

**RACIAL ANTAGONISM, SEXUAL BETRAYAL,  
GRAFT, AND MORE:  
RETHINKING AND REMEDYING THE UNIVERSE  
OF DEFENSE COUNSEL FAILINGS**

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## INTRODUCTION

Is a defendant entitled to a new trial when his counsel has repeatedly spouted ugly racial stereotypes and used racial epithets in referring to his clients? Or should a reviewing court require the defendant to show how he was “prejudiced” by that lawyer’s racial antagonism? In June of 2018, *Ellis v. Harrison* held that unless defense counsel had expressed his racist views to the defendant himself, no conflict will be presumed.<sup>1</sup> The defendant must show both deficient performance and prejudice to establish a Sixth Amendment violation. In January of 2019, the Ninth Circuit granted rehearing en banc.

At first, this may look like just another case where a liberal circuit grants en banc review of a conservative panel’s decision. But the *Ellis* panel was not conservative: all three judges were Democratic appointees. And accompanying the per curiam opinion was a remarkable concurrence—signed by all three judges—that began by virtually begging for an en banc review and reversal:

If we were writing on a blank slate, I would vote to grant relief. Of the constitutional rights given to a criminal defendant, none is more important than the Sixth Amendment right to counsel. By allowing *Ellis*’s conviction to stand, we make a mockery of that right.<sup>2</sup>

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1. 891 F.3d 1160, 1165–66 (9th Cir. 2018) (per curiam).

2. *Id.* at. 1166 (Nguyen, J., concurring).

Moreover, in the course of her concurrence, Judge Nguyen described and deplored the comments made by defense counsel, distinguished counsel's attitudes from run-of-the-mill racism, referred to the race of the panel members and advocates in the case, and observed that the increasing diversity in the legal profession had failed to eradicate racial bias. She ended by stating that circuit precedent tied her hands, requiring denial of relief.<sup>3</sup>

Will en banc review provide a simple answer? No. The oral argument makes clear that the Ninth Circuit, though sympathetic to the merits of the claim, is troubled by a host of procedural issues.<sup>4</sup> But even were those obstacles to be overcome, grant of certiorari following a liberal criminal procedure decision, particularly from the Ninth Circuit, would not be unexpected. And then, even if the Supreme Court were willing to view the case more generously than most criminal procedure claims because it involves race—which four recent cases<sup>5</sup> suggest it might—a swamp of lawyer misconduct beyond racial antagonism lies ahead. Any decision by the Ninth Circuit or the Supreme Court will likely implicate misconduct in forms other than racial antagonism.

What should happen if a lawyer sleeps during parts of the trial—or is sleeping with the prosecutor? If defense counsel was mentally ill or intoxicated during the trial, should a court measure her performance by the deferential standards that apply to most ineffective assistance of counsel claims? Or should that court, after ascertaining those facts, simply grant the defendant a new trial? What about defendants represented by lawyers who aim to profit by securing media rights to their client's case? Or defendants represented by lawyers seeking employment with the district attorney's office?

No one doubts that lawyers should refrain from the use of racial slurs, from sleeping during trial, from “sleeping with the enemy,” from

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3. *Id.* at 1166–67.

4. The procedural history of the case is something of a circus. Upon the grant of en banc review, the State changed its position, and conceded that the writ of habeas corpus should be granted. The Ninth Circuit then appointed Kent Scheidigger to argue that the original decision was correct. The San Bernadino District Attorney's Office then filed an amicus brief in support of Scheidigger's brief. Moreover, there are issues related to the failure to exhaust state court remedies. Oral Argument at 21:39, *Ellis v. Harrison*, 891 F.3d 1160 (9th Cir. 2018) (No. 16-56188), [https://www.ca9.uscourts.gov/media/view\\_video.php?pk\\_vid=0000015908](https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015908).

5. *Flowers v. Mississippi*, 588 U.S. \_\_\_ (2019) (trial court at defendant's sixth trial for capital murder clearly erred in concluding that State's peremptory strike of black prospective juror was not racially motivated); *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017) (holding that, when a juror clearly states that he relied on race to convict the defendant, the Sixth Amendment requires the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee); *Buck v. Davis*, 137 S. Ct. 759 (2017) (finding counsel ineffective for introducing otherwise favorable testimony that included statement that defendant was more likely to be violent because he was black); *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (finding prosecutor discriminated on the basis of race in striking two black jurors).

representing clients while mentally ill, from intoxication in the courtroom, or from securing illicit gains through the travails of their clients. Such prohibitions are generally imposed by rules of professional ethics, but those rules do not address the consequences for the criminal defendant whose lawyer ignored them. Cases raising these and similar questions are rife in the lower courts.

To date, the Supreme Court has not considered the appropriate remedies for any of these transgressions. Its precedents do, however, establish three categories of counsel failure, each with a different standard for judging whether the failure harmed the defendant enough to demand a new trial: the truant, the torn, and the terrible. Under claims governed by *United States v. Cronic*, a defendant who proves that his lawyer was “truant,” that is, absent or constructively absent, need show no more.<sup>6</sup> This is the most defendant-friendly, but least common, category. A slightly larger category, defendants with “torn” lawyers, must, pursuant to *Cuyler v. Sullivan*, show the existence of a conflict of interest, and show that the existing conflict “adversely affected” the lawyer’s performance.<sup>7</sup> But by far the largest category of counsel failure claims, those involving present, presumptively loyal, but just plain terrible lawyers, are governed by the harsh standard of *Strickland v. Washington*, which requires proof that trial counsel was incompetent, and proof of “prejudice”—a “reasonable likelihood” that competent representation would have resulted in a different verdict.<sup>8</sup>

Years after the verdict, the difficulty in assessing that likelihood combined with the judicial drive toward finality means that many lower courts refuse to find prejudice under *Strickland* even in the face of grave malfeasance by counsel. Consequently, determining into which category a particular form of counsel failure falls—and therefore whether any proof of prejudice is required—is often outcome-determinative. Nonetheless, the Supreme Court has provided only a few examples of these categories, eschewing both catalogues and theories. Not surprisingly, lower courts have responded in ways that seem arbitrary.

Calvin Burdine’s case provides a striking example of arbitrary determination of a *Cronic* claim of constructive absence. The Texas Court of Criminal Appeals<sup>9</sup> and a panel of the Fifth Circuit Court of Appeals<sup>10</sup> were excoriated for ruling that even when a capital defendant’s lawyer slept

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6. 466 U.S. 648 (1984).

7. 446 U.S. 335 (1980).

8. 466 U.S. 668 (1984).

9. *Ex parte Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995), *vacated sub nom.* *Burdine v. Johnson*, 231 F.3d 950 (2000).

10. *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000), *reh’g granted en banc*, 234 F.3d 1339 (5th Cir.).

through significant portions of his trial, a new trial was not automatic, but required the defendant to shoulder the burden of proving that he was prejudiced by those naps. Public response to this ruling was very critical; put in layperson's terms, it was astonishing to learn that, if charged with a crime, a person would be entitled to a lawyer, but not necessarily one who was awake. The Fifth Circuit Court of Appeals sitting en banc was therefore applauded for concluding that a sleeping lawyer was tantamount to no lawyer at all, and mandated reversal.<sup>11</sup> What did not reach the public or the press, however, was the Fifth Circuit's insistence that drunk lawyers and mentally ill lawyers were horses of a different color, and consequently, that the demonstration of a lawyer's intoxication or paranoia would not suffice for reversal.<sup>12</sup> A layperson might have thought the right to a lawyer implied a sane and sober lawyer, as well as one able to stay awake.

The Supreme Court's response to *Burdine* only deepens the apparent arbitrariness of the constructive absence category. The Court held the petition for certiorari in *Burdine* pending its determination of *Bell v. Cone*,<sup>13</sup> another case in which the lower court had determined that the *Cronic* constructive absence standard applied. The Supreme Court reversed the lower court in *Cone*, explaining that defense counsel's failure to oppose the prosecution *at specific points*—rather than throughout the sentencing proceeding—made the case one governed by *Strickland* (where prejudice must be proved), and not by *Cronic* (where prejudice would be presumed).<sup>14</sup> This would seem to imply that falling asleep only during *portions* of a trial should be governed by *Strickland* and not by *Cronic*—which would mean that the Fifth Circuit's decision in *Burdine* was wrong. Nonetheless, the Supreme Court denied certiorari in *Burdine*.

Another case from the Fifth Circuit, that of Betty Lou Beets,<sup>15</sup> makes clear that the application of the category of conflicted lawyers is as arbitrary as the application of the constructively absent lawyers category. Beets was charged with the murder of her husband for pecuniary gain, and part of the State's proof of motive was evidence that she sought to obtain insurance benefits for her husband's death.<sup>16</sup> Her lawyer, however, could have

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11. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001), *cert. denied sub nom. Cockrell v. Burdine*, 535 U.S. 1120 (2002); *see also, e.g.*, Editorial, *Slumber and Death in Texas*, WASH. POST, Aug. 15, 2001; *Rulings Show Texas' Justice System Flawed*, SAN ANTONIO EXPRESS-NEWS, Aug. 17, 2001; Bootie Cosgrove-Mather, *Let Sleeping Lawyers Plea*, CBSNEWS (Mar. 7, 2002, 2:08 PM), <https://www.cbsnews.com/news/let-sleeping-lawyers-plea/> [<https://perma.cc/Z9VF-4ZWS>].

12. *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001), *cert. denied sub nom. Cockrell v. Burdine*, 535 U.S. 1120 (2002).

13. 535 U.S. 685 (2002).

14. *Id.* at 697–98.

15. *Beets v. Scott*, 65 F.3d 1258 (5th Cir. 1995) (en banc), *cert. denied sub nom. Beets v. Johnson*, 517 U.S. 1157 (1996).

16. *Id.* at 1262.

testified that he himself had informed Beets of such benefits *after* her husband's disappearance, and her subsequent interest or inquiry into benefits was attributable to this post-crime information.<sup>17</sup> But a lawyer cannot be both an advocate and a witness, and Beets's lawyer did not withdraw. Why not? Probably because he had a formal contract with Beets that exchanged his legal services for the media rights to her story, rights that would vest when she was executed.<sup>18</sup> The district court found that this contract created a conflict and granted relief.<sup>19</sup>

Although the Fifth Circuit agreed that Beets would prevail were *Cuyler* applicable, and also castigated the lawyer's decision to enter into the contract as a breach of his ethical obligations, it reversed the grant of relief.<sup>20</sup> It reasoned that *Strickland* rather than *Cuyler* should be applied, because, unlike in multiple representation cases where the lawyer may be "immobilized by conflicting ethical duties among clients, a lawyer who represents only one client is obliged to advance the client's best interest despite his own interest or desires."<sup>21</sup> Thus, because a lawyer *should* place his client's interests above his own, the Fifth Circuit presumed that the lawyer in fact did so—despite the fact that this same lawyer *should not* have entered into a situation that placed his client's interests in opposition to his own, but nevertheless did so. *Beets* has become the leading case in the Fifth Circuit on the question of what constitutes a conflict sufficient to trigger the *Cuyler* standard,<sup>22</sup> that position was bolstered by the Supreme Court's passing reference to *Beets* in *Mickens v. Taylor*,<sup>23</sup> its own most recent case applying—but declining to define—*Cuyler*'s boundaries.

Despite the fact that the Supreme Court decided *Cronic* thirty-five years ago, and *Cuyler* almost forty, lower court opinions reflect widespread disagreement on the kinds of lawyer failure each encompasses.<sup>24</sup> *Mickens* has done nothing to alleviate the confusion about conflict cases, and *Cone* has set the rule for only a small subset of the *Cronic* cases.<sup>25</sup> This article

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17. *Id.* at 1263–64.

18. *Id.* at 1261–62.

19. *Id.* at 1261.

20. *Id.* at 1279.

21. *Id.* at 1271.

22. See Brent Coverdale, Comment, *Cuyler Versus Strickland: The Proper Standard for Self-Interested Conflicts of Interest*, 47 U. KAN. L. REV. 209 (1998); see also Alexandra N. DeNeve, Recent Development, *Beets v. Scott: The Fifth Circuit Adopts the Strickland Test to Deal with Ineffective Assistance Claims that Arise from Conflicts of Interest that Do Not Involve Multiple- or Serial-Client Representation*, 70 TUL. L. REV. 1689 (1996).

23. 535 U.S. 162, 174 (2002).

24. See Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515 (2009); Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronic's Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827 (2003).

25. Criticism of *Cone* and *Mickens* has been limited and narrow. See, e.g., Stuart E. Walker,

aims to rethink the categories of counsel failure; no article to date does so. Perhaps *Ellis v. Harrison* will provide the motivation to sort out the forms of counsel failure, and perhaps this article might provide help in doing so.

Part I will first summarize the Supreme Court's Sixth Amendment right to counsel jurisprudence, paying particular attention to the Court's descriptions of the purpose of the right and its comments regarding the three counsel failure categories. Part II then samples lower court attempts to place species of counsel failure into the three categories. Part III will consider what the rationale behind *Cronic* suggests about the criteria by which courts should separate out the constructively absent lawyer from the merely bad one, and then apply the resulting insight to racially antagonistic, sleeping, intoxicated and mentally ill lawyers. Part IV does the same thing for conflicted lawyers, proposing a touchstone for identifying *Cuyler* cases, and applying it to two other identifiable groups of conflicted loyalties: extreme psychological barriers to loyalty, such as animosity, and large personal opportunity costs, such as extraordinary countervailing financial or romantic incentives.

## I. THE LEGAL FRAMEWORK GOVERNING COUNSEL FAILURES

A quick tour of the development of the Sixth Amendment right to counsel is a necessary predicate to understanding the values the right protects, which I will argue has implications for where the lines should be drawn between *Cronic*, *Cuyler*, and *Strickland* claims.

### A. *The Right to Appointed Counsel*

The last clause of the Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”<sup>26</sup> In 1932, *Powell v. Alabama*<sup>27</sup> held that the Due Process Clause of the Fourteenth Amendment both incorporates that right against the states and requires the State to provide counsel for indigent defendants facing capital charges.<sup>28</sup>

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Casenote, “*What We Meant Was . . .*” *The Supreme Court Clarifies Two Ineffective Assistance Cases in Bell v. Cone*, 54 MERCER L. REV. 1271 (2003) (criticizing *Cone*); Hadassah Reimer, Case Note, *Legal Ethics—Stabbed in the Back, but No Adverse Effect*, *Mickens v. Taylor*, 122 S. Ct. 1237 (2002), 3 WYO. L. REV. 329 (2003) (criticizing *Mickens*).

26. U.S. CONST. amend. VI, cl. 3.

27. 287 U.S. 45 (1932).

28. *Id.* at 71.

Thirty years later *Gideon v. Wainwright*<sup>29</sup> recognized the applicability of this reasoning to non-capital felonies.<sup>30</sup> Citing language from *Powell*, it described the importance of a lawyer:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.<sup>31</sup>

### B. Counsel Failure

*Gideon* involved a total denial of counsel, and therefore said nothing about the quality of the assistance of counsel required by the Sixth Amendment. It did, however, establish that total denial of counsel requires reversal of a defendant's conviction, and, by its silence, implied that inquiry into the consequences of that denial is inappropriate.<sup>32</sup>

*Powell*, in contrast, did not involve a total denial of the right to counsel, but the Supreme Court treated the last-minute appointment of counsel in *Powell* as the equivalent of total denial, and did not consider how the defendants were prejudiced by the tardiness of the appointment.<sup>33</sup> *Powell* therefore suggested that the right to counsel was more than the right to have a member of the bar sit next to the defendant at trial, but gave little further guidance.

Shortly after *Powell*, the Supreme Court decided *Glasser v. United States*,<sup>34</sup> adding another clue as to what the right to counsel entailed. *Glasser* reversed a conviction where, over objection, an attorney was required to represent two codefendants whose interests were in conflict.<sup>35</sup> *Glasser* abjured inquiry into "the precise degree of prejudice sustained," because the

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29. 372 U.S. 335 (1963).

30. *Gideon* did not specifically describe the crimes to which the right to appointed counsel applies, but in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court held that no person may be imprisoned for a crime without being offered the assistance of counsel.

31. *Gideon*, 372 U.S. at 345 (quoting *Powell*, 287 U.S. at 68–69).

32. *Id.*

33. *Powell*, 287 U.S. at 71 (the duty to provide indigent capital defendants with counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case").

34. 315 U.S. 60 (1942).

35. *Id.* at 68–70.

Court deemed such inquiry both difficult and unnecessary, reasoning that “[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.”<sup>36</sup>

It took another forty years for the Supreme Court to return to the question of what standards should govern counsel failure. In the meantime, the Court considered a number of issues tied to prosecutorial or judicial interference with the right to counsel, such as the nature of Sixth Amendment rights in interrogation<sup>37</sup> and identification<sup>38</sup> proceedings, and the permissibility of denying counsel the right to examine his client under oath<sup>39</sup> or to argue facts in summation.<sup>40</sup> Then, in quick succession, the Court decided *Cuyler v. Sullivan*, *Cronic v. United States*, and *Strickland v. Washington*, and in those three cases laid out the categories of counsel failure and the standards for assessing each category. I begin with the most permissive—but, as it turns out, numerically tiny—category.

### 1. *Truant Lawyers*

The most defendant-friendly category of cases, like *Powell* and *Gideon*, requires automatic reversal without any additional showing; neither deficient performance nor prejudice is required. The Supreme Court’s comments concerning that category of cases, however, have been as brief as the category is (apparently) small. Such claims are commonly referred to as “*Cronic*” claims, despite the fact that *Cronic v. United States*<sup>41</sup> decided that the claim made in that case was not a *Cronic* claim, or at least not a successful *Cronic* claim.<sup>42</sup>

#### a. *Cronic v. United States*

*Cronic* was decided on the same day as *Strickland*, and was remanded for a determination of the merits under ordinary *Strickland* standards. The Tenth Circuit Court of Appeals had reversed *Cronic*’s conviction as a violation of the Sixth Amendment.<sup>43</sup> It had not, however, considered whether trial counsel had made specific errors or what effect any errors might have had on the outcome. Instead, it had reasoned that no showing of

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36. *Id.* at 75–76.

37. *See* *Massiah v. United States*, 377 U.S. 201 (1964).

38. *See* *United States v. Wade*, 388 U.S. 218 (1967).

39. *See* *Brooks v. Tennessee*, 406 U.S. 605 (1972).

40. *See* *Herring v. New York*, 422 U.S. 853 (1975).

41. 466 U.S. 648 (1984).

42. *Id.* at 666.

43. *United States v. Cronic*, 675 F.2d 1126, 1128 (10th Cir. 1982), *rev’d*, 446 U.S. 648 (1984).

deficient performance or prejudice was necessary “when circumstances hamper a given lawyer’s preparation of a defendant’s case.”<sup>44</sup> The lower court’s inference that counsel had been unable to discharge his duties was based upon the consideration of five circumstances: 1) the time afforded for investigation and preparation; 2) the inexperience of counsel; 3) the gravity of the charge; 4) the complexity of possible defenses; and 5) the inaccessibility of witnesses.<sup>45</sup>

The Supreme Court rejected both this approach and the circuit court’s conclusions, “begin[ning] by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.”<sup>46</sup> The Court next noted, “[B]ecause we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation.”<sup>47</sup> However, it acknowledged that some circumstances are “so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.”<sup>48</sup>

So far, so good, the author of the lower court opinion might have thought, but then came the list of what those cases are. Not surprisingly, the Supreme Court deemed “complete denial of counsel” the most obvious — explaining that “[t]he presumption that counsel’s assistance [at trial] is essential requires us to conclude that a trial is unfair if the [defendant] is denied counsel at a critical stage of his trial.”<sup>49</sup> Second, where counsel has “entirely fail[ed] 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.”<sup>50</sup> Third, citing *Powell v. Alabama*, the Court stated:

Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.<sup>51</sup>

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44. *Id.*

45. *Id.* at 1129.

46. *Cronic*, 466 U.S. at 658.

47. *Id.* (citation omitted).

48. *Id.*

49. *Id.* at 659.

50. *Id.*

51. *Id.* at 659–60.

The opinion then considers the five factors cited by the Court of Appeals, and concludes that whether viewed separately or in combination, they did not provide a basis for concluding that competent counsel would not have been able to provide a defendant with “the guiding hand that the Constitution guarantees.”<sup>52</sup> According to the Court, neither the period of time the Government spent investigating the case, nor the number of documents that its agents reviewed during that investigation determined whether a competent lawyer could prepare the case in twenty-five days. The Court also held that none of the other factors *Cronic* had relied upon—the lawyer’s youth, his lack of any jury trial experience, and his lack of expertise in criminal law—even viewed together, did not justify a presumption of ineffectiveness.<sup>53</sup> Finally, although the seriousness of the charge, the complexity of the case, and the accessibility of witnesses “are all matters that may affect what a reasonably competent attorney could be expected to have done under the circumstances, . . . none identifies circumstances that in themselves make it unlikely that respondent received the effective assistance of counsel.”<sup>54</sup>

Thus, after *Cronic* it seemed unlikely that a short preparation period (unless as short as that in *Powell*), counsel’s inexperience or lack of expertise, the nature of the case, or barriers to investigation could trigger automatic reversal. But *Cronic*, by virtue of its listing of “complete denial of counsel,” “failure to subject the prosecution’s case to adversarial testing,” and “circumstances of that magnitude” fostered hopes—and habeas petitions asserting—that there were other cases to which the automatic reversal rule should apply. Since *Cronic*, the Supreme Court has offered lower courts only one small source of guidance on what any of these phrases mean—*Bell v. Cone*.<sup>55</sup>

*b. Bell v. Cone*

*Cone*, like *Cronic*, turned out not to be a *Cronic* case after all. The Sixth Circuit had concluded that *Cronic* should have governed *Cone*’s claim that his counsel’s failure to present any mitigating evidence or make a closing argument at his capital sentencing proceeding constituted a violation of *Cone*’s right to counsel.<sup>56</sup> In reversing, the majority first affirmed that *Cronic* had “identified three situations . . . ‘so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified,’”<sup>57</sup>

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52. *Id.* at 663.

53. *Id.* at 665.

54. *Id.* at 666.

55. 535 U.S. 685 (2002).

56. *Id.* at 693.

57. *Id.* at 695 (quoting *Cronic*, 466 U.S. at 658–59).

but then disagreed with the lower court's determination that counsel's failure to "mount some case for life" fell within the second exception identified in *Cronic*:

When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, [466 U.S.] at 659 (emphasis added). Here, [Cone's] argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind.

The aspects of counsel's performance challenged by [Cone]—the failure to adduce mitigating evidence and the waiver of closing argument—are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components.<sup>58</sup>

Justice Stevens was the lone dissenter. Much of his dissent is a lengthy description of the sentencing phase, after which Stevens concludes:

On these facts, and as a result of [trial counsel's] overwhelming failure at the penalty phase, the Court of Appeals properly concluded that *Cronic* controls the Sixth Amendment claim in this case . . . . [Counsel's] decisions to present no mitigation case in the penalty phase, and to offer no closing argument in the face of the prosecution's request for death, are nothing short of incredible. Moreover, [counsel's] explanations for his decisions were not only uncorroborated, but were, in my judgment, patently unsatisfactory.<sup>59</sup>

To the majority's assertion that Cone's complaints could be framed as objections to what counsel failed to do "at specific points," Stevens responded that "when those complaints concern 'points' that encompass all of counsel's fundamental duties at a capital sentencing proceeding—performing a mitigation investigation, putting on available mitigation evidence, and making a plea for the defendant's life after the State has asked for death—counsel *has* failed 'entirely.'"<sup>60</sup>

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58. *Id.* at 696–98 (footnote omitted).

59. *Id.* at 715 (Stevens, J., dissenting) (footnotes omitted).

60. *Id.* at 716–17 (quoting *Cronic*, 466 U.S. at 659).

Another issue lurking in *Cone*, but not fully faced, was the question of whether the mental illness of counsel should be treated as a *Cronic* violation. Justice Stevens noted while the state court did not have information concerning counsel's mental illness, in fact he suffered a severe mental impairment and committed suicide six months after the postconviction hearing.<sup>61</sup> The onset of his mental illness was not certain, but Justice Stevens interpreted his extraordinary fear of what the prosecution would do as likely attributable to his paranoia, and Stevens commented that the timidity displayed by counsel was not consistent with the adversarial testing required by the Sixth Amendment.<sup>62</sup> The majority expressed doubt that counsel was in fact ill at the time of trial.<sup>63</sup> The Court further found that, because no evidence of mental illness had been presented to the state court, federal courts could not consider such evidence in reviewing the state court judgment.<sup>64</sup> It did not, however, express any view as to the significance of mental illness in *Cronic* claims in cases where evidence of that illness was properly before a court.<sup>65</sup>

## 2. *Torn Lawyers*

The conflict cases are intermediate, both with respect to the stringency of what they require a defendant to establish, and with respect to their numbers. *Cuyler v. Sullivan*,<sup>66</sup> decided in 1980, was the first Supreme Court case to address a conflict of interest for which the lawyer bore responsibility. But prior to *Cuyler*, the Court had twice faced the issue of the proper remedy for a defendant whose lawyer was forced—over his objection—to represent conflicting interests, and these cases laid much of the groundwork for *Cuyler*.

### a. *Holloway v. Arkansas*

*Glasser v. United States*,<sup>67</sup> as noted earlier, held that when a judge compelled joint representation of codefendants whose interests were in conflict, reversal was mandated because the right to counsel “is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.”<sup>68</sup> *Holloway v.*

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61. *Id.* at 715–16.

62. *Id.* at 716.

63. *Id.* at 697 n.4 (majority opinion).

64. *Id.*

65. *See id.*

66. 446 U.S. 335 (1980).

67. 315 U.S. 60 (1942).

68. *Id.* at 75–76.

*Arkansas*,<sup>69</sup> a second case of joint representation over objection, affirmed the propriety of automatic reversal in such cases, and offered further defense for that remedy. First it described the harm flowing from the representation of conflicting interests, drawing out the parallels to total denial of counsel:

That an attorney representing multiple defendants with conflicting interests is physically present at pretrial proceedings, during trial, and at sentencing does not warrant departure from [the automatic reversal rule of *Gideon*]. Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. . . . Generally speaking, a conflict may also prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another.<sup>70</sup>

*Holloway* then turned to the practical reason for an automatic reversal rule, the difficulty of assessing the damage flowing from joint representation of conflicting interests:

[A] rule requiring a defendant to show that a conflict of interests . . . prejudiced him in some specific fashion would not be susceptible of intelligent, evenhanded application. In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. . . . But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. . . . Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.<sup>71</sup>

*b. Cuyler v. Sullivan*

The Third Circuit extended *Holloway*'s reasoning to a case where counsel had not objected to joint representation, but the defendant asserted in postconviction proceedings that his lawyers had represented conflicting

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69. 435 U.S. 475 (1978).

70. *Id.* at 489–90.

71. *Id.* at 490–91 (citations omitted).

interests; it held that a criminal defendant is entitled to reversal whenever he makes “some showing of a possible conflict of interest or prejudice, however remote.”<sup>72</sup> The Supreme Court granted certiorari and vacated, explaining why the Third Circuit erred in applying *Hlloway*’s reasoning to *Cuyler*:

Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. . . . Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.<sup>73</sup>

Concomitantly, “unless the trial court fails to afford [the opportunity to show that potential conflicts imperil his right to a fair trial], a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel.”<sup>74</sup>

Instead, reversal in a conflict of interest case where no timely objection was raised requires that a defendant “establish that an actual conflict of interest adversely affected his lawyer’s performance.”<sup>75</sup> A defendant who makes such a showing, however—unlike a defendant complaining about the adequacy of unconflicted counsel’s performance—“need not demonstrate prejudice in order to obtain relief.”<sup>76</sup>

The *Cuyler* court gave no instruction into the meaning of “an actual conflict of interest adversely affect[ing] his lawyer’s performance.” Justice Marshall dissented in part, asserting that because “[a]n actual conflict of interests negates the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney,”<sup>77</sup> a showing of such a conflict should suffice for reversal. The majority did not explain exactly what the modifying phrase “adversely affect[ing] his lawyer’s performance” meant, but Justice Marshall objected that “[i]f the Court’s holding would require a defendant to demonstrate that his attorney’s trial performance differed from what it would have been if the defendant had been the

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72. United States *ex rel.* Sullivan v. Cuyler, 593 F.2d 512, 519 (1979) (quoting Walker v. United States, 422 F.2d 374, 375 (3d Cir. 1970) (per curiam)), vacated, 446 U.S. 335 (1980).

73. Cuyler v. Sullivan, 446 U.S. 335, 346–47 (1980) (footnotes omitted).

74. *Id.* at 348.

75. *Id.* at 350.

76. *Id.* at 349–50.

77. *Id.* at 356 (Marshall, J., concurring in part and dissenting in part).

attorney's only client . . . it is inconsistent with [the Court's] previous cases[,] . . . unduly harsh, [and] incurably speculative as well."<sup>78</sup>

Justice Brennan would have split the difference, requiring no showing of prejudice or effect in cases where the trial court had not advised the defendant of the risks of joint representation, but "[w]here it is clear that a defendant has voluntarily chosen to proceed with joint representation, it is fair, if he later alleges ineffective assistance [of counsel] growing out of a conflict, to require that he demonstrate 'that a conflict of interest actually affected the adequacy of his representation.'" <sup>79</sup>

For twenty years, the lower courts struggled—without Supreme Court elaboration—to apply the *Cuyler* standard.<sup>80</sup> *Wood v. Georgia*'s<sup>81</sup> cryptic remand "to determine whether the conflict of interest that this record strongly suggests actually existed<sup>82</sup> further complicated matters. Its wording suggested that perhaps the Court was adopting Justice Brennan's distinction, and would not, in cases where the trial court had made no inquiry, require a showing that the conflict "adversely affected his lawyer's performance."

*c. Mickens v. Taylor*

The Supreme Court granted certiorari in *Mickens v. Taylor*<sup>83</sup> to resolve "what a defendant must show in order to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest about which it knew or reasonably should have known."<sup>84</sup> *Mickens* buried Justice Brennan's distinction, deeming the "actual conflict" wording of *Wood* merely shorthand for "a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties."<sup>85</sup> Consequently, it held that regardless of whether a trial court should have conducted an inquiry into a possible conflict, unless counsel had protested joint representation, Sixth Amendment claims concerning conflicted

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78. *Id.* at 355.

79. *Id.* at 353 (Brennan, J., concurring in part).

80. See Coverdale, *supra* note 22, at 223–24 (analyzing how lower courts apply *Cuyler*); see also Mark W. Shiner, *Conflicts of Interest Challenges Post Mickens v. Taylor: Redefining the Defendant's Burden in Concurrent, Successive, and Personal Interest Conflicts*, 60 WASH. & LEE L. REV. 965, 977 & n.94 (2003) (noting the lack of clarity as to what would constitute a conflict of interest and citing Supreme Court cases discussing the different ways in which the standard has been applied by lower courts).

81. 450 U.S. 261 (1981).

82. *Id.* at 273.

83. 535 U.S. 162 (2002).

84. *Id.* at 164.

85. *Id.* at 171 (emphasis omitted).

counsel require a showing of an actual conflict of interest that adversely affected the lawyer's performance.<sup>86</sup>

*i. "Adversely affecting the lawyer's performance"*

More importantly for our purposes here, *Mickens* provided a hasty application, though not an *explanation*, of the meaning of "an actual conflict of interest that adversely affected his lawyer's performance." Byran Saunders had been appointed to represent a juvenile, Timothy Hall, on assault and weapons charges on March 20, 1992, and within ten days of their first meeting, Hall was murdered.<sup>87</sup> Four days after Hall's body was discovered, a juvenile court judge dismissed the charges against Hall, and then, three days later, the same judge appointed Saunders to represent Walter Mickens on charges that he had murdered Hall during the course of attempting to forcibly sodomize him.<sup>88</sup> Saunders became lead trial counsel in Mickens's capital case, and did not tell either his co-counsel or Mickens that he represented the victim at the time of the murder.<sup>89</sup>

Some might think moving from representation of one client to representing his murderer would be problematic, but Saunders did not.<sup>90</sup> Although in fact a lawyer's fiduciary relationship with a client survives the client's death,<sup>91</sup> Saunders testified in postconviction proceedings that his allegiance to Hall "[e]nded when . . . they told me he was dead."<sup>92</sup> For the majority, this was enough: Saunders's erroneous belief was a sufficient basis for concluding that Mickens could not establish the requisite adverse effect on counsel's performance.<sup>93</sup>

The brevity of the majority's treatment of the question of whether adverse effect had been demonstrated may be attributable to the fact that it was not the question on which certiorari was granted, and Justice Souter's dissent, like the majority opinion, focuses on whether reversal is automatic when a trial judge who is on notice of a potential conflict fails to avoid it. But Souter devoted a long footnote to "noting that the case for an adverse effect appears compelling in at least two respects."<sup>94</sup>

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86. *Id.* at 173–74.

87. *Id.* at 164.

88. *Id.* at 164–65.

89. *Id.*

90. *Id.* at 177 (Kennedy, J., concurring).

91. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

92. *Mickens*, 535 U.S. at 177 (Kennedy, J., concurring).

93. *Id.* at 173–74 (majority opinion).

94. *Id.* at 208 n.13 (Souter, J., dissenting).

In this footnote Souter first observed that Saunders admitted that he failed to even discuss with Mickens whether they should pursue a trial strategy of creating reasonable doubt about whether the sex was consensual, a crucial matter because, without forcible sex, the murder would not have been death-eligible. *Id.* Moreover, Saunders neglected leads suggesting that the victim had engaged in prostitution,

Justice Breyer, joined by Justice Ginsburg, dissented on a different, albeit related ground. For them, the question of how most conflict of interest cases should be resolved was beside the point because *Mickens* was an extraordinary case that should not be governed by more general precedents.<sup>95</sup> Three factors—that the case was capital, that the representational incompatibility was facially egregious, and that the State created the conflict by appointing Saunders—taken together, constituted a “breakdown in the criminal justice system” that calls its legitimacy into question.<sup>96</sup>

Justice Stevens echoed Souter’s objections, and also agreed with Breyer that the appearance of justice is of independent importance, and is fatally compromised in a capital case where the State “foist[s] a murder victim’s lawyer onto his accused.”<sup>97</sup> But Stevens’s opinion also explores territory not covered by either Souter or Breyer, arguing that the attorney-client relationship in a capital case depends on building trust, which is precluded when a lawyer decides to conceal from his client a fact as important as prior representation of the victim.<sup>98</sup> Because of the importance of the attorney-client relationship, Stevens would “presume that the lawyer for the victim of a brutal homicide is incapable of establishing the kind of relationship with the defendant that is essential to effective representation.”<sup>99</sup>

## ii. *Conflicts of Interest*

Until the Supreme Court’s decision, everyone seems to have assumed that Saunders’s prior representation of the victim constituted a “conflict of interest,” and that the germane questions were whether he had to show anything more than the existence of such a conflict, given the trial judge’s awareness of the conflict, and if not, whether Mickens had established that the conflict “adversely affected his lawyer’s performance.” Both of the lower court opinions make this assumption, and, from a professional responsibility standpoint, there was no doubt that Saunders had a continuing

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even though his body was found in an area where it was common. *Id.* Souter acknowledged that these omissions may have resulted from strategy or incompetence, rather than a conflicting duty of loyalty to the victim, but noted that strategic choice seemed unlikely, given that Saunders did not raise the possibility of such a defense with his client. *Id.* In contrast, Souter opined that there was little doubt as to the source of the second adverse impact Mickens had alleged: that Saunders knew that the victim’s mother had initiated charges of assault and battery against her son just before he died, yet did nothing to counter the mother’s assertion in the post-trial victim impact statement given to the trial judge that “all [she] lived for was that boy.” *Id.*

95. *Id.* at 209–11 (Breyer, J., dissenting).

96. *Id.* at 210–11.

97. *Id.* at 189 (Stevens, J., dissenting).

98. *Id.* at 180.

99. *Id.* at 188.

duty of loyalty to Hall, and should not have undertaken representation of Mickens, *at least* not without informing Mickens of the potential conflict and obtaining a waiver from him. Indeed, a group of experts in legal ethics filed an amicus curiae brief submitting that this conflict was in fact nonwaivable according to the ABA Model Rules of Professional Conduct.<sup>100</sup>

Most of the majority's opinion does not question the application of the conflict of interest cases—however they might properly be interpreted—to this kind of conflict. The last section of Justice Scalia's majority opinion, however, casts doubt on that categorization. "Lest today's holding be misconstrued," it notes that the only question presented was the effect of a trial court's failure to inquire into a potential conflict on the *Cuyler* rule, and that "[t]he case was presented and argued on the assumption that (absent some exception for failure to inquire) [*Cuyler v. Sullivan*] would be applicable—requiring a showing of defective performance, but *not* requiring in addition (as *Strickland* does . . .), a showing of probable effect upon the outcome of trial."<sup>101</sup> Justice Scalia conceded that such an assumption was "not unreasonable" given lower court decisions applying the *Cuyler* standard to a variety of attorney ethical conflicts, including conflicts rooted in obligations to former clients, pecuniary stake in the outcome of a case, a romantic relationship with the prosecutor, or fear of alienating the trial judge.<sup>102</sup> He admonished, however, that the language of *Cuyler* itself "does not clearly establish, or indeed even support, such expansive application,"<sup>103</sup> and that both *Cuyler* and *Holloway* emphasized the high likelihood of prejudice *arising from multiple concurrent representation*.<sup>104</sup>

There is no conclusion to this unexpected caveat, but only the assertion that the purpose of the *Cuyler/Holloway* "exceptions from the ordinary requirements of *Strickland* . . . is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel."<sup>105</sup> The opinion ends ambiguously: "Whether [*Cuyler v. Sullivan*] should be extended to [reach successive representation] cases remains, as far as the jurisprudence of this Court is concerned, an open question."<sup>106</sup>

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100. Brief for Legal Ethicists & Stein Center for Law and Ethics as Amici Curiae Supporting Petitioner at 16–17, *Mickens v. Taylor*, 535 U.S. 162 (2002) (No. 00-9285).

101. *Mickens*, 535 U.S. at 174.

102. *Id.* at 174–75.

103. *Id.* at 175.

104. *Id.*

105. *Id.* at 176.

106. *Id.*

### 3. *Terrible Lawyers*

Last are the largest group of counsel failures, those involving present, unconflicted, but just plain terrible lawyers. *Strickland v. Washington*<sup>107</sup> forced the Court “to consider the proper standards for judging a criminal defendant’s contention that the Constitution requires a conviction or death sentence to be set aside because counsel’s assistance at the trial or sentencing was ineffective.”<sup>108</sup> *Strickland* involved three murders, and a lawyer who “cut his efforts short . . . [and] experienced a sense of hopelessness about the case” when he learned that, contrary to his instructions, his client confessed to two of the murders.<sup>109</sup> *Strickland*’s lawyer decided not to investigate evidence concerning his client’s mental and emotional state, both because of his hopelessness and because of his judgment that it was advisable to rely upon the plea colloquy for evidence of *Strickland*’s mental state, background, and remorse.<sup>110</sup>

The Court began by noting that the constitutional command is not satisfied by the fact “[t]hat a person who happens to be a lawyer is present at trial alongside the accused.”<sup>111</sup> Rather, because the constitutional command “envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results,” it requires the accused’s attorney, “whether retained or appointed,” to “play[] the role necessary to ensure that the trial is fair.”<sup>112</sup> Consequently, the “benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>113</sup>

From this “benchmark,” the majority devised a two-prong test for ineffectiveness: first, the defendant must show that counsel’s performance was deficient; and second, he must show that the deficient performance prejudiced the defense.<sup>114</sup> The Court’s elaboration of these prongs—hotly objected to by Justice Marshall<sup>115</sup>—made them both very hard to satisfy.

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107. 466 U.S. 668 (1984).

108. *Id.* at 671.

109. *Id.* at 672.

110. *Id.* at 673.

111. *Id.* at 685.

112. *Id.*

113. *Id.* at 686.

114. *Id.* at 687.

115. *Id.* at 712 (Marshall, J., dissenting) (“Even if I were inclined to join the majority’s two central holdings, I could not abide the manner in which the majority elaborates upon its rulings. Particularly regrettable are the majority’s discussion of the ‘presumption’ of reasonableness to be accorded lawyers’ decisions and its attempt to prejudge the merits of claims previously rejected by lower courts using different legal standards.”).

The proper standard for attorney performance is that of “reasonably effective assistance.”<sup>116</sup> Judicial scrutiny of counsel’s performance must be “highly deferential,” and a court must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”<sup>117</sup> More particularly, the defendant must overcome a presumption that the challenged actions or omissions “might be considered sound trial strategy.”<sup>118</sup> Finally, “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable,” and even those made after incomplete investigation are reasonable “to the extent that reasonable professional judgments support the limitations on investigation.”<sup>119</sup>

After acknowledging that in certain contexts (such as actual or constructive denial of the assistance of counsel, state interference with counsel’s assistance, or actual conflicts of interests) its precedents presumed prejudice, the Court defended the imposition of a prejudice requirement in the ordinary ineffective assistance case on two grounds. First it explained that “[t]he government is not responsible for, and hence not able to prevent, attorney errors;” and second, it observed that attorney errors “come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.”<sup>120</sup>

The Court then chose a stringent prejudice requirement: A defendant must show that there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>121</sup> The *Strickland* majority also urged lower courts to consider dispensing with analysis of counsel’s performance when they could more expeditiously “dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice.”<sup>122</sup>

Perhaps not surprisingly, lower courts since *Strickland* have been eager to avoid assessing the adequacy of counsel’s performance and frequently dismiss ineffective assistance of counsel claims on the prejudice prong without first addressing counsel’s competence.<sup>123</sup> For courts resistant to ineffective assistance of counsel claims, the prejudice hurdle is

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116. *Id.* at 687 (majority opinion).

117. *Id.* at 689.

118. *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

119. *Id.* at 690–91.

120. *Id.* at 693.

121. *Id.* at 694.

122. *Id.* at 697.

123. See Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 19–21 (discussing lower courts’ use of the prejudice prong before assessing the performance prong and citing cases).

convenient.<sup>124</sup> Until *Williams v. Taylor*,<sup>125</sup> decided in 2000, no Supreme Court case found *Strickland* prejudice.<sup>126</sup> And to this day, no Supreme Court case has found *Strickland* prejudice in the context of a non-capital trial. Moreover, even in capital cases decided after *Williams*, lower courts were extraordinarily reluctant to find prejudice;<sup>127</sup> until 2008,<sup>128</sup> the Fourth Circuit Court of Appeals had *never* found counsel ineffective in a capital case, a perfect score made possible in part by its manipulation of the prejudice prong.<sup>129</sup>

Only Justice Marshall dissented from *Strickland*. He objected to the performance standard on the ground that “it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation” in its application.<sup>130</sup> He objected to the prejudice standard for two reasons, most fundamentally because he thought the Sixth Amendment was not solely directed at reducing the incidence of wrongful conviction, but also designed to ensure that convictions are obtained through fundamentally fair procedures.<sup>131</sup>

Whatever the merits of that perspective on the purpose of the Sixth Amendment right to counsel, time and precedent have left it behind. Still relevant today, however, is Marshall’s practical objection to the prejudice prong:

Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government’s

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124. See *id.* at 20–21; Richard L. Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1271 (1986) (“[T]he difficult burden of proving prejudice that the Court in *Strickland v. Washington* places on the defendant allows a court to sweep attorney incompetence under the rug of a conviction that was affirmed because a defendant could not prove prejudice. The attorney’s incompetence is quietly forgotten.”).

125. 529 U.S. 362 (2000).

126. See John H. Blume & Stacey D. Neumann, “*It’s Like Deja Vu All Over Again*”: *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 134 (2007).

127. See Kenneth Williams, *Does Strickland Prejudice Defendants on Death Row?*, 43 U. RICH. L. REV. 1459, 1472–79 (2009) (analyzing capital cases in four circuits from 2003 to 2008 and finding that only fourteen out of 158 ineffective assistance of counsel claims were successful).

128. *Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1579 (2009). It bears noting that Gray, a dentist, was that rare bird, a middle class capital defendant. Gray was sentenced to death for murdering his wife.

129. See John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit’s “Double-Edged Sword”: Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 MD. L. REV. 1480 (1999); see also Williams, *supra* note 127, at 1473 (showing that from 1998 to 2008, the Fourth Circuit did not find that counsel was ineffective in any of the seventy-seven capital cases it decided).

130. *Strickland v. Washington*, 466 U.S. 668, 707 (1984) (Marshall, J., dissenting).

131. *Id.* at 710–11.

evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.<sup>132</sup>

This objection to a prejudice inquiry lives today, though not in run-of-the-mill ineffective assistance of counsel cases governed by *Strickland*. While Marshall raised—and the majority implicitly rejected—the argument that prejudice cannot reliably be assessed in ordinary ineffective assistance cases governed by *Strickland*, no member of the Court has questioned the proposition that accurate measurement of prejudice is impossible in the other two categories of counsel failure.

## II. LOWER COURT APPLICATIONS OF *CRONIC* AND *CUYLER*

The lower courts have struggled to apply *Cronic* and *Cuyler*. The cases attempting to do so are striking in two respects. First, they suggest a disturbing variety of professional lapses, or perhaps, viewed through another lens, demonstrate that lawyers reflect the diverse frailties of human beings. And second, they demonstrate the indeterminacy of the Court's guidance concerning the three categories.

### A. *Lapses and Frailties of the Defense Bar*

I put aside three categories of failings that are clearly within the sole ambit of *Strickland*: sloth, ignorance, and stupidity. Lawyers that are lazy, uninformed, or dumb are doubtless “terrible,” but are not—at least not for that reason—“truant” or “torn.” I first summarize lower court reactions to variations of counsel failures that might be considered to stem from constructive absence, and then those that arguably reflect conflicted loyalty.

#### 1. *Truant?*

##### a. *Lack of Licensure*

A “lawyer” who fraudulently claims to have passed the bar may be assigned to a case, and when the fraud is discovered, prejudice is generally presumed.<sup>133</sup> More commonly, a disbarred lawyer is mistakenly assigned to

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132. *Id.* at 710.

133. *See, e.g.,* United States v. Bergman, 599 F.3d 1142, 1148 (10th Cir. 2010) (adopting “narrow” per se rule of ineffectiveness where an unknowing defendant is represented by someone who has not

a case, or a lawyer in good standing is assigned to a case, and then suspended from the practice of law, but continues to represent a criminal defendant. Courts are split on what should happen in such cases.<sup>134</sup> Courts tend to find less troubling—and are less likely to presume prejudice in—the cases where a defendant’s only lawyer, though not licensed to practice law in the state pressing criminal charges, *is* licensed in another state.<sup>135</sup> The Second Circuit has proposed the distinction between “substantive” and “technical” defects in bar licensure. In its view, technical defects, such as failure to pay bar dues, do not reflect the attorney’s substantive qualifications to practice law, and consequently do not result in a presumption of prejudice.<sup>136</sup> On the other hand, substantive defects, such as failure to meet the requirements of bar admission, do warrant that presumption.<sup>137</sup>

*b. Lack of Opportunity*

Courts have been generally unsympathetic to claims that counsel had insufficient time to adequately prepare, and relegate such cases to

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been admitted to any bar); *Bond v. United States*, 1 F.3d 631, 637 (7th Cir. 1993) (same); *Solina v. United States*, 709 F.2d 160, 169 (2d Cir. 1983) (vacating conviction where attorney had graduated from an accredited law school and had never been admitted to any bar); *Harrison v. United States*, 387 F.2d 203, 212–14 (D.C. Cir. 1967) (conviction reversed because government used defendant’s statements from earlier trial in which defendant was represented by ex-convict posing as a lawyer), *rev’d on other grounds*, 392 U.S. 219 (1968); *People v. Williams*, 530 N.Y.S.2d 472 (N.Y. Sup. Ct. 1988) (conviction reversed where defendant’s attorney was disbarred because he had never met the requirements to practice law).

134. *Compare* *Elfgeeh v. United States*, 681 F.3d 89, 93 (2d Cir. 2012) (per se ineffectiveness rule applies to representation by an individual who, before the representation in question, has been disbarred in all jurisdictions where he or she was once admitted), *People v. Chin Min Foo*, 545 N.Y.S.2d 55 (N.Y. Sup. Ct. 1989) (same), *In re Johnson*, 822 P.2d 1317 (Cal. 1992) (prejudice presumed where attorney suspended from practice), *and* *State v. Newcome*, 577 N.E.2d 125 (Ohio Ct. App. 1989) (same), *with* *United States v. Bosch*, 914 F.2d 1239 (9th Cir. 1990) (attorney suspended from practice during course of trial does not lead to a presumption of prejudice), *and* *Commonwealth v. Wilson*, 819 N.E.2d 919, 932 n.23 (Mass. 2004) (fact that counsel was previously disbarred did not create presumption of prejudice); *see also* *United States v. Hoffman*, 733 F.2d 596 (9th Cir. 1984) (attorney suspended from home state bar, but not suspended from federal bar during defendant’s trial, qualifies as “counsel” under the Sixth Amendment); *Washington v. Moore*, 421 F.3d 660 (8th Cir. 2005) (where law-student intern presented defendant’s case-in-chief and handled the direct and re-direct examinations of alibi witnesses, prejudice was not presumed under *Cronic* because counsel was present during the trial).

135. *Mallory v. State*, 954 N.E.2d 933, 936 (Ind. Ct. App. 2011); *State v. Chadwick*, 586 N.W.2d 391, 393–94 (Iowa Ct. App. 1998); *see also* *Pagan v. Comm’r of Correction*, 935 A.2d 175, 177 (Conn. App. Ct. 2007) (absence of local counsel to accompany pro hac vice counsel is not necessarily a denial of counsel).

136. *United States v. Novak*, 903 F.2d 883, 888 (2d Cir. 1990).

137. *Id.* at 890; *see also* *Bear v. United States*, 777 F.3d 1008, 1011 (8th Cir. 2015) (no per se ineffectiveness when counsel was trained and qualified but had licensing problems); *Reese v. Peters*, 926 F.2d 668, 669 (7th Cir. 1991) (no per se ineffectiveness when trial counsel was suspended for failure to pay dues).

*Strickland*.<sup>138</sup> However, truly extreme circumstances occasionally are sufficient to invoke the specter of *Powell v. Alabama*, and result in a presumption of prejudice.<sup>139</sup>

*c. Inaction and Absence*

Prior to *Bell v. Cone*, some lower courts had found inaction during significant portions of the trial sufficient to presume prejudice.<sup>140</sup> But *Cone* settled the question of whether inaction during some portion of the trial creates a winning *Cronic* claim: it does not.<sup>141</sup> *Cone* does, however, suggest that cases finding that prejudice is presumed when a lawyer does nothing at all or explicitly refuses to do anything may still be good law.<sup>142</sup>

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138. *Lenz v. Washington*, 444 F.3d 295 (4th Cir. 2006), *cert. denied sub nom. Lenz v. Kelly*, 127 S. Ct. 103; *United States v. Oliver*, 118 F.3d 562, 565–66 (7th Cir. 1997) (rejecting defendant's contention that the court's scheduling of trial and admission of certain evidence prevented counsel from "mounting a meaningful defense to the government's case"); *Camargo v. State*, 55 S.W.3d 255, 263 (2001); *Rinehart v. State*, 883 So. 2d 573, 576–77 (Miss. 2004); *State v. Morgan*, 604 S.E.2d 886, 894–95 (N.C. 2004), *cert. denied*, 546 U.S. 830 (2005); *State v. Ahmed*, 813 N.E.2d 637, 664 (Ohio 2004), *cert. denied*, 544 U.S. 952 (2005).

139. *See, e.g., Hunt v. Mitchell*, 261 F.3d 575 (6th Cir. 2001) (presuming prejudice where counsel was appointed on the day trial began). *But see Avery v. Proconier*, 750 F.2d 444 (5th Cir. 1985) (appointment *morning of trial* does not create presumption of prejudice).

140. *See Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984) (presuming prejudice where counsel did not participate in jury selection, cross-examine any witnesses, make any objections, call any witnesses for the defense, make any closing argument, or object to any part of the court's charge to the jury); *Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001) (presumed prejudice in a capital case where counsel did not investigate and failed to make an argument at a pre-trial competency hearing); *Childress v. Johnson*, 103 F.3d 1221 (5th Cir. 1997) (presumed prejudice where counsel never investigated the facts, never discussed the applicable law with [the defendant], and never advised him of the rights he would surrender by pleading guilty); *Tucker v. Day*, 969 F.2d 155 (5th Cir. 1992) (presumed prejudice where counsel did not confer with defendant and made no attempt to represent his client's interests during a resentencing hearing).

141. *See Castillo v. Florida*, 722 F.3d 1281, 1289–91 (11th Cir. 2013) ("Allowing an attorney's failure to object to a constitutional or otherwise important error to warrant a presumption of prejudice would run counter to a wall of binding precedent from *Strickland* forward; it would obliterate the complete-denial and total-failure elements of *Cronic*'s first two exceptions; and it would significantly stretch *Cronic*'s deliberately narrow exceptions to swallow *Strickland*'s general rule. . . . We look to the facts of the *Harding* case to frame the holding of that decision. The holding, and the only holding, is that under those total-failure-throughout facts prejudice is presumed.")

142. *See, e.g., Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984) (presuming prejudice under *Cronic* where lawyer explicitly refused to participate in the trial); *United States v. Collins*, 430 F.3d 1260, 1266 (10th Cir. 2005) (defendant was constructively denied counsel at a critical stage in the proceedings when counsel sought to withdraw from representation but the court went ahead with Collins's competency hearing and found him competent before addressing the motion to withdraw, and although physically present, counsel did not participate in the competency hearing in any meaningful way, remaining silent throughout, failing to provide the court with relevant mitigating information, and utterly failing to test the prosecution's case, which led the Tenth Circuit to conclude that the attorney's conduct was "akin to the conduct of counsel who sleeps through portions of trial"); *Harding v. Davis*, 878 F.2d 1341 (11th Cir. 1989) (presuming prejudice under *Cronic* where counsel made no opening or closing statements, presented no witnesses, and cross-examined no witnesses).

Lower courts have attempted various distinctions when faced with attorneys who are not present for some portion of the proceedings, generally holding that absence during a critical stage of the prosecution does trigger the presumption of prejudice.<sup>143</sup> But these courts sometimes issue a caveat that temporary absences from court proceedings do not necessarily constitute a constructive denial of counsel.<sup>144</sup>

*d. Impairments: Sleeping, Drug Addiction, and Mental Illness*

This article's introduction included *Burdine*, in which a lawyer slept through significant portions of the trial. The Ninth and Second Circuits also have considered when sleeping by trial counsel becomes the effective denial of counsel because it "so likely . . . prejudice[s] the accused"<sup>145</sup> that *Cronic* applies and prejudice is presumed. Both have held that the denial of counsel with presumed prejudice only occurs once counsel sleeps through a "substantial portion of [defendant's] trial."<sup>146</sup> The Sixth Circuit, while not disavowing this approach, determined that sleeping during a single cross-examination did not constitute a *Cronic* denial of counsel, but must be analyzed under *Strickland*.<sup>147</sup> No court of which I am aware has attempted to reconcile this approach with the Supreme Court's rationale in *Bell v. Cone*, which emphasizes that failure to advocate during a portion of the trial cannot establish a *Cronic* claim.

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143. See, e.g., *French v. Jones*, 332 F.3d 430 (6th Cir. 2003) (finding denial of counsel at a critical stage in the proceedings under *Cronic* where counsel was not present when the trial court gave a supplemental jury instruction to a deadlocked jury), *cert. denied*, 540 U.S. 1018; *Hunter v. Moore*, 304 F.3d 1066 (11th Cir. 2002) (defendant was denied effective assistance of counsel at a critical stage in the proceedings under *Cronic* where, following the close of evidence in a non-jury trial, the court immediately entered a guilty verdict without providing opportunity for the defense to make a closing argument or to make an objection); *Robinson v. Norris*, 60 F.3d 457 (8th Cir. 1995); *Golden v. Newsome*, 755 F.2d 1478 (11th Cir. 1985); *State v. Hendershot*, 153 P.3d 619, 171 (Mont. 2007) ("McLavery did not attend either of the two substantive procedural hearings—Hendershot's revocation hearing and the hearing on the adequacy of his representation."); *McKnight v. State*, 465 S.E.2d 352, 354 n.2 (S.C. 1995) (counsel absent during testimony of the victim); *Delgado v. Lewis*, 223 F.3d 976 (9th Cir. 2000) (prejudice presumed where counsel was absent from every proceeding except change of plea).

144. See, e.g., *Vines v. United States*, 28 F.3d 1123 (11th Cir. 1994) (counsel's temporary absence from trial during the presentation of testimony and evidence not directly related to the defendant did not constitute a complete denial of counsel nor denial of counsel during a critical stage of the proceedings, and hence, *Cronic* was inapplicable); see also *McKnight*, 465 S.E.2d at 354 n.2 ("Some absences might be so de minimis they would have no constitutional significance.")

145. *United States v. Cronic*, 466 U.S. 648, 658 (1984).

146. *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984); *Tippins v. Walker*, 77 F.3d 682, 685 (2d Cir. 1996) (holding the defendant's right to counsel was violated where defense counsel was asleep for "numerous extended periods of time").

147. *Muniz v. Smith*, 647 F.3d 619 (6th Cir. 2011).

As the *Burdine* majority took pains to make clear, other impairments get much less favorable treatment than somnolence:

The State maintains that it is impossible to distinguish between sleeping counsel and other impairments that nevertheless have been subjected to prejudice analysis. We disagree. An unconscious attorney does not, indeed cannot, perform at all. This fact distinguishes the sleeping lawyer from the drunk or drugged one. Even the intoxicated attorney exercises judgment, though perhaps impaired, on behalf of his client at all times during a trial. Yet, the attorney that is unconscious during critical stages of a trial is simply not capable of exercising judgment. The unconscious attorney is in fact no different from an attorney that is physically absent from trial since both are equally unable to exercise judgment on behalf of their clients. Such absence of counsel at a critical stage of a proceeding makes the adversary process unreliable, and thus a presumption of prejudice is warranted pursuant to *Cronic*.<sup>148</sup>

As this purported distinction<sup>149</sup> suggests, prior to *Burdine*, two Fifth Circuit cases had established that neither an attorney's addiction to illegal drugs<sup>150</sup> nor his alcoholism gave rise to a presumption of prejudice.<sup>151</sup> Other circuits that have addressed addiction and alcoholism have agreed. The Sixth Circuit refused to find ineffective assistance of counsel based on a claim that counsel was using cocaine at the time of trial, and indeed had been arrested three weeks before his appearance in the case.<sup>152</sup> That court reasoned that although he was later suspended for his drug use, he was a licensed attorney at the time of trial.<sup>153</sup> Similarly, when a defendant claimed his counsel was drunk during his trial, the Eleventh Circuit affirmed the

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148. *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001), *cert. denied sub nom. Cockrell v. Burdine*, 535 U.S. 1120 (2002).

149. An unpublished Ninth Circuit decision prior to *Burdine* adopted the same distinction. *United States v. Carrillo*, C.A. No. 96-16597, 1997 U.S. App. LEXIS 5680 (9th Cir. Mar. 13, 1997).

150. *Berry v. King*, 765 F.2d 451, 454 (5th Cir. 1985) (addiction to illegal drugs), *cert. denied*, 476 U.S. 1164 (1986).

151. *Burnett v. Collins*, 982 F.2d 922, 928–30 (5th Cir. 1993) (during trial, defendant could smell alcohol on attorney's breath, and after trial, attorney entered a facility for treatment of alcohol abuse). Since *Burdine*, the Fifth Circuit has reaffirmed that intoxication during trial does not obviate the need to show prejudice under *Strickland*. *Kelly v. Cockrell*, 72 F. App'x 67, 82 (5th Cir. 2003).

152. *Muniz v. Smith*, 647 F.3d 619 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1575 (2012).

153. *Id.* at 625; *see also Ivory v. Jackson*, 509 F.3d 284 (6th Cir. 2007) (recently discovered evidence that trial counsel's license was suspended for use of drugs and alcohol after he represented the defendant, and admissions during these proceedings that substance abuse was a problem during the representation, did not excuse procedural default of defendant's ineffective assistance claim; Ivory himself filed one of the complaints that led to the disciplinary proceedings before his direct appeal was filed, and thus, was clearly on notice of counsel's possible ineffectiveness and the reasons for it when he appealed), *cert. denied*, 552 U.S. 1322 (2008); *Coates v. McCormick*, 5 F.3d 535 (9th Cir. 1993) (holding drug use alone does not constitute ineffective assistance of counsel).

federal district court's decision, which held that prejudice should not be presumed.<sup>154</sup>

Nor have demonstrations that counsel was mentally ill led courts to presume prejudice.<sup>155</sup> In two of these cases, mental illness was clearly the source of very bizarre trial behavior, but nonetheless did not lead to a presumption of prejudice. The Eighth Circuit rejected the argument that defense counsel's bipolar disorder requires a per se presumption of prejudice, even in the face of "numerous examples of [counsel's] conduct before and during trial which seemed unprofessional," including "lying to the petitioner about his experience in capital cases, submitting a false application for malpractice insurance, being unprepared to present the petitioner's case, and appearing confused at trial."<sup>156</sup> Yet more striking is the Ninth Circuit's decision in *Young v. Runnels*,<sup>157</sup> where the lawyer in question falsely charged opposing counsel in another case with being involved with a pedophile ring, threatened the life of another opposing counsel, threatened her own former paralegal, falsely accused a former client of terrorism and of stalking her, accused the same former client and his new counsel of being "supremacist militia members," and during proceedings before the state bar court, "repeatedly screamed at the Court, refused to follow rulings and directions, and made direct threats toward the Court and Trial Counsel. . . . [causing] the Court the gravest concern that [she] is not capable of conducting herself properly in any court of law."<sup>158</sup>

Judge Noonan concurred, stating that precedent did not permit the presumption of prejudice, but called the result a "cruel parody of the right to counsel,"<sup>159</sup> finding the distinction between cases that do presume prejudice and those that do not "bizarre."<sup>160</sup>

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154. *Hernandez v. Wainwright*, 634 F. Supp. 241, 245 (S.D. Fla. 1986), *aff'd*, 813 F.2d 409 (11th Cir. 1987); *see also* *Hamilton v. State*, 226 P.3d 588 (Mont. 2010) (refusing to hold a hearing on the defendant's allegations that defense counsel was addicted to drugs and alcohol because there was no proof of deficient performance).

155. *Bellamy v. Cogdell*, 974 F.2d 302 (2d Cir. 1992); *Johnson v. Norris*, 207 F.3d 515 (8th Cir. 2000) (bipolar disorder), *cert. denied*, 531 U.S. 886; *Dows v. Wood*, 211 F.3d 480, 485–86 (9th Cir. 2000) (counsel had late stage Alzheimer's disease eighteen months after trial); *Smith v. Ylst*, 826 F.2d 872, 875–76 (9th Cir. 1987) (mental illness), *cert. denied*, 488 U.S. 829 (1988); *Young v. Runnels*, 435 F.3d 1038 (9th Cir. 2006) (lawyer with delusions), *cert. denied*, 549 U.S. 1033; *see also* *State v. Brewer*, 699 A.2d 1139 (Me. 1997) (defense counsel's mental and physical problems, for which he was being treated during trial, do not create presumption of prejudice).

156. *Johnson*, 207 F.3d at 517.

157. 435 F.3d 1038.

158. *Id.* at 1044–45 (Noonan, J., concurring).

159. *Id.* at 1046.

160. It is conceded by all that if Darris Young had been represented by a college student or a cobbler or counsel not admitted to the California bar he would have been denied his Sixth Amendment right to counsel. But his case is different because he was represented by a fully licensed member of the California bar whom the courts of California took nearly two years to

*e. Antagonism Toward the Client*

In *Morris v. Slappy*, the Supreme Court held that the Sixth Amendment does not guarantee “a right to counsel with whom the accused has a ‘meaningful attorney-client relationship,’”<sup>161</sup> and no court since *Slappy* has held that an attorney’s failure to get along with a client is a basis for presuming either prejudice or a conflict.<sup>162</sup> However, in two kinds of cases, counsel’s antagonism toward the client has sometimes been viewed as tantamount to the denial of counsel.

First, where a lawyer advocates for the prosecution rather than the defendant, prejudice has been presumed by some courts. According to the Ninth Circuit, when a defense attorney tells the jury that “it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute,” prejudice is presumed under *Cronic*, for that lawyer “has utterly failed to ‘subject the prosecution’s case to meaningful adversarial testing.’”<sup>163</sup> In so holding, the Ninth Circuit was following the lead of the Tenth that “an attorney who adopts and acts upon a belief that his client should be convicted ‘fail[s] to function in any meaningful sense as the Government’s adversary.’”<sup>164</sup> This view, or at least its application, is not universal. The Fourth Circuit, when confronted with a lawyer who told Ricky Drayton’s capital jury, “You want to sentence him to death, O.K.,”

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remove from a position where she could harm the public, the courts, and her clients! A fully licensed lawyer with her head full of fantasies and “with complete lack of insight into the wrongfulness of her actions” was counsel enough to satisfy the Sixth Amendment! As Judge Ferguson’s opinion indicates, precedent apparently requires this bizarre conclusion. Only the Supreme Court of the United States can eliminate this cruel parody of the right to counsel.

*Id.* at 1045–46.

161. *Morris v. Slappy*, 461 U.S. 1, 3–4 (1983).

162. *See, e.g., Everett v. State*, 54 So. 3d 464 (Fla. 2010), *as revised on denial of reh’g.* (Feb. 10, 2011). Clients are, however, entitled to make major decisions, such as whether or not to plead guilty, or plead insanity, or testify. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (the defendant has “the ultimate authority” to determine “whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal”).

163. *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991) (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)) (prejudice presumed where lawyer concedes both elements of the offense and client’s identity as perpetrator). *But see Florida v. Nixon*, 543 U.S. 175 (2004) (attorney need not obtain explicit consent from client to concede guilt in a capital trial where doing so may be good strategy).

164. *Osborn v. Shillinger*, 861 F.2d 612, 625, 629 (10th Cir. 1988) (quoting *Cronic*, 466 U.S. at 666) (presuming prejudice where counsel informed the judge in a letter, subsequently submitted to the state supreme court hearing Osborn’s appeal, that his client deserved the death sentence, that the defendant brought it on himself, and later insisted that whether it helped his client “wasn’t my concern”); *see also Rickman v. Bell*, 131 F.3d 1150, 1159 (6th Cir. 1997) (presuming prejudice where extremely damaging images of the defendant came from his own attorney, who was not responding to testimony or improper arguments by the prosecution, but himself “present[ed] a terrifying image of [the defendant], and thereby aligned himself with the prosecution against his own client”); *In re Personal Restraint of Benn*, 952 P.2d 116 (Wash. 1998) (en banc) (finding that a defense attorney who effectively joins the State in an effort to attain conviction or death sentence suffers from an obvious conflict of interest).

deemed *Strickland* rather than *Cronic* controlling.<sup>165</sup> It then held—remarkably cavalierly in my view—that “even assuming” this was deficient performance, prejudice had not been established.<sup>166</sup>

Second, where defense counsel expresses racial antagonism toward the client one court has—once—presumed prejudice. This is the problem posed by *Ellis v. Harrison*, the case with which this article began, and its unsteady history in the Ninth Circuit stretches back more than twenty years ago to *Frazer v. United States*.<sup>167</sup> In the early nineties a district court, relying on the lack of a showing of prejudice, refused to hold a hearing on a habeas petitioner’s claim that his counsel called him a “stupid [n\*\*\*\*] son of a bitch and said he hopes I get life [for the crime of bank robbery] . . . And if I continue to insist on going to trial I will find him to be very ineffective.”<sup>168</sup> The Ninth Circuit reversed, saying:

If the Sixth Amendment itself protects an accused from a lawyer with a traditional conflict of interest, and from a lawyer who is asleep, completely disinterested, or so unprepared that his appearance is merely pro forma, surely it must protect the indigent from an appointed lawyer who calls him to his face a “stupid [n\*\*\*\*] son of a bitch” and who threatens to provide substandard performance for him if he chooses to exercise his right to go to trial.<sup>169</sup>

Though the language is bold, the categorization is unclear. Perhaps when it decided *Frazer*, the Ninth Circuit thought the result so obvious that it was unnecessary to choose between a *Cronic* and a *Cuyler* rationale. But if so, the solicitude proved short-lived, or at least tightly cabined. As the per curiam opinion in *Ellis* later would put it: “To the extent *Frazer* held that defense counsel’s extreme animus towards the persons of the defendant’s race violates the Sixth Amendment without need to show prejudice,

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165. *Drayton v. Moore*, No. 98-18, 1999 WL 10073 (4th Cir. Jan. 12, 1999) (per curiam). The opinion does not report what trial counsel said to the jury; I know because I represented Drayton in the Fourth Circuit. Transcript on file with author.

166. *Id.* at \*2.

The First Circuit has explicitly rejected the approach of the Ninth and Tenth Circuits:

We believe [*Osborne* and *Swanson*] misperceive the rationale underlying the *Cronic* exception. In our view, the Court’s language in *Cronic* was driven by the recognition that certain types of conduct are in general so antithetic to effective assistance . . . that a case-by-case analysis simply is not worth the cost of protracted litigation. No matter what the facts of a given case may be, this sort of conduct will almost always result in prejudice. But attorney errors particular to the facts of an individual case are qualitatively different.

*Scarpa v. Dubois*, 38 F.3d 1, 12 (1st Cir. 1994) (emphasis omitted) (citation omitted).

167. 18 F.3d 778 (9th Cir. 1994).

168. *Id.* at 780.

169. *Id.* at 783.

*Mayfield* [*v. Woodford*] implicitly overruled that holding.<sup>170</sup> *Mayfield* held that unless a defendant could show that, *during a critical phase of the proceedings, he was aware of his lawyers racial antagonism*, the ordinary rule of *Strickland* would apply, and prejudice would not be presumed.<sup>171</sup> And thus it was *Mayfield* that Judge Nguyen railed against last year in *Ellis*—but believed the panel to be bound by. The Ninth Circuit sitting en banc has now heard argument, but the argument does not (at least to my ears) reveal what the outcome will be.

It is worth noting that *Mayfield* is not an outlier. In this century, no defendant of which I am aware has persuaded a court to presume prejudice based upon his lawyer’s racial antagonism. The optimistic reader may be imagining that this is because no recent case has involved such blatant racial hostility—but if so, she would be wrong. I am aware of five cases decided since 2000 in which defense counsel used a racial epithet towards his client, and in none of them did the reviewing court presume prejudice.<sup>172</sup> Most remarkable is *Osborne v. Terry*,<sup>173</sup> in which the Eleventh Circuit declined to presume prejudice from a lawyer’s statement about Curtis Osborne, his client, “That little n\*\*\*\* deserves the chair,” even though coupled with the lawyer’s boast that he would hire no experts to examine Osborne.<sup>174</sup> The *Osborne* court also more sweepingly declared that although there is a constitutional prohibition against race-based decisionmaking by a prosecutor, there is no prohibition against race-based animus on the part of defense counsel.<sup>175</sup>

## 2. Torn?

The species of attempts at invoking *Cuyler* is large indeed, and below I try to sample rather than fully catalog them; I summarize conflicts alleged to stem from other clients, financial or professional stake, romantic or sexual relationships, criminal charges, and animosity.<sup>176</sup>

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170. *Ellis v. Harrison*, 891 F.3d 1160, 1165–66 (9th Cir. 2018).

171. *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001).

172. See Sheri Lynn Johnson et al., *Racial Epithets in the Criminal Process*, 2011 MICH. ST. L. REV. 755, 768–72 (describing cases).

173. 466 F.3d 1298 (11th Cir. 2006).

174. *Id.* at 1316.

175. *Id.* at 1318.

176. For more complete lists, see Gregory G. Sarno, Annotation, *Circumstances Giving Rise to Prejudicial Conflict of Interests Between Criminal Defendant and Defense Counsel—State Cases*, 18 A.L.R.4th 360 (1982); Gregory G. Sarno, Annotation, *Circumstances Giving Rise to Prejudicial Conflict of Interests Between Criminal Defendant and Defense Counsel—Federal Cases*, 53 A.L.R. Fed. 140 (1981).

*a. Other Clients*

Even the seemingly clearest conflict—between or among criminal codefendants—is so complicated that it has its own A.L.R. annotation.<sup>177</sup> While it is clear that concurrent representation of codefendants, the paradigmatic claim of both *Cuyler* and *Holloway*, can give rise to a conflict claim, it is equally clear that it does not always do so. Beyond that, multiple representation of codefendants is a jungle of possibilities. What if defense counsel represented both defendants for a significant period of time, and then chose one? What if defense counsel previously represented the codefendant on other charges? What if she is presently representing him on another charge? What if she represents him on a civil matter? What if her partner (or former partner, or spouse) represents the codefendant, or represented him on a previous charge, or in a civil matter? As even skimming the annotation makes clear, there is little agreement on these variations. Moreover, *Mickens* added confusion rather than clarity. Prior to *Mickens*, all circuits had assumed that successive (rather than concurrent) representation of codefendants could—under the right circumstances—trigger the conflict standard. After *Mickens*, they have continued to do so, albeit a little nervously. As the Fifth Circuit explained in a post-*Mickens* case, it was not ready to jettison all successive representation conflicts based solely upon the Supreme Court’s cautionary note that “[w]hether [*Cuyler v. Sullivan*] should be extended to [successive representation] cases remains, as far as the jurisprudence of this Court is concerned, an open question,”<sup>178</sup> given both circuit precedent, and the lack of persuasiveness of a distinction between concurrent and successive representation.<sup>179</sup>

Less clear yet is the approach that should be taken when it is not a codefendant, but some other participant in the proceedings who is or was represented by counsel on another matter. *Mickens* provides one example: prior representation of the victim. But even with respect to that particular relationship, *Mickens* gives little guidance, for its rationale depends on the fact that *Mickens*’s lawyer perceived no ongoing duty to the former client/homicide victim.<sup>180</sup> Most lawyers, however, would recognize that ethics rules provide that duties to the client survive the client’s death. In other

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177. Allan L. Schwartz, Annotation, *Circumstances Giving Rise to Conflict of Interest Between or Among Criminal Codefendants Precluding Representation by Same Counsel*, 34 A.L.R.3d 470 (1970).

178. *Mickens v. Taylor*, 535 U.S. 162, 176 (2002).

179. *United States v. Infante*, 404 F.3d 376, 391 (5th Cir. 2005); see also *Hall v. United States*, 371 F.3d 969, 974 (7th Cir. 2004).

180. *Mickens*, 535 U.S. at 173; see also *id.* at 177 (Kennedy, J., concurring).

cases, the other client is not the victim, but a witness for the State,<sup>181</sup> or the prosecutor in the case,<sup>182</sup> or the State itself,<sup>183</sup> or someone with a stake in a related civil proceeding.<sup>184</sup>

A few courts have drawn a bright line, refusing to read *Cuyler* to include anything beyond multiple representation of codefendants.<sup>185</sup> Most courts, however, find conflicts that trigger the *Cuyler* standard in at least some extreme situations where loyalty is obviously divided, despite the fact that the conflicting loyalty is not to another client.<sup>186</sup>

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181. See, e.g., *Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996) (finding attorney's concurrent representation of capital murder defendant and witness who had been granted transactional immunity for that murder required evidentiary hearing); *United States v. Miranda*, 936 F. Supp. 945 (S.D. Fla. 1996) (finding attorney's representation of both defendant and witness who had earlier pled guilty to drug trafficking and money laundering and would testify for government at defendant's money-laundering trial was impermissible absent consent of witness); see also *United States v. McClelland*, 223 F. App'x 742 (9th Cir. 2007) (finding right to conflict-free counsel was violated when defense counsel identified a potential defense witness, took her on as a client, and told defendant that the court would not let potential witness testify).

182. See *United States v. Mett*, 65 F.3d 1531 (9th Cir. 1995) (finding fraud defense counsel's prior representation of prosecutor on drunk-driving charges did not prove prejudicial conflict of interest, where conflict did not affect counsel's performance); *Davis v. State*, 897 So. 2d 960 (Miss. 2004) (finding defense counsel was not acting under conflict of interest in capital murder trial by having previously represented prosecutor in prosecutor's divorce proceedings; defendant had been informed of the representation and had voiced no objection, and there was no showing that counsel acted with less than full loyalty to defendant or that defendant suffered any prejudice from counsel's representation).

183. Cases involving defense counsel who were allied with the State in some other case vary widely, ranging from instances where counsel prosecuted the defendant on other charges, see *State v. Almanza*, 910 P.2d 934 (N.M. Ct. App. 1995) (denying motion of defense counsel to withdraw after counsel discovered that his firm was prosecuting defendant in municipal court for traffic offenses and was erroneous), to cases where some counsel had been part of the prosecutor's office when criminal charges were filed but had no role in the case, see, e.g., *Endress v. Coe*, 433 So. 2d 1280 (Fla. Dist. Ct. App. 1983) (finding no conflict); *Brownlee v. State*, 666 So. 2d 91 (Ala. Crim. App. 1995) (finding fact that defense counsel's name was listed as prosecutor on case action summaries that would have been used to prove defendant's prior convictions in capital murder prosecution did not create conflict of interest where counsel's name appeared on summaries only because he was supervising district attorney at that time, not because he had a role in those cases), to cases where defense counsel had previously worked for the prosecutor, but not in any case related to the defendant, see, e.g., *United States v. Mays*, 77 F.3d 906 (6th Cir. 1996) (finding no conflict where defense counsel had previously served as a government informant but role as informant had terminated and was unrelated to defendant's case).

184. *McConico v. Alabama*, 919 F.2d 1543 (11th Cir. 1990) (finding concurrent representation of defendant in murder trial and representation of defendant's wife as beneficiary-claimant under murder victim's insurance policy created a conflict, given that the wife's claim to proceeds required asserting that the victim was not the aggressor and the defendant's claim of self-defense required asserting that the victim was the aggressor); see also *Caban v. United States*, 281 F.3d 778 (8th Cir. 2002) (applying *Strickland* and granting relief where defense counsel represented defendant's prior counsel in disciplinary proceedings, failed to call prior counsel as a witness in the defendant's prosecution for drug trafficking and the testimony of prior counsel would have benefitted the defendant).

185. *Beets v. Scott*, 65 F.3d 1258, 1265 (5th Cir. 1995) (en banc), cert. denied, 517 U.S. 1157 (1996); *People v. Washington*, 461 N.E.2d 393, 397 (Ill. 1984), cert. denied, 469 U.S. 1022.

186. See, e.g., *Spreitzer v. Peters*, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997) ("[W]e have routinely applied both the *Cuyler* and the *Holloway* standards to conflict of interest cases which are not multiple representation cases, and we do so here.").

*b. Professional or Financial Stake*

Ordinarily, courts are loath to find that the lure of professional advancement constitutes a conflict of interest sufficient to trigger *Cuyler*'s relaxed "adverse effect" standard. Courts agree that neither defense counsel's pending employment application at the prosecuting district attorney's office<sup>187</sup> nor defense counsel's campaigning to be elected the district attorney during the course of representing a client creates a conflict of interest.<sup>188</sup>

Not surprisingly, courts also resist finding that the structure of fee arrangements or opportunity costs in the form of more lucrative work create a conflict of interest.<sup>189</sup> The most extreme of these decisions is an Illinois

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187. *Aase v. Roy*, Civ. No. 16-3101, 2017 WL 2791418 (D. Minn. May 1, 2017) (finding no conflict under *Cuyler* where four days before trial and without informing defendant or court, counsel applied for a position with the District Attorney's office, discussed the application with the prosecutor over lunch while the jury deliberated, and accepted an offer of employment after guilty verdict but before sentencing, where he did not represent defendant); *United States v. Horton*, 845 F.2d 1414 (7th Cir. 1988); *People v. McCrone*, 784 N.Y.S.2d 683 (App. Div. 2004) (defense counsel's pending employment as assistant district attorney did not pose conflict of interest because defendant's trial was slated to end well in advance of counsel's new employment); *Smith v. State*, 588 So. 2d 561 (Ala. Crim. App. 1991) (finding defendant did not establish actual conflict of interest on part of defense counsel in capital murder prosecution based on counsel's negotiation and acceptance of job with county prosecutor's office while representing defendant without informing defendant of alleged conflict, where counsel did not join district attorney's office in county in which defendant was being prosecuted and where no specific acts of counsel which prejudiced defendant were referenced); *see also Jackson v. State*, 502 So. 2d 858 (Ala. Crim. App. 1986) (finding no conflict of interest was created by subsequent employment of defendant's former appointed attorney as part-time assistant district attorney where attorney did not take any files relating to defendant to district attorney's office, did not reveal any information about case or discuss case with attorneys who actively prosecuted it, did not have any prosecutorial responsibility for case, and did not divulge any information he had acquired from defendant); *Wilkey v. State*, 953 P.2d 347 (Okla. Crim. App. 1998) (finding that the fact that both former public defenders who worked on defendant's first murder trial were employed by district attorney during defendant's retrial did not amount to conflict of interest where these attorneys did not appear of record in retrial, and there was no evidence of any actual contact between these attorneys and prosecutors of retrial); *cf. Atley v. Ault*, 191 F.3d 865 (8th Cir. 1999) (holding that, where both prosecutor and defense counsel sought a hearing on the potential conflict inherent in defense counsel's application to the prosecutor's office, court was obliged to hold a hearing).

188. *People v. Clark*, 857 P.2d 1099, 1128 (Cal. 1993) ("Any conflict between an attorney's personal interest in obtaining employment and his or her client's interest in loyal and effective representation is too attenuated to impute a violation of professional ethics in each such case."); *Jones v. Ivory*, 334 S.E.2d 666 (Ga. 1985) (finding defendant who knew of his counsel's campaign for district attorney, who was aware of his victory one month prior to trial, and who chose to proceed to jury trial with counsel was not entitled to new trial based on conflict of interest at time of trial and conviction); *Coleman v. State*, 694 N.E.2d 269 (Ind. 1998) (finding defense attorney's candidacy for state attorney general at time of defendant's murder trial did not create conflict of interest that violated defendant's right to effective assistance of counsel because attorney stated that he campaigned only at night and on weekends and that campaign had no impact on his representation of defendant, and attorney had strategic reason for recommending jury waiver).

189. *See, e.g., People v. Winkler*, 523 N.E.2d 485, 485 (N.Y. 1988) ("Legal representation in a criminal proceeding pursuant to a contingent fee retainer, while unquestionably unethical, does not constitute per se ineffective assistance of counsel."); *Rodriguez v. State*, 741 P.2d 1200 (Alaska Ct. App.

case, in which no conflict of interest was found when the defendant executed a note, deed, and mortgage to counsel in return for legal services despite the fact that establishing the defendant's capacity to execute these instruments was in tension with establishing his unfitness for trial and insanity defense.<sup>190</sup> The court held that this tension was *reconcilable* because different standards govern the capacity to contract, fitness to stand trial, and legal insanity, and that the defendant could therefore have had capacity to contract while being unfit to stand trial or being legally insane.<sup>191</sup>

Equally surprising (to me, at least) is the treatment of contracts for media rights to the defendant's story. The *Beets* case, described in the introduction, is extreme in that the "conflict" in a colloquial sense was obvious: Had her lawyer withdrawn, he could have provided evidence that Beets did not kill her husband for the pecuniary gain of an insurance policy (since he could testify that she had been unaware of the existence of the policy at the time of the homicide), but had he withdrawn, he would have lost the media rights to her story.<sup>192</sup> It is, however, completely in the mainstream in its holding that media rights contracts do not create a conflict of interest.<sup>193</sup>

### *c. Romantic or Sexual Entanglements*

Many of the cases in the category of romantic entanglement are ones that would chagrin most members of the bar. Nonetheless, courts have been resolute that the romantic or sexual relationships of defense counsel,

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1987) (finding fee arrangement by which state agreed to pay defendant's appointed counsel \$15,000, but left counsel free to negotiate for further compensation if defendant had funds available did not create conflict of interest, and neither the agreement nor defendant's failure to supplement fee affected counsel's representation); *State v. Labonville*, 492 A.2d 1376 (N.H. 1985) (finding contingency fee agreement improper, but did not prejudice defendant); *see also* *People v. Doolin*, 198 P.3d 11, 32, 36 (Cal. 2009) (observing that all fee structures provide lawyer with some financial conflict of interest and therefore refusing to find conflict for a particular structure). *But see* *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989) (justifying raising rates based on concerns that low rates of pay for attorneys defending indigents, together with arbitrary caps on total amount of fees available for case and delays in payment caused by shortfalls in state funding created circumstances in which financial burdens placed on attorneys could well create conflict of attorney's interest with that of his client).

190. *People v. Kinion*, 435 N.E.2d 533 (Ill. App. Ct. 1982).

191. *Id.* at 536.

192. *See supra* notes 15–22 and accompanying text.

193. *Dumond v. State*, 743 S.W.2d 779 (Ark. 1998) (holding that defense counsel's entering into publication contract with defendant and his wife did not constitute conflict of interest); *Hammond v. State*, 452 S.E.2d 745 (Ga. 1995) (finding that media-rights agreement entered into by murder defendant—my client in postconviction proceedings—and his attorney did not create conflict of interest); *State v. Pitts*, 635 A.2d 1356 (N.H. 1993) (holding that contract between defendant, attorney, and publishing company transferring defendant's media interests whereby attorney would receive payments to be applied to defense of case, which never generated money when media interest waned, did not create prejudicial conflict of interest); *Stafford v. State*, 697 P.2d 165 (Okla. Crim. App. 1985) (finding contract to serve as trial counsel in exchange for exclusive publication rights of defendant's life did not create conflict of interest), *cert. denied*, 473 U.S. 3537.

regardless of their nature, do not create Sixth Amendment<sup>194</sup> conflicts of interest. That defense counsel is married to a prosecutor does not create a conflict of interest, even when his spouse prosecuted the defendant in a previous case.<sup>195</sup> Nor does an “undisclosed, intimate relationship” between defense counsel and an assistant district attorney who is the colleague of the district attorney prosecuting the case.<sup>196</sup> Perhaps these cases are not so surprising; certainly the existence of relationships that cross the courtroom is not surprising.

But even with respect to sexual relationships that are completely indefensible, courts sometimes refuse to find conflicts of interest. Courts disagree as to whether defense counsel’s sexual relationship *with the defendant’s wife* during the trial creates a conflict of interest.<sup>197</sup> Nor is the defense counsel’s sexual relationship *with the defendant herself* always found to create a conflict.<sup>198</sup> One court has found that where counsel herself felt a conflict because she had a one-night stand with the prosecutor handling her client’s death penalty case, a court should defer to that perception, but declined to hold that the relationship itself created a conflict cognizable under *Cuyler*.<sup>199</sup>

#### *d. Criminal Charges*

One might imagine numerous ways that an attorney arrested or indicted for criminal conduct could compromise representation of a client to ingratiate himself to the authorities; at least if the attorney is subsequently convicted, it is clear that criminal prohibitions did not deter self-interested conduct, so it seems unlikely that an ethical duty to a client would do so.

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194. *Cf.* *People v. Jackson*, 213 Cal. Rptr. 521, 521–22 (Ct. App. 1985) (finding a potential conflict of interest under the California Constitution requiring a new trial where defense counsel had undisclosed ongoing dating relationship with prosecutor in defendant’s case).

195. *Abney v. State*, 523 S.E.2d 362 (Ga. Ct. App. 1999).

196. *Commonwealth v. Croken*, 797 N.E.2d 403, 404 (Mass. App. Ct. 2003).

197. *Compare Hernandez v. State*, 750 So. 2d 50 (Fla. Dist. Ct. App. 1999) (en banc) (finding no conflict of interest), *with People v. Singer*, 275 Cal. Rptr. 911 (1990) (finding conflict of interest). *Cf. State v. Lasane*, 852 A.2d 246 (N.J. Super. Ct. App. Div. 2004) (finding sexual encounter between defense counsel and the defendant’s mother entitled the defendant to withdraw his guilty plea where mother was providing family support for young defendant and encouraging a quick disposition of the charges).

198. *United States v. Babbitt*, 26 M.J. 157, 158 (C.M.A. 1988) (counsel’s adulterous intercourse with client on the night before her court martial did not create a conflict of interest). The lone exception is *United States v. Cain*, 59 M.J. 285 (C.A.A.F. 2004), where a military court found that a same-sex relationship between counsel and his client created a conflict of interest, but only because it was also illegal.

199. *Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001). Interestingly, the Court declined to name either attorney, explaining in a footnote its use of pseudonyms as due to the fact that after twenty years, their identities were irrelevant. *Id.* at 931 n.4.

Nonetheless, most courts have found that pending charges, standing alone, do not create a conflict of interest.<sup>200</sup> “Generally, the criminal conduct of a defense counsel creates an actual conflict of interest only when ‘there is a danger that the defense attorney would ineffectively represent his client because of fear that authorities might become aware of the attorney’s own misconduct if he undertook effective representation.’”<sup>201</sup> Therefore, only when defense counsel is suspected of involvement in the same crime with which the client is charged have most courts found a conflict of interest,<sup>202</sup> although even here, some have not.<sup>203</sup>

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200. *People v. Smith*, 581 N.W.2d 654, 660 (Mich. 1998); *see also* *Campbell v. Rice*, 408 F.3d 1166 (9th Cir. 2005) (en banc) (finding defendant failed to establish that he was prejudiced by trial counsel’s arrest for felony drug possession two days before his trial, as there was no evidence that her arrest adversely affected her representation), *cert. denied*, 546 U.S. 1036; *Bowling v. Parker*, 344 F.3d 487 (6th Cir. 2003) (finding defendant failed to establish ineffective assistance of counsel where there was no evidence that defense counsel’s indictment had any negative impact on the trial), *cert. denied sub nom.* *Bowling v. Haeblerlin*, 534 U.S. 842 (2004); *People v. Zambrano*, 640 N.E.2d 1334 (Ill. App. Ct. 1994) (finding no conflict of interest where defense counsel was subject of federal investigation concerning corruption in courts because counsel did not have tie to person or entity which would benefit from unfavorable verdict for defendant); *State v. Hunter*, 960 N.E.2d 955, 965 (Ohio 2011) (“[Defense counsel’s] legal problems relating to pending charges do not establish ineffective assistance of counsel.”); *State v. Williams*, 556 N.E.2d 221, 223 (Ohio Ct. App. 1989) (per curiam) (“[P]ending criminal charges against an attorney are not, standing alone, sufficient . . . to support a charge of ineffective assistance of counsel.”); *State v. Carter*, 84 So. 3d 499 (La. 2012) (finding defense counsel not ineffective due to conflict of interest although he was facing possible criminal charges at the time of defendant’s trial); *State v. Smith*, 476 N.W.2d 511, 516 (Minn. 1991).

201. *United States v. Cain*, 57 M.J. 733, 738 (C.C.A. 2002) (quoting *United States v. Balzano*, 916 F.2d 1273, 1293 (7th Cir. 1990) and citing *United States v. Saccoccia*, 58 F.3d 754, 771–72 (1st Cir. 1995)); *see also* *People v. Frye*, 959 P.2d 183 (Cal. 1998), *reh’g denied*, (Sept. 23, 1998) *and as modified*, (Sept. 23, 1998) (finding possibility that defense counsel’s interest in retaining his license, which caused him to ingratiate himself with prosecutor to obtain prosecutor’s assistance in securing postponement of his suspension until conclusion of trial, was insufficient to establish a violation of defendant’s right to conflict-free counsel).

202. *State v. Cyrs*, 529 A.2d 947 (N.H. 1987); *Gov’t of the Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3d Cir. 1984) (actual conflict occurs when attorney becomes entangled in the criminal conduct charged against his client, “has independent personal information regarding the facts underlying his client’s charges, and faces [himself] potential liability for those charges”); *Mannhalt v. Reed*, 847 F.2d 576, 581 (9th Cir. 1988) (actual conflict may exist when attorney is accused of or under investigation for crimes similar or related to those of his client “because the potential for diminished effectiveness in representation is so great”); *see also* *Briguglio v. United States*, 675 F.2d 81 (3d Cir. 1982) (actual conflict where defense counsel was under investigation by the same United States Attorney’s office that was prosecuting the defendant).

203. *Neal v. State*, 669 S.W.2d 254 (Mo. Ct. App. 1984) (in the absence of evidence of prosecutorial pressure on trial counsel, fact that his attorney had been implicated by a state witness in the drug sale was not sufficient basis for reversing conviction); *see also* *State v. Wille*, 595 So. 2d 1149 (La. 1992) (finding no conflict despite fact that defendant’s appointed counsel had been convicted of felony in widely-publicized case, had received suspended sentence with probation conditioned on performance of community service, was appointed to represent defendant to complete his community service obligation, and had interest in not further publicizing his felony conviction, creating a disincentive to question jurors as to whether their attitude toward defendant would be affected by their knowledge that he was being represented by convicted felon).

*e. Animosity*

Animosity may form the basis of a *Cuyler* claim, but as discussed above, it also may be argued to create a *Cronic* claim, particularly where it is racial, or results in a failure to advocate for the client. In *Frazer*, the Ninth Circuit seemed to rely on both *Cronic* and *Cuyler* in holding that racial animosity toward one's client leads to a presumption of prejudice.<sup>204</sup>

Some courts have also considered whether other negative feelings toward the defendant create a *Cuyler* claim. In the absence of proof of animosity, courts generally do not presume it from personal connection with the victim.<sup>205</sup> On at least some occasions, specific evidence of animosity has led a court to find a conflict of interest. For example, one court held that the defendant's allegation that defense counsel exhibited strong antipathy toward him, as established by defense counsel's assertion that the defendant "may epitomize the banality of evil," warranted a remand for evidentiary hearing on the issue to determine whether counsel's animosity affected his ability to act in defendant's best interests.<sup>206</sup> Similarly, a Washington state court held that a defense attorney who joins the State in an effort to obtain a conviction or death sentence labors under a conflict of interest.<sup>207</sup> In contrast, an Illinois court refused to order an evidentiary hearing regarding defendant's allegation that appointed defense counsel had told another attorney that the defendant deserved the death penalty because, if proven, this would not establish a conflict of interest.<sup>208</sup>

Thus, with respect to both the *Cronic* and *Cuyler* genera of counsel failure, lower court cases reveal considerable disagreement but very little discussion of the criteria for determining either constructive absence or conflicts of interest. Although *Cone* has settled one subset of *Cronic* claims—failure to take action—it has provided no guidance for the others, and *Mickens* has done nothing to alleviate the confusion about conflict cases. Someone ought to think about these cases in a systematic way, and

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204. See *supra* notes 167–70 and accompanying text.

205. See, e.g., *Ex parte Bell*, 511 So. 2d 519, 522–23 (Ala. Crim. App. 1987) (holding that trial court did not abuse its discretion in denying motions to withdraw from representing defendant in murder prosecution by attorneys who had personally known victim where there was no showing of actual ineffectiveness and thus no showing of prejudice). *But see* *State v. Reedy*, 352 S.E.2d 158, 161–62 (W. Va. 1986) (finding that potential conflict of interest arising from fact that defense counsel was relative and friend of victim, which was not revealed to defendant before trial, violated defendant's right to effective assistance of counsel).

206. *Commonwealth v. Washington*, 880 A.2d 536, 541–46 (Pa. 2005); see also *State v. Moody*, 968 P.2d 578 (Ariz. 1998) (finding conflict between defendant charged with first-degree murder and his attorney was irreconcilable and required a change of counsel where attorney admitted that he told the defendant that he did not care about his case and attorney and defendant almost came to blows).

207. *In re Personal Restraint of Benn*, 952 P.2d 116 (Wash. 1998) (en banc).

208. *People v. Holman*, 647 N.E.2d 960 (Ill. 1995).

Parts III and IV reflect my attempt to do so. I have no neat rule to divide bad defense lawyers into truant, torn, and just plain terrible ones, but I provide a framework for thinking about the categories.

I pause here to note that if parsimoniousness were the only criterion, Justice Marshall's approach would win hands down.<sup>209</sup> Because he believed that the underpinnings of the right to counsel were independent of reliability concerns, his approach never would require a showing of prejudice. Instead, the only question for Marshall was whether an attorney had failed in the discharge of his or her duties; whether the failure came from judicial obstruction, ignoring a conflict of interest, incompetence, or indifference did not matter. I put aside Marshall's view, at least for the rest of this article despite its practical and theoretical appeal, simply because no one currently sitting on the Court subscribes to it. I do not think of what follows as a departure from the Court's basic approach (though it parts company on a few applications), but as an exploration of the implications of that approach.

I also put aside a fear that I think undergirded many of the early cases: that lawyers facing hopeless cases would search for ways to sabotage those cases. If one believed that such behavior would be prevalent, one would need to design rules that make sabotage difficult. But at least under the current regime, it appears that cases where lawyers will fall on their swords for their clients—in disregard of both professional standards of conduct and criminal prohibitions against perjury—are very rare. By this generalization I do not mean to suggest that no lawyer ever deliberately sabotaged a case by egregious misconduct or feigned incompetence, but only that such lawyers are so much less of a problem than truant, torn, and terrible lawyers that designing rules to thwart the former is foolish. Whether for good or bad, unethical criminal defense lawyers do not congregate at the overly-zealous end of the spectrum, at least when overzealousness risks their own well-being. Rather, when faced with allegations of conflicts or incompetence, far too many lawyers deny all wrongdoing and incompetence, wrapping themselves in the warm mantle of "strategy," even in the most implausible of circumstances.<sup>210</sup>

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209. See *supra* notes 130–32.

210. It is possible that alteration of the *Cronic* and *Cuyler* categories would affect the rates of attorney malingering, but I doubt it. The basic preference for law-abiding ethical behavior among lawyers is likely to be impervious to such changes, as is the basic predilection for self-protection when charged with incompetent or unethical behavior.

### III. THE *CRONIC* TOUCHSTONE: THE EXERCISE OF LAWYERLY JUDGMENT

#### A. *Defining Truancy*

Whether we ask why the Sixth Amendment protects the right to the assistance of counsel, or ask why the right is so fundamental to the American scheme of justice that the right has been incorporated against the States through the due process clause, the answer from precedent is the same. A defendant is entitled to the assistance of a lawyer because, all too often, his lack of knowledge and skill renders him unable to defend himself.<sup>211</sup> If forced to defend himself, a person might be unable to establish his innocence, even if he were innocent;<sup>212</sup> conversely, affording defendants the right to counsel will decrease the risk of wrongful conviction. At least where imprisonment is at stake, the increased risk of error that the absence of a lawyer would impose is constitutionally intolerable. It is this purpose of the Sixth Amendment—supplying what the layperson lacks—that holds the key to the constructive absence of counsel category.

As early as *Powell*, the Supreme Court recognized that nominal representation by a lawyer did not satisfy the Sixth Amendment command. Indeed, without really discussing whether there might be any differences between no lawyer at all, and nominal representation under the stark circumstances of *Powell*—eleventh hour, fifty-ninth minute appointment of a lawyer—the Court imposed the remedy for total deprivation of counsel: automatic reversal.<sup>213</sup> Then, between *Powell* and *Cronic*, the Court imposed automatic reversal on another set of cases, those where the trial court (in some way other than tardy appointment of counsel) wrongly interfered with the actions counsel would have taken.<sup>214</sup> Finally, in *Cronic*, the Court described three exceptions to *Strickland* that did not require a showing of prejudice: 1) a “complete denial of counsel” at a “critical stage of [the accused’s] trial” occurs;<sup>215</sup> 2) “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing;”<sup>216</sup> or 3) the

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211. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (“Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.” (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932))).

212. *Id.* (“[The lay defendant] lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.”).

213. *Powell*, 287 U.S. at 56.

214. *See, e.g.*, *Geders v. United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks v. Tennessee*, 406 U.S. 605, 612–13 (1972) (requirement that defendant be first defense witness); *Ferguson v. Georgia*, 365 U.S. 570, 593–96 (1961) (bar on direct examination of defendant).

215. *United States v. Cronic*, 466 U.S. 648, 659 (1984).

216. *Id.*

“[c]ircumstances [are of such a] magnitude” as those present in *Powell*, where “the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate.”<sup>217</sup>

What links these cases? I think it is *the absence of an exercise of lawyerly judgment*. What do I mean by lawyerly judgment? By this, I mean the application of the legal knowledge, skills, and experience that make a lawyer a lawyer. The absence of lawyerly judgment is obvious when no lawyer is present for a critical stage of the trial, but it is equally glaring when the trial court interferes with the lawyer’s exercise of his judgment in a significant way. Moreover, circumstances can be so extreme—such as those in *Powell v. Alabama*—that although a lawyer appears to be calling the shots, his or her judgment cannot rightly be deemed the judgment of a lawyer, because the judgment of a lawyer presupposes that he or she can apply legal knowledge, skills, and experiences to the advocacy task at hand. The absence of lawyerly judgment also explains the third category. When a lawyer “entirely fails” to subject the prosecution’s case to adversarial testing, it is not that he or she has been prevented from the exercise of lawyerly judgment, but that he has not in fact—either through election or incapacity—exercised lawyerly judgment.

Thus, the need for an exercise of lawyerly judgment explains the Court’s three *Cronic* categories. But another equally important consideration recommends this formulation: Lawyerly judgment is what a layperson hopes to get—and needs to get—from a lawyer. A lawyer need not be smarter than a client, or more personable, or more articulate. However, because he or she has the set of legal skills, knowledge, and experience that are helpful in legal proceedings, a client relies upon the lawyer to exercise the judgment informed by those skills, that knowledge, and that experience to make better decisions than the client would make uninformed by that judgment. Put differently, the reason the Sixth Amendment assures the provision of professional counsel in serious cases is because the exercise of lawyerly judgment makes it less likely that an innocent person will be convicted, and less likely that a guilty person will be punished more harshly than he or she deserves. Absent the exercise of such judgment, we cannot have enough confidence in the verdict to justify criminal penalties.

Likewise, in the absence of lawyerly judgment, we do not try to assess the effect such judgment would have had on a proceeding because the entire proceeding would have been different. In contrast with discrete errors in investigation, judgment, knowledge of the law, execution of strategy, or the like—where a reviewing court *can* imagine the counterfactual adequate

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217. *Id.* at 659–60.

performance—without the exercise of lawyerly judgment, such an estimate is fanciful. This I think is the essence of a *Cronic* claim; the lawyer is constructively absent (or “truant,” in my shorthand) if there is no person in counsel’s chair exercising lawyerly judgment. And this is so *regardless of the reason no lawyerly judgment is exercised*.

*B. Applying the “Exercise of Lawyerly Judgment” Standard*

What does the notion of the *Cronic* category imply for the cases described above? For starters, it explains the reaction of most lower courts to the status cases; if a purported “lawyer” has never been admitted to a bar, or has been disbarred, we cannot count his judgment as “lawyerly.” On the other hand, if a lawyer is admitted to a bar in another jurisdiction, that should suffice to take the matter out of *Cronic*. For my money, a disbarred lawyer usually is quite a bit more like one never admitted to the bar than one admitted in another jurisdiction; disbarment means we no longer trust the ex-lawyer to exercise whatever lawyerly judgment he or she might have. However, a focus on the exercise of lawyerly judgment might endorse the Second Circuit’s response that “technical” defects in bar licensure such as failure to pay dues should not create a presumption that no lawyerly judgment has been exercised.

*1. Sleeping, Drunk, Drugged, and Mentally Ill Lawyers*

Under an exercise of lawyerly judgment standard, the next category is almost as easy. A sleeping lawyer is a truant lawyer; he exercises no judgment at all while asleep. A drunk lawyer, or a drugged lawyer, exercises some judgment, but contrary to all circuits that have addressed the issue, those lawyers also should fall within *Cronic*. It simply cannot be said that a drunk lawyer or a drugged lawyer exercises *lawyerly* judgment. The parameters of lawyerly judgment may encompass a wide range of abilities and experience, but it cannot be lawyerly judgment to impair one’s decision-making through the influence of alcohol or drugs. Or at least this is so with respect to the lawyer’s condition during a critical stage of the proceedings; intoxication or drug use on other occasions may impede investigation or brief writing, but there are opportunities for correction, and the likelihood that the proceeding is unreliable based on drug or alcohol use at non-critical stages seems much smaller.

Whether mental illness causes the disappearance of lawyerly judgment depends on the particular mental illness. Surely there are enough neurotic lawyers that it is hard to call the exercise of judgment by a neurotic lawyer

the absence of lawyerly judgment. The opposite is true of mental illnesses with psychotic features. Thus, the judgment of a schizophrenic lawyer is not lawyerly judgment, and though the judgment of a bipolar lawyer may be lawyerly judgment most of the time, it is not lawyerly judgment during a manic phase, when delusions are common. Of course there are many "depressed" lawyers, some of whom are clinically depressed and some of whom may feel hopeless *about a particular case*. Because hopelessness about a case (depending on the case) may reflect a lawyerly judgment, a court should not deem that attitude, standing alone, a *Cronic* violation—as indeed *Cronic* itself held. It may be that Pollyannas are better defense lawyers, and it may not, but neither unwarranted optimism nor exaggerated pessimism can fairly be seen as negating lawyerly judgment. Untreated<sup>218</sup> clinical depression, however, like mania, precludes the exercise of lawyerly judgment.

## 2. Racially Antagonistic Lawyers

Racially antagonistic lawyers are harder. Nonetheless, they too fall within *Cronic*. Judgment tainted by conscious racial prejudice is not lawyerly judgment. When Curtis Osborne's lawyer referred to him as a "n\*\*\*" and made decisions about how to allocate resources based on Osborne's race, those were not lawyerly judgments. Looked at from the rationale the *Cronic* court used to defend the three exceptions it recognized, conscious racial animosity toward the defendant too is "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." It is true, if we go back in time, that such attitudes were not uncommon among lawyers, and perhaps *at that time* passed for lawyerly judgment, but that time has—thankfully—passed.<sup>219</sup>

*Mayfield*—and the panel opinion in *Ellis*—were wrong to distinguish between cases where the client knew of the antagonism during the course of the representation and those in which the client did not learn of it until later. What the client knew is irrelevant because the Sixth Amendment is focused on the *lawyer*, and whether he has exercised *lawyerly judgment*, not on how the client *feels* about his lawyer. *Ellis* involved a lawyer who was heard to express racial antagonism about the defendant himself (though not

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218. What about a lawyer who is being treated for clinical depression but is still in a clinically depressed state? One would hope that a lawyer who is in treatment would be getting—and taking—advice as to whether his or her condition precludes the exercise of professional judgment. Acting contrary to such advice would seem itself to be the failure to exercise lawyerly judgment.

219. That what counts as lawyerly judgment changes over time is not problematic. Reading the law once was enough to make a person a lawyer, but now we require formal study in an accredited law school; it would be silly to say that a person whose reading of the law would have sufficed to make him a lawyer a century ago is therefore a lawyer today.

addressed to the defendant), but explicit linkage between the client and racial animus is not critical. This is because the nature of racial animus is not individual. If a lawyer has expressed racial animus—*toward anyone in the defendant's racial group*<sup>220</sup>—a defendant is entitled to a new trial with no additional showing.

Some readers may worry at this point that I stand on a very slippery slope, and will next slide toward the view that lawyers whose judgments, strategic or otherwise, are in any way influenced by race, are also encompassed by *Cronic*. It cannot be disputed that racial stereotypes, even when consciously disavowed, also alter judgment.<sup>221</sup> When a lawyer consciously endorses *relevant*<sup>222</sup> racial stereotypes, the effect on judgment is similar.<sup>223</sup> It seems to me, however, that the time has not yet come to disqualify judgment subconsciously influenced by race; it blinks reality to pretend that the judgment of most lawyers (or even most defense lawyers)<sup>224</sup> is in no way influenced by race. Indeed, given the prevalence of racial prejudice in the general population, there may be times that strategic consideration of race is appropriate.<sup>225</sup> Open racial hostility (or the endorsement of racially derogatory stereotypes), however, is another matter.

### 3. *Lawyers Who Fail to Advocate for a Client*

The other hard case is failure to advocate for a client, a case made difficult by the Supreme Court's decision in *Cone*. Lower courts mostly

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220. I do not think that a close temporal connection should be required. Given the enduring nature of most racial animosity, I think any expression of racial animus during the period in which a lawyer has practiced law ordinarily should suffice. If a lawyer has explicitly—and credibly—renounced racist beliefs, that would make a presumption of prejudice inappropriate.

221. The implicit bias literature is now vast. For an easily accessible summary of this literature, see Cheryl Staats et al., *State of the Science: Implicit Bias Review*, KIRWAN INST. (2017), <http://kirwaninstitute.osu.edu/wp-content/uploads/2017/11/2017-SOTS-final-draft-02.pdf> [https://perma.cc/CN4U-KZCK].

222. Any stereotype about criminality, sexuality, work ethics, violence, or moral worth are relevant. Stereotypes about lesser matters, such as musical or athletic ability, while harmful in and of themselves, unless linked to more pernicious stereotypes are unlikely to distort the exercise of lawyerly judgment in a criminal case; consequently, their endorsement should not lead to automatic reversal.

223. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017), treats racial animus and the expression of racial stereotypes as comparable when determining whether their expression by a juror requires the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

224. Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539 (2004).

225. Other readers may worry that the ground slopes another direction. What is to stop the next defendant from objecting that her counsel's sexism or his counsel's homophobia rendered counsel constructively absent? Such cases would be rarer, but if the level of animosity were comparable, it seems that once again, the judgment being exercised is not lawyerly judgment, and therefore, a *Cronic* violation would have been shown.

agree that the most extreme members of this group of lawyers—those who actually advocate for the prosecution with respect to conviction or sentence—presumptively prejudice a trial. That much should be obvious; there can be no “testing” of the prosecution’s case if the defense endorses it.<sup>226</sup> Or, looked at from the lens of lawyerly judgment, it is not the judgment of a lawyer to advocate for the other side. Almost as clearly, it is not lawyerly judgment to express *indifference* to the outcome, as did Ricky Drayton’s lawyer when he said, “You want to sentence him to death? O.K.”<sup>227</sup>

Then what about *Cone*? Here I think that the distinction the Court draws, *in principle* is correct: It is not whether counsel fails to test the prosecution’s case “at specific points,” but whether it “*entirely* fails to [test] the prosecution’s case.”<sup>228</sup> But Justice Stevens’s counter is persuasive: when the “points” at which counsel failed to test the prosecution’s case “encompass all of counsel’s fundamental duties at a capital sentencing proceeding—performing a mitigation investigation, putting on available mitigation evidence, and making a plea for the defendant’s life after the State has asked for death—counsel *has* failed ‘entirely.’”<sup>229</sup>

An approach to constructive absence that focuses on the exercise of lawyerly judgment would resolve the dispute about what counts as a “point” and what counts as “entirely.” Or, more precisely, it would shift the terms of the dispute, thereby rendering it easier to resolve. The exercise of lawyerly judgment in a capital case requires, at a minimum, evaluation of what actions might save the client’s life and an attempt to take the actions most likely to do so; therefore, if counsel has not investigated potential mitigation, introduced mitigating evidence, or pleaded for the defendant’s life, he has not exercised lawyerly judgment.

That this is a better conclusion than the one the majority came to in *Cone* by its focus on “entirely” and its insistence that the “distinction is not one of degree but of kind” is clear from the Court’s rationale in *Cronic*. *Cronic*’s articulation of the purpose behind the strand of constructive absence focused

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226. See, e.g., *Rickman v. Bell*, 131 F.3d 1150, 1159 (6th Cir. 1997) (presuming prejudice where defense counsel, who was not responding to witness testimony or improper arguments by the prosecutor, himself “present[ed] a terrifying image of [the defendant], and thereby aligned himself with the prosecution against his own client”); *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991) (prejudice presumed where lawyer concedes both elements of the offense and client’s identity as perpetrator); *Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir. 1988) (prejudice presumed where counsel informed the judge in a letter, subsequently submitted to the state supreme court hearing Osborn’s appeal, that his client deserved the death sentence, that the defendant brought it on himself, and later insisted that whether it helped his client “wasn’t my concern”).

227. See *Harding v. Davis*, 878 F.2d 1341 (11th Cir. 1989) (prejudice presumed where counsel remained silent throughout most of the trial and failed to object when the court directed a verdict against the defendant).

228. *Bell v. Cone*, 535 U.S. 685, 697 (2002).

229. *Id.* at 716–17 (Stevens, J., dissenting).

on the failure to test the prosecution's case is that a lack of such testing "makes the adversary process itself presumptively unreliable."<sup>230</sup> But some *degrees* of inaction are so extreme that they also make the adversary process presumptively unreliable. If, as in one Tenth Circuit case, counsel waived both opening and closing statements, presented no evidence, *but* made one objection to the prosecutor's closing statement<sup>231</sup>—doing nothing else in the entire sentencing proceeding—surely such a proceeding should be deemed presumptively unreliable. Thus, identification of the touchstone of *Cronic* claims as the failure to exercise lawyerly judgment would require a different result in *Cone*, though only because the inaction in *Cone* is so extreme, given the nature of the proceeding.

#### IV. THE *CUYLER* TOUCHSTONE: LOYAL ADVOCACY

##### A. *Defining Torn Allegiance*

The Sixth Amendment right is not "the right to counsel," though we often refer to it that way, but "the right to the assistance of counsel." To state the obvious, a lawyer, in order to provide the "assistance of counsel," needs to be *assisting* the client. It is not only lawyerly judgment, but the exercise of that judgment *in the service of the defendant*, that constitutes the Sixth Amendment entitlement. I think it is this "assistance" aspect of the Sixth Amendment right that is central to the *Cuyler* conflict of interest category of counsel failures.

In a related line of cases I have not yet described, the Court has made clear that the Constitution does not foist lawyers on the unwilling, or even foist their preferences on crucial matters upon a defendant who has agreed to be represented by counsel. *Faretta v. California*<sup>232</sup> holds that a lay defendant, even one without technical legal knowledge, skills, or experience, has the right to represent himself, provided that he knowingly waives the assistance of counsel. According to the *Faretta* court, the right of self-representation "finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged . . . [and] grants to the accused personally the right to make his defense."<sup>233</sup> Concomitantly, while a defendant who accepts counsel is bound by the "strategic" decisions of counsel, the right to the "*assistance of counsel*" means that a represented defendant retains the

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230. *United States v. Cronic*, 466 U.S. 648, 659 (1984).

231. *Fisher v. Gibson*, 282 F.3d 1283, 1288 (10th Cir. 2002) (granting relief on guilt phase claims and therefore not reaching ineffectiveness in sentencing).

232. 422 U.S. 806 (1975).

233. *Id.* at 818–19.

right to make decisions concerning “fundamental rights,” including choices concerning whether to plead guilty, whether to waive his rights to jury trial, whether to be present at trial, whether to testify on his own behalf, or whether to concede guilt in the hopes of avoiding the death penalty.<sup>234</sup>

This is not to say that a defendant has the right to a lawyer who will do anything for him; as *Nix v. Whiteside*<sup>235</sup> made clear, a defendant is not entitled to commit perjury, and consequently, not entitled to his lawyer's assistance in doing so. Nor is he entitled to his lawyer's assistance in hiding evidence, intimidating a witness, bribing a juror, or doing many other things that an accused might contemplate, but are the subject of criminal prohibition. Put differently, the accused is entitled to the same use of the lawyer's skill, judgment, and energy that the lawyer would be entitled to use in his or her own defense.

*Glasser, Holloway, Cuyler, and Mickens* all recognize that other duties or interests may impair the serve-my-client-as-myself assistance required by the Sixth Amendment. “The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters.”<sup>236</sup> Thus, *Cronic* claims focus on the lack of the essence of counsel—the exercise of lawyerly judgment—while *Cuyler* claims focus on the lawyer's decision to *override* that lawyerly judgment due to concerns other than the defendant's interests. And just as *Cronic* claims do not depend on the reason that no lawyerly judgment was exercised, *Cuyler* claims *do not depend on the reason the lawyerly judgment was overridden*. Speaking of joint representation cases, the Court in *Holloway* described “the conflict” in terms that would appear to apply to other kinds of conflicting interests: it lies “in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.”<sup>237</sup>

Moreover, the Court's rationale for dispensing with a prejudice inquiry in joint representation cases seems applicable to other cases in which the conflicting interest is not a codefendant:

[E]ven with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on an attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into

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234. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1503–05 (2018).

235. 475 U.S. 157 (1986).

236. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978).

237. *Id.* at 490 (emphasis omitted).

a claim of harmless error here would require, unlike most cases, unguided speculation.<sup>238</sup>

Notice that this view of the heart of conflict of interest claims also explains the Court's decision in *Cuyler* (and *Mickens*) that it is not just conflicts of interest in the abstract, but conflicts that "adversely affect the lawyer's performance" that give rise to a presumption of prejudice. The Sixth Amendment demands loyal advocacy. It does not, however, demand loyalty for its own sake, but because loyal advocacy assures the defendant that he is being "assisted" by counsel and assures the rest of us that the reliability enhancement that counsel affords is not impeded by the diversion of a lawyer's judgment to purposes other than adversarial testing of the prosecution's case for guilt and sentence. We can also look at the question of what should count as a conflict of interest from the perspective of why *Strickland's* standards should not apply to conflicted counsel, and here too, the answer does not suggest a difference between conflicts that arise from joint representation and those that arise from other sources of divided loyalties. *Strickland* presumes competence and defers heavily to strategic choice when a defendant attempts to rebut that presumption. It is hard to imagine, however, why we would defer to strategic choices under circumstances where a lawyer's actions reflect a balancing of conflicting motivations; that is, in a situation where the lawyer is not loyal to the client.

If loyal advocacy were accepted as the touchstone of *Cuyler* claims, would this open the door to assertions of endless varieties of purportedly "torn" lawyers? In one sense, every lawyer is a torn lawyer. Family priorities (or hobbies or health) may compete with time spent on a particular case, and time spent on one case may compete with time spent on another case. If such conflicts count as *Cuyler* conflicts, then *Strickland* collapses into *Cuyler*. But I think they need not do so, and this is because "loyal advocacy" cannot mean single-minded pursuit of one client's best interests. As already noted, the loyalty due a client does not require a willingness to commit crime, nor even "drop everything." Indeed, even a lawyer representing himself or herself might have other demands on his or her time and attention.

Rather, *Cuyler* claims are claims that a lawyer's judgment is subjected to *undue* influence by other considerations. There is a parallel here to *Cronic* claims; a *Cronic* claim is not a claim that a lawyer's judgment in a particular case was imperfect, for at least over the course of a trial, all lawyers will exercise imperfect judgment; rather, a *Cronic* claim is that what counsel did could not be considered exercising lawyerly judgment at all. Likewise, a

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238. *Id.* at 490-91.

lawyer's time and efforts are always in some sense divided, but a *Cuyler* claim arises when a lawyer is *torn*—so deeply conflicted at the moment he must make strategic decisions that he is not acting as a loyal advocate.

*B. Applying the “Loyal Advocacy” Standard*

*1. Sequential Representation and Representation of Parties Other than Codefendants*

Focusing on loyal advocacy makes the answer to the question raised at the end of *Mickens* an easy one: No, it does not matter whether concurrent or sequential representation is at issue. Nor should it matter whether the representation is of two defendants, or a defendant and a witness. Representation of any two such parties imposes separate duties of loyalty, and where those duties result in an actual conflict, it is enough to show that the lawyer's performance was adversely affected.

Moreover, this focus also drives rejection of any per se rule cordoning off multiple representation from all other cases, such as that promulgated by the Fifth Circuit. The harder question is, what other classes of cases impede loyal exercise of a lawyer's judgment to the same extent as do multiple representation cases?

*2. Financial and Professional Stake*

In *Beets*, one of the media rights contract cases, the Fifth Circuit reasoned that *Strickland* rather than *Cuyler* should be applied to financial stake cases, because, unlike multiple representation cases where the lawyer may be “immobilized by conflicting ethical duties among clients, a lawyer who represents only one client is *obliged* to advance the client's best interest despite his own interest or desires.”<sup>239</sup> This is true, but beside the point if the touchstone is loyal advocacy. A touchstone of loyal advocacy requires that the first question be whether lawyers *will* choose to advance the client's interest over their own, and the second, whether they *will be able* to do so.

With respect to the first question, it seems clear that where contingency fee arrangements or media contracts are involved, to assume that lawyers *will* put aside their own interests blinks the facts. Lawyers in such situations have *already* elected to put their own financial interests over the commands of the rules of professional conduct, which clearly forbid both “contingen[cy] fee[s] for representing a defendant in a criminal case”<sup>240</sup> and “agreement[s] prior to the conclusion of representation] giving the lawyer

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239. *Beets v. Scott*, 65 F.3d 1258, 1271 (5th Cir. 1995) (emphasis added).

240. MODEL RULES OF PROF'L CONDUCT r. 1.5(d)(2) (AM. BAR ASS'N 2018) (emphasis added).

literary or media rights to a portrayal or account based in substantial part on information relating to the representation.”<sup>241</sup> I am not arguing that a conflict exists because the Rules identify one, although the existence of the Rule does suggest that the Bar Association—which has had a committee studying professional ethics for a century—believes that there is a substantial risk that lawyers will compromise their clients’ interests in such circumstances. Nonetheless the *Mickens* majority is right that the Rules of Professional Conduct are not co-extensive with the contours of the Sixth Amendment guarantee.<sup>242</sup> If they were, automatic reversal would follow upon establishment of a conflict, but because the Sixth Amendment concern is with reliability, adverse effect must also be demonstrated. So the relevance of the Rules here is not what they prohibit, but that the lawyers in question chose to ignore those rules. I see no persuasive force behind a generalization that a lawyer who places his financial interest ahead of binding Rules of Professional Conduct will not put those interests above his clients’ welfare.

Equally important as the likelihood that a lawyer who disobeyed rules prohibiting contingency fees or media contracts would deliberately place his interest above his clients is the likelihood that his judgment of what is in his or her clients’ interest would be involuntarily swayed by his financial self-interest. The concept of motivated cognition, also referred to as “hot cognition,” posits that being motivated to reach a particular conclusion often leads to unconsciously biased reasoning.<sup>243</sup> This phenomenon has been demonstrated in a variety of contexts, including the formation of beliefs about events and other people.<sup>244</sup> And most relevant here, it has been demonstrated to affect legal judgments.<sup>245</sup>

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241. MODEL RULES OF PROF’L CONDUCT r. 1.8(d) (AM. BAR ASS’N 2018).

242. *Mickens v. Taylor*, 535 U.S. 162, 176 (2002) (“The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland*, however, is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant’s Sixth Amendment right to counsel.”).

243. Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990).

244. *Id.*; see also Charles S. Taber et al., *The Motivated Processing of Political Arguments*, 31 POL. BEHAV. 137 (2009); Eileen Braman & Thomas E. Nelson, *Mechanism of Motivated Reasoning? Analogical Perception in Discrimination Disputes*, 51 AM. J. POL. SCI. 940 (2007); Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755 (2006); David P. Redlawsk, *Hot Cognition or Cool Consideration? Testing the Effects of Motivated Reasoning on Political Decision Making*, 64 J. POL. 1021 (2002); Mark Fischle, *Mass Response to the Lewinsky Scandal: Motivated Reasoning or Bayesian Updating?*, 21 POL. PSYCHOL. 135 (2000); Lindsley G. Boiney et al., *Instrumental Bias in Motivated Reasoning: More When More Is Needed*, 72 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1 (1997).

245. See, e.g., Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CAL. L. REV. 1313 (2012); Eileen Braman, *Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making*, 68 J. POL. 308 (2006); Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers’ Socio-Political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31 (1999).

How do people reach those biased conclusions without realizing that they are doing so? Rather than consider all the facts to which they have access in a neutral way, people who are motivated to reach a particular conclusion conduct a biased search through the information, rules, and beliefs they have to help themselves reach the outcome they desire. They can also be creative in combining the knowledge they access to construct new beliefs that can provide logical support for the desired conclusion.<sup>246</sup>

What motivated cognition does not do is enable a decisionmaker to reach a completely unreasonable conclusion; this is because motivated decisionmakers attempt to be rational and find a justification that would persuade a neutral observer.<sup>247</sup> Thus, this psychological process operates under an illusion of objectivity; people are unaware of the biases driving their decisionmaking and may not realize that “in the presence of different directional goals . . . they might even be capable of justifying opposite conclusions.”<sup>248</sup>

The relevance of this phenomenon to lawyers with significant financial interests in conflict with the clients they represent is obvious: Even assuming that the lawyer is not trying to make strategic decisions based upon his financial stake, his estimation of the risks and benefits of various strategies will be altered by the presence of the motivation to make a decision in line with that stake. Worse yet, those decisions are unlikely to be either consciously venal or implausible; therefore, if subjected to analysis under *Strickland*, the lawyer with a financial stake in a particular outcome or intermediate decision will—often honestly—report that he made those strategic decisions in good faith, and those decisions will not appear patently unreasonable.

Thus, it seems to me that the question should not be whether financial stake creates a cognizable conflict of interest, but what degree of financial stake is sufficient to do so. All of the special financial arrangements forbidden by the rules seem like easy cases, in part because the particular lawyer has either had his or her ethical judgment *swayed* by the incentive, deluding himself or herself into believing that there is no ethical barrier, or else he or she has *deliberately* decided against ethical considerations (in which case we should have no confidence he would decide for his client over his self-interest).

With respect to the more ordinary financial incentives—such as the competition with more lucrative civil cases, or even a fee cap (unless

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246. Kunda, *supra* note 243, at 483.

247. *Id.* at 482–83.

248. *Id.* at 483. See Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*, 20 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 297, 310–11 (1987).

perhaps where that cap is tantamount to ordering significant expenditures rather than merely limiting compensation)—I am inclined to say that the lawyer is not torn. Unlike the media deal cases, there is no basis for inferring a willingness to override professional judgment, or for inferring that the incentive is so great as to subconsciously sway judgment.

The harder question is the professional incentives cases, which, like the financial incentives cases, vary a lot in how compelling the incentive is, but, unlike the financial incentives cases, cannot be resolved by drawing the line at whether the behavior was condemned by ethical rules. Consequently, whether the attempt to change sides renders a lawyer torn is not, I think, amenable to a simple answer. In part this is because there are so many variations, both in terms of the degree of professional advancement (or even financial stake) that will come with the sought-after position, and in terms of the conduct that is likely to advance that professional stake. Does it matter if the salary at the District Attorney's office is greater, or how much greater? Does it matter what the culture at a particular prosecutor's office is, or what kinds of lawyers that office typically hires? Does it matter who the opponent in the election is? Because of these variations, answers will depend upon specifics, and what is most important, therefore, is that the right question is asked: Is there a significant incentive to behave in a way that might warp litigation judgment?

Having said that, I think that an application to the district attorney's office ordinarily does not create a conflict. In large part, this is because it is unlikely to be clear what conduct will actually increase the chances of obtaining the job, and therefore, the attorney's judgment is less likely to be swayed. On the other hand, I think that running for the office of district attorney—or judge—does create a conflict of interest, simply because in most jurisdictions, zealous advocacy on the part of a criminal defendant is likely to cost votes. And once the lawyer has accepted a job on the other side? Sports team analogies come to mind here, but let me offer one closer to home: On my faculty, a person can participate in appointment matters while “looking,” but once he or she has accepted an offer from another law school, it is understood that he or she will not vote anymore.<sup>249</sup> Thus, once a lawyer has actually committed to another position, his or her representation of a defendant gives rise to a *Cuyler* claim—one that will prevail only, of course, if adverse effect also can be demonstrated.<sup>250</sup>

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249. In contrast, people who are planning to retire are viewed differently; they can vote until they actually stop teaching because there is no conflicting loyalty. Likewise, taking a job at a firm, a nonprofit, or a governmental agency other than a prosecutor's office does not produce a conflict. It is accepting an offer “on the other side” that creates a conflict.

250. There may be situations in which continued representation after acceptance of a position on

### 3. *Criminal Charges*

If the standard is loyal advocacy, this one should be easy. One can imagine a charge so small that it neither permits the conclusion that one does not respect the law nor supports an inference that one will have strong incentives to please the judge or prosecutor. But if we are talking about a felony, the stake in avoiding conviction is at least as likely to motivate cognition toward certain strategies as is a contingency fee or a book contract, and consequently, at least as likely to impair loyal advocacy. The reader who hesitates, attracted to some limitation that will assure that the charges are relevant (such as the one commonly imposed that the crime be the same) should remember that, as with respect to professional advancement—and all species of conflict claims—it is only when the defendant can show adverse effect that the conflict will lead to a new trial.

### 4. *Romantic and Sexual Entanglements*

Here I am not going to deploy empirical evidence, but rely on common experience regarding the power of love and sex. The desire to please or woo particularly early in a relationship is so ubiquitously human that to imagine that legal training inoculates against its influence is silly. The line I would draw, however, is a sexual or romantic *relationship*, not attraction, at least in most cases. Sleeping with or dating the enemy (or any member of the prosecution team) obviously creates incentives that diverge from the client's best interest. Similarly, sleeping with or dating the judge creates incentives against vigorous objections to rulings, or other aggressive challenges to the judge's actions.

Sleeping with a client also warps judgment and gives the lawyer incentives that he or she should not be considering. The professional rules have somewhat belatedly recognized the destructive impact of these relationships on the lawyer client relationship, though they have done so in large part because of the risk that clients may be coerced, or even if not coerced, may be psychologically vulnerable. The *Cuyler* concern, however, is not with power, but with the warping of judgment. Does the lawyer want to impress the client? Avoid confronting the client with his or her lack of candor? Hesitate before delivering bad news or giving unwanted advice? True, in some situations, the lawyer's romantic interest in the client will dovetail with the client's interest in zealous advocacy; but in such cases, adverse effect will not be demonstrable.

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the other side is in the client's best interest—in which case the client might elect to waive the conflict.

A sexual relationship with a client's spouse or partner is at least as likely to create conflicting motivations, and at least as likely to have unmeasurable effects. A dissenting judge in a case where the majority found no conflict put it well:

Sex is at the top of the list of compelling emotional forces. It propelled [defense counsel] into a conflict of interest with [his client] with the precise effect on his representation being unknown and unknowable. Would [counsel], whose character may otherwise be sterling, hold back a bit at trial, or change his strategy, in order to assure [his client's] unavailability to his wife—leaving [himself] a clear field?<sup>251</sup>

Where adverse impact can be demonstrated, such a relationship also compels reversal.

##### 5. *Antagonism or Ambivalence—Actual and Presumed*

Some defense lawyers and clients will not like each other. Even more often, defense lawyers will not like—or may even abhor—what their clients have done. As the Supreme Court has pointed out, the Sixth Amendment does not guarantee any particular emotional relationship. And yet, there are some relationships so fraught with poison that one cannot imagine loyal advocacy. That a client dislikes or distrusts his lawyer does not create a conflict; one would imagine that if such feelings arise early in the course of representation, it generally would be prudent to reassign the case, but that does not mean the Sixth Amendment compels such reassignment. But if the lawyer *despises* the client, and expresses that sentiment to the client,<sup>252</sup> or describes him to others in extreme terms, such as "epitomiz[ing] the banality of evil,"<sup>253</sup> then that lawyer is a torn lawyer, and his conflicted feelings should be traced to see whether they led to adverse effects on the representation.

It is a small step to recognize that there are also some—though not many—situations so *likely* to produce conflicted feelings that we should not demand evidence of those feelings. If the Sixth Amendment demands loyal advocacy, we should ask: Is it just too much to expect a lawyer not to be

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251. *Hernandez v. State*, 750 So. 2d 50, 56–57 (Fla. Dist. Ct. App. 1999) (Fletcher, J., dissenting) (footnote omitted) (dissenting from the opinion and decision on motion for rehearing en banc).

252. *State v. Moody*, 968 P.2d 578, 580–82 (Ariz. 1998) (finding a conflict between defendant charged with first-degree murder and his attorney was irreconcilable and required a change of counsel where attorney admitted that he told the defendant that he did not care about his case and attorney and defendant almost came to blows.).

253. *Commonwealth v. Washington*, 880 A.2d 536, 541 (Pa. 2005).

conflicted when his friend was the defendant's victim? Put differently, we should expect lawyers to be human beings, and expecting loyal advocacy in representing someone who is accused of violently assaulting or murdering a friend or relative is pretending that lawyers are not human. Lawyers may feel grief or anger or something inchoate—but it is quite likely that whatever they feel will compromise their loyalty. Lawyers who request permission to withdraw under such circumstances should be permitted to do so, and when lawyers fail to reveal a close relationship to the victim, a conflict should be presumed.

This leaves, I think, only *Mickens*, which is less obvious. While it is true that representation of a client is not the same as a close personal relationship, *for most lawyers*, the attorney-client relationship is one that produces at least loyalty, and often affection. When a lawyer has represented someone who later becomes the victim of a nonviolent crime, it is reasonable to assume (unless the lawyer protests the assignment on that basis), that the prior representation does not create a conflict of interest. But I think Justice Stevens had it right: We should “presume that the lawyer for the victim of a brutal homicide is incapable of establishing the kind of relationship with the defendant that is essential to effective representation.”<sup>254</sup> In fact, we should presume that the lawyer for the victim of any *violent* crime is a torn lawyer. Not to do so denigrates the right to loyal advocacy—and the humanity of the lawyer.

### CONCLUSION

I hope this article has at least convinced the reader that it is time to rethink the categories of counsel failure. In deciding whether to require a showing of a “reasonable likelihood of a different result,” or an “adverse effect,” or simply to presume prejudice, we need to focus on the purposes of the Sixth Amendment promise of the right to the “assistance of counsel” rather than on arbitrary categories untethered to those purposes. I think a focus on those purposes points toward lawyerly judgment and loyalty. When loyalty has been significantly compromised—for whatever reason—a defendant should receive a new trial if he can show that the compromised loyalty caused any adverse effect on his lawyer's performance. When lawyerly judgment has not been exercised—for whatever reason—a new trial should be automatic.

I remember here my client Ricky Drayton, executed by the State of South Carolina, my clients Emanuel Hammond and Curtis Osborne, executed by the State of Georgia, and my colleague John Blume's client, Betty Lou

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254. *Mickens v. Taylor*, 535 U.S. 162, 188 (2002) (Stevens, J., dissenting).

Beets, executed by the State of Texas. I trace my interest in the subject of this article to the outrageous behavior of their “lawyers.” In each of these four cases, the failures of trial counsel were not due to sloth, or ignorance, or stupidity, which are travesties enough, but to something more fundamental: the lack of lawyerly judgment directed toward saving their lives.

Emanuel and Betty Lou were both, in my view, represented by conflicted, badly torn lawyers, both of whom sold their skills—and loyalty—for media rights to their client’s stories. Emanuel’s lawyer, who had never previously tried a *felony*, let alone a murder case, should never have represented any capital defendant; his judgment of his own capability appears to have been twisted by the lure of rights to a blockbuster. Betty Lou’s lawyer held onto the media rights that he had negotiated as his fee instead of stepping down as her lawyer and testifying that she was unaware of the potential for pecuniary gain, and therefore not guilty of capital murder—his judgment of the importance of the testimony forfeited by that choice was equally warped by self-interest.

Curtis and Ricky, were, in my view, represented by constructively absent—truant—lawyers. When Curtis’s lawyer, speaking to another client, said, “That little n\*\*\* deserves the chair,” and boasted that he would hire no experts for Curtis, he was worse than no lawyer at all. And Ricky’s lawyer, who argued to the jurors that Ricky, *a man who could not read*, “could have climbed the ladder of success, but chose not to,” then reassured them, “You want to sentence him to death, O.K.”—that “lawyer” too was worse than no lawyer at all.

What those four lawyers did shames them. The affirmances of their convictions and death sentences—and their executions—shame us all. It’s time to rethink counsel failures, and align the *Cronic* and *Cuyler* categories with the purposes of the Sixth Amendment.