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2017]

YOU SNOOZE, YOU LOSE, AND YOUR CLIENT GETS A RETRIAL:
UNITED STATES v. RAGIN AND INEFFECTIVE ASSISTANCE
OF COUNSEL IN SLEEPING LAWYER CASES

KIMBERLY SACHS*

“[T]here is a time for many words and there is a time for sleep.”¹

I. SLEEP? THERE’S A NAP FOR THAT: AN INTRODUCTION TO THE PROBLEM
OF OVERWORKED AND OVERTIRED ATTORNEYS

Anyone who has ever contemplated an important life decision has probably heard these five words: You should sleep on it.² This is not just an age-old adage.³ Sleep, like food and water, is one of life’s essentials; the human brain and body rely on sleep to stay healthy and function properly, and studies suggest sleep can improve an individual’s ability to process information and make decisions.⁴ Today, however, more

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1. HOMER, *THE ODYSSEY OF HOMER* 153 (Charles W. Eliot ed., Samuel Henry Butcher & Andrew Lang trans., P.F. Collier & Son Co. 1909).

2. See *Sleep on It*, FREE DICTIONARY, <http://idioms.thefreedictionary.com/sleep+on+it> [<https://perma.cc/JRH4-EVZP>] (last visited Apr. 9, 2017) (explaining meaning of “sleep on it” idiom). To “sleep on it” means “to wait before making an important decision.” *Id.*

3. See Karen Erger, *Sleepless in the Corner Office*, 103 ILL. B.J. 48, 48–49 (2015) (discussing study that found sleeplessness can make individuals over-optimistic when contemplating decisions); see also *Sleep-Deprived People Make Risky Decisions Based on Too Much Optimism*, DUKE HEALTH (Mar. 8, 2011), <https://corporate.dukehealth.org/node/3318> [<https://perma.cc/M7DH-GLAZ>] (summarizing study that found sleep deprivation diminishes sensitivity to negative consequences). In the study, neuroscientists from two Duke University medical schools tested twenty-nine healthy adults to learn how sleep deprivation affects decision-making. See *id.* The study found “that a night of sleep deprivation leads to increased brain activity in brain regions that assess positive outcomes, while at the same time, this deprivation leads to decreased activation in the brain areas that process negative outcomes.” *Id.*

4. See *Why Is Sleep Important?*, NAT’L INST. HEALTH, <http://www.nhlbi.nih.gov/health/health-topics/topics/sdd/why> [<https://perma.cc/F3JN-HZHC>] (last updated Feb. 22, 2012) (providing summary of physical and mental benefits of good night’s sleep and noting “[s]leep helps your brain work properly”); see also *Brain Basics: Understanding Sleep*, NAT’L INST. NEUROLOGICAL DISEASE & STROKE, http://www.ninds.nih.gov/disorders/brain_basics/understanding_sleep.htm [<https://perma.cc/WW4F-VNBS>] (last visited Apr. 9, 2017) (summarizing importance of sleep and explaining sleep “gives the brain a chance to exercise important neuronal connections that might otherwise deteriorate from lack of activity”).

(427)

than one-third of American adults suffer from chronic sleep deprivation.⁵

Lawyers in particular average less sleep than almost any other working professionals.⁶ Round-the-clock working cultures have become the norm in the legal industry.⁷ Civil attorneys are chasing endless to-do lists, billable hour minimums, and the dream of partnership, and they are sacrificing sleep to accomplish their goals.⁸ Public defenders are similarly overworked.⁹ As a result, public defenders are tired, and they are catching

5. See Anna Almendral, *More Than a Third of Americans Don't Get Enough Sleep*, HUFFINGTON POST (Feb. 18, 2016, 4:16 PM), http://www.huffingtonpost.com/entry/americans-arent-getting-enough-sleep_us_56c61306e4b0b40245c9687b [<https://perma.cc/ZJ2G-5DEN>] (summarizing sleep study conducted by center of disease control, which concluded approximately 83.6 million U.S. adults suffer from sleep deprivation); see also Yong Liu et al., *Prevalence of Healthy Sleep Duration Among Adults—United States, 2014*, CTRS. DISEASE CONTROL & PREVENTION (Feb. 19, 2016), http://www.cdc.gov/mmwr/volumes/65/wr/mm6506a1.htm?s_cid=mm6506a1_w [<https://perma.cc/6BRH-FDZL>] (noting adults should sleep at least seven hours each night because short sleep duration can lead to physical and mental health problems).

6. See Catherine Rampell, *America's 10 Most Sleep-Deprived Jobs*, N.Y. TIMES: ECONOMIX (Feb. 22, 2012, 4:41 PM), http://economix.blogs.nytimes.com/2012/02/22/americas-10-most-sleep-deprived-jobs/?_r=1 [<https://perma.cc/GYJ8-Y2A5>] (explaining law is second most sleep-deprived profession, with most lawyers averaging just seven hours of sleep each night); see also Erger, *supra* note 3, at 49 (noting practice of law involves late nights and stating “[i]t is not [] easy to do good legal work or give good advice when you are running at a steep sleep deficit”).

7. See *The Truth About the Billable Hour*, YALE L. SCH., <https://www.law.yale.edu/student-life/career-development/students/career-guides-advice/truth-about-billable-hour> [<https://perma.cc/5QN2-37H9>] (last updated May 2016) (concluding lawyers must work from 7:00 a.m. to 9:00 p.m. during week and from 9:00 a.m. to 6:00 p.m. three Saturdays each month to hit billable hour minimums).

8. See Erger, *supra* note 3, at 48–49 (“For lawyers, the pressure to generate billable hours creates added incentives to steal a few hours from their personal ‘sleep bank.’”); see also Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 172, 182–83 (2005) (noting long-term effects of billable hour expectations and discussing attorney work-life survey that found average lawyer sleeps less than five hours each night and often feels stressed and fatigued); Stephen L. Carter, *Big Law Associates Need a Nap*, BLOOMBERG (Sept. 3, 2015, 3:56 PM), <https://www.bloomberg.com/view/articles/2015-09-03/big-law-associates-need-a-nap> [<https://perma.cc/9HW8-5VL2>] (explaining legal industry encourages overwork and long hours). These articles suggest “Big Law” associates work long hours because they must meet billable hour minimums. See *id.* (stating big firms require between 2,000 and 2,200 billable hours each year).

9. See Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 436 (2004) (“Although there are many dedicated and competent public defenders, they often face staggering case loads that prevent them from devoting their best efforts to every client.”). Weaver indicates that most public defenders are overworked and underpaid, and “[i]n some offices, the work loads are crushing and prevent public defenders (even the many who are competent and dedicated) from providing quality representation.” See *id.* at 441; see also Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683, 703 (2010) (noting public defenders have excessive

up on lost sleep when they can, where they can.¹⁰

Recently, a new favorite nap spot has emerged: the courtroom.¹¹ Drowsy defense attorneys are sleeping through trial, and their clients, who are often facing prison or death sentences, are challenging their convictions on the ground that they have received ineffective assistance of counsel under the Sixth Amendment.¹² Four federal circuit courts have already addressed this “sleeping lawyer” issue.¹³ In March 2016, the Fourth Circuit added its voice to the matter in *United States v. Ragin*.¹⁴

In *Ragin*, the Fourth Circuit considered whether an attorney who sleeps through trial violates a defendant’s Sixth Amendment right to effective assistance of counsel.¹⁵ The court relied on two landmark Supreme Court decisions when making its decision: *Strickland v. Washington*¹⁶ and its

caseloads and often lack skill, knowledge, and time to provide adequate representation to their clients).

10. See, e.g., *Tippins v. Walker*, 77 F.3d 682, 684 (2d Cir. 1996) (noting court-appointed counsel clearly slept during defendant’s trial); see also Deborah L. Rhode, *Access to Justice: Again, Still*, 73 *FORDHAM L. REV.* 1013, 1014 (2004) (stating “[c]ourts have upheld convictions where lawyers were on drugs, *asleep*, or parking their cars during key parts of the prosecutors’ cases” (emphasis added) (citing DEBORAH L. RHODE, *ACCESS TO JUSTICE* 3 (2004))). But see Bright *supra*, note 9, at 703 (“[M]ost lawyers do not sleep during trial.”).

11. See *Muniz v. Smith*, 647 F.3d 619, 621 (6th Cir. 2011) (addressing sleeping lawyer issue); *Burdine v. Johnson*, 262 F.3d 336, 338 (5th Cir. 2001) (ruling on habeas corpus claim in sleeping lawyer case); *Tippins*, 77 F.3d at 683 (addressing sleeping lawyer issue); *Javor v. United States*, 724 F.2d 831, 834–35 (9th Cir. 1984) (ruling on sleeping lawyer issue). These cases have become known as the “sleeping lawyer” cases. See Kristina G. Van Arsdell, Note, *Burdine v. Johnson: The Fifth Circuit Wakes up, but the Supreme Court Refuses to Put the Sleeping Attorney Standard to Rest*, 39 *HOUS. L. REV.* 835, 853–56 (2002) (referring to *Tippins*, *Javor*, and *Burdine* as “sleeping attorney” cases); see also Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1801 (2001) (“Instances of courtroom napping are sufficiently common that an entire jurisprudence has developed to determine how much dozing is constitutionally permissible.”).

12. For an in-depth discussion of sleeping lawyer cases, see *infra* notes 60–87 and accompanying text.

13. See *Muniz*, 647 F.3d at 623, 626 (ruling on sleeping lawyer issue and concluding there is no Sixth Amendment violation unless attorney sleeps for substantial portion of time); see also *Burdine*, 262 F.3d at 341 (ruling Sixth Amendment violation occurs when counsel is “repeatedly unconscious through not insubstantial portions” of trial); *Tippins*, 77 F.3d at 687 (concluding defendant suffers prejudice when counsel is “repeatedly unconscious at trial for periods of time in which defendant’s interests were at stake”); *Javor*, 724 F.2d at 834 (holding attorney that sleeps through substantial portion of defendant’s trial does not provide defendant with legal assistance guaranteed by Sixth Amendment).

14. 820 F.3d 609 (4th Cir. 2016).

15. See *id.* (noting sleeping lawyer problem was issue of first impression in Fourth Circuit). The case was on appeal from the Western District of North Carolina. See *id.* at 609; see also generally *Ragin v. United States*, No. 3:10-cv-488-RJC, 2014 WL 4105898 (W.D.N.C. Aug. 19, 2014), *vacated*, *Ragin*, 820 F.3d at 624.

16. 466 U.S. 668 (1984).

companion case *United States v. Cronic*.¹⁷ Under *Strickland*, a defendant claiming ineffective assistance of counsel must prove counsel's performance was deficient and that this deficiency prejudiced the defendant.¹⁸ In most contexts, a defendant must affirmatively prove prejudice; however, the *Cronic* Court recognized certain circumstances are presumptively prejudicial, such as when there is an actual or constructive denial of counsel at a critical stage of trial.¹⁹ In *Ragin*, the Fourth Circuit reasoned a sleeping lawyer is akin to no lawyer at all and concluded there is a presumption of prejudice under *Cronic* when an attorney sleeps through a substantial portion of a defendant's criminal trial.²⁰

This Note suggests the "substantial portion rule" articulated by the Fourth Circuit is a vague and imprecise standard for determining prejudice in sleeping lawyer cases and argues for a clearer rule that finds a presumption of prejudice when an attorney sleeps during a critical portion of trial.²¹ Part II provides background information regarding the

17. 466 U.S. 648 (1984); see also *Ragin*, 820 F.3d at 617–18 (discussing and interpreting Supreme Court precedent). For an in-depth discussion of the *Strickland* and *Cronic* decisions, see *infra* notes 41–59 and accompanying text.

18. See *Strickland*, 466 U.S. at 686 (explaining two-part test for ineffective assistance of counsel claims and stating test has both performance prong and prejudice prong).

19. Compare *id.* at 693 (noting ineffective assistance of counsel test is subject to requirement that "defendant affirmatively prove prejudice"), with *Cronic*, 466 U.S. at 658 (finding certain situations trigger presumption of prejudice). The *Cronic* Court stated that there are some "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. According to the Court in *Cronic*, there is a Sixth Amendment violation "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." See *id.* at 659.

20. See *Ragin*, 820 F.3d at 619 (concluding that counsel who sleeps through substantial portion of trial is presumptively prejudicial under *Cronic*). The Fourth Circuit analogized *Ragin*'s navigating through trial with a sleeping attorney to a gladiator arriving in the arena without the proper weapons. See *id.* at 624; see also *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975) ("While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.").

21. See *Tippins v. Walker*, 77 F.3d 682, 685 (2d Cir. 1996) (noting word "substantial" is unhelpful because "[i]t can refer to the length of time counsel slept, or the proportion of the proceedings missed, or the significance of those proceedings"). Indeed, the word substantial is susceptible to a variety of interpretations. See *Substantial*, OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/us/substantial> [<https://perma.cc/5WK9-75W9>] (last visited Apr. 9, 2017) ("Of considerable importance, size, or worth."); see also *Substantial*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/substantial> [<https://perma.cc/3GUP-F7G4>] (last visited Apr. 9, 2017) ("[L]arge in amount, size, or number."). The "critical stage rule" mirrors the language in *Cronic*. See *Cronic*, 466 U.S. at 659 (concluding trial is unfair if defendant does not receive effective assistance of counsel at critical stage of trial); see also Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronin's Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 878 (2004) ("Not even a substantial absence satisfies [*Cronic*] unless it occurs during key moments of the trial."); Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth*

Sixth Amendment and effective assistance of counsel jurisprudence.²² Part III discusses the facts of *Ragin* and provides an analysis of the *Ragin* court's decision-making process.²³ Part IV analyzes the *Ragin* court's decision and disagrees with the Fourth Circuit's adoption of the substantial portion rule.²⁴ Finally, Part V assesses the potential impact of the Fourth Circuit's decision.²⁵

II. THE DEFENSE RESTS: *STRICKLAND*, *CRONIC*, AND SLEEPING LAWYER CASES

As lawyers continue to juggle heavy caseloads, reaching the recommended eight hours of sleep each night becomes increasingly more difficult for them.²⁶ Sleep deprivation plagues the legal profession, and while the physical price of insufficient sleep may be poor health, an attorney's lack of sleep raises substantive legal issues, as well.²⁷ Indeed, courts have been faced with deciding whether a sleeping lawyer constitutes an actual or constructive denial of counsel under the Sixth Amendment of the Constitution for over three decades.²⁸ While each court has concluded that

Amendment and Should Be Deemed Per Se Prejudicial, 26 J. LEGAL PROF. 67, 99 (2002) (arguing courts should find per se prejudice when "counsel sleeps during a relatively large portion of the overall trial, during any substantial portion of the trial, or during any *critical stage of trial*" (emphasis added)).

22. For a further discussion of the development of Sixth Amendment jurisprudence and effective assistance of counsel, see *infra* notes 26–87 and accompanying text.

23. For a further discussion of the facts of *Ragin*, see *infra* notes 88–117 and accompanying text. For a narrative analysis of the *Ragin* decision, see *infra* notes 118–44 and accompanying text.

24. For a critical analysis of the *Ragin* decision, see *infra* notes 145–83 and accompanying text.

25. For a discussion of the impact of the *Ragin* decision, see *infra* notes 184–90 and accompanying text.

26. See Rampell, *supra* note 6 (discussing study that concluded law is second most sleep-deprived profession and noting lawyers get only seven hours of sleep each night).

27. See, e.g., *United States v. Ragin*, 820 F.3d 609, 612 (4th Cir. 2016) (considering Sixth Amendment violation in sleeping lawyer case). Sixth Amendment claims are not the only substantive legal issues that surround the sleeping lawyer; a sleeping lawyer can also face legal malpractice claims. See Rebecca A. Copeland, *Toward a More Effective Standard of Review: The Potential Effect of Burdine v. Johnson on Legal Malpractice in Texas*, 33 ST. MARY'S L.J. 849, 852 (2002) (arguing court finding that attorney slept through trial should "affect [a] criminal defendant's ability to prevail as a plaintiff in a legal malpractice civil action against [a] sleeping attorney").

28. See *Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984) (addressing sleeping lawyer claim). *Javor* was the first federal circuit court to address the sleeping lawyer issue. See *id.* (issuing decision same year as *Strickland* and *Cronic* opinions); see also Jeffrey L. Kirchmeier, *Drinks, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 460 (1996) (characterizing *Javor* as pre-*Strickland* case). The most recent circuit court to rule on the issue was the *Ragin* court. See *Ragin*, 820 F.3d at 609 (issuing decision in March 2016).

dozing defense attorneys violate the Sixth Amendment, the current rules regarding courtroom catnaps are vague and vary from circuit to circuit.²⁹

A. *It Is Not a Dream: You Have the Right to an Effective Attorney*

The Sixth Amendment of the Constitution guarantees all criminal defendants the right to counsel.³⁰ As early as 1932, the Supreme Court recognized the right to counsel as a fundamental right essential to fair trials.³¹ Attorneys' presence at trial is essential because "they are the means through which the other rights of the person on trial are secured."³² The average criminal defendant is unequipped with the skill and knowledge necessary to prepare an adequate legal defense, and as a result, attorneys are necessary to guide an accused through the judicial process and protect the accused from a conviction.³³

29. See Van Arsdell, *supra* note 11, at 856 (explaining standards utilized to determine when sleeping attorney's conduct is "so egregious" as to trigger presumption of prejudice differ from circuit to circuit).

30. See U.S. CONST. amend. VI. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. (emphasis added).

31. See *Powell v. Alabama*, 287 U.S. 45, 63, 65 (1932) (finding right to counsel fundamental right and concluding denial of counsel would contravene due process clause of Fourteenth Amendment). In *Powell*, the defendants were charged with rape, and no lawyer had been designated to represent the defendants until the morning of trial. See *id.* at 58–60 (finding defendants did not have aid of counsel from time of arraignment until beginning of trial and stating attorney appearance at trial was "pro forma [rather] than zealous and active"). The Court considered whether this denial of counsel violated the due process clause of the Fourteenth Amendment. See *id.* at 61. Answering affirmatively, the Court held a denial of counsel would be a denial of a hearing, and, therefore, a denial of due process "in the constitutional sense." See *id.* at 69. The Court, however, expressly limited its holding to the facts before it. See *id.* at 65 (choosing not to decide whether denial of counsel violates due process clause in other criminal proceedings or under other circumstances). Still, the Court recognized that

[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible He requires the guiding hand of counsel at every step in the proceedings against him.

Id. at 68–69.

32. See *United States v. Cronin*, 466 U.S. 648, 653 (1984) (discussing importance of attorneys).

33. See *Powell*, 287 U.S. at 68–69 (noting defendants require guiding hand of counsel because defendants are "unfamiliar with the rules of evidence" and "science of law").

As such, in *Johnson v. Zerbst*,³⁴ the Supreme Court held that counsel must be provided for defendants who cannot afford to hire their own attorneys in all federal criminal trials.³⁵ The Supreme Court extended this constitutional mandate to state criminal courts in *Gideon v. Wainwright*.³⁶ Writing for the *Gideon* majority, Justice Black famously stated lawyers “are necessities, not luxuries.”³⁷

Mere appointment of counsel, however, does not in and of itself satisfy the Sixth Amendment’s constitutional guarantees.³⁸ In order to achieve the purpose of the Sixth Amendment—a fair trial—an attorney must provide an accused with *effective* assistance of counsel.³⁹ The Sixth Amendment right to counsel, in essence, is the right to a reasonably competent attorney who advocates for the defendant and subjects the criminal trial to “meaningful adversarial testing.”⁴⁰

Prior to the Supreme Court’s decision in *Strickland*, all federal courts of appeal assessed attorney performance using a “reasonably effective assistance” standard.⁴¹ However, each court applied different tests with re-

34. 304 U.S. 458 (1938).

35. *See id.* at 467–68 (stating federal court must comply with Sixth Amendment when depriving defendant of life or liberty).

36. 372 U.S. 335 (1963). In *Gideon*, the Court recognized the purpose of the Sixth Amendment is a fair trial, and “[t]his noble ideal cannot be realized if the poor [defendants] charged with crime ha[ve] to face [their] accusers without a lawyer to assist [them].” *See id.* at 344.

37. *See id.* (“That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts *are necessities, not luxuries.*” (emphasis added)); *see also Cronin*, 466 U.S. at 653 (stating counsel’s presence at trial is essential because lawyers help secure rights of defendants).

38. *See 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, however, is not enough to satisfy the constitutional command.”). The Supreme Court has long recognized that the Sixth Amendment right to counsel envisions “counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.” *See id.*; *see also Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984) (explaining mere physical presence of attorney in courtroom is insufficient to satisfy “the [S]ixth [A]mendment entitlement to the assistance of counsel” (citing *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978))).

39. *See McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (recognizing right to counsel as right to effective assistance of counsel); *see also Strickland*, 466 U.S. at 686 (stating purpose of Sixth Amendment is “to ensure a fair trial”).

40. *See Cronin*, 466 U.S. 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.”); *see also Jones v. Barnes*, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting) (“To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court.” (citing *Anders v. California*, 386 U.S. 738, 744 (1967); *Entsminger v. Iowa*, 386 U.S. 748, 751 (1967))).

41. *See Strickland*, 466 U.S. at 683 (stating all federal courts of appeals have adopted “reasonably effective assistance” standard). The “reasonably effective assistance” standard looks to see if an attorney’s performance fell below an objective standard of reasonableness. *See id.* at 688 (“The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”).

spect to the prejudice a defendant had to show to succeed on an ineffective assistance of counsel claim.⁴² For these reasons, in 1984, the Supreme Court granted certiorari in *Strickland* to elaborate on the meaning of effective assistance of counsel.⁴³

In *Strickland*, a defendant sentenced to death filed for a writ of habeas corpus.⁴⁴ The defendant claimed his counsel provided ineffective assistance during his criminal trial by failing to seek out evidence concerning the defendant's character and emotional state.⁴⁵ The case eventually

For many years, there was sharp disagreement over what specifically constituted "reasonably effective assistance of counsel," and two opposing schools of thought emerged: the categorical approach and the "judgmentalist" approach. See 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, 419 (1988). "The categorical approach proceeds from the basic premise that certain identifiable actions by counsel are essential to effective representation . . . [and] failure or inability to complete these [actions] . . . provides per se grounds for granting the defendant relief." *Id.* (footnote omitted) (citing WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.7(c) (1984)). In contrast, "judgmentalists" believe that "each trial is different and that therefore ineffective assistance claims must be judged with greater subjectivity and deference, on a case-by-case basis." *Id.* (noting Justice Brennan's opinion in *Strickland* exemplifies judgmentalist approach because Brennan emphasized that particular set of rules would be inappropriate to accommodate variety of situations that give rise to ineffective assistance of counsel claims).

42. See *Strickland*, 466 U.S. at 684 ("With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation." (citing appellate brief)).

43. See *id.* at 684, 686 (recognizing Supreme Court has not yet decided whether "reasonably effective assistance" standard is proper standard by which to address attorney performance and granting certiorari to examine meaning of effective assistance of counsel further).

44. See *id.* at 678 (stating defendant sought habeas relief). Prior to filing a petition for a writ of habeas corpus in federal court, the defendant sought relief in Florida state court. See *id.* at 677-78 (noting Florida state court denied relief to defendant).

45. See *id.* (explaining defendant's ineffective assistance of counsel claim). In *Strickland*, the state of Florida appointed a criminal lawyer to represent a defendant charged with planning and committing "three brutal stabbing murders." See *id.* at 672 (discussing facts of case). The defendant, acting against counsel's specific advice, confessed to two of the murders and waived his right to a jury trial. See *id.* (describing defendant's confession). In preparing for sentencing, counsel did not seek character witnesses for the defendant nor request a psychiatric examination. See *id.* at 673 (discussing lack of action by counsel). The decision to stop looking for evidence concerning the defendant's character and emotional state reflected counsel's "sense of hopelessness about overcoming the evidentiary effect of [the defendant's] confessions to the gruesome crimes." See *id.* (discussing reasoning of decision). The trial judge sentenced the defendant to death, and the defendant subsequently sought relief in state court on the ground that his attorney provided ineffective assistance of counsel at the sentencing proceeding. See *id.* at 675 (noting procedural history). The state trial courts rejected the defendant's petition. See *id.* at 678 (noting Florida state courts concluded defendant was unable to make out prima facie case of ineffective assistance of counsel). The defendant then filed a petition for a writ of habeas corpus in the Southern District of Florida. See *id.* (discussing defendant's writ of habeas corpus). When the district court denied the

reached the Supreme Court, where the Justices considered the proper standard by which to assess an attorney's performance.⁴⁶

The *Strickland* majority held that a defendant claiming ineffective assistance of counsel must make two showings.⁴⁷ First, the defendant must show that the attorney's performance was deficient, and second, that this deficient performance prejudiced the defendant.⁴⁸ The performance prong requires a defendant to show that the counsel's performance was objectively unreasonable considering all of the circumstances.⁴⁹ Addition-

petition, the defendant appealed to the Fifth Circuit. *See id.* at 679 (discussing defendant's appeal to Fifth Circuit). In reversing the lower court's decision, the Fifth Circuit developed its own standard for analyzing ineffective assistance of counsel claims. *See* *Washington v. Strickland*, 673 F.2d 879, 891 (5th Cir. 1982) (discussing standard for assessing attorney performance in Fifth Circuit), *rev'd on reh'g*, *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. 1982) (en banc), *rev'd Strickland*, 466 U.S. at 701. The Fifth Circuit stated that the methodology for determining whether an attorney rendered reasonably effective assistance of counsel "involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether reasonably effective assistance was rendered based on the totality of the circumstances." *See Strickland*, 673 F.2d at 891 (internal quotation marks omitted) (quoting *Washington v. Estelle*, 648 F.2d 276, 279 (5th Cir. 1981)). The court then remanded the case and instructed the district court to apply the newly-announced framework. *See id.* at 906 (remanding with instructions to analyze case using standards developed and summarized in opinion). The government sought review of the Fifth Circuit's decision, and the Supreme Court granted certiorari to elaborate on the constitutional requirement of effective assistance of counsel and consider the proper standard by which to assess an attorney's performance. *See Strickland*, 466 U.S. at 686 (explaining Supreme Court has not yet elaborated on effective assistance of counsel in cases presenting claims of "actual ineffectiveness"); *see also id.* (noting officials of state of Florida sought review of lower court's decision).

46. *See id.* at 684 (granting certiorari).

47. *See id.* at 687 (articulating two-part test).

48. *See id.* (explaining what defendant must show to satisfy *Strickland* test). Before the Supreme Court began its discussion, it noted that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *See id.* at 686. Since 1984, the rigid two-part test has been heavily criticized as creating "an almost insurmountable hurdle for defendants claiming ineffective assistance [of counsel]." *See* Calhoun *supra* note 41, at 427 (criticizing two-part test). Calhoun argues that "the specific goals of the Sixth Amendment would be better served if the Court . . . were to reverse convictions without requiring a showing of prejudice." *Id.* at 417. Calhoun urges the Supreme Court to abolish the prejudice requirement, arguing the *Strickland* "prejudice prong is in large measure responsible for transforming a standard meant to protect the basic constitutional right to effective assistance of counsel into the proverbial 'eye of the needle' through which few defendants are able to pass." *See id.* at 455 (arguing for abolition of prejudice prong). At the time Calhoun's article was written, "43.3% of all the unsuccessful ineffective assistance claims brought under *Strickland* [had] been rejected solely for lack of prejudice." *Id.*

49. *See Strickland*, 466 U.S. at 688 (explaining performance prong of two-part test). *But see id.* at 708 (Marshall, J., dissenting) ("Is a 'reasonably competent attorney' a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney?"). The Court noted that judicial scrutiny of an

ally, the defendant must show that counsel was not providing the legal assistance guaranteed by the Sixth Amendment.⁵⁰ Under the prejudice prong, a defendant must show that the counsel's errors deprived the defendant of a fair and reliable trial.⁵¹ The *Strickland* Court made it clear that a defendant must prove both prongs in order to show there was "a breakdown in the adversary process."⁵²

In most circumstances, a defendant alleging ineffective assistance of counsel must affirmatively prove prejudice under the *Strickland* test.⁵³ To prove prejudice adequately, the defendant must show there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different.⁵⁴ In some contexts, however, a case-by-case inquiry into prejudice is unnecessary; prejudice is presumed.⁵⁵

Strickland and its companion case, *Cronic*, identified distinct situations in which there is a presumption of prejudice, such as when there is state interference with counsel's assistance or when a lawyer is burdened by a conflict of interest.⁵⁶ Courts may also presume prejudice when there is a

attorney's performance must be highly deferential. *See id.* at 689 (majority opinion) (stating courts should strongly presume that "counsel's conduct falls within the wide range of reasonable professional assistance").

50. *See id.* at 687 (explaining first prong of test "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment").

51. *See id.* (stating prejudice prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). *But see id.* at 710 (Marshall, J., dissenting) (objecting to prejudice standard and noting difficulties of estimating prejudice after trial's conclusion). Marshall wrote that "a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby." *Id.* at 712; *see also* Jeffery Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 169 (2001) (agreeing with Justice Marshall and stating "failure to provide effective assistance could constitute an independent due process violation, with or without prejudice to the defendant" (citing *Strickland*, 466 U.S. at 711 (Marshall, J., dissenting))).

52. *See Strickland*, 466 U.S. at 687 ("Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.").

53. *See id.* at 693 (explaining that defendant must show that attorney's conduct had adverse effect on defense). The Court made it clear that a defendant must prove prejudice, and a showing that an attorney's performance was unreasonable or "had some conceivable effect on the outcome of the proceeding" is not enough under the *Strickland* test. *See id.* *But see* *United States v. Cronic*, 466 U.S. 648, 658–59 (1984) (describing circumstances that trigger presumption of prejudice).

54. *See Strickland*, 466 U.S. at 694 (explaining that "reasonable probability is a probability sufficient to undermine confidence in the outcome").

55. *See id.* at 692 (stating certain contexts trigger presumption of prejudice).

56. *See Cronic*, 466 U.S. at 658 ("There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."). The Court continued:

Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a

complete denial of counsel during a critical stage of trial.⁵⁷ This occurs when counsel is totally absent from trial or prevented from assisting the accused during a critical stage of the proceedings.⁵⁸ Absent these limited circumstances, the two-part *Strickland* test governs, and defendants have the burden of proving that their counsel's conduct affected the outcome of the case.⁵⁹

B. *In the Courtroom, the Mighty Courtroom, the Lawyer Sleeps Tonight: Presuming Prejudice in Sleeping Lawyer Cases*

Since *Strickland*, three circuits have addressed ineffective assistance of counsel claims in sleeping lawyer cases.⁶⁰ Each court recognized that a

trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that make the adversary process itself presumptively unreliable

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

Id. at 659–60 (footnote omitted) (citations omitted). *Cronic* errors are deemed to be structural errors, which means they affect the reliability of the trial itself. See *United States v. Ragin*, 820 F.3d 609, 618 (4th Cir. 2016) (“*Cronic* errors are structural, requiring automatic reversal without any inquiry into the existence of actual prejudice.” (citing several cases analyzing *Cronic*)).

57. See *Cronic*, 466 U.S. at 659 (noting certain circumstances warrant presumption of prejudice); see also *Burdine v. Johnson*, 262 F.3d 336, 345 (5th Cir. 2001) (“We conclude that the Sixth Amendment principle animating *Cronic*'s presumption of prejudice is the fundamental idea that a defendant must have the actual assistance of counsel at every critical stage of a criminal proceeding for the court's reliance on the fairness of that proceeding to be justified.”). The Supreme Court has identified which stages of trial are critical. See *id.* at 347 (“[T]he presentation of evidence against a defendant is a critical stage of a criminal proceeding.” (citing *Brewer v. Williams*, 430 U.S. 387, 398 (1977))); see also *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (quoting *United States v. Ash*, 413 U.S. 300, 310 (1973); *United States v. Wade*, 388 U.S. 218, 224 (1967)) (suggesting proceeding is critical when accused is confronted by expert adversary or legal procedural system and “results of the confrontation ‘might well settle accused's fate’” (quoting *Wade*, 388 U.S. at 224)). When deciding whether a particular stage of trial is “critical,” the Supreme Court has looked to whether the “substantial rights of a criminal accused may be affected” during that portion of the proceeding. See *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); see also *Herring v. New York*, 422 U.S. 853, 858 (1975) (finding presentation of defendant's testimony and making of closing arguments to be critical stages of trial).

58. See *Cronic*, 466 U.S. at 659 n.25 (explaining Supreme Court has “uniformly found” Sixth Amendment violations without “showing of prejudice” when counsel is absent or unable to assist defendant during critical portion of trial).

59. See *Ragin*, 820 F.3d at 618 (discussing *Strickland* and *Cronic* and explaining defendants must show prejudice under two-part *Strickland* test unless narrow circumstances articulated in *Cronic* are present).

60. See *Muniz v. Smith*, 647 F.3d 619, 621 (6th Cir. 2011) (addressing sleeping lawyer claim); see also *Burdine*, 262 F.3d at 338 (ruling on sleeping lawyer issue);

sleeping attorney equates to no attorney at all and held there is a presumption of prejudice under *Cronic* when counsel sleeps during trial.⁶¹ However, the standards for when a sleeping attorney's conduct triggers this presumption vary from circuit to circuit.⁶²

Prior to the Supreme Court's *Strickland* decision, the Ninth Circuit decided a sleeping lawyer ineffective assistance of counsel claim in *Javor v. United States*.⁶³ Defendant Eddie G. Javor was sentenced to seven years' imprisonment after a jury found him guilty of the possession and sale of heroin under federal law.⁶⁴ Javor filed for a writ of habeas corpus from prison, claiming he did not receive the representation guaranteed by the Sixth Amendment because his attorney slept during trial.⁶⁵ The Ninth Circuit agreed and concluded an attorney who sleeps through a substantial portion of trial is unable to provide a defendant with the legal assistance necessary to defend his or her interests.⁶⁶

Tippins v. Walker, 77 F.3d 682, 683–84 (2d Cir. 1996) (addressing sleeping lawyer issue).

61. See, e.g., *Tippins*, 77 F.3d at 685 (recognizing counsel was unconscious during trial and stating circumstance triggers presumption of prejudice).

62. Compare *Muniz*, 647 F.3d at 623 (adopting substantial portion rule), with *Burdine*, 262 F.3d at 349, 364 (concluding attorney's repeated unconsciousness "through not insubstantial portions" of trial warrants presumption of prejudice). See also Fogelman *supra* note 21, at 85 (recognizing disagreement among lower courts regarding what standard to use when assessing ineffective assistance of counsel claims in sleeping lawyer cases); Van Arsdell, *supra* note 11, at 856 ("[W]hat may be enough sleep at the right time to constitute presumed prejudice for one court may not be adequate proof for another court.").

63. *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984).

64. See *id.* (discussing facts of case).

65. See *id.* (explaining Javor sought relief pursuant to 28 U.S.C. § 2255). Section 2255 of Title 28 of the U.S. Code provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a) (2012). In relation to Javor's habeas petition, the magistrate judge held an evidentiary hearing and found Javor's attorney was asleep during a substantial part of the trial, particularly when evidence relevant to the prosecution was being introduced and the participation of Javor's counsel—"to observe witnesses, listen to testimony, consider the posing of objections, prepare cross-examination of witnesses, consider the preparation of rebuttal evidence, and prepare argument on such evidence"—was proper. See *Javor*, 724 F.2d at 832. However, the magistrate judge found Javor had failed to show that prejudice resulted from the courtroom catnap. See *id.*

66. See *id.* at 834 (concluding substantial courtroom slumber is inherently prejudicial because "unconscious or sleeping counsel is equivalent to no counsel at all"). The *Javor* court emphasized that the defendant's right to counsel "was violated not because of specific legal errors or omissions indicating incompetence, but because he had no legal assistance during a substantial portion of his trial." See *id.* at 833–34.

In 1996, the Second Circuit in *Tippins v. Walker*⁶⁷ became the first circuit to apply *Strickland* and *Cronic* in a sleeping lawyer case.⁶⁸ After receiving an eighteen-year prison sentence, Dale Tippins filed a writ of habeas corpus in the Southern District of New York, claiming his attorney provided ineffective assistance of counsel by sleeping during trial.⁶⁹ Applying the *Javor* rule, the district court found Tippins' attorney had slept for a "substantial portion" of trial and granted the petition.⁷⁰

On appeal, the Second Circuit affirmed the district court's judgment but articulated a new rule regarding presumptive prejudice in sleeping lawyer cases.⁷¹ Finding the word substantial "unhelpful," the court declined to adopt the "substantial portion" rule and instead held an attorney deprives a defendant of effective assistance of counsel when the attorney is "repeatedly unconscious at trial for periods of time in which the defendant's interests were at stake."⁷²

67. 77 F.3d 682 (2d Cir. 1996).

68. *See id.* at 685–87 (interpreting Supreme Court precedent).

69. *See id.* at 684. Tippins was charged with criminal sale of a controlled substance and criminal possession of a controlled substance after purchasing two pounds of cocaine from an undercover police officer in 1986. *See id.* at 683–84. The State of New York appointed attorney Louis Tirelli to represent Tippins at trial. *See id.* at 684. Tirelli mounted an entrapment defense, but the jury found Tippins guilty and sentenced him to eighteen years to life in prison. *See id.* Tippins claimed ineffective assistance of counsel, but the New York Appellate Division found Tirelli provided Tippins with a vigorous defense. *See People v. Tippins*, 173 A.D.2d 512, 513 (N.Y. App. Div. 1991) (finding ineffective assistance of counsel claim to be without merit because counsel "vigorously cross-examined [] witnesses . . . delivered [adequate] opening and closing arguments . . . raised appropriate objections, [and] made appropriate motions" throughout trial), *habeas corpus granted*, *Tippins v. Walker*, 889 F. Supp. 91 (S.D.N.Y. 1995), *aff'd*, *Tippins*, 77 F.3d at 683. After the New York Court of Appeals denied leave to appeal and the U.S. Supreme Court denied certiorari, Tippins sought relief in the Southern District of New York. *See Tippins*, 77 F.3d at 684.

70. *See Tippins*, 889 F. Supp. at 94 ("Accordingly, as the Second Circuit has accepted *Javor's* holding that sleeping counsel is tantamount to no counsel at all, this Court holds that Tirelli's sleeping constituted a *per se* violation of petitioner's Sixth Amendment right to effective assistance of counsel.").

71. *See Tippins*, 77 F.3d at 685 (agreeing with district court that evidence supports grant of writ but finding *Javor* rule unhelpful). Recognizing that "[p]rolonged inattention during stretches of a long trial (by sleep . . . or otherwise), particularly during periods concerned with other defendants, uncontested issues, or matters peripheral to a particular defendant, may be quantitatively substantial but without consequence," the court articulated a rule that focused not only on how long an attorney sleeps, but also on the portion of trial an attorney sleeps through. *See id.* at 686–87 (concluding defendants suffer prejudice when counsel is repeatedly unconscious for periods of time in which defendants' interests are at stake).

72. *See id.* at 689–90 (applying this rule and finding Tirelli repeatedly slept for several minutes during testimony of some witnesses). The court found that "those witnesses included either the key prosecution witnesses or the witnesses Tippins was calling in his own defense." *Id.* at 689.

Five years later, the sleeping lawyer issue reached the Fifth Circuit.⁷³ In *Burdine v. Johnson*,⁷⁴ the court considered whether Calvin Jerold Burdine's state-appointed attorney violated Burdine's Sixth Amendment right to counsel by sleeping throughout the guilt-innocence phase of Burdine's trial.⁷⁵ After a six-day trial in 1984, the jury found Burdine guilty of capital murder and sentenced him to death.⁷⁶

Burdine filed for a writ of habeas corpus in the Southern District of Texas, claiming his attorney's sleeping at trial amounted to a constructive denial of counsel.⁷⁷ On appeal, the Fifth Circuit vacated Burdine's capital murder conviction.⁷⁸ In granting habeas corpus relief, the court ruled a Sixth Amendment violation occurs when counsel is "repeatedly unconscious through not insubstantial portions" of trial.⁷⁹

73. See *Burdine v. Johnson*, 262 F.3d 336, 339 (5th Cir. 2001) (discussing merits of Sixth Amendment claim where petitioner's attorney slept during trial).

74. 262 F.3d 336 (5th Cir. 2001).

75. See *id.* at 340 (noting state court findings show counsel repeatedly slept when prosecutor was questioning witnesses and presenting evidence against defendant).

76. See *Burdine v. State*, 719 S.W.2d 309, 312 (Tex. Crim. App. 1986) (en banc) (affirming conviction and death sentence related to defendant's capital murder charge), *habeas corpus granted*, *Burdine v. Johnson*, 66 F. Supp. 2d 854 (S.D. Tex. 1999), *vacated*, 231 F.3d 950 (5th Cir. 2000), *aff'd on reh'g*, 262 F.3d at 350.

77. See *Burdine*, 262 F.3d at 340 (discussing petitioner's application for writ of habeas corpus). Prior to filing for a writ of habeas corpus in federal court, Burdine petitioned the Texas state court for habeas relief. See *id.* at 339 (noting Burdine's initial state application was denied). Although the state habeas court found Burdine's attorney slept through the guilt-innocence phase of Burdine's trial, the Texas Court of Criminal Appeals denied Burdine's petition. See *id.* at 340 (concluding Burdine did not discharge burden of proof required by *Strickland*). Burdine subsequently sought relief in federal court pursuant to 28 U.S.C. § 2254. See *id.* Section 2254 of Title 28 of the United States Code provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

.....

(2) An application for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust remedies available in the courts of the State.

28 U.S.C. § 2254(a)-(b)(2) (2012). In reviewing Burdine's petition, the district court concluded that Burdine's counsel's unconsciousness amounted to a constructive denial of counsel and triggered a presumption of prejudice under *Strickland* and *Cronic*. See *Burdine*, 262 F.3d at 340. The state appealed. See *id.* at 340-41 (noting state argued "the facts of Burdine's case [did] not warrant a presumption of prejudice because Burdine's counsel slept during indeterminate periods of what otherwise amounted to an adversarial trial").

78. See *id.* at 350 (affirming district court's grant of habeas relief and vacating Burdine's conviction and sentence).

79. See *id.* at 341, 349 (noting decision is limited to egregious facts of case and refusing to adopt per se rule that "any dozing by defense counsel during trial merits a presumption of prejudice").

The Sixth Circuit chose not to adopt the *Burdine* standard when it addressed the sleeping lawyer problem in *Muniz v. Smith*.⁸⁰ Instead, the court looked to the earlier *Javor* decision and held a sleeping attorney triggers a presumption of prejudice under *Cronic* only if the attorney sleeps for a “substantial portion” of the trial.⁸¹ Applying this rule, the court found defendant Joseph Arthur Muniz established that his attorney slept only for an undetermined portion of a single cross-examination; this did not satisfy the substantial portion standard.⁸² Therefore, the court analyzed Muniz’s ineffective assistance of counsel claim using the *Strickland* two-part test.⁸³

In sum, the rules used to determine prejudice in sleeping lawyer cases vary from circuit to circuit, and since 1984, three main standards have emerged.⁸⁴ The Second Circuit presumes prejudice when an attorney is “repeatedly unconscious at trial for periods of time in which the defendant’s interests were at stake.”⁸⁵ In the Fifth Circuit, an attorney violates a defendant’s Sixth Amendment right to counsel if the attorney is “repeatedly unconscious through not insubstantial portions” of trial.⁸⁶ Lastly, the Sixth and Ninth Circuits presume prejudice when an attorney sleeps through a “substantial portion” of a trial.⁸⁷

80. See *Muniz v. Smith*, 647 F.3d 619, 621 (6th Cir. 2011) (ruling on ineffective assistance of counsel claim in sleeping lawyer case).

81. See *id.* at 623 (noting all federal circuits to consider sleeping lawyer issue have, in some formulation or another, held there is presumption of prejudice when counsel sleeps through substantial portion of trial).

82. See *id.* (concluding counsel’s mid-trial slumber did not rise to level of “substantial”). The Sixth Circuit found Muniz’s counsel did not sleep for the entire cross-examination because the attorney raised some objections toward the end of the questioning. See *id.* at 623–24. Given the cross-examination was fairly short—only twenty-six pages of the entire trial transcript—the court concluded that Muniz’s counsel must have only been asleep for a brief period of time. See *id.* at 624.

83. See *id.* (applying *Strickland* test and finding Muniz unable to satisfy prejudice prong).

84. See Fogelman, *supra* note 21, at 85 (noting there is disagreement among circuit courts regarding sleeping lawyer standards).

85. *Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996) (articulating rule and stating Tippins’ claim of prejudice was not that “his lawyer should have taken any particular initiative . . . but that, at critical times, Tippins had no counsel to sort out what initiatives were open”).

86. See *Burdine v. Johnson*, 262 F.3d 336, 341 (5th Cir. 2001) (articulating rule and highlighting “fundamental unfairness in *Burdine*’s capital murder trial created by the consistent unconsciousness of his counsel”).

87. See *Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984) (stating substantial portion rule); see also *Muniz*, 647 F.3d at 623 (applying substantial portion rule and finding defendant could not establish that counsel was asleep for substantial portion of trial).

III. WAKE ME UP WHEN THE TRIAL ENDS: THE FOURTH CIRCUIT
CONSIDERS COURTROOM CATNAPS IN *UNITED STATES V. RAGIN*

In March 2016, the sleeping lawyer issue reached the Fourth Circuit in *Ragin*.⁸⁸ In *Ragin*, the court considered whether a dozing defense lawyer violated a defendant's Sixth Amendment right to effective assistance of counsel.⁸⁹ Answering affirmatively, the Fourth Circuit followed the lead of the *Javor* and *Muniz* courts and held there is a presumption of prejudice under *Cronic* when an attorney sleeps through a *substantial* portion of a defendant's criminal trial.⁹⁰

A. *Facts of United States v. Ragin*

For almost three years in the early 2000s, Nicholas Ragin participated in a prostitution and crack cocaine conspiracy in North Carolina.⁹¹ Ragin's involvement with the conspiracy ended in 2004, when a grand jury in the Western District of North Carolina returned a two-count indictment charging Ragin with conspiracy to commit offenses against the United States and conspiracy to possess cocaine with intent to distribute.⁹² Following the indictment, the district court appointed attorney Nikita V. Mackey to represent Ragin.⁹³

Ragin pleaded not guilty and proceeded to trial, where he was one of three defendants.⁹⁴ The trial lasted eighteen days and included testimony

88. See *United States v. Ragin*, 820 F.3d 609, 612 (4th Cir. 2016) (addressing sleeping lawyer issue).

89. See *id.* ("This appeal presents an issue of first impression in this Circuit: whether a defendant's right to effective assistance of counsel is violated when his counsel sleeps during trial.").

90. See *id.* at 619 (detailing when presumption of prejudice exists as result of substantial portion rule).

91. See *Ragin v. United States*, No. 3:10-cv-488-RJC, 2014 WL 4105898, at *2 (W.D.N.C. Aug. 14, 2014) (summarizing factual background of prostitution ring and crack cocaine conspiracy), *vacated*, *Ragin*, 820 F.3d at 624. Ragin, as the "enforcer" for the conspiracy, allegedly beat women and used firearms to defend the operations. See *id.* (describing Ragin's role in conspiracy and explaining Ragin would beat women for price, usually around \$100). Witness testimony also revealed that Ragin would drive prostitutes to their "appointments," and he helped bag various drugs for the conspiracy. See *id.*

92. See *Ragin*, 820 F.3d at 613 (stating grand jury convicted Ragin with conspiracy in violation of federal statutes). In particular, Ragin was alleged to have violated 18 U.S.C. § 371, 21 U.S.C. § 841, 21 U.S.C. § 846, and 21 U.S.C. § 861. See *id.*; see also 18 U.S.C. § 371 (2012) (making conspiracy to commit offense or to defraud United States unlawful); 21 U.S.C. § 841(a)(1) (2012) (making it unlawful to knowingly "manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"); 21 U.S.C. § 846 (2012) (criminalizing attempt and conspiracy); 21 U.S.C. § 861 (2012) (making it unlawful to employ or use persons under eighteen years old in drug operations).

93. See *Ragin*, 820 F.3d at 613 (stating district court appointed Mackey as counsel for Ragin).

94. See *Ragin*, 2014 WL 4105898, at *1 (noting Ragin and six others were charged with conspiracy). Three of Ragin's co-defendants pleaded guilty, while Ragin, Tracy Howard, David Howard, and Oscar Solano-Sanchez pleaded not

from approximately forty witnesses, six of whom testified about Ragin's direct involvement in the drug and prostitution rings.⁹⁵ At the conclusion of trial, the jury found Ragin guilty on both counts, and the court sentenced Ragin to thirty years' imprisonment.⁹⁶ Ragin appealed the sentence, but it was affirmed.⁹⁷

On October 1, 2010, Ragin filed a petition to have his conviction and sentence vacated.⁹⁸ Ragin argued that Mackey provided ineffective assistance of counsel by falling asleep during the trial.⁹⁹ The district court ordered an evidentiary hearing to resolve Ragin's claim.¹⁰⁰ At the hearing, Ragin called three witnesses, including Richard Culler and Peter Adolf, the defense attorneys for Ragin's two co-defendants, as well as Pamela Vernon, a juror in the trial.¹⁰¹

First, Adolf testified that he saw Mackey sleeping at trial on one occasion.¹⁰² In particular, Adolf recalled that Mackey was unresponsive when an attorney for the government approached Mackey to introduce a new exhibit.¹⁰³ Mackey did not move or say anything until the judge called

guilty. *See id.* ("Three co-defendants chose to plead guilty, while Ragin and three co-defendants pleaded not guilty and were tried jointly by a jury in April 2006."); *see also Ragin*, 820 F.3d at 613 (indicating which co-defendants proceeded to trial with Ragin).

95. *See Ragin*, 820 F.3d at 613 (stating trial lasted from April 3 to April 21 and noting six of forty witnesses testified about Ragin's direct involvement in conspiracy while other witnesses testified about acts of Howard, Howard, and Solano-Sanchez).

96. *See Ragin*, 2014 WL 4105898, at *1 (noting Ragin was career offender with sixteen criminal history points, which resulted in sentencing guideline range of 360 months to life imprisonment). Mackey argued for a departure from the guideline range, while the government recommended a life sentence. *See id.* After the trial but prior to sentencing, Ragin sent a handwritten letter to the district court claiming Mackey fell asleep twice during the trial. *See Ragin*, 820 F.3d at 613. The district court ultimately sentenced Ragin to thirty years in prison. *See Ragin*, 2014 WL 4105898, at *1.

97. *See Ragin*, 820 F.3d at 613 (stating Fourth Circuit affirmed Ragin's sentence).

98. *See id.* at 613–14 (noting Ragin sought habeas relief pursuant to 28 U.S.C. § 2255 and stating government opposed Ragin's motion).

99. *See id.* at 614 (stating Ragin submitted sworn affidavit in conjunction with § 2255 motion, which elaborated on his ineffective assistance of counsel claims and noted that Mackey fell asleep twice during trial). Ragin claimed Mackey's sleeping indicated Mackey's lack of interest in and dedication to the case. *See id.*

100. *See Ragin*, 2014 WL 4105898, at *1–2. The evidentiary hearing took place on May 12, 2014. *See id.* (noting court held evidentiary hearing open and stating Mackey testified on June 2, 2014).

101. *See Ragin*, 820 F.3d at 614 (stating Ragin called Peter Adolf, Richard Culler, and Pamela Vernon as witnesses). The government called Mackey and Special Agent Terrell Tadeo to testify at the evidentiary hearing. *See id.*

102. *See id.* (noting Adolf testified he "definitely" saw Mackey sleeping on one occasion but did not specifically recall any other situations where Mackey was sleeping during trial).

103. *See Ragin*, 2014 WL 4105898, at *3 ("Adolf stated that the Assistant United States Attorney was showing defense counsel a document and Mackey did not respond until the [c]ourt called out his name.").

Mackey's name on the microphone.¹⁰⁴ Adolf said Mackey "jumped" up, looking confused, and reviewed the document before returning to his "sleeping" position.¹⁰⁵ Culler similarly testified that he noticed Mackey's head was down as if he were sleeping at one point during the trial.¹⁰⁶ Both Adolf and Culler made clear that they were focused on their clients and did not pay much attention to Mackey's behavior.¹⁰⁷

Next, Vernon testified that she noticed Mackey sleeping almost every day throughout the trial.¹⁰⁸ Specifically, Vernon said Mackey was asleep while evidence was being presented and witnesses were being questioned.¹⁰⁹ Based on the courtroom setup, Mackey was in the jurors' direct line of sight, and Vernon testified that the other jurors noticed Mackey's sleeping and discussed it during jury deliberations.¹¹⁰

Finally, Ragin testified on his own behalf, claiming he had to rouse Mackey numerous times when Mackey failed to respond at trial.¹¹¹ The government then called two witnesses: Special Agent Terrell Tadeo and Mackey.¹¹² Tadeo testified that he observed Mackey potentially nodding off on at least one—possibly two—occasions.¹¹³ Mackey did not recall

104. *See Ragin*, 820 F.3d at 614 (retelling Adolf's testimony and explaining Mackey "jumped" when judge said his name loudly in microphone).

105. *See id.* (highlighting that Adolf did not recall who was testifying "or what document the government was showing" when Mackey was sleeping).

106. *See Ragin*, 2014 WL 4105898, at *3 (stating Richard Culler testified that "he remembered one specific instance during the trial where Mackey had his head down on his arms and appeared to be sleeping but breathing regularly").

107. *See Ragin*, 820 F.3d at 614–15 (noting Mackey was in neither Adolf's nor Culler's direct line of sight and stating Culler did not pay much attention to Mackey's sleeping because witness on stand was speaking about Culler's client).

108. *See Ragin*, 2014 WL 4105898, at *3 (retelling Vernon's testimony).

109. *See id.* (stating Vernon observed "Mackey with his head in his hands propped up on the table, not seeming alert"); *see also Ragin*, 820 F.3d at 615 (stating Vernon saw Mackey sleeping while evidence was being presented and witnesses were being questioned).

110. *See Ragin*, 820 F.3d at 615, 621 ("[I]t appears not only that the jurors discussed their observations of Mackey 'resting his head' during jury deliberations but also, even more troubling, that the jurors may have held Mackey's conduct against Ragin in reaching their verdict.").

111. *See id.* at 615 (summarizing Ragin's testimony). Vernon testified she noticed Ragin punch Mackey to rouse him when Mackey was called on during trial. *See id.*

112. *See id.* at 615–16 (discussing Tadeo's testimony). Tadeo was a witness at Ragin's jury trial, where he testified about "Ragin's admissions to him about driving the prostitutes to their appointments, using firearms to defend the drug territory, and receiving \$100 to beat up a woman." *See Ragin*, 2014 WL 4105898, at *2.

113. *See Ragin*, 820 F.3d at 615–16 (restating Tadeo's testimony and noting Tadeo saw Mackey's eyes closed and head down during trial); *see also Ragin*, 2014 WL 4105898, at *4 ("Special Agent Tadeo testified about one or two instances in which Mackey briefly had his eyes closed, but was not outright sleeping. He could not remember which day or during which witness that behavior occurred.").

whether he slept during the trial and dismissed the claims as political fodder.¹¹⁴

After consideration of the testimony presented at the hearing, the district court found Ragin's and Vernon's statements not credible.¹¹⁵ As such, the court concluded that Mackey was not asleep for a substantial portion of the trial and denied Ragin's motion.¹¹⁶ On appeal, the Fourth Circuit vacated the lower court's decision and granted Ragin habeas relief.¹¹⁷

B. *Ragin Court Hears the Alarm and Awakens Substantial Portion Rule in Fourth Circuit*

The Fourth Circuit began its analysis by summarizing the *Strickland* and *Cronic* decisions.¹¹⁸ First, the court classified *Cronic*-type errors as structural.¹¹⁹ The court explained that structural errors affect the underlying reliability of a trial and therefore require automatic reversal without any inquiry into counsel's performance or the existence of prejudice.¹²⁰

114. *See Ragin*, 820 F.3d at 616 (noting Mackey was running for sheriff at time of ineffective assistance of counsel allegations). Mackey stated "he would have remembered" falling asleep at trial if it had happened, and he testified "that he believed the [c]ourt would have admonished him had he been asleep and that the record would reflect him sleeping." *Ragin*, 2014 WL 4105898, at *4 (stating Mackey could not recall details because time had passed since trial).

115. *See Ragin*, 820 F.3d at 616 (stating lower court found Vernon's testimony not credible because Vernon used Ragin's first name while testifying and did not bring sleeping to court's attention); *see also Ragin*, 2014 WL 4105898, at *7 (finding Ragin's testimony not credible because Ragin had great incentive to embellish claim). In finding Vernon's testimony not credible, the district court stated Vernon "repeatedly referred to Ragin by his first name during her testimony, [and] may be remorseful for the severity of the sentence imposed." *See Ragin*, 2014 WL 4105898, at *7.

116. *See id.* at *9 ("[T]he Court finds that Petitioner has not established any prejudice from the alleged sleeping."). The court applied the *Strickland* test and concluded Ragin did not make a sufficient showing that Mackey's behavior prejudiced the outcome of the proceeding. *See id.* at *7–8.

117. *See Ragin*, 820 F.3d at 612 (reversing denial of habeas relief and remanding for further proceedings).

118. *See id.* at 617–18 (beginning discussion by explaining *Strickland* and *Cronic* decisions). For an in-depth discussion of the *Strickland* and *Cronic* decisions, see *supra* notes 41–59. Before the *Ragin* court began its analysis, it noted that it would be reviewing *de novo* the district court's legal conclusions and any mixed questions of law and fact regarding Ragin's Sixth Amendment claim. *See Ragin*, 820 F.3d at 617. The court also stated it would be reviewing the findings from Ragin's evidentiary hearing for clear error. *See id.*

119. *See id.* at 618 (stating *Cronic* errors are structural and defining structural error as error that "affect[s] the framework within which the trial proceeds" and prevents the trial from "reliably serv[ing] its function as a vehicle for determination of guilt or innocence'" (alteration in original) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991))).

120. *See id.* (citing *Wright v. Van Patten*, 552 U.S. 120, 124 (2008)); *see also United States v. Cronic*, 466 U.S. 648, 659–60 (1984) (citing *Powell v. Alabama*, 287 U.S. 45, 53 (1932)) (stating certain circumstances require presumption of prejudice without any inquiry into actual conduct of counsel).

In contrast, a *Strickland* error results in reversal only when the defendant shows that the outcome of the trial is unfair or unreliable due to counsel's performance.¹²¹

The court then went on to discuss the *Strickland* test in more detail.¹²² Because the performance prong of the *Strickland* test focuses on the acts or omissions of counsel, the Fourth Circuit recognized that the test necessarily assumes counsel is present and able to render assistance and exercise judgment at trial.¹²³ Under *Strickland*, courts must determine whether counsel provided "professionally competent assistance" given the range of strategies and tactics available to him or her.¹²⁴

When counsel sleeps through trial, the issue shifts focus.¹²⁵ Courts are no longer deciding whether an attorney failed to employ a particular trial initiative; instead, courts are determining whether the courtroom slumber amounted to a constructive denial of counsel.¹²⁶ Using this framework, the Fourth Circuit concluded an attorney who sleeps through a substantial portion of trial violates a defendant's Sixth Amendment right to counsel and triggers a presumption of prejudice under *Cronic*.¹²⁷

121. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) ("Unless a defendant makes both showings [under the two-pronged test], it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.").

122. See *Ragin*, 820 F.3d at 617–18 (discussing *Strickland*).

123. See *id.* at 620 ("[T]he buried assumption in our *Strickland* cases is that counsel is present and conscious to exercise judgment, calculation and instinct, for better or worse.") (alteration in original) (quoting *Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996)).

124. See *Strickland*, 466 U.S. at 690 (explaining courts ruling on ineffective assistance of counsel claims must determine whether counsel's acts or omissions were reasonable in light of circumstances).

125. See *Ragin*, 820 F.3d at 620 (noting *Ragin*'s claim of prejudice was not "that his lawyer failed to take any particular initiative at trial" but rather that his counsel was absent during substantial portion of trial); see also *Tippins*, 77 F.3d at 687 ("[W]e understand *Tippins*' claim of prejudice to be not that his lawyer should have taken any particular initiative that would potentially affect the result, but that, at critical times, *Tippins* had no counsel to sort out what initiatives were open."). The *Ragin* and *Tippins* courts recognized that "[t]he situation where counsel is asleep . . . is more analogous to the situation where a defendant is without counsel than where a defendant claims that counsel acted improperly." Kirchmeier, *supra* note 28, at 466; see also *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) ("Unconscious counsel equates to no counsel at all. Unconscious counsel does not analyze, object, listen or in any way exercise judgment on behalf of a client.").

126. See *Strickland*, 466 U.S. at 692 (stating there is legal presumption of prejudice when defendant is actually or constructively denied counsel); see also *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984) (stating defendant is prejudiced as matter of law when defendant "is tried in the . . . absence of counsel").

127. See *Ragin*, 820 F.3d at 619 (articulating "substantial portion" rule); see also *Javor*, 724 F.2d at 834 (holding attorney who sleeps through substantial portion of defendant's trial does not provide defendant with legal assistance guaranteed by Sixth Amendment).

The Fourth Circuit then proceeded to apply this rule to the facts of Ragin’s case and found that the district court erred when it concluded that Mackey was not asleep for a substantial portion of trial.¹²⁸ First, the court reasoned that every witness—including the government’s witness—said the same thing at the evidentiary hearing: Mackey was asleep, or appeared to be sleeping, at some point during the eighteen-day trial.¹²⁹ The Fourth Circuit noted that Adolf observed Mackey sleeping once, and Culler, Ragin, and Tadeo saw Mackey nodding off on one or two occasions throughout the trial.¹³⁰ Recognizing that each witness could have observed Mackey sleeping on different occasions, the court identified seven potential instances of courtroom slumber.¹³¹

Next, the Fourth Circuit determined it was clear error for the district court to dismiss Vernon’s testimony.¹³² As a juror in the case, Vernon sat directly across from Mackey during the eighteen-day trial.¹³³ The Fourth Circuit reasoned that Vernon was in the best position to observe Mackey’s conduct and assess the frequency of his sleeping based on this courtroom setup.¹³⁴

As such, the Fourth Circuit gave great deference to Vernon’s testimony that Mackey was asleep almost every day of the two-week trial for at least thirty minutes.¹³⁵ The court noted that nothing in the record contra-

128. See *Ragin*, 820 F.3d at 620 (finding mistake had been committed in district court’s finding of facts and reversing district court’s decision). The district court found Mackey was not asleep for substantial portions of trial. See *Ragin v. United States*, No. 3:10-cv-488-RJC, 2014 WL 4105898, at *7 (W.D.N.C. Aug. 19, 2014), *vacated*, *Ragin*, 820 F.3d at 624.

129. See *Ragin*, 820 F.3d at 621 (recognizing every witness testified that Mackey was asleep during trial “[b]esides Mackey, who, tellingly, could not recall whether he was asleep at trial”).

130. See *id.* at 621–22 n.9 (noting number of times each witness observed Mackey’s sleeping).

131. See *id.* at 621–22 (“[T]he district court utterly failed to consider the likely possibility that each witness saw Mackey asleep or nodding off on *different occasions*. Had the court done so, it would have reached the conclusion that Mackey could have been asleep on *at least six or seven different occasions*.”); see also *id.* (noting possibility that Mackey slept at least six or seven different times throughout trial was “consistent with Vernon’s testimony” that Mackey was sleeping almost every day).

132. See *id.* at 621 (finding “nothing in the record to suggest that Vernon had knowledge of the sentence the district court imposed, that she felt remorseful, or that she had improper communications or any interactions with Ragin”). For a discussion of why the district court dismissed Vernon’s testimony, see *supra* note 115 and accompanying text.

133. See *Ragin*, 820 F.3d at 622 (explaining courtroom setup and noting Vernon sat directly across from Mackey).

134. See *id.* (“Every other witness at the evidentiary hearing stated that Mackey was not directly in their line of sight and that their attention was directed at the witness box, which was located at the opposite side of the courtroom from where Mackey sat.”).

135. See *id.* (“Common sense dictates that a juror who is seated directly across from counsel can observe counsel asleep more often during a two-week trial than a person who does not have a direct line of sight to counsel and whose attention is

dicted or discredited this testimony.¹³⁶ All of the witnesses, even the government's witness, testified that Mackey was asleep on one or two occasions during the trial.¹³⁷ The Fourth Circuit found it "impossible" not to conclude that Mackey slept during a substantial portion of Ragin's trial.¹³⁸ Therefore, the court held that Ragin suffered prejudice under *Cronic*.¹³⁹

The court concluded by comparing the facts of Ragin's case to other sleeping lawyer cases, in particular *Javor* and *Burdine*.¹⁴⁰ The court found the facts of Ragin's case to be "equally—if not more—egregious than the facts" of those cases.¹⁴¹ In *Javor*, the attorney only "dozed off momentarily," and in *Burdine*, three witnesses, including a juror, testified that they had not noticed counsel sleeping during the trial.¹⁴² However, in Ragin's case, Mackey slept for at least thirty minutes every day of the trial, and every witness stated that they observed Mackey sleeping "on at least one occasion."¹⁴³ The Fourth Circuit found this to be an extraordinary case of

admittedly directed to the opposite side of the courtroom from where counsel sat.").

136. *See id.* (stating government did not dispute Vernon's testimony even though it had opportunity to do so).

137. *See id.* at 615 (stating government witness "Tadeo testified that he saw Mackey 'nod off' on at least one . . . occasion[]" during trial). *Contra* Ragin v. United States, No. 3:10-cv-488-RJC, 2014 WL 4105898, at *4 (W.D.N.C. Aug. 19, 2014) (noting Tadeo testified that Mackey was alert and aggressive during Tadeo's testimony and cross-examination and explaining that Tadeo testified "about one or two instances in which Mackey briefly had his eyes closed, but was not outright sleeping").

138. *See Ragin*, 820 F.3d at 622 ("Based on this record, we find it impossible not to conclude that Mackey slept, and was therefore not functioning as a lawyer during a substantial portion of the trial.").

139. *See id.* at 621 n.6 (choosing not to undertake *Strickland* analysis "because prejudice in this case [was] presumed under *Cronic*").

140. *See id.* at 623 (discussing *Burdine* and *Javor*); *see also generally* *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (ruling on sleeping lawyer issue where counsel slept repeatedly throughout trial); *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984) (ruling on sleeping lawyer issue where counsel slept, dozed, and was not alert to proceedings during defendant's trial). For a further discussion of *Javor*, *see supra* notes 63–66 and accompanying text. For a further discussion of *Burdine*, *see supra* notes 73–79 and accompanying text.

141. *See Ragin*, 820 F.3d at 623 (stating facts of Ragin's case were "equally—if not more—egregious than the facts presented in cases where other circuits have presumed prejudice"). The Fourth Circuit highlighted the fact that none of the evidence was in dispute, and "[t]here were no witnesses that testified that Mackey was not asleep—not even Mackey." *See id.*

142. *See id.* (distinguishing Ragin's case from *Burdine* and *Javor*); *see also Burdine*, 262 F.3d at 339 (stating some witnesses did not notice Burdine's counsel asleep during trial); *Javor*, 724 F.2d at 836 (Anderson, J., dissenting) ("The magistrate noted that the trial judge observed the sleeping attorney, but did not call a recess because the attorney would only doze off momentarily and then wake up.").

143. *See Ragin*, 820 F.3d at 623 ("[A]s discussed extensively above, every witness stated that they observed Mackey asleep on at least one occasion, with multiple witnesses testifying that Mackey was asleep on multiple occasions.").

ineffective assistance of counsel and vacated Ragin's conviction and sentence.¹⁴⁴

IV. CRITICAL ANALYSIS: DREAMING OF A CLEARER RULE IN THE FOURTH CIRCUIT

Because the word substantial is susceptible to multiple interpretations, courts ruling on ineffective assistance of counsel claims in sleeping lawyer cases have found the substantial portion rule to be a vague and unhelpful standard by which to evaluate prejudice.¹⁴⁵ In *Ragin*, the court “decline[d] to dictate precise parameters” regarding substantial sleep and instead offered three potential meanings of the word substantial—length, proportion, or significance.¹⁴⁶ Its own analysis, however, placed significant weight on the duration and frequency of Mackey's sleeping.¹⁴⁷ Therefore, it seems likely that lower courts looking to *Ragin* for guidance will adopt a quantitative interpretation of the word substantial.¹⁴⁸

A quantitative rule, however, is an inadequate standard by which to assess prejudice in sleeping lawyer cases.¹⁴⁹ Such a rule contravenes *Cronic* because it could result in the reversal of a case in which an attorney sleeps

144. *See id.* at 623–24 (classifying facts as “extraordinary and egregious,” vacating, and remanding case for further proceedings).

145. *See Tippins v. Walker*, 77 F.3d 682, 685 (2d Cir. 1996) (finding word “substantial” unhelpful because it has multiple meanings and can refer to length of time, proportion of proceeding, or significance of proceeding); *see also Burdine*, 262 F.3d at 362–63 (Barksdale, J., dissenting) (explaining word “substantial” could refer to length of sleep, significance of evidence presented, or impact on defense and noting word “‘substantial’ has many uses in the legal context” (citing numerous definitions incorporating word “substantial” in *Black's Law Dictionary*)).

146. *See Ragin*, 820 F.3d at 622 n.11 (explaining word substantial). The court stated:

Whether a lawyer slept for a substantial portion of the trial should 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. At the same time, however, while we decline to dictate precise parameters for what must necessarily be a case-by-case assessment, we caution district courts that the scope of our holding today should not be limited to only the most egregious instances of attorney slumber.

Id.

147. *See id.* at 623 (basing decision on fact that Mackey was asleep on multiple occasions for at least thirty minutes).

148. *See Burdine*, 262 F.3d at 363 (Barksdale, J., dissenting) (suggesting lower courts will look to majority decision for guidance, so court cannot expressly limit rule to facts before it). The dissent criticized the majority for failing to give “guidance to federal habeas courts, which may well in the future consider similar claims.” *See id.*

149. *See Tippins*, 77 F.3d at 686 (explaining prolonged periods of sleep “may be quantitatively substantial” yet have no effect on trial). The *Tippins* court recognized that there are certain periods of trial where “even alert and resourceful counsel cannot affect the proceedings to a client's advantage.” *See id.*

for a long, yet inconsequential, portion of trial.¹⁵⁰ A more precise standard would find prejudice when an attorney sleeps during a “critical portion[] of the trial.”¹⁵¹ Because the Supreme Court has already characterized certain stages of trial as critical, this rule would be easier for lower courts to implement.¹⁵²

A. Courts Should Put the Substantial Shut-Eye Rule to Bed

The Oxford Dictionary defines the word substantial as “of considerable importance, size, or worth.”¹⁵³ The Merriam-Webster Dictionary states substantial means “large in amount, size, or number.”¹⁵⁴ These are just two of the likely hundreds of definitions for the word substantial, but the point is clear: “substantial” is susceptible to many interpretations.¹⁵⁵

In *Ragin*, the court expressly declined to adopt a particular definition of the word.¹⁵⁶ Instead, the court noted that the word substantial could refer to “the length of time counsel slept, the proportion of trial missed, and the significance of the portion counsel slept through.”¹⁵⁷ The Fourth Circuit’s failure to provide a clear meaning of the word substantial could lead to considerable confusion and inconsistency in the lower courts.¹⁵⁸ Courts could easily adopt any one of the three definitions outlined in the

150. See *United States v. Cronin*, 466 U.S. 648, 659 (1984) (stating courts may presume prejudice when counsel is absent during critical stage of trial); see also *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.”); *Burdine*, 262 F.3d at 382 (Barksdale, J., dissenting) (noting it was impossible to glean from record which portions of trial through which counsel slept).

151. See *Kirchmeier*, *supra* note 28, at 469 (concluding prejudice should be presumed in three distinct circumstances, one of which is when counsel sleeps during “critical portions of the trial”).

152. See *Burdine*, 262 F.3d at 355 (Higginbotham, J., concurring) (classifying presentation of guilt and taking of evidence as critical stages of trial). For a further discussion of critical stages of trial, see *infra* notes 177–80 and accompanying text.

153. See *Substantial*, OXFORD LIVING DICTIONARIES, *supra* note 21.

154. See *Substantial*, MERRIAM-WEBSTER, *supra* note 21.

155. See *Burdine*, 262 F.3d at 362 (Barksdale, J., dissenting) (stating majority did not define word “insubstantial” and explaining word could refer to length of sleep or “significance of the evidence being presented while counsel slept and its impact on the defense” (citing *Tippins v. Walker*, 77 F.3d 682, 685 (2d Cir. 1996))).

156. See *United States v. Ragin*, 820 F.3d 609, 622 n.11 (4th Cir. 2016) (declining “to dictate precise parameters for what must necessarily be a case-by-case assessment”).

157. See *id.* (discussing factors involved in defining substantial).

158. See *Burdine*, 262 F.3d at 363 (Barksdale, J., dissenting) (arguing majority views substantiality as continuum “in which there is some middle ground which is neither ‘substantial’ nor ‘insubstantial’” and stating majority gave no guidance to lower courts regarding how to determine substantiality of sleeping).

Ragin decision; depending on which interpretation courts embrace, they may reach different results on identical facts.¹⁵⁹

It seems likely that lower courts looking to *Ragin* for guidance will adopt a quantitative rule.¹⁶⁰ Although the *Ragin* court provided three definitions of the word substantial, its own analysis placed significant weight on the duration and frequency of Mackey's sleeping.¹⁶¹ A quantitative rule, however, is an inadequate standard by which to assess prejudice in sleeping lawyer cases.¹⁶² First, a quantitative rule necessarily requires a benchmark prejudicial quantity of sleep.¹⁶³ In *Ragin*, the Fourth Circuit did not indicate how many minutes of courtroom slumber would trigger a reversal under *Cronic*.¹⁶⁴ While thirty minutes of sleeping every day of trial was presumptively prejudicial in *Ragin*, it is unclear how many minutes of slumber would constitute a substantial portion of trial in future cases.¹⁶⁵

Second, a rule that focuses on the length of sleep could lead to reversal in cases where an attorney sleeps for a long time but during inconsequential stages of trial.¹⁶⁶ Although "the notion of a sleeping lawyer is

159. See Van Arsdel, *supra* note 11, at 859–60 (stating "district courts could eventually come to different conclusions depending on which [version of sleeping lawyer standard] they use").

160. See *Burdine*, 262 F.3d at 363 (Barksdale, J., dissenting) (suggesting lower courts will look to majority's decision for guidance).

161. See *Ragin*, 820 F.3d at 623 (emphasizing Mackey was asleep almost every day for at least thirty minutes).

162. See Kirchmeier, *supra* note 28, at 469 ("It is difficult for a defendant to pinpoint evidence of exactly how much overall time counsel slept or of exactly when counsel was sleeping. Unless someone is closely observing counsel during the trial, it will not be easy to pinpoint this information, except perhaps in the more extreme cases."); see also *Burdine*, 262 F.3d at 363 (Barksdale, J., dissenting) ("[H]ow many minutes of sleeping, or how many nods or head bobs will trigger presumed-prejudice?").

163. See Van Arsdel, *supra* note 11, at 860 (stating sleeping lawyer standards need to "address the amount of sleep necessary to meet the threshold for presuming prejudice"). Van Arsdel poses an important question: "Who should be time-keeper" with a test that reduces the prejudice question to actual minutes? See *id.* at 862 (explaining evidentiary hearings in sleeping lawyer cases rely "on witnesses noticing counsel's sleeping, remembering what they saw, and being able to identify the amount of time and stage of the trial during which counsel was asleep"); see also *Burdine*, 262 F.3d at 363 (Barksdale, J., dissenting) (finding majority rule imposes obligation on judges and prosecutors "to closely and unceasingly monitor defense counsel throughout trial to ensure defense counsel is awake"). But see Kirchmeier, *supra* note 28, at 469 (proposing test that would presume prejudice when "counsel sleeps [ten] minutes of a one-hour trial, [and] where counsel sleeps several different times over a 30-day trial").

164. See *Ragin*, 820 F.3d at 622 n.11 (concluding thirty minutes of sleep was substantial and noting substantiality must be assessed on case-by-case basis).

165. See *Burdine*, 262 F.3d at 363 (Barksdale, J., dissenting) (stating sleeping lawyer standards "must be shaped so that [they] can be applied—as [they] may well be—in future cases" and concluding majority's rule "will result in uncertainty and undermine accuracy").

166. See *id.* at 338 (majority opinion) (affirming district court decision, which presumed prejudice and granted habeas relief). But see *id.* at 382 (Barksdale, J.,

abhorrent,” under *Cronic*, an attorney’s sleeping is not presumptively prejudicial if it does not occur at a critical time.¹⁶⁷

In *Ragin*, the Fourth Circuit’s decision hinged on the fact that Mackey snoozed for at least thirty minutes every day of trial; the court vacated Ragin’s conviction and sentence without any inquiry into *when* Mackey slept.¹⁶⁸ The court even noted that its holding did not bar a claim based on counsel sleeping during a critical portion of a defendant’s trial because Ragin did not plead facts that would implicate such a rule.¹⁶⁹

By failing to consider when Mackey slept or what Mackey missed while he was unconscious, the Fourth Circuit ignored the plain language of *Cronic*.¹⁷⁰ *Cronic* presumes prejudice *only if* counsel’s absence occurs at a critical time; “[n]ot even a substantial absence satisfies *Cronic* unless it occurs during key moments of the trial.”¹⁷¹ Had the court considered what Mackey missed while he was unconscious, it may have found that Mackey slept only during periods concerned with Ragin’s co-defendants or uncontested issues.¹⁷²

dissenting) (finding it impossible to glean from record which portions of trial counsel slept through).

167. See Cunningham-Parmeter, *supra* note 21, at 829–30 (noting public is conditioned to think of criminal procedure as “equal battle between dueling sides” but stating there is “disconnection between the public perception of the meaning of effective assistance and the legal definition outlined in *Strickland*” and *Cronic* decisions). Cunningham-Parmeter states:

The outcry from the sleeping lawyer cases demonstrates the disconnection between the public perception of the meaning of effective assistance and the legal definition outlined in *Strickland*, which has been so restrained by technicalities since its inception that even the performance of some somnolent lawyers has satisfied its characterization of competency.

Id. at 830.

168. See *Ragin*, 820 F.3d at 623 (stating Mackey was asleep on multiple occasions without discussing when Mackey was asleep). *But see* *Ragin v. United States*, No. 3:10-cv-488-RJC, 2014 WL 4105898, at *7 (W.D.N.C. Aug. 19, 2014) (noting transcript shows Mackey was attentive to six witnesses that directly testified about Ragin’s involvement with conspiracy), *vacated*, *Ragin*, 820 F.3d at 624.

169. See *Ragin*, 820 F.3d at 619 n.3 (“Our holding today does not preclude a claim in which counsel is asleep during a critical portion of the defendant’s trial. Ragin, however, has not pled facts that would implicate such a rule.” (citation omitted)).

170. See *United States v. Cronic*, 466 U.S. 648, 659 (1984) (concluding trial is unfair when counsel is absent during critical stage of trial).

171. See Cunningham-Parmeter, *supra* note 21, at 878 (highlighting that courts can presume prejudice only when counsel’s absence occurs at critical time). *But see* *Cronic*, 466 U.S. at 659 (noting courts may presume prejudice when there is complete denial of counsel at critical stage *or* when “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing”). See also *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345–50 (1980)) (“[P]rejudice is presumed when counsel is burdened by an actual conflict of interest.”).

172. See *Ragin*, 820 F.3d at 614 (explaining Adolf and Culler saw Mackey sleeping at time when witnesses were mostly talking about their clients); see also *Burdine v. Johnson*, 262 F.3d 336, 393 (5th Cir. 2001) (Barksdale, J., dissenting) (noting circumstances of case do not justify presumed prejudice because “it is im-

B. *Lawyers, Don't Close Your Eyes, Don't Fall Asleep, Because You'd Miss a Critical Portion of Trial, and You Don't Want to Miss a Thing*

Currently, all of the circuits that have addressed the sleeping lawyer issue have developed standards that focus, in one way or another, on the duration or frequency of attorney slumber.¹⁷³ Although sleeping for a prolonged period of time during a defendant's criminal trial may be considered poor lawyering, it is not presumptively prejudicial under *Cronic* unless the sleeping occurred at a critical time.¹⁷⁴ Therefore, courts should abandon the substantial portion standard and simply presume prejudice when counsel sleeps through a critical portion of trial.¹⁷⁵

The critical portion rule would provide lower courts with a clearer rule by which to assess ineffectiveness claims in sleeping lawyer cases.¹⁷⁶ Unlike the substantial portion rule, which is susceptible to multiple interpretations, the Supreme Court has delineated exactly which portions of trial are critical.¹⁷⁷ In general, a stage is critical if "the substantial rights of

possible to determine whether . . . [counsel] slept during the presentation of crucial, inculpatory evidence, or during the introduction of unobjectionable, uncontested evidence"). *But see Ragin*, 820 F.3d at 621 n.5 ("Even assuming, *arguendo*, that Mackey only slept during the portion of trial in which no witness testimony directly implicated Ragin, '[t]he adversary process becomes unreliable when no attorney is present to keep the taint of conspiracy from spreading to the client.'" (quoting *United States v. Russell*, 205 F.3d 768, 772 (5th Cir. 2000))).

173. *See, e.g., Ragin*, 820 F.3d at 622 n.11 (explaining word substantial could refer to length of time); *Muniz v. Smith*, 647 F.3d 619, 623–24 (6th Cir. 2011) (analyzing duration of counsel's sleeping); *Burdine*, 262 F.3d at 362 (Barksdale, J., dissenting) (noting substantial could refer to length of time or significance of evidence being presented when counsel slept and because record made it impossible to determine when counsel slept "the majority . . . chose[] the former—length of sleep-time").

174. *See Cronic*, 466 U.S. at 659 ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a *critical stage* of his trial." (emphasis added)). In a footnote, the Court explained that it "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25 (citing exemplary cases); *see also Strickland*, 466 U.S. at 689 ("[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation The purpose is simply to ensure that criminal defendants receive a fair trial."). In *Strickland*, the Court noted that "[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Id.* at 693.

175. *See Kirchmeier, supra* note 28, at 467 (concluding prejudice should be presumed "when defense counsel sleeps during [critical portions of] trial").

176. *See Burdine*, 262 F.3d at 363 (Barksdale, J., dissenting) (noting substantial or insubstantial rule "gives no guidance to federal habeas courts, which may well in the future consider similar claims").

177. *See Mempa v. Rhay*, 389 U.S. 128, 134 (1967) (stating counsel must be present at every critical stage of trial "where substantial rights of a criminal accused may be affected"); *see also United States v. Gouveia*, 467 U.S. 180, 189 (1984) (quoting *United States v. Ash*, 413 U.S. 300, 310 (1973) and *United States v. Wade*, 388 U.S. 218, 224 (1967)) (suggesting proceeding is critical when accused is confronted by expert adversary or legal procedural system and results of confrontation

a defendant may be affected” during that time.¹⁷⁸ Critical stages include the introduction of incriminating evidence, the presentation of key testimony, and the confrontation of the defendant by “the legal procedural system or the expertise of a [government] adversary.”¹⁷⁹ Under the critical portion rule, so long as the attorney is awake and performing during these proceedings, the trial is fair and reliable, even if the attorney sleeps for a prolonged period of trial.¹⁸⁰

If, however, courts wanted to maintain a quantitative element in their sleeping lawyer standards, they could follow the lead of the Sixth Circuit.¹⁸¹ The *Tippins* rule, which presumes prejudice if counsel is “repeatedly unconscious at trial for periods of time in which defendant’s interests were at stake,” requires courts to focus not only on the length and frequency of sleeping, but also on *when* the sleeping occurred.¹⁸² Of all the sleeping lawyer standards, the *Tippins* rule best captures the underlying principles of *Strickland* and *Cronic*.¹⁸³

V. CONCLUSION: RAGIN DECISION SERVES AS WAKE-UP CALL FOR THE SUPREME COURT

If individuals are going to practice law, they need to be prepared for the day-to-day stresses and challenges of being a lawyer: strict deadlines, heavy caseloads, long hours, and sleep deprivation.¹⁸⁴ Practicing law can be an exhausting marathon, and, given the ever-increasing demands of

might settle accused’s fate); *Herring v. New York*, 422 U.S. 853, 858–59 (1975) (finding closing argument constituted critical stage of trial).

178. See *Burdine*, 262 F.3d at 347 (citation omitted) (quoting *United States v. Taylor*, 933 F.2d 307, 312 (5th Cir. 1991)).

179. See *id.* (citing *United States v. Gouveia*, 467 U.S. 180, 189 (1984)); see also *id.* at 355 (Higginbotham, J., concurring) (finding presentation of evidence of guilt to be part of critical stage of trial); *id.* at 394 (Barksdale, J., dissenting) (citing *Davis v. Alaska*, 415 U.S. 308, 318 (1974)) (finding presumption of prejudice when defendant was denied counsel during cross-examination).

180. See *United States v. Cronic*, 466 U.S. 648, 656 (1984) (“When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred.” (footnote omitted)).

181. For a discussion of the *Tippins* decision, see *supra* notes 67–72 and accompanying text.

182. See Van Arsdell, *supra* note 11, at 854 n.175 (“*Tippins* suffered prejudice, by presumption or otherwise, if his counsel was repeatedly unconscious at trial for periods of time in which defendant’s interests were at stake.” (citing *Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996))); see also *id.* at 859 (differentiating between *Javor* and *Tippins* tests and noting that “the former only requires an amount of time while the latter also requires the defendant’s interests to be at stake”).

183. See *Tippins*, 77 F.3d at 690 (analyzing whether counsel “was functioning as a lawyer during critical times at trial”). For a further discussion of the *Strickland* and *Cronic* decisions, see *supra* notes 41–59 and accompanying text.

184. See Carter, *supra* note 8 (stating “[s]ome aspect of legal culture encourages overwork” and discussing American Bar Foundation study that found average lawyer works at least fifty hours per week); see also Rampell, *supra* note 6 (describing study that found law second most sleep-deprived profession).

the legal industry, it is likely courts will face sleeping lawyer cases well into the future.¹⁸⁵ Future courts need a clear rule to apply.¹⁸⁶

Currently, there are three different standards for assessing prejudice in sleeping lawyer cases, and “what may be enough sleep at the right time to constitute presumed prejudice for one court may not be adequate proof for another court.”¹⁸⁷ The Fourth Circuit’s decision in *Ragin* only adds to this confusion.¹⁸⁸ Ideally, the *Ragin* decision will serve as a wake-up call to the Supreme Court: it is time to grant certiorari to a future sleeping lawyer case and issue a uniform standard by which to assess prejudice in sleeping lawyer cases.¹⁸⁹ Until then, lawyers need to wake up in the courtroom and smell the coffee—and maybe drink some, too.¹⁹⁰

185. See *United States v. Ragin*, 820 F.3d 609, 619 (4th Cir. 2016) (stating case was issue of first impression in Fourth Circuit but noting “four other circuits have considered whether application of a presumption of prejudice under *Cronic* is warranted when a defendant’s counsel is asleep during trial” (emphasis added)). But see Kirchmeier, *supra* note 28, at 469 (“[T]he situation of sleeping counsel is, hopefully, rare. There are not many published cases involving sleeping counsel.”).

186. See Van Arsdel, *supra* note 11, at 838 (arguing for more specific standard in sleeping attorney cases).

187. See *id.* at 856 (describing different standards in sleeping lawyer cases); see also *Ragin*, 820 F.3d at 612 (“We hold that a defendant is deprived of his Sixth Amendment right to counsel when counsel sleeps during a substantial portion of the defendant’s trial.”); *Muniz v. Smith*, 647 F.3d 619, 623–24 (6th Cir. 2011) (ruling on sleeping lawyer issue and concluding there is no Sixth Amendment violation unless attorney sleeps for substantial portion of time); *Burdine v. Johnson*, 262 F.3d 336, 341 (5th Cir. 2001) (ruling Sixth Amendment violation occurs when “counsel is repeatedly unconscious through not insubstantial portions of . . . trial”); *Tippins*, 77 F.3d at 687, 689 (concluding defendant suffers prejudice when counsel is repeatedly unconscious at trial when “defendant’s interests [are] at stake”); *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984) (holding attorney that sleeps through substantial portion of defendant’s trial does not provide defendant with legal assistance guaranteed by Sixth Amendment).

188. See *Ragin*, 820 F.3d at 622 n.11 (declining to define term substantial for all cases); see also Van Arsdel, *supra* note 11, at 854 (stating variety of rules is “reminiscent of pre-*Strickland* case law,” where each circuit had its own standard for assessing prejudice).

189. See Van Arsdel, *supra*, at 860 (arguing standard for assessing prejudice needs to be more specific). But see *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984) (“No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.”). Currently, it seems unlikely that the Supreme Court will grant certiorari to a sleeping lawyer case. See e.g., Van Arsdel, *supra* note 11, at 837 (stating Supreme Court denied certiorari in *Burdine* case). However, if the Court does hear a sleeping lawyer case, “[n]o matter what standard [the Court] adopts, another question presents itself—who, if anyone, is keeping track of the sleep necessary to find presumed prejudice?” See *id.* at 865, 867 (arguing courts should place video cameras in courtroom and explaining cameras “would record the proceedings [and act] as a video supplement to the audio trial record” (citing Winton Woods, *Firms Take Courtrooms to the Next Level*, 37 ARIZ. ATT’Y 46, 46–47 (2001))).

190. See generally Almendrala, *supra* note 5 (discussing sleep deprivation in America).