NO. _____

In the

Supreme Court of the United States

JAVAID PERWAIZ,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

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

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I. QUESTION PRESENTED FOR REVIEW

In *United States v. Cronic*, 466 U.S. 648, 659 (1984), this Court recognized that where "complete denial of counsel" occurs prejudice due to ineffective of counsel can be presumed. Furthermore, "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-657. Thus, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659.

In this case, Petitioner was convicted after a jury trial on numerous counts related to health care fraud. When proceedings turned to sentencing, his sentencing counsel failed to make any meaningful objections to the Presentence Investigation Report, did not argue for the district court to impose any particular sentence on Petitioner – who faced centuries in prison – and said only that "I have every confidence that the Court will fashion a sentence . . . that is sufficient but not greater than necessary pursuant to 18 U.S.C. § 3553."

The question presented in this Petition is whether such minimal sentencing advocacy is the kind of failure to "subject the prosecution's case to meaningful adversary testing" that "makes the adversary process itself presumptively unreasonable," entitling Petitioner to relief under *Cronic*.

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- *United States v. Perwaiz*, Appeal No. 21-4255, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on June 10, 2024.

V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Perwaiz's conviction is unpublished and is attached to this Petition as Appendix A. The issue raised in this Petition was not raised in the district court and, therefore, there is no district court ruling on the matter. The relevant portion of the sentencing hearing transcript is attached to this Petition as Appendix B. The judgment order is unpublished and is attached to this Petition as Exhibit C.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on June 10, 2024. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court's entry of its judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of the Sixth Amendment to the United States Constitution, which provides, in pertinent part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On November 8, 2019, a criminal complaint was filed in the Eastern District of Virginia charging Javaid Perwaiz with one count each of healthcare fraud, in violation of 18 U.S.C. § 1347, and making false statements related to healthcare matters, in violation of 18 U.S.C. § 1035. JA032.[1] On December 5, 2019, an indictment was returned charging Perwaiz with five counts of healthcare fraud (Counts One through Five), three counts of making false statements related to healthcare matters (Counts Six through Nine), and two counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A (Counts Ten and Eleven). JA033-048. On June 19, 2020, a superseding indictment was returned, charging Perwaiz with 26 counts of healthcare fraud (Counts One through Twenty-Six), 33 counts of making false statements related to healthcare matters (Counts Twenty-Seven through Fifty-Nine), and three counts of aggravated identity theft (Counts Sixty, Sixty-One, and Sixty-Three). JA049-090. Because those charges constitute offenses against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Perwaiz was convicted by a jury of Counts One through Ten, Fourteen through Thirty-One, Thirty-Three through Forty, and Forty-Four through Fifty-Nine. JA3420-3430. A judgment order was entered on May 18, 2021. JA3743-3762. Perwaiz timely filed a notice of appeal on May 20, 2021. JA3763. The United States Court of Appeals for the Fourth Circuit had jurisdiction

[1] "JA" refers to the Joint Appendix filed in this appeal before the Fourth Circuit.

pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This appeal arises from a trial on a 63-count indictment, which led to Perwaiz's convictions on 52 counts of healthcare fraud and making false statements in relation to healthcare matters. At sentencing, the district court imposed a 59-year term of imprisonment, a *de facto* life sentence for the 71-year-old Perwaiz. At issue in this Petition is whether Perwaiz's sentencing counsel's minimal contribution to sentencing failed to "subject the prosecution's case to meaningful adversarial testing" rendering "the adversary process itself presumptively unreasonable." *Cronic*, 466 U.S. 648, 659 (1984).

1. Perwaiz, a long-time physician with a practice in Virginia, is charged with several dozen counts related to fraudulent healthcare practices.

Pervaiz was born in Pakistan in 1950. JA2622. After graduating from college and medical school he came to the United States in 1974. JA2625. He spent four years in Charleston, West Virginia, for his residency before relocating to the Chesapeake, Virginia, area, where he began practicing medicine in 1980. JA2626-2632. After a brief period working in partnership with other doctors, Perwaiz opened his own medical office, where he practiced as a board certified OB/GYN until his arrest in 2019. JA2633; JA9847.

In 2018, the FBI received a tip from a former colleague of Perwaiz alleging that he had performed an unnecessary procedure on a patient who was unaware that the procedure was taking place. JA9847. An investigation ensued that uncovered

evidence suggesting that Perwaiz had engaged in a lengthy scheme to defraud various healthcare benefit programs, including Medicare and Medicaid, by submitting claims for services that were not medically necessary, based on falsified patient records, and, in some cases, were not performed at all. JA9848. The scheme could be broken down generally to include: (1) the falsification and modification of estimated due dates for pregnant mothers, leading to their early induction and child birth, JA9849-9850; (2) billing for hysteroscopies[2] and colposcopies[3] that were not performed or were, in some instances, allegedly performed when the necessary equipment was defective, JA9850-9852; (3) patient records that did not match the complaints or conditions patients actually had, leading to the performing of unnecessary procedures based on the falsified complaints, JA9852-9858; and (4) falsifying dates on Medicaid forms requiring a 30-day waiting period before sterilization procedures were performed. JA9858-9859.

As a result of the investigation, Perwaiz was initially charged in a criminal complaint with one count each of healthcare fraud and making false statements in relation to healthcare matters. JA032. Ultimately, a 63-count superseding indictment was returned charging Perwaiz with 26 counts of healthcare fraud, 33 counts of making false statements, and three counts of aggravated identity theft.[4] JA069-090.

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[2] A hysteroscope is an instrument for examining the cervix for evidence of cancer, fibroids, polyps, or other conditions. JA562.

[3] A colposcope is another instrument used to examine the cervix, usually based on abnormal results from a Pap smear or other tests. JA550.

[4] The superseding indictment contained an additional count of aggravated identity theft, Count Sixty-Two, which was withdrawn by the Government after the indictment was returned. JA088.

Ten of the fraud counts included allegations that they resulted in serious bodily injury. JA063-070. The Government proposed to resolve matters by offering Perwaiz an agreement to plead guilty to a single fraud count, initially to one of the serious bodily injury counts (which carries a 20-year statutory maximum sentence) and then to a count without such injury (which carries a 10-year statutory maximum sentence). JA165-166. Perwaiz rejected both offers and proceeded to trial. JA167-168.

Over the course of an 18-day trial, the Government presented dozens of witnesses, including former patients and employees, others who worked with Perwaiz in various facilities, and representatives of the various insurance companies involved. The Government also presented expert testimony about the standard of care applicable to the patients who testified and whether the procedures performed were appropriate for the complaints (or lack thereof) made by patients. The defense case primarily consisted of the testimony of Perwaiz, who testified over the course of three days. JA2621-3355.

The jury convicted Perwaiz on by a jury of 23 counts of healthcare fraud and 29 counts of making false statements in relation to healthcare matters. JA3420-3430.

2. The district court imposes a 59-year sentence, nine years more than requested by the Government, after Perwaiz's sentencing counsel fails to make any meaningful sentencing argument on his behalf.

Following Perwaiz's conviction, a Presentence Investigation Report ("PSR") was prepared to assist the district court at sentencing. JA9843-9884. Perwaiz's advisory Guideline range was calculated under U.S.S.G. § 2B1.1, which applies to

"larceny, embezzlement, and other forms of theft." The probation officer recommended a base offense level of seven, along with numerous upward adjustments:

- 20-level enhancement for a loss amount between $9.5 and $25 million
- 2-level enhancement because the offense involved ten or more victims
- 3-level enhancement for loss to a Government healthcare program between $7 and $20 million
- +2 enhancement for the use of sophisticated means
- +2 enhancement because the offense involved the reckless risk of serious bodily injury
- +2 enhancement because the victim of the offense was vulnerable
- a further +2 enhancement because the offense involved a large number of vulnerable victims
- +2 enhancement for abuse of a position of trust
- +2 enhancement for obstruction of justice

JA1864-9865. In total, Perwaiz's offense level was 44, reduced to 43 by operation of the Guidelines. JA9865. Combined with a Criminal History Category I,[5] Perwaiz's advisory Guideline "range" was life in prison, restricted by the aggregate statutory maximum for his offenses of conviction of 5700 months (or 475 years). JA9866; JA9877-9878. The Government had no objection to those calculations. Perwaiz,

[5] Perwaiz had prior tax offenses which were too old to count for criminal history points. JA9865-9866.

through counsel, objected to all of them generally because "he pled not guilty in this matter, testified that he did not commit any of the offenses and maintains that he is not guilty of any of the offenses." JA9835. Sentencing counsel did not argue that any of the particular enhancements should not apply.

The PSR also contained a lengthy summary of Perwaiz's life, including his employment and medical histories. JA9867-9877. Perwaiz was born in "a small village" in Pakistan in 1950. JA9867. Although "there was no electricity or running water," he explained that he never suffered any "abuse or neglect as a child." *Ibid*. He had a brother and sister who continued to live in Pakistan, as well as another brother who passed away approximately 15 years prior. While at one time Perwaiz would return to Pakistan to visit every few years, Perwaiz had not been there in more than 20 years. After the death of his brother, he began helping to financially support his widow and four children, sending at least $1000 per month prior to his arrest. *Ibid*.

Perwaiz came to the United States in 1974, by himself, which was "frightening" and "lonely." JA9867. At one point, he was sleeping on a kitchen floor of a family friend while looking for work. JA9868. He knew little English, but became a United States citizen in the early 1980s. JA9845, 9867. After arriving in the United States he lived in northern Virginia for two years, then Charleston, West Virginia, for the next four, before settling in the Chesapeake, Virginia, area in 1980. JA9868. He has never married or had any children. JA9867.

In 2010, Perwaiz had quadruple bypass surgery, from which he continues to have physical limitations. He also suffers from coronary artery disease, hypertension,

and high cholesterol. For over 20 years he had dealt with back pain, for which he had been receiving pain management prior to his arrest. JA9869. He contracted COVID-19 while in custody awaiting trial, but was successfully treated. JA9870.

The Government filed a 16-page sentencing memorandum, supported by two attached exhibits. JA3451-3531. It argued for a sentence of 600 months. JA3451 at 1. As to the nature of the offenses for which Perwaiz was convicted, the Government argued that "the Court knows from trial that very little Perwaiz wrote down in the medical records was accurate or truthful" and that "even more serious" than the financial fraud was "the nature and circumstances of the crime against his individual victims." JA3459. The Government argued that many victims "underwent invasive surgeries and procedures and experienced pain and discomfort" with some having "experienced permanent, debilitating pain and other complications." *Ibid*. While the Government argued that "alone, the nature and circumstances of the offense" supported a 600-month sentence, Perwaiz's history and characteristics did as well. JA3461. That was because Perwaiz "has spent decades defrauding insurance companies at the expense of and without regard to the women he took an oath to heal." *Ibid*. In addition to that argument for a particular sentence, the Government reported that it had consulted with Perwaiz's counsel and reported that counsel "stated that, for purposes of sentencing, the Court can rely on the jury's verdict" and that "the Court's reliance on the jury's verdict is sufficient to support the PSR and the Guidelines calculations." JA3457.

In contrast, Perwaiz's sentencing counsel filed a memorandum that was only two substantive pages. JA3447-3450. Sentencing counsel simply repeated the general objection to the PSR and then stated that "[d]ue to the fact that [Perwaiz] maintains his innocence, counsel is not requesting any particular sentence." JA3447-3448.

Sentencing for Perwaiz was held on May 17, 2021. JA3532-3742. Addressing the advisory Guideline calculations in the PSR, the district court noted the positions of the parties and that it "does not have to rule on a PSR where there are no specific objections, and here it's just a blanket objection that the defendant maintains his position that he is not guilty" which was "contrary to the jury verdict beyond a reasonable doubt." JA3537.

After the district court heard from several victims, the Government reiterated its argument for a sentence of 600 months in prison. JA3558. The Government recognized that, due to Perwaiz's age, that was "equivalent to a life sentence," but "based on the evidence this Court saw at trial, and the damage the defendant has caused so many women, and the complete lack of remorse" that sentence would be "entirely appropriate in this matter." JA3559. The Government stressed the need for deterrence and to protect the community, arguing that "if the defendant was allowed to go out that door today, he has shown that he would go right ahead and continue these crimes today" and therefore the "sentence cannot let that be a possibility." JA3564.

In response, Perwaiz's counsel stated that "I have every confidence that the Court will fashion a sentence . . . that is sufficient but not greater than necessary

pursuant to 18 U.S.C. § 3553." JA3569. Counsel did note that Perwaiz was "71 years old" with "ongoing medical conditions." *Ibid*. Counsel also noted that Perwaiz successfully completed the probationary sentence he received for prior tax convictions and "did pay back the funds to the United States." JA3570. In that case he "made no effort to flee or to avoid that process . . . faced that obligation and satisfied it" and "acknowledged his guilt in a case for which he believed he was guilty." *Ibid*. Counsel also pointed out that Perwaiz no longer had a medical license and that "there is no expectation if Dr. Perwaiz were released from custody at any point that he would resume the practice of medicine" because he "will have no offices . . . no staff" and "no malpractice insurance." *Ibid*. In the end, counsel stated "I would just stand on our position paper" and did not argue for any particular sentence. *Ibid*.

The district court imposed a sentence of 708 months, spread out among the counts of conviction. JA3583-3584. The district court cited the "nature and circumstances of the offense and your history and characteristics" as the "most important" factor for the Court to consider in this case." JA3571. The district court called Perwaiz's criminal conduct "overwhelming," citing particularly that he "abused the trust that your patients had placed in you, that your profession had placed in you." JA3572. Citing that Perwaiz "has expressed no remorse for such a callous disregard for the welfare of the patients and the victims" and that it "was done for greed and to enhance a very lavish lifestyle," the district court concluded that "this conduct is simply unconscionable." *Ibid*. The district court also pointed to "the overwhelming amount of fraud at every point in the process." JA3574. In addition to

the term of imprisonment, the district court imposed concurrent three-year terms of supervised release on each count and a restitution obligation of over $18.5 million. JA3584-3585.

3. The Fourth Circuit affirms Perwaiz's convictions and sentence.

The Fourth Circuit affirmed Perwaiz's convictions and sentence in an unpublished opinion. *United States v. Perwaiz*, __ F. App'x ___, 2024 WL 2891327 (4th Cir. 2024). With regard to his sentence,[6] Perwaiz argued that he was denied effective assistance of counsel during the sentencing process. Specifically, Perwaiz argued that under *United States v. Cronic*, 466 U.S. 648, 658, 659 (1984), he had suffered the complete denial of counsel when his sentencing counsel effectively abandoned him at sentencing without providing advocacy for a particular sentence. The Fourth Circuit rejected that argument, noting that counsel had "submitted a sentencing memorandum, were present (and awake) during sentencing, and spoke on Perwaiz's behalf" at sentencing, and thus "[e]ven if (in Perwaiz's eyes) counsel didn't do *enough*, he can't argue that they did *nothing*." *Perwaiz*, 2024 WL 2891327 at *5. As a result, *Cronic* did not apply and an argument regarding ineffective assistance of counsel was better presented in postconviction proceedings. *Ibid*.

[6] Perwaiz does not present any of the arguments challenging his convictions in this Petition.

IX. REASON FOR GRANTING THE WRIT

The writ should be granted to determine whether sentencing counsel's minimal efforts at sentencing, which did not even include an argument for a particular sentence, created a situation where "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" such that "there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."

The Sixth Amendment provides that in "all criminal cases, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." Moreover, "the right to counsel is the right to the ***effective*** assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)(emphasis added). In *United States v. Cronic*, 466 U.S. 648 (1984), this Court recognized that there are situations where counsel's performance can be so deficient that a defendant is effectively denied counsel and prejudice is presumed. In situations where "no actual 'Assistance' 'for' the accused's 'defense' is provided, then the constitutional guarantee has been violated." *Id*. at 654.

That is what happened in this case. Convicted of numerous offenses that left him facing a recommended Guideline sentence of life and a statutory maximum sentence measured in centuries, Perwaiz was effectively abandoned by his counsel at sentencing. Sentencing counsel provided no meaningful advocacy for Perwaiz, merely expressing "every confidence that the Court will fashion a sentence . . . that is sufficient but not greater than necessary pursuant to 18 U.S.C. § 3553." JA3569. Perwaiz, a 71-year-old man with a heart condition, was sentenced to 708 months – 59 years – in prison. Whether such deficient performance by sentencing counsel is

the kind of abandonment contemplated by *Cronic* is an important question of federal law that this Court should resolve. *See* Rules of the Supreme Court 10(c).

A. A defendant can be so deprived of effective counsel that such deprivation does not require a separate showing of prejudice in the assertion of Sixth Amendment rights.

In *Cronic*, the defendant was convicted of multiple counts of fraud after being appointed "a young lawyer with a real estate practice" to represent him who was given "only 25 days for pretrial preparation, even though it had taken the Government over four and one-half years to investigate the case" which involved "thousands of documents." *Cronic*, 466 U.S. at 649. On appeal, the Sixth Circuit reversed due to ineffective assistance of counsel, "because it inferred that" the defendant's "right to the effective assistance of counsel had been violated" using a test that required reversal "even if the lawyer's actual performance was flawless." *Id*. at 652-653. This Court ultimately reversed the Sixth Circuit, but in doing so did recognize a small universe of situations where prejudice due to ineffective assistance of counsel must be presumed.

This Court noted that "lawyers in criminal cases are necessities, not luxuries," recognizing, as one commentator put it, that of "all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he must have." *Cronic*, 466 U.S. at 653, 654 (cleaned up). Thus, if "no actual 'Assistance' 'for' the accused's 'defense' is provided, then the constitutional guarantee has been violated." *Id*. at 654. Key to "the adversarial process protected by the Sixth Amendment" is "that the accused have

counsel acting in the role of an advocate." *Id.* at 656 (cleaned up). Thus, "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 656-657.

Therefore, there are "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. Of those, the "[m]ost obvious . . . is the complete denial of counsel." *Id.* at 659. That is because the "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." *Ibid.* Thus, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Ibid.*

In rejecting Perwaiz's argument that his sentencing counsel were deficient under *Cronic*, the Fourth Circuit concluded that because sentencing counsel had "submitted a sentencing memorandum, were present (and awake) during sentencing, and spoke on Perwaiz's behalf regarding the § 3553(a) factors" that Perwaiz "can't argue that they did *nothing*." *Perwaiz*, 2024 WL 2891327 at *5. But doing "nothing" is not what *Cronic* requires. Whatever minimal effort sentencing counsel put into Perwaiz's sentencing, they "fail[ed] to subject the prosecution's case to meaningful adversarial testing" leading to the "denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659.

B. Perwaiz's trial counsel provided no meaningful advocacy on his behalf at sentencing, depriving him of his Sixth Amendment right to the effective assistance of counsel.

In addition to trial proceedings related to guilt or innocence, "sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Perwaiz's trial counsel vigorously contested the evidence presented by the Government at trial. However, when the case turned to sentencing, trial counsel effectively abandoned Perwaiz to the district court and the Government.

After the PSR was produced trial counsel lodged a general objection to the sections of it that laid out the facts of the case and the Guideline calculations because Perwaiz "pled not guilty in this matter, testified that he did not commit any of the offenses and maintains that he is not guilty of any of the offenses." JA9883. Such a general objection is not sufficient to raise any issue at sentencing with regard to the PSR or the Guideline calculations made therein and was thus meaningless.[7] *See United States v. Fowler*, 58 F.4th 142, 151 (4th Cir. 2023)(defendant must make particular showing that information in PSR is unreliable; otherwise district court is free to adopt that information).

Then in a memorandum filed prior to sentencing, styled as the "position of the defendant . . . with respect to sentencing factors," Perwaiz's counsel reasserted that general objection before concluding that due "to the fact that the Defendant

[7] The district court recognized this at sentencing, stating that it "does not nave to rule on a PSR where there are no specific objections, and here it's just a blanket objection that the defendant maintains his position that he is not guilty." JA3537.

maintains his innocence, counsel is not requesting any particular sentence." JA3448. By contrast, the Government made a lengthy argument in support of a sentence of fifty years in prison, a more than *de facto* life sentence given Perwaiz's age. JA3451-3466. At sentencing itself, while Perwaiz's counsel pushed back slightly against a couple of the points made by the Government, they stuck to their posture of not requesting any particular sentence for Perwaiz, stating only that they had "every confidence that the Court will fashion a sentence . . . that is sufficient but not greater than necessary pursuant to 18 U.S.C. § 3553." JA3569.

"I am confident the court will follow the law" is not argument. It is not advocacy on behalf of a client. Argument and advocacy requires going further, using the district court's legal obligations as a basis to argue that a particular sentence, presumably one lower than the Government has requested, fulfills those obligations. For *Cronic*'s presumption of prejudice to apply "the attorney's failure must be complete." *Bell v. Cone*, 535 U.S. 685, 697 (2002); *see also Cronic*, 466 U.S. at 659 (presumption applies "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"). The record in this case cannot support a conclusion that Perwaiz's trial counsel subjected the Government's sentencing case to "meaningful adversarial testing." Rather, their "failure" at sentencing was "complete." For that reason, this is one of those rare situations "where the record conclusively establishes ineffective assistance." *United States v. Baptiste*, 596 F.3d 214, 216 n.1 (4th Cir. 2010).

The need for advocacy at sentencing is particularly acute where, as here, the Guidelines provide little meaningful advice. Going into sentencing, the Guideline

"range" in this case, which is generally the "anchor" for "the district court's discretion," *Peugh v. United States*, 569 U.S. 530, 549 (2013), was life in prison, capped by the cumulative total of the statutory maxima for Perwaiz's convictions, 5700 months (475 years).[8] JA9866; JA9877-9878. The district court thus had vast discretion to craft a particular sentence in this case. The Government played its adversarial role and argued for a sentence of 50 years. Perwaiz's counsel did not, resting on the fact that Perwaiz maintained his innocence as a reason for not engaging in sentencing advocacy on his behalf.

The failure of Perwaiz's trial counsel to actually advocate on behalf of their client is evident from the response to the Government's invocation of two other fraud cases as a comparison at sentencing. JA3567-3568. Sentencing counsel stated that "[w]e don't have the trial transcripts for Dr. Fata or for Mr. Madoff" and that they were not able to "watch those victims testify to understand what evidentiary objections there were pretrial or during the trial," therefore "it's difficult for us to make an argument about where Dr. Perwaiz's sentence should fall among two other unrelated cases with very different facts and very different testimony." JA3569. Rather than actually advocate from that position – that the district court should disregard the comparisons and sentence Perwaiz based on the unique characteristics

[8] 71 years old at sentencing, JA9845, Perwaiz had a life expectancy then of approximately 15 years, or 180 months. Social Security Administration Retirement & Survivors Benefits: Life Expectancy Calculator (https://www.ssa.gov/cgi-bin/longevity.cgi)(last visited Aug. 2, 2023).

of himself and his offense[9] – sentencing counsel effectively shrugged. That is not meaningful adversarial testing of the Government's case.

Cases which approve of such minimalist participation as a tactical decision arise in trial situations, not sentencing, where minimal case presentations, or remaining silent entirely, may have strategic value. *See, e.g.*, *United States v. Sanchez*, 790 F.2d 245, 253 (2d Cir. 1986)(concluding that "a strategy of silence on defense counsel's part may be quite appropriate" where defendant absented himself from trial and was uncooperative with counsel). After all, at trial a defendant is presumed innocent and has no obligation to prove he is innocent. *See United States v. Porter*, 821 F.2d 968, 973 (4th Cir. 1987). In the face of weak evidence at trial it may be a reasonable strategic decision to simply stay out of the way and allow the prosecution to fail. Further, there is the possibility of relying on the work of co-counsel in attacking the prosecution's case. *See, e.g., Warner v. Ford*, 752 F.2d 622, 625 (4th Cir. 1985)(finding no ineffectiveness in trial counsel's decision to "maintain a 'low profile'" during trial, partly because counsel "knew codefendants' counsel to be very aggressive trial lawyers" and "anticipated they would thoroughly cross-examine" prosecution witnesses). Such a decision at sentencing cannot be similarly strategic for the simple fact that "once the defendant has been convicted fairly in the guilt

[9] Because as part of the district court's ultimate command to impose a sentence "sufficient, but not greater than necessary, to comply with the purposes of sentencing," 18 U.S.C. § 3553(a), it "must make an individualized assessment based on the facts presented." *Gall v. United States*, 552 U.S. 38, 50 (2007); *see also* 18 U.S.C. § 3553(a)(1)(district court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant").

phase of the trial, the presumption of innocence disappears." *Delo v. Lashley*, 507 U.S. 272, 278 (1993)(cleaned up). At that point, there is no strategic reason to completely fail to advocate for a particular sentence. Finally, in many cases defense counsel did actually engage in some explicit advocacy, if not as much as they should have done ideally. *See Sanchez*, 790 F.2d at 248 (counsel objected to trial *in absentia*, joined codefendant's motion for judgment of acquittal, and objected to jury instructions); *Siverson v. O'Leary*, 764 F.2d 1208, 1210 (7th Cir. 1985)(counsel was absent only for jury deliberations and return of verdict, notably was present for sentencing); *Fink v. Lockhart*, 823 F.2d 204, 206 (8th Cir. 1987)(defense counsel was "far from passive," striking potential jurors, cross-examining prosecution witnesses, and making closing argument); *Moss v. Hofbauer*, 286 F.3d 851, 860 (6th Cir. 2002)(defense counsel "cross examined several witnesses, and made a closing argument").

C. There were arguments available to sentencing counsel following Perwaiz's conviction at trial.

The passivity of Perwaiz's sentencing counsel appear to have been based on a fundamental misunderstanding – that a defendant who goes to trial, is convicted, and thereafter maintains their innocence, has no choice but to leave their sentencing to the mercy of the district court (aided by argument from the Government). That is false, as defendants routinely present arguments for reduced sentences after guilty verdicts at trial. In fact, the Federal Reporter is full of cases from this Court where defendants were convicted at trial then raised sentencing issues, with various degrees of success. *See, e.g., United States v. Barnett*, 48 F.4th 216 (4th Cir. 2022)(defendant convicted on drug charges after trial, challenged Guideline enhancement for

maintaining a drug house, and ultimately received a downward variance); *United States v. Powers*, 40 F.4th 129 (4th Cir. 2022)(defendant convicted of fraud at trial, argued for downward variance and appealed sentence imposed); *United States v. Rose*, 3 F.4th 722 (4th Cir. 2021)(defendant convicted at trial of drug charges and challenged leadership enhancement at sentencing); *United States v. Gillespie*, 27 F.4th 934 (4th Cir. 2022)(defendant convicted by jury of robbery and firearm charges, argued for downward variance based on lenient sentences imposed on co-conspirators); *United States v. Louthian*, 756 F.3d 295 (4th Cir. 2014)(district court imposed variance sentence after fraud conviction at trial); *United States v. Carvajal*, 85 F.4th 602 (1st Cir. 2023)(defendant convicted of being a felon in possession of a firearm at trial contests multiple issues at sentencing and on appeal); *United States v. Docampo*, 573 F.3d 1091 (11th Cir. 2009)(defendant convicted at trial of drug and firearm offenses raised multiple sentencing challenges); *United States v. Lewis*, 976 F.3d 787 (8th Cir. 2020)(defendant convicted of drug offense at trial contested multiple issues at sentencing);

More particularly, there are numerous examples of cases where defendants convicted of large-scale frauds, like Perwaiz, were eventually sentenced to significant downward variances. In *Louthian*, the defendant was convicted at trial of numerous healthcare fraud counts, with a loss of nearly $1 million. *Louthian*, 756 F.3d at 301-302. The defendant was sentenced to 48 months in prison, a variance down from an advisory Guideline range of 121 to 151 months in prison. *Id*. at 302. The Government did not challenge that sentence on appeal (although the defendant did). *Id*. at 306;

see also United States v. Curry, 461 F.3d 453 (4th Cir. 2006)(vacating 12-month sentence, variance from 41-51 month range, after trial conviction for mail fraud).

Other cases are even more stark in the variance between the recommended Guideline range and the sentence eventually imposed. In *United States v. Adelson*, 301 F. App'x 93 (2d Cir. 2008), the defendant was convicted at trial of securities fraud (and related charges), producing a restitution order of $50 million and a forfeiture order of $1.2 million. *Id*. at 94-95. Nonetheless, at sentencing, the district court varied from "the applicable Guidelines range of life in prison" and imposed a sentence of 42 months in prison. *Id*. at 95. That was due, in part, to a lengthy sentencing memorandum filed by the defendant arguing for a variance sentence. *United States v. Adelson*, 1:05-cr-00325-JSR-2 (S.D.N.Y.), Dkt. No. 78. The Second Circuit affirmed that sentence on appeal by the Government. *Adelson*, 301 F. App'x at 94-95; *see also United States v. Parris*, 573 F. Supp. 2d 744, 745 (2008)(two brothers sentenced for fraud to 60 months "in the face of an advisory guidelines range of 360 to life"); Reuters Staff, *Ex-AIG Exec Milton Sentenced to Four Years in Prison*, Reuters (January 27, 2009)(https://www.reuters.com/article/us-generalre-milton/ex-aig-exec-milton-sentenced-to-four-years-in-prison-idUSTRE50Q6AR20090127) (48-month sentence for $500 million fraud with minimum recommended Guideline sentence of 210 years); Reuters Staff, *Ex-General Re Chief Gets 2 Year Sentence for Fraud*, Reuters (December 16, 2008)(https://www.reuters.com/article/us-usa-crime-generalre/ex-

general-re-chief-gets-2-year-sentence-for-fraud-idUSTRE4BF5F120081216).[10]

The reason why such sentences are not uncommon in fraud cases is because courts have recognized that "the calculations under the guidelines have run so amok that they are patently absurd on their face." *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006); *see also Parris*, 573 F. Supp. 2d at 754 (calling the § 2B1.1 loss table "a black stain on common sense"). That is due to "a stubborn problem that has been explored by commentators repeatedly over the past thirty years," namely that § 2B1.1 "routinely recommends arbitrary, disproportionate, and often draconian sentences to first time offenders of economic crimes." Barry Boss and Kara Kapp, *How the Economic Loss Guideline Lost Its Way, and How to Save It*, 18 Ohio St. J. Crim. L. 605, 605-606 (2021). That is due to the loss table, which was "designed (and redesigned) by the Commission to drive the severity of sentences for fraud offenders based primarily on the magnitude of the loss." *Id*. at 608. When initially promulgated, "the Commission deviated from its standard practice of anchoring the recommended sentencing ranges in the empirical data," partly by excluding "from its analysis fifty percent of the total data – every sentence in which a judge had issued a sentence of probation." *Id*. at 609. A "series of amendments" compounded that error, so that the "loss table today recommends sentences for economic crimes that are *orders of magnitude* greater than the same sentence of the same crime back in the mid-1980s." *Id*. at 613. As a result, the "gulf between recommended Guideline sentences and any

[10] Those convictions were ultimately reversed on appeal. *United States v. Ferguson*, 676 F.3d 260 (2d Cir. 2011). There is no mention as to whether the Government cross appealed the sentences given.

grounding in empirical data fundamentally undermines the Guideline's ability to fulfill its key function." *Ibid.* The Guideline "has failed in its mission and, in its current form, cannot be justified by the policy concerns animating its dysfunctional design." *Id.* at 614. In addition, "using the steep ladder of loss enhancements as a proxy for seriousness of the offense results in unfair double counting" as the means by which such losses are generated are subjected to additional enhancements for things like sophisticated means or a large number of victims. *Id.* at 616. The "severe increases in the loss table, coupled with these independent enhancements, result in deeply unfair double counting, which in high loss cases often results in the extreme and disproportionate recommendation of life imprisonment." *Id.* at 617.

As a result of these flaws, "a broad judicial consensus has developed that Section 2B1.1's loss table overstates culpability in a great many cases." Boss and Kapp at 618. Indeed, less than half of all defendants sentenced under U.S.S.G. § 2B2.1 receive a sentence within the advisory Guideline range. U.S. Sentencing Comm'n, *2021 Sourcebook of Federal Sentencing Statistics* 159 tbl. E-7 (2021) (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/TableE7.pdf). Most importantly, Perwaiz's Guideline calculation bore the hallmarks of the criticisms of § 2B1.1 that have fueled significant downward variances in other large-scale fraud cases. Twenty levels were added to Perwaiz's base offense level due to the loss calculation, with an additional three levels added because part of that loss involved Government healthcare programs. He also received two-level enhancements for sophisticated means and number of victims,

both of which are tied to the scope of the scheme necessary to produce the loss amount. JA9864. What the current state of § 2B1.1, and its application in the district courts, makes clear is that there were avenues for argument Perwaiz's sentencing counsel could have made at sentencing, rather than "not requesting any particular sentence."[11] JA3448.

D. The passivity of Perwaiz's sentencing counsel is the type of performance that falls within the contours of *Cronic*.

"Occasionally, the performance of defense counsel is so dismal that it ripens into the deprivation of counsel altogether." *Aparicio v. Artuz*, 269 F.3d 78, 95 (2d Cir. 2001). This is one of those occasions. Sentencing in the wake of a trial conviction strips counsel of some common tools of sentencing advocacy, such as contrition and acceptance of responsibility, but does not require surrender. As set forth above, numerous defendants have been convicted at trial and then made substantive sentencing arguments that did not undermine their continued assertion of their innocence, particularly in cases involving fraud. By failing to make any argument on Perwaiz's behalf, his sentencing hearing lost "its character as a confrontation between adversaries," resulting in a violation of his Sixth Amendment right to counsel. *Cronic*, 466 U.S. at 656-657.

[11] Given the Government's final offer to let Perwaiz plead guilty to a single count with a 10-year maximum sentence, a sentencing argument for a similar sentence would not have been unreasonable. JA165-168.

X. CONCLUSION

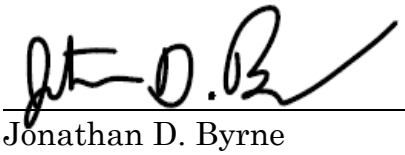
For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

JAVAID PERWAIZ

By Counsel

WESLEY P. PAGE
FEDERAL PUBLIC DEFENDER



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Dated: September 5, 2024