No. 13-6646

IN THE
SUPREME COURT OF THE UNITED STATES

RODOLFO CIPRIANO GOMEZ,
Petitioner,
v.

WILLIAM STEPEHENS,
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

PROOF OF SERVICE

I hereby certify that on the 27th day of January 2014, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Rodolpho Cipriano Gomez, TDCJ No. 1343576, Wayne Scott Unit, 6999 Retrieve Rd. Angleton, TX 77515. All parties required to be served have been served. I am a member of the Bar of this Court.

*JESSICA MANOJLOVICH
Assistant Attorney General
Criminal Appeals Division

* Counsel of Record

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RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JOSEPH P. CORCORAN
Supervising Attorney for Non-Capital
Appeals, Criminal Appeals Division

*JESSICA MANOJLOVICH
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
Fax (512) 936-1280

*Counsel of Record

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

Respondent objects to the Petitioner's Questions Presented on the ground that they assume certain procedural, legal, and factual premises that are demonstrably unfounded, as established more fully in this brief. Respondent suggests instead the following Questions Presented:

1. Whether the Fifth Circuit was correct when it concluded that the Texas Court of Criminal Appeals (CCA) had not unreasonably applied clearly established Supreme Court precedent in relation to *United States v. Cronic*, 466 U.S. 648 (1984), where trial counsel was absent during a portion of a pre-trial suppression hearing, but where his co-defendants' attorneys "carried the ball on argument" during trial counsel's absence.

2. Assuming that the Antiterrorism and Effective Death Penalty Act (AEDPA) bars relitigation of Petitioner's *Cronic* claim under 28 U.S.C. § 2254(d), whether the Court should nevertheless grant certiorari to relitigate this claim "because it is ripe for this Court's determination," and because "there will be instances when this issue will again arise."

3. Whether the Court should grant the writ of certiorari to consider Petitioner's argument that his Sixth Amendment right to confront and cross-examine his "accusers" was violated by the absence of his attorney during the suppression hearing, where this claim is unexhausted and procedurally barred, and where this claim was neither properly presented nor decided below.

4. Whether the Court should grant the writ of certiorari to consider whether Petitioner knowingly, intelligently, and voluntarily waived trial counsel's presence during a part of the hearing, as required by *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938), where this claim was neither properly presented nor decided below, and where Petitioner fails to advance a free-standing constitutional claim.

5. Whether the Court should grant the writ of certiorari under the facts and circumstances of this case, to consider Petitioner's assertion that a conflict of interest arose and existed due to trial counsel's absence, which resulted in a distinct "lack of representation" during the hearing, where this claim was neither properly presented nor decided below.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, William Stephens, Director of the Texas Department of Criminal Justice, Correctional Institutions Division, (the Director), respectfully files this brief in opposition to Rodolfo Cipriano Gomez's petition for writ of certiorari.

JURISDICTION

The judgment of the court of appeals affirming the district court's denial of relief was entered April 25, 2013. The petition for a writ of certiorari was filed on July 19, 2013. This Court has jurisdiction under the provisions of 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236, 240 (1998).

STATEMENT OF THE CASE

I. Statement of Facts

A. Facts of the crime

The state appellate court summarized the facts as follows:

> [Gomez] was convicted of engaging with his brother, Arnaldo Gomez, and his sister, Sandra Gomez, in the crime of drug possession with the intent to deliver. The house from which the drugs were sold was at one point owned by Sandra, and she arranged for utility service at the house in her name. When Sandra signed up for utility service, she paid a $100 deposit and stated she was unemployed. After four controlled buys by a confidential informant ("CI"), the police obtained and executed a search warrant for the house, where they found twenty grams of heroin; more than twenty-five grams of cocaine; more than 150

> grams of marihuana; a rifle, .22 handgun, and .38 handgun, all loaded; ammunition for the three firearms; surveillance equipment; $5,656 in cash; a wallet containing two bills that the CI had used for his controlled buys and [Gomez]'s expired driver's license, social security card, and temporary driving permit; syringes; an electronic scale, balloons, and "corner baggies," which drug dealers use to package drugs; and utility bills for the house addressed to Sandra and letters mailed to Arnaldo and [Gomez] at the house. The scale and balloons were in the kitchen, and syringes and a bowl of marihuana were in the living room. [Gomez] and his siblings were all present at the house when the warrant was executed and were arrested, along with three other people who were present. When they were arrested, Arnaldo and Sandra had track marks on their arms; [Gomez] did not.
>
> [Gomez] was tried separately from his siblings, but all three were represented by separate attorneys at a joint hearing on a motion to suppress, where they raised the same arguments attacking the search warrant. The trial court denied the motion to suppress, and Arnaldo was the first to go trial. He was convicted, and this Court affirmed the conviction, overruling challenges to the sufficiency of the evidence, the warrant, and the admission of certain evidence. *See Gomez v. State,* No. 03-05-00730-CR, 2007 Tex.App. LEXIS 8853, 2007 WL 3306495 (Tex. App.-Austin Nov. 9, 2007, pet. ref'd) (not designated for publication).

See Gomez v. State, No. 03-05-842-CR, 2008 WL 4603574 (Tex. App.–Austin 2008, pet. ref'd).

B. Facts of the suppression hearing

Gomez and his two siblings attempted to suppress the evidence gathered through the search warrant. Thus, although the siblings were tried

separately, the trial court held a joint *Franks*[1] hearing to test the legitimacy of the warrant. Proceedings connected to the hearing spanned a total of three days, February 6th, 10th, and 13th of 2003. *See* Appx.[2] 1; Appx. 2.

On February 6th, a Thursday, the bulk of the hearing took place. Appx. 1. All three siblings' attorneys were present and three witnesses were called: Detective Juan Guerrero, Judge Brenda Chapman, and Deputy Enrique Sanchez. Detective Guerrero testified that he was lead investigator in the case and was assisted by Deputies Pastrano and Sanchez. *Id.* at 22-24. He testified about the events leading to pursuit of the warrant. *Id.* at 22-32, 44-77. Judge Chapman, who signed the warrant, testified that she did not have any specific recollection of the circumstances surrounding the issuance of the warrant. *Id.* at 33-34. Deputy Sanchez, like Guerrero, testified regarding events leading to the warrant. *Id.* at 77-90. Both sides then rested and stated they were not going to call any additional witnesses. *Id.* at 90-91. After hearing closing arguments and vocalizing his concerns, the judge continued the hearing to the following Monday to give the attorneys

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1 *See Franks v. Delaware,* 438 U.S. 154 (1978) (holding hearing is required when defendant makes a preliminary showing that a warrant relies on false statements made in underlying affidavit).

2 "Appx." refers to Respondent's Appendix and is followed by the applicable appendix number. Where appropriate it is also followed by the applicable page number.

time to brief the court on the issues. *Id.* at 101-06. At that time, the following exchange occurred between Gomez's attorney, Glen Peterson, and the trial judge:

> Peterson: I'm out of the city Saturday, Judge. Is it okay if I have my brief delivered to everybody and circulated? Next week is spring break and I'm on a ship Sunday morning.
>
> The Court: Looks like you will be busy tomorrow.
>
> Peterson: Yes, sir.
>
> The Court: If you're not here, I'm sure that –
>
> Peterson: I just wanted to make sure that is okay with the Court.
>
> The Court: It won't be your case we will be trying. I think these other counsel can adequately carry the ball on argument. If you want to give any written brief, then get that to counsel as quickly as you can. If you don't get that ready until Saturday, [m]ake sure Mr. Garcia or Mr. Friesenhahn has it so they can deliver it to counsel Monday at 8:30.
>
> Peterson: Very well.

Id. at 108-09.

Thus, the hearing continued on February 10th, the following Monday, with only Gomez's siblings' attorneys present.[3] Appx. 1 at 109-10. That day, Arnaldo's attorney called another witness, Deputy Pastrano, whose testimony

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3 Although he was physically absent on February 10th, counsel prepared a brief in advance and filed it on Gomez's behalf in support of the motion to suppress. *See* Appx. 4.

supplemented prior testimony about events leading to the warrant. *Id.* at 110-43. The attorneys closed, and the trial court announced that it was overruling the motion to suppress. *Id.* at 144-46.

Three days later (on February 13th), however, for reasons unexplained in the record and after jury selection in Arnaldo's case, the court allowed Arnaldo's attorney to examine another witness, the CI, for the limited purpose of determining who searched the CI prior to each controlled buy. Appx. 2 at5-20.4 Neither counsel for Gomez nor Sandra's attorney were present for this examination. *Id.* at 1. After the examination of the CI, the court reaffirmed its denial of the joint motion to suppress. *Id.* at 20. Nevertheless, Gomez's trial attorney[5] re-urged the motion to suppress by lodging over 20 objections at trial, which were all overruled. *See* Appx. 3 (not exhaustive).

II. Course of Proceedings and Disposition Below

A. State proceedings

The federal magistrate judge summarized the procedural history leading up to this federal habeas proceeding as follows:

> The [Director] has custody of petitioner pursuant to the November 18, 2005 judgment and sentence of the 22nd District Court of

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4 Because he was a confidential informant, the Director has redacted the name and age of the CI from the transcript contained in the Appendix.

5 Gomez had a different attorney by the time of his trial. *See* Appx. 5.

> Comal County, Texas. On that day, a jury convicted petitioner of the felony offense of engaging in organized criminal activity over a period of months in 2001. In a separate punishment hearing, after finding that petitioner had used firearms to facilitate this activity, the trial judge assessed a 60-year term of confinement. . . Petitioner appealed his conviction, but the Court of Appeals affirmed on October 6, 2008; the [CCA] refused petitioner's petition for discretionary review on March 11, 2009. Petitioner filed a state application for writ of habeas corpus on November 23, 2009, but the CCA denied it without a written order on February 10, 2010.

See Gomez v. Thaler, Civil Action No. SA-10-CA-344-OG (W.D. Tex. 2010), at ECF No. 19.

B. Federal proceedings

When Gomez filed the present § 2254 federal habeas petition, the magistrate recommended denying both the petition and a COA. *See Gomez v. Thaler*, at ECF No. 19. Gomez objected to the magistrate's report and recommendation, but the district court adopted it and denied both his § 2254 petition and COA. *Id.* at ECF No. 26. The Fifth Circuit Court of Appeals granted a COA to determine whether the district court and state courts erred in denying Gomez's *Cronic* claim. *Gomez v. Thaler*, 526 Fed.Appx. 355, 2013 WL 1760858 (5th Cir. 2013). The Fifth Circuit determined that this Court has never extended the rule of *Cronic* to the facts of Gomez's case, and as such, Gomez had failed to demonstrate unreasonable application of clearly established federal law. *Id.* This proceeding followed.

SUMMARY OF THE ARGUMENT

As the Fifth Circuit's opinion makes plain, this case illustrates the powerful limits that AEDPA and 28 U.S.C. § 2254(d) place on a habeas petitioner's ability to *re*-litigate constitutional claims in the federal courts. Simply put, no decision of this Court has ever addressed the issue of whether for purposes of the Sixth Amendment, the temporary and innocuous absence of trial counsel for a cumulative portion of a pre-trial hearing on a motion to suppress—during which Gomez was more than adequately represented by trial counsel for his co-defendants—should be analyzed under *Strickland v. Washington*, 466 U.S. 668 (1984) or *United States v. Cronic*, 466 U.S. 648 (1984).

Because no decision of this Court has ever extended the *Cronic* presumption-of-prejudice to circumstances remotely resembling this case, and because the manner in which the CCA rejected Gomez's constitutional claim was fully consistent with several lower court decisions—each constituting reasonable interpretations of this Court's *Cronic* precedent, it can never be said that the CCA unreasonably applied clearly established Supreme Court precedent.

REASONS FOR DENYING THE WRIT

I. AEDPA Deference Bars Relitigation of the *Cronic* Issue, and Alternatively, No *Cronic* Violation Occurred.

In his first Question Presented, Gomez argues that the Court should grant certiorari because the Fifth Circuit improperly held that the CCA did not unreasonably apply *Cronic*. *See* Cert. Pet. at 7-14. But, AEDPA deference bars relitigation of this issue. Alternatively, no *Cronic* violation occurred in Gomez's case.

A. AEDPA deference bars relitigation of the issue.

To have obtained federal habeas relief under AEDPA's strictures in the courts below, Gomez was required to have established that when the CCA rejected this constitutional claim, it unreasonably applied federal law as that law was *clearly* established in this Court's decisions. *See Metrish v. Lancaster*, 133 S. Ct. 1781, 1786 (2013) (citing 28 U.S.C. § 2254(d)(1)). This standard, the Court explained, is "difficult to meet": "To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on 'an error *well understood and comprehended in existing law* beyond any possibility for fairminded disagreement.'" *Id.* at 186–87 (emphasis added) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011)).

Thus, "a state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 131 S. Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)); *see also Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) (federal habeas relief is only merited where the state-court decision is both incorrect and objectively unreasonable, "whether or not [this Court] would reach the same conclusion"). Moreover, "evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Alvarado*, 541 U.S. at 664.

"It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 131 S. Ct. at 786.

> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther. Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal.

Id. (internal citations omitted).

Finally, if the Court has not "broken sufficient legal ground to establish [a] . . . constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar" under either the contrary to or unreasonable application standard. *(Terry) Williams v. Taylor*, 529 U.S. 362, 381 (2000). And a federal court must be wary of circumstances in which it must "extend a [legal] rationale" of this Court "before it can apply to the facts at hand" because such a process suggests the proposed rule is not clearly established. *Alvarado*, 541 U.S. at 666.

No decision of this Court has found a *Cronic* violation under circumstances similar to the instant case. Gomez cannot demonstrate that the CCA unreasonably applied federal law as that law was *clearly* established in this Court's decisions. *See Metrish*, 133 S. Ct. at 1786. As a result, this Court should deny certiorari.

B. Petitioner has failed to establish that no "fairminded jurist" could find the CCA's decision to be reasonable.

In *Cronic*, this Court recognized that a defendant can technically be denied counsel even though an attorney has been appointed to represent him if, *inter alia*, that denial occurred at a "critical stage" of his criminal proceedings. *Cronic*, 466 U.S. at 658–62. And in such a case, prejudice is

presumed. *Id.* And because a *Cronic* violation results in presumed prejudice, this Court has gone to considerable lengths to highlight the limits of *Cronic*'s applicability. The circumstances presented must be "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.*, at 659; *see Bell v. Cone*, 535 U.S. 685, 696-697 (2002) (for *Cronic*'s presumed prejudice standard to apply, counsel's "failure must be complete").

In *Florida v. Nixon*, this Court explained that the surrounding circumstances will rise to this level infrequently. 543 U.S. 175, 190 (2004).

> *Cronic* recognized a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense. *Cronic* instructed that a presumption of prejudice would be in order in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S., at 658, 104 S.Ct. 2039. The Court elaborated: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.*, at 659, 104 S.Ct. 2039; *see Bell v. Cone*, 535 U.S. 685, 696-697, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (for *Cronic*'s presumed prejudice standard to apply, counsel's "failure must be complete"). We illustrated just

> how infrequently the "surrounding circumstances [will] justify a presumption of ineffectiveness" in *Cronic* itself.

Nixon, 543 U.S. at 190.

The circumstances of this case establish that the CCA could reasonably have determined that Gomez fit within *none* of the narrow rationales described in *Nixon* to obtain the *Cronic* presumption. *See Nixon*, 543 U.S. at 190; *Cronic*, 466 U.S. at 658–62. First, the circumstances of this case establish that trial counsel's absence was voluntary and not caused by the trial court. *See* Appx. 1 at 108-09. This Court has noted that the vast majority of its prior decisions in which it presumed prejudice "involved criminal defendants who had actually or constructively been denied counsel by government action." *Bell*, 535 U.S. at 696, n.3. The fact that counsel's absence was not due to state action militates in favor of finding no *Cronic* violation occurred in this case, and in support of the CCA's decision to deny the claim.

Second, the nature of the testimony introduced at the relevant hearing was cumulative to testimony offered during the initial hearing when counsel was present. *See* Appx. 1; Appx. 2. As a result, it cannot be said that counsel failed to "subject the prosecution's case to meaningful adversarial testing" or that counsel's failure was complete. *Cronic*, 466 U.S. at 659; *see*

Bell, 535 U.S. at 696-697.

Third, any prejudice was cured by trial counsel's decision to file a post-hearing, written brief in support of the motion to suppress, and by trial counsel lodging objections during the trial, which the trial court actively entertained and overruled. *See* Appx. 3. Thus, Gomez's counsel took sufficient prophylactic measures and had ample opportunity to take additional such measures, and there is no reason to believe that counsel's absence from the supplemental testimony jeopardized Gomez's rights. *See Canizio v. New York*, 327 U.S. 82 (1946) (even though petitioner did not have counsel when he pled guilty, he had counsel in ample time to take advantage of every defense which would have been available to him originally).

Fourth, the motion to suppress was without merit. *See Gomez v. State*, 2008 WL 4603574. Because the motion was meritless, it is not possible that the circumstances presented were "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. This fact alone suggests that Gomez's case cannot rise to the level of abandonment envisioned by *Cronic*. *Id.*; *see also Nixon*, 543 U.S. at 190 (holding that the surrounding circumstances will infrequently rise to the level of complete failure of counsel).

Also, Gomez's interests were adequately represented by his co-defendants' attorneys under the circumstances of the case, because each of the co-defendants participated in the hearing, and each had an identical interest in suppressing the physical evidence in this case. Appx. 1 at 108-10. Hence, there was no concern about Gomez's co-defendants' attorneys having conflicting interests during the suppression hearing; Gomez was not "denied" counsel under the auspices of *Cronic* because his co-defendants' attorneys acted as "stand-in" counsel. *See e.g., Carroll v. Renico*, 475 F.3d 708, 712 (6th Cir. 2007) (no *Cronic* violation when counsel for the co-defendant "stood in" for defendant's counsel during jury re-instruction).

Finally, the Sixth Circuit's opinion in *Carroll v. Renico* powerfully demonstrates that "fairminded jurists" have already indicated their agreement with the CCA's resolution in this case. *See id.*; *see also e.g., Loredo v. Quarterman*, 2007 WL 2461854, at *15 (S. D. Tex. Aug. 23, 2007) (counsel's absence from pretrial hearing did not result in a failure to subject prosecution's case to adversarial testimony and thus did not constitute a denial of counsel); *Israel v. Riley*, 1992 WL 100157, at *8 (E.D. N.Y. April 21, 1992) (defendant not denied counsel due to his trial attorney's decision to not attend pretrial hearing). Indeed, these reasoned opinions provide powerful support for the CCA's determination under AEDPA, and bar the relitigation of

this claim in federal court.

In sum, Gomez has failed to establish that "no reasonable jurist" would agree with the CCA's resolution on this complex question. Indeed, even assuming the absence of § 2254(d), the circumstances of Gomez's case do not support extension of the *Cronic* rational. Therefore, even if AEDPA deference was inapplicable, his case is not appropriate for certiorari review.

II. The Court Should Decline Gomez's Request to Perform a Gratuitous and *De Novo* Analysis of His *Cronic* Claim Because Gomez Could Never Obtain the Benefit of a Favorable Decision, and Therefore Does Not Possess a Concrete Interest Which Could Ever be Redressed by That Decision, and Hence, Cannot Establish Article III Jurisdiction in the Court.

In his Second Question Presented, Gomez argues that certiorari should be granted to address an important issue of federal law (i.e., whether *Cronic* extends to the facts presented in his case), *even if* the CCA's decision was not an unreasonable application of existing federal law as determined by this Court. *See* Cert. Pet. at 14-17. He argues that this issue is ripe for consideration because there will be instances where this issue arises again. *Id.* at 17. In other words, Gomez presupposes that the Fifth Circuit correctly determined that no clearly established Supreme Court precedent existed to render the CCA's decision unreasonable, but asks the Court to fix this "problem" by deciding the question anyway, *de novo*, on behalf of both he and

other future petitioners, because it is important. To the extent that Gomez seeks relief in this appeal, such an approach would plainly violate § 2254(d)(1). Moreover, Gomez incorrectly presupposes that he possesses sufficient standing under Article III to pursue the constitutional claims of hypothetical litigants who are not themselves bound by 28 U.S.C. § 2254(d). His assumption fails.

If there is no clearly established federal law extending *Cronic* to the circumstances of his case and thereby rendering the CCA's decision both "unreasonable" and the proper subject of relitigation in federal court, habeas relief is not available to Gomez. *See* 28 U.S.C. § 2254(d)(1). And if Gomez can never obtain the benefit of a favorable decision in this appeal, he does not possess a concrete interest which could ever be redressed by a favorable decision of the Court. As a result, the Court would not possess Article III authority to resolve the claim on his behalf, and hence, the Court should deny certiorari. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992)).

III. The Issue of Whether Gomez's Sixth Amendment Right to Confront and Cross-examine His "Accusers" Was Violated is Not Properly Before the Court.

In his Third Question Presented, Gomez claims that his right to confront his "acusers" was violated by counsel's absence at a portion of the motion to

suppress hearing. Cert. Pet. at 17-18. But this claim has never been advanced to, or addressed by, any court. As a result, the Court should deny certiorari because the issue is unexhausted and procedurally defaulted; because it is not proper pursuant to Supreme Court Rule 10; and because Gomez has not meet the burden pursuant to *Slack v. McDaniel* to demonstrate entitlement to a certificate of appealability. 529 U.S. 473 (2000).

The exhaustion doctrine requires that the state courts be given the initial opportunity to address and, if necessary, correct alleged deprivations of federal constitutional rights. *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Anderson v. Harless*, 459 U.S. 4, 6 (1982). In order to satisfy the exhaustion requirement, a claim must be presented to the highest court of the state for review. *Richardson v. Procunier*, 762 F.2d 429, 431 (5th Cir. 1985); *Carter v. Estelle*, 677 F.2d 427, 443 (5th Cir. 1982). For purposes of exhaustion, the Texas Court of Criminal Appeals is the highest court in the state of Texas. *Richardson*, 762 F.2d at 431. To proceed before that court, a petitioner must either file a petition for discretionary review, Tex. R. App. P. 68.1, or an application for a post-conviction writ of habeas corpus. Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon 1977 and Vernon Supp. 1998). Gomez's claim that his confrontation rights were violated was never raised to the CCA. *See Gomez v. State*, 2008 WL 4603574. The first time it was mentioned by Gomez

was in his reply to the Director's answer in district court. *See Gomez v. Thaler*, at ECF No. 18. As a result, it is unexhausted and procedurally defaulted; and the Court should not grant certiorari.

Additionally, this Court will not ordinarily consider a claim that was neither raised nor decided below, and Gomez has not presented "exceptional" circumstances that would warrant ignoring this principle. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed'" (*quoting Duignan v. United States*, 274 U.S. 195, 200 (1927)); *see also Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 169 (2004). While Gomez's failure to properly raise the question presented below may not affect the Court's jurisdiction to consider the claim, such a failing does inform the Court's decision to grant certiorari. *See Canton v. Harris*, 489 U.S. 378, 384 (1989) ("[T]he 'decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition.'") (citations omitted). The Director does not waive this defect; rather, the Director cites the defect and urges this Court to deny review for this reason. *See id.* at 384 ("Nonjurisdictional defects of this sort should be brought to our attention no later than in respondent's brief in opposition to the petition for certiorari; if

not, we consider it within our discretion to deem the defect waived.") (citation and emphasis omitted).

Alternatively, even had Gomez pressed for a COA on the issue of a confrontation violation, this Court's certiorari jurisdiction generally extends to review the decision of the Fifth Circuit Court of Appeals to deny Gomez a COA on the issue. Sup. Ct. R. 10 (referencing decisions from courts of appeals); 28 U.S.C. § 1254(1) (providing that Supreme Court may review cases in the courts of appeals); *Hohn*, 524 U.S. at 253. But to demonstrate that the Fifth Circuit improperly denied a COA, Gomez must demonstrate to this Court that he was entitled to a COA pursuant to the burden established in *Slack*. 529 U.S. at 484-485.

According to *Slack*, on appeal, a petitioner must make a substantial showing that his petition stated a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable that the district court was correct in its procedural ruling. *See* 28 U.S.C. § 2253(c) (2); *Slack*, 529 U.S. at 484-485. *Miller-El* adds additional nuance to Section 2253(c), directing circuit judges to deny certificates of appealability unless jurists of reason could debate the application of AEDPA deference to those claims. *See Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003); *see also id.* at 348-350 (Scalia, J., concurring) (defending on textual grounds "the Court's willingness to

consider the [AEDPA] limits on habeas relief in deciding whether to issue a [COA]"). Gomez does not acknowledge or attempt to meet this burden in his petition for certiorari. Therefore, certiorari should be denied.

IV. The Issue of Whether Gomez Knowingly, Intelligently, and Voluntarily Waived Trial Counsel's Presence is Not Properly before the Court and it Does Not Advance a Free-standing Cause of Action.

In his Fourth Question, Gomez argues that this Court should grant certiorari review on the issue of whether he knowingly, intelligently, and voluntarily waived trial counsel's presence during a part of the suppression hearing, as required by *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938). Cert. Pet. at 18-22. But this issue is neither properly before the Court nor does it advance a free-standing constitutional claim.

The Fifth Circuit explicitly denied a COA on this issue. *Gomez v. Thaler*, 2013 WL 1760858 at Court Order Nov. 8, 2011. Again, this Court's certiorari jurisdiction generally extends to review the decision of the Fifth Circuit Court of Appeals to deny Gomez a COA on the issue. Sup. Ct. R. 10 (referencing decisions from courts of appeals); 28 U.S.C. § 1254(1) (providing that Supreme Court may review cases in the courts of appeals); *Hohn*, 524 U.S. at 253. But to demonstrate that the Fifth Circuit improperly denied a COA, Gomez must demonstrate to this Court that he was entitled to a COA

pursuant to the burden established in *Slack*, a burden he has failed to meet. 529 U.S. at 484-85.

Furthermore, this issue is a red-herring. Whether Gomez voluntarily waived the right to counsel at the hearing has no bearing on the outcome below because the purported failure to obtain a "knowing" waiver of counsel does not advance a free-standing constitutional claim upon which a federal court could grant relief. It is, rather, the unconstitutional *absence* of counsel that would constitute the violation—a question resolved in Section I. Certiorari should be denied.

V. The Issue of Whether a Conflict of Interest Arose and Existed Due to Trial Counsel's Absence is Not Properly Before the Court.

In the final Question Presented, Gomez claims that certiorari should be granted on the issue of whether a conflict of interest arose and existed due to counsel's absence, which resulted in a distinct "lack of representation" during the suppression hearing. Cert. Pet. at 22-23. But, like Question Presented Three, this claim has never been advanced to or addressed by any court. As a result, for the same reasons outlined in Section III, above, the Court should deny certiorari because the issue is unexhausted and procedurally defaulted, because it is not proper pursuant to Supreme Court Rule 10, and because Gomez has not meet the burden pursuant to *Slack* to demonstrate entitlement

to a certificate of appealability. 529 U.S. at 484-85.

CONCLUSION

On the basis of the foregoing arguments and authorities, the petition for a writ of certiorari should be denied.

Respectfully submitted,

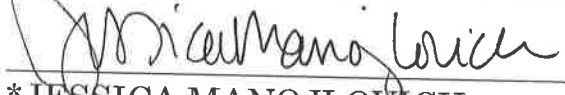
GREG ABBOTT
Attorney General of Texas

DANIEL HODGE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JOSEPH CORCORAN
Supervising Attorney for Non-capital Appeals, Criminal Appeals Division



*Counsel of Record

*JESSICA MANOJLOVICH
Assistant Attorney General
Criminal Appeals Division
Texas Bar No. 24055632

P. O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1600
Fax: (512) 936-1280

ATTORNEYS FOR RESPONDENT