RECENT CASES

SIXTH AMENDMENT — INEFFECTIVE ASSISTANCE OF COUNSEL — SIXTH CIRCUIT HOLDS THAT DEFENSE COUNSEL'S NAP DURING THE DEFENDANT'S CROSS-EXAMINATION DOES NOT CLEARLY VIOLATE THE SIXTH AMENDMENT. — *Muniz v. Smith*, 647 F.3d 619 (6th Cir. 2011).

Though the Sixth Amendment guarantees criminal defendants "the right . . . to have the Assistance of Counsel," it is silent regarding when defense counsel's ineffectiveness violates that guarantee.[1] In *Strickland v. Washington*,[2] the Supreme Court clarified that counsel's performance violates the Sixth Amendment when it is both "deficient" and prejudicial to the defense.[3] A companion case, *United States v. Cronic*,[4] recognized several exceptions to *Strickland*'s actual prejudice requirement, including that prejudice is presumed when the defendant has been "denied counsel at a critical stage of his trial."[5] Recently, in *Muniz v. Smith*,[6] the Sixth Circuit held that defense counsel's sleeping during the defendant's cross-examination was insufficient to trigger *Cronic*'s presumption of prejudice.[7] Yet the Sixth Circuit's application of *Cronic* focused solely on the duration of counsel's sleeping. To be consistent with both the language in and rationales underlying *Cronic*, the *Muniz* court should have at least considered the importance of the proceedings during which defense counsel slept.

In August 2004, Joseph Muniz stood trial in Michigan state court for charges stemming from the shooting of his ex-girlfriend's boyfriend.[8] At the trial, a juror saw defense counsel sleeping during the State's cross-examination of Muniz.[9] During this examination, and allegedly while counsel slept, Muniz made statements that ultimately led to the admission of evidence against him[10] and was asked a series of

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[1] U.S. CONST. amend. VI.
[2] 466 U.S. 668 (1984).
[3] *Id.* at 687.
[4] 466 U.S. 648 (1984).
[5] *Id.* at 659.
[6] 647 F.3d 619 (6th Cir. 2011).
[7] *Id.* at 623–24.
[8] *Id.* at 621.
[9] *Id.* at 623–24.
[10] Muniz's testimony led to a State rebuttal witness and to the admission of a previously suppressed tape of a 911 call by Muniz's mother. Petitioner's Motion for Panel Rehearing & Rehearing En Banc at 8, *Muniz*, 647 F.3d 619 (6th Cir. 2011) (No. 09-2324).

improper questions.[11] The jury ultimately convicted Muniz of assault with intent to commit murder.[12]

Muniz appealed, asserting ineffective assistance of counsel, and the Michigan Court of Appeals affirmed the conviction.[13] The court noted that Muniz had not — at that point — asserted actual prejudice, and then held that because Muniz's allegations did not put the fairness of the proceeding in doubt, *Cronic*'s presumption of prejudice also did not apply.[14] The Michigan Supreme Court denied Muniz leave to appeal.[15] Muniz then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan.[16] The district court first noted that, under the Antiterrorism and Effective Death Penalty Act of 1996[17] (AEDPA), if a state court adjudicates a defendant's claim on the merits, habeas relief may be granted only if that court's ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law."[18] The court then held that the state court had properly declined to apply *Cronic* and agreed with the state court's conclusion that Muniz had failed to demonstrate prejudice under *Strickland*.[19] The district court also denied Muniz's request for an evidentiary hearing because his allegations did not establish a factual dispute over whether his attorney slept for a substantial portion of the trial.[20]

The Sixth Circuit affirmed.[21] Writing for the panel, Judge Siler[22] first rejected Muniz's claim that the Michigan Court of Appeals's decision was contrary to federal law under AEDPA. The court reasoned that the state court's application of *Strickland* was incorrect only if the defendant was "denied counsel at a critical stage of his trial," in which case *Cronic*'s presumption of prejudice would apply.[23] Interpreting precedent from three other circuits, the court concluded that sleeping counsel constitutes a "denial" only if counsel slept during a "substantial"

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[11] The prosecutor asked Muniz about the credibility of other witnesses, a line of questioning that "[p]resumably, . . . if counsel had properly objected, . . . would have been excluded" under Michigan law. *Muniz*, 647 F.3d at 625.

[12] *See* Muniz v. Smith, No. 2:08-cv-11785, 2009 WL 2928898, at *1 (E.D. Mich. Sept. 10, 2009). Muniz was also convicted of two lesser charges. *Id.*

[13] *Muniz*, 647 F.3d at 622.

[14] People v. Muniz, No. 259291, 2006 WL 2708587, at *5 (Mich. Ct. App. Sept. 21, 2006).

[15] *Muniz*, 647 F.3d at 622.

[16] *Muniz*, 2009 WL 2928898, at *1–2. Muniz raised other claims irrelevant here.

[17] Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of the U.S. Code).

[18] *Muniz*, 2009 WL 2928898, at *2 (quoting 28 U.S.C. § 2254(d)(1) (2006)).

[19] *Id.* at *9–10. In particular, the district court found that Muniz lacked evidence indicating that counsel slept for a substantial portion of the trial. *Id.* at *9.

[20] *Id.* at *9.

[21] *Muniz*, 647 F.3d at 621.

[22] Judge Siler was joined by Judges Kennedy and McKeague.

[23] *Id.* at 623 (quoting United States v. Cronic, 466 U.S. 648, 659 (1984)) (internal quotation marks omitted).

portion of the trial.[24] Muniz's evidence did not merit a finding of per se prejudice under *Cronic* because it indicated counsel slept for a temporally insubstantial portion of the trial: a "brief period" during an examination that was "fairly short."[25] The state court's application of *Strickland* was therefore "not contrary to clearly established federal law."[26]

The court then found that the state court's application of *Strickland* was not unreasonable under AEDPA. The court acknowledged that Muniz had satisfied *Strickland*'s first prong, as sleeping is necessarily deficient performance.[27] Yet Muniz had failed to carry his burden with respect to the prejudice prong. First, the harmful evidence admitted after the cross-examination was admissible because of "misguided responses by Muniz himself" that even alert counsel likely could not have prevented.[28] Second, the fact that the prosecutor's improper questions would have been excluded did not establish "a reasonable probability of a different outcome."[29] Third, there was strong evidence arrayed against Muniz: two eyewitnesses testified that Muniz was the shooter, Muniz admitted being present with a firearm, and Muniz's mother testified that he confessed the shooting to her.[30] The court thus concluded that the state court correctly found Muniz's claim insufficient under *Strickland*.[31]

Lastly, the court refused to disturb the state court's denial of a habeas evidentiary hearing for Muniz's claim.[32] Such hearings are typically warranted only when petitioner's allegations, if true, would lead to habeas relief.[33] Because Muniz's allegations, if true, established only that his attorney slept for a portion of one examination, the court held that a hearing was unwarranted.[34]

Given that the evidence against Muniz was damning and that the evidence of counsel's sleeping was slim,[35] *Muniz* presented an unat-

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[24] *Id.* (citing Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001); Tippins v. Walker, 77 F.3d 682 (2d Cir. 1996); Javor v. United States, 724 F.2d 831 (9th Cir. 1984)).

[25] *Id.* at 624.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 625.

[29] *Id.*

[30] *Id.* at 621, 625.

[31] *Id.* at 625. Had the court found prejudice under *Strickland*, it would also have had to find that the state court decision was "unreasonable" before it could overturn that decision. *Id.* at 624; *see also* Bell v. Cone, 535 U.S. 685, 698–99 (2002). The court also dismissed Muniz's second claim for ineffective assistance of counsel, which was based on his counsel's pretrial arrest for cocaine possession. *Muniz*, 647 F.3d at 625.

[32] *Muniz*, 647 F.3d at 625–26.

[33] *Id.* at 625 (citing Schriro v. Landrigan, 550 U.S. 465, 474 (2007)).

[34] *Id.* at 625–26.

[35] Muniz presented the affidavit of one juror, taken a year after the trial, which noted the juror's surprise at seeing counsel sleeping during Muniz's cross-examination. Muniz v. Smith, No. 2:08-cv-11785, 2009 WL 2928898, at *9 (E.D. Mich. Sept. 10, 2009). The district court noted that

tractive case for habeas relief. Yet the court's holding that the brevity of counsel's sleeping foreclosed application of *Cronic* was not compelled by precedent or AEDPA. Further, the language in *Cronic* and the rationales underlying per se prejudice in the Sixth Amendment context indicate that courts should consider the importance of the proceedings missed — and not merely the length of the proceedings missed — in determining whether to apply per se prejudice when counsel sleeps during the trial.[36] Conducting such an analysis might have changed the outcome of *Muniz*; more importantly, it would have signaled that federal habeas courts take seriously the problem posed by constructive absences of counsel.

To start, the precedent facing the *Muniz* court afforded ample doctrinal room for the court to consider the importance of the slept-through proceedings. Prior courts had agreed that counsel sleeping through a "substantial" portion of the trial should trigger per se prejudice.[37] Contrary to the *Muniz* court's implication, however, these courts did not hold that *only* the duration of counsel's sleeping was important,[38] and before *Muniz* no circuit court had squarely addressed an instance of counsel sleeping during a brief yet critical portion of the trial.[39]

Nor did AEDPA's deferential standard of review foreclose consideration of the importance of the slept-through proceedings. Only Supreme Court precedent is relevant in determining whether a state court decision is "contrary to" federal law.[40] However, courts may look to the "fundamental principles" underlying relevant Court precedent when specific guidance from the Court is absent.[41] *Cronic* did not ex-

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the record contained "no indication" that counsel slept through "any portion of, much less a significant portion of the trial," and that "defense counsel objected near the end of the cross-examination." *Id.* Further, "defense counsel's closing argument referred to matters that were elicited only during the . . . cross-examination." People v. Muniz, No. 259291, 2006 WL 2708587, at *5 (Mich. Ct. App. Sept. 21, 2006).

[36] The importance of the proceedings would be measured by their importance to defendants generally, not by what actually occurred at the particular trial. *See* Burdine v. Johnson, 262 F.3d 336, 347 (5th Cir. 2001).

[37] *See, e.g.*, Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984).

[38] *See, e.g.*, Tippins v. Walker, 77 F.3d 682, 685 (2d Cir. 1996) ("['Substantial'] can refer to the length of time counsel slept . . . or the significance of [the missed] proceedings.").

[39] Commentators, however, had anticipated the scenario presented in *Muniz*. *See, e.g.*, Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 468 (1996) ("The [substantial period of trial standard] does not adequately address situations where counsel only sleeps during the testimony of one key witness.").

[40] 28 U.S.C. § 2254(d)(1) (2006).

[41] Abdul-Kabir v. Quarterman, 550 U.S. 233, 258 (2007). In *Carey v. Musladin*, 549 U.S. 70 (2006), the Supreme Court took a narrower view, declaring that a state court determination should not be considered violative of § 2254(d)(1) absent Supreme Court holdings on point. *See id.* at 77. Yet *Carey* is distinguishable: in *Muniz* there was no question that either *Cronic* or *Strickland* gov-

plicitly address sleeping counsel, but if the *Muniz* court felt constrained by this silence, it would have held that there was no clearly established federal law to apply. Instead, the court found such federal law in circuit court precedent interpreting *Cronic*.[42] The Sixth Circuit, consistent with its actual approach in *Muniz*, thus could have derived a rule from the text of and rationales underlying *Cronic* to apply to Muniz's claim.

In fact, *Cronic*'s text indicates that the importance of the slept-through proceedings *must* be considered in determining whether to apply per se prejudice. Prior to *Cronic*, the term "critical stage" referred to a stage of criminal proceedings at which counsel must be provided, with the entire trial being one such stage.[43] By appending "of [the] trial" to the term "critical stages"[44] and citing cases dealing with denial of counsel during a specific component of the trial,[45] *Cronic* indicated that "critical stage" refers to parts of the trial as well as the trial as a whole.[46] Conversely, because *Cronic*'s requirement indicates that some portions of the trial are *not* critical,[47] whether to apply per se prejudice will necessarily depend on the nature of the proceedings missed by counsel. Following this interpretation, when counsel is actually absent, courts regularly ask whether that absence occurred during a "critical stage" of the trial; the Sixth Circuit has itself struggled with this issue.[48] Given that courts have unanimously held sleeping counsel to be equivalent to absent counsel,[49] the nature of the proceedings should be equally relevant whether counsel is absent or asleep.

Additionally, the Supreme Court's proffered rationales for Sixth Amendment per se prejudice support consideration of the importance

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erned — which is why the Sixth Circuit did not conclude that there was no clearly established federal law to apply.

[42] *Muniz*, 647 F.3d at 623–24.

[43] *See, e.g.*, United States v. Wade, 388 U.S. 218, 237 (1967) (holding postindictment lineup to be a "critical stage").

[44] United States v. Cronic, 466 U.S. 648, 659 (1984).

[45] *Cronic* cited, inter alia, *Herring v. New York*, 422 U.S. 853, 865 (1975), which concerned a summation of argument, and *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961), which concerned direct examination of the defendant. *See Cronic*, 466 U.S. at 659 n.25.

[46] *See* Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of* Cronic*'s Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 860–61 (2003) (arguing that if *Cronic* meant "critical stage" as it was commonly understood, the term "of [the] trial" would be superfluous — because all stages of the trial are critical under that definition — and that *Cronic* likely intended individual stages of the trial to be considered critical).

[47] *Id.* at 861 ("[B]y listing specific trial moments that constitute 'critical stages' . . . , the Court signaled that not all trial absences will trigger a presumption of prejudice.").

[48] The Sixth Circuit has noted that a sidebar bench conference and the reading of supplemental jury instructions are "critical stages" requiring counsel, while the rereading of jury instructions is not. Van v. Jones, 475 F.3d 292, 306–07 (6th Cir. 2007) (collecting cases).

[49] *See, e.g.*, Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001) ("Unconscious counsel equates to no counsel at all.").

of the proceedings during which counsel slept. The Court has offered three such rationales.[50] First, some circumstances are "so likely to prejudice the accused that the cost of litigating" prejudice is unjustified.[51] Second, some Sixth Amendment violations are so "easy to identify" that they are "easy for the government to prevent."[52] Third, certain "structural defects" require reversal because prejudice is too difficult to ascertain.[53]

The first two rationales support a per se prejudice rule when counsel sleeps during critical portions of the trial. First, such temporary deprivations of counsel can result in a high probability of prejudice. True, if counsel briefly nods off during inconsequential proceedings, it is less likely to result in prejudice than some trial errors that are analyzed under *Strickland*,[54] such as a failure to investigate the defendant's case. But if counsel is sleeping during critical portions of the trial, that constructive absence may so degrade the adversarial nature of the proceeding that it "renders the result unreliable,"[55] much like the absence of counsel during a pretrial proceeding.[56]

Second, the judge should be able to prevent even brief naps during sufficiently important stages of the trial. While it can be difficult for the judge to know when to intervene during counsel's spells of drowsiness,[57] sleeping is easier to identify than many instances of deficient performance[58] and easier to prevent through recesses, breaks, or warnings.[59] Further, it is reasonable to expect the judge to pay attention to

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[50] *See, e.g.*, Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths — A Dead End?*, 86 COLUM. L. REV. 9, 89–90 (1986); Kirchmeier, *supra* note 39, at 465.

[51] United States v. Cronic, 466 U.S. 648, 658 (1984).

[52] Strickland v. Washington, 466 U.S. 668, 692 (1984); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.8(a) (3d ed. 2000) ("[Per se] prejudice may be . . . a prophylactic measure designed to discourage state action that [precludes] effective representation.").

[53] Arizona v. Fulminante, 499 U.S. 279, 310 (1991); *see also* Holloway v. Arkansas, 435 U.S. 475, 491 (1978) ("[A]n inquiry into a claim of harmless error [when the defense attorney has an alleged conflict of interest] would require, unlike most cases, unguided speculation.").

[54] *See* Tippins v. Walker, 77 F.3d 682, 686 (2d Cir. 1996); Berger, *supra* note 50, at 92 (arguing that some instances of temporary denial of counsel are "much more apt to be innocuous than many mistakes . . . by counsel").

[55] *Strickland*, 466 U.S. at 687; *see also Tippins*, 77 F.3d at 687 ("[T]he buried assumption in [ineffective assistance of counsel cases] is that counsel is present and conscious to exercise judgment, calculation and instinct, for better or worse. But that is an assumption we cannot make when counsel is unconscious at critical times.").

[56] *See* Hamilton v. Alabama, 368 U.S. 52, 54 (1961).

[57] *See Tippins*, 77 F.3d at 689 (acknowledging that monitoring counsel is difficult because "consciousness and sleep form a continuum, and . . . there are states of drowsiness that come over everyone from time to time during . . . a trial").

[58] *See* Morales v. United States, 143 F.3d 94, 97 (2d Cir. 1998) ("A lawyer asleep in open court has abandoned his client in front of the judge and the prosecutor; his ineffectiveness . . . [is] both 'easy to identify' and 'easy for the government to prevent.'" (quoting *Strickland*, 466 U.S. at 692)).

[59] *See* Jay William Burnett & Catherine Greene Burnett, *Ethical Dilemmas Confronting a Felony Trial Judge: To Remove or Not to Remove Deficient Counsel*, 41 S. TEX. L. REV. 1315, 1349

defense counsel when counsel plays a critical role — as during the stages of the trial that are most important to the defendant. By contrast, the types of deficient trial performance analyzed under *Strickland*, such as a failure to present mitigating evidence in a sentencing proceeding, can be difficult for a judge either to recognize or rectify while maintaining an adversarial system.[60]

The third rationale is less supportive.[61] The Supreme Court has presumed prejudice under this rationale only when prejudice is nearly impossible to discern, as when reconstructing what might have occurred absent an improper closure of the courtroom.[62] Divining what sleeping counsel might have done during a brief portion of the trial is difficult, but it is equally difficult to estimate the prejudicial impact of other trial errors typically analyzed under *Strickland*.[63] Still, though this rationale is unsupportive, other Sixth Amendment violations resulting in per se prejudice have been supported by fewer than all three rationales.[64] Further, because courts agree that sleeping counsel merits the application of per se prejudice at some point, a broader objection that would categorically deny per se prejudice to instances of sleeping counsel is unpersuasive.[65]

(2000) (placing responsibility on the trial judge to watch for sleeping counsel because the judge has "remedies available [to address sleeping defense counsel], such as appointing standby counsel, or declaring a mistrial and removing counsel").

60 *Strickland*, 466 U.S. at 689–93 (contrasting errors meriting per se prejudice with other trial errors, which "[t]he government is not responsible for, and hence not able to prevent," *id.* at 693, in part because of the "range of legitimate decisions regarding how best to represent a criminal defendant," *id.* at 689, that might not be readily apparent to the government).

61 *But see* Burdine v. Johnson, 262 F.3d 336, 355 (5th Cir. 2001) (Higginbotham, J., concurring) (decrying the dissent's attempt to ascertain prejudice by looking at what occurred when counsel was asleep as being contrary to the reality of trial practice).

62 Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) (describing the benefits of a public trial as "difficult to prove," *id.*, such that a defendant would be unlikely to have "evidence available" of injury, *id.* (quoting United States *ex rel.* Bennett v. Rundle, 419 F.2d 599, 608 (3d Cir. 1969))).

63 One example is persistently poor representation during a trial. *See Strickland*, 466 U.S. at 710 (Marshall, J., dissenting) ("On the basis of a cold record, it may be impossible . . . to ascertain [if the State's case] would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer.").

64 For example, attorney conflicts of interest are difficult to identify or prevent, *see* LAFAVE ET AL., *supra* note 52, § 11.9(d) (noting that many litigants raise conflict of interest claims for the first time on appeal because "neither the defense counsel nor the prosecution suggested to the trial court that a conflict existed"), and many closures of the trial do not *assuredly* entail a high probability of prejudice to the defendant, given the presence of defense counsel, the jury, and the record. *Cf. Waller*, 467 U.S. at 46 (noting that such closures are deemed problematic because of broader concerns about their impact on the judicial system).

65 *See Burdine*, 262 F.3d at 363 (Barksdale, J., dissenting) (arguing that presuming prejudice "will encourage defendants not to bring [sleeping counsel] to the attention of the court during trial"); Prada-Cordero v. United States, 95 F. Supp. 2d 76, 82 (D.P.R. 2000) (arguing that presuming prejudice "would provide unscrupulous practitioners with a safety valve to annul trials that they feel they are at risk of losing" (citing Tippins v. Walker, 77 F.3d 682, 688 (2d Cir. 1996))). *Tippins* rejected these objections. *See Tippins*, 77 F.3d at 688.

Had the Sixth Circuit considered the importance of the proceedings missed by counsel, it might have announced a standard applying per se prejudice either when counsel sleeps through a "substantial portion" of *any* critical stage of the trial or, alternatively, when counsel sleeps through a substantially long *or* substantially important part of the trial.[66] While such a standard would involve complex determinations, circuit courts have effectively managed the same complexity when determining whether various stages of the trial are "critical" under *Cronic*[67] and whether defense counsel's errors have caused prejudice under *Strickland*'s second prong.[68]

Regardless of the specific contours of the standard it announced, the *Muniz* court might have reached a different outcome had it considered the importance of the defendant's cross-examination. That examination, in cases where the defendant testifies, is clearly an important phase of the trial.[69] The Court has described the Sixth Amendment guarantee of counsel as a protection for defendants, who are "no match for the skilled prosecutor";[70] that mismatch is at its peak during the defendant's cross-examination. Further, the State presumably would be unable to deny counsel completely during the cross-examination.[71]

These factors favor applying per se prejudice in *Muniz*. More importantly, a discussion of the importance of the slept-through proceedings would have communicated to future courts that they should review constructive denials of counsel under the more forgiving *Cronic* standard, rather than the much-maligned *Strickland* standard,[72] when the question is close. Factoring in the importance of the slept-through proceedings, meanwhile, might help reduce the disparity between the level of indigent defense found by courts to be constitutionally sufficient and the level deemed by the public to be morally adequate.[73]

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66 For a similar proposal, see Kirchmeier, *supra* note 39, at 469.

67 *See* United States v. Russell, 205 F.3d 768, 771–72 (5th Cir. 2000) ("Since *Cronic* was announced, [courts] have struggled to define the 'critical' stages of trial . . . ." *Id.* at 771.).

68 *Cf.* Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67, 78 (2002) (noting the difficulty of proving that discrete trial errors impacted a trial's outcome).

69 Indeed, the Supreme Court has held that being deprived of the choice of when or whether to take the stand, and thereafter be cross-examined, is unconstitutional. *See* Brooks v. Tennessee, 406 U.S. 605, 612–13 (1972).

70 Williams v. Kaiser, 323 U.S. 471, 476 (1945).

71 *Cf.* Kirchmeier, *supra* note 39, at 467 ("A court would not allow defense counsel to be absent during direct examination of a witness because it is essential for a defendant's rights that counsel be present.").

72 *See* Fogelman, *supra* note 68, at 78 (noting that *Strickland* has been "heavily criticized").

73 *See, e.g.*, Janie Parks, *6th Circuit Holds a Sleeping Attorney Is Not "Ineffective" Counsel*, TENN. CRIM. L. REV. (Aug. 1, 2011, 5:19 PM), http://davis-hoss.blogspot.com/2011/08/6th-circuit-holds-sleeping-attorney-is.html ("If an attorney sleeping through examination of his client by the government is not enough to trigger relief, what is?").