

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Schuette, P.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BERNARD CHAUNCEY MURPHY,

Defendant-Appellee.

Supreme Court No. 132421

Court of Appeals No. 258397

Lower Court No. 04-001084-01

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED



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COUNTER-STATEMENT OF JURISDICTION

Bernard Chauncey Murphy was sentenced on October 4, 2004 after a jury convicted him of two counts of armed robbery, MCL 750.529, and one count of felony firearm, MCL 750.227b (1a). His appeal of right to the Court of Appeals reversed his convictions in a published opinion on July 26, 2006 (1a, 3b, 8b). The Court of Appeals vacated the published opinion and issued an unpublished opinion reversing Mr. Murphy's convictions on October 12, 2006 after the prosecution moved for reconsideration (8b-9b).

The prosecution asked for leave to appeal in this Court on November 8, 2006 (9b). Jurisdiction is vested in this Court because it granted leave to appeal on February 9, 2007 (9b). It ordered the parties to brief:

(1) whether trial counsel's failure to respond to the prosecutor's interlocutory application for leave to appeal, which resulted in the reversal of a pretrial motion to suppress evidence, should be viewed as structural error under *United States v Cronin*, 466 US 648; 80 L Ed 2d 657; 104 S Ct 2039 (1984), or whether it should be reversed under the two-prong standard for evaluating claims of ineffective assistance of counsel enunciated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); and (2) whether, under either standard, the appropriate remedy is reversal of the defendant's conviction and remand for a new trial, or whether a second appellate review of the trial court's suppression ruling should be conducted with the defendant being afforded constitutionally adequate representation (383a).¹

This Court has jurisdiction to consider this matter because it granted leave to appeal, as well from MCL 600.151, MCL 770.12, MCR 7.301 and MCR 7.302.

¹ Mr. Murphy filed a cross-application for leave to appeal that remains pending (383a). This Court also directed the Court of Appeals to inform defense counsel in writing that they must file a timely response to prosecutorial pre-conviction appeals (383a).

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COUNTER- STATEMENT OF QUESTION PRESENTED

1. Is trial counsel's failure to respond to a pre-trial prosecutorial appeal, emergency or otherwise, structural error under *United States v Cronic* because it is either a total absence of counsel during a critical stage or a circumstance where competent counsel very likely could not give assistance?

The Court of Appeals said "Yes."

Plaintiff-Appellant says "No."

Defendant-Appellee says "Yes."

2. Is the appropriate remedy under either *Strickland* or *Cronic* the appropriate remedy reversal of the conviction and remand for a new trial when counsel fails to oppose a pre-trial prosecutorial appeal?

The Court of Appeals said "Yes."

Plaintiff-Appellant says "No."

Defendant-Appellant says "Yes."

3. Will fashioning a rule of structural error when trial counsel does not answer a pre-trial prosecutorial appeal of an adverse evidentiary ruling give the criminal defense bar license to regularly fail to file briefs in interlocutory appeals to “ensure” appellate reversal?

The Court of Appeals said “No.”

Plaintiff-Appellant says “Yes.”

Defendant-Appellant says “No.”

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Although the Wayne County Circuit Court held three pretrial conferences between Bernard Chauncey Murphy's arraignment and armed robbery trial, the prosecution waited until after the jury had been selected on late Thursday afternoon, April 22, 2004, to ask Judge Deborah Thomas if it could have a police officer testify that in an unrelated case, police recovered a sawed-off shotgun and unfired shells at a gas station and an unfired shell in a truck under *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989) (1a, 6a-15a). Its only offer of proof was its recitation that Ramon Childs would testify that he followed a black Dodge Ram pickup truck to a gas station, saw one person get out and go inside, one person get out and head towards the back and two get out and stay by garbage cans next to the gas pumps, before driving away (8a-9a). Officer Childs continued to follow the truck, called back-up, who stopped the truck, and police found an unfired shell in the truck, unfired shells in the garbage cans next to the gas pumps and a sawed-off shotgun in a dumpster behind the gas station (9a-11a).

Defense counsel Salle Erwin objected because the proposed testimony came from a case that had been dismissed and no one had testified that Officer Childs saw anyone carrying anything, let alone a weapon or something that looked like a weapon (15a-18a). Judge Thomas noted that in *Hall*, the witness testified he saw the defendant carrying an object to a car where police subsequently found something, that Officer Childs never testified he saw anyone carrying "anything anywhere period" and she would have agreed that it was a distinction without a difference if he had seen any of the four men putting anything in the dumpster (18a-19a). She allowed the prosecution to use testimony about what police found in the trash cans near the gas pumps and in the

truck, but would not allow it to use any testimony about what was found behind the gas station because there had been no offer of proof that anyone saw someone taking anything there (20a). She did not rule whether the gun was admissible, and made it clear that she had not suppressed any evidence, because the only thing the prosecution had asked to admit was testimony (20a-21a).

After the jury was dismissed for the day, the prosecution asked to for a ruling on whether a shotgun police recovered in an unrelated case could be admitted into evidence “under both the ability of the victims to say that it looks like the weapon that was recovered and the circumstances of its recovery that I’ve placed on the record in light of the link it has to the Black Dodge Ram Pickup”:

THE COURT: Or it doesn’t have because the only thing that the record shows from any of these proceedings including the other trial was that the officer was at the gas station. He saw one person go into the gas station. He saw one person go behind the gas station. He saw two people stay with the vehicle. He gave no testimony that he saw anybody carrying anything anywhere. He did give testimony that he saw the people who stayed with the vehicle were around the trash receptacles that were at the pumping station. He did not see what they did with those. He could only identify one of them as a shadow of a person. He did not testify that he saw anybody putting anything in the trash bin. He didn’t see anybody taking anything out of the trash bin, but he did see them milling around the trash bin. *Then they got into the vehicle and left and he left. So both he and the vehicle left that location for some period of time. Chain broken in terms of observations of what did or did not appear at that location with that time span. So I don’t know if somebody else got there. I don’t know if somebody was there before then. I don’t know who – he didn’t say he saw anybody going around the store carrying anything. If I had that, I would allow it. I don’t have any of that. So if that is what you’re going to rely upon in terms of admissibility, it’s not there.* Now I don’t know what other testimony you may have which may make it both material and relevant, but *the observations of the officer which showed a break in the observations which did not include seeing anyone carrying anything does not support allowing an object that was found sometime later to come into evidence when you have not connected it to any of these four individuals whoever they may have been.* I don’t have a problem saying that the four individuals who were at the gas station were the same four individuals that

were arrested within a couple of blocks of the gas station. I think that burden has been met. *The problem is there's nothing, no testimony whatsoever that any of those four individuals whoever they may have been were carrying anything to the location where this gun was found. So I can't jump that leap. I don't have anything to carry me across the bridge. There's nothing there, so no I will not allow that to come in based on the absence of that evidence, the absence of that testimony.* Now, you got something else that might make both relevant and material, then it's in (23a-25a, emphasis added).

Judge Thomas emphasized that *Hall* did not apply to the gun's admission because there had been no offer of proof that "anybody saw anybody carrying anything." (25a). She denied the prosecution's motion to "stay the ruling," because it had tried armed robberies where it produced no weapon (25a-26a). She told the prosecution to prepare an order and ordered the parties to return at 9:00 a.m. the following day, a Friday (32a).

Instead, the prosecution drafted and obtained an order that Thursday afternoon granting the motion "in part as to shotgun shells found gas station trash bin and vehicle, denied to shotgun," then filed an Emergency Application for Leave to Appeal in the Court of Appeals on Friday, April 23, 2004, alleging that Judge Thomas' ground for not allowing the gun was "the defendants were never actually seen by the police with the shotgun in their hands, and that for this reason *Hall* was distinguishable." (3a, generally 35a-45a, 39a). The prosecution personally served papers at an address Ms. Erwin had listed in the Bar Journal Directory on "Friday afternoon," but it was not her current address and she claimed she never received any "paperwork" and went so far as to check her office on Saturday afternoon and found nothing and complained that the trial prosecutor did not mention an appeal when she spoke with him at 2:00p.m. on Friday afternoon (33a, 77a, 78a, 79a-80a, 83a). Mr. Murphy, who was incarcerated in the

Wayne County Jail just across the street from the Frank Murphy Hall of Justice, was not served (3a).

The Court of Appeals tried to page Ms. Erwin and left a voice mail message to confirm whether she had been served and to tell her that an answer was due as soon as possible and that she could fax it, however, Ms. Erwin waited to check with her service for telephone messages until after she was done at the hairdresser's at 6:00 p.m. (47a, 58a-59a, 1b). She admitted she did not file an answer because "I don't have an appellate section that I can walk into and say, hey look, take care of this." (77a). At 5:35 p.m., that Friday afternoon, the Court of Appeals peremptorily reversed the ruling because:

In light of the proposed testimony of the victims, evidence of the shotgun was clearly relevant to the charge that these defendants utilized the shotgun in committing acts of armed robbery. MRE 401; *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989). The fact that there were no eyewitnesses to any of the defendants actually depositing the shotgun into the trash dumpster goes to the weight of the evidence, not it's (sic) admissibility. *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999) (46a, see also 48a, 59a, 60a-61a).

Ms. Erwin apparently did not learn about the peremptory reversal until 10:00 a.m. on Saturday morning and did not actually receive a copy of the order until just before trial resumed on Monday morning (47a, 77a, 78a).

The first thing Ms. Erwin did when trial resumed the following Monday was tell Judge Thomas what had happened over the weekend (47a, 78a-79a). Judge Thomas pointed out that the emergency leave application's statement of facts was incomplete, the reason for her ruling was "totally inaccurate" and was troubled that it inferred that Mr. Murphy was a co-defendant in the unrelated case where the gun had been used as

evidence when in fact he had not even been charged (48a-50a). Ms. Erwin noted “numerous” incorrect facts in the emergency application:

. . . such as, they talk about Sergeant Chiles, of the Detroit Police aware of the robbery of the two women early that morning. I mean, this is the first time I’ve even heard of the – of an earlier robbery of two women.

And secondly, it says that he watches them go to the gas station pumping no gas. Well, we know in the police reports, they say Suspect Number One was pumping gas. They don’t distinguish who suspect Number One is, ever.

So I mean, I just had a few minutes to look at this, but when I compare it to the police reports, there are numerous factual errors –

* * *

. . . – just in their Statement of Facts (50a-51a).

She thought that the Court of Appeals reversed the ruling because it had been told incorrect facts (53a). Judge Thomas found other factual errors in the prosecutor’s leave application:

It also says in their Statement of Facts, that they saw someone going towards the dumpster. I heard no testimony that anybody saw anybody going toward a dumpster. I’ve heard – this is the first – only in reading the Statements of Fact have I ever heard the word dumpster used. I had no knowledge that this gun, the testimony is going to show that this gun was found in a dumpster.

There’s been no testimony that the person who went toward the back of the gas station, or the side of the gas station, went toward the side of the gas station where a dumpster may have been found.

There’s nothing in this Statement of Fact that says that the person who was seen walking toward the side or the back of the gas station was seen not carrying anything, period, whatsoever, at all.

There’s nothing in the Statement of Fact to make it clear that this Defendant was not a Defendant in the case involving the two women.

There’s nothing in the Statement of Facts that says that the – this Defendant, as it relates to the robbery of the paperboy or man that was delivering paper, that case has been dismissed because there was no identification, even if it’s going up on appeal. There’s nothing in the Statement of Facts. So, it does not make it clear that the case that is before this Court, the instant case, is the first case in what the prosecutor represents to be a series of cases. But that in the first case, as I understand it, there were two individuals in the instant case? This case before the Court, the argument that there were two individuals?

* * *

And then in the – which – the second case – the second case that prosecutor represents is connected, there were two individuals. Maybe more, but only two. And then, in the third case, and the second case being the two women. The third case that the prosecutor represents is also connected, they arrest four men in a truck. Even though there was supposed to be a fifth somebody that drove off in another vehicle.

* * *

And even with – one of the connecting factors is supposed to be the black pick-up. We've got a black pick-up, the make and model of the black pick-up changes from case to case. That's not in the Statement of Facts. And we've got no driver – we have no license plate that strictly identified this is the same one in all three cases. But yet in the Statement of Fact it goes on as if it's well established, when it is not.

And it doesn't make it clear that this is the first case, and this is the only one the Defendant is charged in (51a-53a; see also 79a.

Judge Thomas also noted that the prosecution had misstated the basis for her ruling:

Well, I know on Page 7 it says: 'The trial judge seems to have held that the reason the shotgun is inadmissible is because it was found in a dumpster after one of the occupants of the robbery truck went to the area of the dumpster, rather than having been seen by the police in the actual physical possession in the truck, when the truck was stopped.' *I didn't make any such ruling. I didn't say that at all. What I said was, no one saw anyone with the gun at all at the gas station. No one said that they saw anyone carry a gun anywhere at all at the gas station. That everyone left the gas station, including the witness. And just is arguable as reasonable for the prosecutor to assert that somebody in this truck, four of them, left a gun somewhere in public. It's just as arguable that somebody else left it there. You've got a chain in the observation. So, even if he said – if the witness had stayed at the gas station, and said, I didn't see anybody else go in that locale the whole time. Or I was there, and I had checked it before I saw that person go toward the side of the gas station, so I know it wasn't there before he got there, then you got something. But nobody has testified that they saw anyone with a gun, anything that looked like a gun, act like they were trying to conceal anything, went toward the dumpster, where the dumpster was, that there even was a dumpster.*

And so that was the Court's ruling is that *you haven't shown a nexus between what was recovered and the people in the car, period.* And to put all this information in here about these other two cases, where this man has not been charged, is certainly misleading. Especially, when in one case you've got two, one you've got five to six, the other you've got

three to four. You don't know what – if this man was in all of them all of them, none of them, one of them. So the Statement of Facts are inaccurate, and my – and the representation as to why this Court made its ruling is inaccurate (53a-55a, emphasis added; see also 79a).

Ms. Erwin agreed that this was the basis of the court's ruling:

I understand how the Court distinguished *Hall* from this case; and that is, Officer Chiles, when he's looking at that gas station, he sees four people, and one of them is walking to the side of the gas station. Now, is this person who's walking to the side of the gas station going there to urinate? Is he going – what's he going there for? Is he going there to throw trash somewhere? We don't know. And that's – that's my problem, that the Court is supposed to infer at this point, somebody, one of those four, not even my client is named, has gone back there to deposit a shotgun. And that's a stretch, your Honor, that I think is very unconstitutional at this point.

THE COURT: Well, I mean, I mean, what concerns this Court is that the officer testified he didn't see the man carrying anything.

MS. ERWIN: That's – that's correct.

THE COURT: If he said he saw him carrying something, it wouldn't be a stretch. I could go for that.

MS. ERWIN: And, Judge, *Hall* was further distinguished by having, like, a signature. It was a gun in a paper bag that appeared over and over, so it did fit a scheme or plan. But not in this case (76a-77a).

Ms. Erwin also pointed out that the Court of Appeals' ordered the ruling reversed because "the Defendants were not actually seen," which was "totally wrong." (86a). The appellate prosecutor who drafted the emergency interlocutory appeal based the Ex-Parte Statement of Facts on what the trial prosecutor had told him and knew nothing about how the order he appealed from had been prepared (81a-82a, 83a-84a, 86a).

Ms. Erwin felt that "this has to be looked into," so she moved for a stay because she anticipated that she would file a motion for reconsideration and "[go] up to the Supreme Court, if necessary:

. . . I believe that the Supreme Court – or the Court of Appeals did not have a correct Statement of Facts. I mean, when I read it, and I see about the two women, I – it's just, well, first of all, it's a violation of due process in my opinion (84a).

Judge Thomas granted the stay and released the jury over the prosecutor's objection:

. . . if the Statement of Facts had been more accurate, and if the reason for my ruling had been accurate at all, even close, I would be inclined to go along with you. But I've got an order that's been issued by the Court of Appeals, based on Statement of Facts that do not include some very pertinent information, like this is the only case the man has been identified in, and charged with. Does not – and – includes some facts that are, I think misleading, highly prejudicial, irrelevant. And the reason for my ruling is totally, totally wrong. Nowhere in these pleadings does it state that the officer, in my recollection, has clearly given sworn testimony that when he saw the person walk to the side, or the back of the gas station, he had no reason to believe that person was carrying anything. And that's my recall of that testimony, and that that is how I distinguished the case (85a).

Judge Thomas signed an order staying the trial “for the purposes of seeking Reconsideration by the Court of Appeals of its Order #255101 dated 4/23/04” that gave the following reasons for the stay:

The stay is granted because this Court finds that:

1. The Ex Parte Statement of Facts as submitted to the Court of Appeals is inaccurate;
2. The Order appealed from does not properly reflect the complete trial ruling of this Court as reflected in the record; and
3. The Defendant was not given any opportunity to respond [or] to be heard (11b).

She also signed an amended order that accurately reflected her original ruling (93a).

Ms. Erwin was uncertain whether she would be handling the appeal and told Judge Thomas that she would “get back to the Court by the end of the day.” (92a).

Ten days later, on May 6, 2004, the trial court appointed Neil Leithauser to handle the “prosecutor's [interlocutory] appeal” and ordered just the transcript of the April 22, 2004 aborted jury trial (94a). The following day, the Court of Appeals called Mr. Leithauser to tell him that his rehearing motion was due eight days later on May 14, 2004 (2b). The April 22, 2004 transcript was filed on May 12, 2004, just two days

before that deadline (2b). On June 21, 2004, the prosecution filed a written motion to dissolve the stay because “the Defendant has done nothing to preserve the right to rehearing or appeal to the Michigan Supreme Court” and was now “time barred” from doing so (12b). At a July 12, 2004 hearing, Mr. Leithauser explained why he had done nothing:

...Your Honor, this is one of those unusual cases where the Prosecutor had a motion for immediate consideration in the Court of Appeals. And it wasn't ten minutes when he filed his application, but it was almost as quick. He filed application one day, then the Court of Appeals without retaining jurisdiction, reversed Your Honor's decision (inaudible).

I was appointed about two weeks after that. Then the 21 days for a motion for reconsideration would have run, this was within the two days, and I didn't have any information really on the case where I could have a handle on it.

The Court did retain jurisdiction. So that Court – after my assignment actually the Court – what's this about, we don't even have a case. So then the decision that I undertook was whether or not to proceed to the Michigan Supreme Court under the 56 Day Application. I just didn't think I had enough of a record to do that. So that hasn't been done. There's nothing pending.

THE COURT: So what are you doing?

MR. LEITHAUSER: Nothing (95a-96a).

After Mr. Leithauser corrected Judge Thomas' impression that her stay also stayed his appellate deadlines, the stay was lifted (97a).

Mr. Murphy appealed as of right after a jury convicted him, arguing that Ms. Erwin's failure to file an answer to the prosecution's emergency interlocutory appeal and Mr. Leithauser's failure to seek reconsideration or leave to appeal in this court was a complete denial of counsel and structural error (366a-373a). Although served with a brief on October 28, 2005, the prosecution never filed a response, even though the parties stipulated for a deadline extension (8b). On July 27, 2006, the Court of Appeals, in an authored, published opinion, unanimously found structural error, and reversed Mr.

Murphy's convictions because "his trial counsel was ineffective in failing to oppose the prosecution's application for leave to appeal the trial court order suppressing evidence of the shotgun found at the gas station." (368a). The prosecution, claiming it did not file a brief because of a "bureaucratic snafu" and "carelessness," asked for reconsideration, and on October 12, 2006, the Court of Appeals granted reconsideration, vacated the July 27, 2006 authored, published opinion and issued an unpublished opinion virtually identical to the July 27, 2006 opinion except that it addressed the prosecution's claims and contained a concurring opinion (374a-392a, 8b-9b, 16b). On November 8, 2006, the prosecution filed an Application for Leave to Appeal asking this Court to reverse the Court of Appeals and hold that *Strickland* rather than *Cronic* applies when trial counsel fails to oppose an emergency prosecutorial interlocutory appeal (9b). Mr. Murphy filed a cross-appeal concerning a second issue he raised but not addressed by the Court of Appeals on November 22, 2006, which remains pending (383a, 9b). This Court granted leave on the prosecutor's application on February 9, 2007, ordering the parties to brief (1) whether trial counsel's failure to respond to the prosecutor's interlocutory application for leave to appeal that reversed "a pretrial motion to suppress evidence" should be viewed as structural error under *Cronic* or is subject to the error and prejudice analysis of *Strickland*, and (2) the appropriate remedy under either standard (383a).

COUNTER-ARGUMENT

1. TRIAL COUNSEL'S FAILURE TO RESPOND TO A PRE-TRIAL PROSECUTORIAL APPEAL, EMERGENCY OR OTHERWISE, IS STRUCTURAL ERROR UNDER *UNITED STATES v CRONIC* BECAUSE IT IS EITHER A TOTAL ABSENCE OF COUNSEL DURING A CRITICAL STAGE OR A CIRCUMSTANCE WHERE COMPETENT COUNSEL VERY LIKELY COULD NOT GIVE ASSISTANCE.

Standard of Review & Issue Preservation

Constitutional error is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). When error implicates a constitutional right, this Court must determine whether it is structural or non-structural. *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005), citing *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). If the error is structural, this Court must reverse; if it is not structural, it does not have to reverse unless it was harmless beyond a reasonable doubt. *Id.* See also *Cronic*, 659-660.

No hearing pursuant to *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973) was held, so review is limited to errors apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Discussion

The prosecution waited until after jury selection to ask for a ruling that testimony on how a gun was found and the gun recovered in an unrelated case were admissible so that the complainants could testify that it "looked like" the one used by one of the robbers. Judge Thomas ruled that neither testimony about how the gun was found nor the gun itself could be used at Mr. Murphy's trial, denied the prosecutor's motion to "stay the ruling," and ordered the parties to return the following morning to present an order that complied with her ruling. Rather than do that, the prosecutor got a generic

order denying his motion that same afternoon, filed an emergency application for interlocutory leave to appeal in the Court of Appeals the following day, personally served Ms. Erwin's office sometime "in the afternoon," and the Court of Appeals reversed Judge Thomas by end of the day. No one disputes that Ms. Erwin was ineffective when she did not respond to the prosecution's interlocutory appeal, even though both she and Judge Thomas determined that the prosecution's application contained inaccurate, irrelevant, prejudicial and misleading facts and misstated the ruling, and that the Court of Appeals peremptorily reversed without the benefit those arguments. No one disputes that Mr. Leithauser was ineffective when he did not seek reconsideration in the Court of Appeals or leave in this Court to point out those inaccuracies because he "did not have enough of a record." The sole area of contention is whether this is structural error under *Cronic* or whether this is analyzed under *Strickland*.

The right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." *Cronic*, 653; quoting *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). Their presence is essential because they are the means through which the other rights of the person on trial are secured. *Cronic*, 653. This right's special value explains why "[it] has long been recognized that the right to counsel is the right to the effective assistance of counsel." *Cronic*, 648, quoting *McMann v Richardson*, 397 US 759, 771, n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). If no actual "Assistance" "for" the accused's "defence" is provided, then the Sixth Amendment guarantee of counsel has been violated. *Cronic*, 655, quoting US Const, Am VI.

Most ineffective assistance of counsel claims are analyzed under *Strickland* because they involve counsel's performance either at trial or on appeal. *Roe v Flores-Ortega*, 528 US 470, 481; 120 S Ct 1029; 145 L Ed 2d 985 (2000), citing *Strickland*, 699, *Cronic*, 649-650; *Smith v Robbins*, 528 US 259; 120 S Ct 746; 145 L Ed 2d 756 (2000) and *Smith v Murray*, 477 US 527, 535-536; 106 S Ct 2661; 91 L Ed 2d 434 (1986). *Strickland* requires a showing that counsel's performance fell below objective standards of reasonableness and that it is reasonably probable that the result would have been different if counsel had not made the error. *Strickland*, 687, 690, 694. *Strickland* recognized, however, that a complete denial of the assistance of counsel is legally presumed to result in prejudice:

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent. *Strickland*, 696 (citations omitted).

Cronic identified the situations where prejudice is presumed: (1) the complete denial of counsel, because a trial would be presumptively unfair when the accused was denied counsel at a critical stage, (2) where counsel fails to subject the prosecution's case to meaningful adversarial testing and (3) where counsel is placed in circumstances where competent counsel very likely could not give assistance. *Cronic*, 659-662. A defense attorney's failure to respond to pre-trial appeals taken by prosecutors upset with adverse evidentiary rulings, emergency or otherwise, is structural error under *Cronic*, because for purposes of that proceeding, no response is no representation at all, with

no one looking at the record “with an advocate’s eye.” *Thomas v O’Leary*, 856 F2d 1011 (CA 7, 1988) ; *Castellanos v United States*, 26 F3d 717, 718 (CA 7, 1994). Prejudice is presumed because the lawyer’s conduct is not a denial of *effective* assistance of counsel in that proceeding, but of *any* assistance of counsel in that proceeding. *Turner v United States*, 961 F Supp 189, 191 (1997), quoting *Castellanos*, 718.

A. Trial counsel’s failure to respond to a pre-trial prosecutorial appeal is a denial of counsel during a “critical stage.”

The Sixth Amendment right to counsel attaches at all “critical stages” of a criminal proceeding. *Powell v Alabama*, 287 US 45, 57; 53 S Ct 1029; 77 L Ed 2d 985 (1932). A “critical stage” is one “where counsel’s absence might derogate from the accused’s right to a fair trial.” *People v Bladel*, 421 Mich 39, 52; 365 NW2d 56 (1984), see also *Coleman v Alabama*, 399 US 1, 9, 90 S Ct 1999, 26 L Ed 2d 387 (1999); and includes, for example, the indictment, arraignment, and preliminary hearing, *Kirby v Illinois*, 406 US 682, 689, 32 L Ed 2d 411, 92 S. Ct. 1877 (1972), the period between appointment of counsel and the start of trial, *Bell v Cone*, 535 US 685, 122 S Ct 1843, 152 L Ed 2d 914 (2002); *Mitchell v Mason*, 325 F 3d 732, 738 (2003), sentencing, *Strickland*, 686; *Glover v United States*, 531 US 198, 121 S Ct 696, 148 L Ed 2d 604 (2001), and appeal, *Evitts v Lucey*, 469 US 387, 396, 83 L Ed 2d 821, 105 S Ct 830 (1985). *Powell* described the pre-trial period, from arraignment until the beginning of trial, as the most critical time. *Id.*, 57.

Thomas v O’Leary found that a prosecutorial pre-trial appeal was also a critical stage. After it lost a motion to suppress a confession, the prosecution appealed under

authority² allowing for such appeals, sent copies of the Notice of Appeal, its subsequent motions and its brief to the defendant and his attorneys. When it moved for oral argument on October 13, the prosecution told the appellate court that the defendant had not filed a brief. That motion was denied on October 20. An appellate court justice sent only the prosecution a letter on October 30 saying no oral argument was necessary. Defense counsel moved for a deadline extension on November 2, but on November 9, while that motion was still pending, the appellate court, basing its decision solely on the record and the prosecution's brief, reversed the suppression order. *Id.*, 1013. The Seventh Circuit found that this pre-trial prosecutorial appeal was a critical stage of the trial:

The State's Rule 604(A)(1) appeal from the state trial court's suppression hearing was equally as critical. Surely the result was no less crucial to Thomas than Judge Kaplan's ruling on the suppression motions. Indeed, after the appellate court reversed the state trial court's suppression of Thomas's and Clark's statements, the disputed evidence was admitted at Thomas's trial and he was convicted. *Thomas v O'Leary*, 1014 (citations omitted).

Likewise, MCL 770.12(2)(a) allows prosecutors to appeal adverse pre-trial evidentiary rulings, and the outcome of that pre-trial appeal is no less crucial to defendants than the original suppression ruling, because it can result in the evidence being admitted at trial. As with *Thomas v O'Leary*, pre-trial appeals taken by Michigan prosecutors unhappy with adverse evidentiary rulings must be deemed a "critical stage" of the proceedings.

This Court recently discussed *Cronic's* application to counsel's absence at a post-arraignment police interrogation, a critical stage under *Michigan v Jackson*, 475 US 625, 629-630; 106 S Ct 1401; 89 L Ed 2d 631 (1986), in *People v Frazier*, ___ Mich

² Illinois Supreme Court Rule 604(a)(1), Ill. Rev. Stat. Ch. 110A, §604(A)(1) allows the prosecution to appeal of right from orders suppressing evidence.

___; ___ NW2d ___ (2007). After his mother retained an attorney for him when police got an arrest warrant, the defendant told the attorney that he had no idea his accomplice intended to rob the victims, he had not been involved in their murders, even though he was there when his accomplice robbed and murdered them, and that he wanted to tell police about his non-involvement. Relying on these innocence claims, the attorney told the defendant that he could talk to police and tell the truth because it might help negotiate a plea bargain. The defendant insisted on talking to police even after the prosecutor told him and the attorney that there would be no plea bargains or “deals.” Counsel arranged for the defendant’s surrender, went with him to the police station, was present when he waived his *Miranda*³ rights, but left before the interrogation because he assumed he could not stay. The defendant, contrary to what he had told counsel, admitted he knew the accomplice had been armed and intended to rob the victims and that the accomplice paid him with two \$50 bills after the murders. Slip Op, 3-4.

On appeal, the defendant argued that counsel had given ineffective assistance for advising him to talk to police, but the trial court found no ineffective assistance after a *Ginther* hearing and the Court of Appeals affirmed. The federal district court conditionally granted a writ of habeas corpus, finding structural error under *Cronic*, because counsel had abandoned his client during the police interrogation and ruled the confession inadmissible at the new trial. Before the retrial, the trial court ruled the confession inadmissible for all purposes and the prosecution appealed. In affirming in part and reversing in part, a split Court of Appeals agreed with the federal district court that the confession could not be used because counsel had abandoned his client at a

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1062; 16 L Ed 2d 694 (1966).

critical stage of the proceedings. Slip Op 5-7, see also *People v Frazier*, 270 Mich App 172; 715 NW2d 341 (2006).

This Court granted the prosecution's application for leave to appeal, asking the parties to address whether the exclusionary rule applied to fruits of a confession resulting from retained counsel's abandonment of his client during the interrogation under *Cronic* and from not police misconduct (Slip Op, 8) and held that the correct Sixth Amendment analysis was *Strickland* because, under *Bell v Cone*, *supra*, counsel was not *completely* absent during the interrogation:

Because counsel consulted with defendant, gave him advice, and did nothing contrary to defendant's wishes, counsel's alleged failure was not complete. Defendant alleges only that counsel erred at a specific point of the proceeding by advising him that he could waive his right to counsel at the interrogation. Slip Op, 13-14.

This Court noted its holding was supported by *Roe*, *supra*, which analyzed counsel's failure to file an appeal under *Strickland* and not *Cronic* because:

. . . the decision to plead guilty and waive the right to appeal, much like the decision to plead guilty and waive the right to a jury trial, belonged to the defendant. The Court stated that when an attorney consults with his client about the consequences of his client's decision, the attorney's performance can be considered deficient under the first prong of *Strickland* only if the attorney fails to follow his client's express instructions. Slip Op, 14 (citations omitted).

Strickland's applicability in *Frazier* was even more apparent than in *Roe*, this Court held, because the attorney discussed the risks of talking to police, and as in *Roe*, the decision to talk to police and waive the rights against self-incrimination and to have an attorney present during the interrogation belonged to the defendant. Slip Op, 14-15.

Bell v Cone, on which this Court relied for its ruling that counsel's absence must be *complete* before *Cronic* applies where there has been a denial of counsel at a critical

stage, did not involve a claim that counsel was absent from a critical stage. Instead, it involved a claim that counsel was present, but did not put on any mitigating evidence and waived final argument in the sentencing phase of a death penalty case:

Respondent argues that his claim fits within the *second* exception identified in *Cronic* because counsel failed to ‘mount some case for life’ after the prosecution introduced evidence in the sentencing hearing and gave a closing statement. *Bell v Cone*, 696 (emphasis added).

Although counsel did not put on mitigating evidence or make a closing statement, he gave an opening statement asking the jury to consider mitigating evidence that had been admitted at the trial, cross-examined a records custodian to bring out favorable evidence and successfully kept out gruesome photographs, *Id.*, 691-692. *Strickland* applied because counsel did not subject the prosecution’s case to meaningful adversarial testing only at specific points of the sentencing hearing – presentation of evidence and closing argument -- and for *Cronic* to apply, he must have failed to subject the *entire* sentencing hearing – opening argument, presentation of evidence, cross-examination and closing argument – to meaningful adversarial testing. *Id.*, 696-697. Even if situations presented by this case were one where counsel did not subject the prosecutor’s case to meaningful adversarial testing, it would still be structural error, because unlike the attorney in *Bell v Cone*, an attorney who does not respond to a pre-trial prosecutorial appeal fails to subject the *entire* pre-trial prosecutorial appeal to meaningful adversarial testing.

Roe overturned a bright-line rule in the First and Ninth Circuits that required counsel to file a notice of appeal unless the defendant specifically instructed otherwise, and that a failure to do so was per se deficient, because it ignored *Strickland’s* requirement that counsel’s deficient performance actually cause forfeiture of the appeal.

In the course of that analysis, the Court noted that applying *Strickland* broke no new ground because the decision to appeal rested with the defendant and only when an attorney does not file a notice of appeal after being asked to do by his client can that failure be deficient. While that may be true in post-conviction appeals either by leave or by right, that is not necessarily true with pre-trial *prosecutorial* appeals, because MCR 6.005(H)(3) imposes an affirmative duty on defense counsel to respond to any pre-conviction appeals filed by prosecutors. Claims where counsel has an affirmative duty to pursue an appeal and fails to do so are analyzed under *Cronic*. *Turner v United States*, 961 F Supp 189 (1997), citing *Rodriguez v United States*, 395 US 327; 89 S Ct 1717; 23 L Ed 2d 340 (1969); *Bonneau v United States*, 961 F 2d 17, 21 (CA 1, 1992); *Castellanos, supra*; *Williams v Lockhart*, 849 F2d 1134, 1137 n 3 (CA 8, 1988); *United States v Horodner*, 993 F 2d 191, 195 (CA 9, 1993).

A situation where counsel fails to respond to a pre-trial prosecutorial appeal can be distinguished from those presented in *Frazier*, *Bell v Cone* and *Roe*, because the defendants in those cases at least had attorneys assisting them and making tactical judgments about their cases. *Frazier's* attorney advised him before he turned himself into police. The attorney in *Bell v Cone* advocated on the defendant's behalf, albeit in a limited way. The attorney in *Roe* did not file an appeal, but the defendant claimed he talked about an appeal with her. *Id.*, 475. Unlike *Frazier*, *Bell v Cone* and *Roe*, attorneys who do not oppose prosecutorial efforts to overturn adverse pre-trial evidentiary rulings in the Court of Appeals give no assistance, make no tactical judgments and leave their clients with no advocate at all to argue their position while the Court of Appeals is deciding the pre-trial appeal. Situations like the one in this case are

more akin to a line of cases beginning with *Penson v Ohio*, 488 US 75; 109 S Ct 346; 102 L Ed 2d 300 (1988), where counsel's absence leaves the defendant with no representation during the appellate court's decisional process.

Penson involved an indigent defendant whose appellate lawyer was allowed to withdraw based on a conclusory statement that the case had no merit and he would not be filing a brief. Although the Ohio Court of Appeals noted that counsel's certification of no merit was "highly questionable," it nonetheless looked at the record without the assistance of any advocacy on the defendant's behalf, found that there had been plain error in jury instructions and reversed one conviction, finding that the defendant was not prejudiced by his attorney's dereliction because it had thoroughly examined the record and had received the benefit of arguments made by counsel for two co-defendants. The Ohio Supreme Court dismissed the appeal, but the United States Supreme Court reversed. *Penson*, 78-79.

Penson distinguished between two types of denial of effective assistance of appellate counsel: (1) those where the deficiency was a failure to raise (or properly brief or argue) one or more specific issues and (2) those where there has been an actual or constructive complete denial of any assistance at all. *Penson*, 88. In the first type, *Strickland* applies, and is exemplified by *Jones v Barnes*, 463 US 745; 103 S Ct 3308; 77 L Ed 2d 987 (1983), where the defendant complained that his court-appointed attorney did not raise a non-frivolous issue which he had asked be raised. In the second type, *Cronic* applies, and *Penson* found that the second type applied, analogizing its ruling to its holdings in critical stage cases where counsel was absent at trial:

The present case is unlike a case in which counsel fails to press a particular argument on appeal, or fails to argue an issue as effectively as he or she might. Rather, at the time the Court of Appeals first considered the merits of petitioner's appeal, appellate counsel had already been granted leave to withdraw; petitioner was thus entirely without the assistance of counsel on appeal. In fact, the only relief that counsel sought before the Court of Appeals was leave to withdraw, an action that can hardly be deemed advocacy on petitioner's behalf. It is therefore inappropriate to apply either the prejudice requirement of *Strickland* or the harmless-error analysis of *Chapman*.⁴ *Id.*, 88-89.

The difference between cases covered by *Jones v Barnes*, requiring a *Strickland* analysis, and cases covered by *Penson*, that are structural error under *Cronic*, is a difference in degree between *inadequate or incompetent* appellate advocacy in *Jones v Barnes* and *no actual or constructive* appellate advocacy in *Penson*. See *Lombard v Lynaugh*, 86 F2d 1475, 1486 (CA 5, 1989) (emphasis added). A situation where trial counsel does not respond to a pre-trial prosecutorial appeal clearly falls under *Penson*, because it cited with approval, among "a number" of federal court of appeals cases that had reached "a like conclusion when faced with similar denials of appellate counsel," *Id.*, 89 n 10, *Thomas v O'Leary, supra*.

Thomas v O'Leary is directly on point with the situation presented in this case. After the trial judge suppressed the defendant's statements, the state appealed. The defendant and his attorneys received a copy of the Notice to Appeal, but did not file a brief. The attorneys unsuccessfully moved for an extension of time to file a brief, and the appellate court, basing its decision solely on the record and the state's brief, reversed the suppression order. *Id.*, 1013. The Seventh Circuit held that a *Strickland* analysis was inapplicable:

. . . although cases in which defense counsel is unavailable during a critical stage of the proceedings bear some similarity to the kinds of

⁴ *Chapman v California*, 386 US 18, 24; 17 L Ed 2d 705; 87 S Ct 824 (1967).

situations that raise typical ineffective assistance of counsel claims, *Strickland* and *Cronic* convinces us that the Court does not intend for the *Strickland* test to control the former class of cases. The crucial premise on which the *Strickland* formula rests -- that counsel was in fact assisting the accused during the proceedings and should be strongly presumed to have made tactical judgments 'within the wide range of professional assistance' -- is totally inapplicable when counsel was absent from the proceedings and unavailable to make any tactical judgments whatsoever. *Id.*, 1016, quoting *Silverman v O'Leary*, 164 F2d 1208, 1216 (CA 7, 1985).

Applying *Cronic*, the Seventh Circuit held that trial counsel's failure to file a brief opposing the interlocutory appeal amounted to a complete denial of counsel:

In this case, Thomas's attorneys' failure to file a brief on his behalf on the State's Rule 604(a)(1) appeal from the trial court's suppression order amounted to a complete denial of assistance of counsel during a critical stage. For purposes of the appeal, no brief meant no representation at all. Thus, in our view, Thomas is not required under *Strickland* and *Cronic* to prove that the denial of his right to effective assistance of counsel on the appeal prejudiced the outcome of his case in order to make out a constitutional violation. *O'Leary v Thomas*, 1016-1017.

Fields v Bagley, 275 F 3d 478 (CA 6, 2001) is also directly on point and purports to apply *Strickland*. After the trial court suppressed cocaine as the fruit of an unreasonable search and seizure, the state filed an appeal and served the defendant's attorney, although he apparently no longer believed that he represented the defendant, and the defendant. The attorney filed an affidavit saying he told the prosecutor and the court of appeals that he had not been retained to represent the defendant and he believed that the defendant was indigent, but filed no motion to withdraw before the appellate court reversed the suppression order. Neither the attorney nor the defendant filed a brief on the merits. *Fields v Bagley*, 481. After the appellate court reversed the suppression order, the trial judge signed an affidavit saying the prosecutor had not provided the appellate court with a full record and that it had omitted the court's ruling that the evidence had been suppressed because the police officer's testimony was not

credible. A public defender filed a motion for reconsideration arguing his client had no representation on appeal that was denied. The public defender appealed to the Ohio Supreme Court, arguing that the defendant was denied effective assistance on appeal. Leave was denied. The defendant plead nolo contendere, and eventually appealed in federal court, arguing that he was denied any assistance of counsel during the prosecution's interlocutory appeal. *Id.*, 481-482. Purportedly applying *Strickland*, the Sixth Circuit automatically assumed a denial of counsel:

Fields's counsel did not provide any assistance at all, let alone effective assistance. Respondent, itself, points out that Fields's counsel breached his duty to inform his client and the court of the fact that he no longer represented Fields and to inform his client that an appeal had been taken. Fields's counsel, moreover, violated several Ethical Considerations under the Ohio Code of Professional Responsibility in leaving his client with no representation on appeal of the suppression issue. *Id.*, 484 (citations omitted).

Purportedly applying *Strickland*, the Sixth Circuit also automatically assumed prejudice from counsel's failure to file a brief, based on *Thomas v O'Leary, supra* and *Cronic, supra*: "Fields was not able to present any argument to advocate for affirmation of the of the suppression order, which, by itself, is enough to show prejudice." *Fields v Bagley*, 485.

Even if this Court were to declare *Strickland* applicable where trial counsel does not oppose a pre-trial emergency prosecutorial appeal of an adverse evidentiary ruling, the result would be the same, per *Fields v Bagley*. *Fields*, citing *Thomas v O'Leary, supra*, held that the state's interlocutory appeal of an order suppressing evidence was an appeal requiring the effective assistance of counsel just as a direct appeal would. *Fields* found that *Strickland's* first prong was satisfied when counsel did not file a response to the interlocutory appeal, finding that he "did not provide any assistance at

all, let alone effective assistance,” that the prosecution even pointed out that his lawyer breached his duty to tell his client that the prosecution had appealed and to tell his client and the court that he was no longer representing Fields, and that counsel violated several Ohio ethical rules with his conduct. *Fields* found that *Strickland’s* second prong was satisfied because, under the authority of *Thomas v O’Leary, supra, Cronin, supra,* and *Green v Arn, 809 F 2d 1257, 1263 (CA 6, 1987),* because he was not able to present any argument to advocate that the suppression order be affirmed. It found that but for counsel’s error, the result would have been different because:

More specifically, however, *Fields* was unable to point out that the appellate court did not have the full record of the suppression proceedings before it. The trial court’s statement that it was suppressing the drugs because it did not find the testimony of the police officers to be credible was not included in the transcript. . . . The appellate court, therefore, was unaware of this basis for the trial court’s decision. *Fields v Bagley, 485.*

As with *Fields*, both Ms. Erwin and Mr. Leithauser violated various ethical considerations when they left their client with no representation on appeal of Judge Thomas’ order. Ms. Erwin violated Rule 1.3 of the Michigan Rules of Professional Conduct that “[a] lawyer shall act with reasonable diligence and promptness in representing a client,” meaning that “[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer....” Under MCR 6.005(H)(3), she had a duty and obligation to respond to the prosecution’s emergency application for interlocutory leave to appeal. Mr. Leithauser’s inaction violated the *Minimum Standards for Indigent Criminal Appellate Defense Services* in effect in 2004, including Standard 1 (“Counsel shall, to the best of his or her ability, act as the defendant’s counselor and advocate, undeflected by conflicting interests and subject to the applicable law and rules of professional conduct.”) and Standard 12

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("Assigned counsel shall not take any steps towards dismissing an appeal for lack or arguable meritorious issues without first obtaining the defendant's informed written consent."⁵). Not only did Mr. Leithauser not act as Mr. Murphy's counselor and advocate, he effectively dismissed the appeal without first getting Mr. Murphy's informed, written consent. As in *Fields*, failure by both to present any to argument to advocate Judge Thomas' order was enough to show prejudice, and Mr. Murphy was unable to point out that the Court of Appeals did not have an accurate record of the hearing where Judge Thomas would not allow the evidence before it and was unaware of the misrepresentations and misstatements.

However, *Cronic* controls a situation where trial counsel does not respond to a pre-trial appeal taken by prosecutors unhappy that the trial court suppressed evidence. As with *Penson* and *Thomas v O'Leary*, no brief filed by defense counsel in a pre-trial prosecutorial interlocutory appeal means no representation at all at a critical stage – a *complete* absence from that critical stage, not an absence at a specific point of that critical stage. Unlike *Roe*, the decision to oppose the appeal is not one a defendant can waive – MCR 6.005(H)(3) requires trial counsel to respond to any prosecutorial pre-conviction appeals.⁶ Applied specifically to this case, no brief filed arguing to uphold the trial court's ruling by Ms. Erwin and no motion filed for reconsideration of the order

⁵ The *Minimum Standards for Indigent Criminal Appellate Defense Services* were completely revised, effective January 1, 2005, by Administrative Order No. 2004-6. Revised Standard 5 is much stronger: "An appeal may never be abandoned by counsel; an appeal may be dismissed on the basis of the defendant's informed consent, or counsel may seek withdrawal pursuant to *Anders v California*, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967), and related constitutional principles. Although failing to follow the revised *Standards* do "not itself constitute grounds for...a claim of ineffective assistance of counsel....," the *Minimum Standards* in effect at the time of Mr. Leithauser's appointment contained no such restriction.

⁶ In addition to granting leave to appeal to the prosecution in this case, this Court directed the Court of Appeals to inform defense counsel in writing that they must file a timely response in all prosecutorial pre-conviction appeals (383a).

reversing that ruling by Mr. Leithauser meant no representation in the Court of Appeals. That *complete* absence contaminated Mr. Murphy's entire trial, because the evidence was admitted and Mr. Murphy was convicted. The issue of whether the shotgun was admissible was crucial to the prosecution's case as "evidence...clearly relevant to the charge that these defendants utilized the shotgun in committing acts of armed robbery." (45a). The trial court's ruling excluding this evidence was a crucial blow to the prosecution, otherwise, it would not have filed the emergency interlocutory appeal in the first place; the order's reversal by the Court of Appeals spelled doom for Mr. Murphy, because the prosecution extensively argued that the shotgun was "evidence of street robberies." (321a, 339a, 24b-25b). The use of a sawed-off shotgun was essential to the jury's findings of guilt, because it was instructed that it had to find that "at the time of the assault, the defendant was armed with a weapon designed to be dangerous and capable of causing death or serious injury," to find him guilty of armed robbery (26b-27b) and also find that "...at the time the defendant committed armed robbery he knowingly carried or possessed a firearm and it doesn't matter whether the gun was loaded or not" to find him guilty of felony firearm (28b). The only way it could make that finding was to accept that the sawed-off shotgun recovered by police in an unrelated case "looked like" the one used in this case. Because the pre-trial interlocutory appeal was non-adversarial, no one can possibly know what would have happened had Mr. Murphy's side of the case had been briefed. Would a brief on Mr. Murphy's behalf pointing out the prosecutor stated misleading, highly prejudicial, irrelevant and inaccurate facts and an incorrect recitation of Judge Thomas' ruling swayed the Court of Appeals? No one will ever know, however, in the trial court, when the battle was fair

and both sides were represented, Mr. Murphy won. The result of the Court of Appeals' reversal, coupled with Mr. Murphy's constitutionally deficient representation on his behalf there, was that Mr. Murphy had no one looking out for his rights on the prosecution's pre-trial appeal, a critical stage of his trial.

B. Pre-trial emergency prosecutorial appeals where counsel must respond within a matter of mere hours is a circumstance where competent counsel very likely could not give effective assistance.

The prosecution claimed it personally served Ms. Erwin's office with "a packet of materials" sometime on "Friday afternoon" (80a). The Court of Appeals tried to page and left a voice mail message to confirm whether she had been served, but she did not check with her service for telephone messages until after the Court had peremptorily reversed Judge Thomas' ruling (47a, 58a-59a, 1b). Such situations place defense counsel in a situation where competent counsel very likely could not render assistance, and would be structural error under *Cronic's* third prong.

Powell, supra was such a case. The defendants had been indicted for a highly publicized capital offense and six days before trial, "all members of the bar" were appointed for the arraignment. *Powell*, 56. An attorney from Tennessee appeared on behalf of persons "interested" in the defendants on the day of trial, but had not had an opportunity to prepare the case or become familiar with local procedure and was not willing to represent the defendants on such short notice. That problem was solved when the trial court decided that the Tennessee attorney would represent the defendants, with whatever help the local bar could provide. *Cronic*, 660. The United States Supreme Court held that "such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and

substantial aid in that regard.” *Powell*, 53. Counsel’s performance at trial was ignored, because under the circumstances, the likelihood that counsel could have performed as an effective adversary was so remote as to make the trial inherently unfair. *Cronic*, 660-661.

In *United States v Morris*, 470 F3d 596 (CA 6, 2006), the defendant was charged in Wayne County Circuit Court with three firearm and drug offenses under Project Safe Neighborhoods, a joint effort between the federal government and Michigan authorities to address problems related to gun violence. The defendant met with his attorney for the first time at the “pre-preliminary examination,” where the prosecution made a plea offer of one to four years for the drug charge and two years for the firearm charge. Defense counsel, who had not practiced in federal court and had no experience interpreting the Federal Sentencing Guidelines, had been given an estimate of 62 to 68 months under the federal guidelines by the state prosecutor, who had been told the range by an assistant United States attorney, and she gave this information to the defendant. That estimate was wrong, and the defendant was really subject to a range of 90 to 97 months if he plead guilty, or 101 to 111 months if he did not. Defense counsel had not received complete discovery at the time and could speak only briefly with her client in the “bull pen,”⁷ where she was forced to talk with him through a meshed screen in the presence of other detainees. *Id.* Right after this meeting, the defendant was taken to the “pre-preliminary examination” and told that he had to make an immediate decision on the plea offer and if he turned it down, he would be referred to federal court to face charges that could result in a more severe sentence, even though

⁷ The “bull pen” is a cell located behind the courtroom, is usually crowded with detainees, requires attorneys and clients to shout at each other and attorneys, court personnel and officers walk the hall where it is located, further diminishing attorney-client privacy. *Id.*

he could not discuss his options privately with his attorney and she did not know the strength of the case. The defendant rejected the state's offer and was referred to federal court with the understanding that his guidelines were 62 to 68 months. Six months after being indicted in federal court, the defendant filed a motion to remand to state court because his state attorney's failure to properly advise of the applicable federal sentencing range, in conjunction with the system of attorney consultation, denied him the Sixth Amendment right to counsel. *Id.*

After two days of hearings, the district court granted the defendant's motion because the "pre-preliminary examination" was a critical stage, and the defendant had suffered a constructive denial of counsel under *Cronic*. *Id.* The Sixth Circuit affirmed, agreeing that Wayne County's practice of assigning counsel just before the "pre-preliminary examination" was a "state impediment to effective assistance of counsel" in that it gave appointed counsel an extremely short time to prepare for the hearing, it provided a lack of privacy to consult with the client, and it required the defendant to make an immediate decision about the plea offer. It had no trouble agreeing that "counsel was placed in circumstances in which competent counsel very likely could not render assistance," and presumed prejudice in the situation in which the attorney was placed. *Id.*

The same can be said in situations involving emergency pre-trial prosecutorial appeals, especially like the one in this case. Although the prosecution likely did not expect the adverse ruling based on its experience with a "co-defendant's" trial, it was responsible for creating the problem in the first place, waiting until after the jury had been selected to ask whether it could use testimony and evidence that it apparently had

known about for months before the trial (7a, 10a-11a, 15a-17a, 21a-22a, 38a-39a, 49a, 61a, 63a, 64a, 67a, 68a, 87a-88a). It served Ms. Erwin's office, but not Ms. Erwin herself, "Friday afternoon," giving her an extremely short time to draft and file a response likely because, as the prosecution claims, she was unable "to do multiple tasks at once: engaged in trial, and without a dedicated appellate department to handle litigation in a different forum, counsel was simply unable to do both tasks." (Plaintiff-Appellant's Brief on Appeal, 23). Like the situation in *Morris*, Mr. Murphy was prejudiced by the situation in which his attorney was placed.

Mr. Leithauser was no better off. The April 22, 2004 transcript was filed a mere two days before a motion for rehearing was due. It appears that no other transcripts, such as the April 26, 2004 hearing where Ms. Erwin and Judge Thomas pointed out the factual errors in the prosecutor's interlocutory leave application or the ones containing the proposed testimony discussed at the April 22, 2004 hearing (see 47a-92a, 10a-11a, 15a-20a, 23a-25a) were ordered or filed (1b). As he admitted, he did not have "enough of a record" on which he could proceed by either deadline (96a). Under the circumstances, it is clear that the appropriate analysis for these types of claims is one of a denial of counsel and presumption of prejudice under *Cronic*, *Penson*, *O'Leary v Thomas*, *Powell* and *Morris*.

2. UNDER EITHER *STRICKLAND* OR *CRONIC* THE APPROPRIATE REMEDY IS REVERSAL OF THE CONVICTION AND REMAND FOR A NEW TRIAL WHEN COUNSEL FAILS TO OPPOSE A PRE-TRIAL PROSECUTORIAL APPEAL.

Standard of Review & Issue Preservation

Technically, there is no standard of review. This Court asked the parties to address this question in its order granting the prosecution leave to appeal.

Discussion

Under either standard, the appropriate remedy cannot be merely a second appellate review of the lower court order disallowing or suppressing the evidence conducted by “constitutionally adequate” defense representation, because if the second appellate review of the order is affirmed, a defendant will still stand convicted. A Sixth Amendment violation requires automatic reversal when the constitutional violation pervades the entire criminal proceeding, because it affects the “framework within which the trial proceeds, rather than simply [causing] an error in the trial process itself.” *Satterwhite v Texas*, 486 US 249, 257-258; 108 S Ct 1792; 100 L Ed 2d 284 (1988); *Arizona v Fulminate*, 499 US 279, 310; 111 S Ct 246, 113 L Ed 2d 302 (1991).

The Sixth Amendment violation here did pervade the entire trial, because the testimony and evidence was admitted and Mr. Murphy was convicted. The jury even heard that other people had been assaulted with the gun (259a, 260a). The issue of whether the shotgun was admissible was crucial to the prosecution’s case as “evidence...clearly relevant to the charge that these defendants utilized the shotgun in committing acts of armed robbery.” (45a). Reversal of Judge Thomas’ order with no opposition by Ms. Erwin and Mr. Leithauser spelled doom for Mr. Murphy, because the prosecution extensively argued that the shotgun was “evidence of street robberies.”

(321a, 339a, 24b-25b). The use of a sawed-off shotgun was essential to the jury's findings of guilt, because it was instructed that it had to find that "at the time of the assault, the defendant was armed with a weapon designed to be dangerous and capable of causing death or serious injury," to find him guilty of armed robbery (26b-27b) and also find that "...at the time the defendant committed armed robbery he knowingly carried or possessed a firearm and it doesn't matter whether the gun was loaded or not" to find him guilty of felony firearm (28b). The only way it could make that finding was to accept that the sawed-off shotgun recovered by police in an unrelated case "looked like" the one used in this case.

Thomas v O'Leary, supra, gave the prosecutor three remedies: release him, retry him or conduct a second appellate review of the suppression ruling with constitutionally adequate representation. *Id.*, 1019. Although the prosecutor chose to conduct a second appellate review, that is not what ultimately happened. After initially getting a stay of the mandate so it could pursue a writ of certiorari to the United States Supreme Court, a mandate was issued after the state told the United States Court of Appeals it was abandoning its Supreme Court petition, then, believing it had 120 days to choose its option, took no action until May 1, 1989, when it filed a motion in the Illinois Court of Appeals to recall the mandate and reinstate its appeal. The appellate court reinstated the appeal, and gave the state until June 1, 1989 to file an appellate brief, but the state did nothing. After the appellate court issued an order to show cause why the appeal should not be dismissed, the state filed its brief. The defendant argued that the state appellate court no longer had jurisdiction. The appellate court dismissed the

appeal, *People v Thomas*, 205 Ill App 3d 840; 563 NE2d 852 (1990), leaving the prosecution with the options of re-trying the defendant or releasing him.

The better solution where counsel has failed to respond to a pre-trial prosecutorial appeal of an adverse evidentiary ruling is to vacate the conviction and remand for a new trial where the prosecution can re-appeal the adverse evidentiary ruling using a complete record. Such a remedy is not without precedent. *Goebel v State*, 848 So2d 479 (2003) involved a situation where defense counsel did not oppose a prosecutorial appeal of a suppression order that was reversed on appeal. He subsequently plead guilty to amended charges. *Id.*, 479. The Florida appellate court found *Cronic* structural error under the authority of *Thomas v O’Leary, supra*, and although it appeared that the court remanded for a “new appeal” of the suppression order, it had to first be determined whether that plea was fatal to the claim. *Id.*, 481. The only way that could be determined was to let the defendant to withdraw his plea:

We conclude that Goebel may be entitled to a belated appeal, but a necessary first step is with the withdrawal of his guilty plea. Otherwise, even if a belated appeal of the interlocutory order were granted and the suppression order reversed, Goebel would still stand convicted. *Goebel*, 481.

Fields v Bagley, supra, remanded for a belated appeal of the suppression order, but did not address the effect of the subsequent entry of a nolo contendere plea. However, it appears that the appropriate remedy where trial counsel does not oppose prosecutorial appeals from adverse evidentiary rulings is to put the defendant in the position he would have been but for the appeal – reverse the conviction and remand for a new trial where the prosecution can choose whether to appeal. That would be most appropriate in situations like the one presented in this case.

3. FASHIONING A RULE OF STRUCTURAL ERROR WHEN TRIAL COUNSEL DOES NOT ANSWER A PRE-TRIAL PROSECUTORIAL APPEAL OF AN ADVERSE EVIDENTIARY RULING WILL NOT GIVE THE CRIMINAL DEFENSE BAR LICENSE TO REGULARLY FAIL TO FILE BRIEFS IN INTERLOCUTORY APPEALS TO “ENSURE” APPELLATE REVERSAL.

Standard of Review & Issue Preservation

Technically, there is no standard of review. However, the Court of Appeals has ruled against the prosecution’s hysterical hyperbole (381a, 382a).

Discussion

The prosecution warns that an argument that “no competent or intelligent defense attorney” would risk his or her reputation by deliberately failing to respond to a pre-trial prosecutorial appeal of an adverse evidentiary ruling “ignore[s] the critical differences between claims analyzed under *Cronic* and *Strickland*,” and “far from risking reputation or disbarment, counsel’s actions would be legally unassailable and tactically brilliant: if the issue was a significant one, it might complicate the trial in the unlikely event the Court of Appeals made a mistake in considering the prosecutor’s application, but the worst that would happen would be a second chance at an acquittal; responding, on the other hand, might lead not only to an appellate loss, but also to the possibility that the conviction would be sustained on appeal,” yet, the prosecution argues that the remedy should be “full and fair’ litigation of the point on direct appeal.” (Plaintiff-Appellant’s Brief on Appeal, 32, 36-37). This argument borders on the absurd. Why would trial counsel create an issue for appeal when the remedy for that error would be to provide the client with counsel on appeal, something counsel could have done in the first place? See *Fields v Bagley*, 485. The prosecution’s concerns are exaggerated, because by its own admission, “interlocutory appeals come only by the leave of the

court, and are rarer events,” and “[r]arer still are emergency appeals. . . .” (Plaintiff-Appellant’s Brief, 26, emphasis added). The fact that there is a dearth of cases on point underscores that this is a situation that it is a rare case where counsel does not oppose a pre-trial prosecutorial appeal. Furthermore, MCR 6.005(H)(3) requires trial counsel to respond to any prosecutorial pre-conviction appeals and to the extent that this Court believes that defense counsel can flaunt the rules to get a reversal and a new trial for the client, it can amend the rule to impose sanctions against the attorney for failing to adhere to the rule, rather than sanction the client. Its February 9, 2007 order already directs the Court of Appeals to inform defense counsel in writing that they must timely respond to the application (383a). This would be more effective and would stem the prosecution’s anticipated flood of inaction by defense counsel in the name of insuring appellate reversal and the proverbial “second bite of the apple.” *Evitts v Lucey*, supra, recommended such an action to a similar hysterical prosecutorial claim. *Id.*, 397, 399.

However, if this Court reverses the Court of Appeals and holds that a complete failure to file a brief opposing a prosecutorial interlocutory appeal is not structural error mandating reversal under *Cronic*, then it will become a way station for other similarly situated defendants on the way to successful federal habeas review, because such a ruling would be both contrary to and an unreasonable application of *Cronic*, and *Bell v Cone*. The United States Supreme Court has continued to confirm the vitality of *Cronic*’s “per se” approach. See *Roe v Flores-Ortega*, 483 and *Terry Williams v Taylor*, 529 US 362; 120 S Ct 1495; 146 L Ed 2d 389, 391 (2000). The Sixth Circuit has also continued to confirm the vitality of *Cronic*’s “per se” approach in *Olden v United States*,

224 F3d 561 (CA6 2000) and *Mitchell, supra* and have noted this Court's failure to properly apply *Cronic*. See *Mitchell, supra*; *French v Jones*, 332 F 3d 430 (CA 6, 2003).

SUMMARY AND RELIEF REQUESTED

Defendant-Appellee BERNARD CHAUNCEY MURPHY respectfully requests:

1. That this court hold that defense trial counsel has an affirmative duty to respond to any prosecutorial preconviction appeals under MCR 6.005(H)(3) and failure to do so constitutes structural error under *Cronic*,
2. Affirm the Court of Appeals judgment reversing his conviction because of the denial of counsel at a critical stage of trial,
3. Remand this case for a new trial consistent with the Court of Appeals' October 12, 2006 opinion, at which the prosecution can choose to appeal the original order denying its motion to use testimony about the recovery of a gun that "looked like" the one used in the charged robbery in an unrelated case, and the gun itself, based on an accurate recitation of the proposed evidence and the trial court's original ruling.

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