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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Director's opposition confirms that the Court should grant certiorari. The Director does not explain how the Fifth Circuit's demand that Alvarez identify a case "where one counsel allegedly performed defectively but a second, engaged attorney [supposedly] effectively participated," App.13a—is anything but a demand for factual parity contrary to *Andrew* v. *White*, 604 U.S. 86 (2025) (per curiam). Nor does he offer any reason why *Andrew* does not apply here, or engage with the decisions of five other circuits that have rejected the Fifth Circuit's overly narrow interpretation of that decision.

The Director mostly argues the facts. But the relevant facts are unrebutted: Two jurors swore that Alvarez's lead lawyer, Frumencio Reyes, repeatedly slept while prosecutors questioned witnesses only he could cross-examine, and the trial court enforced a rule barring co-counsel, John L. Denninger, from stepping in. The Director offers no evidence showing otherwise. He cites the limited nature of the record—notwithstanding that he opposed Alvarez's numerous requests for an evidentiary hearing to amplify the unrebutted facts. He invokes deference to trial-court findings that the Texas Court of Criminal Appeals expressly *declined* to adopt. And he speculates about what co-counsel might have done during Reyes's cross-examinations of witnesses whose direct examination Reyes had slept through.

Alvarez was sentenced to death while his lawyer slept. The petition should be granted.

ARGUMENT

I. THE FIFTH CIRCUIT DECIDED ALVAREZ'S *CRONIC* CLAIM IN A WAY THAT CONFLICTS WITH THIS COURT'S PRECEDENT AND FIVE OTHER CIRCUITS' APPLICATION OF THAT PRECEDENT

1. The Director all but concedes that the Fifth Circuit, contrary to *Andrew*, required Alvarez to establish factual parity between the constitutional violation and the Court's AEDPA precedent to obtain habeas relief. He does not dispute that in *Andrew* this Court held that "[g]eneral principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court," 604 U.S. at 94-95. And although he asserts (Opp.13) that *Andrew* is inapposite, he never explains why. Nor does he square the Fifth Circuit's cramped interpretation of *Andrew* as limited to "the evidentiary issue presented to the courts," App.13a, with *Andrew*'s capacious ruling that "certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." 604 U.S. at 95. The Director also does not address, much less distinguish, the five court of appeals decisions (Pet.23) that have rejected the Fifth Circuit's anomalous interpretation of *Andrew*. In short, the Director offers little resistance to *Andrew*'s applicability here. And he fails to explain how the Fifth Circuit's demand of Alvarez—identify a Supreme Court case where "one counsel allegedly performed defectively but a second, engaged attorney [supposedly] effectively participated," App.13a—is anything but a demand for factual parity contrary to *Andrew*.

If anything, the Director presses the more radical position that no defendant could *ever* obtain AEDPA relief for a sleeping-lawyer *Cronic* claim because this

Court has yet to rule specifically on that issue. "It is uncertain," he says (Opp.15 & n.19) citing only an unpublished district court opinion that pre-dates *Andrew*, whether "*Cronic* is the clearly established law for the purposes of sleeping counsel." That assertion runs counter to the decisions of multiple courts of appeal, including the Fifth Circuit, that recognize sleeping-lawyer claims constitute *Cronic* violations under AEDPA. *See McFarland* v. *Lumpkin*, 26 F.4th 314, 319 (5th Cir. 2022) (per curiam); *Muniz* v. *Smith*, 647 F.3d 619, 625-626 (6th Cir. 2011).

The Director's other efforts to prop up the opinion below lack merit. Citing *Wright* v. *Van Patten*, 552 U.S. 120 (2008) (per curiam), the Director recycles the Fifth Circuit's holding that the facts here constitute a "novel" circumstance unsuitable for AEDPA. Opp.13. But the novelty in *Van Patten* was technological: the Court had never decided whether appearing telephonically "amounted to total absence or 'prevented [counsel] from assisting the accused.'" 552 U.S. at 125. Here, Alvarez's lawyers unquestionably failed to perform their duties due to repeated sleeping and a court rule that barred co-counsel's participation—facts that fit comfortably under *Cronic*'s rule that a "complete denial of counsel" warrants a presumption of prejudice. *United States* v. *Cronic*, 466 U.S. 648, 659 (1984); Pet.13. The law supporting Alvarez's claim has long been clearly established.

Likewise inapt are other Fifth Circuit sleeping-lawyer decisions (Opp.14) that declined to presume prejudice where two defense lawyers were present. None of those cases involved a second lawyer who, as here, was prohibited by court rule (or any other impediment) from participating in the proceedings. In *McFarland*, the second counsel performed his duties "as if [he] was going to

have to do everything," and was present and active at all times. 26 F.4th at 318, 320. Similarly, in *Hall* v. *Thaler*, 504 F. App'x 269 (5th Cir. 2012), the second lawyer "actively participated at trial," *id.* at 277, and "contest[ed] virtually *every piece of evidence* the prosecution attempted to admit," *Hall* v. *Thaler*, 2011 WL 13185739, at *45 (W.D. Tex. Dec. 20, 2011) (emphasis added). The second lawyers in those cases could cover for the sleeping lawyer; here, the second lawyer was barred from doing so by court order. And Alvarez has never contended, as the Director outlandishly claims (Opp.15), that "no matter how many lawyers a defendant [has] … if any of them sleeps, then relief is automatic." Alvarez seeks only what the law demands: relief under *Cronic* when a defendant is denied assistance of counsel because his lead counsel sleeps through critical stages of a criminal trial and his second lawyer is prevented by court rule from stepping in.

2. The Director's attacks on the factual record are unfounded. He asserts that Alvarez never proved Reyes slept and that the lower courts found Alvarez's counsel did not sleep. Both assertions are wrong.

The Director claims (Opp.10) that the state court's factual findings, "whether implicit or explicit," are presumed correct. But there are no relevant state-court factual findings. Pet.9. In the last reasoned state-court decision that is the subject of AEDPA review, the Court of Criminal Appeals *expressly declined* to adopt the trial court's findings regarding ineffective assistance of counsel, including the trial court's findings that "counsel [had] … vigorously cross-examined witnesses" and "made relevant objections throughout the trial," App.207a. The Director never disputes this critical point. Nor does he identify any findings adopted by the Court of Criminal Appeals supporting the contention that Reyes did not

sleep, or explain how the Court of Criminal Appeals could have "implicitly" predicated its ruling on facts it expressly declined to adopt. The Director's complaint that the Court of Criminal Appeals' characterization of the unadopted facts is "inscrutable" (Opp.5 n.7) is irrelevant. What matters is that there are no state-court fact findings, explicit or implicit, that are subject to deference under AEDPA.

The Director repeatedly invokes purported fact finding by the lower *federal* courts. *See, e.g.*, Opp.7, 13. But he cites no authority showing that factual "findings" of a federal court reviewing a section 2254 petition are entitled to deference—a proposition obviously inconsistent with the structure of federal habeas review. *See* 28 U.S.C. § 2254(d)(2) (describing federal review of "unreasonable determination of the facts" in "State court proceeding"). It is thus the Director's construction of the lower-court proceedings—not Alvarez's—that risks "usurp[ing] the fact-finding functions" of state courts under AEDPA (Opp.11) by awarding a co-equal role to the federal courts. Alvarez need not overcome any deference to lower-court fact finding here, and even if he did, the record supports the grant of habeas relief.

In any event, the evidence that Alvarez was deprived of counsel runs entirely one way: sworn, unrebutted affidavits from two jurors stating that Reyes repeatedly slept at trial, "most" often "while the prosecutors were questioning their witnesses," App.226a, 230a; and a trial transcript showing that the court enforced a rule barring Denninger from stepping in while Reyes slept. App. 272a. The Director identifies no contrary evidence.

Nor does the Director offer grounds for discrediting this record evidence—even were that permissible on AEDPA review. He never disputes the contents of the

affidavits, which corroborate one another. He also never contests that the trial court enforced a rule barring Denninger from objecting to or cross-examining Reyes's witnesses. App.272a; Pet.7-8. Instead, he argues—incorrectly—that the record evidence should be given less weight because the sleeping-lawyer claim was raised "late in the game." Opp.8. But Alvarez timely raised the claim in his initial state habeas application and included the affidavits now before the Court, which the State never disputed or rebutted. App.225a-257a; Pet.8.

The Director insists that Alvarez needed evidence from his lawyers admitting to sleeping to prove his claim. Opp.8. He cites no authority for this assertion, and in any event, one can understand why lawyers would be unenthusiastic about admitting to either sleeping or preventing co-counsel from sleeping in a trial that resulted in their client being sentenced to death.[1]

Alvarez has already explained (Pet.21) why Denninger's participation at other points in the trial does not demonstrate that Alvarez had the assistance of counsel while Reyes slept. The Director's only retort is to invite this Court to speculate, just as the Fifth Circuit did, that it is "'only supposition'" that Denninger "'sat like *a bump on a log*'" during Reyes's cross-examinations. Opp.16. Such speculation, refuted by the juror affidavits, cannot foreclose Alvarez's sleeping-lawyer claim. That is particularly the case since the State successfully opposed Alvarez's repeated requests for an evidentiary hearing to add to the evidence on precisely these factual points. *See*, *e.g.*, C.A. Dkt. 27 at 18 (2018 motion for certificate of appealability); ROA.3136-3137 (2017 Rule 59(e) motion);

[1] Reyes did concede that he likely slept at trial in his 2019 affidavit, but the Fifth Circuit declined to either entertain that affidavit or remand the case for the district court to consider it. App.23a-25a.

ROA.2282-2285 (2011 reply in support of federal habeas petition); ROA.1889-1894, 2083 (2011 federal habeas petition); ROA.5258-5260 (2008 reply in support of state habeas petition and motion renewing request for an evidentiary hearing); ROA.5190-5191 (2008 motion for evidentiary hearing).

II. THE FIFTH CIRCUIT DECIDED ALVAREZ'S *STRICKLAND* CLAIM IN A WAY THAT CONFLICTS WITH THIS COURT'S PRECEDENT

Even if Reyes's sleeping and the trial court's order barring his co-counsel from stepping in were somehow inadequate to warrant review under *Cronic*, the Fifth Circuit's rejection of Alvarez's claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984), independently does. The panel majority demanded that Alvarez identify a Supreme Court decision involving "a second, engaged attorney" to obtain AEDPA relief. App.13a. But relief under *Strickland* is available whenever a state court unreasonably applies that decision's "general standard," *Knowles* v. *Mirzayance*, 556 U.S. 111, 122 (2009), as multiple courts of appeals have confirmed, *Rogers* v. *Superintendent Greene SCI*, 80 F.4th 458 (3d Cir. 2023); *Dunn* v. *Neal*, 44 F.4th 696 (7th Cir. 2022). The majority then compounded its error by requiring Alvarez to reconstruct the cross-examinations his sleeping lawyer could not conduct—a burden *Strickland* does not impose. *See* 466 U.S. at 694.

The Director insists (Opp.17) that Alvarez "[i]dentifies [n]o [s]pecific [d]eficiencies in [c]ounsel's [p]erformance." But the deficiency could not be more specific: unrebutted evidence showing that Reyes slept while the State examined witnesses Reyes alone could cross-examine. Jurors attested that Reyes repeatedly fell asleep, sometimes for several minutes, and that he did

"most of his dozing while the prosecutors were questioning their witnesses," App.226a, such that he "was clearly asleep and was not hearing what the witnesses were saying," App.230a. No reasonable lawyer could regard that behavior as adequate representation.

The Director does no better on prejudice. He faults Alvarez for failing either to identify a particular "missed objection or question" (Opp.10), or to explain how Reyes should have handled particular witnesses differently (Opp.19). But *Strickland* asks whether counsel's deficient performance creates "a probability sufficient to undermine confidence in the outcome," 466 U.S. at 694, not whether, years later, a defendant can reconstruct the precise questions an alert lawyer would have asked after hearing testimony his sleeping lawyer missed. Indeed, the Director's approach turns the very consequence of Reyes's constitutional deficiency into a barrier to relief. As Judge Richman recognized, it is "virtually impossible to reconstruct what cross-examination by effective counsel would have elicited from witnesses at trial." App.34a.

Nor is the prejudice speculative. The juror affidavits describe, in detail, the effect that Reyes's sleeping had on their deliberation. They "couldn't believe that a lawyer like this in a capital case was falling asleep during the trial." App.230a-231a; *see also* App.226a-227a. The sleeping "fit with [their] overall impression that the defense did not really do much of a job of defending their client." App.231a; *see also* App.226a-227a.

Finally, labeling the evidence "overwhelming" (Opp.19-20) does not answer the constitutional deficiency here, particularly in a capital case where Reyes's sleeping extended into the punishment proceedings. Under *Strickland*, the question is whether counsel's

failures "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686. A death sentence imposed after lead counsel repeatedly slept through the State's presentation, including testimony he alone was responsible for challenging, readily meets that standard. His conduct conveyed to the jury that "[h]e did not seem to care for his client or what was happening during the trial." App 226a; *see also* App. 230a.

III. The Director Concedes The Importance Of The Question Presented

The Director does not dispute the importance of the Sixth Amendment's fundamental guarantee of effective assistance of counsel, *Cronic*, 466 U.S. at 653, or the immense stakes of a death-penalty conviction resulting from ineffective representation, Pet.22-23. And a plethora of retired judges and former prosecutors have underscored the clear violation of Alvarez's constitutional rights that occurred at trial. "[E]very person who has touched a criminal proceeding knows this outcome is indefensible: unconscious counsel is equivalent to no counsel at all." Former Judges and Prosecutors and Fair and Just Prosecution Br. 3.

CONCLUSION

The petition for a writ of certiorari should be granted for full merits consideration. If the Court does not grant merits review, the Court should grant the petition, vacate the opinion below, and remand for the evidentiary hearing petitioner repeatedly requested.

Respectfully submitted.

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