Casenote

"What We Meant Was . . ." The Supreme Court Clarifies Two Ineffective Assistance Cases in *Bell v. Cone*[*]

In *Bell v. Cone*,[1] the Supreme Court held that an ineffective assistance claim premised on attorney errors made at "specific points" during a trial was governed by the performance and prejudice standard set forth in *Strickland v. Washington*.[2] In doing so, the Court refused to extend its holding in *United States v. Cronic*,[3] which allows prejudice to be presumed in certain ineffective assistance challenges, beyond a narrow class of cases, including those in which an attorney demonstrates a "complete failure."[4] Consequently, because most ineffective assistance claims target specific decisions made by trial counsel, the *Strickland* standard will continue to govern in most instances. Due to the arduous task of satisfying *Strickland*'s prejudice component, the Court's decision

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1. 535 U.S. 685, 122 S. Ct. 1843 (2002).
2. 122 S. Ct. at 1851-52. Strickland v. Washington, 466 U.S. 668 (1984).
3. 466 U.S. 648 (1984).
4. *Bell*, 122 S. Ct. at 1851.

in *Bell* solidifies the practical difficulty of obtaining federal habeas corpus relief for ineffective assistance claims.

I. FACTUAL BACKGROUND

On August 9, 1980, Gary Bradford Cone shocked the city of Memphis, Tennessee by embarking on a two-day crime spree resulting in two brutal murders. The crimes began with the burglary of a local jewelry store, from which Cone stole nearly $112,000 in merchandise. In an attempt to evade authorities, he led a police officer on a high-speed chase through mid-town Memphis, finally abandoning his car in a residential neighborhood. While fleeing the scene, Cone shot both an officer who was assisting in the apprehension and a citizen who challenged his flight. He then drew a gun on a second citizen in an effort to steal his automobile.[5]

Cone managed to elude law enforcement officials for the rest of the night, only to reemerge the next morning at the door of a resident in the same neighborhood where the chase ended. He left after the resident refused to let him inside to use the telephone, but not before brandishing a gun once again. That same afternoon, Cone broke into the home of Shipley and Cleopatra Todd, an elderly couple who lived several blocks away. When the Todds refused to help Cone escape, he savagely beat them to death. Cone stole enough money from the Todds home to fly to Florida, where he was later apprehended. Authorities found the mutilated bodies of Mr. and Mrs. Todd three days later, after worried family members instigated an investigation.[6]

At trial, a jury convicted Cone of first degree murder and murder in the perpetration of a burglary. The jury also convicted him of three charges of assault with intent to commit murder and robbery by use of deadly force. For each of the two murders, Cone received the death penalty. On direct appeal to the Tennessee Supreme Court, Cone's attorney sought reversal on numerous grounds, including selective prosecution, improper voir dire, improper jury instructions, and prosecutorial misconduct. The court, however, found these arguments unpersuasive and affirmed Cone's conviction and sentence.[7]

After the United States Supreme Court denied certiorari to hear the appeal, Cone petitioned the state for post conviction relief.[8] Cone argued that his counsel rendered ineffective assistance by failing to

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5. State v. Cone, 665 S.W.2d 87, 89-90 (Tenn. 1984).
6. *Id*. at 89-91.
7. *Id*. at 89-90, 96.
8. *Bell*, 122 S. Ct. at 1849.

introduce mitigating evidence or make a final argument to plead for his life during the sentencing phase of the initial trial.[9] However, the trial judge at the post conviction proceeding found that these decisions did not constitute ineffective assistance.[10] The Court of Criminal Appeals of Tennessee agreed with the lower court, holding that competent attorneys could reasonably disagree about tactical questions such as witness selection and waiver of final argument.[11] The appellate court, therefore, affirmed the denial of post conviction relief.[12] Thereafter, the Tennessee Supreme Court refused to hear the appeal,[13] and the United States Supreme Court denied further review.[14]

In 1997 Cone filed a petition in federal district court for a writ of habeas corpus under 28 U.S.C. § 2254,[15] which permits federal courts to hear habeas claims on behalf of persons in custody "pursuant to the judgment of a State court."[16] The district court denied Cone's petition on grounds that he failed to meet the requirements of § 2254(d).[17] The Court of Appeals for the Sixth Circuit affirmed the district court's denial of Cone's habeas claim with respect to his conviction, but reversed the denial with respect to his death sentence.[18] The court reasoned that the egregiousness of his attorney's failure to introduce mitigating factors

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9. Cone maintained that his mother, who testified during the guilt phase, should have been reintroduced during the sentencing phase to testify about his early childhood. Cone believed her testimony would serve to humanize him and, thus, reduce the imposed sentence. During the post conviction proceeding, Cone's trial counsel testified that he purposely did not recall Cone's mother to the stand because she did not make a good witness and he did not want to expose her to further cross-examination. Cone also attacked his counsel's choice to waive final argument at the sentencing phase, insisting that a competent attorney would have made a final plea for his client's life. Again, his trial counsel testified that he waived final argument by choice in order to prevent the persuasive and powerful lead prosecutor from making a closing argument that would resonate with the jurors. *Id.* at 1853-54.

10. Cone v. State, 747 S.W.2d 353, 356-57 (Tenn. Cr. App. 1987).

11. *Id*. at 357.

12. *Id*. at 358.

13. *Bell*, 122 S. Ct. at 1849.

14. Cone v. Tennessee, 488 U.S. 871 (1988). After Cone's unsuccessful bid for post conviction relief, he attempted to secure relief a second time, again at the state level. His second attempt was dismissed. *Bell*, 122 S. Ct. at 1849.

15. 28 U.S.C. § 2254 (2000). This statute and its subsequent amendments will be discussed later in this Article.

16. *Id*.

17. Cone v. Bell, 243 F.3d 961, 965 (6th Cir. 2001). Under subsection (d)(1), a federal court cannot interfere with a state court's legal determination unless it was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

18. 243 F.3d at 979.

and make a final argument at the sentencing phase "amount[ed] to a virtual abandonment of the adversarial process."[19] The court disagreed with the district court's application of the *Strickland* test for ineffective assistance claims, which requires a showing of both deficient representation *and* prejudice to the defense.[20] Instead, the court of appeals applied the *Cronic* standard,[21] holding that Cone was entitled to a presumption of prejudice because his counsel failed to subject the prosecution's case to "meaningful adversarial testing."[22] According to the court of appeals, the district court unreasonably applied the *Strickland* standard to Cone's case.[23] Hence, relying on § 2254(d)(1)'s "unreasonable application" provision, the Sixth Circuit partially granted Cone's petition for habeas corpus.[24]

The United States Supreme Court granted certiorari to correct what it perceived to be a misreading of *Cronic* by the Sixth Circuit.[25] The Court determined that because Cone challenged his attorney's performance only at "specific points" during his trial, he was not entitled to the *Cronic* prejudice exception, which is reserved primarily for instances in which an attorney's failure is *complete* with respect to the *whole* trial.[26] The Court held that the *Strickland* standard governed because Cone's allegations were similar to those in other cases in which the Court applied the performance and prejudice test.[27] In addition, the Court pointed out that to prevail, Cone must show that the state court's application of *Strickland* was "objectively unreasonable," which he failed to do.[28] Thus, the Supreme Court reversed the Sixth Circuit, denying Cone's habeas petition.[29]

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19. *Id*. at 978.
20. *Id*. at 979. *See Strickland*, 466 U.S. at 687.
21. In *United States v. Cronic*, the Court held that, generally, three categories of cases will give rise to a presumption of prejudice: (1) when a defendant suffers a complete denial of counsel at a "critical stage" of a criminal proceeding, (2) when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," and (3) when counsel is expected to assist the accused under circumstances in which even a fully competent attorney could not. 466 U.S. at 659-60. At issue in *Bell v. Cone* is the second scenario.
22. 243 F.3d at 979 (quoting *Cronic*, 466 U.S. at 659).
23. *Id.*
24. *Id*.
25. Bell v. Cone, 534 U.S. 1064 (2001).
26. *Bell*, 122 S. Ct. at 1851.
27. *Id*. at 1851-52.
28. *Id*. at 1854.
29. *Id*.

II. LEGAL BACKGROUND

A. *Writ of Habeas Corpus*

State criminal defendants may vindicate their constitutional rights in federal court by seeking a writ of habeas corpus through a collateral attack.[30] The writ of habeas corpus, or the "Great Writ" as Blackstone referred to it, is part of America's legal heritage, tracing its origin back to thirteenth century England.[31] Both the United States Constitution[32] and the Judiciary Act of 1789[33] mention the writ expressly. At the time, however, habeas writs applied to only federal prisoners. In 1867 Congress passed the Habeas Corpus Act,[34] which broadened the scope of habeas jurisdiction to include state prisoners.[35] The Act permitted federal courts to issue the writ in "*all* cases where *any* person may be restrained of his or her liberty in violation of the constitution."[36]

The modern authority for federal courts to issue habeas writs is codified at 28 U.S.C. §§ 2241-2255.[37] Specifically, § 2254 provides certain procedural guidelines for issuing the writ to state prisoners. Interestingly, however, Congress did not pass legislation designed to flesh out the substantive contours of federal habeas procedure until the mid-1990s.[38] On April 24, 1996, President Clinton signed the Antiter-

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30. Alternatively, state criminal defendants may seek relief for constitutional violations by petitioning the Supreme Court for direct review. Because of the limited number of appeals heard by the Supreme Court each term, however, direct review rarely proves a viable route. A collateral attack, on the other hand, is a separate, independent lawsuit filed to challenge the legitimacy of the outcome of the principal suit. A habeas corpus petition is filed with a court to seek a prisoner's release from custody. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 33.01 (4th ed. 2000). The term habeas corpus, as used in this Article, refers to only one type of habeas writ—habeas corpus *as subjiciedum*. This type of writ is concerned exclusively with the legitimacy of detentions. *Id*. at § 33.01 n.2.

31. *Id*. at § 33.01.

32. U.S. CONST. art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended . . . .").

33. 1 Stat. 81-82 (1789) ("[A]ll the before-mentioned courts in the United States, shall have power to issue writs of . . . *habeas corpus* . . ."; "either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of committement [sic].").

34. 14 Stat. 385 (1867).

35. WHITEBREAD & SLOBOGIN, *supra* note 30, § 33.01.

36. 14 Stat. at 385 (emphasis added).

37. 28 U.S.C. §§ 2241-2255 (2000).

38. WHITEBREAD & SLOBOGIN, *supra* note 30, § 33.01.

rorism and Effective Death Penalty Act[39] ("AEDPA") into law.[40] One of the avowed purposes of the Act was "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases."[41] In fact, President Clinton, in his signing statement, declared that "[f]or too long, and in too many cases, endless death row appeals have stood in the way of justice being served."[42] In an effort to streamline the federal appeals process and give more finality to state court proceedings, the AEDPA amended several provisions of the United States Code dealing with the issuance of writs of habeas corpus.[43] The amendment of § 2254(d) brought the most important substantive change. For thirty years prior to the passage of the AEDPA, § 2254(d) required federal courts to presume the correctness of issues determined in state courts, but listed numerous exceptions a defendant could rely on to rebut the general presumption.[44]

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39. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).

40. Statement by President William J. Clinton Upon Signing S. 735, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 29, 1996), *reprinted in* 1996 U.S.C.C.A.N. 961-1 to -4.

41. H.R. CONF. REP. NO. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944.

42. Statement by President William J. Clinton, *supra* note 40, at 961-62.

43. The AEDPA amended §§ 2244, 2253, 2254, and 2255 of 28 U.S.C.

44. *See* 28 U.S.C. § 2254 (1966) (amended 1996).

> (d) A determination . . . made by a State court of competent jurisdiction . . . shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear . . .
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> (1) that the merits of the factual dispute were not resolved in the State court hearing;
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> (2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;
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> (3) that the material facts were not adequately developed at the State court hearing;
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> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
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> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
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> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
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> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
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> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issues was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of

The current version of § 2254(d) no longer permits defendants such broad latitude; instead, it significantly restricts their ability to obtain a habeas writ. It provides that a writ based on a state court proceeding shall not be granted unless the adjudication "resulted in a decision that was *contrary to*, or involved an *unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States."[45] While federal courts still have independent authority to review cases adjudicated in state courts, the AEDPA makes clear that such cases must be given full effect to the extent they are consistent with federal law.

Prior to congressional efforts to restrict habeas practice, case law in this area revealed a similar attitude in the Supreme Court. In 1989 the Court decided *Teague v. Lane*,[46] perhaps, according to one source, the most significant habeas decision in the last fifteen years.[47] The Court in *Teague* significantly limited the scope of habeas relief, holding that an individual involved in a collateral attack may not rely on a federal rule of law that was not in existence at the time his state conviction became final.[48] The Court based its decision not to extend new constitutional rules retroactively on considerations of finality in the criminal context.[49] It noted the fundamental importance of finality to our system of criminal justice and commented that "[w]ithout [it], the criminal law is deprived of much of its deterrent effect."[50]

Eleven years after that significant decision, the Supreme Court thoroughly analyzed the amended version of § 2254(d)(1) in *Williams v. Taylor*,[51] a case involving a collateral attack by a state prisoner convicted of capital murder. In *Williams*, defendant challenged his attorney's failure to make an adequate investigation during the sentencing phase of his trial that would have resulted in the discovery of important mitigating evidence.[52] The Fourth Circuit Court of

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> the record as a whole concludes that such factual determination is not fairly supported by the record . . . .

45. 28 U.S.C. § 2254(d)(1) (emphasis added).

46. 489 U.S. 288 (1989).

47. HOWARD P. FINK ET AL., FEDERAL COURTS IN THE 21ST CENTURY 949 (Michie 1996) ("A discussion about [the] 'types of claims that federal courts may reach on state prisoners' habeas petitions pales into relative insignificance compared to the limits established in a line of cases beginning with *Teague v. Lane*.'").

48. 489 U.S. at 310.

49. *Id*. at 309.

50. *Id*.

51. 529 U.S. 362 (2000).

52. *Id*. at 370-71.

Appeals interpretation of § 2254(d)(1) was the central issue in the case.[53] In considering the meaning of that provision, the Court divided its discussion into two parts.[54] First, writing for a fractured majority, Justice Stevens examined the requirement that state court determinations be evaluated only against "clearly established federal law."[55] According to the Court, Congress used this language specifically to codify the holding from *Teague* because the "clearly established" requirement is the functional equivalent of *Teague*'s antiretroactivity rule.[56] In reaching this conclusion, Justice Stevens reasoned that the *Teague* prohibition against relying on a "new" constitutional rule requires the same inquiry as that required by the AEDPA's "clearly established" language.[57] According to Justice Stevens, forcing courts to ask both questions—is the law "new" and is the law "clearly established"—would be a redundancy that Congress did not intend.[58]

Next, the Court in *Williams* explored the meaning of the "contrary to, or unreasonable application of" requirement.[59] Writing separately, but concurring with the majority, Justice O'Connor examined at great length the independent nature of each phrase.[60] First, she described two ways in which a state court decision can be "contrary to" Supreme Court precedent.[61] A state court can either apply a rule that contradicts the governing law, or it can decide a case differently from the Supreme Court on a set of facts that are materially indistinguishable.[62] In contrast, O'Connor distinguished those scenarios from ones involving an "unreasonable application" of established federal law.[63] This situation arises when a state court chooses the governing principle correctly, but then applies it to the facts of the case in an objectively unreasonable

53. *Id*. at 374.
54. *Id*. at 379.
55. *Id*.
56. *Id*. at 379. The Court noted that Congress frequently codifies Supreme Court precedent in the habeas context. *Id*. at 380 n.11.
57. *Id*. at 379-80.
58. *Id*.
59. *Id*. at 379.
60. *Id.* at 404-13 (O'Connor, J., concurring). Justice O'Connor wrote separately because she disagreed with the reasoning employed by Justice Stevens in analyzing the two phrases. Stevens argued that each phrase overlaps in meaning and, thus, is not mutually exclusive of the other. *Id*. at 384-85. The majority in *Bell v. Cone* adopted Justice O'Connor's conclusion that the meaning of each phrase is distinct and deserves independent attention.
61. *Id*. at 405-06 (O'Connor, J., concurring).
62. *Id*. (O'Connor, J., concurring).
63. *Id*. at 409 (O'Connor, J., concurring).

manner.[64] By qualifying this requirement with the word "objectively," Justice O'Connor intended to stress that federal courts are not permitted to disturb the judgment of state courts for merely applying the law incorrectly.[65] By prescribing a standard under the "unreasonable application" requirement that removes subjective inquiry, the Court in *Williams* effectively furthered the AEDPA's goal of restricting the use of habeas procedures.[66]

B. Ineffective Assistance

The Sixth Amendment to the United States Constitution provides, among other things, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."[67] However, this right offers little more than a hollow promise unless courts are willing to dress the skeletal guarantee in judicial flesh. In 1970 the Supreme Court did just that by noting for the first time that the right to counsel necessarily requires the right to "effective assistance."[68] In *McMann v. Richardson*,[69] a case involving the legitimacy of guilty pleas entered by three defendants, the Court did not prescribe a specific standard for measuring effective assistance, except to say, "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel."[70] In *McMann*, after entering felony guilty pleas upon the advice of their attorneys, two defendants instituted collateral

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64. *Id*. at 408-09 (O'Connor, J., concurring).

65. *Id.* at 411 (O'Connor, J., concurring).

66. *Id*. at 412 (O'Connor, J., concurring).

67. U.S. CONST. amend. VI. Because the Bill of Rights originally applied only to the federal government, this provision was initially inapplicable in state criminal cases. Therefore, courts were forced to find other means by which to secure this right for state criminal defendants. Such means were found in 1932 when the Supreme Court first recognized the right to counsel in *Powell v. Alabama*, 287 U.S. 45 (1932). In that case the Court used the Due Process Clause of the Fourteenth Amendment to apply the right to counsel to the states. *Id*. at 67. In holding that the Fourteenth Amendment embraced this right, the Court noted that the denial of counsel violated the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)). It was not until three decades later, however, in *Gideon v. Wainright*, 372 U.S. 335 (1963), that the Supreme Court applied the Sixth Amendment directly to the states. *Id*. at 342. Until *Gideon*, the Court recognized the right to counsel on a case-by-case basis only. Thus, criminal defendants were not automatically entitled to the right.

68. *See* McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

69. 397 U.S. 759 (1970).

70. *Id*. at 771.

attacks challenging the competency of their representation.[71] The Court held that the ineffective assistance claims could not be sustained because the advice from each attorney was "reasonably competent."[72] However, because the Supreme Court did little in the following fourteen years to clarify this language, the lower courts were left to struggle with fashioning an ineffective assistance standard of their own.[73]

The Court's 1984 decision in *Strickland v. Washington*[74] developed, for the first time, a two-part test for analyzing ineffective assistance claims.[75] In *Strickland*, respondent confessed to a series of criminal episodes, including three stabbing murders. He then waived his right to a jury trial and pleaded guilty to all charges. After receiving the death penalty, respondent sought collateral relief on grounds that his attorney provided ineffective assistance at the sentencing proceeding.[76] Before *Strickland*, the Court had addressed only actual or constructive denial of counsel claims under the Sixth Amendment, never having "directly and fully addressed a claim of 'actual ineffectiveness' of counsel's assistance."[77] According to the Court, the purpose of the constitutional right to counsel is to ensure the fairness of the trial process.[78] Therefore, the paramount concern in evaluating ineffective assistance claims is "whether [the] 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."[79]

The *Strickland* test has two components. For an ineffective assistance claim to warrant reversal of a conviction or death sentence, the defendant must show (a) his counsel's representation was objectively unreasonable, and (b) absent his counsel's performance, a reasonable probability exists that the outcome of the trial would have been

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71. *Id*. at 765-66.
72. *Id*. at 770.
73. *See* WHITEBREAD & SLOBOGIN, *supra* note 30, § 32.03(b).
74. 466 U.S. 668 (1984).
75. *Id*. at 687.
76. *Id*. at 671-75. During the plea colloquy, the trial judge, without indicating his likely sentencing decision, told respondent that he had admiration for people who owned up to their crimes. Based on this exchange, respondent's counsel relied heavily during the sentencing hearing on the fact that respondent accepted responsibility for his crimes, but he did not present character witnesses as mitigating evidence. *Id*. at 672-73. On collateral attack, respondent alleged ineffective assistance because, among other things, his attorney failed to investigate character witnesses, failed to present meaningful arguments to the sentencing judge, and failed to seek a presentence investigation report. *Id*. at 675. The Supreme Court held that counsel's decisions were "strategic choices." *Id*. at 699.
77. *Id*. at 683.
78. *Id*. at 686.
79. *Id*.

different.[80] The Court further opined that in applying this test, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[81] This presumption of adequacy reflects the Court's basic unwillingness to second-guess attorney decisions made at trial, unless a defendant can overcome the heavy burden of showing that those decisions were not sound trial strategies.[82]

In a case decided with *Strickland*, the Court provided an exception to the general test for ineffective assistance claims.[83] In *United States v. Cronic*,[84] the Court held that in some exceptional instances, prejudice can be inferred from the circumstances surrounding the case.[85] *Cronic* concerned a complex "check-kiting" scheme for which respondent received a twenty-five year sentence. When respondent's retained counsel withdrew just before trial, a young, inexperienced real estate attorney was appointed and given twenty-five days to prepare the case. The government, on the other hand, spent four years in preparation.[86] The court of appeals reasoned that respondent was entitled to relief without inquiry into his counsel's actual performance because the external circumstances "mandated an inference that counsel was unable to discharge his duties."[87] The Supreme Court disagreed that the circumstances in *Cronic* were sufficient to warrant a presumption of prejudice.[88] The Court did recognize, however, that a fair trial requires the prosecution's case be forced "to survive the crucible of meaningful

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80. *Id*. at 687-88. Specifically, the Court provided that:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. 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.

Id. at 687.

81. *Id*. at 689.

82. *Id*.

83. *See Cronic*, 466 U.S. 648.

84. 466 U.S. 648 (1984).

85. *Id*. at 659-60. *See also supra* text accompanying note 21.

86. 466 U.S. at 649-50.

87. *Id*. at 657-58.

88. *Id*. at 666. Instead, the Court held that respondent could "make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel." *Id*.

adversarial testing."[89] If an attorney "entirely fails" to put the prosecution's case to this sort of testing, a defendant need not show prejudice because the process is presumptively unreliable.[90] Therefore, in certain situations, the holding in *Cronic* provides defendants with an alternative method of proving a Sixth Amendment violation without satisfying the two-part *Strickland* test.

III. RATIONALE OF THE COURT

A. *The Majority Opinion*

In rejecting respondent's argument that prejudice should be presumed, the Court in *Bell* drew a sharp distinction between the rule from *Strickland* and the rule from *Cronic*.[91] According to the Court, when determining which rule applies in habeas cases involving ineffective assistance claims, courts must necessarily look at the type of argument made by the party seeking relief.[92] For instance, if a defendant argues his attorney failed to adequately represent his interests throughout the "whole" court proceeding, the prejudice exception from *Cronic* may apply.[93] On the other hand, if a defendant insists that his attorney failed to challenge the prosecution's case at "specific points" during the proceeding, then the traditional, two-part *Strickland* test will apply.[94]

Writing for the Court, Justice Rehnquist began by acknowledging the dual purposes of the AEDPA: to eliminate federal "retrials" and to give maximum effect and finality to state court convictions.[95] He further noted that under the AEDPA's amended version of § 2254(d)(1), federal habeas courts are granted authority to issue relief only when a state court adjudication is contrary to or involves an unreasonable application of clearly established federal law.[96] Because the decision in *Bell* turned on the interpretation and application of these two phrases, the Court drew on Justice O'Connor's opinion in *Williams* to explain that each phrase has an independent meaning.[97] The Court reaffirmed its position that a state court decision is contrary to clearly established federal law if it applies the wrong legal rule to a set of facts or if it

89. *Id*. at 656.
90. *Id*. at 659.
91. 122 S. Ct. at 1851.
92. *Id*.
93. *Id.*
94. *Id*.
95. *Id*. at 1849.
96. *Id*. at 1849-50.
97. *Id*. at 1850.

reaches a different conclusion than the Supreme Court in a case involving materially indistinguishable facts.[98] Similarly, the Court reiterated that a state court unreasonably applies clearly established federal law if it identifies the correct legal principle from a Supreme Court decision, but fails to apply it reasonably to the set of facts before it.[99] To determine whether a state court applied the correct legal rule unreasonably, the Court held that the application must be "objectively unreasonable."[100] The Court fashioned this standard to prevent a federal habeas court from subjectively determining, in its independent judgment, that a state court applied the rule incorrectly or erroneously.[101] Having addressed these prefatory concerns, the Court proceeded to apply the facts of the case to the language of § 2254(d)(1) to determine whether *Strickland* or *Cronic* contained the governing legal rule.[102]

In *Bell*, Cone premised his ineffective assistance claim on his attorney's failure to adduce mitigating evidence and make a final argument at the sentencing phase of his trial.[103] In an attempt to take advantage of *Cronic's* prejudice presumption, he argued that due to his attorney's actions, the prosecution's case was not subjected to "meaningful adversarial testing."[104] Cone maintained that because the state court applied the *Strickland* test, it chose the wrong legal rule. Thus, he argued for habeas relief under the "contrary to clearly established federal law" requirement of § 2254(d)(1).[105] The Court rejected this contention, relying primarily on the type of argument made by Cone.[106] The Court stressed that the *Cronic* standard does not apply unless an attorney's failure is complete with respect to the entire proceeding.[107] Here, however, because Cone attacked his attorney's performance by focusing on two specific points during the proceeding, the Court reasoned that the alleged deficiencies were similar to other kinds of specific attorney errors to which the performance and prejudice components from *Strickland* were applied.[108] The Court noted that the difference in the type of argument made by a defendant is of kind, not of degree, for purposes of choosing between the rule from *Strickland* versus the rule

98. *Id*.
99. *Id*.
100. *Id*.
101. *Id*.
102. *Id*.
103. *Id*. at 1851-52.
104. *Id*. at 1851.
105. *Id*. at 1850.
106. *Id*. at 1851.
107. *Id*.
108. *Id*. at 1852.

from *Cronic*.[109] Therefore, because the state court correctly identified *Strickland* as the governing legal rule, the Court denied Cone relief under § 2254(d)(1)'s "contrary to" clause.[110]

Next, the Court examined whether the "unreasonable application" clause of the statute entitled Cone to relief.[111] The Court began by noting its requirement that lower courts accord a high level of deference to attorney decisions when reviewing ineffective assistance claims under *Strickland*.[112] A court's ultimate goal in evaluating such claims is to judge the decisions of the attorney from *the attorney's* perspective at the time of the trial.[113] However, the Court pointed out that a defendant in federal habeas court must do more than show that he can satisfy the performance and prejudice components of the *Strickland* test.[114] He must clear the additional hurdle of demonstrating that the state court applied this test in an objectively unreasonable manner.[115]

To determine whether the state court applied *Strickland* unreasonably, the Court reviewed the decisions made by Cone's attorney in light of his alternative options.[116] For instance, Cone maintained that his mother should have been called to testify at the sentencing hearing to present mitigating facts about his childhood.[117] However, his attorney decided that because Cone's mother did not make a good witness during the guilt phase, it would be unwise to allow her to be cross-examined any further at the sentencing proceeding.[118] On appeal, Cone offered no argument to dispute this choice.[119]

Next, the Court considered Cone's assignment of error in his attorney's failure to make a final argument during the sentencing phase.[120] In the majority's view, Cone's attorney offered a plausible reason for declining to make a final argument.[121] At the conclusion of the hearing, the junior prosecutor made a very simple closing argument, without focusing on the horrific nature of the murders.[122] If Cone's

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109. *Id*. at 1851.
110. *Id*. at 1852.
111. *Id*.
112. *Id*.
113. *Id*.
114. *Id.*
115. *Id*.
116. *Id*. at 1853-54.
117. *Id.* at 1853.
118. *Id.*
119. *Id*.
120. *Id*.
121. *Id.* at 1853-54.
122. *Id.* at 1854.

attorney had delivered a final argument, the lead prosecutor would have had an opportunity to make a rebuttal.[123] His attorney feared that given the opportunity, the skillful prosecutor would paint a lingering image of Cone as a cold-hearted killer immediately before jury deliberation commenced.[124] His decision not to argue was part of a calculated effort to prevent the prosecution from obtaining the upper hand.[125] Considering the choices faced by Cone's counsel in determining which witnesses to call and whether to make a final argument, the Court held that the state court did not apply the performance standard from *Strickland* in an objectively unreasonable fashion.[126]

Consequently, because the state court applied the correct legal rule in assessing Cone's ineffective assistance claim and it did not apply the rule in an objectively unreasonable manner, the Court held that Cone was properly denied relief under both the "contrary to" and "unreasonable application" provisions contained in § 2254(d)(1).[127]

B. Justice Stevens's Dissent

Because Justice Stevens believed the majority applied the wrong standard in *Bell*, he dissented.[128] From Justice Stevens's point of view, the facts of the case fell squarely within the exception identified in *Cronic*, giving rise to a presumption of prejudice. Justice Stevens dismissed as unacceptable the very justifications offered by Cone's counsel that the majority accepted as sound trial practice.[129] He took particular issue with the reason advanced by Cone's attorney that by not making a final argument he hoped to prevent the lead prosecutor from delivering a persuasive and damaging rebuttal.[130] Justice Stevens noted with dissatisfaction that "fear of the opponent cannot justify such absolute dereliction of a lawyer's duty to the client."[131] He described the conduct of Cone's attorney in turns as "simply bewildering," "nothing short of incredible," and "patently unsatisfactory."[132]

Justice Stevens primarily rejected the majority's characterization of Cone's argument as alleging ineffective assistance only at "specific

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123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 1852, 1854.
128. *Id.* at 1854 (Stevens, J., dissenting).
129. *Id.* at 1861 (Stevens, J., dissenting).
130. *Id.* (Stevens, J., dissenting).
131. *Id.* (Stevens, J., dissenting).
132. *Id.* (Stevens, J., dissenting).

points."[133] While admitting it was possible to frame Cone's argument in this manner, Justice Stevens nonetheless maintained that the attorney's failures were egregious enough to be considered "complete."[134] He argued that the majority's semantic distinction ignored the facts of the case.[135] To support his conclusion, he noted that "when those complaints concern 'points' that encompass all of counsel's fundamental duties . . . counsel *has* failed 'entirely.'"[136] He further commended the Sixth Circuit Court of Appeals for properly determining that the conduct of Cone's attorney's constituted a "complete failure" within the meaning of the decision in *Cronic*.[137]

In addition, Justice Stevens argued that the majority overindulged the strong presumption that attorneys generally perform their duties within the requisite bounds of professional conduct.[138] He reprimanded his colleagues for their "blind reliance" on the explanations given by Cone's attorney to justify his decisions at trial.[139] Justice Stevens pointed out that in some situations, "uncritical analysis of a lawyer's proffered explanations for aberrant behavior in the courtroom . . . may result in the denial of the constitutional 'right to the effective assistance of counsel.'"[140] He argued that the choices made by Cone's attorney were not sound trial strategies driven by skill and cunning, but instead were motivated by a fatalistic view of his client's case and fear of the lead prosecutor.[141] Therefore, in his view, the majority not only applied the wrong legal standard to the case, but also relied on a presumption of adequate representation unwarranted by the facts.[142]

IV. IMPLICATIONS

The decision in *Bell v. Cone* reinforces the practical difficulty of obtaining federal habeas corpus relief for ineffective assistance claims. The prejudice component of the *Strickland* test poses the most substantial obstacle to defendants seeking habeas relief.[143] Under that

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133. *Id*. at 1862 (Stevens, J., dissenting).
134. *Id*. (Stevens, J., dissenting).
135. *Id*. (Stevens, J., dissenting).
136. *Id*. (emphasis in original) (Stevens, J., dissenting) (quoting *Cronic*, 466 U.S. at 659).
137. *Id*. (Stevens, J., dissenting).
138. *Id*. at 1863 (Stevens, J., dissenting).
139. *Id*. (Stevens, J., dissenting).
140. *Id*. (Stevens, J., dissenting) (quoting *McMann*, 397 U.S. at 771 n.14).
141. *Id*. at 1856-57, 60 (Stevens, J., dissenting).
142. *Id.* at 1860-62 (Stevens, J., dissenting).
143. Even if a defendant proves that his attorney's performance fell outside the bounds of reasonable professional judgment (a relatively difficult task), the outcome will not be set

requirement, a defendant must prove that but for his attorney's deficient performance, a "reasonable probability" exists that the result at trial would have been different.[144] Proving the existence of a reasonable probability is particularly daunting as courts are required to proceed on the assumption that the law was applied "reasonably, conscientiously, and impartially" by the decisionmaker.[145] In *Cronic*, however, the Court seemed to offer a ray of hope to state prisoners by recognizing that under some circumstances prejudice may be presumed, therefore, significantly increasing the chances of obtaining habeas relief.[146]

In discussing the two tests used to analyze ineffective assistance claims, the Court in *Bell* placed special emphasis on the kind of argument made by defendant, i.e., "specific errors" versus "complete failure." This distinction, according to the majority, governs which cases are analyzed under *Strickland* (the former) and which are analyzed under *Cronic* (the latter). By limiting *Cronic's* prejudice presumption to only those situations in which an attorney's failure is complete with respect to the entire proceeding, the Court seems to have subtly expressed its own view concerning the use of habeas procedures for disturbing state court decisions. *Bell v. Cone* presented the Court with an opportunity to extend the principle from *Cronic* to situations in which an attorney's alleged performance, though egregious from the point of view of the defendant, was deficient only at "specific points." In declining the invitation to read the presumption more broadly, the Court explicitly emphasized just how narrow it intended the *Cronic* exception to be.[147] Meanwhile, most ineffective assistance claims are premised on actual attorney performance and rely principally on arguments challenging specific decisions made at certain points during the proceeding.[148] The Court's recent decision leaves little doubt that such cases will continue to receive treatment under *Strickland*.

Certain to be most dramatically affected by the consequences of *Bell* are those persons who comprise this nation's lowest social stratum and whose very freedom depends, from the outset, on court appointed attorneys. The reality of indigent defense systems across the country raises an important question that the Supreme Court has made even

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aside unless it worked some prejudice on the defendant. *Strickland*, 466 U.S. at 691.

144. *Id*. at 694.

145. *Id*. at 695.

146. 466 U.S. at 658-61.

147. 122 S. Ct. at 1851-52.

148. *See* Darden v. Wainwright 477 U.S. 168 (1986); Burger v. Kemp 483 U.S. 776 (1987). Both cases address counsel's failure to introduce mitigating evidence at capital sentencing hearings.

more timely by its recent decision: How do we ensure the quality of court appointed attorneys? The answer to this question will become crucially important in the wake of *Bell* as it provides but another link in the already fortified chain of ineffective assistance case law.

For example, a commission charged by the Georgia Supreme Court with examining Georgia's indigent defense system has recently released the findings of its two-year study. Besides a general finding that Georgia's system is sorely under-funded and disorganized, the commission further found that the state has neither a statewide method of accountability nor minimum eligibility requirements for court appointed attorneys.[149] What does this mean for those in Georgia who must rely on public defenders? At the very minimum, in light of *Bell*, it suggests that the scrutiny of the initial appointment process must be heightened if the Sixth Amendment is to guarantee a substantive right to those who need it most.

The high level of deference extended to lower courts in the habeas arena combined with *Strickland's* demanding prejudice component results in a formidable barrier to habeas relief. Given the Supreme Court's decision in *Bell v. Cone*, many state prisoners seeking federal habeas relief for ineffective assistance claims may face a dim future.

STUART E. WALKER

149. Report of Chief Justice's Commission on Indigent Defense, p. 3-4, *available at* http://www.georgiacourts.org/aoc/idchearings/idcreport.doc