No. 07-212

In the Supreme Court of the United States

RANDALL WRIGHT, SHAWANO COUNTY SHERIFF,
SHAWANO COUNTY, WISCONSIN, PETITIONER

v.

JOSEPH L. VAN PATTEN, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The lawyer appointed to represent Joseph Van Patten failed to appear in person at the plea hearing where Van Patten surrendered his constitutional rights. While the lawyer did participate by speakerphone, the trial judge did not ask Van Patten's consent to proceed without his lawyer present and did not guarantee Van Patten's ability to confer with his lawyer privately during this critical hearing. The lawyer also was not in a position to observe his client's demeanor and assure himself that his client understood the proceedings and was entering an intelligent and voluntary plea.

This case presents the question whether, in light of this Court's decision in *Carey* v. *Musladin*, 127 S. Ct. 649 (2006), the Seventh Circuit properly held that Van Patten was entitled to relief under 28 U.S.C. § 2254 based on its conclusion that his Sixth Amendment claim was governed by *United States* v. *Cronic*, 466 U.S. 648 (1984)—rather than *Strickland* v. *Washington*, 466 U.S. 668 (1984)—and thus that the state courts had reached a decision contrary to this Court's cases by requiring him to prove prejudice.

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INTRODUCTION

Further review is not warranted in this case. The petition does not point to any disagreements among the Circuits, and it fails to identify any conflict between the decision below and decisions of this Court. More fundamentally, the hyperbolic question posed by Petitioner—whether federal courts will "abide by the limits Congress has imposed on the issuance of federal habeas corpus relief" (Pet. at 4)—is not presented here. This is a simple right-to-counsel case that called for the application of clear and long-established federal law.

While the original petition for certiorari in this case was pending last Term, this Court issued its decision in *Carey* v. *Musladin*, 127 S. Ct. 649 (2006), which concerned the scope of "clearly established Federal law" under Section 2254. 28 U.S.C. § 2254(d). The Court remanded the instant case for further consideration in light of the new decision, and the Seventh Circuit carefully undertook that analysis in a separate published opinion, concluding that *Musladin* did not require a different result. In *Musladin*, this Court held that relief under Section 2254 should have been denied where the legal question before the state courts was an "open question" in this Court's jurisprudence. But as the Seventh Circuit recognized, the instant case "does not concern an open constitutional question." Pet. at A2. The question presented in this petition—and before the Seventh Circuit on remand—is whether, through the lens of Section 2254, the particular failure of counsel in this case should have been analyzed under *Strickland* v. *Washington*, 466 U.S. 52 (1985), which requires a separate showing of prejudice, or under

United States v. *Cronic*, 466 U.S. 52 (1985), which does not. There is no doubt that *Strickland* and *Cronic* both represent clearly established principles of federal constitutional law, nor is there any doubt that this case must be analyzed under one or the other. According to the Seventh Circuit, the state courts chose the wrong set of U.S. Supreme Court cases to apply. That was enough to warrant relief under Section 2254, even under *Musladin*.

Although Petitioner may disagree with the Seventh Circuit's decision, his petition does not point to any basis for a grant of certiorari. The petition should be denied.

STATEMENT OF THE CASE

I. State Proceedings

A. Plea Hearing

The state proceedings began when Van Patten was charged with one count of first-degree intentional homicide following a fatal shooting in Shawano County, Wisconsin. Attorney James B. Connell was appointed to serve as Van Patten's counsel and began exploring the possibility of a plea.

As he awaited trial, Van Patten received word that he would be appearing at a plea hearing in court later that same day. Before he left the county jail, his appointed counsel conferred with him by telephone about a plea agreement reached with the prosecutor. Post-Conviction Hrg. Tr. 5. Under this agreement, Van Patten would enter a plea of "no contest" to a charge of first degree reckless homicide with a penalty enhancer for a dangerous weapon. Pl. Hrg. Tr. 3. The agreement did not include a sentencing

range. *Id.* at 10. By entering a plea of "no contest," Van Patten would effectively be admitting that he committed all the elements of the crime of first degree reckless homicide.

At the end of his conversation with Connell, Van Patten asked him "if he was going to be there [at the hearing], and he said no." Post-Conviction Hrg. Tr. 6. Van Patten later testified that he had some questions and concerns that he did not have an opportunity to raise with his counsel, including about the interplay between the plea agreement and a related charge then pending in another jurisdiction. *Id.* at 6-8. He also testified that he explained to Connell before the plea hearing that he "wanted to go to jury trial" and that he "didn't want [a] plea bargain to begin with." *Id.* at 9.

At the hearing itself, attorney Connell participated only by speakerphone. Pl. Hrg. Tr. 1. At no point during the hearing did he or the judge ask Van Patten whether he objected to his attorney's participation by speakerphone, nor did they ask whether Van Patten would prefer to move the hearing to a time when his attorney was available to appear in person. Instead, the judge warned Van Patten that any discussions he had with his attorney during the hearing would be "on the record," unless Van Patten made a special request, in which case the court could "perhaps" get Connell "on the line in a private place":

> THE COURT: All right, now, before your plea is entered and accepted by the Court, the Court will ask you certain questions to determine whether or not your pleas should be entered and accepted. If you have any

> trouble understanding any question, take all the time you need to confer with your attorney, and we can perhaps get him on the line in a private place so you could talk to him privately also. Do you understand that?
>
> THE DEFENDANT: Yes, Sir.
>
> THE COURT: Everything here is going to be on the record.
>
> THE DEFENDANT: Yes, your honor. [Pl. Hrg. 6]

At one point the judge noted that "Mr. Van Patten wanted to say something" and asked counsel on the telephone, "Do you object to him saying something?" *Id.* at 22. Counsel responded, "If it's about the visit," referring to the question whether Van Patten would be allowed an hour-long visit at the county jail with his seven-year-old daughter. *Id.* at 21-24. Van Patten's only extended comments on the record at the hearing related to whether he would be able to visit with his daughter.

Van Patten entered a plea of no contest and surrendered his constitutional right to defend himself at trial. He later explained that at the time of the plea, he "didn't know what to do." *Id.* Further, when asked whether he made a request to the Court to speak with his lawyer privately during the hearing, Van Patten explained that he had not done so "because Mr. Connell told [him] just say yes and just go along with everything." *Id.* at 13-14. Van Patten testified that he believes he would not have entered the plea if his attorney had been present that day. *Id.* at 13.

At a later hearing, Van Patten was sentenced to the maximum possible term of 25 years in prison.

B. Decision on Post Conviction Relief

After retaining different counsel, Van Patten filed a motion to withdraw his plea and for other relief, based in part on his contention that his Sixth Amendment right to counsel had been violated because of his counsel's failure to appear in person at the plea hearing. The State of Wisconsin opposed this motion, arguing in relevant part that Van Patten had failed to show ineffective assistance of counsel under *Strickland*. Post-Conviction Mot. Hrg. Tr. 47.

In an oral ruling, the court denied Van Patten's motion. *Id.* at 49-52, Pet. at A52-A55. The court included little analysis of Van Patten's argument concerning his advocate's failure to appear in person, commenting bizarrely that Van Patten may have been better off without him present. *Id.* at 50, Pet. at A54 ("if his argument is that he was forced by his attorney to [take the plea], an attorney on the phone is certainly less intimidating than one standing right next to him").

C. Wisconsin Appellate Court Proceedings

Van Patten appealed, arguing that he was denied the assistance of counsel by virtue of his counsel's participation by speakerphone at the plea hearing, in violation of both Wisconsin law and the Sixth Amendment. The court of appeals affirmed. *See* Pet. at A46-A51. The court acknowledged that Wisconsin Statute § 967.08—which authorizes certain proceedings to be conducted by phone—does *not* permit an attorney to appear by speakerphone at a plea hearing. Pet. at A48-A49. The court held, however, that this "procedural error" was not a

"manifest injustice" sufficient to permit Van Patten to withdraw his no contest plea. *Id.* at A50.

As for Van Patten's Sixth Amendment claim, the court of appeals applied the two-prong analysis in *Strickland* and indicated that in order to satisfy the "prejudice" prong, "the defendant must allege facts to show that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at A50 (citations omitted). The court concluded that counsel's participation in the hearing by telephone did not "interfere[] in any way with [Van Patten's] ability to communicate with his attorney about his plea." *Id.* at A49. The court referred to passages in the plea colloquy in which Van Patten agreed that he had thoroughly discussed the plea with his attorney and was satisfied with his representation. *Ibid.* The court also noted that Van Patten had not asked to speak privately with his attorney during the colloquy and had raised no objection to the plea during his allocution at sentencing, when his attorney was physically present. *Id.* at A50. Accordingly, the court concluded that Van Patten was not entitled to relief under *Strickland*. *Id.* at A51.

Van Patten also sought discretionary review in the Wisconsin Supreme Court, but his petition was denied.

II. Federal Court Habeas Corpus Proceedings

A. Magistrate Judge Recommendation

Van Patten then filed a *pro se* petition for relief under Section 2254, asserting a violation of his Sixth Amendment right to counsel in connection with his plea hearing. On January 17, 2003, a magistrate

judge issued an order denying the petition. Rec. 28. The magistrate judge concluded that counsel was "ineffective under *Cronic*," the decision by this Court that stands for the proposition that the denial of counsel at a critical stage in the proceedings is presumptively prejudicial. Magistrate Judge's Order (Rec. 28 at 3), Pet. at A38-39.[1] Nevertheless, the magistrate judge denied relief based on his conclusion that counsel's ineffectiveness under *Cronic* was harmless error, because counsel "did appear at the plea proceeding by telephone" and the court "conducted a significant colloquy with Van Patten to make sure that he understood the ramifications of his plea." Rec. 28. at 7, Pet. at A42. The magistrate judge also noted that Van Patten "had ample time and sufficient reasons to withdraw his plea" before sentencing, and "there is no indication that Attorney Connell would have done anything different if he had been present in person." *Id.*

Although the Clerk of Court initially entered final judgment based on that order, the magistrate judge later vacated the order and directed the Clerk to transfer the matter to a district judge, converting his prior order into a recommendation to the district court. The case was then assigned to Chief Judge Rudolph T. Randa.

B. District Court Proceedings

Van Patten then filed an answer to the order vacating the judgment, as well as a request for a

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[1] At the same time, the magistrate judge concluded that counsel "was effective under *Strickland*" because Van Patten had not shown that he was prejudiced by trial counsel's error. Magistrate Judge's Order (Rec. 28) at 3, Pet. at A38-39.

certificate of appealability. Rec. 39. Along with his answer, he also submitted several letters and requested the appointment of counsel.[2] One of these letters—sent during the period between the plea hearing and the sentencing—was addressed to an attorney whom Van Patten had first contacted months earlier. Pet. at A31. As the district court noted, Van Patten's letter sought the attorney's guidance and complained that he "could see [he] wasn't getting anywhere" with his current attorneys, who had "forced [him] into a plea * * *." *Ibid.*

The district court denied Van Patten's petition. Pet. at A25-A35. After considering both the recommendation by the magistrate judge and the various pleadings and additional documentary evidence submitted by Van Patten, the court concluded that Van Patten "ha[d] not demonstrated that he contacted counsel about withdrawing his plea or that he told the judge during sentencing that he wanted to withdraw his plea." Pet. at A33. The court further concluded that the state court's finding that Van Patten "only sought to withdraw [the plea] after he was sentenced" was a "credibility determination which has not been rebutted." *Id.*. Thus the district court concluded that Van Patten had not proven

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[2] Later, Van Patten also filed a "supplemental," which referred to a state disciplinary action against an attorney who had been appointed to represent him in the federal habeas proceedings. Rec. 44. The "supplemental" also argued that Van Patten or his new counsel should have the opportunity to admit certain evidence that his appointed habeas counsel had failed to submit, including the letters he had already submitted as "proof of contact" with other attorneys concerning his plea. *Ibid.*

ineffective assistance of counsel under *Strickland*. It also held that the state court "properly identified and applied *Strickland* as the proper legal standard governing Van Patten's ineffective assistance claim." *Id.* at 33-34.

At the same time, the district court concluded that Van Patten's counsel was "ineffective under *Cronic*." *Id.* at 34. Without any further analysis, however, the district court accepted the magistrate judge's conclusion that "trial counsel's appearance by telephone was a harmless error even though it was a violation of Van Patten's Sixth Amendment right of effective assistance of counsel." *Ibid.* On this basis, the court denied Van Patten's petition. Pet. at A34-35.

C. Seventh Circuit Decision

The Seventh Circuit reversed. The Court recognized that a defendant has a right to an attorney's "guiding hand" during a proceeding in which he enters a guilty or "no contest" plea because such a proceeding is a critical stage where defenses may be irretrievably lost if not asserted. Pet. at A17 (quoting *Hamilton* v. *Alabama*, 368 U.S. 52 (1961)). The court also held that the right of an accused to be represented by counsel at such a hearing is "pervasive for it affects his ability to assert any other rights he may have." *Id.* (quoting *Cronic*, 466 U.S. at 654).

Having established the importance of the Sixth Amendment right at the plea hearing, the court then considered whether the claim in this case is governed by *Strickland* or *Cronic*. Pet. at A17-A19. The court concluded that Van Patten's claim was based on a structural defect in the design of the proceeding

rather than any specific legal judgment or incorrect information his attorney provided. *Id.* The nature of communication over speakerphone deprived Van Patten of his attorney's guidance and support; he could not turn to his lawyer for private advice, and the lawyer was not in a position to detect and respond to non-verbal cues from his client regarding misunderstandings or a change of heart. *Id.* at A18. In short, the court concluded that the structural limitations and surrounding circumstances deprived Van Patten of the assistance of counsel at a critical stage in the proceedings—a claim that must be analyzed under *Cronic*. By applying *Strickland* and requiring prejudice, the state court had reached a decision contrary to clearly established federal law.

Having found a *Cronic* violation, the Seventh Circuit then concluded that the district court had erred in finding the error to be harmless. *Id.* at A23. The court held that harmless error analysis is inapplicable "where the denial of counsel contaminated the entire proceeding." *Id.* at A23 (citing cases). Thus the court reversed the district court's decision and remanded with instructions to grant the petition for a writ of habeas corpus. *Id.* at A24. The court further instructed that when the case returned to the state trial court, the proceedings could proceed "with a plea of not guilty in place." *Ibid.*

Petitioner's predecessor did not seek a stay of the mandate from the Seventh Circuit. Nevertheless (and despite Van Patten's right to a speedy trial), the state prosecutors have asked the trial judge to delay the trial pending final resolution of this matter. Jeffrey P. Endicott, warden of Redgranite Correctional Institution and the respondent-appellee

in the Seventh Circuit, has since transferred custody of Van Patten to Shawano County Sheriff Randall Wright. Today—more than a year and a half since the Seventh Circuit's mandate issued and the petition for habeas corpus was granted by the federal district court—Van Patten remains in custody and still has not been granted a trial on the claims against him.

D. United States Supreme Court Order

While Petitioner's original petition for certiorari was pending, this Court considered and decided *Musladin*, another case addressing a claim under Section 2254. Immediately after issuing that decision, the Court granted Petitioner's petition, vacated the Seventh Circuit's decision, and remanded the instant case (along with one other) for further consideration in light of its decision in *Musladin*.

In *Musladin*, this Court vacated a decision by the Ninth Circuit holding that a criminal defendant was entitled to relief under Section 2254. The petitioner in *Musladin* challenged his murder conviction on the ground that his trial was inherently unfair because spectators in the courtroom were wearing buttons bearing the victim's image. Because this Court's cases had never addressed the significance of *spectator* courtroom conduct (as opposed to state-sponsored conduct) on a defendant's right to a fair trial, this Court determined it was an "open question" in this Court's jurisprudence for purposes of Section 2254. 127 S. Ct. at 653 (stating "[i]n contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of the spectator conduct to which Musladin objects is an open question in our jurisprudence"). Thus, the Court concluded, the

Ninth Circuit erred in holding that Musladin was entitled to habeas relief under Section 2254, which allows relief only when the state courts reached a decision that is "contrary to," or an unreasonable application of, "clearly established" federal law. *Ibid.*

E. The Seventh Circuit's Decision on Remand

As provided by the Seventh Circuit's local rules, Petitioner and Van Patten each submitted statements of position on remand. Petitioner's statement of position again described the issue in terms of whether *Strickland*, rather than *Cronic*, properly governed the state court's analysis of the claim. According to Petitioner's submission, "[n]o holding of [the] [Supreme] Court required the [Wisconsin] Court of Appeal[s] to apply" *United States* v. *Cronic* rather than *Strickland* v. *Washington* to Van Patten's claim that by appearing telephonically rather than it person at the change-of-plea hearing, defense counsel provided ineffective assistance." State's Cir. R. 54 Statement at 4 (quoting *Musladin*, 127 S. Ct. at 654 (alteration in original)).

The Seventh Circuit issued a new, published decision (with one judge dissenting) in which it concluded that its original decision should be reinstated. According to the Seventh Circuit, "[n]othing in *Musladin* requires that our 2006 opinion be changed." Pet. at A2. The court explained that "[u]nlike *Musladin*, this case does not concern an open constitutional question. The Supreme Court has long recognized a defendant's right to relief if his defense counsel was actually or constructively absent at a critical stage of the proceedings." *Ibid.* The

Seventh Circuit further stated that "[n]either § 2254 nor *Musladin* limits relief to the precise factual situations addressed in the Supreme Court's previous cases. The technology employed in taking Van Patten's no contest plea (the use of a speakerphone) may have been novel, but the legal principle presented by the case was not." *Ibid.*

REASONS FOR DENYING THE PETITION

As discussed further below, the petition fails to satisfy any of this Court's usual criteria for granting review. Petitioner has not cited any conflicting decisions by any other federal court of appeals—either on the specific right-to-counsel question presented here or on the broader question of the standards to be applied in analyzing a state court's decision under Section 2254. There is also no conflict between the Seventh Circuit's decision and the relevant decisions of this Court. Petitioner incorrectly suggests that the reinstated Seventh Circuit decision ignores this Court's decision in *Musladin*. On the contrary, the Seventh Circuit explicitly noted that "[n]othing in *Musladin* requires that our 2006 opinion be changed." Pet. at A2. *Musladin* exemplified, but did not fundamentally alter, this Court's analysis of Section 2254 claims. And whereas the Court in *Musladin* held that habeas relief was unavailable because the case before the state courts had involved an open constitutional question, no such open question is implicated here. The right to counsel is among our most well-established rights, and this Court long ago prescribed the analysis that should apply to claims based on specific errors by counsel *(Strickland)* and to those based on the actual or constructive denial of counsel *(Cronic)*. Thus there can be no doubt that the law

applicable to this case was clearly established in this Court's jurisprudence.

To be sure, this Court has not had the opportunity to address specifically whether "speakerphone assistance of counsel fits within a *Cronic* exception." Pet. at 19. But nothing in Section 2254 limits this Court's decisions to their specific facts. Here, the Seventh Circuit properly concluded that the state court had reached a decision "contrary to" this Court's cases by analyzing the claim under *Strickland* rather than under *Cronic*. Nothing in the habeas statute precluded the Seventh Circuit from deciding that the facts of this case were materially indistinguishable from those in *Cronic* and its progeny.

Nor is the Seventh Circuit's decision inconsistent with this Court's cases involving plea hearings. This Court has never held that right-to-counsel cases involving plea hearings *must* be analyzed under *Strickland*. To the contrary, this Court has often recognized that a plea hearing or arraignment is a "critical stage" of the proceedings and that the actual or constructive denial of counsel at such a hearing would be presumptively prejudicial under *Cronic*.

Petitioner is also incorrect in claiming that the Seventh Circuit substituted its own factual determinations for those of the state courts. The Seventh Circuit's conclusions were in no way inconsistent with the Wisconsin court's factual findings. Further, the state findings Petitioner cites primarily concern whether Van Patten suffered actual prejudice, which is irrelevant under *Cronic*. Thus a decision by this Court on that fact-bound

issue would have no impact at all, even on the judgment in this case.

The notion that counsel should be physically present when his client is pleading guilty is not a new idea. A defendant who is forced to stand alone in the courtroom—without a lawyer at his side to answer questions, observe his demeanor, and assess personally whether the plea is knowing and voluntary—should not be denied relief on the ground that no lawyer has ever tried such a thing before. The Seventh Circuit's decision in this case fell well within the bounds of Section 2254, even as interpreted by *Musladin*. The petition should be denied.

I. The petition fails to identify any conflicts among the Circuits or with any relevant decision of this Court with regard to the scope of Section 2254.

Tellingly, Petitioner does not allege any conflict between the Seventh Circuit's decision and a decision by any of the other federal courts of appeals. Nor has Petitioner demonstrated any genuine conflict between the Seventh Circuit's decision and decisions of this Court. Thus this case fails to present the most basic criteria that this Court uses to determine whether to exercise its certiorari jurisdiction.

This case does not present a conflict with this Court's decision in *Musladin*. That decision exemplifies, but does not fundamentally change, the standard for assessing "clearly established Federal law" under Section 2254. The petitioner in *Musladin* claimed that his trial was unfair because spectators in the courtroom were wearing buttons bearing the

image of the victim. This Court held that he was not entitled to relief under Section 2254 because there was no "clearly established Federal law" addressing the constitutional significance of conduct by courtroom spectators. While this Court had previously addressed claims based on state-sponsored courtroom practices, the effect of conduct by *spectators* was "an open question" in the Court's jurisprudence. *Musladin*, 127 S. Ct. at 653. Moreover, this Court's framework for addressing state-sponsored courtroom conduct affirmatively suggested that it did *not* apply to spectator conduct, as it specifically included a component addressing whether the practices furthered an essential state interest. *See id.* at 654.

Unlike *Musladin*, this case does not concern an open constitutional question. This Court has long recognized a defendant's right to relief if his defense counsel was actually or constructively absent at a critical stage of the proceedings. *See Cronic*, 466 U.S. at 659-60; *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932) (holding that the defendant requires the "guiding hand" of counsel through every stage of the proceedings against him); *Hamilton* v. *Alabama*, 368 U.S. 52, 55 (1961) (recognizing that the "guiding hand of counsel" is necessary where criminal defendant is "arraigned without having counsel at his side"); *White* v. *Maryland*, 373 U.S. 59, 60 (1963) (holding the absence of counsel at a preliminary hearing required the defendant's conviction to be reversed and stating "[o]nly the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently"). The Supreme Court has set out a basic analysis to govern most claims of attorney error—the two-pronged

analysis in *Strickland*, 466 U.S. at 687, which requires both an error by counsel and proof that the error was prejudicial. But the Court has also held that the "[a]ctual or constructive denial of the assistance of counsel altogether" requires a different analysis and "is legally presumed to result in prejudice." *Id.* at 692 (citing *Cronic*, 466 U.S. at 659 & n.25, issued on the same day as *Strickland*).

The fact that this Court's cases have not applied those principles in this precise factual scenario does not create an open constitutional question. Petitioner argues that because this Court has never addressed the precise factual issue in this case—defense counsel's appearance at a plea hearing via speakerphone—the courts lacked a clear statement of the relevant law to apply. *See* Pet. at 17 ("Without a clear statement from this Court, the Seventh Circuit lacked authority under the AEDPA to grant habeas relief here, and the court should not have done so.") (citing *Musladin*, 127 S. Ct. at 654). But the result in *Musladin* did not turn on the fact that the Court had never addressed a case involving buttons that bore the image of the victim. Rather, this Court found a *categorical* limitation in its cases, holding that the constitutional significance of *spectator* conduct – as opposed to *state-sponsored* conduct – was an "open question" in the Court's jurisprudence. By contrast, the right to the presence of counsel at a plea hearing is simply not an open question.

As this Court has explained, "[c]learly established Federal law" under Section 2254(d)(1) "is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer* v. *Andrade,* 538 U.S. 63, 71-72 (2003). A legal principle that is both "clear" and

"established" may also cover various factual situations. That a case enunciating the relevant legal principle contains different facts from a subsequent case does not remove the clarity of the legal principle stated. *Ibid.* (despite its fact-intensive nature, the "gross disproportionality" principle and its applicability to sentences for terms of years was "clearly established"); *see also Williams* v. *Taylor*, 529 U.S. 362, 391 (2000) (the case-by-case examination required by *Strickland* "obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established'"); *id* at 382 (Stevens, J., concurring) (noting that legal principles are clear for purposes of habeas review "even when they are expressed in terms of a generalized standard rather than as a bright-line rule"); *Musladin*, 127 S. Ct. at 656 ("While general rules tend to accord courts 'more leeway' * * * in reaching outcomes in case-by-case determinations,' *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140, 158 L.Ed.2d 938 (2004) (plurality opinion), AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.") (Kennedy, J., concurring opinion) (citing *Wright* v. *West*, 505 U.S. 277 (1992) (Kennedy, J., concurring in judgment)).[3]

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[3] Justice Stevens, writing for three other justices, has highlighted the inappropriateness of an argument similar to what Petitioner now advances. Requiring decisions to match both legally and factually before there is a "clearly established" rule creates an absurd result. Under this logic even *Strickland* would not be clearly established for purposes of an ineffective assistance of counsel claim, "since that case, which established the 'controlling' rule of law on the issue, contained facts insufficient to show ineffectiveness." *Williams,* 529 U.S. at 377 n.9 (Stevens, J., concurring).

Thus a state court decision is "contrary to" Supreme Court precedent if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" *or* "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Williams*, 529 U.S. at 405-406. "[F]actual contexts of cases may be regarded as 'materially indistinguishable,' because their legal implications clearly are the same, notwithstanding that the facts themselves are significantly different." 2 RANDY HERTZ & JAMES S. LIEBNAM, FEDERAL HABEAS CORPUS PRAC. & PROC. 1594 n.24 (5th ed. 2005); *Ramdass* v. *Angelone*, 530 U.S. 156, 180 (2000) (O'Connor, J., concurring) (providing an example of factually disparate situations that could be understood as "materially indistinguishable").

Petitioner's position on this issue is undercut by its citations to *Kane* v. *Garcia Espitia,* 126 S. Ct. 407 (2005) and *Lockyer* v. *Andrade,* 538 U.S. 63 (2003). In *Kane*, this Court considered whether it was clearly established that a pro se defendant had a right to access a law library to prepare his defense. The Court specifically noted that "federal appellate courts have split on whether *Faretta* [v. *California,* 422 U.S. 806 (1975)], which establishes a Sixth Amendment right to self-representation, implies a right of the *pro se* defendant to have access to a law library." 126 S. Ct. at 408 (per curiam). As evidenced by the circuit split, there was no clearly established right to access to a law library at that time, and the Supreme Court refused to "imply" such a right in a habeas proceeding. *Id.* Here, by contrast, it is the factual scenario—not the right itself—that was "novel."

Unlike in *Kane*, there is no serious debate here about whether the Constitution guarantees the right to have counsel present and in a position to provide advice, support, and zealous advocacy as the defendant enters a plea and thereby surrenders his constitutional rights. The fact that this particular defendant was denied the assistance of counsel in a new and unique way does not mean that his rights were not "clearly established."

Petitioner's citation to *Lockyer* fares no better. This Court acknowledged in *Lockyer* that its Eighth Amendment jurisprudence was neither "clear" nor "consistent" regarding what factors should be considered in determining whether a sentence was "grossly disproportionate." 538 U.S. at 72. And the Court cited numerous opinions that directly pointed out its lack of clarity in this area—a lack of clarity that made the state court's resolution of the issue a reasonable choice based on the established law at the time of its decision. *Id.* at 72-73.[4] In contrast, there is no lack of clarity with the *Strickland* and *Cronic* decisions. This Court has held that the absence or constructive absence of counsel from a plea hearing is presumptively prejudicial, and the fact that it has not applied that standard to precisely these facts is not a bar to relief.

In sum, as the Seventh Circuit recognized, "[n]either §2254 nor *Musladin* limits relief to the precise factual situations addressed in the Supreme Court's previous cases. The technology employed in taking Van Patten's no contest plea (the use of a

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[4] As noted above, in spite of this lack of clarity, this Court did find its general disproportionality principle to be "clearly established [Federal] law." *Lockyer*, 538 U.S. at 73.

speakerphone) may have been novel, but the legal principle presented by the case was not." 489 F.3d at 828. This approach to Section 2254 is entirely consistent with this Court's cases and requires no further review.

II. The Seventh Circuit's decision does not conflict with decisions of this Court in respect to the standard to be applied to right-to-counsel cases in plea hearings.

Petitioner's suggestion that this Court has held that *Strickland* always applies to right-to-counsel claims in plea hearings is simply incorrect. Petitioner argues that *Hill* v. *Lockhart,* 474 U.S. 52 (1985) requires courts to apply *Strickland* to all ineffective assistance claims relating to guilty or no contest pleas. Pet. at 15 ("On the other hand, in *Hill*, this Court explicitly held that *Strickland* applies to claims of ineffective assistance occurring in a change of plea hearing.") (citation omitted). This is a misreading of *Hill* and of this Court's cases generally.

Whether *Strickland* applies rather than *Cronic* turns on the nature of the right-to-counsel claim, not the particular proceeding in which the claim arose. Moreover, "[f]or purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree [of the error] but of kind." *Bell* v. *Cone,* 535 U.S. 685, 697 (2002). This Court issued its decisions in *Strickland* and *Cronic* on the same day, creating two different regimes for Sixth Amendment cases. In cases where counsel committed a specific error in the representation, this Court requires the defendant to show that the error "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. As the Court has

explained, "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." 466 U.S. at 693; *see also id.* at 702 (Brennan, J., concurring) (*Strickland's* prejudice analysis applies to "claims of ineffective assistance based on allegations of specific errors by counsel—claims which, by their very nature, require courts to evaluate both the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding") (citations omitted).

In some cases, however—including where counsel is absent during a critical stage of the proceedings—prejudice to the defendant is presumed. *Id.* at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance.") (citing *Cronic*, 466 U.S. at 659 & n.25). In such cases, prejudice to the defendant "is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692 (citing *Cronic*, 466 U.S. at 658). This analysis applies not only when counsel was completely absent but also when "the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial." *Cronic*, 466 U.S. at 661.

The Court elaborated on this reasoning in *Cronic* by describing several instances in which prejudice need not be evaluated, including when counsel is "either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." 466 U.S. at 659 & n.25. Such cases suffer from "'constitutional error of the first magnitude and no

amount of showing of want of prejudice would cure it.'" *Id.* at 659 (quoting *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974)). Among the examples cited in *Cronic* itself was *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), in which the Court held that a conviction must be reversed when the defendant was denied counsel at an arraignment because—even though the defendant did not plead guilty—an arraignment or plea hearing is a proceeding where available defenses or other rights might be irretrievably lost. *Id.* (citing *Hamilton*, 368 U.S. at 55); *accord Iowa* v. *Tovar*, 541 U.S. 77, 81 (2004) ("[t]he entry of a guilty plea . . . ranks as a 'critical stage' at which the right to counsel adheres") (citing *White* v. *Maryland*, 373 U.S. 59, 60 (1963)); *Bell*, 535 U.S. at 695-96 (proceedings are "presumptively unfair" if the accused "is denied the presence of counsel at 'a critical stage,'" a phrase used "in *Hamilton* v. *Alabama* and *White* v. *Maryland* to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused") (citations omitted); *accord Childress* v. *Johnson*, 103 F.3d 1221, 1231-1232 (5th Cir. 1997) (applying *Cronic* and granting a writ of habeas corpus under Section 2254 when defense counsel functioned as the equivalent to standby counsel at a plea hearing).

Against this backdrop, the Court's decision in *Hill*—which Petitioner repeatedly invokes in its petition—obviously does not require application of *Strickland* in every right-to-counsel case that relates to a plea hearing.[5] Although *Hill* did involve a plea

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[5] Petitioner's suggestion that counsel's presence is not necessary at a plea hearing because it is "nonadversarial" in the same sense as a trial is bizarre and unfounded. Pet. at 18-19. A defendant's right to counsel is not limited to proceedings in

hearing, it did not concern either the absence of counsel or a structural defect in the proceedings that prevented counsel from providing adequate representation to his client. To the contrary, the defendant's claim was that the attorney—who was present the entire time—made specific mistakes, including in his advice regarding the timing of the defendant's parole eligibility. 474 U.S. at 60. It was these specific errors that the *Hill* Court subjected to the prejudice requirement in *Strickland*.

Indeed, *Hill* itself echoed the reasoning the Court gave for the prejudice requirement in *Strickland*. The Court's decision in *Hill* explains that the prejudice analysis is fraught with difficulty because errors by counsel "come in an infinite variety" and "cannot be classified according to likelihood of causing prejudice." 474 U.S. at 57-58. These "errors" are often strategic decisions. Whether any specific act or omission is strategic or inappropriate is difficult to determine. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 58. Accordingly, the "additional 'prejudice' requirement [from *Strickland*] was based on [a] conclusion that '[an] error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" *Id.* at 57. Thus *Hill* too

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which there will be cross-examination of witnesses. Indeed, it is simply incorrect to suggest that it is "not even clearly established that *Cronic* applies at all in the context of a guilty or no-contest plea" (Pet. at 19), given that *Cronic* itself cited *Hamilton*—a plea hearing case—as an example of precisely the circumstance in which the Court would not stop to assess prejudice. 466 U.S. at 659 n.25.

makes clear that the prejudice requirement is designed to address specific errors or mistakes by counsel.

Here, the Seventh Circuit concluded that Van Patten's claim did not present the sort of specific error or mistake that must be assessed under *Strickland*. Rather, the court held that the unique circumstances of Van Patten's plea hearing amounted to the denial of counsel altogether. As this Court held in *Cronic*, the prejudice requirement does not apply when counsel was absent or when the surrounding circumstances were such that no lawyer could have provided adequate representation. 466 U.S. at 656 n.16.

Van Patten stood alone in the courtroom before the judge and prosecutor. He could not turn to his lawyer for a private discussion or to share any last-minute misgivings or concerns about the plea. His lawyer was not in a position to observe his demeanor or to detect non-verbal clues about whether Van Patten was confused about something or was having second thoughts. No one had asked Van Patten's consent to proceed in this fashion, and no arrangements had been made in advance for him to be able to consult with his counsel privately during the hearing. The judge's suggestion that a private consultation could "perhaps" be provided did little to solve the problem here. Indeed, it put the burden on Van Patten to make a special request for such a consultation from the judge whom he anticipated would be imposing his sentence. For all these reasons, the circumstances of this hearing were such that the likelihood of "effective assistance" was "so small that a presumption of prejudice is appropriate." *Cronic*, 466 U.S. at 659-60.

As the Seventh Circuit noted, Van Patten's claim was focused on a structural problem with the representation, not on a specific legal judgment that could be evaluated under *Strickland*. The court noted, for example, that Van Patten had not complained "that his attorney botched his defense through bad legal judgments, or misinformed him of the ramifications of his plea." Pet. at A9. The specifics of counsel's performance were "beside the point if the attorney is prevented by the design of the proceeding from providing the full benefit of his skills when his client needs them most." *Id.* Thus this is a *Cronic* case, and Van Patten is entitled to relief without first having to establish that counsel's absence caused him specific prejudice. The state court's decision was contrary to Supreme Court precedent in that it chose to evaluate Van Patten's claim under *Strickland* instead. *See Williams*, 529 U.S. at 397-98 (state court decision may be "contrary to" Supreme Court precedent if the state court chooses the wrong legal rule to apply to the facts of a particular case before it).[6]

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[6] The question presented in the petition—like Petitioner's position on remand—focuses on whether the state court rendered a decision "contrary to" clearly established law by choosing *Strickland*, rather than *Cronic*, to analyze the claim in this case. To the extent that Petitioner is also arguing that counsel's appearance by speakerphone does not, in fact, constitute a complete or constructive denial of counsel under the particular analysis provided in *Cronic*, that issue would not implicate Section 2254 at all. As noted above, the state courts did not analyze the facts here under *Cronic*, and thus the federal courts were not obliged to defer to any state court legal determination regarding whether counsel's failure to appear in person was, or was not, an actual or constructive denial of counsel at a critical stage of the proceedings. Moreover, the conclusions by both the district court and the Seventh Circuit

III. The Seventh Circuit did not substitute its own factual conclusions for those of the state courts.

Petitioner's arguments about the Seventh Circuit's factual discussion also provide no basis for a grant of certiorari here. The particular factual conclusions made by the state courts—and the supposed relationship between these facts and the Seventh Circuit's more general discussion of the hazards of an attorney's attempting to represent a criminal defendant by speakerphone—are of no significance beyond the instant case and do not implicate any larger legal questions under Section 2254.

Moreover, the state court factual determinations to which Petitioner refers relate generally to whether Van Patten could demonstrate prejudice or could defend against a harmless error analysis. *See e.g.,* Pet. at 24-25 (discussing state court's credibility determination concerning whether Van Patten grew concerned about and attempted to withdraw his plea before or after sentencing). But as the Seventh Circuit held, neither prejudice analysis nor harmless error analysis is appropriate here in the first place, as a matter of law. Thus the Seventh Circuit's analysis in no way intruded on the state court's findings—and even if it had, that issue would have no impact on the judgment here.

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that counsel was "ineffective under *Cronic*" are fact-bound and (one hopes) are based on a situation that is unlikely to recur. Under the facts presented here, counsel's participation by speakerphone was not authorized by the relevant state statutes and—for all the reasons discussed by the Seventh Circuit—put the lawyer in a position where he could not possibly render effective representation to his client.

For example, Petitioner claims that the Wisconsin trial court held that Van Patten would have entered the same plea had counsel properly appeared. Pet. at 24-25. Rather than make a factual determination on whether Van Patten can prove actual prejudice, however, the Seventh Circuit correctly noted that where counsel is constructively absent from the proceedings, prejudice is presumed. Pet. at A19 (citing, *inter alia, White*, 373 U.S. at 60 (noting that "when [a] defendant enters a plea outside the presence of counsel, "we do not stop to determine whether prejudice resulted: 'only the presence of counsel could have enabled [the] accused to know all the defenses available to him and to plead intelligently'")). Thus when the court stated that it "cannot know what Van Patten might have done had he been treated like any other defendant with counsel at his side" (Pet. at A19), that was obviously a comment on why prejudice is not required—not a conclusion that the state court was wrong in finding the prejudice requirement unsatisfied on this record.

Next Petitioner takes issue with the Seventh Circuit's assertion that "[i]f Van Patten wished to converse with his attorney, anyone else in the courtroom could effectively eavesdrop." Pet. at 25 (citing Pet. at A18). But this observation—based on common sense and the plea hearing transcript itself—does not conflict with any factual finding by the state courts. Indeed, Petitioner does not identify any state court factual finding on this subject at all. Pet. at 25-26 (citing testimony rather than state court decisions). Furthermore, the Seventh Circuit's recounting of the events of the plea hearing does not contradict anything in the record. The Seventh Circuit did nothing more than recite the fact that Van

Patten's counsel was using a speakerphone and that Van Patten could only have a private conversation if he made a special request to the trial judge. Pet. at A18 (recounting the proceedings described in Pl. Hrg. 6); *see also supra* Part I.A.

Finally, although Petitioner repeatedly asserts the Seventh Circuit relied on "debatable inferences," it is unclear what these supposedly "debatable inferences" were. The Seventh Circuit simply discussed the practical implications of having counsel participate in a hearing by speakerphone. Pet. at A18, A21-22 (commenting that an attorney participating by speakerphone might not be paying attention, might not be in a able to share crucial information with his client, is not available for private consultation, and would not be in a position to observe the defendant's demeanor and clues about his level of understanding). And in any event, these fact-specific and case-specific questions provide no basis for further review in this Court.

CONCLUSION

This Court's intervention is not required here. The Seventh Circuit's decision does not present any unresolved issue of law, and Petitioner has not demonstrated any conflict of authority among the Circuits or with any decision of this Court. The petition should be denied.

Respectfully submitted.

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