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 Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

Juan Carlos Alvarez was convicted and sentenced to death for his role in a pair of gang-related shootings that killed four men. Alvarez asserts that his lead attorney slept during his capital murder trial, but the lower courts found that he failed to prove it. Alvarez also had *two* attorneys at trial, and the lower courts found that Alvarez's second attorney was engaged and present even if his lead counsel slept. Alvarez's certiorari petition thus presents the following questions for review:

1. Should this Court overturn the lower courts' factual determination that Alvarez failed to prove that his lead attorney slept during trial—a presumptively correct fact finding under AEDPA[1] that must be rebutted by clear and convincing evidence?

2. Viewed pursuant to AEDPA's deferential standard, did the Fifth Circuit err by holding that the state court did not unreasonably deny relief under *Cronic*[2] and *Strickland*[3] when a second lawyer represented Alvarez besides the one that supposedly slept?

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[1] The Antiterrorism and Effective Death Penalty Act of 1996.

[2] *United States v. Cronic*, 466 U.S. 648 (1984).

[3] *Strickland v. Washington*, 466 U.S. 668 (1984).

PARTIES TO THE PROCEEDING

The Petitioner is Juan Carlos Alvarez. The Respondent is Eric Guerrero, Director, Texas Department of Criminal Justice, Correctional Institutions Division. Because no party is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

LIST OF PROCEEDINGS

Alvarez v. State, No. 787007 (Tex. Dist. Sept. 22, 1999) (capital murder conviction and death sentence)

Alvarez v. State, No. AP-73,648 (Tex. Crim. App. Oct. 30, 2002) (affirming conviction and sentence on direct appeal)

Alvarez v. State, No. AP-77,035 (Tex. Crim. App. May 7, 2014) (denial of impermissible funding appeal)

Ex parte Alvarez, No. WR-62,426-01 (Tex. Crim. App. Sept. 24, 2008) (denying initial state habeas application)

Ex parte Alvarez, No. WR-62,426-02 (Tex. Crim. App. Sept. 15, 2010) (dismissing subsequent state habeas application)

Ex parte Alvarez, No. WR-62,426-03 (Tex. Crim. App. Sept. 17, 2014) (denying leave to file a petition for mandamus)

Ex parte Alvarez, No. WR-62,426-04 (Tex. Crim. App. Apr. 29, 2015) (dismissing subsequent state habeas application)

Alvarez v. Davis, No. 4:09-CV-3040 (S.D. Tex. Oct. 25, 2017) (denying federal habeas relief)

Alvarez v. Guerrero, No. 18-70001 (5th Cir. Dec. 23, 2025) (affirming denial of federal habeas relief)

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INTRODUCTION

Alvarez, a gang member, participated in two drive-by shootings that left four dead—Michael and Adrian Aguirre, José Varela, and Hugo Perez. Punishment evidence showed that Alvarez was involved in another drive-by killing, and he had an ugly history of aggravated robbery and assault. Alvarez now seeks certiorari review of the Fifth Circuit's decision affirming the district court's denial of Alvarez's habeas claim that his constitutional rights were violated when one of his two lawyers purportedly slept during trial. *See generally* Petition (Pet.); *Alvarez v. Guerrero*, 162 F.4th 570 (5th Cir. 2025); Appendix (App.) at 1a–32a. Specifically, Alvarez argues that the Fifth Circuit's opinion conflicts with Court precedent in *Cronic* and *Strickland*.

However, this is an AEDPA case, so to obtain relief Alvarez must show the state court unreasonably applied clearly established Court precedent when it denied his claim. 28 U.S.C. § 2254(d)(1). As noted, Alvarez had two lawyers, and Alvarez only complains that one slept. The Fifth Circuit correctly held "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." App. 13a. Certainly, *Strickland* and *Cronic* do not establish Alvarez's proposed rule beyond all "fairminded disagreement." *Shoop v. Hill*, 586 U.S. 45, 48 (2019) (per curiam).

Alvarez asserts that counsel's sleeping created a spectacle that robbed the trial proceedings of their gravity. Pet. 2–3. But the lower courts found that Alvarez failed to prove counsel slept, meaning there was no "spectacle" to behold. App. 17a–19a, 22a, 24a–25a, 171a–73a; ROA.3079–80.[4] Largely parroting the dissent, Alvarez contests the lower courts' adverse findings. But even if the Court were inclined to engage in error correction, there is nothing to correct. The lower courts appropriately found that Alvarez's contention that his lawyer slept is vague and speculative, and it suffers from severe evidentiary deficiencies. Furthermore, the lower courts properly ascertained that Alvarez's second attorney was actively involved at trial and provided a backstop even assuming that Alvarez's other attorney slept. *Id.*

Alvarez asserts that "[e]very circuit court to consider a sleeping-lawyer claim has concluded that 'unconscious or sleeping counsel is equivalent to no counsel at all.'"[5] Pet. 14–15 (collecting cases). But this is a strawman. The question in this case is whether Alvarez proved counsel slept in the first place, and, further, whether the presence of engaged co-counsel

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[4] "ROA" refers to the record on appeal.

[5] Confronted with similar precedent, the Fifth Circuit correctly observed: "[t]hat this court and others cited by the dissent have affirmed the application of *Cronic* in 'sleeping lawyer' cases is not legally relevant to AEDPA. . . . Even if they were relevant, however, in none of these cases did two counsel represent the defendant." App. 23a n.15.

would negate the imposition of presumed prejudice even if sleeping occurred. Alvarez's petition proceeds off the false premise that the Fifth Circuit somehow excuses sleeping attorneys. That is emphatically not the case. *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (en banc decision presuming prejudice when a capital defendant's attorney slept during trial). Rather, Alvarez simply failed to meet his burden to show that his attorney slept. And, even if Alvarez did meet his evidentiary burden, the Texas court still could have reasonably found that co-counsel's active representation provided Alvarez constitutionally adequate assistance.

This Court should refuse to second-guess the Fifth Circuit's detailed and fact-bound resolution of the issues at hand—a resolution that mirrors the district court's careful assessment. At bottom, Alvarez's petition does not demonstrate any special or important reason for this Court to review the Fifth Circuit's decision. Rather, it merely reflects his disagreement with the lower courts' factual findings and the onerous standard imposed by Congress in AEDPA. Alvarez was convicted and sentenced to die in 1999—twenty-seven years ago. App. 95a; ROA.3019. Alvarez's federal habeas proceedings alone (including two *Rhines*[6] stays) have now dragged on for nearly two decades. ROA.2. This litigation has pended long enough, and this Court should decline Alvarez's invitation to needlessly prolong it into a fourth decade. Certiorari review should be denied.

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[6] *Rhines v. Weber*, 544 U.S. 269 (2005).

STATEMENT OF THE CASE

I. Guilt-Innocence Evidence

Alvarez, a member of the Southwest Cholos street gang, was convicted of capital murder for his participation in two shootings stemming from conflict with a rival gang, La Primera. These shootings resulted in the June 6, 1998 murders of brothers Michael and Adrian Aguirre and the June 17, 1998 murders of José Varela and Hugo Perez. ROA.3019–23. The State presented "overwhelming" evidence supporting the conviction, including "eyewitness accounts, co-participant testimony, forensic evidence, and Alvarez's statement to the police." App. 2a–5a, 95a–110a; ROA.3019–23.

II. Punishment Evidence

At punishment, the State offered evidence of "Alvarez's previous conviction for aggravated assault with a deadly weapon[,] . . . other unadjudicated aggravated assaults, and drive-by shootings . . . that involved at least one additional death." App. 5a–6a. Alvarez's gang violence was random and indiscriminate. *Id*. In turn, the defense offered evidence about Alvarez's background, his childhood in Mexico, and his father's murder. *Id*. at 6a. His family testified that "Alvarez learned English, worked hard, provided for his family, did not use drugs, was responsible, got along well with others, and was quiet." *Id*. A psychologist testified to

Alvarez's response to the murders of his father and a friend as well as Alvarez's general mental health. *Id.*

III. Course of Proceedings

Alvarez was convicted and sentenced to death by the 338th District Court of Harris County, Texas. Appeal was automatic to the Texas Court of Criminal Appeals (CCA), which affirmed. *Alvarez v. State*, No. AP-73,648 slip op. (Tex. Crim. App. Oct. 30, 2002) (not designated for publication).

Alvarez challenged his conviction and sentence with a state habeas application. The trial court made findings and conclusions, and the CCA entered an order denying relief that adopted most of them.[7] *Ex parte Alvarez*, No. WR-62,426-01, 2008 WL 4357801 (Tex. Crim. App. Sept. 24, 2008) (per curiam) (not designated for publication); App.193a–94a.

Alvarez petitioned for federal habeas relief in 2009. ROA.9. After two fruitless stays permitting Alvarez to litigate his claims in state court,[8] the district court

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[7] Alvarez implies that the CCA's failure to adopt some of the findings has favorable importance. Pet. 9 (citing App. 194a). But the CCA's language that the findings "'relate to arguments rather than new claims'" is inscrutable. The parties have endlessly debated the meaning and significance of this uncommon terminology. *See*, *e.g.*, App. 10a–11a.

[8] *Ex parte Alvarez*, No. WR-62,426-02, 2010 WL 3572246 (Tex. Crim. App. Sept. 15, 2010) (per curiam) (not designated for publication) (dismissing Alvarez's subsequent application as an abuse of the writ); *Alvarez v. State*, No. AP-77,035, 2014 WL

denied habeas relief and a certificate of appealability (COA). App. 95a, 191a–92; ROA.3019, 3095, 3097.

Alvarez then sought a COA from the Fifth Circuit. ECF Nos. 27, 32, 38–40, 46.[9] Alvarez attempted to supplement the record with a new affidavit from lead trial counsel, which the court declined to accept. App. 2a n.1. The Fifth Circuit eventually granted a COA, permitted supplemental merits briefing, and heard oral argument. ECF Nos. 80–81, 83, 85, 91. After argument, the court granted Alvarez's motion to supplement the record with certain documents and to file another brief. ECF Nos. 96, 98, 105. Ultimately, the panel affirmed the denial of habeas relief. App. 2a, 32a. Judge Richman dissented. App. 33a. Alvarez requested rehearing en banc, which the Fifth Circuit denied without a poll following the Director's response. App. 223a; ECF Nos. 149–50, 161, 163, 171, 175.

Alvarez now seeks certiorari review of the Fifth Circuit's decision. The instant response follows.

1875365 (Tex. Crim. App. May 7, 2014) (per curiam) (not designated for publication) (rejecting Alvarez's attempts to appeal the trial court's unappealable order denying funding); *Ex parte Alvarez*, No. WR-62,426-03 (Tex. Crim. App. Sept. 17, 2014) (Alvarez's unsuccessful mandamus action attempting to secure funding); *Ex parte Alvarez*, No. WR-62,426-04, 2015 WL 1955072 (Tex. Crim. App. Apr. 29, 2015) (per curiam) (not designated for publication) (dismissing Alvarez's second subsequent application as an abuse of the writ).

[9] "ECF No." refers to entries on the Fifth Circuit's electronic docket sheet, available on PACER.

REASONS FOR DENYING THE WRIT

I. Alvarez's Petition Does Not Warrant This Court's Review.

The questions that Alvarez presents for review are unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely granted." *Id*.

II. Alvarez Failed to Prove That His Lead Attorney Slept.

Alvarez argues that his lead attorney slept at trial, depriving him of his Sixth Amendment right to counsel. *See generally* Pet. But this argument falls apart in view of the facts. In short, the district court found Alvarez failed to adequately prove counsel slept at a critical stage. With no proven sleeping, the district court correctly refused to presume prejudice. App. 171a–73a; ROA.3079–80. The district court further noted that any guilt-innocence claim would fail under de novo[10] review

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[10] *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) (allowing denial of habeas relief under de novo review regardless of whether AEDPA applies). The district court's careful opinion found that *any* ineffectiveness claim would fail. ROA.3065 ("[T]he Court has reviewed the pleadings, the record, and the relevant state court decision and finds no error, nor any reasonable probability of a different result, under either an AEDPA or de novo standard.").

in view of the overwhelming evidence. App. 164a; ROA.3065. The Fifth Circuit largely agreed. App. 16a–19a.

Alvarez repeatedly states that lead counsel's sleeping was "unrebutted," Pet. 1, 3, 6, 11–12, 14, 21–22; but it was very much rebutted. It was rebutted by the absence of any sleeping in the trial record, Alvarez's failure to develop his claim until late in the game, the suspicious absence of mention from lead counsel's initial affidavits, and the omission of confirmation from co-counsel. App. 18a. Indeed, the Fifth Circuit found that the record does not reflect that "the trial judge admonished [lead counsel] about sleeping or had to wake him up or encouraged him to pay attention." *Id*. In fact, the judge complimented lead counsel, saying "'[no]body takes advantage of you.'" *Id*. The Fifth Circuit noted that sleeping was suspiciously a non-issue in Alvarez's post-trial proceedings, pressed neither on direct appeal nor in Alvarez's initial habeas application "filed by two accomplished capital defense attorneys," which "never alluded to constitutionally inadequate, much less 'absent' defense counsel." *Id*. Lead counsel submitted affidavits[11] that did not mention his sleeping, and co-

[11] Alvarez mentions the 2019 affidavit his lead attorney filed in the Fifth Circuit, Pet. 10, but he fails to plainly acknowledge that this affidavit was inadmissible. Both the Fifth Circuit majority and the dissent agreed that lead counsel's 2019 affidavit cannot be considered, either because of 28 U.S.C. § 2254(e)(2) or *Cullen v. Pinholster*, 563 U.S. 170 (2011). App. 2a n.1, 9a–10a, 87a. Nevertheless, lead counsel's 2019 affidavit does not appear to contain any straightforward admission from lead counsel that he actually slept—he merely concedes it was a possibility. ECF Nos. 53 & 57. Indeed, lead counsel has no independent recollection of

counsel—in the best position to observe the supposed sleeping—never supplied an affidavit detailing it. *Id*. at 18a & n.10. Now, co-counsel is dead and, "conveniently" for Alvarez, cannot be consulted. *Id*.

Alvarez offered two juror affidavits in support of his claim. Here, as did the lower court dissent, Alvarez "recites the operative paragraphs of each affidavit over and over as if repetition will increase their credibility." App.17a. However, the Fifth Circuit found these affidavits limited and uncorroborated.[12] App.16a–17a. Alvarez contends that his mother and sister's affidavits also show they saw lead counsel sleep during the prosecution's closing argument, Pet. 8, but those individuals lack credibility due to their relationship with Alvarez, and Alvarez concedes they were not present for much of trial.[13]

The Fifth Circuit observed that the dissent never identified a single question that lead counsel should

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sleeping and admits that he previously disputed doing so. ECF No. 53 (affidavit at pp.2, 4).

[12] The Fifth Circuit majority did not reach the issue, and the dissent believed any objection was waived, but the Fifth Circuit "has repeatedly held that [Federal Rule of Evidence] 606(b) forbids consideration of juror affidavits in federal habeas cases." *Young v. Davis*, 835 F.3d 520, 529 (5th Cir. 2016).

[13] ECF No. 149 at 11 n.6 ("This was the only day of trial the sister attended; accordingly, she did not have other opportunities to observe counsel during trial.") & n.7 ("As a testifying witness, the mother was barred from entering the courtroom until her testimony concluded the defense case at punishment; accordingly, she did not have other opportunities to observe counsel.").

have asked, but did not, because he was asleep. App. 15a–16a n.9. The suggestion that lead counsel may have mishandled a witness was mere "conjecture." *Id*. at 14a. To this day, Alvarez has refused to pinpoint the page in the record that shows his lead attorney slept. He likewise does not identify any missed objection or question. *See*, *e.g.*, Pet. 19–20. Simply put, "Alvarez never made his proof." App. 19a.

Instead of providing discrete instances of counsel's failings in the record, Alvarez vaguely contends that lead counsel's alleged sleeping occurred during the direct examination of the State's witnesses. Pet. 1–2. He asserts that "for the twenty-five witnesses [lead counsel] handled during the guilt and penalty phases of Alvarez's trial, when [lead counsel] slept, Alvarez was without a lawyer." *Id*. at 8. But Alvarez does not say on what pages of the record counsel purportedly slept. In fact, some of the record snippets that Alvarez has attached to his appendix seem to show Alvarez's lead attorney speaking and making objections. App. 272a–73a, 277a–78a 280a, 283a–84a. Counsel is very much awake.

The state court's fact-findings adverse to Alvarez, whether implicit or explicit, are entitled to a presumption of correctness on federal habeas review. § 2254(e)(1); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001). The Fifth Circuit, in turn, reviewed the district court's fact-findings for clear error. App. 19a (citing *Higgins v. Cain*, 720 F.3d 255, 260 (5th Cir. 2013)). These findings, combined with the deferential AEDPA standard of review, form an insurmountable barrier for Alvarez.

In sum, Alvarez failed to prove his case. The Court should decline to review the lower court's thorough opinion, which is entirely consistent with Court precedent and the governing statute. Alvarez's complaints are merely an entreaty that this Court usurp the fact-finding functions of the lower courts and engage in unwarranted error correction. Certiorari review should be denied.

III. Even If Lead Counsel Slept, Alvarez Had a Second, Engaged Attorney Safeguarding His Rights

Alvarez's complaint that the Fifth Circuit misapplied *Cronic* and its progeny is unworthy of certiorari review, as the Fifth Circuit's decision conforms with this Court's teachings. "'[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.'"[14] *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)). A state court ruling is an unreasonable application of federal law "if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement." *White v. Woodall*, 572 U.S. 415, 427 (2014) (quotation and citation omitted); *Shinn v. Kayer*, 592 U.S. 111, 112, 118–20 (2020) (per curiam).

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[14] If the Court has not "broken sufficient legal ground to establish [a] . . . constitutional principle, the lower federal courts cannot themselves establish such a principle [ ] sufficient to satisfy the AEDPA bar." *Williams v. Taylor*, 529 U.S. 362, 381 (2000).

Relief is only appropriate where the state court "managed to blunder so badly that every fairminded jurist would disagree" with its decision. *Mays v. Hines*, 592 U.S. 385, 392 (2021) (per curiam).

Here, the Fifth Circuit held that none of this Court's cases concerning counsel's "absence" during critical portions of trial dealt with the situation where only one of two counsel was alleged absent, and other counsel was actively representing the defendant. App. 13a–14a, 21a–22a. As observed by the Fifth Circuit, "[t]he dissent cites no case because there is none even remotely on point." *Id*. at 13a.

Alvarez attempts to overcome this fundamental lack by relying on this Court's recent decision in *Andrew v. White*[15] for the proposition that general principles can constitute clearly established federal law. Pet. 2–3, 16–17. But the Fifth Circuit correctly noted that "*Andrew* is inapposite on the facts and the precise legal issue before the Court." App. 13a. In *Andrew*, the prosecution introduced evidence about Andrew's sex life and her failings as a mother and wife, much of which the prosecution later conceded was irrelevant. 604 U.S. at 87. Andrew argued introduction of the evidence was so prejudicial that it violated her right to due process. *Id*. Conducting AEDPA review, the Tenth Circuit held that no relevant clearly established federal law existed to consider whether the state court's application of such was reasonable. *Id*. at 88–89, 95–96. This Court disagreed and remanded the case, finding that the Court

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[15] 604 U.S. 86 (2025).

had "made clear that when 'evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause . . . provides a mechanism for relief.'" *Id.* at 88 (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

Alvarez baselessly asserts that "[a]lone among the federal courts of appeal, the Fifth Circuit required Alvarez to identify a factually identical Supreme Court case to obtain habeas relief." Pet. 2. He also argues that the Fifth Circuit instituted a "factual parity" requirement for application of this Court's precedent in violation of *Andrew*. *Id.* at 3, 16, 22. But the Fifth Circuit did no such thing. At no point did the Fifth Circuit refuse to acknowledge or apply *Cronic*'s general principles or insist on an identical fact pattern. Rather, the Fifth Circuit found—after painstaking review—that *Cronic* was not even "potentially applicable." App. 19a–23a.

As pertinent here, *Cronic* deals with situations where there is a "complete denial of counsel" such that evaluating prejudice is a waste of time.[16] *Wright v. Van Patten*, 552 U.S. 120, 124–25 (2008). As in *Van Patten*, the Fifth Circuit found that no precedent extended *Cronic* to this "novel" factual situation.[17] App. 22a.

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[16] *Cronic* applies in three situations—the denial of counsel at a critical stage, the entire failure of meaningful adversarial testing, and certain circumstances where even a competent lawyer could not provide effective representation. App. 22a (citing *Bell v. Cone*, 535 U.S. 685, 697 (2002)).

[17] In the same vein, the Fifth Circuit did not refuse to acknowledge or apply *Strickland*'s teachings. Pet. 8–9. Rather, it explicitly applied *Strickland* and held that "[t]he state court could reasonably

Alvarez argues that *Van Patten* is inapplicable because he believes that the attorney in *Van Patten* could fully participate, albeit by speakerphone. Pet. 17. But the Court itself explained that its precedents did not deal with speakerphone issues and were not squarely on point. *Van Patten*, 552 U.S. at 125. The Court thus held, "[e]ven if we agree . . . that a lawyer physically present will tend to perform better than one on the phone, it does not necessarily follow that mere telephone contact amounted to total absence or 'prevented [counsel] from assisting the accused,' so as to entail application of *Cronic*." *Id.* Alvarez is in the same boat, where there is no square holding by this Court, and it does not necessarily follow that Alvarez's representation by two attorneys amounted to a total absence of counsel even if one attorney slept.

As the Fifth Circuit observed, that court and the CCA have repeatedly refused to apply presumed prejudice in the multiple-attorney context. *McFarland v. Lumpkin*, 26 F.4th 314, 319–20 (5th Cir. 2022); *Hall v. Thaler*, 504 F. App'x 269, 277–78 (5th Cir. 2012); *Ex parte McFarland*, 163 S.W.3d 743, 753, 760 (Tex. Crim. App. 2005).[18] This is a practical result, as Alvarez's argument,

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have determined that the record was insufficient to show prejudice pursuant to *Strickland*." App. 15a–16a.

[18] *See also Morgan v. Hardy*, 662 F.3d 790, 804 (7th Cir. 2011) (prejudice not presumed when co-counsel was present during lead counsel's absence); *United States v. Rosnow*, 981 F.2d 970, 972 (8th Cir. 1992) (co-counsel protected Sixth Amendment rights); *Geddings v. United States*, 5:06-CR-136-D, 2019 WL 2247509, at *3 (E.D.N.C. May 15, 2019) (no prejudice even if attorney slept because there was no allegation that co-counsel was ineffective); *Ervin v.*

taken to the logical extreme, implies that no matter how many lawyers a defendant employs—ten, twenty, a hundred—if any of them sleeps, then relief is automatic. The law does not countenance such absurdities.

Because Alvarez had two lawyers, presumed prejudice is congruently forbidden by AEDPA and *Teague v. Lane*, 489 U.S. 288, 309–10 (1989). App.22a n.13; *McFarland*, 26 F.4th at 320; *Hall*, 504 F. App'x at 278 n.16. Indeed, even assuming that *Cronic* is the clearly established law for the purposes of sleeping counsel,[19] the additional *extension* of *Cronic*'s holding to a defendant with more than one lawyer remains barred by AEDPA and *Teague*.[20]

Furthermore, contrary to Alvarez's assertions that co-counsel was an inadequate backstop, the Fifth Circuit and the district court observed that co-counsel was an active participant at trial and safeguarded Alvarez's rights. App. 17a–18a. Co-counsel was involved with the

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Davis, 00-CV-01228-LHK, 2016 WL 4681203, at *11–14 (N.D. Cal. Sept. 7, 2016) (presumption of prejudice unwarranted even if counsel slept because of co-counsel's presence); *Jackson v. State*, 290 S.W.3d 574, 587 (2009); *United States v. Williams*, ACM 38255, 2014 WL 4804506, at *5–6 (A.F. Ct. Crim. App. Jul. 9, 2014) (co-counsel mitigates claim of sleeping).

[19] It is uncertain that it is. *Ervin*, 2016 WL 4681203, at *11 ("Petitioner has cited no case where the U.S. Supreme Court has expressly held that counsel sleeping at trial constitutes ineffective assistance. The Court has found none in its own research.").

[20] *Williams*, 529 U.S. at 379–80 (*Teague* anti-retroactivity and § 2254(d)(1)'s "clearly established law" requirement are functionally equivalent).

case for over a year and far longer than counsel. *Id.* at 17a. Both the Fifth Circuit and the district court reviewed the trial record and found that co-counsel "was present at all times and 'made various objections, questioned experts on voir dire, cross-examined witnesses, and argued before the jury.'" App.17a–18a, 171a–73a; ROA.3079–80. Co-counsel "was fully engaged in the case." App. 18a. These findings—that Alvarez failed to prove that his lead attorney slept at a critical stage of trial and that he failed to show co-counsel was unengaged—preclude presumed prejudice under *Cronic*. App. 14a–16a ("even if there were such 'clearly established law,' there is no basis for its application on the barebones claims about the trial here").

Reiterating the dissent, Alvarez now contends that co-counsel's representation was inadequate because of a local rule or custom that only one attorney at a time could examine a witness.[21] Pet. 2, 9–10; App. 35a–36a. The majority correctly responded that "it is only supposition that [co-counsel] sat like *a bump on a log* and never proposed questions for cross on [counsel]'s witnesses." App. 19a n.11 (emphasis added). "Alvarez never asserts as much, because Alvarez's briefing is bereft of any specifics about the alleged sleeping other than the suspiciously similar, decade-old affidavits."[22] *Id.*

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[21] Pet. 7–8 (citing Harris County District Courts, *Trial Guidelines for Attorneys*, https://www.justex.net/section/1493 (visited Aug. 27, 2026)); 19.RR.137–38.

[22] It does not appear that Alvarez presented this argument to the lower court in his primary briefs. ECF No. 27 at 2–3, 8–10, 12–18;

As with his contention that his lead attorney slept, Alvarez's argument that his co-counsel was insufficiently involved or somehow precluded from participating in trial was rejected on the facts by the lower courts. Alvarez fails to muster the necessary proof to overturn this finding, and certiorari review should be denied.

IV. Alvarez Identifies No Specific Deficiencies in Counsel's Performance, and Overwhelming Evidence Supports the Conviction and Sentence.

Properly understood, Alvarez's claim is correctly processed under *Strickland*. And pursuant to *Strickland*, Alvarez's claim fails because he cannot show deficiency or prejudice. The petitioner has the burden of proof in a habeas proceeding attacking the effectiveness of counsel. *Garlotte v. Fordice*, 515 U.S. 39, 46 (1995) ("the habeas petitioner generally bears the burden of proof"); *Carter v. Johnson*, 131 F.3d 452, 463 (5th Cir. 1997). Thus, it was Alvarez's burden below to produce facts showing that trial counsel slept substantially at specific times, thereby causing prejudicial deficiencies in his representation, while at the same time, co-counsel was not present or was himself performing deficiently. Alvarez failed to show such facts and thus failed to meet

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ECF No. 46 at 2–6; ECF No. 83 at 1–4, 13–14 n.20. Thus, while the Fifth Circuit may have passed upon this argument and therefore rendered it available for review, *United States v. Williams*, 504 U.S. 36, 44 (1992), its lack of prominence in Alvarez's briefing shows how little Alvarez believes this rule was an impediment.

his burden. The district court found that Alvarez failed to show when and how long counsel purportedly slept. App. 171a–73a; ROA.3079–80. The district court therefore essentially denied Alvarez's claim as conclusory. *Id.* This was undoubtedly the correct resolution, as "unsupported allegations and pleas for presumptive prejudice are not the stuff that *Strickland* is made of." *Ochoa v. Davis*, 750 F. App'x 365, 371 (5th Cir. 2018) (quotation omitted).

Indeed, because AEDPA and *Strickland* both apply here, federal courts must "afford 'both the state court and the defense attorney the benefit of the doubt.'" *Woods v. Etherton*, 578 U.S. 113, 117 (2016) (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)). Put another way, "[]when the claim at issue is one for ineffective assistance of counsel . . . AEDPA review is 'doubly deferential.'" *Id.* (quoting *Pinholster*, 563 U.S. at 190). Furthermore, Alvarez cannot overcome the governing statute's barriers protecting the state court's implicit findings. Section 2254(d)(2) allows relief only where the state decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." And § 2254(e)(1) provides that state factual determinations are "presumed to be correct" and rebuttable only "by clear and convincing evidence." A finding is not unreasonable just because the federal court would have decided differently, *Wood v. Allen*, 558 U.S. 290, 300–01 (2010), and reasonable-minds disagreement does not suffice to overturn it. *Rice v. Collins*, 546 U.S. 333, 341–42 (2006). Certainly, Alvarez's vague accusations do not meet these standards.

Turning to prejudice, Alvarez's attempt to show harm amounts to little more than reiterating the *Cronic* standard. Pet. 19–21. But that is not the standard for prejudice under *Strickland*. *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) ("*Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different."). To establish that he has sustained prejudice, Alvarez "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Id*. That requires a "substantial," not just "conceivable," likelihood of a different result. *Richter*, 562 U.S. at 112. Thus, Alvarez cannot simply point to counsel's responsibilities at trial without explaining how those responsibilities were mishandled. *Strickland* requires "but for" causation.

Moreover, Alvarez's desperation to avail himself of presumed prejudice is a direct consequence of the overwhelming evidence against him at both phases of trial.[23] This included Alvarez's videotaped statement admitting his presence at the Prestwood and Woodfair shootings as well as the assault rifle and shotgun recovered from his apartment. App. 95a–100a; ROA.3019–22. Eyewitness and accomplice testimony placed Alvarez at both shootings. *Id*. DNA evidence

[23] *See also United States v. Johnson*, 5:15-CR-1268, 2016 WL 10706396, at *4 (S.D. Tex. Jun. 13, 2016) (unpublished) (appearance of sleeping not prejudicial in light of overwhelming evidence).

linked victim blood to the shotgun. *Id*. Alvarez was also subject to the law of parties, meaning that "even if Alvarez did not pull the trigger, he was guilty of capital murder." App. 5a, 99a; ROA.3022 (citing CR.481[24]). Similarly, punishment evidence demonstrated Alvarez's involvement in (1) the drive-by shooting murder of Juan Nevarez; (2) the shooting of Jesus Bear and Aniceto Espinoza; (3) the aggravated robbery of Tomas Carreon, Jr., at gunpoint; and (4) the aggravated assault of Alex Trajejo with a lug wrench. App. 5a, 101a; ROA.3023–24; 25.RR.47–49[25]; 26.RR.24, 43, 53, 67–69. Even assuming Alvarez's lead attorney did perform deficiently at some unspecified time and in some ill-defined way, the "overwhelming" evidence against Alvarez precludes any finding of prejudice at either phase of trial. *Strickland*, 466 U.S at 696, 700.

CONCLUSION

For the forgoing reasons, Alvarez's petition for a writ of certiorari should be denied.

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[24] "CR" refers to the clerk's record.

[25] "RR" refers to the reporter's record.

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