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ARTICLE

Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness

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Abstract. For years, experts have blamed *Strickland v. Washington*'s lax standard for assessing trial attorney effectiveness for many of the criminal justice system's problems. But the conventional understanding of *Strickland* as a problem for ineffectiveness claims gives the decision too much prominence because it treats *Strickland* as the test for all such claims. That is a mistake. Properly understood, the Supreme Court has recognized four different constitutional forms of trial attorney ineffectiveness, and *Strickland*'s two-pronged test applies to only one of the four. If litigants and courts would notice this complexity and relegate *Strickland* to its proper place, it would pave the way for meritorious ineffectiveness claims of the other three kinds. This Article disaggregates strands of Sixth Amendment doctrine that others have jumbled together to enable courts and litigants to confine *Strickland* to its proper domain and use more appropriate analyses elsewhere.

The Article also explains why additional disaggregation is necessary within the category of cases where *Strickland* rightly applies. Implicitly, the Supreme Court has created not one but three tests for assessing deficient performance within that domain, and it has indicated a willingness to soften the outcome-determinative prejudice prong as well. Failure to recognize these different forms of *Strickland* ineffectiveness has made the test seem much harder for defendants to satisfy than needs to be true. Recognizing these complexities, and applying the right test in the right case, is necessary if individual defendants are to be treated fairly and systemic constitutional problems in the provision of indigent defense services are to be addressed.

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Table of Contents

Introduction

Indigent defense features a paradox. Everyone knows that the conditions under which indigent defense services are provided often make effective representation impossible.[1] Public defender caseloads are too high for any attorney to manage effectively.[2] Some public defenders must meet clients for the first time in court, having had no opportunity to investigate or research their cases.[3] Judges often pressure public defenders to process cases quickly through the system and sometimes affirmatively punish defenders for filing motions or asserting their clients' rights.[4] These problems are notorious and

1. For years, scholars and judges have described these problems. *See, e.g.*, McFarland v. Scott, 512 U.S. 1256, 1256-61 (1994) (Blackmun, J., dissenting from the denial of certiorari) (noting how the legal counsel provided to indigent defendants was "woefully inadequate" and cataloguing the problem in capital cases); David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973) ("[W]hat I have seen in 23 years on the bench leads me to believe that a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment."); Stephen B. Bright & Sia M. Sanneh, Essay, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2152-55 (2013) (describing how the right to effective assistance of counsel is routinely violated around the country in criminal cases); Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 431-32 (1988) (collecting data from judicial surveys indicating that judges believe that many criminal defense attorneys who appear in their courtrooms are incompetent).

2. *See, e.g.*, Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* REFORMING CRIMINAL JUSTICE—VOLUME 3: PRETRIAL AND TRIAL PROCESSES 121, 123-24 (Erik Luna ed., 2017) (collecting studies and statistics); Samantha Jaffe, Note, *"It's Not You, It's Your Caseload": Using* Cronic *to Solve Indigent Defense Underfunding*, 116 MICH. L. REV. 1465, 1475-76 (2018) (noting that defenders in Atlanta have on average 59 minutes to spend on a case; defenders in Detroit have only 32 minutes per case; and defenders in New Orleans have only 7 minutes per case).

3. *See, e.g.*, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 16-19 (2004), https://perma.cc/WG55-D6Z2; NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 23, 30-36 (2009), https://perma.cc/NC7V-Q5Z6; NAT'L LEGAL AID & DEF. ASS'N, EVALUATION OF TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN: A RACE TO THE BOTTOM 1, 19, 29 (2008), https://perma.cc/DLC2-Q27K; NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 49-101 (2009), https://perma.cc/J6AM-DEJH (describing the problems in indigent defense delivery systems around the country, including a lack of sufficient funding, high caseloads, a lack of independence, and inadequate training and supervision).

4. *See, e.g.*, Stephen B. Bright, Address, *Independence of Counsel: An Essential Requirement for Competent Counsel and a Working Adversary System*, 55 HOUS. L. REV. 853, 882 (2018) (noting how attorneys are pushed to follow judges' needs and desires for fear of losing their jobs if they upset judges); Charlie Gerstein, *Dependent Counsel*, 16 STAN. J. C.R. & C.L. 147, 162-65 (2020) (discussing how judges pressure and punish defenders).

well documented,[5] and they frequently preclude effective representation. But—and here is the paradox—the number of cases where judges have deemed trial defenders constitutionally ineffective is vanishingly small.[6] Why?

The standard answer blames *Strickland v. Washington*.[7] Under that decision's two-pronged test, a criminal defendant arguing that his or her trial attorney's performance was constitutionally ineffective must show both that the trial attorney performed unreasonably given prevailing norms of practice and that the trial attorney's deficient performance prejudiced the defense.[8] But on the first prong, courts regularly presume that defense attorney actions that might seem to reflect attorney incompetence actually reflect deliberate, strategic

5. *See* sources cited *supra* note 3.

6. *See, e.g.*, NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 5, 9-10 (2007), https://perma.cc/G9SF-FM8M (noting that a majority of federal habeas petitions filed in district courts raise ineffective assistance of trial counsel claims but that grant rates are exceedingly low); 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.10(a) n.49 (West 2019) (collecting additional studies); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 & n.5 (describing one study of 4,000 state and federal appellate decisions and noting that the courts found ineffective assistance in only about 3.9% of cases); Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 135-37 (2010) (collecting statistics and finding that "courts remain[] reluctant to grant relief to defendants claiming ineffective assistance").

7. 466 U.S. 668 (1984); *see also* John H. Blume & Sheri Lynn Johnson, Essay, Gideon *Exceptionalism?*, 122 YALE L.J. 2126, 2138-39 (2013) (describing *Strickland* as "a formidable obstacle to defendants alleging that they were deprived of their Sixth Amendment right to the effective assistance of counsel"); Paul Marcus, *The United States Supreme Court (Mostly) Gives Up Its Review Role with Ineffective Assistance of Counsel Cases*, 100 MINN. L. REV. 1745, 1765 (2016) (describing how the *Strickland* standard makes it "so very difficult" to obtain relief); *id.* at 1765-66 (collecting scholars' and courts' statements describing and lamenting the *Strickland* standard). The *Strickland* standard is not the only reason why it is difficult to raise and win such claims. Scholars have also noted that there are procedural barriers to reviewing ineffective assistance of trial counsel claims. *See, e.g.*, Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance—Waiving* Padilla *and* Frye, 51 DUQ. L. REV. 647, 656 & nn.29-30 (2013) (discussing how prosecutors extract and courts enforce waivers of the right to claim ineffective trial attorney representation as part of plea bargaining); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 688-97 (2007) (arguing that locating ineffective assistance of trial counsel claims in collateral proceedings undermines defendants' abilities to raise these claims); Gray Proctor & Nancy King, *Post* Padilla*:* Padilla*'s Puzzles for Review in State and Federal Courts*, 23 FED. SENT'G REP. 239, 240-43 (2011) (discussing restrictions on raising ineffectiveness challenges, including retroactivity barriers, statutes of limitations, the prohibition on second or successive petitions, procedural default doctrines, deferential standards of review, and limits on obtaining evidentiary hearings).

8. *Strickland*, 466 U.S. at 687-96.

choices by counsel.[9] And on the second prong, courts are loath to find that any trial errors actually cause outcome-determinative prejudice.[10] All in all, experts lament, the way that courts apply *Strickland* makes claims of ineffective assistance nearly impossible to win.[11]

It is true that *Strickland* claims are hard to win. But the standard understanding of *Strickland* as a problem for ineffectiveness claims gives *Strickland* too much prominence because it treats *Strickland* as the test for all such claims. That is a mistake. Properly understood, the Supreme Court has recognized four different constitutional forms of trial attorney ineffectiveness, and *Strickland*'s two-pronged test applies to only one of the four. If litigants and courts would notice this complexity and relegate *Strickland* to its proper place, it would pave the way for meritorious ineffectiveness claims of the other three kinds.

In this Article, I distinguish and name the four forms of constitutional ineffectiveness. Ineffectiveness can be either *structural* or *personal*. It can also be either *episodic* or *pervasive*. These two distinctions interact. Attorney ineffectiveness can be structural and episodic, or structural and pervasive, or personal and episodic, or personal and pervasive. Below, I explain the differences among these four forms of ineffectiveness. *Strickland*'s two-pronged test, properly understood, applies only to the episodic personal form. By demonstrating that ineffectiveness also takes other forms, this analysis can help litigants and courts apply the appropriate test to different kinds of ineffectiveness claims, rather than lumping them all together under *Strickland*.[12]

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9. *See, e.g.*, Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 633-34 (1986) ("The primary reason appellate courts give for denying ineffective assistance claims is that the court does not wish to second-guess a lawyer's decisions concerning proper trial strategy or tactics."); Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786-87 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)) (noting that "a lawyer with a pulse will be deemed effective").

10. *See, e.g.*, Cecelia Klingele, Editor's Observations, *Vindicating the Right to Counsel*, 25 FED. SENT'G REP. 87, 87 (2012) ("*Strickland*'s prejudice prong has proven to be a formidable obstacle in vindicating the right to counsel.").

11. *See, e.g.*, Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 12 (1986) (arguing that the *Strickland* standard "announced a constitutional right to reasonably competent lawyering but promptly proceeded to strip the right of any force"); Richard Klein, *The Constitutionalization of* In*effective Assistance of Counsel*, 58 MD. L. REV. 1433, 1445 (1999) (describing *Strickland* as "a disaster of constitutional proportions" (capitalization altered)).

12. I am not the first to discuss the importance of disentangling different strands of ineffective assistance of counsel doctrine. In *Disentangling the Right to Effective Assistance of Counsel*, Sanjay Chhablani sought to distinguish the Sixth Amendment right to counsel from the due process right to counsel. *See* Sanjay K. Chhablani, *Disentangling*

footnote continued on next page

A *structurally* ineffective trial attorney is ineffective not due to some fault of her own but rather by virtue of outside forces that operate on her.[13] This form of ineffectiveness stems from sources external to the trial attorney herself. For example, a trial judge can make it impossible for defense counsel to do her job properly by interfering with counsel's ability to consult with her client[14] or preventing counsel from presenting arguments to the court.[15] Structural ineffectiveness can also be the product of the indigent defense delivery system. If an attorney must handle 19,000 cases in a year (which would give her only seven minutes for the average case),[16] it does not matter how qualified she is or how hard she is willing to work. She cannot provide effective assistance of counsel when the system gives her so little time.[17]

Alternatively, an attorney is *personally* ineffective if the failure to provide competent trial representation is attributable to the lawyer herself. This form of ineffectiveness is internal to the defense attorney rather than imposed on her by an external source. For example, there are lawyers who sleep through trial,[18] abuse alcohol and drugs while representing defendants,[19] or fail to do

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the Right to Effective Assistance of Counsel, 60 SYRACUSE L. REV. 1 (2009). My focus is different. Instead of discussing the relationship between due process and the Sixth Amendment, I argue that courts should recognize and disaggregate the tests for the four different forms of ineffective assistance of trial counsel that exist under the Sixth Amendment right to counsel.

13. My use of the word "structural" here differs from the Supreme Court's when it describes structural versus harmless error on direct appeal. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991) (describing the difference between trial errors that are subject to harmless error review and structural errors that defy harmless error analysis). Structural error, in the Supreme Court's view, "affect[s] the framework within which the trial proceeds" and "transcends the criminal process." *Id.* at 309-11. Structural ineffectiveness as I describe it is trial attorney ineffectiveness that is not attributable to the defense attorney herself but rather is caused by the state's structure or other state actors in that structure. Some forms of structural ineffectiveness defy harmless error analysis and are structural errors that will result in automatic reversal on appeal. *See infra* Part I.A. Other forms of structural ineffectiveness are subject to harmless error analysis because they are more isolated. *See infra* Part I.B.

14. *See, e.g.*, Geders v. United States, 425 U.S. 80, 87-89 (1976).

15. *See, e.g.*, Herring v. New York, 422 U.S. 853, 856, 862-65 (1975).

16. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 3, at 21 (explaining that part-time defenders in New Orleans are "handling the equivalent of almost 19,000 cases per year per attorney, which literally limits them to seven minutes per case"); *see also* sources cited *supra* note 2.

17. *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 56-59 (1932).

18. *See* Muniz v. Smith, 647 F.3d 619, 623 (6th Cir. 2011).

19. *See* Paul Duggan, *George W. Bush: The Record in Texas*, WASH. POST (May 12, 2000), https://perma.cc/786W-P8U7.

basic legal research or factual investigation.[20] In many of these cases, the trial attorney's ineffectiveness is not the fault of the system. It is a failing of the particular lawyer.[21]

The difference between personal and structural ineffectiveness goes to the cause of an attorney's deficient performance: Does the deficiency result from a flaw in the specific attorney or from something about the system?[22] The other distinction I introduce here, between *episodic* and *pervasive* ineffectiveness, goes not to the cause of deficient performance but rather to its breadth in a particular defendant's case. A trial attorney who misunderstands a point of law and therefore fails to file a motion to suppress evidence is in that respect ineffective, but that ineffectiveness might be an isolated occurrence within a proceeding where the attorney otherwise does a good job. I use the term "episodic" to describe such discrete episodes of deficient performance. In contrast, if an attorney fails to show up for trial at all, the ineffectiveness is *pervasive*. It shapes the entire proceeding rather than a discrete thing within it.

Two points about the distinction between episodic and pervasive ineffectiveness bear emphasis here. First, episodic and pervasive ineffectiveness exist along a continuum. If a proceeding features many instances of episodic ineffectiveness, the ineffectiveness at some point becomes pervasive. Suppose an attorney does not meet with her client, fails to investigate the case, presents

20. *See, e.g.*, McFarland v. Scott, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting from the denial of certiorari) ("Capital defendants have been sentenced to death when represented by counsel who never bothered to read the state death penalty statute . . . ."); Bright & Sanneh, *supra* note 1, at 2166-70 (collecting examples); Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351, 383-89 (2009) (same).

21. A defense lawyer can be both personally and structurally ineffective in the same criminal case if, for example, the judge interferes with her ability to conduct the trial (rendering her structurally ineffective), *and* she is high on drugs during her representation of the client (rendering her personally ineffective). The judge's interference would be analyzed under the structural ineffectiveness line of cases and the attorney's drugged state under the personal ineffectiveness line.

22. Admittedly, some outward displays of incompetence that initially appear to be examples of personal ineffectiveness might be symptoms that flow from forms of structural ineffectiveness. *See infra* Part II.

Of course, all trial attorney ineffectiveness is attributable to the government in a sense. *See* Cuyler v. Sullivan, 446 U.S. 335, 343 (1980) ("Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty." (citations omitted)). Here, I mean a different kind of attribution that is more directly causal. I am not asking if there is sufficient action attributable to the state or federal government to satisfy the state action requirement. Rather, I am asking about the root cause of the trial attorney's deficient performance: Did the government prevent the attorney from performing effectively, or was the failure the fault of the attorney herself?

neither an opening statement nor a closing argument, and examines no witnesses at trial. At some point, the attorney's ineffective performance is better understood as a constructive denial of counsel throughout the proceeding, and it makes sense to think of the ineffectiveness as pervasive rather than merely episodic. In this respect, the episodic-pervasive distinction is unlike the personal-structural distinction: Personal ineffectiveness does not become structural by sheer multiplication.

Second, the question whether ineffectiveness is episodic or pervasive is different from the question whether a defendant was prejudiced by an attorney's performance. The prejudice analysis asks about the *effects* of an error.[23] In contrast, the difference between episodic and pervasive ineffectiveness is not a matter of effects. Episodic ineffectiveness can be just as damaging as pervasive ineffectiveness. Instead, the distinction between episodic and pervasive ineffectiveness is a matter of the breadth of ineffective performance within the overall proceeding. Did the attorney perform deficiently with respect to a particular thing, or was the deficient performance a feature of most or all of the proceeding?

The four forms of trial attorney ineffectiveness can thus be represented in a two-by-two matrix:

23. *See* Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277, 282-84 (2020) (discussing how prejudice is an element of various criminal procedure analyses).

	Personal	**Structural**
Episodic	*Definition*: An isolated instance of trial attorney ineffectiveness that is attributable to the trial attorney herself. *Examples*: • Defense attorney fails to object to inadmissible evidence because the attorney simply missed that it was inadmissible or was not paying attention. • Defense attorney fails to file a pretrial motion to suppress or exclude evidence due to an erroneous understanding of the applicable law.	*Definition*: An isolated instance of trial attorney ineffectiveness that is attributable to the government or the structure of the system. *Examples*: • State denies defendant an attorney at a postindictment, pretrial lineup. • State denies defendant an attorney for a matter of moments during an insignificant part of a trial.
Pervasive	*Definition*: Trial attorney ineffectiveness that is attributable to the trial attorney herself and that pervades the entire process. *Examples*: • Defense attorney is drunk or sleeping throughout the trial. • Defense attorney does not investigate, make arguments, or question witnesses at trial despite having the opportunity to do so.	*Definition*: Trial attorney ineffectiveness that is attributable to the government or the structure of the system and that pervades the entire process. *Examples*: • Judge denies defendant an attorney altogether. • High caseloads prevent defense attorney from being able to meet client pretrial, investigate the case, research, or present a defense.

Properly understood, the Supreme Court's Sixth Amendment right-to-counsel jurisprudence recognizes these four different forms of trial attorney ineffectiveness (albeit without these labels).[24] It also recognizes that there are different tests for determining when trial attorney ineffectiveness is constitutionally problematic depending on which form of ineffectiveness is at issue. Only episodic personal ineffectiveness is governed by the narrow, two-

24. For a mapping of Supreme Court cases into these four categories, see the Appendix.

pronged *Strickland* test. The test's doctrinal requirements simply do not make sense as applied to instances of structural or pervasive ineffectiveness.

Unfortunately, some courts and litigants have treated *Strickland* as if it were applicable to ineffectiveness claims generally rather than to a specific kind of ineffectiveness claim.[25] That error threatens to underenforce the right to effective trial counsel on the whole because data from the last three decades suggest that many of the problems in criminal defense representation in this country are structural, not personal.[26] To attempt to remedy those problems with a tool designed for redressing episodic instances of personal ineffectiveness is, at best, to play whack-a-mole with the Sixth Amendment. It prevents lower courts from addressing structural problems in states' indigent defense delivery systems.[27]

I have two aims in this Article. First, I distinguish the different forms of ineffective assistance so as to enable courts and litigants to confine *Strickland* to its proper domain and use more appropriate analyses elsewhere. This project involves disaggregating strands of Sixth Amendment doctrine that others have jumbled together.

Second, I show that further disaggregation is necessary within the category of episodic personal ineffectiveness where *Strickland* applies. Many lower courts and scholars, in addition to improperly pushing all ineffectiveness claims into the *Strickland* box, apply the harshest and most

25. For example, some courts will consider whether counsel's failures were strategic even when the type of ineffectiveness alleged is structural. *See, e.g.*, State v. Warren, 780 S.E.2d 835, 839, 843 (N.C. Ct. App. 2015) (suggesting that a defense attorney's failure to call two witnesses might have been strategic even though the defendant had raised a structural ineffectiveness claim on appeal alleging that the trial judge had erroneously failed to grant a defense request for a continuance after defense counsel had petitioned the trial court to produce those two witnesses and the court had failed to produce them). Other courts improperly graft *Strickland*'s prejudice requirement onto pervasive structural errors. *See, e.g.*, Platt v. State, 664 N.E.2d 357, 362-64 (Ind. Ct. App. 1996) (rejecting the petitioners' pervasive structural ineffectiveness argument for failure to demonstrate specific prejudice under *Strickland*). For a more extended discussion of this problem, see Part II below.

26. *See* sources cited *supra* note 3; *see also infra* Part II.

27. Sometimes structural problems in indigent defense delivery systems are systemic problems that exist across all cases. Other times, they are one-off problems that occur in individual cases. The two-by-two matrix above assumes (as Supreme Court doctrine dictates) that the courts' ineffectiveness analyses are conducted on an individualized, case-by-case basis. That does not mean that these individual cases cannot be leveraged to effectuate systemic change when the structural problems are systemwide. Pretrial class actions seeking structural reform are one way to effectuate such sweeping change. *See infra* notes 198-203 and accompanying text (discussing such cases). Recurring posttrial remedies can also be used to catalyze systemic change. *See generally* Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1 (2010) (discussing how individualized, posttrial habeas challenges can promote systemic change).

state-friendly version of the *Strickland* test to all ineffectiveness challenges.[28] In so doing, they fail to recognize that the *Strickland* test itself is multilayered and not always so state friendly.

Although the Supreme Court has denied that there is a checklist for assessing trial attorney performance under *Strickland*,[29] it has adopted a de facto checklist for certain kinds of ineffectiveness challenges.[30] In fact, there are three different tests for assessing trial attorney performance within *Strickland*, and two of those tests are much easier for defendants to satisfy than scholars and lower courts have assumed.[31] Additionally, the Supreme Court has recently indicated a willingness to soften the outcome-determinative-prejudice inquiry, and some states have already taken steps in that direction.[32] Recognizing and disentangling the different layers of the *Strickland* test for episodic personal ineffectiveness is important for providing an adequate check on poor attorney performance, preventing the wrongful conviction of innocent people, and ensuring the procedural fairness necessary to generate respect for the legal system and its results.[33]

This Article proceeds in four parts. Part I describes the development of the four forms of ineffectiveness in Supreme Court doctrine. That development began with a focus on structural ineffectiveness and later began to address personal ineffectiveness. Once both concerns became a part of the doctrine, the Court's 1984 decisions in *Strickland v. Washington*[34] and *United States v. Cronic*[35] recognized the four different forms of trial attorney ineffectiveness—but the Court did not label them or discuss their different tests as clearly as it could have. Part I clarifies that doctrine.

Part II explores how and why the Supreme Court has focused primarily on episodic personal ineffectiveness since *Strickland* and *Cronic* were decided. That focus has in turn prompted litigants, scholars, and lower courts to focus on *Strickland* as the dominant test for trial attorney ineffectiveness. For reasons I explain, this myopic focus on *Strickland*, and on episodic personal ineffectiveness more generally, is problematic.

Part III revisits structural ineffectiveness in its episodic and pervasive forms, explaining how these branches of the doctrine have evolved in some lower courts and how they provide underappreciated opportunities to address

28. *See infra* Part IV.

29. *See* Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

30. *See infra* Part IV.A.

31. *See infra* Parts IV.A.1-.3.

32. *See infra* Part IV.B.

33. *See infra* Part IV.

34. 466 U.S. 668.

35. 466 U.S. 648 (1984).

systemic problems of trial attorney ineffectiveness. Part IV then conducts a parallel analysis for personal ineffectiveness, again in both its episodic and pervasive forms. I explain how lower courts and litigants applying *Strickland* have improperly conflated three different tests for assessing trial attorney performance, discuss how recent Supreme Court case law opens the door to broader review of personal ineffectiveness challenges, and explain why such broader review is important. The Article then concludes by encouraging litigants, courts, and scholars to think more carefully about the different forms of ineffectiveness when discussing the right to effective assistance of counsel.

I. The Path to Four Forms of Trial Attorney Ineffectiveness

The Supreme Court's jurisprudence on criminal defendants' Sixth Amendment right to effective trial counsel has not been a model of clarity. Between 1932 and 1984, the Court's thinking evolved significantly. The Court began that period with a focus on cases involving states' flat refusal to appoint counsel for indigent defendants.[36] In the scheme this Article presents, those cases involved ineffective assistance that was both structural (because its source was the states) and pervasive (because the denial of counsel was complete). Gradually, the Court also came to consider cases involving partial denials of counsel—in this Article's terms, cases where ineffective assistance was structural and episodic.[37] It took almost forty years from the Court's initial rulings on structural ineffectiveness for the Court to begin recognizing personal ineffectiveness claims.[38] But once it did, it was not long before the Court recognized personal ineffectiveness in both its episodic and pervasive forms. Even at the end of this process, the Court never fully articulated the four categories of ineffectiveness that its cases recognized. But by 1984, when the Court decided *Strickland v. Washington*[39] and *United States v. Cronic*,[40] the four different forms of constitutional ineffectiveness were visible in the Court's decisions.

A. An Initial Focus on Pervasive Structural Ineffectiveness

The Supreme Court's initial rulings on the scope of the Sixth Amendment right to counsel dealt with complete denials of that right. In the 1930s, many state and federal courts required indigent criminal defendants to plead guilty

36. *See infra* Part I.A.

37. *See infra* Part I.B.

38. *See infra* Part I.C.

39. 466 U.S. 668.

40. 466 U.S. 648.

or go to trial without ever having an opportunity to consult with an attorney.[41] In *Johnson v. Zerbst*, the Supreme Court held that "[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[42] The Court later extended the right to appointed counsel to defendants in state-court prosecutions that would result in actual jail time.[43] And criminal defendants whose rights under these cases were violated did not have to demonstrate prejudice: Convictions obtained in cases where defendants were denied counsel at trial or when taking a plea were subject to automatic reversal.[44]

The government's complete denial of an attorney to an indigent defendant is the quintessential example of a pervasive structural ineffectiveness problem. The problem is structural rather than personal because it stems from the government. It is pervasive rather than episodic because counsel is denied for the entire course of the proceedings. In such cases, there is no need to demonstrate prejudice because "[p]rejudice in these circumstances is so likely that case-by-case inquiry . . . is not worth the cost."[45] After all, the Court has noted that a criminal defendant without an attorney "lacks both the skill and knowledge adequately to prepare his defense"[46] and face the "intricacies of the law and the advocacy of the public prosecutor."[47] Without counsel, the defendant "may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible."[48] Moreover, the "impairment[] of the Sixth Amendment right . . . [is] easy to identify," the government is directly responsible for the problem,

41. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 459-60 (1938); Powell v. Alabama, 287 U.S. 45, 49-50, 52-53, 56 (1932); *see also, e.g.*, Sara Mayeux, *What* Gideon *Did*, 116 COLUM. L. REV. 15, 28-30 (2016) (describing how indigent defense delivery operated on a charity model before *Gideon v. Wainwright*, 372 U.S. 335 (1963), and noting that half of Massachusetts defendants appeared in court on their own as a result).

42. 304 U.S. at 463 (footnote omitted).

43. *See Gideon*, 372 U.S. at 338-39, 343-45 (applying the right to defendants charged with felonies); *see also* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (extending the *Gideon* right to counsel to alleged misdemeanants facing jail sentences). *But cf.* Scott v. Illinois, 440 U.S. 367, 369 (1979) (limiting *Argersinger* and holding that there is a constitutional right to counsel only if the defendant faces actual, as opposed to potential, imprisonment upon conviction).

44. *See, e.g.*, *Gideon*, 372 U.S. at 343-45; Tomkins v. Missouri, 323 U.S. 485, 488-89 (1945); Williams v. Kaiser, 323 U.S. 471, 476-77 (1945).

45. Strickland v. Washington, 466 U.S. 668, 692 (1984).

46. *Powell*, 287 U.S. at 69.

47. United States v. Ash, 413 U.S. 300, 309 (1973).

48. *Powell*, 287 U.S. at 69.

and the violation is "easy for the government to prevent."[49] So when counsel is denied at trial (or when a defendant pleads guilty), the ineffectiveness is structural and pervasive, and convictions are automatically reversed without any need for the defendant to demonstrate prejudice.

The foregoing analysis applies most easily in cases where counsel is actually completely denied. But early on, the Supreme Court recognized that pervasive structural ineffectiveness could also be *constructive*. Consider *Powell v. Alabama*.[50] In that case, seven poor, black men were accused of raping two white women.[51] The trial judge did not appoint counsel, instead relying on "all the members of the bar" who were present to assist as needed.[52] In three separate trials, each lasting a day, the defendants were all convicted and sentenced to death.[53] The Supreme Court held that the defendants' rights to counsel had been violated even though attorneys were technically present to represent them in the courtroom on the day of the trial.[54] As the Court noted:

> [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense . . . .[55]

Two lawyers offered to help at trial, but their "appearance was . . . pro forma."[56] The attorneys were present, but they were not willing or able to act as advocates for the defendants. As the Court later put it, the appointment of counsel in such circumstances is "a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."[57]

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49. *Strickland*, 466 U.S. at 692.

50. 287 U.S. 45.

51. *Id.* at 49-51.

52. *Id.* at 56-57.

53. *Id.* at 49-50.

54. *Id.* at 53-56, 68-71.

55. *Id.* at 57. *Powell* was decided as a due process case because the Supreme Court had not yet incorporated the Sixth Amendment against the states, but it was later understood as a right to counsel case. *See* Gideon v. Wainwright, 372 U.S. 335, 341-42 (1963).

56. *Powell*, 287 U.S. at 57-58 (quoting Powell v. State, 141 So. 201, 214 (Ala. 1932) (Anderson, C.J., dissenting), *rev'd*, 287 U.S. 45).

57. Avery v. Alabama, 308 U.S. 444, 446 (1940) (footnote omitted); *see also* Strickland v. Washington, 466 U.S. 668, 685 (1984) ("That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an

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Another common scenario in early cases finding pervasive structural ineffectiveness featured trial courts requiring criminal defense attorneys to represent codefendants simultaneously, even when the defense attorneys claimed that joint representation would pose conflicts of interest. In *Holloway v. Arkansas*, the defense attorney objected to his appointment to represent three codefendants facing charges of robbery and rape on the ground that the defendants had mutually adverse interests.[58] All three wanted to testify, and their shared counsel could not possibly simultaneously represent them all without a conflict.[59] The trial court denied the request to appoint separate counsel for the three defendants, and the Supreme Court held that the defendants' rights to effective assistance of counsel had been violated.[60] The violation was structural because it was forced on the defendants by the court. And it was pervasive because the conflict of interest

> may well have precluded defense counsel . . . from exploring possible plea negotiations . . . . 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 [the] clients in order to minimize the culpability of one by emphasizing that of another.[61]

In short, the conflict of interest infected the attorney's performance throughout the proceedings. And as in the cases featuring complete denials of the right to counsel, the Supreme Court in the conflict-of-interest scenario presumed prejudice rather than requiring that it be specifically demonstrated.[62]

As these cases demonstrate, the Supreme Court's first interventions focused on structural actions by the court system that resulted in the complete and total denial of representation (actual or constructive). Once a complete denial of counsel was detected, prejudice was presumed, and the defendant was entitled to a new trial.

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attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."); White v. Ragen, 324 U.S. 760, 763-64 (1945) (per curiam) ("[I]t is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel.").

58. 435 U.S. 475, 476-77 (1978).

59. *Id.* at 477-81.

60. *Id.* at 484, 489-91.

61. *Id.* at 490.

62. *Id.* at 490-91 (noting that a rule requiring the defendants to show prejudice in specific ways "would not be susceptible of intelligent, even-handed application" and that determining what impact a conflict of interest had on "the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible"); *see also* Mickens v. Taylor, 535 U.S. 162, 168, 173-74 (2002) (limiting the automatic prejudice presumption to structural cases).

B. The Move to Episodic Structural Ineffectiveness

The scenario of pervasive structural ineffectiveness presents a relatively straightforward violation of the right to counsel, and the Court's response was similarly simple: The complete denial of the right to counsel, whether actual or constructive, entitled defendants to new trials without the need to demonstrate specific prejudice. But once the Supreme Court began enforcing the right to counsel in this way, subtler questions naturally arose. For example, what if a trial court appointed counsel but limited that counsel's involvement at specific points in the trial? What if counsel was present at trial but the trial court (or the justice system more broadly) denied the defendant access to counsel at a critical pretrial stage? Judges, legislators, and executive officials who were hostile to the Court's recognition in *Gideon* of a right to appointed counsel found creative ways to limit counsel's involvement.[63] Their actions raised the possibility of ineffectiveness that was structural but episodic rather than pervasive. Soon after the Supreme Court announced its remedy for pervasive structural ineffectiveness, it began to address cases involving ineffectiveness that was structural but episodic.

For example, in *Gilbert v. California*, the defendant was charged with, among other things, a series of robberies.[64] At trial, the government offered testimony indicating that eleven eyewitnesses had identified the defendant as the robber at a postindictment, pretrial lineup that police had staged without defense counsel present.[65] *Gilbert* was decided along with a companion case, *United States v. Wade*.[66] In these cases, the Court first noted that corporeal pretrial identification procedures are "peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial."[67] The eyewitnesses are often subjected to suggestive influences that are difficult to re-create and challenge at trial later on. Additionally, once a witness picks a suspect out of a lineup, she is unlikely to change her mind, and witness

63. *See, e.g.*, Mayeux, *supra* note 41, at 17-19 (explaining how some judges and legislators around the country were hostile to the right to appointed counsel); *see also id.* at 62-63 (describing how hostile trial judges tried to avoid the implications of *Gideon*, believing that "petty stuff should be . . . handled by the judge in his own way" (alteration in original) (internal quotation marks omitted) (quoting William P. Homans, Jr., Board Member, Massachusetts Defenders Committee)).

64. 388 U.S. 263, 265 (1967).

65. *Id.* at 269-70; *see also* Gilbert v. United States, 366 F.2d 923, 934 (9th Cir. 1966) (discussing the testimony of these eleven eyewitnesses). Police had put over one hundred eyewitnesses to these various robberies into an auditorium together and asked them en masse to identify the perpetrator from a lineup. *See Gilbert*, 388 U.S. at 269-70, 270 n.2.

66. 388 U.S. 218 (1967).

67. *Id.* at 228.

identification testimony tends to be highly persuasive to juries.[68] For these reasons, the Court deemed pretrial lineups "critical stages" in criminal prosecutions where counsel's presence is "necessary to preserve the defendant's basic right to a fair trial."[69] Because Gilbert did not have counsel at the pretrial lineup, the Supreme Court held that his Sixth Amendment right to counsel had been violated.[70] In other cases, the Court deemed other elements of criminal proceedings "critical stages" subject to the same analysis. Examples include pretrial police interrogations[71] and a defendant's pretrial decision to submit to a psychiatric examination.[72]

Of course, the trial itself is also a critical stage of the prosecution, and the episodic denial of the right to counsel within it is treated comparably. In *Geders v. United States*, for example, the trial court ordered the defense attorney not to consult with his client for a period of seventeen hours during an overnight recess that was taken while the defendant was testifying at trial.[73] Recognizing that the trial itself is a critical stage of the prosecution, the Court found a violation of the Sixth Amendment.[74]

The fact that the Sixth Amendment is violated, however, does not always mean that a conviction is reversed and a new trial ordered. Where the denial of counsel is structural and pervasive, that result follows automatically (as noted above) without any need for a specific demonstration of prejudice. But the Court's treatment of cases involving episodic structural denials of the right to counsel is similar only up to a point. As in cases where the denial is pervasive, the defendant in an episodic-denial case is entitled to a presumption of prejudice. But that presumption goes only to the specific episode in which counsel was denied, rather than applying pervasively to the entire proceeding.

Thus, if a criminal defendant's Sixth Amendment right to counsel has attached,[75] and so long as that right has not been waived, denying the defendant access to counsel at a critical stage constitutes a Sixth Amendment

68. *Id.* at 228-32.

69. *Id.* at 227.

70. *Gilbert*, 388 U.S. at 271-72.

71. *See* Massiah v. United States, 377 U.S. 201, 203-04, 206 (1964).

72. *See* Estelle v. Smith, 451 U.S. 454, 469-71 (1981). The Court deemed arraignment and preliminary hearings critical stages that would trigger the need for counsel, *see id.* at 469-70, but whether the denial of counsel at those stages results in episodic or pervasive structural ineffectiveness is a trickier question, *see infra* Part III.B.

73. 425 U.S. 80, 81-82 (1976).

74. *Id.* at 82-83, 91.

75. *See* Rothgery v. Gillespie County, 554 U.S. 191, 198 (2008) (noting that the Sixth Amendment right to counsel attaches at the moment of the first formal hearing, indictment, formal charge, preliminary hearing, information, or arraignment, whichever comes first).

violation requiring the exclusion of any evidence obtained at that critical stage. As the Court noted in *Gilbert*, the government is at fault in cases like these, and "[o]nly a *per se* exclusionary rule . . . can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of . . . counsel."[76] The defendant has no obligation to show that the denial of counsel was prejudicial with respect to what happened at that stage; prejudice is conclusively presumed and the Sixth Amendment violation deemed complete.[77] But instead of presuming that the entire proceeding was tainted by prejudice, as in the case of a pervasive structural denial,[78] the appellate courts subject the episodic deprivation of counsel at a critical stage to harmless error review under *Chapman v. California*.[79] In other words, a denial of counsel that is structural and episodic is always a Sixth Amendment violation, but a reviewing court will not reverse the conviction and order a new trial without giving the prosecution the opportunity to demonstrate beyond a reasonable doubt that the deprivation of counsel at the critical stage was harmless to the ultimate outcome.[80] For example, if the defendant was deprived of counsel at a pretrial interrogation but the government can show beyond a reasonable doubt that the resulting statement did not contribute to the conviction, reversal will not be warranted.[81] Similarly, if a defendant facing a capital sentencing hearing is not given access to counsel before deciding to undergo a pretrial psychiatric examination on the issue of his future dangerousness, the reviewing court will not reverse if the State can prove beyond a reasonable doubt that the psychiatrist's testimony about the evaluation was harmless.[82]

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76. Gilbert v. California, 388 U.S. 263, 273 (1967).

77. *See, e.g.*, *Estelle*, 451 U.S. at 469-71 (denial of counsel before deciding whether to submit to a pretrial psychiatric interview); Moore v. Illinois, 434 U.S. 220, 231 (1977) (denial of counsel at a postindictment, pretrial corporeal identification procedure); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (plurality opinion) (denial of counsel at a preliminary hearing); United States v. Wade, 388 U.S. 218, 236-37 (1967) (denial of counsel at a postindictment, pretrial corporeal identification procedure); White v. Maryland, 373 U.S. 59, 59-60 (1963) (per curiam) (denial of counsel at a preliminary hearing).

78. *See* sources cited *supra* note 44.

79. 386 U.S. 18, 22-24 (1967).

80. *See, e.g.*, Satterwhite v. Texas, 486 U.S. 249, 257-58 (1988) (holding that an *Estelle* violation is subject to the *Chapman* harmless error test); *Moore*, 434 U.S. at 227-32 (holding that a *Wade* violation is subject to the *Chapman* harmless error test); Milton v. Wainwright, 407 U.S. 371, 372, 377-78 (1972) (holding that a *Massiah* violation is subject to the *Chapman* harmless error test); *Coleman*, 399 U.S. at 10-11 (holding that a violation of the right to counsel at a preliminary hearing in Alabama is subject to the *Chapman* harmless error test).

81. *See Milton*, 407 U.S. at 372.

82. *See Satterwhite*, 486 U.S. at 254-58. There are, of course, always questions about the line between the episodic and pervasive forms of structural ineffectiveness. *See infra* Part III.B

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C. The Coming of Personal Ineffectiveness

The Supreme Court addressed personal ineffectiveness in *McMann v. Richardson*, a 1970 case involving a criminal defendant who pleaded guilty and then wanted to attack the plea as constitutionally defective.[83] According to the defendant, his trial attorney met with him for only ten minutes before he pleaded guilty, incorrectly advised him that they could not challenge the voluntariness of his confession until postconviction proceedings, and told him to plead guilty to avoid the electric chair.[84] There was no allegation of an external, structural ineffectiveness problem in *McMann*; the defendant was arguing that fault lay with his attorney personally, not the system.[85] The Supreme Court in *McMann* acknowledged that personal, or internal, ineffectiveness can violate the Sixth Amendment, but it remanded the case to the lower courts without saying much about the legal test for personal ineffectiveness or the appropriate next steps if personal ineffectiveness was found.[86]

Some clarification came ten years later in *Cuyler v. Sullivan*.[87] *Cuyler* involved a potential conflict of interest: Two lawyers jointly represented three codefendants in a murder trial.[88] But unlike in *Holloway*,[89] the trial court had not directed defense counsel to undertake that joint representation. The lawyers were privately retained.[90] If defense counsel were compromised by a conflict of interest, it was because they had made a poor choice. In other words, the ineffectiveness at issue was personal, not structural. But although the cases differed in that respect, they were comparable in another: As in *Holloway*, the Court recognized that ineffectiveness arising from a conflict of interest pervades an entire proceeding.[91] If defense counsel labored under an actual conflict of interest that adversely affected counsel's performance, the Court wrote, that deficiency would infect the entire trial in ways that could not be

(discussing how the denial of counsel at arraignments and preliminary hearings may be pervasive or episodic depending on the state's procedural rules).

83. 397 U.S. 759, 760 (1970).

84. *Id.* at 762-63.

85. *See id.*

86. *Id.* at 770-71, 774-75 (acknowledging that trial attorney ineffectiveness can give rise to a later constitutional challenge if unreasonable attorney incompetence induced a plea and noting that defendants "are entitled to the effective assistance of competent counsel").

87. 446 U.S. 335 (1980).

88. *Id.* at 337.

89. Holloway v. Arkansas, 435 U.S. 475, 476-77 (1978).

90. *Cuyler*, 446 U.S. at 337.

91. *Id.* at 349-50.

measured, and the Court would not "indulge in nice calculations as to the amount of prejudice" attributable to the conflict.[92] In a case of pervasive personal ineffectiveness, prejudice would be presumed, and reversal would be automatic.[93]

But what if a personal ineffectiveness claim was predicated on counsel's individual, episodic errors at trial or during a plea-negotiation process rather than on a conflict of interest? When would counsel's performance be deficient enough to be deemed unreasonable? And how much prejudice would a defendant have to show in order to obtain postconviction relief? The Supreme Court did not answer these questions until 1984.

D. *Strickland* and *Cronic* Solidify the Existence of Four Forms of Ineffectiveness

At this point in the development of Sixth Amendment doctrine, the Court had addressed cases where the problem of ineffective assistance of counsel was (1) structural and pervasive, (2) structural and episodic, or (3) personal and pervasive. What of the fourth possibility—ineffective assistance that was personal and episodic? For example, what if defense counsel performed ineffectively not by litigating while burdened by a conflict of interest but by failing to call a witness or failing to object to a piece of evidence? The Court finally addressed that scenario in 1984, when it decided *Strickland v. Washington*.[94] On the same day, the Court also decided *United States v. Cronic*.[95] And though the Court did not explain the decisions in these terms, *Strickland* and *Cronic* together mapped and distinguished the four forms of trial attorney ineffectiveness.

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92. *Id.* at 348-50 (quoting Glasser v. United States, 315 U.S. 60, 76 (1942), *superseded in other part by rule*, Fed. R. Evid. 104(a)).

93. The Court did note that, in order to establish a Sixth Amendment violation, the defendant first needed to demonstrate an actual conflict of interest that affected trial counsel's representation. *Id.* at 348. The mere possibility of a conflict was not sufficient. After all, sometimes multiple representation of defendants by an attorney can be advantageous to the defendants, and sometimes defendants are willing to waive any conflict. But once the defendant demonstrated that counsel was laboring under an actual conflict of interest that affected counsel's choices and actions, prejudice would be presumed. For example, if the record showed that defense counsel failed to cross-examine a prosecution witness due to fear about implicating one of the codefendants even though the testimony might have been favorable to another codefendant, then there was an actual conflict. *Id.* at 348-49 (discussing *Glasser*). Or if counsel failed to object to arguably inadmissible evidence because it would help one defendant even if it might hurt another, that would demonstrate a conflict. *Id.* at 349 (discussing *Glasser*).

94. 466 U.S. 668 (1984). The issue had been percolating in the lower courts for years. *See* Bazelon, *supra* note 1, at 28-38 (summarizing the lower courts' approaches).

95. 466 U.S. 648 (1984).

Strickland and *Cronic* involved allegations of ineffective assistance of trial counsel at opposite corners of my two-by-two matrix. In *Strickland*, after the defendant was convicted of kidnapping and murder and sentenced to death, he alleged that his trial attorney was constitutionally ineffective at the sentencing phase of his trial, citing six specific errors that he thought trial counsel made.[96] So the case presented the Supreme Court with an allegation of episodic personal ineffectiveness. In contrast, the allegation in *Cronic* was one of pervasive structural ineffectiveness. The trial court in *Cronic* appointed a young lawyer with a real estate practice to represent a defendant indicted on mail fraud charges and gave the lawyer twenty-five days to prepare.[97] (The lawyer had asked for at least thirty.[98]) After he was convicted at trial, Cronic argued that, in light of the complexity of the charges, giving his trial attorney only twenty-five days to prepare necessarily prevented him from having effective assistance of counsel.[99]

The Supreme Court rejected both claims in opinions that implicitly surveyed the four forms of ineffectiveness. First, the *Strickland* Court noted the possibility of pervasive structural ineffectiveness by writing that "[a]ctual or constructive denial of the assistance of counsel altogether [violates the Sixth Amendment and] is legally presumed to result in prejudice."[100] The Court's concern with structural rather than merely personal ineffectiveness in this respect was particularly clear in *Cronic*. Citing *Powell v. Alabama*,[101] the *Cronic* Court noted the possibility of "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."[102] The idea that something about the circumstances of a trial could prevent even a fully competent attorney from being able to provide effective

96. *Strickland*, 466 U.S. at 672, 675. The allegations were that counsel had "failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts." *Id.* at 675.

97. *Cronic*, 466 U.S. at 649, 663.

98. *Id.* at 663.

99. *Id.*

100. *Strickland*, 466 U.S. at 692; *accord Cronic*, 466 U.S. at 659 n.25 ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was . . . totally absent . . . ."). The Court also recognized that pervasive structural ineffectiveness could be constructive as well as actual. *Strickland*, 466 U.S. at 685 ("That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command.").

101. 287 U.S. 45 (1932).

102. *Cronic*, 466 U.S. at 659-60 (emphasis added).

assistance makes clear that the Court was discussing structural as opposed to personal ineffectiveness.

In *Strickland* and *Cronic*, the Court recognized that structural ineffectiveness can be episodic as well as pervasive,[103] noting that prejudice is presumed in both scenarios for the same reasons[104] (albeit relative only to the specified episodes in one and to the entire proceeding in the other[105]). First, "[p]rejudice . . . is so likely that case-by-case inquiry . . . is not worth the cost."[106] Second, the total deprivation of counsel at trial or at a critical stage is "easy to identify" and thus easy to prevent going forward.[107] And third, the government is "directly responsible" for structural problems, so it can take steps to prevent them.[108]

With respect to personal ineffectiveness claims, the Court recognized both the episodic and pervasive forms of personal ineffectiveness and promulgated a test for personal ineffectiveness challenges going forward. First, the defendant would have to show that the trial attorney's performance was deficient, meaning that counsel performed unreasonably given prevailing norms of practice.[109] For example, the Court noted that *Cuyler v. Sullivan* involved a claim of deficient performance because the defendant alleged that the defense attorney had breached the duty of loyalty to the client and "fail[ed] to render

103. *See Strickland*, 466 U.S. at 686 ("Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." (citing Geders v. United States, 425 U.S. 80 (1976) (judge bars attorney from speaking with client during an overnight recess); Herring v. New York, 422 U.S. 853 (1975) (judge bars defense's closing argument in a bench trial); Brooks v. Tennessee, 406 U.S. 605 (1972) (judge requires that defendant be first witness to testify); and Ferguson v. Georgia, 365 U.S. 570 (1961) (judge prevents direct examination of defendant))).

104. *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 659 & n.25.

105. That is, *Chapman*'s harmless error inquiry applies to episodic structural ineffectiveness claims, but pervasive structural ineffectiveness claims are subject to automatic reversal on appeal. *See supra* Parts I.A-.B.

106. *Strickland*, 466 U.S. at 692.

107. *Id.*

108. *Id.* Of course, episodic structural ineffectiveness claims are still subject to *Chapman* harmless error review on appeal. *See supra* note 80 and accompanying text.

109. *Strickland*, 466 U.S. at 687-91. The deficient performance prong of the *Strickland* test followed naturally from the Court's decision in *McMann v. Richardson*, 397 U.S. 759 (1970). As the Court put it, it had already "indirectly" recognized the standard of "reasonably effective assistance" in *McMann* when it said "that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not 'a reasonably competent attorney' and the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" *Strickland*, 466 U.S. at 687 (quoting *McMann*, 397 U.S. at 770-71).

'adequate legal assistance'" due to a conflict of interest.[110] To establish deficient performance in that context, the defendant had to demonstrate that there was an actual conflict of interest that affected defense counsel's representation.[111]

But deficient performance could exist outside of conflict-of-interest cases when a trial attorney makes errors at trial or during a plea negotiation process if those errors demonstrate that counsel performed unreasonably given prevailing norms of practice. While recognizing that unreasonable errors by counsel could give rise to constitutional violations, the Court was concerned about hamstringing defense counsel by limiting their freedom to make strategic choices and deterring attorneys from becoming defense counsel for fear of being harshly "grade[d]" by reviewing courts.[112] For these reasons, it announced that there would be no checklist for attorney performance.[113] Rather, defense counsel would be "strongly presumed" to have made strategic choices, and defendants would have the burden of overcoming that presumption.[114]

Strickland and *Cronic* also made clear that the test for personal ineffectiveness would depend on whether the deficient performance alleged was pervasive or episodic. For pervasive personal ineffectiveness, once deficient performance is shown, prejudice will be presumed just as it is for pervasive structural ineffectiveness.[115] The prejudice issue, the Court wrote, is about the effect of counsel's pervasive failure on the fairness of the trial, not about who is culpable for that failure.[116] So if ineffectiveness is pervasive, it infects the entire proceeding, and defendants should not be asked to demonstrate specific prejudice.[117]

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110. *Strickland*, 466 U.S. at 686 (quoting Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)); *see also* United States v. Cronic, 466 U.S. 648, 655 (1984).

111. *See Cuyler*, 446 U.S. at 348-50.

112. *Strickland*, 466 U.S. at 689-91, 697.

113. *Id.* at 688-89.

114. *Id.* at 690.

115. *Cronic*, 466 U.S. at 659.

116. *Id.* at 662 & n.31. In so noting, the Supreme Court rejected the government's attempt to distinguish between pervasive structural claims and pervasive personal claims. The government had argued that a presumption of prejudice should apply only when trial counsel is subject to "external constraints" on her performance. *Id.* at 662 n.31. The Court disagreed, noting that the presumption of prejudice applies to pervasive claims even if the problem is "entirely self-imposed," because of the breadth of the violation. *Id.*

117. *See id.* at 659 ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice [is] required . . . .").

But when personal ineffectiveness is episodic, prejudice will not be presumed—not even with respect to the specific episode in which counsel performed ineffectively.[118] In this respect, personal ineffectiveness is treated differently from structural ineffectiveness where prejudice is presumed for purposes of establishing a Sixth Amendment violation, even for episodic errors. There are two reasons why. First, "[t]he government is not responsible for, and hence not able to prevent, [personal] attorney errors."[119] Defendants would accordingly bear the burden of demonstrating prejudicial effect. Second, the likelihood of prejudice is greater when ineffectiveness is structural and episodic than when it is personal and episodic.[120] In the former scenario, the government has deprived the defendant of counsel at a critical stage or interfered with counsel's ability to do her job, and a defendant who must operate without the assistance of counsel (even only episodically) is, in that episode, utterly exposed to the hazards of a complex system and a sophisticated prosecutorial apparatus. In that posture, "[p]rejudice . . . is so likely that case-by-case inquiry . . . is not worth the cost."[121] But when episodic ineffectiveness is personal rather than structural, the defendant is often not similarly exposed, even though the attorney who is supposed to protect him is performing inadequately. As a result, episodic personal attorney errors come in a variety of different forms ranging from extremely prejudicial to utterly harmless.[122] For these reasons, the Court concluded that a defendant alleging episodic personal ineffectiveness would have to demonstrate prejudice. In particular, they would have to show that their trial attorney's deficient performance prejudiced their defense by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[123]

118. *Strickland*, 466 U.S. at 693 ("Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.").

119. *Id.* The Court noted that structural ineffectiveness is easier for a court to detect since the government or the system itself is imposing restrictions on defense counsel, and it is easier for the government to refrain from imposing structural limits on trial counsel's performance than it is to find and prevent all forms of personal ineffectiveness. *See id.* at 692.

120. *See id.* at 692.

121. *Id.*

122. *Id.* at 693.

123. *Id.* at 694; *see also id.* ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). This standard is not as demanding, the Court noted, as a standard requiring a defendant to show "that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. But it is more demanding than a requirement that the defendant merely demonstrate that attorney errors "impaired the presentation of the defense." *Id.* (quoting Brief of Respondent at 58, *Strickland*, 466 U.S. 668 (No. 82-1554), 1983 U.S. S. Ct. Briefs LEXIS 533).

In sum, the Court had recognized and distinguished among the four forms of ineffectiveness once *Strickland* and *Cronic* were decided. And the Court had articulated the doctrinal tests applicable in each scenario. Notably, only one form—episodic personal ineffectiveness—requires defendants to make specific showings of prejudice in order to establish Sixth Amendment violations.

II. Personal-Episodic Myopia

Since the Supreme Court articulated its two-pronged test for assessing claims of episodic personal attorney ineffectiveness in *Strickland*, it has paid little attention to structural ineffectiveness. In fact, the Supreme Court has not reached the merits of a structural ineffectiveness challenge in the last thirty years.[124] Instead, almost all of the Court's jurisprudence on issues of the ineffective assistance of trial counsel has addressed episodic personal ineffectiveness.

There are several potential reasons why the Court focused on personal ineffectiveness after *Strickland*. First, the *Strickland* test was new. Litigants and lower courts accordingly made many arguments about the test's two prongs—deficient performance and prejudice—each of which initially seemed to be a fairly open-ended standard.[125] By contrast, the tests for the structural forms of ineffectiveness were well established. Moreover, complete denials of counsel at trial were rare by the 1980s—or, more precisely, they were rare in cases involving defendants who might plausibly file postconviction challenges to their trial attorneys' performance.[126] Many assumed that the judiciary had little appetite for claims of constructive structural ineffectiveness: *Powell v. Alabama* remains

124. The last case was *Perry v. Leeke*, 488 U.S. 272 (1989), which rejected a claim. More recently, *Woods v. Donald* raised an episodic structural ineffectiveness challenge predicated on a trial court's decision to conduct ten minutes of the trial proceedings without defense counsel present, but the Court disposed of the case under 28 U.S.C. § 2254(d) without addressing the merits of the underlying claim. 135 S. Ct. 1372, 1375-78 (2015) (per curiam).

125. *See* Berger, *supra* note 11, at 104-12 (discussing the hard questions left open for litigants to resolve after *Strickland*); Grace Chung & Alan Sege, *Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991-1992—Trial; Right to Counsel*, 81 GEO. L.J. 1267, 1281-90 (1993) (summarizing the arguments and decisions in courts interpreting the *Strickland* standard).

126. Most defendants have no incentive (or even ability) to file postconviction challenges to their trial attorneys' performance because it takes years to get to postconviction review, and the defendants are released from custody before postconviction review becomes possible. *See* Primus, *supra* note 7, at 680-81. As a result, although alleged misdemeanants are often denied counsel, they typically don't challenge the Sixth Amendment violation. *See* Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648, 1683-86, 1694 (2019) (reviewing ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018)) (noting that "motions and appeals are rarely filed").

the only case in which the Supreme Court has credited such a claim, and many lower courts thought that the Court's unwillingness to find a Sixth Amendment violation in *Cronic* made it clear that constructive structural claims would be difficult to win.[127] As for episodic forms of structural ineffectiveness, which commonly occurred in pretrial proceedings, they were generally addressed through exclusion of the resulting evidence at trial or with *Chapman* analysis of improperly admitted evidence later on.[128] Twenty years after *Strickland* and *Cronic*, the Court revealed much about conventional thinking by describing *Cronic* as creating a "narrow exception" to the otherwise-dominant *Strickland* regime for assessing attorney effectiveness.[129]

Claims of pervasive personal ineffectiveness also receded. A few litigants tried to get the Supreme Court to say more about that scenario, but their attempts were rebuffed when the Court either recast their claims as alleging episodic ineffectiveness[130] or used the deferential standards of federal habeas corpus review to avoid addressing the claims on their merits.[131] In all, of the forty ineffective assistance of counsel cases that the Supreme Court has addressed since *Strickland* and *Cronic*, thirty-one have focused on episodic personal ineffectiveness.[132] Not surprisingly, the Supreme Court's focus on *Strickland*'s domain has led lower courts and scholars to focus on it as well. A Westlaw search reveals that for every judicial citation to *Cronic*, there are approximately twenty citations to *Strickland*.[133] The scholarly consideration of

127. *See, e.g.*, United States v. Roy, 855 F.3d 1133, 1144 (11th Cir. 2017) (en banc) (describing *Cronic* as creating an exception to *Strickland* and noting that "the exception applie[s] 'to only a very narrow spectrum of cases'" and that the "burden of establishing that an error warrants *Cronic*'s presumption of prejudice is a 'very heavy one'" (emphasis omitted) (quoting Stano v. Dugger, 921 F.2d 1125, 1153 (11th Cir. 1991) (en banc))); *see also* Lorelei Laird, *The* Gideon *Revolution*, A.B.A. J., Jan. 2017, at 44, 46 (noting that David Carroll, the Executive Director of the Sixth Amendment Center, believes that *Cronic* "might not have been on attorneys' radars because the criminal defendant in *Cronic* lost his ineffective assistance claim"); Carol S. Steiker, Keynote Address, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2701 (2013) (describing *Cronic* as "shut[ting] off systemic arguments by individual defendants seeking to overturn their convictions").

128. *See supra* Part I.B.

129. *See* Florida v. Nixon, 543 U.S. 175, 190 (2004).

130. *See* Bell v. Cone, 535 U.S. 685, 696-98 (2002).

131. *See* Wright v. Van Patten, 552 U.S. 120, 124-26 (2008) (per curiam) (avoiding a pervasive personal ineffectiveness challenge by noting that the law was not clearly established and therefore did not satisfy federal habeas requirements).

132. *See infra* Appendix (categorizing Supreme Court cases).

133. According to a Westlaw search conducted on January 20, 2020, there have been 187,104 citations to *Strickland* in the courts and only 8,985 citations to *Cronic*.

Strickland far outpaces consideration of *Cronic* as well.[134] Many scholars criticize the *Strickland* standard, talking about the injustices that result from its application and proposing alternatives.[135] *Cronic* is often ignored, and when it is mentioned, scholars typically note its limited effect and emphasize that it is a small exception to the generally applicable *Strickland* regime.[136]

This focus on episodic personal ineffectiveness is problematic. It threatens to underenforce the right to effective trial counsel on the whole because data from the last three decades suggest that many of the problems in criminal defense representation in this country are structural, not personal.[137] To attempt to solve those problems with a tool designed for redressing episodic instances of personal ineffectiveness would be, at best, to play whack-a-mole with the Sixth Amendment. And if anything, that image understates the futility of approaching the project this way, because structural problems are not properly understood as the sum of many instances of personal ineffectiveness.

Some litigants have tried to raise structural ineffectiveness challenges and have been stymied by lower courts whose tendency to regard *Strickland* as the sole framework for ineffectiveness claims has led them to incorporate aspects of *Strickland*'s analysis where they do not belong. For example, there are cases involving allegations of structural ineffectiveness where courts have deployed *Strickland*'s presumption that lawyers are competent and are engaged in tactical decisionmaking.[138] That presumption is entirely inapposite in structural

134. According to a Westlaw search conducted on January 20, 2020, there have been 5,365 citations to *Strickland* in secondary sources and only 1,203 citations to *Cronic*.

135. *See, e.g.*, *supra* note 11 (criticizing the *Strickland* standard); *see also, e.g.*, Calhoun, *supra* note 1, at 416-17 (proposing an alternative); Jahaan Shaheed, Note, *The "Amorphous Reasonable Attorney" Standard: A Checklist Approach to Ineffective Counsel in Juvenile Court*, 24 GEO. J. LEGAL ETHICS 905, 914-18 (2011) (same).

136. *See* sources cited *supra* note 127; *see also, e.g.*, Kimberly Helene Zelnick, *In* Gideon*'s Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363, 380 (2003) (describing "the *Cronic* exception" as "illusory"); Amanda Myra Hornung, Note, *The Paper Tiger of* Gideon v. Wainwright *and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 495, 513 (2005) (arguing that the Supreme Court has interpreted the *Cronic* "exception" narrowly). In light of some lower courts' willingness to recognize *Cronic* violations in civil cases challenging systemic indigent defense delivery failures, there has been some recent discussion of *Cronic* in the literature, *see, e.g.*, sources cited *infra* notes 196, 203, but it is still dwarfed by the discussion of *Strickland*.

137. *See* sources cited *supra* notes 2-3.

138. *See, e.g.*, State v. Warren, 780 S.E.2d 835, 839, 842 (N.C. Ct. App. 2015). *Warren* is one example of a case where a state court improperly applied *Strickland* to a structural claim. There are others. *See e.g.*, Robinson v. State, 791 S.E.2d 13, 15-16 (Ga. 2016) (applying *Strickland* incorrectly to an allegation of structural ineffectiveness predicated on the system's failure to appoint the defendant counsel until a year after his arrest and counsel's consequent inability to find defense witnesses); People v. Fuller, No. 255961, 2005 WL 3076931, at *1-2 (Mich. Ct. App. Nov. 17, 2005) (per curiam) (applying
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ineffectiveness challenges. If the allegation is that the structure of an indigent defense delivery system prevents attorneys from having the time or information needed to make tactical decisions, courts should not presume that the decisions those attorneys made were tactical. As the Court noted in *Cronic*, there are cases where even fully competent attorneys cannot possibly deliver constitutionally adequate representation.[139]

Consider, for example, *State v. Warren*.[140] Defense counsel had requested a writ to have two defense witnesses transported from a detention facility to testify at trial.[141] When the State failed to transport the prisoners, counsel asked for a continuance, which the trial court denied.[142] On appeal, the defendant alleged that the trial court's failure to grant the continuance interfered with his trial attorney's ability to provide effective representation.[143] Even though the claim raised was a structural ineffectiveness challenge predicated on trial court action, the North Carolina Court of Appeals analyzed the defendant's ineffectiveness claim under *Strickland*, noting that "we are unable to determine whether defense counsel's failure to call [the witnesses] to testify constituted trial strategy."[144] Nothing in the record suggested a trial strategy *not* to call these witnesses. Counsel requested their presence, applied for and received writs to obtain their presence, and objected when they were not produced by the State.[145] This was a structural ineffectiveness challenge not susceptible to *Strickland*'s analytical structure—but, by habit or otherwise, the court applied *Strickland* anyway.

The improper conflation of the tests for personal and structural ineffectiveness has also infected civil lawsuits aimed at redressing structural violations of the Sixth Amendment. Consider *Platt v. State*, an Indiana case in which a group of criminal defendants filed a pretrial civil action arguing that "the system for providing legal counsel for indigents in Marion County lacks sufficient funds for pretrial investigation and preparation which inherently causes ineffective assistance of counsel at trial."[146] That allegation clearly claimed structural ineffectiveness. But the Indiana Court of Appeals rejected the plaintiffs' Sixth Amendment claims because the plaintiffs did not

Strickland incorrectly where the defendant alleged that ineffectiveness resulted from his trial attorney's appointment to represent him on the day of trial).

139. United States v. Cronic, 466 U.S. 648, 659-60 (1984).

140. 780 S.E.2d 835.

141. *Id.* at 839.

142. *Id.*

143. *Id.* at 843.

144. *Id.*

145. *Id.* at 839-40.

146. 664 N.E.2d 357, 362 (Ind. Ct. App. 1996).

demonstrate specific prejudice as described in *Strickland*.[147] The requirement to demonstrate prejudice under *Strickland* is, of course, a requirement tailored for claims of episodic personal ineffectiveness; it is entirely inapposite in cases alleging pervasive structural violations. Indeed, its transposition to the pervasive structural context is particularly troubling given that Supreme Court doctrine specifically establishes that prejudice should be presumed upon a finding of pervasive structural ineffectiveness.[148] But in *Platt*, as in *Warren*, *Strickland*'s analysis infected a domain where it did not belong and doomed a Sixth Amendment claim.

Focusing on episodic personal ineffectiveness is also problematic because many trial judges are particularly reluctant to recognize that kind of ineffectiveness, even when it does exist. Because *Strickland* ineffective assistance of trial counsel claims typically require extrarecord development in the trial court about what counsel did and did not do and about her defense strategies,[149] trial court judges (often the same trial judges who presided over the initial trials) will hold hearings to develop the record and will make the initial determinations about whether trial attorneys were ineffective under *Strickland*. Many trial judges don't like saying that a particular lawyer who is a part of their local legal community was inadequate on the basis of one (or even a few) mistake(s).[150] Judges know and regularly interact with these defense attorneys and are often loath to personally criticize their professionalism in such a deep way.[151] The trial attorneys who are asked to admit their own failures are also frequently reluctant to do so both because of the psychological discomfort that comes with admitting error[152] and out of fear that there will be professional repercussions stemming from their admissions.[153]

147. *Id.* at 362-63 (noting that "a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial").

148. As discussed in Part III below, not all lower courts have improperly conflated personal and structural ineffectiveness challenges. That said, the conflation is not an isolated problem and is indicative of the general confusion in some lower courts about the different forms of constitutional ineffectiveness.

149. *See* Primus, *supra* note 7, at 689.

150. *See* Bazelon, *supra* note 1, at 25 (noting that judges are "reluctan[t] to soil the reputations of appointed counsel by labeling their work 'ineffective'").

151. *See, e.g.*, Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 825-26 (explaining how "appointed lawyers also stay in the good graces of the judges by contributing to their campaigns for office").

152. *See generally* CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY *ME*): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS (rev. ed. 2015) (describing cognitive dissonance); Kristin Wong, *Why It's So Hard to Admit You're Wrong*, N.Y. TIMES (May 22, 2017), https://perma.cc/NJ89-LLC9 (summarizing studies).

153. *See, e.g.*, Richard Klein, *Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant*, 61 TEMP. L. REV. 1171, 1201 n.180 (1988) ("Lawyer concern and fear

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Trial attorneys are more willing to cooperate when the allegation is one of structural ineffectiveness. If an indigent defense delivery system is structured such that even a fully competent attorney is incapable of providing effective assistance,[154] the attorney who makes mistakes is not at fault. The system is ineffective, and the trial attorney is one of the victims of that poorly structured system. And while trial judges may be reluctant to indict structural aspects of the criminal justice system,[155] presenting data about structural problems in trial courts preserves the record for states' higher courts, which may be more receptive to structural claims.[156]

Of course, it is also possible that some courts are intentionally focusing on episodic personal ineffectiveness. In a world where we are suffering from an indigent defense crisis,[157] focusing on structural errors that are often systemic runs the risk of essentially declaring that the whole system is unconstitutional.[158] Courts might not want to spend the political capital required to upend the entire system by dismissing massive numbers of criminal cases or ordering states to redirect large sums of money to fund indigent defense. These courts may try to avoid structural ineffectiveness challenges by treating systemic crises like a smattering of discrete, episodic personal problems. Litigants who fail to raise structural ineffectiveness claims clearly and who cite *Strickland* rather than *Cronic* enable such judicial avoidance.[159]

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of a malpractice claim most certainly exists."). Every state has procedures to discipline ineffective and unethical attorneys. *See id.* at 1174-75.

154. *See* United States v. Cronic, 466 U.S. 648, 659-60 (1984).

155. *See, e.g.*, William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6-22 (1997) (describing how courts are loath to inject themselves into questions of indigent defense funding and structure).

156. *See, e.g.*, State v. Citizen, 898 So. 2d 325, 338-39 (La. 2005) (noting that trial judges have the power to halt criminal prosecutions until adequate defense funding is made available); Kuren v. Luzerne County, 146 A.3d 715, 718 (Pa. 2016) (recognizing a civil cause of action entitling a "class of indigent criminal defendants to allege prospective, systemic violations of the right to counsel due to underfunding"); *see also, e.g.*, Hurrell-Harring v. State, 930 N.E.2d 217, 224-25 (N.Y. 2010).

157. *See, e.g.*, Stephen B. Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1837, 1841-66 (1994) (describing "the pervasiveness of deficient representation"); *see also* sources cited *supra* note 3 (describing the indigent defense crisis).

158. *Cf.* McCleskey v. Kemp, 481 U.S. 279, 320, 339 (1987) (Brennan, J., dissenting) (indicting the Supreme Court majority for stating that recognizing a constitutional problem with the racially disparate effects of the imposition of the death penalty "would open the door to widespread challenges to all aspects of criminal sentencing" and suggesting that their view demonstrated "a fear of too much justice").

159. *See, e.g.*, Fusi v. O'Brien, 621 F.3d 1, 6-7 (1st Cir. 2010) (dismissing a structural ineffectiveness claim as unexhausted because the postconviction attorney raised a *Strickland* claim and not a *Cronic* claim); People v. Jones, 111 Cal. Rptr. 3d 745, 752, 760-65 (Ct. App. 2010) (presenting a *Strickland* challenge in a structural ineffectiveness case

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A myopic focus on *Strickland* also has problematic downstream consequences related to the timing of ineffectiveness challenges. *Strickland* claims are typically raised after trial at the appellate or postconviction stages because we do not expect trial attorneys to raise their own personal ineffectiveness.[160] Structural ineffectiveness claims, on the other hand, are ripe for pretrial consideration. A focus on episodic personal ineffectiveness means that many litigants will not raise pervasive structural ineffectiveness claims pretrial.[161] When ineffective assistance of counsel claims are raised after trial, the procedural and substantive obstacles to obtaining relief are often insurmountable. In most jurisdictions, defendants who want to challenge their trial attorney's ineffectiveness after trial must wait until state postconviction proceedings to do so because they need to expand the record to support the claim.[162] There is currently no constitutional right to the assistance of counsel at the postconviction stage, so the vast majority of defendants must reinvestigate their own cases and figure out how to raise ineffectiveness challenges from within their prison cells.[163] It often takes years for litigants to get to the postconviction stage after the direct appeal process, which means that only convicted felons with long prison sentences have realistic opportunities to challenge their trial attorneys' performance after trial.[164]

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where the defense attorney could not get an investigator to visit the scene due to a shortage of investigative resources).

160. In fact, an attorney who raises her own personal ineffectiveness puts herself into a conflict situation that might require her to withdraw from further representation. *See* 3 LAFAVE ET AL., *supra* note 6, § 11.7(e). That said, if a trial attorney is suffering from a personal problem that is rendering her ineffective and she is aware of it, she absolutely should move to withdraw pretrial.

161. Although some public defenders have mounted pretrial challenges to structural ineffectiveness, *see infra* Part III.C, the scope of the nationwide indigent defense crisis means that many more challenges should be raised.

162. *See* Primus, *supra* note 7, at 689.

163. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (holding that there is no constitutional right to counsel in postconviction proceedings); *see also* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion) (extending *Finley* to capital cases); Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, CRIM. JUST., Fall 2009, at 6, 7-8 (noting that "a large majority of defendants who file state postconviction challenges to their criminal convictions do so without the assistance of counsel" and therefore have to reinvestigate their own cases to raise ineffectiveness claims).

164. *See* Primus, *supra* note 7, at 693-94. In addition to these procedural barriers, there are substantive barriers to posttrial review. For example, harmless error doctrines exist at both the appellate and postconviction review stages. *See* Brecht v. Abrahamson, 507 U.S. 619, 622-23 (1993); Chapman v. California, 386 U.S. 18, 22 (1967); Kotteakos v. United States, 328 U.S. 750, 764-65 (1946). *See generally* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791 (2017) (describing the harmless error doctrine and suggesting modifications to it).

All of this means that many courts are not forced to see and grapple with the serious problems of structural ineffectiveness, because the claims either are not being raised or are being raised after trial when the system hides the ineffectiveness in a procedural labyrinth. Some civil rights organizations and law firms doing pro bono work have stepped into the void, filing pretrial class actions to document systemic structural problems in indigent defense delivery systems.[165] While this is a salutary development, there are many obstacles to class action litigation that make such suits difficult.[166] And the suits are expensive, time-consuming, and slow in effectuating change.[167] If there are other ways to catalyze change and force courts to recognize structural problems, litigants should be pursuing them. But this means that litigants need to get away from the focus on *Strickland*. Defense attorneys should raise clear pretrial challenges to structural ineffectiveness problems and think creatively about how to craft potential remedies.[168]

For all of these reasons, it is time to revive the structural forms of trial attorney ineffectiveness.

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165. *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 431-32 (2009) (describing how these lawsuits have evolved); Stephen F. Hanlon, *The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System*, 61 ST. LOUIS U. L.J. 625, 630-40 (2017) (describing such lawsuits).

166. *See* Steiker, *supra* note 127, at 2701-03; *see also* Eve Brensike Primus, ACS Issue Brief, Litigation Strategies for Dealing with the Indigent Defense Crisis 4-5 (2010), https://perma.cc/543C-VXP3.

167. *See* Cara H. Drinan, *Getting Real About* Gideon*: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1331-34 (2013) (discussing the problems with class action civil lawsuits).

168. *See, e.g.*, Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997) ("My thesis holds that the *Strickland* inquiry into counsel's effectiveness *ex post* should be supplemented by an *ex ante* inquiry into whether the defense is institutionally equipped to litigate as effectively as the prosecution."); Brandon L. Garrett, *Validating the Right to Counsel*, 70 WASH. & LEE L. REV. 927, 932 (2013) (arguing that litigants should rely on social science to make more creative pretrial arguments); Peter A. Joy, *A Judge's Duty to Do Justice: Ensuring the Accused's Right to the Effective Assistance of Counsel*, 46 HOFSTRA L. REV. 139, 155-56 (2017) (arguing that judges should perform pretrial inquiries into counsel's effectiveness under certain situations); *see also* State v. Peart, 621 So. 2d 780, 787 (La. 1993) (agreeing that addressing ineffective assistance claims before trial furthers the interests of judicial economy, protects defendants' constitutional rights, and preserves the integrity of the trial process); Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & C.R. L. REV. 443, 450-56 (2010) (arguing that more lawyers should raise pretrial challenges to structural obstacles that interfere with their abilities to represent their clients). For a more extended discussion of possible creative remedies, see Part III.C below.

III. Reviving the Structural Forms of Trial Attorney Ineffectiveness

To revive structural ineffectiveness claims, litigants need to rely on data to document existing structural problems. They need to raise structural claims early in the litigation process when such claims are ripe for judicial consideration, and they need to encourage courts to craft creative remedies to redress structural problems. What remedies are appropriate may ultimately depend on whether the structural ineffectiveness is episodic or pervasive and when it is raised in the litigation process.

A. Pervasive Structural Ineffectiveness

Cronic remains the most recent Supreme Court case to address the contours of pervasive structural ineffectiveness challenges.[169] But much has changed about our knowledge of the structural landscape of indigent defense representation in the last thirty-five years. We are now more acutely aware of, and can better document, systemic structural problems in the provision of defense services around the country.

Most criminal defendants in this country are too poor to afford attorneys and must rely on appointed counsel.[170] Studies repeatedly reveal that indigent defense delivery systems are woefully underfunded and accordingly staffed by defense attorneys who often lack adequate training or supervision and whose caseloads are impossible for any attorney to manage effectively.[171] In some

169. The Supreme Court has discussed structural ineffectiveness in only a handful of cases since its 1984 decision in *Cronic*. All were in the late 1980s and did not add much to the existing doctrine. In *Satterwhite v. Texas*, the Court made it clear that the State's failure to provide a defendant with counsel to advise him about whether to submit to a pretrial psychiatric examination to determine his future dangerousness at a capital sentencing hearing was an episodic form of structural ineffectiveness subject to *Chapman* harmless error review when raised posttrial. 486 U.S. 249, 251, 254-58 (1988). In *Perry v. Leeke*, the Court rejected a claim of structural ineffectiveness predicated on a trial judge's refusal to permit defense counsel to speak to his client during a fifteen-minute trial recess. 488 U.S. 272, 273-74, 283-85 (1989). And in *Penson v. Ohio*, the Court made it clear that the complete denial of an attorney during the decisional process on the first appeal as of right is a pervasive structural ineffectiveness problem that merits automatic reversal without the need to determine prejudice. 488 U.S. 75, 77-79, 81, 88-89 (1988).

170. *See* CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 179023, DEFENSE COUNSEL IN CRIMINAL CASES 5 (2000), https://perma.cc/L784-W9HF (noting that, between 1992 and 1996, more than 80% of criminal defendants in the United States's most populous counties were indigent); Thomas H. Cohen, *Who Is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 CRIM. JUST. POL'Y REV. 29, 35 (2014) ("In 2004 and 2006, about 80% of defendants charged with a felony in the nation's 75 most populous counties reported having public defenders or assigned counsel . . . .").

171. *See* Primus, *supra* note 2, at 123-28, 130-37 (collecting studies and statistics).

jurisdictions, defense attorneys regularly meet clients for the first time in the courtroom on the day of trial.[172] Many defendants plead guilty to serious crimes without their attorneys ever having conducted real investigations.[173] And often, the defense function is not sufficiently independent of the judges, such that defense lawyers are poorly equipped to withstand judicial pressure to process cases quickly—pressure that sometimes includes judges punishing defense attorneys for investigating cases, filing motions, or asserting their clients' rights.[174]

Some states have created indigent defense commissions to redress these systemic problems,[175] and there is now an emerging literature about ways to improve indigent defense delivery.[176] As a result, there is much more evidence documenting constructive structural ineffectiveness problems than existed when *Cronic* was decided.

This evidence should be deployed in courtrooms to encourage judges to craft remedies for defendants whose constitutional rights to effective counsel have been violated as a result of structural problems. And nothing in the Supreme Court case law need stand in the way of these challenges. After all, the Court in *Cronic* cited *Powell v. Alabama* with approval, describing it as a case in which the designation of counsel was "so close upon the trial as to amount to a denial of effective and substantial aid."[177] When defender offices are so underfunded and overwhelmed that the attorneys cannot meet with their clients pretrial or perform the requisite investigation before advising their clients about whether to take a plea deal or go to trial, that too seems like the "denial of effective and substantial aid."

Some have argued that the pervasive structural problems in indigent-defense delivery systems should not trigger *Cronic* violations, citing the Court's refusal to recognize a structural problem in *Cronic* itself, its unwillingness in

172. *See id.* at 128-29.

173. *See id.*

174. *See id.* at 126.

175. *See* 1 LAFAVE ET AL., *supra* note 6, § 1.4(f) (describing commissions).

176. *See, e.g.*, Erwin Chemerinsky, Remarks, *Lessons from* Gideon, 122 YALE L.J. 2676, 2680-84 (2013) (discussing the need for more funding); Roger A. Fairfax, Jr., Essay, *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2327-28 (2013) (noting that the better equipped the indigent defense system is, "the less waste and inefficiency"); David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 337 (2017) (emphasizing the need for the defense function to be independent of the judiciary); Steiker, *supra* note 127, at 2705-07 (arguing for more training and oversight); *see also* Primus, *supra* note 2, at 130-45 (describing best practices and collecting scholarly literature on proposed solutions).

177. United States v. Cronic, 466 U.S. 648, 660 (1984) (quoting Powell v. Alabama, 287 U.S. 45, 53 (1932)).

the years since to recognize structural ineffectiveness in other cases, and its description of the structural exception as "narrow."[178] But this ignores some of the lower-court development with respect to the scope of the *Cronic* structural exception and other recent developments in the factual and legal landscape that might suggest renewed interest in, and a broader role for, structural ineffectiveness arguments.

Some lower courts have bucked the trend of myopically focusing solely on episodic personal ineffectiveness claims. These courts' recognition of structural *Cronic* violations comes in two forms: postconviction challenges to individual convictions and pretrial, prospective civil litigation. For an example of the first form, consider *Mitchell v. Mason*.[179] Even though the defendant in that case had been incarcerated for seven months and was facing murder charges, his appointed defense attorney spent only six minutes speaking to him in the bullpen on the day of trial.[180] When the defendant complained to the trial judge and asked for a continuance and a lawyer who would properly prepare a defense, the judge denied the request.[181] The Sixth Circuit faulted the Michigan state courts for failing to recognize that a defense attorney's failure to meet with a client during the entire pretrial period (with the exception of only a six-minute period on the day of trial) was a clear violation of *Cronic*.[182] Citing *Powell v. Alabama* for the proposition that the pretrial period between arraignment and trial is a critical stage of the criminal prosecution when the defendant is constitutionally entitled to effective representation,[183] the Sixth Circuit noted that *Cronic* clearly held that the Sixth Amendment is violated and prejudice must be presumed when counsel is totally absent during a critical stage of the proceedings.[184] The Sixth Circuit deemed counsel totally absent in *Mitchell*.[185]

In a similar case involving a defendant facing armed robbery charges, the Delaware Supreme Court held that *Cronic* applied to a constructive denial of counsel during the pretrial investigation period.[186] In *Urquhart v. State*, the defendant was sentenced to fifteen years in prison for armed robbery.[187] He challenged the conviction and noted that in the five months leading up to his

178. *See, e.g.*, Florida v. Nixon, 543 U.S. 175, 190 (2004).

179. 325 F.3d 732 (6th Cir. 2003).

180. *Id.* at 735-36, 741-42.

181. *Id.*

182. *Id.* at 741.

183. *Id.* at 743.

184. *Id.* at 741-44.

185. *Id.* at 741-42.

186. Urquhart v. State, 203 A.3d 719, 734 (Del. 2019) (en banc).

187. *Id.* at 722.

trial, three different public defenders had represented him at preliminary hearings.[188] A fourth public defender was assigned to represent him at trial, but that attorney was unable (because of his caseload and other court appearances) to meet with him or show him the State's evidence against him until the morning of trial.[189] Mr. Urquhart "expressed frustration and confusion to the [state] court" before the trial started, noting that counsel had not met with him and that he did not know what was going on, but the trial judge proceeded with the trial that day anyway.[190] The Delaware Supreme Court determined that *Cronic* applied because Mr. Urquhart was constructively denied counsel during the entire pretrial period, which was a critical stage of the litigation.[191] For the nearly four months between arraignment and trial, Mr. Urquhart received one nonsubstantive phone call from counsel (explaining that counsel was in trial and waiting for discovery) and one letter containing some but not all of the discovery in the case.[192] As the Delaware Supreme Court put it, "the Sixth Amendment demands more than the presence the morning of trial of a warm body with a law degree."[193] Given counsel's failure to meet with his client pretrial, "the defendant should not have to point to any specific event of prejudice and disprove the State's contention that trial counsel was able to 'wing it' enough at trial to satisfy the Sixth Amendment."[194] Rather, this is a situation in which it is "unlikely that any lawyer could provide effective assistance" and prejudice should be presumed.[195]

Some lower courts have also expressed a willingness to recognize *Cronic* violations in civil cases challenging systemic indigent defense failures.[196] Since *Cronic* and *Strickland* were decided, over thirty-five such cases have been filed

188. *Id.* at 721.

189. *Id.* at 721-22. There was evidence that Mr. Urquhart had spoken with defense counsel on the phone twice and that Mr. Urquhart had received letters from counsel. *See id.* at 730.

190. *Id.* at 722.

191. *Id.* at 730-32. The Delaware Supreme Court also found that counsel's performance was constitutionally deficient under *Strickland*. *See id.* at 732-34.

192. *Id.* at 730.

193. *Id.* at 732.

194. *Id.*

195. *Id.* (quoting United States v. Cronic, 466 U.S. 648, 661 (1984)).

196. *See* Johanna Kalb, Gideon *Incarcerated: Access to Counsel in Pretrial Detention*, 9 U.C. IRVINE L. REV. 101, 134 (2018) (noting that *Cronic* went "relatively unexamined" for decades until recent civil lawsuits revived reliance on *Cronic* to address systemic challenges); *see also* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1589-1601 (2018) (noting that the Department of Justice interventions arguing that *Cronic* rather than *Strickland* should apply were critical to the success of these suits).

around the country.[197] In some of these cases, courts have held that actual or constructive denials of counsel during the period between arraignment and trial violate *Cronic* and that, as a result, the plaintiffs have stated cognizable claims.

For example, in *Wilbur v. City of Mount Vernon*, a federal district court found that two cities in Washington State were regularly and systematically violating indigent defendants' Sixth Amendment rights.[198] The district court noted that, due to their high caseloads, defenders had no ability to investigate their cases or meet with their clients before trial.[199] It was "little more than a 'meet and plead' system."[200] Relying on *Cronic*, the district court noted that "if there is no opportunity for appointed counsel to confer with the accused to prepare a defense," then there is a Sixth Amendment violation with a per se presumption of prejudice.[201]

In *Hurrell-Harring v. State*, New York's highest court addressed allegations that five counties in that state were actually and constructively denying indigent defendants counsel at pretrial arraignments and during the critical pretrial stage between arraignment and trial.[202] The high court agreed that the plaintiffs' complaint stated a justiciable cause of action that, if true, would demonstrate a *Cronic* violation. According to that court,

> [a]ctual representation assumes a certain basic representational relationship. The allegations here, however, raise serious questions as to whether any such relationship may be really said to have existed between many of the plaintiffs and their putative attorneys and cumulatively may be understood to raise the distinct possibility that merely nominal attorney-client pairings occur in the subject counties with a fair degree of regularity, allegedly because of inadequate funding and staffing of indigent defense providers.[203]

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197. *See* Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89, 94-98 (2018) (collecting and discussing these cases).

198. 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013).

199. *Id.* at 1124, 1128.

200. *Id.* at 1124.

201. *Id.* at 1131; *see also id.* at 1132 ("[P]erfunctory 'representation' does not satisfy the Sixth Amendment.").

202. 930 N.E.2d 217, 222-25 (N.Y. 2010).

203. *Id.* at 224; *see also* Luckey v. Harris, 860 F.2d 1012, 1018 (11th Cir. 1988) (holding that allegations of systemic delays in the appointment of counsel and a failure to provide necessary investigative and expert resources for indigent defense are sufficient to state a claim upon which relief can be granted); Duncan v. State, 774 N.W.2d 89, 136-37 (Mich. Ct. App. 2009) (noting that declaratory and injunctive relief may be appropriate to remedy pervasive and persistent systemic violations of the right to counsel), *vacated mem. on other grounds*, 780 N.W.2d 843 (Mich. 2010); Kuren v. Luzerne County, 146 A.3d 715, 743 (Pa. 2016) (holding that a cause of action exists based on severe underfunding of indigent defense); Backus & Marcus, *supra* note 196, at 1599-1601 (explaining the importance in these cases of the courts' willingness to shift away from *Strickland*);
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Thus, even though the Supreme Court once said it was unwilling to "fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel,"[204] some lower courts recognize a difference between tardy appointment and the constructive absence of counsel during the entire critical pretrial period. When the structure of a state's indigent defense funding and the resulting caseloads translate into trial counsel being unable to have a substantive meeting with the defendant pretrial, that is structural ineffectiveness that should lead to a per se presumption of prejudice.

Much of the development of *Cronic* in the lower courts (at least in the civil class action cases) has been made possible by the incredible amount of data that has been collected about the indigent defense crisis since 1984. Indigent defense commissions, bar associations, state governmental units, and nonprofit organizations regularly commission experts to investigate and document structural problems in indigent defense delivery systems and their effects at both the national and state levels.[205] These reports contain a wealth of empirical data that was simply not available when *Cronic* was decided. The Supreme Court has recognized a willingness to evolve and recognize on-the-ground changes to the factual and legal landscape when entertaining ineffective assistance challenges.[206] It is time to use the data that have been collected to revive structural ineffectiveness challenges in both the postconviction and pretrial contexts.[207]

There has also been a slight shift in the legal landscape since *Cronic* was decided. In the last five years, the Supreme Court has started to recognize

Laurence A. Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice*, 5 ADVANCE: J. ACS ISSUE GROUPS 73, 74-75 (2011) (arguing for such a shift).

204. Chambers v. Maroney, 399 U.S. 42, 54 (1970); *see also* Morris v. Slappy, 461 U.S. 1, 11 (1983) ("Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel.").

205. The Sixth Amendment Center is a central repository that collects these publications. *See* SIXTH AMEND. CTR., https://perma.cc/5Y9B-2BZK (archived Apr. 25, 2020).

206. *Cf.* Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (noting that "[t]he landscape of federal immigration law has changed dramatically over the last 90 years" and relying on those changes to inform the Court's conclusion that trial counsel has a constitutional duty to inform noncitizen clients of the risk of deportation before they plead).

207. More work has been done to revive structural ineffectiveness challenges in the pretrial context than in the postconviction context. *See* sources cited *supra* note 165 (describing these lawsuits); *see also infra* Part III.C. Pretrial civil class actions challenging the provision of indigent defense services often face procedural obstacles to review in court and take a significant investment of time and resources. *See* sources cited *supra* notes 166-67. Judicial recognition of structural ineffectiveness problems in individual challenges is an underused tool for catalyzing reform. *See infra* Part III.C; *see also* Bibas, *supra* note 6, at 7-11 (discussing how the judiciary can use individual postconviction cases to catalyze systemic reform when it wants to).

aspects of the indigent defense crisis in its decisions. First, in *Martinez v. Ryan* and *Trevino v. Thaler*, the Supreme Court brushed aside an important procedural restriction that had been preventing criminal defendants from having claims of trial attorney ineffectiveness considered in federal habeas corpus petitions.[208] The Court explained that states cannot prevent the federal courts from addressing substantial claims of trial attorney ineffectiveness by burying those claims in state postconviction review and then denying indigent defendants access to effective lawyers to help them raise the claims at that stage.[209] These decisions paved the way for broader consideration of trial attorney ineffectiveness claims in federal courts.[210]

Second, the Supreme Court recently spoke more directly about the indigent defense crisis. In the course of holding that the pretrial restraint of a defendant's legitimate, untainted assets (which the defendant needed to retain counsel of choice) violated the Sixth Amendment, the Court noted that, if pretrial restraint were permissible, it would mean that the defendant would be rendered indigent and would have to rely on a public defender.[211] Citing statistics about public defenders' excessive caseloads and limited resources, the Supreme Court plurality noted that forcing these defendants to rely on public defenders would create a "substantial risk" of "render[ing] less effective the basic right the Sixth Amendment seeks to protect."[212] It was clear, as one of the dissents in that case noted, that the plurality was suggesting that defendants represented by public defenders are more likely to receive inadequate representation.[213] The Court is clearly aware of and expressing some concerns about the structural problems in indigent defense delivery systems. Litigants should use this language to persuade lower courts that they should not take such a dim view of *Cronic* claims.

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208. Trevino v. Thaler, 569 U.S. 413, 416-17 (2013); Martinez v. Ryan, 566 U.S. 1, 17 (2012). The procedural restriction is the procedural default doctrine. *See* Wainwright v. Sykes, 433 U.S. 72, 86-91 (1977) (holding that a state prisoner who waived his constitutional claims in state court by failing to comply with state procedural rules for properly raising the claims has procedurally defaulted those claims in federal habeas corpus proceedings and cannot have the claims considered on the merits unless the state prisoner can demonstrate "cause" and "prejudice" to excuse the prior failure, or a "miscarriage of justice").

209. *Trevino*, 569 U.S. at 416-17; *Martinez*, 566 U.S. at 17.

210. For discussions of how litigants can use *Martinez* and *Trevino* to open the doors to broader habeas review of trial attorney ineffectiveness claims, see Eve Brensike Primus, Essay, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2611-17 (2013); and Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75, 108-10 (2017).

211. *See* Luis v. United States, 136 S. Ct. 1083, 1087, 1095 (2016) (plurality opinion).

212. *Id.* at 1095.

213. *Id.* at 1110 (Kennedy, J., dissenting).

The willingness of some lower courts to entertain pervasive structural ineffectiveness challenges, the existence of a treasure trove of data to support such challenges, and the Supreme Court's dicta suggesting that it understands there are problems with indigent defense delivery systems should all encourage litigants to raise more structural *Cronic* arguments. And lower courts should be receptive to finding structural ineffectiveness in the critical period between arraignment and trial.

B. Episodic Structural Ineffectiveness

When either pervasive or episodic structural ineffectiveness is found, prejudice is presumed and the Sixth Amendment violation is complete. But marking the line between episodic and pervasive structural ineffectiveness is important because pervasive structural ineffectiveness merits automatic reversal whereas episodic structural ineffectiveness is subject to harmless error analysis under *Chapman* when raised posttrial. Thus, it is important to consider what guidance the Supreme Court has given about how to draw a dividing line.

Consider, for example, what should happen when a defendant is denied an attorney at a critical pretrial stage like an arraignment. The Supreme Court has held that the denial of counsel at other pretrial stages—like lineups, police interrogations, and decisions about whether to submit to pretrial psychiatric examinations—is episodic and therefore subject to *Chapman* harmless error review.[214] But in *Hamilton v. Alabama*, the Supreme Court held that the failure to provide counsel at the defendant's arraignment was a pervasive form of structural ineffectiveness.[215] The Court noted that, during Alabama arraignments, "[a]vailable defenses may be . . . irretrievably lost, if not then and there asserted."[216] As a result, what happens at the arraignment "may affect the whole trial."[217] For that reason, the Court held that it would "not stop to determine whether prejudice resulted" because "the degree of prejudice can never be known."[218]

As the Supreme Court explained in a later case, when the deprivation of the right to counsel at a critical stage "affected—and contaminated—the entire criminal proceeding," then the error is pervasive and requires automatic reversal.[219] Given the different structure of arraignment hearings in different

214. *See* sources cited *supra* note 80.

215. 368 U.S. 52, 54-55 (1961).

216. *Id.* at 54.

217. *Id.*

218. *Id.* at 55.

219. Satterwhite v. Texas, 486 U.S. 249, 257 (1988). This explains why deprivations of counsel during the entirety of the period between arraignment and trial are pervasive.
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state and federal jurisdictions, whether the denial of counsel at an arraignment is episodic or pervasive will depend on the jurisdiction.[220] The same is true for preliminary hearings.[221] Thus, reviewing courts must ask whether the denial of counsel at a critical stage irrevocably affects and contaminates the later trial or plea. For example, if the denial of counsel at the pretrial stage causes a defendant to lose the ability to assert a defense entirely, then the later trial is inherently and irrevocably contaminated, and there is a pervasive structural problem. In contrast, if the denial of counsel at the pretrial stage resulted only in the production of evidence that trial counsel can move to suppress later, then there is not an irrevocable effect on the trial, and the denial of effective counsel at the pretrial stage poses an episodic rather than a pervasive problem. The test focuses on whether the damage done through the violation of the right to effective assistance of counsel affects the proceedings so substantially and irrevocably that determining prejudice would be difficult.

In fact, when structural ineffectiveness problems arise during the trial itself, some lower courts have given a bit more guidance about the line between episodic and pervasive ineffectiveness. There are a number of cases

See Powell v. Alabama, 287 U.S. 45, 57 (1932). The entire trial is affected and contaminated when an attorney never consults with her client.

220. *See* United States v. Owen, 407 F.3d 222, 226-27 (4th Cir. 2005) (distinguishing the arraignment process at issue in *Hamilton* from North Carolina's arraignment process and noting that the defendant "did not irrevocably waive any defenses or make any irreversible admissions of guilt, nor was he presented with the opportunity to execute any such irrevocable waiver or irreversible admission").

221. *Compare* Coleman v. Alabama, 399 U.S. 1, 8-11 (1970) (plurality opinion) (deeming the denial of counsel at a preliminary hearing an episodic structural error subject to *Chapman*), *with* White v. Maryland, 373 U.S. 59, 60 (1963) (per curiam) (relying on *Hamilton* and automatically reversing as structural error the denial of counsel at a preliminary hearing). In *Coleman*, the Court noted that the "purposes of [an Alabama] preliminary hearing are to determine whether there is sufficient evidence against the accused to warrant presenting his case to the grand jury and . . . to fix bail." 399 U.S. at 8. As a result, "the accused is not required to advance any defenses, and failure to do so does not preclude him from availing himself of every defense he may have upon the trial of the case." *Id.* (quoting Coleman v. State, 211 So. 2d 917, 921 (Ala. Ct. App. 1968), *vacated*, 399 U.S. 1). In contrast, the defendant in *White* pleaded guilty without counsel at his preliminary hearing. 373 U.S. at 59. He was later appointed counsel and withdrew the guilty plea, but his admission at the preliminary hearing was used against him at his subsequent trial. *Id.* at 60. Given the circumstances of that preliminary hearing, the Court did "not stop to determine whether prejudice resulted." *Id.* Lower courts should avoid making broad statements suggesting that the denial of counsel at all preliminary hearings or all arraignments are instances of episodic structural ineffectiveness subject to *Chapman* harmless error review. *See, e.g.*, People v. Lewis, 903 N.W.2d 816, 818 (Mich. 2017) (describing *Coleman* as holding that the denial of counsel at a preliminary hearing is subject to harmless error review). Instead, they should consider what actually happens at preliminary hearings or arraignments in their state and determine if the deprivation of counsel at the preliminary hearing or arraignment "affected—and contaminated—the entire criminal proceeding." *See Satterwhite*, 486 U.S. at 257.

involving allegations of structural ineffectiveness where trial judges start trials or restart trial proceedings without defense counsel present. These cases range from situations where defense counsel missed seven minutes (eighteen questions) of the direct examination of a prosecution witness[222] to cases where defense counsel missed days of testimony.[223] Unwilling to impose a rule of automatic reversal for very brief absences, some courts have adopted a "substantial portion" test to determine the dividing line between episodic and pervasive ineffectiveness.[224] Originally created in the personal ineffectiveness context, the substantial portion test requires courts to conduct a case-by-case analysis and ask how much of the trial the lawyer missed, what proportion of the trial was missed, and the significance of the portion missed.[225] If the resulting analysis leads the court to conclude that a substantial portion of the trial was missed, then the error is pervasive; if not, then it is episodic.

The fact that these lower courts use the same test to measure the dividing line between episodic and pervasive ineffectiveness for personal and structural ineffectiveness makes sense. In both contexts, the courts are attempting to understand how much of the trial process was affected by the alleged ineffectiveness. The source of the ineffectiveness has no bearing on whether it was episodic or pervasive even if it might have a bearing on the ease of obtaining a postconviction remedy.[226] Instead, the question is whether the trial was substantially and irrevocably affected by trial counsel's ineffectiveness. If so, prejudice should be presumed and reversal should be automatic.

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222. *See* United States v. Roy, 855 F.3d 1133, 1137 (11th Cir. 2017) (en banc); *see also* Sweeney v. United States, 766 F.3d 857, 859, 861 (8th Cir. 2014) (describing a situation where defense counsel missed three minutes of a thirteen-day trial); United States v. Kaid, 502 F.3d 43, 44-45 (2d Cir. 2007) (per curiam) (describing how the trial judge started trial proceedings after the lunch break without waiting for counsel for one of the codefendants, resulting in defense counsel missing twenty minutes of the government's direct examination of a prosecution witness).

223. *See, e.g.*, Olden v. United States, 224 F.3d 561, 565-66 (6th Cir. 2000) (describing trial counsel's absences as "excessive" and noting that he missed two days of prosecution-witness testimony); United States v. Russell, 205 F.3d 768, 769-70 (5th Cir. 2000) (addressing a case where counsel was absent for two days of his client's trial, missing the testimony of eighteen prosecution witnesses).

224. *See, e.g.*, *Roy*, 855 F.3d at 1164-66. For a more extended discussion of the substantial portion test, see Part IV.B.1 below.

225. *Roy*, 855 F.3d at 1164-66.

226. *Compare* Strickland v. Washington, 466 U.S. 668, 694 (1984) (requiring a defendant alleging episodic personal ineffectiveness to show a reasonable probability of a different outcome), *with* sources cited *supra* note 80 (noting that, for episodic structural ineffectiveness problems, prejudice is presumed and the only question when the claim is raised posttrial is whether the Sixth Amendment violation was harmless beyond a reasonable doubt under *Chapman*).

C. The Timing of Structural Ineffectiveness Claims

When a structural ineffectiveness challenge should be raised is almost as important as the content of the challenge itself. The timing of a structural challenge affects the likelihood of success as well as the potential remedies. Most structural ineffectiveness claims should be raised pretrial, when litigants will not face the procedural and substantive obstacles that posttrial claims often confront[227] and creative remedies are still possible.[228]

Ethical rules regarding conflicts of interest can help defenders raise pretrial structural ineffectiveness challenges. In *Holloway v. Arkansas*, the Supreme Court made it clear that trial courts rely on defense attorneys as officers of the court to bring possible conflicts of interest to the court's attention.[229] In *Mickens v. Taylor*, the Court further held that there should be automatic reversal when a trial court denies a defense attorney's timely request to have different counsel appointed based on a conflict of interest (assuming a conflict exists).[230] The American Bar Association (ABA) has issued a formal ethical opinion indicating that criminal defense attorneys who face excessive caseloads that will interfere with their abilities to provide competent and diligent representation face a conflict of interest and are ethically bound (1) not to accept new clients and (2) to move to withdraw from existing cases until their caseload gets to a point where they can provide ethical representation.[231] Defense attorneys should rely on this and other national and local standards of performance to refuse new cases and withdraw from cases when their caseloads are excessive.

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227. *See supra* Part II.

228. *See* Chiang, *supra* note 168, at 450-56 (arguing that more lawyers should raise pretrial challenges to structural obstacles that interfere with their abilities to represent their clients).

229. 435 U.S. 475, 485-86 (1978).

230. 535 U.S. 162, 168, 174 (2002).

231. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441, at 4-5 (2006) (discussing the "ethical obligations of lawyers who represent indigent criminal defendants when excessive caseloads interfere with competent and diligent representation" (capitalization altered)); *see also* ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION standard 4-1.8 (4th ed. 2017), https://perma.cc/EVL8-W9H6; AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS guideline 1 (2009), https://perma.cc/SK7J-FP4Q (imposing similar obligations); AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM princ. 2 (2002), https://perma.cc/KCC5-84U8; AM. COUNCIL OF CHIEF DEFS., NAT'L LEGAL AID & DEF. ASS'N, STATEMENT ON CASELOADS AND WORKLOADS (2007); NAT'L LEGAL AID & DEF. ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION guideline 1.3(a) (2006), https://perma.cc/V34G-Q4HU.

These motions can be made by individual defenders or more systematically by defender offices. For example, the Public Defender for the Eleventh Judicial Circuit in Florida successfully filed motions "in twenty-one criminal cases seeking to be relieved of the obligations to represent indigent defendants in non-capital felony cases."[232] Each motion certified that the defender had a conflict of interest resulting from excessive caseloads caused by underfunding, which "meant the office could not carry out its legal and ethical obligations to the defendants."[233] The Supreme Court of Florida held that these motions were proper.[234] When such motions are granted in large numbers of cases, it can catalyze legislative action to remedy the severe underfunding that causes the caseload crisis.[235]

Individual defenders can also think about other remedies to address pretrial structural ineffectiveness problems. Attorneys facing excessive caseloads that are the result of a lack of funding can ask for continuances to be able to adequately prepare for trial, and they can further ask that those continuances be charged to the state for speedy trial purposes and that the clients, if incarcerated, be released pending trial. Attorneys can also ask for cases to be reassigned to private counsel who do not face structural obstacles to providing effective assistance. If cases are continued for too long, defense attorneys can move to dismiss those cases citing speedy trial concerns.[236]

If the ineffectiveness is more episodic, the remedies can be episodic as well. Consider how pretrial, episodic structural ineffectiveness challenges are addressed at trial. Once the Sixth Amendment right to counsel attaches, if a state deprives a criminal defendant of an attorney at a critical pretrial stage, the defense attorney who comes in later can move at trial to suppress any evidence that the state obtained from that critical pretrial stage.[237] If, as *Powell v. Alabama* suggests, the pretrial period between arraignment and trial is a critical stage,[238] and if a defendant is denied an attorney's assistance during part of that period,

232. Pub. Def., Eleventh Judicial Circuit v. State, 115 So. 3d 261, 265, 274-79 (Fla. 2013); *see also* State *ex rel.* Mo. Pub. Def. Comm'n v. Pratte, 298 S.W.3d 870, 886-88, 890 (Mo. 2009) (granting similar relief); Stephen F. Hanlon, *Case Refusal: A Duty for a Public Defender and a Remedy for All of a Public Defender's Clients*, 51 IND. L. REV. 59, 77-87 (2018) (discussing the benefits of case refusal).

233. *Pub. Def., Eleventh Judicial Circuit*, 115 So. 3d at 265.

234. *Id.* at 268-74.

235. *See id.* at 274 (discussing how these motions have been successful in stimulating reform in some jurisdictions).

236. *See* Barker v. Wingo, 407 U.S. 514, 530-33 (1972).

237. *See, e.g.*, Estelle v. Smith, 451 U.S. 454, 469-71, 473 (1981); United States v. Wade, 388 U.S. 218, 236-37 (1967); Massiah v. United States, 377 U.S. 201, 205-07 (1964).

238. 287 U.S. 45, 57 (1932).

perhaps trial counsel should argue that any evidence that the state obtained during that period should be suppressed.

And what if structural problems prevent the defense attorney from being able to find and obtain evidence *favorable* to the defense due to late appointment or excessive caseloads? Depending on what the evidence is, courts could craft creative remedies. For example, if the defense attorney's late appointment means that the defense attorney is structurally unable to retest a DNA sample or have a defense expert analyze that evidence, perhaps the appropriate remedy is to prevent the state from relying on the evidence. In *United States v. Ash*, when the Supreme Court talked about what constitutes a critical stage, it discussed the fact that defense counsel cannot duplicate lineups or preliminary hearings and noted that "the possibility of duplication may be important."[239] Part of the reason why obtaining a handwriting exemplar from a defendant is not a "critical stage" is because defense counsel can obtain additional exemplars for analysis and comparison.[240] To the extent that a structural impediment prevents defense counsel from being able to perform that duplicating function, there is room to argue that the stage is now critical and that counsel's inability to participate in the testing and inability to duplicate it means that the evidence should be suppressed.[241]

When defense attorneys are forced to go to trial in cases that they have not been able to adequately prepare for due to structural problems, they should ask for other trial-related remedies. For example, they could try to present expert testimony about the structural problems endemic to that indigent defense system in an effort to educate jurors about the limits of defenders' abilities to represent clients adequately and encourage jurors to take that into account.[242] Alternatively, they could request jury instructions that inform the jurors about the structural problems that defense counsel faced and permit jurors to view the evidence through that lens.[243] The Supreme Court has given trial courts a

239. 413 U.S. 300, 318 n.10 (1973).

240. *Id.*

241. *Cf. Wade*, 388 U.S. at 239 (noting that stages can move in or out of being deemed critical on the basis of what state or government actions are taken to otherwise protect the defendants' underlying rights).

242. Experts are used in other contexts to educate jurors about possible misperceptions of evidence. *See, e.g.*, State v. Clopten, 223 P.3d 1103, 1113 (Utah 2009) (noting that trial courts should sometimes permit expert testimony on the dangers of misidentification in criminal cases involving stranger identifications). Admittedly, there may be ethical questions about how to introduce this kind of expert testimony without making the defense attorney a witness in the case.

243. Jury instructions are often used to encourage jurors to be skeptical of certain kinds of testimony or evidence in other contexts. *See, e.g.*, Perry v. New Hampshire, 565 U.S. 228, 246 & n.7 (2012) (collecting examples of jury instructions cautioning against eyewitness

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lot of flexibility in crafting remedies for constitutional ineffectiveness in the plea bargaining context.[244] Litigants should not be afraid to push trial courts to be creative in crafting pretrial and trial remedies for structural ineffectiveness as well.

IV. Revisiting Personal Ineffectiveness After *Strickland*

Perhaps because the personal ineffectiveness doctrine has been entangled with the structural forms of ineffectiveness, courts and scholars have not adequately addressed how much personal ineffectiveness doctrine has changed in recent years. A detailed review of the Supreme Court case law reveals that *Strickland*'s two-pronged test has more defense-friendly layers to it than scholars and courts have recognized. The failure to recognize these developments means that personal ineffectiveness doctrine is not being used by litigants or courts to its full potential. Instead, many courts reject personal ineffectiveness challenges as a matter of course, assuming that the *Strickland* test always requires granting deference to attorney decisionmaking and finding outcome-determinative prejudice.[245]

Courts' failure to properly analyze personal ineffectiveness challenges has a number of negative effects. First, it encourages (or at the very least does not check) poor trial attorney performance. As I and others have pointed out, the structural deficiencies that currently plague indigent defense delivery systems have cultural consequences.[246] In many places, defense lawyers have been conditioned (and even forced) through economic pressure and courtroom practices to provide constitutionally inadequate representation to their clients.[247] Even if these structural impediments are lifted, the learned

testimony); Comm. on Model Criminal Jury Instructions, Mich. Supreme Court, Michigan Model Criminal Jury Instructions 5-16 (n.d.), https://perma.cc/WAN2-VL4V (reminding jurors not to give special credibility to police witness testimony).

244. *See* Lafler v. Cooper, 566 U.S. 156, 170-72 (2012) (trusting lower courts to exercise discretion with respect to remedies).

245. *See* Backus & Marcus, *supra* note 196, at 1572-78.

246. *See, e.g.*, Charles J. Ogletree, Jr., Essay, *An Essay on the New Public Defender for the 21st Century*, LAW & CONTEMP. PROBS., Winter 1995, at 81, 85-86 (describing the "cynicism and disillusionment" that public defenders develop); Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1769-70 (2016) (describing how many defense attorneys fail to perform their role effectively because the system and its pressures "beat the fight out of them"); Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 181, 191-92 (2008) (explaining how the financial and structural forces of indigent defense delivery systems shape the culture of defender offices, and noting how some defender offices develop a "shoot from the hip" attitude and a sense that "fidelity to the judge is paramount").

247. *See, e.g.*, Primus, *supra* note 246, at 1788-89.

helplessness that these systems have created will be resistant to change.[248] Stated differently, structural ineffectiveness problems can and do, over time, create at least some personally ineffective lawyers. Lawyers who have learned not to investigate their cases or perform basic legal research may by habit continue to perform inadequately even after structural impediments are lifted. A robust personal ineffectiveness doctrine is necessary to check the development and continuation of these habits once structural obstacles to effective representation are removed.

Personal ineffectiveness review is also necessary to prevent wrongful convictions of innocent people. Scientific advances in DNA testing have spurred a wave of exonerations and catalyzed a movement focused on preventing wrongful convictions.[249] Scholars who study exonerations have learned that one of the leading causes of wrongful convictions is ineffective defense lawyers.[250] Addressing personal ineffectiveness is accordingly important to prevent false convictions.

It is also important in cases where the defendants are guilty. Procedural justice matters: The legitimacy of the criminal justice system is predicated on the public's feeling that the system treats people fairly.[251] If people do not believe that the system is fair, they will be less inclined to respect its results.

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248. Because of the structural problems that plague many defender organizations, defendants are depersonalized and their cases triaged. Many defenders get worn down and come to believe that there is no point in trying to effectuate change because nothing they do will change the system's outputs. *Cf.* Steven F. Maier & Martin E.P. Seligman, *Learned Helplessness: Theory and Evidence*, 105 J. EXPERIMENTAL PSYCHOL. 3, 16-19 (1976) (documenting the psychological phenomenon of learned helplessness, which describes how people who face uncontrollable outcomes can become "seriously debilitated" and ultimately give in and adapt their behavior to conform to the environment). These lawyers learn not to ask for investigative or expert assistance because they believe that their requests won't be granted due to budget constraints. They accept that their caseloads will be too high, that they will need to plead defendants' cases without ever having investigated the charges, and that they won't have time to file important motions or adequately prepare cases. Without adequate training and supervision, the status quo perpetuates itself. *See* Primus, *supra* note 246, at 1773-74. New attorneys who enter the system learn by watching those who came before them, and the necessary lack of zealous, client-centered advocacy gets passed on. *See id.*

249. *See, e.g.*, Brandon L. Garrett, *Actual Innocence and Wrongful Convictions*, *in* REFORMING CRIMINAL JUSTICE—VOLUME 3: PRETRIAL AND TRIAL PROCESSES, *supra* note 2, at 193, 193 (describing these developments).

250. *See id.* at 208; *see also* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 165-67 (2011) (documenting how ineffective defense lawyers have failed to adequately challenge evidence that leads to wrongful convictions).

251. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161-78 (2006) (arguing that whether people deem the law to be legitimate affects their tendency to comply with the law and explaining how unfair procedures undermine legitimacy).

That disrespect in turn encourages lawlessness.[252] To be sure, people who are convicted of crimes might not be expected to sing the praises of the system, no matter how procedurally fair it is. But indigent criminal defendants, like most people, generally know the difference between being treated fairly and being railroaded. In the system as it currently operates, indigent defendants often complain that their trial attorneys do not communicate with them and assume from the outset that they are guilty.[253] That would be problematic "in any system that wants to be perceived as legitimate, and it is particularly problematic in an adversarial system that relies on zealous defenders to justify its results."[254] So in sum, personal trial attorney ineffectiveness generates disrespect for the system and undermines the legitimacy of its results.

For all these reasons, courts need to take seriously claims of personal as well as structural ineffectiveness. And recent developments in both the Supreme Court and the lower courts suggest that personal ineffectiveness is more complicated than many currently understand.

A. The Deficient Performance Prong

Courts and scholars routinely cite *Strickland* and say that, to prevail on a claim of personal trial attorney ineffectiveness (whether pervasive or personal), a defendant must first show that trial counsel's performance was deficient, meaning that the attorney performed unreasonably given prevailing norms of practice.[255] These experts fail to recognize that the Supreme Court has implicitly created three different tests, not one, for assessing deficient performance in personal ineffectiveness cases. As the following table demonstrates, some kinds of attorney errors give rise to a conclusive presumption of deficient performance, others create a rebuttable presumption of deficient performance, and only those that remain are judged under *Strickland*'s highly deferential reasonableness analysis.[256]

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252. *See id.*

253. Primus, *supra* note 2, at 128-30.

254. *See id.* at 129-30.

255. *See, e.g.*, Dubose v. United States, 213 A.3d 599, 602 (D.C. 2019) ("The proper measure of attorney performance is 'reasonableness under prevailing professional norms.'" (quoting Cosio v. United States, 927 A.2d 1106, 1123 (D.C. 2007) (en banc))); *see also* Pavatt v. Carpenter, 928 F.3d 906, 931 (10th Cir. 2019) (en banc), *cert. denied sub nom.* Pavatt v. Sharp, 140 S. Ct. 958 (2020); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1087-88 (2006); Stephanos Bibas, Essay, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1144 (2011).

256. Many scholars rightly criticize *Strickland*'s deficient performance inquiry, arguing that the *Strickland* presumption that defense counsel's choices are strategic is too strong and that the Court's refusal to adopt a checklist for attorney performance has left the standard too vague. *See, e.g.*, Chhablani, *supra* note 12, at 2-3 (describing scholars'
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Table 1

Tests for Deficient Trial Attorney Performance

Governing Legal Test	Examples
Conclusive Presumption of Deficient Performance	*Conflicts of Interest* • Defense counsel labored under an actual conflict of interest by representing multiple clients, conflict affected counsel's choices or actions in representing the defendant, and the defendant did not consent to the conflict.[257] *Client Autonomy* • Defense counsel failed to perform a task that was either necessary to assist the client in making decisions that were reserved to the client or required to execute the client's wishes with respect to decisions that were reserved for the client.[258] • Defense counsel withheld important information necessary for the client to make decisions that were reserved for the client.[259] • Defense counsel affirmatively misled or misinformed the client in clearly erroneous ways about legal consequences that would flow from making decisions that were reserved for the client.[260] *Clear Errors of Law* • Defense counsel's actions were motivated by a clearly erroneous understanding of the law rather than any strategic concern.[261]

criticisms of the doctrine); Elizabeth Gable & Tyler Green, Note, Wiggins v. Smith*: The Ineffective Assistance of Counsel Standard Applied Twenty Years After* Strickland, 17 GEO. J. LEGAL ETHICS 755, 764-65 (2004) (criticizing the strong presumption against the defendant). I agree with many of these critiques, but they apply only to the category of cases where *Strickland*'s deferential standard is the governing test.

257. *See* Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980); *id.* at 356 & n.3 (Marshall, J., concurring in part and dissenting in part).

258. *See* Garza v. Idaho, 139 S. Ct. 738, 745-46 (2019); McCoy v. Louisiana, 138 S. Ct. 1500, 1509 (2018); Roe v. Flores-Ortega, 528 U.S. 470, 477-80 (2000).

259. *See* Missouri v. Frye, 566 U.S. 134, 145 (2012); Padilla v. Kentucky, 559 U.S. 356, 359, 368-69 (2010).

260. *See* Lee v. United States, 137 S. Ct. 1958, 1967-69 (2017); *Padilla*, 559 U.S. at 368-69.

261. *See* Hinton v. Alabama, 571 U.S. 263, 273-74 (2014) (per curiam); Williams v. Taylor, 529 U.S. 362, 395 (2000); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986).

Governing Legal Test	Examples
Rebuttable Presumption of Deficient Performance	• Failure to investigate (at least in capital cases).[262]
Strickland's Reasonableness Analysis	• All other attorney errors not included in the conclusive presumption of deficient performance or rebuttable presumption of deficient performance categories.[263]

Litigants and courts could profit from recognizing and further developing these three different tests rather than treating the most familiar apparatus—*Strickland* deference—as if it were generally applicable. I do not want to overstate this phenomenon: In several areas, amorphous reasonableness review with baked-in deference to defense counsel's choices remains prevalent and makes claims of ineffective assistance extremely difficult to win. But in a nontrivial number of circumstances, there is a presumption of attorney *in*competence and a de facto partial checklist for defense attorney performance. Instead of lamenting *Strickland* as the prosecution's shield against claims of ineffective assistance, maybe it is time to wield *Strickland* affirmatively as a sword by discovering ways to expand these more promising aspects of its doctrine.

1. A conclusive presumption of deficient performance

Looking at the Supreme Court's personal ineffectiveness cases since *Strickland*, a clear hierarchy emerges. First, contrary to language in Supreme Court opinions suggesting there is no checklist for attorney performance and no list of per se counsel obligations, some failures by defense counsel give rise to a de facto, conclusive presumption of deficient performance. These conclusive presumption cases fall into three categories.

The first category includes the conflict-of-interest cases. Once a defendant demonstrates that (a) trial counsel labored under an actual conflict of interest by representing multiple clients with conflicting interests, (b) the conflict affected counsel's choices or actions with respect to the representation of the defendant, and (c) the defendant did not consent to the multiple representation, the court will automatically find deficient performance.[264] "Defense counsel

262. *See* Andrus v. Texas, No. 18-9674, 2020 WL 3146872, at *4-8 (U.S. June 15, 2020) (per curiam); Porter v. McCollum, 558 U.S. 30, 31, 39-40 (2009) (per curiam); Rompilla v. Beard, 545 U.S. 374, 383-90 (2005); Wiggins v. Smith, 539 U.S. 510, 521-29 (2003); *Williams*, 529 U.S. at 396; *see also infra* notes 295-99 and accompanying text.

263. *See, e.g.*, Yarborough v. Gentry, 540 U.S. 1, 5-6 (2003) (per curiam).

264. *See* Cuyler v. Sullivan, 446 U.S. 335, 348-50 (1980) ("In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate
footnote continued on next page

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."[265] The failure to avoid an actual conflict of interest is per se deficient.[266]

The second category involves cases that infringe on clients' autonomy with respect to decisions that are reserved for them. For example, if counsel fails to perform a discrete, almost ministerial task that is (a) necessary to assist the defendant in making decisions that are reserved for the client or (b) required to execute the client's wishes with respect to decisions that are reserved for the client, that is per se deficient.[267] This includes cases where defense counsel withholds important information necessary for the client to make such decisions[268] and cases where defense counsel affirmatively misleads or misinforms the client in clearly erroneous ways about the legal consequences that will flow from making such decisions.[269] Those decisions include whether to plead guilty or go to trial, whether to have a jury trial or bench trial, whether to testify at trial or remain silent, and whether to pursue or forgo an appeal.[270] Defense counsel has specific ministerial duties that she must perform to aid the client in making and executing the client's decisions in these situations. For example, the Supreme Court has held that when the prosecution

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that an actual conflict of interest adversely affected his lawyer's performance."); *see also id.* at 346-47 (noting that a client can "knowingly accept such risk").

265. *Id.* at 346; *see also* Strickland v. Washington, 466 U.S. 668, 688 (1984) (explaining that "counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest").

266. The defendant has to show that there is an actual conflict that adversely affected the attorney's choices or actions with respect to the defendant. *See* Mickens v. Taylor, 535 U.S. 162, 171, 172 n.5 (2002); *Cuyler*, 446 U.S. at 348. But once an actual conflict is apparent, the lawyer's failure to redress it by obtaining a waiver of the conflict from the client, withdrawing from the representation, or asking the court for help to avoid the conflict (by, for example, appointing new counsel) is per se deficient. *See Cuyler*, 446 U.S. at 348 (recognizing that an actual conflict of interest that adversely affects an attorney's performance violates the Sixth Amendment).

267. *See* Garza v. Idaho, 139 S. Ct. 738, 745-46 (2019); Roe v. Flores-Ortega, 528 U.S. 470, 477-80 (2000).

268. *See* Missouri v. Frye, 566 U.S. 134, 145 (2012); Padilla v. Kentucky, 559 U.S. 356, 368-69 (2010) (finding a constitutional violation where an attorney failed to advise a noncitizen client regarding the risk of deportation before the client entered into a plea that could result in deportation).

269. *See* Lee v. United States, 137 S. Ct. 1958, 1967-69 (2017); *Padilla*, 559 U.S. at 368-69. This should not be surprising given the Supreme Court's handling of other cases involving violations of a defendant's autonomy secured by the Sixth Amendment. *See* McCoy v. Louisiana, 138 S. Ct. 1500, 1509 (2018) (recognizing that there are certain decisions that are reserved for the client and holding that, when a client "expressly asserts that the objective of '*his* defence' is to maintain innocence . . . , his lawyer must abide by that objective" (quoting U.S. CONST. amend. VI)); United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006) (recognizing the right of the client to choose his retained counsel).

270. *McCoy*, 138 S. Ct. at 1508; *accord* Jones v. Barnes, 463 U.S. 745, 751 (1983).

makes a favorable plea offer, defense counsel has a duty to convey that offer in order to permit the client to decide whether to plead or not.[271] If counsel fails to convey a favorable plea offer to her client, that is per se deficient performance because it prevents the client from being able to exercise her right to choose a plea or a trial.[272] The reasons the attorney might have for failing to convey the offer do not matter. She has, by failing to convey the offer, taken away the client's ability to make a choice that is reserved to the client, and her performance is per se deficient. Similarly, the Supreme Court has held that defense counsel's failure to file a notice of appeal when the client requests one is per se deficient performance.[273] Once again, filing the notice of appeal is a purely ministerial act that defense counsel performs to effectuate the client's wishes with respect to a decision that the client is entitled to make.

The Supreme Court has also held that there is per se deficient performance when defense counsel withholds important information or provides information that is clearly legally erroneous to the client during plea negotiations. Counsel's reasons for doing so do not matter, because the error infringes on the client's ability to make an informed choice about what to do. For example, in *Padilla v. Kentucky*, the Supreme Court held that a lawyer performs deficiently when she fails to advise a noncitizen client regarding the risk of deportation before that client enters into a plea that could result in deportation.[274] Such information is critically important, easy to convey, and gives the client information that the client needs to make an informed choice about whether to proceed to trial or take a plea.[275]

Recognizing that there is often little difference between errors of omission and errors of commission, the Court has also held that an attorney renders per se deficient performance when she misinforms a client by stating during plea negotiations that a plea would *not* subject the client to deportation when in fact it could.[276] Any form of attorney advice or information that affirmatively misleads or misinforms the client about clear legal consequences that will flow from pleading guilty rather than going to trial should lead to a finding of deficient performance. For example, in *Lafler v. Cooper* the client expressed a willingness to plead until the defense attorney erroneously told him that he

271. *See Frye*, 566 U.S. at 145.

272. *See id.*

273. *See* Garza v. Idaho, 139 S. Ct. 738, 746 (2019); Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000).

274. 559 U.S. at 359, 368-69.

275. *Id.*

276. Lee v. United States, 137 S. Ct. 1958, 1967-69 (2017); *see also Padilla*, 559 U.S. at 370 (noting that "there is no relevant difference 'between an act of commission and an act of omission' in this context" (quoting Brief of Respondent at 30, *Padilla*, 559 U.S. 356 (No. 08-651), 2009 WL 2473880)).

could not be convicted of murder because the victim had been shot below the waist.[277] That erroneous legal advice caused the client to reject the plea offer and go to trial.[278] When the case reached the Supreme Court, the parties agreed that counsel's performance had been deficient.[279] By misinforming the client about the legal consequences of going to trial, counsel impermissibly infringed on the client's ability to make an informed choice about what to do.

The third category of cases in which the Court conclusively presumes deficient performance by a trial attorney comprises those cases where trial counsel's actions are motivated by a clearly erroneous understanding of the law and not by any strategic concern.[280] This category sometimes overlaps with the previous one. For example, *Lafler* could arguably fall into either category because defense counsel misled the defendant in that case due to a clearly erroneous understanding of the law on inferred intent.[281] But the rationale for a conclusive presumption of deficient performance in the two categories is slightly different. When it comes to decisions that are reserved for the client, counsel has a duty to ensure that the client is able to make an informed decision and must perform the ministerial acts necessary to present the client with the available options and effectuate the client's choices. Clear legal errors and omissions by counsel that interfere with the client's ability to make informed choices infringe on that right and are per se deficient regardless of counsel's reasons. In contrast, the third category of cases includes legal errors committed by counsel in areas beyond those reserved to the client. Because counsel is generally permitted to make strategic and tactical decisions, the attorney's reasons matter here. As a result, only when counsel's actions or omissions are motivated by a clearly erroneous understanding of the law will there be per se deficient performance in this last group of cases.

Hinton v. Alabama[282] provides a good example of this form of per se deficient performance. Hinton was alleged to have committed two murders and then a robbery with a gun.[283] The restaurant manager from the robbery identified Hinton as the robber, and the police found the gun that he used for

277. 566 U.S. 156, 161 (2012).

278. *Id.* at 161, 174.

279. *Id.* at 163.

280. *See* Hinton v. Alabama, 571 U.S. 263, 273-74 (2014) (per curiam); Williams v. Taylor, 529 U.S. 362, 395 (2000); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986); *see also* Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1077 (2009) (noting that the Court has more actively evaluated counsel's performance "where counsel's decision was based on a misunderstanding or ignorance of the law").

281. 566 U.S. at 161.

282. 571 U.S. 263.

283. *Id.* at 264-65.

the robbery.[284] The only evidence connecting Hinton to the homicides was expert ballistics testimony linking that gun to the bullets used to commit the homicides.[285] The defense attorney never retained a reputable ballistics expert, not for any strategic reason but because he mistakenly thought his available funding for an expert was capped at $1,000 and he could not find a good expert for that amount.[286] The only "expert" he could find at that rate was not qualified and was thoroughly discredited at trial.[287] Had he known that more money was available, defense counsel could have found a qualified defense expert to contest the State's ballistics evidence.[288] The Supreme Court deemed counsel's performance deficient, noting that "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."[289]

Consider also *Kimmelman v. Morrison*.[290] The trial counsel in that case failed to file a motion to suppress evidence, not for any strategic reason but merely because he was unaware that the police had performed a search.[291] He had done no investigation because he erroneously believed that the prosecution was legally required to turn over all of its inculpatory evidence.[292] As the Court put it, counsel's actions "betray[ed] a startling ignorance of the law,"[293] and his performance was per se deficient.[294]

These cases reveal the Court's underlying view that, to be reasonable, an attorney's performance cannot be motivated by a clearly erroneous understanding of the law. Attorneys are charged with getting the law right (at least when the law is clear). If they make decisions based on clear legal error, those decisions are patently unreasonable and per se deficient.

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284. *Id.*

285. *Id.* at 265-66.

286. *Id.* at 266-68.

287. *Id.* at 268-69.

288. *Id.* at 268.

289. *Id.* at 274.

290. 477 U.S. 365 (1986).

291. *Id.* at 385.

292. *Id.*

293. *Id.*; *see also* Williams v. Taylor, 529 U.S. 362, 395 (2000) (deeming trial counsel's failure to conduct a mitigation investigation in a capital case deficient and noting that counsel failed to uncover "extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records").

294. *Kimmelman*, 477 U.S. at 386-87.

2. A rebuttable presumption: Failure to investigate

In *Williams v. Taylor*,[295] *Wiggins v. Smith*,[296] *Rompilla v. Beard*,[297] and *Porter v. McCollum*,[298] the Court held that trial counsel performed deficiently by failing to conduct an adequate investigation before a capital sentencing hearing. To be sure, these holdings do not articulate a rule that such failures to investigate are per se deficient. But they seem to recognize a rebuttable presumption of deficient performance. Much of the Court's language in these cases seems to ignore the *Strickland* presumption that defense counsel's decisions are strategic. In fact, these cases seem to flip that presumption, suggesting that the failure to investigate will result in a finding of deficient performance absent the government's ability to make a strong showing of strategic reasons for the failure—at least in capital cases.[299]

For example, in *Rompilla*, the Court explained various ways that defense counsel could have pursued a mitigation investigation and then noted that "trial counsel and the Commonwealth respond to these unexplored possibilities by emphasizing this Court's recognition that the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up."[300] This presentation seems to put the onus on the government to explain the failure to investigate. The Court then faulted the defense attorney more specifically for failing to examine the court file containing information about the defendant's prior convictions, knowing that the State would rely on those convictions as an aggravating factor in favor of death.[301] The Court emphasized that investigating to obtain the information that the State has and will use against the defendant is more than just "common sense."[302] Indeed, the Court noted, "the American Bar Association Standards for Criminal Justice in circulation at the time of Rompilla's trial describes the obligation in terms no

295. 529 U.S. at 367, 395-96.

296. 539 U.S. 510, 521-29 (2003).

297. 545 U.S. 374, 383-90 (2005).

298. 558 U.S. 30, 39-40 (2009) (per curiam); *see also* Andrus v. Texas, No. 18-9674, 2020 WL 3146872 (June 15, 2020) (per curiam).

299. *See* Hessick, *supra* note 280, at 1077-78 (noting that "the Court has aggressively reviewed counsel performance . . . when counsel has failed to conduct an adequate investigation"); Stephen F. Smith, Essay, *Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515, 517 (2009) ("Defense attorneys must, on pains of being faulted for ineffective assistance, diligently investigate and defend their clients' cases—in capital cases, at least."); *see also* 3 LAFAVE ET AL., *supra* note 6, § 11.10(c) n.209 (collecting lower court cases where courts deem the failure to investigate deficient performance).

300. 545 U.S. at 382-83.

301. *Id.* at 383-86.

302. *Id.* at 387.

one could misunderstand in the circumstances of a case like this one."[303] After quoting the standard, the Court then noted that "the Commonwealth has come up with no reason to think the quoted standard impertinent here."[304] The implicit premise of this analysis is that a failure to investigate is deficient performance absent some showing to the contrary.

Rompilla is not the only Supreme Court case where the Court has apparently adopted a rebuttable presumption that the failure to investigate possible mitigation is deficient performance in a capital case. In *Williams v. Taylor*, the Court stated that counsel representing a client in a capital case has an "obligation to conduct a thorough investigation of the defendant's background" and held that the failure to fulfill that obligation was deficient unless "justified by a tactical decision."[305] And in *Porter v. McCollum*, the Court reiterated that "[i]t is unquestioned that under the prevailing professional norms . . . , counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'"[306]

3. The totality-of-the-circumstances reasonableness analysis

These cases stand in sharp contrast to the cases in which the Supreme Court subjects ineffective assistance allegations to a totality-of-the-circumstances reasonableness analysis. The totality-of-the-circumstances reasonableness test comes from *Strickland* itself, where the Court instructed reviewing courts that "[j]udicial scrutiny of counsel's performance must be highly deferential" and courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[307] Prevailing norms of practice in professional standards may be guides for determining what is reasonable, but they "are only guides."[308] The "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."[309]

This approach looks quite different from the rebuttable-presumption and per se approaches. For example, the defendant in *Yarborough v. Gentry* alleged

303. *Id.*

304. *Id.*

305. 529 U.S. 362, 396 (2000); *see also* Andrus v. Texas, No. 18-9674, 2020 WL 3146872, at *4 (June 15, 2020) (per curiam) (quoting the same language from the first quote).

306. 558 U.S. 30, 39 (2009) (per curiam) (quoting *Williams*, 529 U.S. at 396); *see also* Wiggins v. Smith, 539 U.S. 510, 524 (2003) (noting that despite "well-defined norms . . . counsel abandoned their investigation of [defendant's] background after having acquired only rudimentary knowledge of his history from a narrow set of sources").

307. Strickland v. Washington, 466 U.S. 668, 689 (1984).

308. *Id.* at 688.

309. *Id.*

that his trial attorney was ineffective because he gave a poor closing argument.[310] The Supreme Court initially focused on what counsel had done during that closing argument and noted the facts the defendant raised that could have been (but were not) used by defense counsel in closing, but then noted that "[e]ven if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them."[311] The Court then spoke about reasonable strategic choices to focus on a small number of points instead of pursuing a "shotgun approach" and noted that "there is a strong presumption that [counsel acted] for tactical reasons rather than through sheer neglect."[312] The Court started with the assumption that counsel performed reasonably and strategically rather than with a presumption of deficiency.[313]

4. Developing the three tests for deficient performance

As these cases show, the Supreme Court has adopted three different approaches to assessing the reasonableness of trial attorney performance in personal ineffectiveness cases. Going forward, litigants and lower courts should recognize these three approaches and think about ways to flesh out their contours.

First, lower courts should recognize that although the *Strickland* Court eschewed any reliance on "a checklist for judicial evaluation of attorney performance,"[314] the Supreme Court does have a mini-checklist of sorts. Some actions are per se problematic. The Supreme Court has been clearest about this in the multiple-representation conflict-of-interest cases. As a result, lower courts recognize that attorneys who violate the duty of loyalty through an actual conflict of interest involving multiple representation that affected counsel's choices and actions are per se deficient.[315] Lower courts should also

310. 540 U.S. 1, 3-5 (2003) (per curiam).

311. *Id.* at 1-7.

312. *Id.* at 7-8.

313. Even when the Supreme Court deems counsel's performance deficient under the totality-of-the-circumstances approach, it typically does so after emphasizing the heavy deference to be shown to counsel's professional choices and only after noting why counsel's actions cannot be deemed strategically reasonable. For example, in *Buck v. Davis*, the Court emphasized that "*Strickland*'s first prong sets a high bar [because a] defense lawyer navigating a criminal proceeding faces any number of choices about how best to make a client's case." 137 S. Ct. 759, 775 (2017). Even though the Court recognized that counsel is typically entitled to deference about those professional choices, it went on to hold that defense counsel's choice to offer "patently unconstitutional" expert testimony at a capital sentencing hearing, which suggested that the defendant posed a future danger because of his race, was not reasonable. *See id.*

314. *Strickland*, 466 U.S. at 688-89.

315. *See* 3 LAFAVE ET AL., *supra* note 6, § 11.9(d) (collecting cases).

explicitly recognize that a trial attorney's failure to perform tasks that are necessary to assist the defendant in making decisions that are reserved for the client or are necessary to execute the client's wishes with respect to decisions that are reserved for the client will result in a conclusive presumption that the attorney's performance was deficient under *Strickland*. They should also recognize that there is per se deficient performance when defense counsel withholds important information or provides important information that is clearly legally erroneous to the client during plea negotiations.

Courts should then expand on these Supreme Court cases and recognize other similar tasks that would fall into these per se categories of deficiency. With respect to conflict-of-interest cases, lower courts have already begun to recognize that defense attorneys' performance is deficient when actual conflicts of interest arise due to counsel's obligations to former clients[316] or counsel's personal or financial interests.[317] The source of the conflict should not matter. If a defense attorney is laboring under an actual conflict of interest that adversely affects her ability to represent the defendant, her failure to resolve that conflict by removing herself from the case, getting the client's informed consent to waive the conflict, or asking the court to appoint other counsel to resolve the problem constitutes deficient performance.

Lower courts should similarly think about logical implications of the other per se deficient performance categories. For example, counsel's failure to discuss the right to a jury trial with a client or to inform the client of his right to testify at trial on his own behalf always should be deemed per se deficient performance. And when counsel gives advice that is clearly legally incorrect to a client who is trying to make a decision that the client is entitled to make, that too should be deemed per se deficient. For example, suppose an attorney informs a client who is trying to decide between a bench trial and a jury trial that he will be convicted by the jury if a bare majority of the jurors think he is guilty. That advice is clearly erroneous under the law because a jury must be

316. *See, e.g.*, Perillo v. Johnson, 205 F.3d 775, 797-99 (5th Cir. 2000); Freund v. Butterworth, 165 F.3d 839, 858-60 (11th Cir. 1999) (en banc); Mannhalt v. Reed, 847 F.2d 576, 579-80 (9th Cir. 1988); United States v. Young, 644 F.2d 1008, 1012-13 (4th Cir. 1981).

317. *See, e.g.*, *Mannhalt*, 847 F.2d at 580-83 (finding a conflict of interest when defense counsel was accused of criminal conduct related to the charges for which his client was being tried); United States v. Hearst, 638 F.2d 1190, 1193 (9th Cir. 1980) (explaining that an actual conflict of interest was possible due to defense counsel's financial interest in a book deal, and remanding for a hearing). Although the Supreme Court in *Mickens v. Taylor* questioned whether extensions of the conflict-of-interest doctrine beyond the context of multiple representation were appropriate, it appeared to be questioning the presumption of prejudice that accompanied a finding of an actual conflict of interest. *See* 535 U.S. 162, 174-76 (2002). The Court did not appear to question the premise that an attorney performs deficiently when she labors under an actual conflict of interest that adversely affects her ability to represent the defendant, regardless of the source of that conflict.

unanimous for the conviction to be constitutionally valid.[318] Based on that advice, the client opts for a bench trial. That trial attorney's performance should be deemed per se deficient because the attorney provided clearly legally erroneous information that affected the client's decision to plead or go to trial.[319]

Lower courts should also do more to flesh out what affirmative obligations trial attorneys have in terms of the advice that they need to convey to clients facing choices about whether to plead or go to trial, whether to opt for jury trials or bench trials, whether to testify or to remain silent, and whether to appeal. Does the trial attorney have an affirmative obligation to tell the client that if he chooses not to testify, the government cannot comment on his silence?[320] Is a trial attorney's performance per se deficient if she does not inform a client who has prior impeachable convictions about the danger that those convictions will be used against him if he chooses to testify? These are the kinds of questions that lower courts should be addressing when thinking about the category of cases where the Supreme Court has treated attorney errors as per se deficient.

The Supreme Court recently held that, in addition to the decisions of whether to plead, have a jury, testify, and appeal, "it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt."[321] The lower courts should now be addressing what trial counsel's responsibilities are to support the client in making decisions about the "objective of his defense."[322] Perhaps trial counsel has a duty to inform a client about the elements of the crime so that the defendant can decide if he is guilty or innocent. After all, without that information, how can the defendant rationally make a choice about the objectives of the defense?

More also needs to be said about what kinds of deficient performance will trigger a rebuttable presumption of deficient performance. The answer might

318. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1396-97 (2020) (holding that "the Sixth Amendment requires unanimity" and that this "requirement applies to state and federal criminal trials equally").

319. *Cf.* Miller v. State, 548 S.W.3d 497, 498-99 (Tex. Crim. App. 2018) (finding deficient performance when defense counsel incorrectly advised the defendant that he was eligible for bench probation and defendant waived his right to a jury trial as a result of this erroneous advice).

320. *See* Griffin v. California, 380 U.S. 609, 609-10, 613-15 (1965).

321. McCoy v. Louisiana, 138 S. Ct. 1500, 1505, 1508 (2018).

322. *Id.* at 1505; *see also, e.g.*, State v. Luby, 904 N.W.2d 453, 459 (Minn. 2017) (holding that a defense attorney's decision to concede premeditation in a first-degree murder case without client consent was per se deficient).

be found in the definition of "prevailing norms of practice." Recall that in *Strickland*, the Court held that trial counsel's performance is deficient if the attorney performed unreasonably given prevailing norms of practice. It then noted that ABA standards are "guides" for determining prevailing norms, but that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel."[323]

In the years since *Strickland*, there has been some tension in the Court's cases about how much deference to give to professional guidelines and state laws or rules when assessing trial attorney performance.[324] In addition to concerns about the source of the standards—are they codified state standards that attorneys are required to follow or professional standards issued by private organizations that are more aspirational?—there are also questions about whether local or national standards are more appropriate benchmarks for determining prevailing norms of practice. At one point, the Supreme Court recognized that courts "may need to define with greater precision the weight to be given to recognized canons of ethics [and] the standards established by the state in statutes or professional codes" when addressing Sixth Amendment ineffective assistance of trial counsel challenges.[325] Perhaps now is the time for lower courts to take up that invitation. Doing so might inform the dividing line between the rebuttable presumption cases and the totality-of-the circumstances reasonableness cases.

The Court's rebuttable presumption cases are riddled with references to and reliance on ABA guidelines and standards documenting defense counsel's obligations to thoroughly investigate.[326] Some scholars have gone so far as to suggest that these cases "stand for the proposition that the ABA Standards for Criminal Justice should be used as norms for determining what is objectively

323. Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

324. *Compare* Missouri v. Frye, 566 U.S. 134, 145-46 (2012) (noting that professional standards can be "important guides" when assessing deficient performance), Padilla v. Kentucky, 559 U.S. 356, 367-69 (2010) (relying on the ABA Criminal Justice Standards and other professional standards to determine whether counsel's performance was reasonable), Rompilla v. Beard, 545 U.S. 374, 387 (2005) (similar), *and* Wiggins v. Smith, 539 U.S. 510, 524-25 (2003) (similar), *with* Bobby v. Van Hook, 558 U.S. 4, 8 (2009) (per curiam) (faulting the court of appeals for "treat[ing] the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands" and noting that the ABA guidelines are relevant only if they reflect prevailing norms of practice and are not so detailed that they would interfere with counsel's independence or restrict the latitude counsel should have to make tactical decisions).

325. *See* Nix v. Whiteside, 475 U.S. 157, 165 (1986).

326. *See* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION standards 4-4.1 to .7 (2017), https://perma.cc/EVL8-W9H6.

reasonable representation."[327] Even though the Court does not view ABA guidelines as "inexorable commands" that trial attorneys must follow at the risk of being deemed ineffective,[328] its recognition that these standards are important should not be taken lightly.

I agree with those who have suggested that lower courts should look at a host of primary and secondary sources to determine what the prevailing norms of practice were at the time of trial.[329] After all, if the analysis is supposed to ask whether counsel's performance was reasonable given prevailing norms of practice, it is important to know what those norms were, and norms typically are not derived from just one source. Sources that courts should consult include, among other things, court decisions (including legal malpractice cases) describing existing professional norms at the time, state statutes or rules imposing duties and obligations on defense counsel, professional ethics opinions from bar associations, ABA guidelines and Model Rules of Professional Conduct, guidelines from the National Legal Aid & Defender Association, local professional bar guidelines, training materials used by indigent defense providers to describe defense counsel's obligations, standards issued by Indigent Defense Commissions, U.S. Department of Justice publications from the Office of Justice Programs, and law review articles and treatises describing professional norms.

When multiple sources converge in imposing a particular duty on defense counsel, that duty should be considered a prevailing norm of practice. The stronger the convergence, the stronger the norm. At some point, when the sources all agree, the norm might be strong enough to justify a rebuttable presumption of deficiency if the attorney failed to comply with the norm. The Supreme Court has already endorsed an approach similar to this one in *Padilla v. Kentucky*.[330] In finding that an attorney's failure to advise her client regarding the risk of deportation was inconsistent with prevailing norms and thus deficient, the Court noted that "[a]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require

327. 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, 129 (2007); *see also* Robert R. Rigg, *The T-Rex Without Teeth: Evolving* Strickland v. Washington *and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 104 (2007) ("It is clear that the United States Supreme Court has tightened counsel's duty to investigate . . . by using the ABA standards as an evaluative tool rather than mere 'guidelines.'").

328. *Van Hook*, 558 U.S. at 8.

329. *See* Gary Feldon & Tara Beech, *Unpacking the First Prong of the* Strickland *Standard: How to Identify Controlling Precedent and Determine Prevailing Professional Norms in Ineffective Assistance of Counsel Cases*, 23 U. FLA. J.L. & PUB. POL'Y 1, 18-20 (2012).

330. 559 U.S. 356 (2010).

defense attorneys to advise as to the risk of deportation consequences for non-citizen clients."[331]

The fact that the presumption is rebuttable should respond adequately to some of the concerns raised in *Strickland* itself about imposing a rigid checklist for measuring attorney performance.[332] A presumption that can be rebutted with evidence of a real strategic reason for failing to comply with the norm does not "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."[333] Nor does it "distract counsel from the overriding mission of vigorous advocacy of the defendant's cause."[334] In fact, the sources' universal acceptance of a norm of practice suggests that the mission of providing effective advocacy would be better served by recognizing the rebuttable presumption and sending a message that there is a preference for compliance with the norm in the vast majority of cases.

Finally, when courts are looking at sources to determine what the prevailing professional norms were at the time of trial, they need to stop conflating personal and structural ineffectiveness. Some lower courts have defined the prevailing professional norms by looking to customary practice in a given jurisdiction.[335] On this logic, if all of the defense attorneys in the jurisdiction have excessive caseloads such that they cannot investigate their cases pretrial, then no particular attorney is ineffective in failing to investigate: She is just acting in accordance with the prevailing community practice. This leveling-down approach is problematic because it uses structural problems in defense delivery systems to justify patently ineffective attorney performance. It insulates defense attorneys who join in community practices that ignore attorneys' professional obligations to their clients. It also fails to incentivize attorneys to comply with their professional obligations and raise the level of representation to constitutionally acceptable levels. It has the perverse effect of discouraging defense attorneys from highlighting structural ineffectiveness problems that would, in turn, raise their own professional obligations.

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331. *Id.* at 367 (quoting Brief for Legal Ethics, Criminal Procedure, & Criminal Law Professors as Amici Curiae in Support of Petitioner at 12-14, *Padilla*, 559 U.S. 356 (No. 08-651), 2009 WL 1556546).

332. *Cf.* Chiang, *supra* note 168, at 469 (explaining that some scholars believe that checklists "sometimes set unrealistic goals for handling routine minor criminal cases and can be too vague to be helpful in a serious investigation into the adequacy of defense services" (quoting Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 336 (2002))).

333. *See* Strickland v. Washington, 466 U.S. 668, 689 (1984).

334. *See id.*

335. *See* Lauren Sudeall Lucas, *Lawyering to the Lowest Common Denominator:* Strickland*'s Potential for Incorporating Underfunded Norms into Legal Doctrine*, 5 FAULKNER L. REV. 199, 213 (2014).

In short, doctrine in this area should be willing to treat norms as *normative* rather than solely as descriptive of the lowest common denominator of legal representation in a given jurisdiction.[336] Instead, the reasonableness of counsel's behavior needs to be measured against the performance that we would expect of an attorney who was complying with her constitutional obligations. As others have argued, this means that national standards (in addition to local ones) should inform courts' assessments of prevailing professional norms.[337]

B. The Prejudice Analysis

Just as the deficient performance analysis is multilayered and has the potential to provide more robust review of trial attorney behavior than many have realized, the prejudice inquiry is multifaceted and need not be interpreted as stingily as some experts have suggested. The Supreme Court has repeatedly recognized that "the concept of prejudice is defined in different ways depending on the context in which it appears."[338] Whether a reviewing court will require the defendant to show actual prejudice or will presume prejudice "turns on the magnitude of the deprivation of the right to effective assistance of counsel."[339] When personal ineffectiveness is pervasive, prejudice is presumed. But when personal ineffectiveness is episodic, *Strickland* requires the defendant to demonstrate prejudice. The line between episodic and pervasive personal ineffectiveness is therefore important. But little attention has been paid to the case law discussing it.[340]

Even when defendants bear the burden of demonstrating *Strickland* prejudice, recent legal developments suggest that *outcome-determinative*

336. *See, e.g.*, Richard L. Gabriel, Comment, *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, 1284 (1986) (arguing that, when measuring the objective reasonableness of attorney performance, courts should ask if the attorney's performance was "commensurate with the prevailing notion of a competent attorney").

337. *See* Sudeall Lucas, *supra* note 335, at 221.

338. *See, e.g.*, Weaver v. Massachusetts, 137 S. Ct. 1899, 1911 (2017).

339. Roe v. Flores-Ortega, 528 U.S. 470, 482 (2000).

340. A few commentators have discussed the cases involving sleeping lawyers, but they often do not discuss the line between episodic and pervasive ineffectiveness more broadly. *See, e.g.*, Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67, 99-100 (2002); Kimberly Sachs, Note, *You Snooze, You Lose, and Your Client Gets a Retrial:* United States v. Ragin *and Ineffective Assistance of Counsel in Sleeping Lawyer Cases*, 62 VILL. L. REV. 427, 454-55 (2017). *But see* Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of* Cronic*'s Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 863-80 (2003) (extending consideration of the sleeping lawyer cases to other forms of representational absence).

prejudice may not always be what defendants need to show.[341] A showing that a trial was fundamentally unfair may suffice, even if that showing is not tantamount to showing that the result would have been different in the absence of a specific episode of attorney ineffectiveness. As a result, satisfying *Strickland*'s prejudice requirement for personal ineffectiveness need not be as onerous as experts have assumed.

1. Pervasive versus episodic personal ineffectiveness

Prejudice is presumed when personal ineffectiveness infects an entire proceeding. Such pervasive ineffectiveness demonstrates a breakdown in the adversarial process, and the effects of such a breakdown are impossible to measure.[342] But when is counsel's deficient performance serious enough to be deemed pervasive? The Supreme Court has not provided much guidance in answering this question. It has found personal ineffectiveness to be pervasive in only two kinds of cases: (1) cases in which trial counsel represented multiple clients with conflicting interests and the conflict of interest affected counsel's choices or actions vis-à-vis the defendants,[343] and (2) cases in which trial counsel violated the client's autonomy by failing to follow the client's wishes with respect to a decision that was reserved for the client.[344] Outside of the conflict-of-interest and client-autonomy spheres, the Supreme Court has never deemed personal ineffectiveness pervasive.

In *Bell v. Cone*, the Supreme Court rejected a defendant's claim that his attorney's personal ineffectiveness at the sentencing phase of his capital murder trial was pervasive enough to exempt the defendant from having to demonstrate prejudice specifically.[345] Even though defense counsel had not

341. *See infra* Part IV.B.2.

342. *See* Florida v. Nixon, 543 U.S. 175, 179 (2004) (citing United States v. Cronic, 466 U.S. 648, 659 (1984)).

343. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335, 348-50 (1980).

344. These cases fall into two subcategories. The first includes cases where counsel failed to file a notice of appeal when the client had or would have requested one. *See, e.g.*, Garza v. Idaho, 139 S. Ct. 738, 746 (2019); *Flores-Ortega*, 528 U.S. at 477, 479-80. All the defendant needs to show in these cases is that there is a reasonable probability that he would have appealed but for counsel's deficient performance. There is no required demonstration of a likelihood of success on appeal because it would be fundamentally unfair to deprive defendants of the appellate process due to trial counsel's failure. *See Flores-Ortega*, 528 U.S. at 484. The second category includes *McCoy v. Louisiana*, where the Court held that defense counsel performed deficiently by failing to adhere to the client's desire to maintain his innocence and determine the fundamental objective of his capital defense. 138 S. Ct. 1500, 1510-11 (2018).

345. 535 U.S. 685, 696-98 (2002).

presented a mitigation case[346] or made a closing argument at the penalty phase,[347] the Supreme Court refused to presume prejudice, noting that

> [w]hen 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. . . . Here, [the defendant'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.[348]

Cone demonstrates the importance of being able to draw the line between episodic personal ineffectiveness (which requires the defendant to demonstrate prejudice) and pervasive personal effectiveness (which presumes prejudice). As applied to specific cases, the distinction can be difficult to apply. But it cannot be true, as the Supreme Court suggested in *Cone*, that specific failures—no matter how numerous or substantial—are different in kind from pervasive ones. If the specific failures are numerous or substantial enough, they can lead to a pervasive breakdown.

In fact, the Supreme Court recently seemed to acknowledge that pervasive personal ineffectiveness can result from specific, isolated errors. In *Weaver v. Massachusetts*, the Court was faced with a claim that trial counsel was ineffective for failing to object to the closure of the courtroom during voir dire.[349] When analyzing the claim, the Court agreed that trial counsel's performance was deficient and indicated that prejudice would be presumed if the deficient performance "pervade[d] the whole trial."[350] Though the Court ultimately rejected Weaver's claim,[351] its willingness to ask whether a single error could result in a presumption of prejudice demonstrates that, even when counsel does not "fail[] to oppose the prosecution throughout the . . . proceeding as a whole,"[352] one serious error can sometimes lead to a breakdown in the adversarial process that renders the trial fundamentally unfair.[353] But neither

346. He had called mitigation-related witnesses in his attempt to raise an insanity defense at the guilt phase of the trial. *See id.* at 690-92.

347. *Id.* at 692.

348. *Id.* at 696-97; *see also* Wright v. Van Patten, 552 U.S. 120, 124-25, 124 n.* (2008) (per curiam).

349. 137 S. Ct. 1899, 1905 (2017).

350. *Id.* at 1912-13.

351. *Id.* at 1913.

352. *Cone*, 535 U.S. at 697.

353. *See* Hamilton v. Alabama, 368 U.S. 52, 54 (1961) (describing in the structural ineffectiveness context how one error—not having counsel at arraignment—can infect the subsequent proceedings). Some scholars have argued that there should be per se categories of pervasive ineffectiveness. *See, e.g.*, Mark Loudon-Brown, *Garbage In, Garbage Out: Revising* Strickland *as Applied to Forensic Science Evidence*, 34 GA. ST. U. L. REV. 893, 895

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the Court in *Cone* nor the Court in *Weaver* gave any guidance about when counsel's errors cross the line into that pervasive category.

Lower appellate courts have been partially filling that void, particularly in a series of cases involving defense attorneys who have fallen asleep during trial.[354] Falling asleep is a form of personal ineffectiveness; neither the government nor the system forces sleep upon defense counsel.[355] But it can be episodic or pervasive: Though it is problematic for an attorney to fall asleep at all during a legal proceeding, the effect of an attorney's nodding off for a brief moment is often different from the effect of an attorney's sleeping through an entire trial.[356] Lower courts in the sleeping-attorney cases have accordingly adopted a "substantial portion" test to determine when the deficient performance in those cases is pervasive enough to merit a presumption of prejudice.[357] If defense counsel falls asleep for a brief period, a reviewing court can look at the record to see what the attorney missed and then perform a prejudice analysis under *Strickland*. But if an attorney sleeps through a substantial portion of the trial, a meaningful prejudice inquiry is impossible.[358] As one lower court put the point, "[w]hether a lawyer slept for a substantial portion of the trial should

(2018) (arguing that if an attorney is deficient "in combating incriminating forensic science evidence, *Strickland* prejudice should be presumed").

354. *See* Sachs, *supra* note 340, at 441 (summarizing the lower court rules).

355. One could make arguments about the fatigue that results from being overworked, but such arguments would stretch the idea of structural ineffectiveness beyond its useful shape.

356. *See* United States v. Roy, 855 F.3d 1133, 1160 (11th Cir. 2017) (en banc) (noting that "the rule is not 'any is all,' nor is it 'all or nothing'"). *Compare* Muniz v. Smith, 647 F.3d 619, 623-24 (6th Cir. 2011) (noting that counsel was asleep "for a brief period" and holding that counsel must be asleep for a "substantial portion" of the trial to merit relief), *with* United States v. Ragin, 820 F.3d 609, 615, 621-23 (4th Cir. 2016) (noting that counsel was "frequently" asleep for substantial portions of the trial, resulting in a constructive denial of counsel), Burdine v. Johnson, 262 F.3d 336, 348-49 (5th Cir. 2001) (en banc) (similar), Tippins v. Walker, 77 F.3d 682, 685-87 (2d Cir. 1996) (similar), *and* Javor v. United States, 724 F.2d 831, 834-35 (9th Cir. 1984) (similar).

357. *See Ragin*, 820 F.3d at 619 (agreeing with other circuits in holding that "a defendant's Sixth Amendment right to counsel is violated when that defendant's counsel is asleep during a *substantial* portion of the defendant's trial" and that a presumption of prejudice is required); *Muniz*, 647 F.3d at 623 (joining the Second, Fifth, and Ninth Circuits, which "have held that the denial of counsel with presumed prejudice only occurs once counsel sleeps through a 'substantial portion of [defendant's] trial'" (alteration in original) (quoting *Javor*, 724 F.2d at 834)); *Burdine*, 262 F.3d at 348-49 (finding that "defense counsel slept during substantial portions" of the trial and in those circumstances the court "must presume prejudice"); *Javor*, 724 F.2d at 834-35 (holding that "when a defendant's attorney is asleep during a substantial portion of his trial, the defendant has not received the legal assistance necessary" and prejudice must be presumed); *cf. Tippins*, 77 F.3d at 685-87 (adopting a similar "repeatedly unconscious" or "repeated and prolonged lapses" test (capitalization altered)).

358. *See Roy*, 855 F.3d at 1154-55.

be determined on a case-by-case basis, considering, but not limited to, the length of time counsel slept, the proportion of the trial missed, and the significance of the portion counsel slept through."[359]

The substantial-portion test suggests a potentially generalizable way of determining when an error (or series of errors) should be treated as pervasive. Courts faced with allegations of pervasive personal ineffectiveness should look at the sum total of the lawyer's alleged errors and ask how long the errors lasted, how much of the trial they infected, and how significant those parts of the trial were to the case.[360] If numerous errors infected many different and significant parts of the case, it is reasonable to conclude that the attorney "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing."[361] It would be incredibly difficult for a reviewing court to meaningfully assess prejudice in those circumstances, and a presumption of prejudice is warranted.

Some lower courts have begun to consider the sum total of counsel's errors in this way. Consider, for example, a Connecticut appellate court's approach in *Edwards v. Commissioner of Correction*.[362] In a first-degree assault case, trial counsel failed to seek an additional competency evaluation, failed to cross-examine five of the six prosecution witnesses, and failed to investigate a possible alibi defense.[363] When the defendant later raised a personal ineffectiveness challenge to his conviction, the appellate court agreed that trial counsel's ineffectiveness was pervasive enough to merit a presumption of prejudice.[364] By "declining to cross-examine the victim and her children and failing to investigate his alibi . . . [counsel] failed to subject the state's case against the petitioner to any meaningful adversarial testing."[365] It was clear to the reviewing court that trial counsel "had already determined that the petitioner was the perpetrator and that he would be convicted."[366] This translated into an "utter lack of advocacy" that infected the entire trial

359. *Ragin*, 820 F.3d at 622 n.11. One circuit has also suggested that another factor, which is already implicit in this analysis, is "whether the specific part of the trial that counsel missed is known or can be determined." *Roy*, 855 F.3d at 1162. One author has argued that prejudice should be presumed whenever counsel sleeps through "a critical portion of trial." Sachs, *supra* note 340, at 453-54.

360. *Cf.* Cunningham-Parmeter, *supra* note 340, at 876-80 (discussing how, when assessing prejudice in cases of representational absence, courts should consider the length of counsel's absence and whether critical moments of the trial were missed).

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

362. 194 A.3d 329 (Conn. App. Ct. 2018).

363. *Id.* at 331.

364. *Id.* at 333-36.

365. *Id.* at 336.

366. *Id.*

proceeding.[367] More courts should be willing to consider the combined effect of all of trial counsel's deficient performance and presume prejudice when an utter lack of advocacy infected substantial portions of the proceedings.

2. Prejudice need not be outcome determinative

When trial attorney errors are episodic rather than pervasive, the prevailing view is that to demonstrate prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[368] But *Strickland* itself cautioned against applying the prejudice inquiry in a "mechanical" fashion.[369] According to the *Strickland* Court, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding."[370] In *Weaver*, the Court assumed that, even absent a showing of a reasonable probability of a different outcome, relief might still be available if the defendant could show that the attorney's errors were "so serious as to render [the] trial fundamentally unfair."[371]

Justin Murray and I have proposed that, after *Weaver*, criminal defendants should argue (and courts should recognize) that an attorney's episodic deficient performance is "prejudicial when counsel's errors rendered the trial process fundamentally unfair" even if those errors probably did not alter the trial's outcome.[372] Even before *Weaver*, Maryland's highest court relied on *Strickland* to hold that "[a] proper analysis of prejudice . . . should not focus solely on an outcome determination, but should consider 'whether the result of the proceeding was fundamentally unfair or unreliable.'"[373] Since *Weaver*, a

367. *Id.*

368. *See* Strickland v. Washington, 466 U.S. 668, 694 (1984) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). This formulation is regularly adapted for other kinds of proceedings. For example, if a defendant who pleaded guilty alleges that trial counsel was constitutionally ineffective in advising him during the plea process, the prejudice inquiry requires the defendant to "show that there is a reasonable probably that, but for counsel's errors, he would not have pleaded guilty." *See* Hill v. Lockhart, 474 U.S. 52, 59 (1985). And if the allegation is that a defendant who received a death sentence had a constitutionally ineffective attorney at the capital sentencing hearing, the defendant must show "a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

369. *Strickland*, 466 U.S. at 696.

370. *Id.*

371. Weaver v. Massachusetts, 137 S. Ct. 1899, 1911 (2017).

372. *See* Eve Brensike Primus & Justin Murray, *Redefining* Strickland *Prejudice After* Weaver v. Massachusetts, HARV. L. REV. BLOG (May 22, 2018), https://perma.cc/AR6Q-9TRP.

373. Coleman v. State, 75 A.3d 916, 928 (Md. 2013) (quoting Oken v. State, 681 A.2d 30, 44 (Md. 1996)).

number of federal and state courts have similarly suggested that fundamental unfairness is an alternative way to demonstrate prejudice.[374]

In *Weaver* itself, the Court did not find that the defendant demonstrated fundamental unfairness. The trial attorney performed deficiently by failing to object to a courtroom closure during voir dire, but the Court found no evidence that the trial was fundamentally unfair as a result. In particular, there was no evidence that a juror or any other court actor "failed to approach their duties with the neutrality and serious purpose that [the] system demands."[375] In short, the Court did not believe that the attorney's deficient performance "le[d] to basic unfairness."[376] Nonetheless, the *Weaver* Court's willingness to consider that question is potentially revolutionary because it suggests that defendants raising episodic personal ineffectiveness challenges may not need to show outcome-determinative prejudice to win. In *Strickland* itself, after all, the Court cautioned that the test articulated in that case should not be mechanically applied and emphasized that the ultimate question should focus on "the fundamental fairness of the proceeding[s]."[377] *Weaver* reflects that orientation, foregrounding the point that a showing of outcome-determinative prejudice may be only one of several ways to demonstrate the thing that a defendant obliged to show prejudice must establish: that the proceedings were fundamentally unfair.

On the question of what other ways exist for demonstrating fundamental unfairness, state case law is instructive. Some states have interpreted the right to effective trial counsel under their state constitutions to mandate an inquiry into fundamental fairness rather than outcome-determinative prejudice. In New York, for example, once a reviewing court has determined that a trial attorney's performance was deficient, the court "considers whether the defendant was afforded 'meaningful representation.'"[378] One way to show that the defendant was not afforded meaningful representation is to show that the trial attorney's errors likely changed the outcome.[379] But that is not the only way. A trial attorney's ineffective representation may lead to a new trial in New York even when there is strong evidence of the defendant's guilt, because the state's "constitutional standard for the effective assistance of counsel 'is

374. *See* Primus & Murray, *supra* note 372 (collecting cases).

375. *Weaver*, 137 S. Ct. at 1913.

376. *Id.*

377. Strickland v. Washington, 466 U.S. 668, 696 (1984).

378. People v. Olecski, 59 N.Y.S.3d 888, 894 (Crim. Ct. 2017) (quoting People v. Henry, 744 N.E.2d 112, 113 (N.Y. 2000)).

379. *See* People v. Canales, 972 N.Y.S.2d 316, 320 (App. Div. 2013).

ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case.'"[380]

Under the "meaningful representation" standard, New York courts will consider "whether counsel made appropriate motions, set forth a cogent defense theory, interjected viable objections, conducted meaningful cross-examination, gave an effective summation and otherwise presented a zealous defense."[381] The attorney must be "prepared on both the law and the facts."[382] Importantly, the New York courts consider attorney errors cumulatively when asking whether there has been meaningful assistance.[383] "[A] series of egregious deficiencies of a type that [a]re incapable of strategic explanation" can indicate a lack of meaningful representation regardless of whether the outcome was affected.[384] After all, when trial counsel makes a series of unprofessional errors, it undermines the legitimacy and fairness of the proceedings because it reveals that counsel has "failed to approach their duties with the neutrality and serious purpose that [the] system demands."[385]

Given the *Strickland* Court's language that the prejudice inquiry for episodic personal ineffectiveness claims should not be mechanically applied but should instead focus on "the fundamental fairness of the proceeding"[386] and the *Weaver* Court's recent suggestion that fundamental unfairness can exist absent a showing of a reasonable probability of a different outcome,[387] it is time for lower courts to think more expansively about the prejudice requirement for episodic personal ineffectiveness claims (as a matter of both federal and state constitutional law).[388] When a trial attorney fails to provide "meaningful representation" as a result of his or her deficient performance, the resulting trial is fundamentally unfair and reversal is warranted.

Reviving the focus on fundamental fairness will encourage litigants and lower courts to think about the combined effect of multiple trial counsel errors. It will also resolve an important split in the courts about cumulative

380. *Id.* (quoting People v. Benevento, 697 N.E.2d 584, 588 (N.Y. 1998)).

381. People v. Bush, 967 N.Y.S.2d 779, 780 (App. Div. 2013).

382. People v. Echavarria, 561 N.Y.S.2d 226, 227 (App. Div. 1990).

383. People v. Oathout, 989 N.E.2d 936, 939-40 (N.Y. 2013).

384. People v. Bartley, 748 N.Y.S.2d 18, 19 (App. Div. 2002); *see also Echavarria*, 561 N.Y.S.2d at 227.

385. *See* Weaver v. Massachusetts, 137 S. Ct. 1899, 1913 (2017).

386. Strickland v. Washington, 466 U.S. 668, 696 (1984).

387. 137 S. Ct. at 1911.

388. *See* Jan Lucas, Case Note, *A Cumulative Approach to Ineffective Assistance: New York's Requirement That Counsel's Cumulative Efforts Amount to Meaningful Representation;* People v. Bodden, 28 TOURO L. REV. 1073, 1083-86 (2012) (noting that New York, Alaska, Oregon, Hawaii, and Massachusetts have adopted relaxed prejudice requirements).

prejudice inquiries. Lower courts are currently divided on whether the *Strickland* prejudice analysis must be applied in isolation to each individual alleged personal error that trial counsel made or whether trial counsel's errors may be considered cumulatively to establish prejudice.[389] A determination of whether the trial was fundamentally unfair requires a cumulative approach.

Conclusion

Litigants and courts have myopically focused on ineffectiveness that is personal and episodic at the expense of ineffectiveness that is structural, pervasive, or both. That focus is deeply problematic given the widespread and well-documented structural problems in indigent defense delivery systems. To make matters worse, the doctrinal test that courts apply in personal ineffectiveness cases is considerably more cramped than what the Supreme Court's decisions in the area warrant. Litigants and courts should recognize that the right to effective assistance of trial counsel is entitled to more robust protection than it is currently given, even in cases where the violations are personal and episodic. And they should also expand their vision to recognize that personal and episodic ineffectiveness is only one of four forms of ineffectiveness—all of which should be redressed in court.

389. *Compare* Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006) (rejecting a cumulative approach), *with* Dugas v. Coplan, 428 F.3d 317, 335 (1st Cir. 2005) (adopting a cumulative approach), Earls v. McCaughtry, 379 F.3d 489, 495-96 (7th Cir. 2004) (same), Silva v. Woodford, 279 F.3d 825, 834 (9th Cir. 2002) (same), *and* Lindstadt v. Keane, 239 F.3d 191, 199 (2d Cir. 2001) (same).

Appendix

Supreme Court Ineffective Assistance of Counsel Cases

	Personal	**Structural**
Episodic	*McMann v. Richardson*, 397 U.S. 759 (1970) *Strickland v. Washington*, 466 U.S. 668 (1984) *Evitts v. Lucey*, 469 U.S. 387 (1985) * *Hill v. Lockhart*, 474 U.S. 52 (1985) * *Nix v. Whiteside*, 475 U.S. 157 (1986) * *Darden v. Wainwright*, 477 U.S. 168 (1986) *Kimmelman v. Morrison*, 477 U.S. 365 (1986) * *Smith v. Murray*, 477 U.S. 527 (1986) * *Burger v. Kemp*, 483 U.S. 776 (1987) * *Lockhart v. Fretwell*, 506 U.S. 364 (1993) *Smith v. Robbins*, 528 U.S. 259 (2000) *Williams v. Taylor*, 529 U.S. 362 (2000) *Glover v. United States*, 531 U.S. 198 (2001) * *Bell v. Cone*, 535 U.S. 685 (2002) *Wiggins v. Smith*, 539 U.S. 510 (2003) * *Yarborough v. Gentry*, 540 U.S. 1 (2003) * *Florida v. Nixon*, 543 U.S. 175 (2004) *Rompilla v. Beard*, 545 U.S. 374 (2005) * *Bobby v. Van Hook*, 558 U.S. 4 (2009) *Porter v. McCollum*, 558 U.S. 30 (2009) *Padilla v. Kentucky*, 559 U.S. 356 (2010) *Sears v. Upton*, 561 U.S. 945 (2010) * *Harrington v. Richter*, 562 U.S. 86 (2011) * *Premo v. Moore*, 562 U.S. 115 (2011) *Missouri v. Frye*, 566 U.S. 134 (2012) *Lafler v. Cooper*, 566 U.S. 156 (2012) * *Burt v. Titlow*, 571 U.S. 12 (2013) *Hinton v. Alabama*, 571 U.S. 263 (2014) * *Maryland v. Kulbicki*, 136 S. Ct. 2 (2015) *Buck v. Davis*, 137 S. Ct. 759 (2017) * *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) *Lee v. United States*, 137 S. Ct. 1958 (2017) *Andrus v. Texas*, No. 18-9674, 2020 WL 3146872 (U.S. June 15, 2020)	*Reece v. Georgia*, 350 U.S. 85 (1955) *Ferguson v. Georgia*, 365 U.S. 570 (1961) *United States v. Wade*, 388 U.S. 218 (1967) *Coleman v. Alabama*, 399 U.S. 1 (1970) *Brooks v. Tennessee*, 406 U.S. 605 (1972) * *Milton v. Wainwright*, 407 U.S. 371 (1972) * *United States v. Ash*, 413 U.S. 300 (1973) *Geders v. United States*, 425 U.S. 80 (1976) *Moore v. Illinois*, 434 U.S. 220 (1977) * *United States v. Morrison*, 449 U.S. 361 (1981) *Estelle v. Smith*, 451 U.S. 454 (1981) *Satterwhite v. Texas*, 486 U.S. 249 (1988) * *Perry v. Leeke*, 488 U.S. 272 (1989) * *Woods v. Donald*, 135 S. Ct. 1372 (2015)

	Personal	**Structural**
Pervasive	*Cuyler v. Sullivan*, 446 U.S. 335 (1980) * *Burger v. Kemp*, 483 U.S. 776 (1987) *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) * *Mickens v. Taylor*, 535 U.S. 162 (2002) * *Wright v. Van Patten*, 552 U.S. 120 (2008) *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) *Garza v. Idaho*, 139 S. Ct. 738 (2019)	*Powell v. Alabama*, 287 U.S. 45 (1932) *Johnson v. Zerbst*, 304 U.S. 458 (1938) * *Avery v. Alabama*, 308 U.S. 444 (1940) *Glasser v. United States*, 315 U.S. 60 (1942) * *Betts v. Brady*, 316 U.S. 455 (1942) *Williams v. Kaiser*, 323 U.S. 471 (1945) *Tomkins v. Missouri*, 323 U.S. 485 (1945) *White v. Ragen*, 324 U.S. 760 (1945) * *Foster v. Illinois*, 332 U.S. 134 (1947) *Von Moltke v. Gillies*, 332 U.S. 708 (1948) * *Bute v. Illinois*, 333 U.S. 640 (1948) *Hamilton v. Alabama*, 368 U.S. 52 (1961) *Gideon v. Wainwright*, 372 U.S. 335 (1963) *White v. Maryland*, 373 U.S. 59 (1963) *In re Gault*, 387 U.S. 1 (1967) * *Chambers v. Maroney*, 399 U.S. 42 (1970) *Argersinger v. Hamlin*, 407 U.S. 25 (1972) *Holloway v. Arkansas*, 435 U.S. 475 (1978) * *Scott v. Illinois*, 440 U.S. 367 (1979) * *Morris v. Slappy*, 461 U.S. 1 (1983) * *United States v. Cronic*, 466 U.S. 648 (1984) *Penson v. Ohio*, 488 U.S. 75 (1988)

* Defendant lost the ineffective assistance claim in the Supreme Court.