

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 OF FORMER JUDGES AND PROSECU-
TORS AND FAIR AND JUST PROSECUTION AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici are former federal and state judges and prosecutors, together with Fair and Just Prosecution, a project of the Tides Center that brings together elected prosecutors from both urban and rural communities around the nation as part of a network of leaders committed to a justice system grounded in fairness, equity, compassion, and fiscal responsibility. They share a direct institutional stake in the Sixth Amendment's guarantee of effective assistance of counsel. The adversarial system functions only when both sides have engaged advocates. Judges are duty-bound to ensure that the proceedings they oversee are worthy of public confidence. And prosecutors play a special role in ensuring justice is served; they are not mere adversaries out to secure convictions, *Berger v. United States*, 295 U.S. 78, 88 (1935). The Fifth Circuit's opinion is flatly contrary to the long-standing and well-established proposition that sleeping counsel cannot provide effective assistance. These groups speak together here because the Fifth Circuit's decision sanctions precisely the kind of breakdown in the adversarial process that they are tasked with preventing and that no reasonable judge or prosecutor would allow.

¹ Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity aside from amici and their counsel made a monetary contribution intended to fund its preparation or submission. Pursuant to Rule 37.2, counsel for amici timely provided notice of their intent to file this brief to counsel of record for Petitioner. Counsel for amici provided late notice to Respondent, who does not object to the late notice.

INTRODUCTION & SUMMARY OF ARGUMENT

Juan Alvarez was sentenced to death in a Texas state court where his lead counsel, Frumencio Reyes, repeatedly fell asleep during the guilt and penalty phases of trial. While doing so, Reyes missed critical witness testimony, hampering his ability to effectively cross-examine those witnesses. “[T]he judge had to wake Mr. Reyes up by repeating his name when it was his turn to question a witness; the courtroom broke out in laughter” Pet. App. 230a. As one juror noted, “it was mostly nervous laughter at such a spectacle.” *Id.* The Fifth Circuit denied habeas corpus relief.

The Sixth Amendment right to counsel protects the defendant’s right to the assistance of counsel, not merely counsel’s physical presence in the courtroom. See *Strickland v. Washington*, 466 U.S. 668, 685 (1984). When counsel is either wholly absent or “fails to subject the prosecution’s case to meaningful adversarial testing,” the constitutional guarantee is violated. *United States v. Cronin*, 466 U.S. 648, 659 (1984). The Fifth Circuit willingly blessed this arrangement simply because a second attorney—who was barred by the trial court’s invocation of a local rule from stepping in to object or question those witnesses—was present in the courtroom. In so doing, it not only failed Petitioner, but also systematically foreclosed *Cronin* claims in future sleeping-lawyer cases when co-counsel is present.

Judges adhere to federal and state codes of judicial conduct to maintain order, require professional conduct from lawyers, and intervene when the adversarial process breaks down. No judge committed to those obligations would have tolerated sleeping lead counsel. Prosecutors, as ministers of justice with an

institutional stake in reliable convictions, would not treat a sleeping-lawyer trial as a legitimate conviction. Even the jurors understood that what happened at trial was inappropriate. In short, every person who has touched a criminal proceeding knows this outcome is indefensible: unconscious counsel is equivalent to no counsel at all.

ARGUMENT

I. THE STANDARDS GOVERNING THE BENCH LIKEWISE GOVERN THE BAR.

Trial judges’ broad and inherent authority to manage their courtrooms and ensure fair proceedings includes the power to appoint replacement counsel, declare mistrials, and address other breakdowns in the adversarial process. “[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.” *Geders v. United States*, 425 U.S. 80, 86 (1976) (alteration in original) (quoting *Quercia v. United States*, 289 U.S. 466, 469 (1933)).

In *Martel v. Clair*, a capital murder case addressing the standard for motions to substitute counsel, this Court applied an “interests of justice” standard, explaining that “quality legal representation is necessary’ in all capital proceedings to foster ‘fundamental fairness in the imposition of the death penalty.” 565 U.S. 648, 652, 659 (2012) (quoting *McFarland v. Scott*, 512 U.S. 849, 855, 859 (1994)).

Judges understand that a sleeping lawyer does not constitute the “quality legal representation” that is “necessary” to foster fundamental fairness in death-penalty proceedings. *Id.*; accord *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc) (admonishing

counsel for sleeping). “That sleeping counsel is absent counsel is elementary.” *Id.* at 354 (Higginbotham, C.J., concurring).

Judges themselves adhere to canons of conduct and may be subject to judicial disability proceedings if they are unable to competently execute their duties. Canon 3 of the Code of Conduct for United States Judges requires judges to perform the duties of office “[f]airly, [i]mpartially and [d]iligently.” U.S. Jud. Conf., 2 *Guide to Judiciary Policy* pt. A, ch.2 (2008). Judges are also regulated by the Judicial Conduct and Disability Act. This Act allows for complaints against federal judges for conduct “prejudicial to the effective and expeditious administration of the business of the courts” or for “mental or *physical* disability” rendering a judge “unable to discharge all the duties of [the] office.” 28 U.S.C. § 351 (emphasis added). The Rules for Judicial-Conduct and Judicial-Disability Proceedings go further: Rule 4(c) expressly identifies “the inability to stay awake during court proceedings” as an example of a disability that may render a judge unable to discharge the duties of judicial office. U.S. Jud. Conf., 2 *Guide to Judiciary Policy* pt. E, ch. 3, §4(c) (2008). Judicial decisions likewise recognize the importance of an attentive judge. See, e.g., *People v. Degondea*, 3 A.D.3d 148, 149 (N.Y. App. Div. 2003) (“There is no question that it is utterly unacceptable for a judge to sleep while presiding over a trial.”). Repeatedly falling asleep, even temporarily, is certainly a physical disability or limitation. A judge cannot perform the functions of judging while asleep, and a lawyer cannot perform the functions of advocacy while unconscious.

In Texas, where Alvarez faced trial, judges adhere to their own Code of Judicial Conduct.² The Fifth Circuit and its district courts have also issued standing orders and rules on courtroom conduct and attorney professionalism—requirements that their judges must enforce. For example, the Fifth Circuit has published rules that establish the expectations of engaged and attentive counsel. 5th Cir. R. 46. And the Southern District of Texas issued a Courtroom Etiquette Order requiring attorneys to remain attentive and professional throughout all proceedings and be prepared for all proceedings. S.D. Tex. L.R. app. C. In other words, counsel must be actively engaged, not just passively present. The Western District of Texas’s Local Rules similarly provide that “[a] lawyer must . . . take all reasonable steps to prevent disorder or disruption of court proceedings.” W.D. Tex. L.R. AT-5(c), (d), (f). Falling asleep during proceedings is unquestionably disruptive. Any judge, whether former or sitting, would intuitively know that this conduct is improper.

II. THE PROSECUTOR’S ROLE IS DEFINED BY A DUTY TO PROMOTE JUSTICE AND TO PROTECT THE INTEGRITY OF THE CRIMINAL PROCESS.

Prosecutors, too, have an institutional interest in and responsibility for ensuring that criminal

² A judge is obligated to “establish, maintain, and enforce high standards of conduct, and should personally observe those standards so that the integrity of the judiciary is preserved.” Texas Code of Judicial Conduct Canon 1 (2026). As with the federal code, “[a] judge shall require order and decorum in proceedings” and must require professional conduct from lawyers. *Id.* at Canon 3B(3)–(4). A Texas judge would thus likewise understand that sleeping at trial falls far below basic professional standards.

proceedings are fair, reliable, and worthy of public confidence. Nearly a century ago, this Court explained that the government’s lawyer “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all,” and that his interest “in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger*, 295 U.S. at 88 (1935). A prosecutor holds a special role in the administration of justice. Model Rules of Pro. Conduct r. 3.8 cmt. 1 (A.B.A. 1983) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided on the basis of sufficient evidence”). As such, prosecutors as a matter of course respect “the constitutional and legal rights of all persons, including suspects and defendants.” Am. Bar Ass’n, *Criminal Justice Standards for the Prosecution Function* § 3-1.2(a)–(b) (4th ed. 2017) [hereinafter ABA Standards].

These principles inform what prosecutors actually do in the courtroom. When defense counsel is no longer functioning as counsel, the prosecutor’s role remains grounded in the commitment to ensuring that the proceedings remain a fair and constitutionally valid adjudication, not as an opportunity to secure an easier conviction. See U.S. Dep’t of Just., *Justice Manual* § 9-27.001 (stating that prosecutors promote the “fair, evenhanded administration of the federal criminal laws” by “making certain ... that the rights of individuals are scrupulously protected.”). In other words, prosecutors have no legitimate institutional interest in preserving a conviction obtained through a trial that ceased to function as an adversarial proceeding. See *United*

States v. Newell, 315 F.3d 510, 515 (5th Cir. 2002) (“The [S]ixth [A]mendment right to effective assistance of counsel derives from the defendant’s fundamental right to a fair trial, a goal best achieved by ensuring that the process involves vigorous partisan advocacy by both sides.” (alteration in original) (citation omitted)). For prosecutors committed to the fair administration of justice, preserving that process is not separate from prosecutorial work; it is part of it.

Thus, in situations where prosecutors observe defense counsel conduct “that might reasonably constitute ineffective assistance of counsel, [they] should take reasonable steps to preserve the defendant’s right to effective assistance as well as the public’s interest in obtaining a valid conviction.” ABA Standards § 3-8.4(b). This obligation is especially compelling in a capital case, where the government seeks to impose the ultimate punishment and the reliability of the proceedings is paramount. Repeatedly sleeping through critical portions of a capital trial calls into question the integrity of the proceeding as a whole.

Sleeping counsel necessarily threatens the integrity of the adversarial process. When defense counsel falls asleep at trial, the risk is not only unfairness to the defendant but also unreliability of the verdict. This, in turn, undermines confidence that the conviction reflects a tested adversarial proceeding rather than an unexamined prosecution case. This is precisely the kind of consequence that prosecutors seek to avoid.

Testing the prosecution’s case cannot be performed by an unconscious attorney. A sleeping lawyer cannot listen to testimony, recognize an objection, formulate a cross-examination, or make strategic judgments based on testimony being given in real time. See, *e.g.*,

Pointer v. Texas, 380 U.S. 400, 405 (1965) (cross-examination is “an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal”). If defense counsel is unconscious, the proceeding ceases to function in the way the adversarial system is supposed to, and this institutional breakdown harms the prosecutorial function as well because it deprives the resulting judgment of legitimacy. A verdict reached while defense counsel slept is not a verdict prosecutors are willing to defend.

III. PROSECUTORS AND JUDGES ALIKE HAVE AN OBLIGATION TO MAINTAIN PERCEPTIONS OF FAIRNESS AND JUSTICE IN THE COURTROOM.

As former judges and prosecutors, amici are cognizant of the pernicious effect that unfairness in the courtroom, if unremedied, can have on the public’s perception of the judiciary and its work. The decision below was troubling not only because it departed from their understanding of this Court’s Sixth Amendment precedent, but also because permitting such visibly deficient representation risks undermining the public’s confidence in the judicial process. The authority that courts have ultimately rests on the public accepting judicial decisions as the outcome of procedurally sound, fair processes. If public perception of the judiciary plummets, then the overall legitimacy of the institution and the decisions that courts reach are compromised. After all, the judicial branch possesses “neither FORCE nor WILL, but merely judgment.” The Federalist No. 78 (Alexander Hamilton).

This case is a prime example. Here, jurors proffered affidavits explaining that Reyes, the defendant’s counsel, would be asleep “for periods of several minutes, as

long as five minutes or maybe even more on some occasions” “repeatedly throughout the trial.” Pet. App. 226a. The effect of the sleeping lawyer on the jurors was salient. One juror explained that “Reyes could [not] have done a very good job of questioning those witnesses when he was sleeping during their testimony.” Pet. App. 226a–27a. Overall, the jurors felt “that the defense did not really do much of a job defending their client” and even discussed their shock at the actions of the defense counsel during jury deliberations. Pet. App. 230a–31a.

The reactions of the jury are strong signals of doubt in the criminal adjudicative process and illustrate the broader institutional concern. When participants in the judicial process observe conduct that causes them to question whether a party received meaningful representation, their confidence in the fairness of that process can suffer. See *United States v. Olano*, 507 U.S. 725, 736 (1993) (incorporating as final prong in the plain-error test whether error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings” (citation omitted)). Procedural fairness is part of what gives a verdict its legitimacy. When participants perceive that fundamental procedures were not followed or that meaningful representation was absent, the resulting judgment may be viewed as less legitimate. Such perceptions harm the judicial process as a whole. They may raise questions about whether judges permitted proceedings to continue despite serious deficiencies and whether prosecutors treated the pursuit of a conviction as more important than the fairness of the proceeding itself.

Courts are so concerned with ensuring that people understand the work of the courts and their legitimacy that they have launched comprehensive and

coordinated civics education programs aimed at combating misperceptions about the judiciary's role and functions. See, e.g., Admin. Off. of the U.S. Cts., *Educational Resources*, U.S. Cts., <https://www.uscourts.gov/about-federal-courts/educational-resources> (last visited Sep. 20, 2026); see also Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283 (2003) (explaining that perceptions of procedural fairness play an important role in shaping how the public assesses the legitimacy of legal authorities); see also Sarah Benesh, *Understanding Public Confidence in American Courts*, 68 J. Pol. 697 (2006) (explaining that perceptions of court procedures can play a role in the public's support for state courts). These educational efforts build public trust by showing members of the public the activities of the court, why the work is important, and the procedures that are in place to ensure that the proper outcomes are reached.

To ensure fairness, justice, and legitimacy, those involved in courtroom proceedings have an interest in ensuring that the outcomes reached at trial are the product of fair and legitimate representation. A capital punishment conviction resulting from a courtroom proceeding with sleeping defense counsel cannot be the product of a procedurally sound adversarial process. This Court should vacate Mr. Alvarez's conviction and remand for further proceedings.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX: LIST OF *AMICI CURIAE*

The Honorable Nancy F. Atlas (Ret.)—District Judge (1995–2022) for the U.S. District Court for the Southern District of Texas.

The Honorable Scott Bales (Ret.)—Chief Justice (2014–2019), Vice Chief Justice (2012–2014), and Justice (2005–2019) for the Arizona Supreme Court.

The Honorable Thomas A. Balmer (Ret.)—Chief Justice (2012–2018) and Justice (2001–2022) for the Oregon Supreme Court.

The Honorable Mark W. Bennett (Ret.)—Chief Judge (1999–2006) and District Judge (1994–2019) for the U.S. District Court for the Northern District of Iowa.

The Honorable Eric S. Brown (Ret.)—Chief Justice (2010) for the Supreme Court of Ohio.

The Honorable A. Franklin Burgess, Jr. (Ret.)—Judge (1983–2013) for the Superior Court of the District of Columbia.

The Honorable Rubén Castillo (Ret.)—Chief Judge (2013–2019) and District Judge (1994–2019) for the U.S. District Court for the Northern District of Illinois.

The Honorable Robert J. Cindrich (Ret.)—District Judge (1994–2004) for the U.S. District Court for the Western District of Pennsylvania.

The Honorable Andre Davis (Ret.)—Circuit Judge (2009–2017) for the U.S. Court of Appeals for the Fourth Circuit, and District Judge (1995–2009) for the U.S. District Court for the District of Maryland.

The Honorable Fernande R. Duffly (Ret.)—Justice (2011–2016) for the Massachusetts Supreme Judicial Court.

The Honorable Jeremy Fogel (Ret.)—District Judge (1998–2018) for the U.S. District Court for the Northern District of California.

The Honorable Katherine B. Forrest (Ret.)—District Judge (2011–2018) for the U.S. District Court for the Southern District of New York.

The Honorable Lisa Foster (Ret.)—Judge (2003–2013) for the Superior Court of California, County of San Diego.

The Honorable Royal Furgeson (Ret.)—District Judge (1994–2008) for the U.S. District Court for the Western District of Texas and District Judge (2008–2013) for the U.S. District Court for the Northern District of Texas.

The Honorable José A. Fusté (Ret.)—Chief Judge (2004–2011) and District Judge (1985–2016) for the U.S. District Court for the District of Puerto Rico.

The Honorable Nancy Gertner (Ret.)—District Judge (1994–2011) for the U.S. District Court for the District of Massachusetts.

The Honorable John Gleeson (Ret.)—District Judge (1994–2016) for the U.S. District Court for the Eastern District of New York.

The Honorable Thelton Henderson (Ret.)—Chief Judge (1990–1997) and District Judge (1980–2017) for the U.S. District Court for the Northern District of California.

The Honorable Robert H. Henry (Ret.)—Chief Judge (2008–2010) and Circuit Judge (1994–2010) for the U.S. Court of Appeals for the Tenth Circuit.

The Honorable Richard A. Levie (Ret.)—Judge (1985–2000) for the Superior Court of the District of Columbia.

The Honorable Timothy K. Lewis (Ret.)—Circuit Judge (1992–1999) for the U.S. Court of Appeals for the Third Circuit and District Judge (1991–1992) for the U.S. District Court for the Western District of Pennsylvania.

The Honorable Beverly Martin (Ret.)—Circuit Judge (2010–2021) for the U.S. Court of Appeals for the Eleventh Circuit and District Judge (2000–2010) for the U.S. District Court for the Northern District of Georgia.

The Honorable Paul Michel (Ret.)—Chief Judge (2004–2010) and Circuit Judge (1988–2010) for the U.S. Court of Appeals for the Federal Circuit.

The Honorable Maureen O'Connor (Ret.)—Chief Justice (2011–2022) and Justice (2003–2010) for the Supreme Court of Ohio.

The Honorable Philip M. Pro (Ret.)—Chief Judge (2002–2007) and District Judge (1987–2015) for the U.S. District Court for the District of Nevada.

The Honorable Mark E. Recktenwald (Ret.)—Chief Justice (2010–2025) for the Hawaii Supreme Court, and Associate Justice (2009–2010) for the Hawaii Supreme Court.

The Honorable Debra Sasser (Ret.)—Chief District Court Judge (2020–2021) and District Court Judge (2005–2024) for the Tenth Judicial District, Wake County, North Carolina.

The Honorable Shira Scheindlin (Ret.)—District Judge (1994–2016) for the U.S. District Court for the Southern District of New York.

The Honorable Patrick J. Sherlock (Ret.)—Judge (2007–2025) for the Circuit Court of Cook County, Illinois.

The Honorable Marjorie S. Steinberg (Ret.)—Judge (2001–2011) for the Superior Court of California, County of Los Angeles.

The Honorable Laura Denvir Stith (Ret.)—Chief Justice (2007–2009) and Judge (2001–2021) for the Supreme Court of Missouri.

The Honorable John Daniel Tinder (Ret.)—Circuit Judge (2007–2015) for the U.S. Court of Appeals for the Seventh Circuit and District Judge (1987–2007) for the U.S. District Court for the Southern District of Indiana.

The Honorable Thomas I. Vanaskie (Ret.)—Circuit Judge (2010–2019) for the U.S. Court of Appeals for the Third Circuit, and Chief Judge (1999–2006) and District Judge (1994–2010) for the U.S. District Court for the Middle District of Pennsylvania.

The Honorable T. John Ward (Ret.)—District Judge (1999–2011) for the U.S. District Court for the Eastern District of Texas.

The Honorable Michael A. Wolff (Ret.)—Chief Justice (2005–2007) and Judge (1998–2011) for the Supreme Court of Missouri.

The Honorable Diane P. Wood (Ret.)—Chief Judge (2013–2020) and Circuit Judge (1995–2024) for the U.S. Court of Appeals for the Seventh Circuit.

The Honorable Brian Frosh—Attorney General (2015–2023) for the State of Maryland.

Becky James—Assistant U.S. Attorney (1994–2007) for the Central District of California.

Melody Wells—Assistant U.S. Attorney for the Northern District of Illinois (2018–2026) and the Eastern District of New York (2013–2017).

Aitan Goelman—Assistant U.S. Attorney (1998–2003) for the Southern District of New York and Special Attorney (1995–1998) to the U.S. Attorney General.

Larry Mackey—Assistant U.S. Attorney (1986–1998) for the Southern District of Indiana and Assistant U.S. Attorney (1980–1986) for the Central District of Illinois.

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