever had anal sex" and defendant responded "yes, we had." When the police asked defendant to tell when the last time he and complainant had anal sex, defendant asked whether he needed an attorney and then whether he was being accused of rape.

Here, it was plausible that defendant's trial counsel did not wish to risk that the jury would hear defendant's comments about anal sex given that, while somewhat ambiguous, they could be understood as confirming the officer's trial testimony. Trial counsel may have also been concerned that the jury would impute guilt to defendant when he questioned the need for an attorney directly after being asked the last time he and the complainant had anal sex. Defendant's trial counsel called into question the officer's credibility by exposing the differences between his testimony that complainant told him she was anally raped, and the police report which stated complainant only reported oral and vaginal sex. Here, defendant also testified in his own defense and denied the act of anal rape before the jury. Unless defendant's trial counsel knew that the recording unequivocally refuted the officer's testimony, which it does not, defendant has not demonstrated that failure to request that the recording be played was not sound trial strategy.

Defendant also argues that his trial counsel's performance was deficient for failing to excuse two jurors, who we will refer to as "juror S" and "juror H." We disagree. Juror S stated that she lived across the street from the police officer who interviewed defendant on the audiotape just considered. Juror S testified to various personal and professional contacts with the

officer, but also told the trial court that there was nothing about her relationship with the officer that would affect her ability to be fair and impartial. Defendant's trial attorney asked whether juror S could find defendant not guilty with the officer living across the street, and the juror stated that she could. Defendant's counsel could have reasonably determined that juror S would approach the trial with an open mind, as the juror said she could.

Juror H stated that she recognized a name on the witness list and disclosed that the witness's daughter was a patient that she had not seen in years. Juror H stated that she would not be comfortable as a juror if her patient was involved in the trial. However, the daughter was not involved with trial in any fashion; she was not a witness, nor was there any evidence of her involvement in any way with the events at issue. In light of this, defendant's counsel could have reasonably determined that juror H would be able to approach trial with an open mind, and decide the case based on the evidence presented.

VI. OV 3

Finally, defendant argues that the trial court erred in scoring offense variable (OV) 3 at ten points because the complainant had no injury requiring medical treatment. We agree. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

OV 3 considers physical injury to a victim and is scored ten points when the victim of the crime incurred a bodily injury requiring medical treatment, regardless of whether the victim was successful in obtaining treatment. MCL 777.33(1)(d); MCL 777.33(3). OV 3 is scored at five points for bodily injury not requiring treatment, MCL 777.33(1)(e), and zero points when no physical injury occurred to the victim, MCL 777.31(1)(f). *People v Cathey*, 261 Mich App 506, 514; 681 NW2d 661 (2004), defines bodily injury as "physical damage to a person's body." *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011) instructs that bodily injury includes "anything that the victim would, under the circumstances, perceive as some unwanted physically damaging consequence." Here, the complainant testified that following the assault, her anus "hurt" and her throat hurt "a little." She did not seek immediate medical attention, but instead followed a deputy to the hospital. Complainant was examined by a sexual assault nurse who testified that complainant had no injuries. Complainant also did not complain of any injuries. There was insufficient evidence to support the finding that the complainant was physically injured by the assault and required medical treatment. We order correction of defendant's presentence investigation report to reflect an OV 3 scoring of zero. The correction however, does not warrant a resentencing when defendant's guidelines remain the same.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Cynthia Diane Stephens

No. 18-1640

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 13, 2019
DEBORAH S. HUNT, Clerk

KYLE K. CLARK,

Petitioner-Appellant,

v.

KEVIN LINDSEY, WARDEN,

Respondent-Appellee.

O R D E R

BEFORE: NORRIS, CLAY, and SUTTON, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Larsen recused herself from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: November 13, 2019

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Whitmore Lake, MI 48189-0650

Re: Case No. 18-1640, *Kyle Clark v. Kevin Lindsey*
Originating Case No.: 2:16-cv-13485

Dear Mr. Gentry,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Rebecca Ashley Berels
Fadwa A. Hammoud
Ms. Raina I. Korbakis
Mr. John S. Pallas

Enclosure

Order

Michigan Supreme Court
Lansing, Michigan

September 29, 2015

150202(81)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 150202
COA: 313121
Washtenaw CC: 11-001541-FC

KYLE KEITH CLARK,
Defendant-Appellant.

_____/

On order of the Court, the motion for reconsideration of this Court's July 1, 2015 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 29, 2015

Clerk

a0921

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: October 16, 2018

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Re: Case No. 18-1640, *Kyle Clark v. Kevin Lindsey*
Originating Case No. : 2:16-cv-13485

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jennifer Earl
Case Manager
Direct Dial No. 513-564-7066

cc: Mr. David J. Weaver

Enclosure

No. 18-1640

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KYLE K. CLARK,

Petitioner-Appellant,

v.

KEVIN LINDSEY, Warden,

Respondent-Appellee.

O R D E R

Kyle K. Clark, a Michigan prisoner proceeding through counsel, appeals the district court's judgment denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Clark has filed an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2).

In 2012, a jury convicted Clark of third-degree criminal sexual conduct ("CSC") and domestic violence. The victim testified at trial that Clark, her former boyfriend, choked and anally raped her during an argument in their home on October 13, 2011. The trial court sentenced him to ten to fifteen years of imprisonment for the CSC conviction and a concurrent term of ninety-three days of imprisonment for the domestic-violence conviction. *See People v. Clark*, No. 313121, 2014 WL 2795855, at *1 (Mich. Ct. App. June 19, 2014) (per curiam). The Michigan Court of Appeals affirmed. *Id.* The Michigan Supreme Court reversed the Michigan Court of Appeals' affirmance of Clark's sentence, concluding that the trial court had incorrectly calculated the applicable sentencing guidelines range. *People v. Clark*, 865 N.W.2d 32 (Mich. 2015) (mem.). It remanded to the trial court for resentencing but otherwise affirmed the decision of the Michigan Court of Appeals. *Id.* The trial court again imposed a sentence of ten to fifteen years of imprisonment for the CSC conviction and ninety-three days of imprisonment for the

domestic-violence conviction. *See People v. Clark*, No. 332216, 2017 WL 2882546, at *2 (Mich. Ct. App. July 6, 2017) (per curiam). The Michigan Court of Appeals affirmed, *id.* at *4, and Clark did not appeal to the Michigan Supreme Court.

In September 2016, following his January 2016 resentencing, Clark filed a federal habeas petition raising three grounds for relief. In his first ground, Clark argued that the prosecutor violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose images taken with a colposcope[1] during a physical examination of the victim. He also argued that the trial court violated his due process rights by denying his motion to adjourn so that he could obtain the images and locate an expert who could evaluate them. In ground two of his habeas petition, Clark argued that he was deprived of his right to counsel during his competency hearing. In ground three, he argued that trial counsel performed ineffectively by failing to impeach Detective Thomas Sinks's testimony with a tape recording and failing to move to excuse two jurors. The district court denied Clark's habeas petition on the merits and declined to issue a certificate of appealability.

Clark now challenges the district court's findings with respect to the *Brady* claim that he raised in ground one as well as the arguments raised in ground two and ground three. Because his application for a certificate of appealability does not address the trial court's denial of his motion to adjourn, he has forfeited that claim. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing that reasonable jurists could debate whether the petition should have been determined in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)).

[1] A colposcope is an "[e]ndoscopic instrument that magnifies cells of the vagina and cervix in vivo to allow direct observation and study of these tissues." Stedman's Medical Dictionary, available on Westlaw at STEDMANS 191170 (updated Nov. 2014).

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), if a state court previously adjudicated a petitioner's claim on the merits, a district court may not grant habeas relief unless 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 the Supreme Court of the United States," or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011). Where AEDPA deference applies, this court, in deciding whether to grant a certificate of appealability, must evaluate the district court's application of § 2254(d) to determine "whether that resolution was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

I. *Brady Violation*

Prior to trial, the prosecutor informed defense counsel that she had disclosed all of the victim's medical records. At trial, Pamela Federoff, the sexual-assault nurse who examined the victim, testified that she had used a colposcope to take three pictures of the victim's "exterior genitalia and the anus or rectum." She stated that she did not know whether these images depicted physical injuries, but she had not observed any physical injuries on the victim during her examination.

To establish a *Brady* violation, a petitioner must show, inter alia, that the suppressed evidence is favorable to his defense and that the suppression prejudiced his defense. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Prejudice is shown only if "there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.* at 281. Here, Clark merely speculated that the colposcope photographs would have shown no physical injuries. He produced no witness testimony to support this contention, and Federoff testified at trial that she did not know whether the photographs showed the presence of physical injuries. Accordingly, reasonable jurists could not debate the district court's conclusion that the Michigan Court of Appeals did not unreasonably apply clearly established federal law when it concluded that no *Brady* violation occurred.

II. *Lack of Counsel at Competency Hearing*

Clark appeared without counsel at his pre-trial competency hearing. The trial judge noted that there must have been a scheduling "mix-up," but informed the parties that one of Clark's two defense attorneys had contacted his office off the record and stated that the defense had no objection to accepting a report that deemed Clark competent to stand trial. The prosecutor initially objected to proceeding with the competency hearing, but Clark stated that he had discussed the competency issue with his attorneys and wished to proceed to trial without further delay. The trial court then declared Clark competent to stand trial and the hearing concluded.

Because defense counsel was totally absent from the competency hearing, and because the trial court did not expressly question Clark about his apparent desire to waive his right to counsel at that hearing, reasonable jurists could debate whether the Michigan Court of Appeals unreasonably applied clearly established law when it found that no constitutional violation occurred. *See Iowa v. Tovar*, 541 U.S. 77, 87-88 (2004); *United States v. Cronic*, 466 U.S. 648, 658-59 & n.25 (1984); *Faretta v. California*, 422 U.S. 806, 835 (1975); *United States v. Ross*, 703 F.3d 856, 874 (6th Cir. 2012). Clark is therefore entitled to a certificate of appealability on this claim.

III. *Trial Counsel's Failure to Impeach Detective Sinks and Move to Excuse Two Jurors*

To establish ineffective assistance of counsel, a petitioner must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

A. *Detective Sinks's Testimony*

Clark argued that defense counsel should have played a recording of his interview with Detective Sinks to impeach Detective Sinks's account of the interview. At trial, Detective Sinks testified that Clark admitted during a police interview that he had anal sex with the victim on the

morning of October 13, 2011. When defense counsel pointed out that Detective Sinks's report stated that Clark admitted to having vaginal and oral, but not anal, sex with the victim on the morning of the offense, Detective Sinks stated that he would "defer to the recording" of the interview. That recording was not introduced at trial, but Clark submitted the recording to the Michigan Court of Appeals. That court summarized the recording as follows:

> During the interview, defendant was asked when the last time was that he and the complainant had sex and defendant responded that they had sex the morning of the incident. The police then began to ask "do you guys have traditional sex, vaginal sex or –" and was cut off by the defendant who answered "yeah, everything." Defendant was then asked for an explanation of what "everything" meant and responded "oral sex, you know vaginal, you know everything." The police then directly asked "you've ever had anal sex" and defendant responded "yes, we had." When the police asked defendant to tell when the last time he and complainant had anal sex, defendant asked whether he needed an attorney and then whether he was being accused of rape.

Clark, 2014 WL 2795855, at *5. Clark has not challenged the factual accuracy of this summary.

The Michigan Court of Appeals noted that Clark's statements on the recording were "somewhat ambiguous," and it concluded that counsel could have made a reasonable strategic decision to not introduce the recording out of fear that it could be construed by the jury as confirming Detective Sinks's testimony.[2] *Id.* at *6. It also found that "counsel may have also been concerned that the jury would impute guilt to defendant when he questioned the need for an attorney directly after being asked the last time he and the complainant had anal sex." *Id.* The relevant inquiry when evaluating counsel's performance in the habeas context is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105. Reasonable jurists could not debate the district court's conclusion that the Michigan Court of Appeals identified two such arguments. *See Clark*, 2014 WL 2795855, at *5-6. Accordingly, this claim does not deserve encouragement to proceed further.

[2] Clark testified unequivocally at trial that he did not engage in anal sex with the victim on the morning of the offense.

B. Jurors H and S

Clark argued that defense counsel should have used challenges for cause or peremptory challenges to excuse two jurors: Juror H, a physician who believed that the daughter of one of the State's witnesses had been her patient, and Juror S, who was Detective Sinks's neighbor. The Michigan Court of Appeals denied relief on this claim because both jurors stated that they could be fair and impartial, *Clark*, 2014 WL 2795855, at *6, and the district court found that this decision was based on a reasonable application of *Strickland*.

Reasonable jurists could not debate the district court's conclusion. "An attorney's actions during *voir dire* are considered to be matters of trial strategy," *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001), and, thus, "are virtually unchallengeable," *Strickland*, 466 U.S. at 690. Moreover, to make the requisite showing of prejudice, Clark had to "show that the juror[s] w[ere] actually biased against him." *Hughes*, 258 F.3d at 458 (quoting *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995)). Reasonable jurists would agree that Clark could not do so, as both jurors stated that they could remain fair and impartial, and there is no evidence in the record that this was untrue. Although Juror H stated that she would feel uncomfortable serving as a juror if the daughter of the State's witness were involved in the case, the daughter did not testify and was in no way involved. *See Clark*, 2014 WL 2795855, at *6. This claim, therefore, does not deserve encouragement to proceed further.

For the foregoing reasons, this court **GRANTS** Clark's application for a certificate of appealability in part and **DENIES** the application in part. The Clerk's Office is directed to issue a briefing schedule on the following issue only: whether Clark was deprived of his Sixth Amendment right to counsel at his competency hearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk