

No. 26-279

**In the
Supreme Court of the United States**

JUAN CARLOS ALVAREZ,
Petitioner,

v.

ERIC GUERRERO,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

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

**BRIEF FOR THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS AS
AMICUS CURIAE IN SUPPORT OF THE
PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL submits this *amicus* brief in support of Petitioner Juan Carlos Alvarez because the issues presented in this case are of paramount importance to postconviction litigation around the country.

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *Amicus* gave the parties notice of its intent to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether it is reasonable to hold that defense counsel in a capital-murder trial performs adequately when he sleeps through the testimony of prosecution witnesses. The Fifth Circuit answered yes, concluding that the petitioner failed to identify a sufficiently precise analogue in this Court's precedents rendering that conduct deficient, and that the mere presence of a second lawyer cured any problem. That was wrong, as the petition ably explains. This Court should grant certiorari and reverse.

Amicus submits this brief to emphasize three additional points. *First*, capital defense counsel are held to rigorous professional standards reflecting their heightened responsibilities—standards that would be meaningless if counsel could nonetheless be found effective even when they sleep through important portions of trial. *Second*, the Fifth Circuit's analysis in this case flouted the way courts have applied *Strickland v. Washington*, 466 U.S. 668 (1984), and *United States v. Cronin*, 466 U.S. 648 (1984), for decades. Courts have long concluded that the clearly established principles in those cases warranted relief even where this Court had not passed on a factually analogous case. *Third*, the Fifth Circuit's reliance on the mere presence of a second lawyer to dismiss the conduct of petitioner's lead counsel diverged from the context-specific review courts apply to determine whether counsel provided effective representation.

ARGUMENT

I. Capital Defense Counsel Have Heightened Professional Obligations That Counsel Cannot Discharge While Asleep

Death is different, as courts and the capital defense bar have long recognized. The “prevailing professional norms” to which this Court has often turned in evaluating counsel’s performance, *Strickland v. Washington*, 466 U.S. 668, 688 (1984), reflect this understanding. The American Bar Association (ABA), states, and other entities have published standards setting out expectations for capital defense representation. Many organizations spend time and money training and supporting attorneys to meet these high standards. Those special rules and qualifications would be rendered meaningless by the Fifth Circuit’s ruling that counsel would not clearly be ineffective even while asleep.

A. Capital Defense Counsel Are Subject to Rigorous Professional Norms and Standards

This Court has turned time and again to standards promulgated by the ABA as guides to what reasonable representation requires. *See Strickland*, 466 U.S. at 688; *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010) (identifying standards as “valuable measures of the prevailing professional norms of effective representation”). The ABA first published capital defense-specific guidelines in 1989—a decade before petitioner Alvarez’s trial. *See* ABA, *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989), <https://www.americanbar.org/content/dam/>

aba/administrative/death_penalty_representation/1989guidelines.pdf (1989 ABA Guidelines). Those guidelines recognized the “extremely specialized and demanding” nature of capital defense litigation. 1989 ABA Guidelines, introduction, at 1. Accordingly, they set forth rigorous standards for capital counsel’s participation and engagement in capital cases. This Court has relied on those “well-defined norms” to evaluate capital defense counsel’s performance. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing 1989 ABA Guidelines); *Rompilla v. Beard*, 545 U.S. 374, 387 & n.7 (2005) (looking to capital defense guidelines and guidelines for defense counsel generally). Other courts have done the same. *E.g.*, *Ramirez v. Thornell*, 172 F.4th 771, 786 (9th Cir. 2026); *United States v. Runyon*, 994 F.3d 192, 208 (4th Cir. 2021); *Haliym v. Mitchell*, 492 F.3d 680, 716 (6th Cir. 2007).

Other national organizations have also promulgated standards for capital defense counsel’s representation. *See* Nat’l Legal Aid and Defender Ass’n (NLADA), *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* (1988), <https://www.nlada.org/defender-standards/death-penalty> (NLADA Standards); Off. of Just. Programs, U.S. DOJ, *Compendium of Standards for Indigent Defense Practitioners, Volume III: Standards for Capital Case Representation* (2000), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/Standards/National/doj-standards-capital-case-representation-for-indigent-defense-systems.pdf (Compendium). And most states have adopted capital-defense representation standards. *See* Compendium at 6-10 (state standards as of 2000); ABA, *State Standards*

for Appointment of Counsel in Death Penalty Cases (May 2023), https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/state-standards-memo.pdf. Texas adopted such standards in 2006. See State Bar of Texas, *Guidelines and Standards for Texas Capital Counsel*, 69 Tex. Bar J. 966 (2006) (Texas Guidelines).

All of these standards and guidelines lay out expectations for capital defense counsel commensurate with the demanding and difficult nature of their duties.

1. Experience, Training, and Expanded Teams Are Required for Capital Counsel

The 1989 ABA Guidelines impose a two-pronged eligibility test for appointment as capital defense counsel. 1989 ABA Guideline 5.1 cmt., at 59. To serve as lead trial counsel, an attorney should have at least five years of litigation experience in criminal defense; have prior experience as lead counsel in at least nine jury trials, including murder or aggravated murder cases, as well as prior experience in at least one death-penalty case; and have recently completed a death-penalty specific training on criminal advocacy. *Id.* 5.1(I)(A), at 52. In addition, the attorney should have “demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.” *Id.* 5.1(I)(A)(vii), at 53; see *id.* 5.1 cmt., at 59. Beyond those initial qualifications, the ABA Guidelines specify further training the attorney should agree to undertake—specifically, “comprehensive training programs” focusing on advocacy in death penalty cases. *Id.* 9.1 cmt., at 72.

But one specially qualified attorney is not enough. Since 1989, the ABA Guidelines have specified that “two qualified trial attorneys” should be assigned to represent the defendant in every case in which the death penalty is sought. *Id.* 2.1, at 39; *see id.* 2.1 cmt., at 39.² The 1989 commentary explained that capital counsel’s distinct duties, the complexity and rapid development of the body of law affecting death penalty cases, and the “harsh and irrevocable nature” of the potential punishment make the responsibilities of trial counsel “sufficiently onerous to require the appointment of two attorneys.” *Id.* 2.1 cmt., at 40.³ And the second attorney should also have specialized experience, including at least three jury trials, including on murder and aggravated murder charges; at least one death-penalty specific training; and “the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.” *Id.* 5.1(I)(B), at 53. The NLADA standards imposed the same team and qualifications requirements. *See* NLADA Standards 2.1, 5.1.

Texas broadly agrees with these standards. Its 2006 guideline likewise requires two attorneys, along with an investigator and a mitigation specialist. Texas Guideline 3.1(A)(1), 69 Tex. Bar J. at 967. Texas, too, requires that capital defense attorneys

² The revised *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (rev. ed. 2003) (2003 ABA Guidelines) expand the defense team requirements further, adding an investigator and a mitigation specialist. 2003 ABA Guideline 4.1(A)(1), 31 Hofstra L. Rev. at 952.

³ Federal law is in accord: it mandates the appointment of two lawyers in federal capital cases upon a defendant’s request. *See* 18 U.S.C. § 3005.

“satisfactorily complete a comprehensive training program in the defense of capital cases,” and continue to complete appropriate training “at least once every two years.” *Id.* 7.1(b)-(C), 69 Tex. Bar J. at 968-69. And Texas recognizes that capital-defense attorneys must demonstrate “substantial knowledge and understanding” of the relevant law, must possess a variety of trial skills, and must “demonstrate[] a commitment to providing zealous advocacy and high quality legal representation.” *Id.* 4.1(B)(2)(a), 69 Tex. Bar J. at 968.

Of course, as this Court has explained, the ABA Guidelines are “guides,” not “inexorable commands.” *Padilla*, 559 U.S. at 367 (citations omitted). But multiple organizations’ clear statements that capital defense counsel must meet rigorous qualification and training requirements illustrate the profession’s high expectations for counsel in these consequential cases.

2. Counsel’s Obligations to Participate In Trial, Make a Record, and Preserve Issues Are Heightened in the Capital Context

Capital defense counsel must not only be qualified and trained; to discharge their duties, they must pay attention. Counsel “must be especially aware at all trial level stages” not only of strategies for prevailing at trial, but also “of the need to fully preserve issues for later review.” 1989 ABA Guideline 11.5.1 cmt., at 94; *see id.* 11.7.3, at 110. Preservation is particularly important in capital cases given the likelihood of appeal and postconviction proceedings if a death sentence is imposed. *Id.* 11.5.1(B), at 93. Indeed, as the 2003 ABA Guidelines explained, postconviction proceedings in capital cases have become a “near

certainty,” pursued by “almost 100% of capital defendants who are convicted and sentenced to death.” 2003 ABA Guideline 10.8(A)(3)(b), history of guideline, 31 Hofstra L. Rev. at 1028-29. Accordingly, “counsel must be significantly more vigilant about litigating *all* potential issues at *all* levels in a capital case than in any other case.” *Id.* 10.8 cmt., 31 Hofstra L. Rev. at 1032 (emphasis added). This record-preservation duty is especially acute at trial, where counsel must object when necessary and “zealously challenge the prosecution’s evidence and experts through effective cross-examination.” 1989 ABA Guideline 1.1 cmt., at 30-31.

Counsel must pay attention during trial for another reason: to prepare for the penalty phase. A capital trial is, “in substance, two separate trials.” *Id.* at 31. The Guidelines thus require counsel to formulate a defense theory that accounts for both phases. *See id.* 11.7.1, at 106; *id.* 1.1 cmt., at 31. Counsel therefore must consider each witness’s testimony not only for its immediate effect on the jury’s determination of guilt, but also for how it may shape the prosecution’s sentencing case, affect the viability of mitigation evidence, or alter the affirmative case for life. *See id.* 11.7.1 cmt., at 106; *see also Magill v. Dugger*, 824 F.2d 879, 888-89 (11th Cir. 1987) (explaining how counsel’s errors in guilt phase prejudiced defendant in penalty phase).

B. Treating Sleeping Counsel As Reasonable Is Incompatible with the Standards Governing Capital Representation

The 1989 ABA Guidelines governing the appointment, training, and performance of capital

defense counsel reflect the profession's judgment—a decade before the trial at issue here—that capital representation demands great skill, preparation, vigilance, and advocacy. *See* 1989 ABA Guideline 1.1 cmt., at 30-31; *id.* 11.2(A). Other standards adopted contemporaneously and since broadly agree. *Supra* at 5-6. A rule permitting counsel to “repeatedly fall[] asleep during the trial,” Pet.App.230a, cannot be reconciled with those heightened obligations.

Simply put, if conduct as egregious as sleeping while the prosecution questioned witnesses could nevertheless satisfy prevailing professional norms, the ABA's capital-specific standards (and other professional standards) would cease to provide any meaningful measure of reasonable performance. It is beyond cavil that training, experience, and obligations are meaningless if counsel is not awake to use their skills. And in no world is sleeping through direct witness testimony a reasonable way to discharge the serious obligations of capital defense counsel. Allowing a court to hold that such conduct did not clearly fall below professional standards would contradict this Court's repeated reliance on ABA standards as “guides to determining what is reasonable,” *Wiggins*, 539 U.S. at 524 (quoting *Strickland*, 466 U.S. at 688)—and defy common sense. And it would utterly discredit the important role of defense attorneys in ensuring a fair trial.

This disconnect is obvious at a high level, but it is readily apparent in specific applications of the 1989 ABA Guidelines too. For example, giving one attorney on a team a pass to sleep would gut the various Guidelines' exhortations to include at least two attorneys per defense team given the unique demands of capital representation. *Supra* 6-7.

Indeed, the problem is even worse in this case. With one attorney dozing and the other prohibited by local rule from cross-examining or objecting to testimony by the first attorney's witnesses, Pet.14-16, Alvarez essentially went from two attorneys—the 1989 ABA Guidelines' minimum—to zero.

Sleeping during direct examination of witnesses one is responsible for cross-examining likewise makes a mockery of capital defense counsel's heightened obligations with respect to record development and preservation. *Supra* at 7-8. Those obligations reflect the reality that “[l]oss of any appealable issue can mean the difference between a client living or dying.” Matthew K. Mahoney, Note, *Bridging the Procedural Default Chasm*, 12 Cap. Def. J. 305, 305 (2000) (“[I]n a capital case more than in any other case, it is imperative that defense counsel perform [the] duty [of preserving issues] in a comprehensive and effective manner.”). Counsel certainly cannot be carrying out a heightened duty to preserve objections or obtain useful testimony on cross if they are asleep during the relevant testimony.

More broadly, sleeping counsel creates a “spectacle,” Pet.App.230a, that suggests “a breakdown in the adversarial process that our system counts on to produce just results.” *Strickland*, 466 U.S. at 696. Fundamental fairness—to the system and to the defense attorneys striving to meet rigorous standards and discharge the serious duties the profession places on them in capital cases—cannot abide a decision that sleeping counsel was effective counsel.

II. The Fifth Circuit's Demand for Factual Parity Contravenes Long-Settled Practice for Applying Clearly Established Law

The Fifth Circuit said that “there is *no* clearly established Supreme Court law holding that a defendant was subjected to a violation of the Sixth Amendment where one counsel allegedly performed defectively but a second, engaged attorney effectively participated in representing the defendant.” Pet.App.13a. As the petition explains, this rule statement erroneously purports to require a factual analogue in this Court’s precedents for relief. *See* Pet.16-17, 20-21. It also contravenes settled practice of applying the clearly established rules set forth in *Strickland* and *Cronic* to new facts. A factual-analogue rule would be disastrous for defendants whose claims stem in part from local procedure or unique circumstances.

Take *Strickland*, which concerned a lawyer’s failure to investigate and present additional mitigating evidence in a capital sentencing proceeding. 466 U.S. at 675-76, 699. *Strickland* announced “general standards for judging ineffectiveness claims.” *Id.* at 698. For decades, courts have “repeatedly applied that standard to evaluate ineffective-assistance-of-counsel claims where there is no other Supreme Court precedent directly on point.” *Knowles v. Mirzayance*, 556 U.S. 111, 122-23 (2009). And courts have had no trouble finding unreasonable applications of *Strickland* in numerous circumstances.

To name just a few examples, federal courts have held that state courts unreasonably denied relief under *Strickland* where counsel failed to object to the

introduction at trial of unlawfully obtained statements, *Hendrix v. Palmer*, 893 F.3d 906, 922-23 (6th Cir. 2018); where counsel failed to obtain and introduce critical exculpatory evidence, *Neal v. Vannoy*, 78 F.4th 775, 793, 795-96 (5th Cir. 2023); where counsel failed to investigate alibi witnesses, *Stitts v. Wilson*, 713 F.3d 887, 892-93 (7th Cir. 2013); *Gregg v. Rockview*, 596 F. App'x 72, 77 (3d Cir. 2015); and where counsel failed to object to voluminous prejudicial evidence or request a limiting instruction, *Rosa v. Att'y Gen. of N.J.*, 141 F.4th 477, 484-85 (3d Cir. 2025). Those federal courts and numerous others have applied *Strickland* to new facts across multiple stages of criminal proceedings. To be sure, such instances are not routine given *Strickland* and AEDPA's demanding standards. But where the facts warrant application of *Strickland*'s clear principles, courts have not hesitated to say so. See *Chaidez v. United States*, 568 U.S. 342, 348 (2013) (noting that *Strickland* “provides sufficient guidance for resolving virtually all’ claims of ineffective assistance, even though their particular circumstances will differ” (quoting *Williams*, 529 U.S. at 391)).

United States v. Cronic, too, has long been applied by courts to new circumstances. 466 U.S. 648 (1984). *Cronic* was a mail-fraud case involving “check kiting” in which the court appointed “a young lawyer with a real estate practice” and only limited time to prepare to represent the defendant. *Id.* at 649-50. In adjudicating whether the defendant was deprived of his Sixth Amendment right to counsel, the Court identified certain “circumstances that are so likely to prejudice the accused” that prejudice could be presumed. *Id.* at 658-59. Because *Cronic*'s “presumption of prejudice” rule is “narrow,” *Florida v.*

Nixon, 543 U.S. 175, 190 (2004), petitioners relying on it face a high bar to relief. But courts have nonetheless recognized that *Cronic*’s presumption applies even in factual scenarios this Court has not considered. Most notably, courts have applied *Cronic* in situations *where counsel slept*—recognizing that “[u]nconscious counsel equates to no counsel at all.” *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1120 (2002); *see Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984); Pet.14-15, 23.

Courts have also held that state courts unreasonably apply *Cronic* if they fail to acknowledge—even in new contexts—that a defendant was effectively deprived of counsel. The Seventh Circuit, for example, has found relief warranted under *Cronic* where counsel failed to prepare for the penalty phase of a trial. *See Lewis v. Zatecky*, 993 F.3d 994, 1005-06 (7th Cir.), *cert. denied*, 142 S. Ct. 897 (2021); *Miller v. Martin*, 481 F.3d 468, 472-73 (7th Cir. 2007) (per curiam). Where counsel was physically absent during jury re-instruction, the Sixth Circuit recognized the same result should follow: “a structural error occurred in the trial court proceeding,” and “any conclusion otherwise would be an unreasonable application of clearly established federal law as stated in *Cronic*.” *Caver v. Straub*, 349 F.3d 340, 350 (6th Cir. 2003); *see French v. Jones*, 332 F.3d 430, 438 (6th Cir.) (same), *cert. denied*, 540 U.S. 1018 (2003). The facts were clearly distinct from *Cronic* itself, but the principle *Cronic* established demanded relief.

The Fifth Circuit did not follow this well-established path. Instead, it asked whether any “holding” was “directly related to” the “precise legal

issue” that Alvarez presented. Pet.App.13a. And it concluded from this extraordinarily narrow frame that there was no case “even remotely on point.” *Id.* That mode of analysis would contravene settled practice, to devastating effect.

Because every case has some unique facts, the Fifth Circuit’s rule would improperly render *Strickland* and *Cronic* dead letters in practice in the state habeas context. One can always claim that new facts create a new “precise legal issue.” If that were correct, this Court could have held in *Rompilla*, for example, that its prior decision in *Wiggins* did not control because *Rompilla* concerned undiscovered brain damage evidence in addition to undiscovered social history. Compare 545 U.S. at 392, with 539 U.S. at 524; see also *Porter v. McCollum*, 558 U.S. 30, 39-41 (2009). This Court has not taken that approach, and neither have the courts of appeals. The standard for habeas relief is already rigorous. The Fifth Circuit’s rule would stretch it past the breaking point and make it virtually impossible to obtain relief—even where counsel acted egregiously and a state court unreasonably denied the writ.

The consequences of the Fifth Circuit’s demand for factual parity would be stark in capital cases. As of 2023, twenty-nine states and the federal government authorized the death penalty,⁴ and twenty-six states and the federal government continued to hold

⁴ See Tracy L. Snell, Bureau of Just. Stats., *Status of Death Penalty Laws in 2023*, <https://bjs.ojp.gov/document/cp23st-sodpl23.pdf> (last visited Sept. 30, 2026).

prisoners under sentence of death.⁵ Those states contain hundreds of counties, all of which may have different criminal procedural rules, like the Harris County rule at issue here.⁶ Because local rules and practice can and will interact with lawyers' performance in myriad ways, ineffective-assistance claims can appear in a dizzying number of permutations. This reality will produce numerous *sui generis* cases—like this one—where clearly-established law nonetheless requires relief.

This Court should grant review to clarify the proper method for applying clearly established law. And it should confirm that *Andrew v. White*, 604 U.S. 86 (2025), means what other courts of appeals have understood it to mean, *see* Pet.23: that a principle may be clearly established even if this Court has not passed on a factually analogous case.

III. The Fifth Circuit Erroneously Based Its Ruling on the Bare Presence of Counsel And Improperly Ignored Crucial Context

In concluding that the Texas Court of Criminal Appeals did not unreasonably apply *Strickland* or *Cronic*, the Fifth Circuit focused on the presence of co-counsel while lead counsel slept at trial. According to the court, the mere presence of another lawyer meant that Alvarez received effective representation. Pet.App.13a-14a. The petition explains why that is

⁵ See Tracy L. Snell, Bureau of Just. Stats., *Capital Punishment, 2023 – Statistical Tables 1* (July 2025), <https://bjs.ojp.gov/document/cp23st.pdf>.

⁶ Texas alone has 254 counties. See Tex. State Lib. & Archives Comm'n, *About Texas: Cities and Counties*, <https://www.tsl.texas.gov/ref/abouttx> (last visited Sept. 30, 2026).

wrong: local practice imposed, and the trial court enforced, a rule that only one lawyer could cross-examine a witness and object to their testimony. Pet. 7; *see* Pet.App.272a. The Fifth Circuit erred by all but ignoring that context and speculating about the second lawyer's conduct. Its conclusion that the mere presence of a second lawyer excuses ineffectiveness of the first would allow egregious violations to be overlooked.

The Fifth Circuit should have asked whether, in this case, the second lawyer had the opportunity to participate and did participate in a way that could have cured the first lawyer's ineffectiveness. Other courts have approached questions about a second lawyer's conduct this way. In *Debruce v. Commissioner, Alabama Department of Corrections*, for example, the Eleventh Circuit concluded that lead counsel was ineffective in failing to investigate and develop mitigating evidence. 758 F.3d 1263, 1271-73 (11th Cir. 2014), *cert. denied*, 576 U.S. 1021 (2015). On a "review of the entire state court record," the court concluded that neither lead counsel nor the second counsel undertook a sufficient investigation, and that the second counsel's participation did not get lead counsel off the hook. *Id.* at 1272-73.

The Fourth Circuit similarly looked to the record in the context of a conflict of interest in *Hoffman v. Leeke*, 903 F.2d 280 (4th Cir. 1990). There, lead counsel operated under an actual conflict of interest. The state argued that co-counsel's "participation in the trial cured any possible adverse consequences" of the conflict. *Id.* at 287. The Fourth Circuit rejected that finding, noting that lead counsel "remained [Defendant's] principal attorney throughout the trial" and had cross-examined most of the witnesses. *Id.* In

light of the primary role played by an attorney with an “actual conflict of interest,” the court held that the second lawyer’s presence could not cure the prejudice caused by the first lawyer’s conflict. *Id.*

Here, co-counsel was not a substitute for lead counsel at the time when lead counsel was ineffective—that is, when he was asleep. *See* Pet.15-16; *see also* Pet.App.65a-66a. Co-counsel was prohibited by court rule from cross-examining or making objections to testimony of witnesses lead counsel was handling. *Id.* So while lead counsel slept through those witnesses’ testimony, there was effectively no counsel—and surely not counsel who could meet his obligations to object and preserve the record.

The Fifth Circuit’s conclusion to the contrary ignored the record and the particular violation alleged. It focused on co-counsel’s presence and handling of his own witnesses, not his conduct during lead counsel’s witnesses. As a result, the Fifth Circuit excused egregious conduct—sleeping during trial—based on a second lawyer’s mere presence.

This Court should confirm that context is critical in evaluating counsel’s presence or performance. Particularly given the professional standards mandating multi-member defense teams, *supra* at 6-7, and the unique landscape of procedural local rules in which *Strickland* claims may arise, *supra* at 14-15, conclusions about a second lawyer’s impact must be grounded in the particular case record and focused on the specific ineffectiveness alleged. Were the rule otherwise, petitioners with a second attorney would be left with no recourse even where lead counsel made egregious mistakes that went uncorrected.

CONCLUSION

The Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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