

NOTE

*BURDINE V. JOHNSON: THE FIFTH CIRCUIT WAKES UP, BUT THE SUPREME COURT REFUSES TO PUT THE SLEEPING ATTORNEY STANDARD TO REST**

TABLE OF CONTENTS

I.	INTRODUCTION	836
II.	RECITATION OF THE CASE.....	838
	A. <i>Case History</i>	838
	1. <i>Facts of the Case</i>	838
	2. <i>Procedural History</i>	839
	B. <i>The Majority Opinion</i>	841
	C. <i>Judge Higginbotham's Concurrence</i>	843
	D. <i>Judge Jolly's Dissent</i>	844
	E. <i>Judge Barksdale's Dissent</i>	844
III.	ANALYSIS	848
	A. <i>The History of the Sixth Amendment</i> <i>Right to Counsel</i>	848
	1. <i>The Sixth Amendment and the Colonies</i>	848
	2. <i>Powell v. State of Alabama: Applying the</i> <i>Sixth Amendment to the States</i>	848
	3. <i>Gideon v. Wainwright: The Supreme Court</i> <i>Revisits Powell</i>	849
	4. <i>Strickland v. Washington: Extending the</i> <i>Sixth Amendment's Language to Include</i> <i>a Right to Effective Counsel</i>	850

* This paper was selected as the recipient of the 2002 Winstead Sechrest & Minick P.C. award for the best casenote written for the *Houston Law Review*.

5. United States v. Cronin: <i>The Supreme Court Elaborates on Situations Where Prejudice May Be Presumed</i>	852
B. <i>The “Sleeping Attorney” Cases—Tippins v. Walker and Javor v. United States</i>	853
C. <i>The Fifth Circuit’s Creation of a Third Standard Adds to the Confusion</i>	856
D. <i>Who Is Responsible for Detecting the “Not Insubstantial” Slumber?</i>	861
1. <i>Placing Responsibility with the Trial Judge</i>	862
2. <i>Reforming the Criminal Defense System</i>	864
E. <i>Solution: A Video Transcript</i>	865
IV. CONCLUSION.....	867

I. INTRODUCTION

While the name Calvin Jerold Burdine may not immediately awaken any thoughts, his slumbering attorney has garnered national attention.¹ Burdine’s capital murder case made headlines following the Fifth Circuit’s controversial panel decision on October 27, 2000.² In *Burdine v. Johnson*, a Fifth Circuit panel vacated³ the district court’s finding that “[a] sleeping counsel is equivalent to no counsel at all.”⁴ In a 2-1 decision, the panel held that, because the trial record did not indicate when court-appointed attorney Joe Frank Cannon⁵ slept,

1. See, e.g., Editorial, *Alert: Snoozing Lawyer Ruling Mocks Assistance of Counsel Right*, HOUS. CHRON., Nov. 2, 2000, at 36A (stating that, according to the Fifth Circuit’s reasoning in its panel decision, “an attorney merely must have passed the bar and have a pulse to meet a defendant’s constitutional right to counsel”); Diane Jennings, *Judges Say Sleeping Lawyer May Not Have Harmed Case: Panel Overturns New Trial Granted Death-Row Inmate*, DALLAS MORNING NEWS, Oct. 28, 2000, at 1A (reporting the court’s finding in *Burdine v. Johnson* that the defendant did not demonstrate how his counsel’s sleep harmed his case); Mike Tolson, *Case Upheld Although Counsel Slept: Death Penalty Stands Despite Lawyer’s Naps*, HOUS. CHRON., Oct. 28, 2000, at 1A (summarizing the Fifth Circuit’s panel decision in *Burdine*); Editorial, *When Justice Falls Asleep*, L.A. TIMES, Oct. 31, 2000, at B8 (referring to Texas’s justice system as “an assembly-line death apparatus so efficient that neither gross legal incompetence nor exculpatory evidence can slow its gears”).

2. See *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000), *vacated en banc*, 262 F.3d 336 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2347 (2002). Refer to note 1 *supra* for examples of media coverage following the panel decision.

3. *Burdine*, 231 F.3d at 951.

4. See *Burdine v. Johnson*, 66 F. Supp. 2d 854, 866 (S.D. Tex. 1999) (quoting *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984)), *aff’d en banc*, 262 F.3d 336 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2347 (2002).

5. See Stephen B. Bright, *Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental*

the court could not presume his sleeping affected Burdine's case.⁶ The court's opinion concluded an almost sixteen-year appeals process through the Texas state and the federal court systems.⁷ Burdine's case did not end there, however. Responding to a request from Burdine's counsel on appeal, the Fifth Circuit agreed to hear the case *en banc*.⁸ The *en banc* decision effectively reversed the panel's holding, finding that, under the particular facts, Cannon's snoozing prejudiced his client's case.⁹ Texas Attorney General John Cornyn filed a petition with the U.S. Supreme Court in September 2001, asking for review of the Fifth Circuit's *en banc* decision.¹⁰ On June 3, 2002, the Court denied certiorari on the case.¹¹ Burdine now awaits a new trial.¹²

Prior to *Burdine v. Johnson*, only the Second and Ninth Circuits had directly addressed the issue of ineffective assistance of counsel involving a sleeping attorney.¹³ The Fifth Circuit chose

Rights, 54 WASH. & LEE L. REV. 1, 19–20 (1997) (noting that Joe Cannon had also slept at the trial of Carl Johnson, whom the State of Texas executed on September 19, 1995, after the Fifth Circuit found that Johnson's Sixth Amendment rights had not been denied); see also Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review By Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1812–13 (2000) [hereinafter Bright, *Elected Judges*] (noting that Larry Norman Anderson, also represented by Joe Cannon, was executed even after the Fifth Circuit commented on Cannon's habitual ineptness).

6. *Burdine*, 231 F.3d at 964.

7. See *Burdine*, 66 F. Supp. 2d at 855–56 (recounting the procedural history that began with Burdine's conviction on January 30, 1984).

8. See *Burdine v. Johnson*, 234 F.3d 1339, 1339 (5th Cir. 2000) (granting petition for rehearing *en banc*).

9. See *Burdine v. Johnson*, 262 F.3d 336, 349–50 (5th Cir. 2001) (*en banc*) (affirming the district court's decision to grant habeas corpus and vacate the conviction), *cert. denied*, 122 S. Ct. 2347 (2002).

10. See *Cockrell v. Burdine*, 122 S. Ct. 2347 (2002) (denying the Texas Attorney General's petition). Such a request by the State of Texas has led to a great deal of media attention regarding the state's death penalty practices. See, e.g., Editorial, *Conscious, at the Least*, L.A. TIMES, Jan. 4, 2002, at B12 (arguing that the Supreme Court should reject the Texas Attorney General's request for certiorari); C. Bryson Hull, *U.S. Supreme Court May Take Sleeping Lawyer Case*, NAT'L POST, Jan. 4, 2002, at A13 (describing the issue before the Supreme Court by asking, "[i]s it worse to have a drunken lawyer, a crazy one or simply one that sleeps through the trial?"); Editorial, *Sleeping Lawyers: Right to Counsel Meaningless if Trial Naps Overlooked*, HOUS. CHRON., Jan. 8, 2002, at 16A (criticizing prior case law requiring that a defendant prove his counsel's behavior affected the outcome of the trial); Henry Weinstein, *Texas Appeals Case of Sleeping Lawyer*, CHI. TRIB., Jan. 3, 2002, at 1 (recounting the history of the *Burdine* case and the arguments of the Texas Attorney General).

11. *Burdine*, 122 S. Ct. at 2347.

12. See *State Plans to Retry Sleeping Lawyer Case*, DALLAS MORNING NEWS, June 11, 2002, at 23A (confirming the Harris County prosecutor's decision to retry Burdine).

13. See *Tippins v. Walker*, 77 F.3d 682, 685–90 (2d Cir. 1996) (finding Tippins's attorney "repeatedly unconscious . . . when Tippins'[s] interests were at stake"); *Javor v. United States*, 724 F.2d 831, 832–35 (9th Cir. 1984) (presuming prejudice where Javor's attorney slept through a substantial part of a two-week trial). Refer to Part III.B *infra*

not to follow either court's language in crafting its holding, instead creating a new standard for "sleeping attorney" cases.¹⁴ Part II of this Note will analyze how the Fifth Circuit reached its decision in the *en banc* rehearing and address the concurring and dissenting opinions raised by several members of the court. Part III will discuss several problems with the decision, arguing that (1) a more specific standard is warranted in "sleeping attorney" cases, and (2) such a standard will depend on someone actually monitoring an attorney's sleep. Finally, this Note will propose that trial court proceedings be videotaped so that a reviewing court can definitively determine whether an attorney slept during trial.

II. RECITATION OF THE CASE

A. Case History

1. *Facts of the Case.* On April 18, 1983, Calvin Jerold Burdine and Douglas McCreight went to W.T. "Dub" Wise's trailer "to get money from him . . . either voluntarily or by robbery."¹⁵ Burdine and Wise were involved in a homosexual relationship and had disagreed about how Wise handled Burdine's finances, eventually leading Burdine to move out of their trailer.¹⁶ Once Burdine and McCreight entered the trailer on April 18, events escalated.¹⁷ McCreight excused himself to use the restroom, returning with Wise's gun and a large hunting knife.¹⁸ The two proceeded to force Wise on the ground, tying his wrists with a telephone cord, stuffing socks in his mouth, and binding his legs with an electrical cord.¹⁹ After striking him with a lead-filled police sap, the two left the trailer.²⁰ Concerned that Wise could identify Burdine, McCreight and Burdine returned to the trailer and stabbed Wise in the back.²¹ Both men were later apprehended in California.²²

(discussing the standards applied by these courts in addressing ineffective assistance of counsel claims).

14. See *Burdine*, 262 F.3d at 349. Refer to Part III.C *infra* (discussing the standard applied by the court in *Burdine*).

15. *Burdine v. State*, 719 S.W.2d 309, 312–13 (Tex. Crim. App. 1986).

16. *Id.* According to Burdine, Wise subsequently "put a contract out on him." *Id.*

17. *Id.* at 313.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

2. *Procedural History.* In 1984, a Texas jury convicted Burdine of capital murder,²³ and the trial court sentenced him to die by lethal injection.²⁴ On direct appeal two years later, the Texas Court of Criminal Appeals affirmed the lower court's decision.²⁵ Although he raised seventeen points of error on appeal, Burdine did not raise an ineffective assistance of counsel claim at that time.²⁶

Burdine first sought a writ of habeas corpus from the State of Texas.²⁷ The 183rd District Court in Harris County denied the request, and the Texas Court of Criminal Appeals affirmed the denial in 1994.²⁸ Shortly thereafter, Burdine submitted another application for writ of habeas corpus, containing, among other things, a claim for ineffective assistance of counsel.²⁹ This time, the trial court held an evidentiary hearing.³⁰ The trial court's findings of fact exposed the extent to which Burdine's attorney slept during the capital murder trial.³¹ Based on these findings, the trial court recommended the Texas Court of Criminal

23. *Burdine v. Johnson*, 262 F.3d 336, 338–39 (5th Cir. 2001) (en banc), *cert. denied*, 122 S. Ct. 2347 (2002). At trial, Burdine claimed that he did not take part in stabbing Wise. *Burdine*, 719 S.W.2d at 314. He testified to (1) directing McCreight to Wise's gun; (2) suggesting that Wise be gagged; and (3) recommending that the two take Wise to the back of the trailer out of any neighbors' view. *Id.* Burdine also admitted to robbing Wise. *Id.*

24. *See Burdine*, 262 F.3d at 338–39.

25. *Burdine*, 719 S.W.2d at 312.

26. *See id.* (stating that Burdine's claims included challenges to (1) the admission of photographs; (2) the admission of his oral statement; (3) the sufficiency of evidence; (4) the penalty assessed; and (5) the jury charge).

27. *See Burdine v. Johnson*, 66 F. Supp. 2d 854, 855 (S.D. Tex. 1999), *aff'd en banc*, 262 F.3d 336 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2347 (2002).

28. *Id.* (citing *Ex parte Burdine*, No. 37944-A (183d Dist. Ct., Harris County, Tex. June 29, 1994) and *Ex parte Burdine*, No. 16725-02 (Tex. Crim. App. Dec. 12, 1994)).

29. *Burdine*, 66 F. Supp. 2d at 855; *see also Burdine v. Johnson*, 87 F. Supp. 2d 711, 713 & n.2 (S.D. Tex. 2000) (stating that, in addition to the claim that his attorney slept, Burdine asserted prejudice where Cannon called Burdine a "queer" and a "fairy," and never objected when the prosecutor told jurors that "sending a homosexual to the penitentiary certainly isn't a very bad punishment for a homosexual").

30. *See Burdine*, 66 F. Supp. 2d at 855.

31. *See id.* at 857–59 (recounting the testimony of the jury foreperson who stated that he saw Cannon "nod off or perhaps doze," and that this occurred when "[t]here was either questioning [of witnesses by the prosecutor] or perhaps something being presented as evidence"). These statements were corroborated by a second and third juror, in addition to the judge's deputy clerk. *Id.* at 857–58. However, the prosecutor and another juror testified that they did not see Burdine's attorney sleeping. *Id.* at 857, 859. The judge in the case recalled few details but stated that the attorney "clos[ed] his eyes on multiple occasions during the trial and sometimes lean[ed] back in his chair." *Id.* at 858. The court coordinator, appropriately named James Pillow, had no recollection of being present at the trial, but he did recall a conversation with the prosecutor about Burdine's attorney being incompetent. *Id.* at 858–59.

Appeals grant habeas corpus relief³²—a recommendation that fell upon deaf ears.³³ In denying relief, the Texas Court of Criminal Appeals chose to rely on *Strickland v. Washington*³⁴ in concluding that Burdine did not meet his burden of proving actual prejudice.³⁵ United States District Judge David Hittner granted Burdine's request for a stay of execution, noting that "the Texas Court of Criminal Appeals altogether failed to provide any justification for its rejection of the trial court's conclusions of law while approving the findings of fact."³⁶ After reviewing Burdine's application for writ of habeas corpus, Judge Hittner held that the counsel's sleeping constituted per se ineffective assistance of counsel, meaning the error was so egregious that the defendant need not show actual prejudice to prevail on his claim.³⁷

In 2000, the Fifth Circuit heard the *Burdine* case for the first time.³⁸ The court rejected a claim of *presumed* prejudice and found, instead, that Burdine needed to show *actual* prejudice to succeed.³⁹ In doing so, the court reasoned that prejudice could not be presumed where the record did not indicate prejudice existed.⁴⁰ Following the panel decision, Burdine petitioned for a rehearing, and the Fifth Circuit granted the request on December 5, 2000.⁴¹

32. *Id.* at 855–56.

33. *See id.* at 856 (noting that the Texas Court of Criminal Appeals rejected the trial court's recommendation despite acknowledging that the record substantiated these findings).

34. 466 U.S. 668 (1984) (requiring that a defendant demonstrate the result of the trial would have been different if not for counsel's actions). Refer to Part III.A.4 *infra* (discussing *Strickland's* impact on Sixth Amendment jurisprudence).

35. *See Burdine*, 66 F. Supp. 2d at 856 (noting that the Texas Court of Criminal Appeals opinion was not signed); *see also Ex parte Burdine*, 901 S.W.2d 456, 456–58 (Tex. Crim. App. 1995) (publishing only the dissenting opinion). For a discussion of the need for federal habeas corpus review in Texas, *see Bright, Elected Judges, supra* note 5, at 1809, 1812–13.

36. *Burdine*, 66 F. Supp. 2d at 856.

37. *Id.* at 864, 866. The case briefly returned to the district court when the State of Texas failed to comply with the court's order to release Burdine. *See Burdine v. Johnson*, 87 F. Supp. 2d 711, 718 (S.D. Tex. 2000) (deciding not to sanction the State for failing to obey the court order but demanding Burdine's immediate release from prison).

38. *See Burdine v. Johnson*, 231 F.3d 950, 950 (5th Cir. 2000), *vacated en banc*, 262 F.3d 336 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2347 (2002).

39. *Id.* at 958.

40. *Id.* at 964.

41. *Burdine v. Johnson*, 234 F.3d 1339, 1339 (5th Cir. 2000) (granting petition for rehearing *en banc*). *See generally 5th Circuit Judges Urged to Reconsider Killer's Appeal*, HOUS. CHRON., Nov. 18, 2000, at 41A (recounting the events leading up to the Fifth Circuit's decision to hear the case *en banc*); Deborah Tedford, *Lawyer Says Naps in Trial Were Critical: Burdine Murder Case Heard in Court Again*, HOUS. CHRON., Jan. 23, 2001, at 13A (noting that Burdine's attorney on appeal stated that in several instances, Cannon did not object to damaging statements such as the prosecutor asking Burdine whether he

B. The Majority Opinion

On appeal to the Fifth Circuit sitting *en banc*, the State presented two reasons for denying Burdine's habeas relief.⁴² First, the State contended that Burdine sought a "new rule" from the court, a request barred by the U.S. Supreme Court decision in *Teague v. Lane*.⁴³ More specifically, the State claimed Burdine requested a rule that went beyond the parameters of *United States v. Cronin*.⁴⁴

In *Cronin*, the Supreme Court stated that prejudice could be presumed (1) where the defendant is denied counsel (2) during a "critical stage" of the trial.⁴⁵ The *Cronin* Court elaborated on the first part of this statement, indicating that not only would this standard apply where counsel was absent, but also where counsel was "prevented from assisting the accused."⁴⁶ The Fifth Circuit majority opinion, authored by Judge Benavides,⁴⁷ seized upon the "absent counsel" language of *Cronin* in concluding that counsel could be mentally, as well as physically, absent.⁴⁸ In this regard, the court found the policy behind the Supreme Court's words persuasive, stating that "[t]he Court in *Cronin* was not concerned with the cause of counsel's absence, but rather the effect of such absence on the fairness of the criminal proceeding."⁴⁹ In finding that unconsciousness could be equated with absence, the court noted that even a drunk attorney could be more effective than a sleeping one.⁵⁰ Thus, the court rejected the State's argument that,

preferred to be "the man or the woman"); Mike Tolson, *Dozing Defense Case Goes to Full 5th*, HOUS. CHRON., Dec. 7, 2000, at 37A (calling the decision to take the case "an unusual move that may signal skepticism" of the panel decision); Henry Weinstein, *Attorney's Dozing at Center of Texas Murder Case Challenge*, L.A. TIMES, Jan. 23, 2001, at A5 (referring to the case as "a battle cry for those concerned about the administration of capital punishment in Texas").

42. *Burdine v. Johnson*, 262 F.3d 336, 340-41 (5th Cir. 2001) (*en banc*), *cert. denied*, 122 S. Ct. 2347 (2002).

43. *Id.* (citing *Teague v. Lane*, 489 U.S. 288 (1989)). In *Teague*, the Supreme Court held that a new rule could not upset a verdict already finalized before the rule was announced. *Teague*, 489 U.S. at 310.

44. *Burdine*, 262 F.3d at 345 (citing *United States v. Cronin*, 466 U.S. 648 (1984)).

45. *Cronin*, 466 U.S. at 659.

46. *Id.* at 659 n.25.

47. Judge Benavides dissented in the Fifth Circuit's panel decision, stating that "it shocks the conscience that a defendant could be sentenced to death under the circumstances surrounding counsel's representation of Burdine." *Burdine v. Johnson*, 231 F.3d 950, 965 (5th Cir. 2000) (Benavides, J., dissenting), *vacated en banc*, 262 F.3d 336 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2347 (2002).

48. *See Burdine*, 262 F.3d at 345 (concluding that a defendant must receive "actual assistance" of counsel to comply with the Sixth Amendment right to counsel and meet the requirements set forth in *Cronin*).

49. *Id.*

50. *Id.* at 349 ("Even the intoxicated attorney exercises judgment, though perhaps

in the case of a sleeping attorney, prejudice should not be presumed.⁵¹

The State also contended that Burdine should be required to pinpoint when his attorney slept at trial.⁵² Because Burdine had not produced such evidence, the State argued that he could not show the court that the sleeping occurred during a “critical stage” of the proceeding.⁵³ The Fifth Circuit rejected this argument as well.⁵⁴ The court found no basis in either Supreme Court or Fifth Circuit precedent that would require Burdine to make such proof.⁵⁵ Using the State’s reasoning, the court argued that Burdine would have to “*prove* prejudice in order to receive a *presumption* of prejudice.”⁵⁶ Unwilling to adopt such a requirement, the court held that in a case where counsel is, in essence, absent during a critical stage of the trial, prejudice is presumed.⁵⁷ Applying this rule to the facts before it, the court found that Burdine had been prejudiced by his counsel’s slumber.⁵⁸

The court chose its language very carefully, however. Avoiding a broad holding, the court explicitly stated that it “decline[s] to adopt a per se rule that any dozing by defense counsel during trial merits a presumption of prejudice.”⁵⁹ Rather, the court limited its holding to the “egregious facts” before it.⁶⁰ Specifically, the court held that the “repeated unconsciousness of Burdine’s counsel through not insubstantial portions of the critical guilt-innocence phase of Burdine’s capital murder trial warrants a presumption of prejudice.”⁶¹ The term “not insubstantial” provided much fodder for Judge Barksdale’s dissenting opinion.⁶²

impaired, on behalf of his client at all times during a trial.”).

51. *Id.*

52. *Id.* at 347.

53. *Id.* (emphasizing the second part of *Cronic’s* presumed prejudice test).

54. *Id.* at 348 (finding no need for Burdine to prove prejudice where he alleged, and the state court findings reflected, that his attorney slept).

55. *Id.* at 347 (“To justify a particular stage as ‘critical,’ the Court has not required the defendant to explain how having counsel would have altered the outcome of his specific case.”).

56. *Id.* at 348 (emphasis added).

57. *Id.*

58. *Id.* at 349 (concluding that the state court findings suggest that Burdine’s counsel was absent throughout the “critical” guilt-innocence phase of the trial). Chief Judge King and Judges Higginbotham, Davis, Wiener, DeMoss, Stewart, Parker, and Dennis joined in the court’s decision. *Id.* at 350 n.11.

59. *Id.* at 349.

60. *Id.*

61. *Id.*

62. Refer to Part II.E *infra* (exploring Justice Barksdale’s dissent).

C. Judge Higginbotham's Concurrence

Judge Higginbotham agreed in his concurrence, joined by three other members of the court, that the facts in *Burdine* fit snugly within the parameters of the *Cronic* rule.⁶³ Significantly, however, Judge Higginbotham's language differed from the carefully worded majority opinion. He stated that Burdine lacked representation during "not insignificant amounts of time" at trial,⁶⁴ whereas the majority used the phrase "not insubstantial."⁶⁵ Nonetheless, his observations conformed with the majority and he did not otherwise specify that he meant something other than what the majority intended.⁶⁶

In his concurrence, Judge Higginbotham first discussed the importance of the federal habeas corpus review system.⁶⁷ He then explained the application of *Teague v. Lane*.⁶⁸ After concluding that the court did not announce a new rule precluded by *Teague*,⁶⁹ Judge Higginbotham discussed further the two-part requirement of *Cronic*.⁷⁰ He reiterated the majority opinion's conclusion that Burdine's sleeping attorney fit the definition of "absent," declaring that the assumption that "sleeping counsel is absent counsel" is elementary.⁷¹ Judge Higginbotham also agreed that the facts before the court warranted such a finding, noting that "[t]he novelty of this case stems . . . from the stunning image of an attorney sleeping in the courtroom while his client is on trial for his life."⁷²

Judge Higginbotham did not rest his convictions there. Addressing the second requirement under *Cronic*⁷³—that the

63. See *Burdine*, 262 F.3d at 353–54 (Higginbotham, J., concurring) (observing that the *Cronic* rule stemmed from *Hamilton v. Alabama*, 368 U.S. 52, 53 (1961), and that *Hamilton* "made clear that determination of what was a 'critical stage' rested upon the facts of each case").

64. *Id.* at 350 (Higginbotham, J., concurring) ("This is surely a denial of the constitutional right to counsel.").

65. *Id.* at 349.

66. See *id.* at 350–57 (Higginbotham, J., concurring).

67. *Id.* at 350–51 (Higginbotham, J., concurring) (referring to the modern writ of habeas corpus as "a vital safeguard of the federal constitutional rights of persons convicted in state courts").

68. *Id.* at 351–52 (Higginbotham, J., concurring) (describing *Teague* as allowing federal habeas proceedings to function like appellate reviews without upsetting state convictions that were decided prior to the announcement of a new rule).

69. Refer to note 43 *supra* and accompanying text (citing the holding in *Teague*).

70. *Burdine*, 262 F.3d at 353–57 (Higginbotham, J., concurring).

71. *Id.* at 354 (Higginbotham, J., concurring). Refer to notes 1, 47 *supra* (expressing the similar public perception of an attorney asleep during his client's capital murder trial).

72. *Burdine*, 262 F.3d at 354–55 (Higginbotham, J., concurring).

73. *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984).

attorney's absence occur during a critical stage of the proceeding—he emphasized that “the presentation of the evidence of guilt is a critical phase.”⁷⁴ Judge Higginbotham concluded his concurrence by noting the effect a sleeping attorney could have on a jury, reasoning that a sleeping attorney could potentially do more damage than no attorney at all, because the jury may make inferences when sleeping occurs and nothing is done about it.⁷⁵

D. Judge Jolly's Dissent

Judge Jolly, with whom Judge Smith joined, summed up in one sentence his reasons for dissent.⁷⁶ First, Judge Jolly stated that, because Burdine was “plainly guilty of capital murder” and volunteered a confession, Burdine should not receive the benefit of presumed prejudice for his lawyer's sleeping.⁷⁷ Second, Judge Jolly looked to the trial record to substantiate several points.⁷⁸ He contended that the record did not indicate that Burdine's attorney slept at a critical period in the trial, nor did it indicate that the sleeping affected the trial's outcome.⁷⁹ He also found that, in fact, Burdine received competent counsel on the record before the court.⁸⁰ Finally, Judge Jolly questioned Burdine's intentions, noting that (1) Burdine waited eleven years before bringing this claim, and (2) Burdine praised his attorney's performance immediately following the trial.⁸¹

E. Judge Barksdale's Dissent

In a lengthy dissent, Judge Barksdale, the author of the panel decision that found prejudice lacking,⁸² criticized the majority opinion on several levels.⁸³ Foreshadowing his forthcoming critique, he began the dissent with the statement:

74. *Burdine*, 262 F.3d at 355 (Higginbotham, J., concurring).

75. *Id.* (Higginbotham, J., concurring) (noting that an attorney's prolonged dozing signals to the jury that the trial is no more than a drawn out guilty plea).

76. *Id.* at 357 (Jolly, J., dissenting).

77. *Id.* (Jolly, J., dissenting).

78. *Id.* (Jolly, J., dissenting).

79. *Id.* (Jolly, J., dissenting).

80. *Id.* (Jolly, J., dissenting).

81. *Id.* (Jolly, J., dissenting) (describing Burdine's claim as “a diverting tactic to create the impression of a miscarriage of justice in a case in which substantial justice has been done”).

82. *See Burdine v. Johnson*, 231 F.3d 950, 958 (5th Cir. 2000), *vacated en banc*, 262 F.3d 336 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2347 (2002).

83. *See Burdine*, 262 F.3d at 357–402 (Barksdale, J., dissenting).

“Bad facts make bad law.”⁸⁴ Judge Barksdale then questioned the majority’s reading of the Sixth Amendment, stating:

The majority is not alone in its abhorrence at the spectacle of Cannon sleeping during a capital murder trial; but, our decision must not be influenced, much less dictated, by this. In focusing so narrowly and intently on Cannon’s sleeping, the majority has lost sight of the reasons for the Sixth Amendment’s requiring effective assistance of counsel in a criminal proceeding: adversarial testing of the prosecution’s case and reliability of the result.⁸⁵

Additionally, Judge Barksdale repeatedly admonished the majority for its application of the presumed prejudice doctrine, describing the majority’s actions as “turn[ing] the basis for presumed-prejudice on its head.”⁸⁶ He viewed the doctrine as being reserved for those times when deficient attorney performance is so obvious that a review of the record is unnecessary.⁸⁷ At the outset, Judge Barksdale noted three ways in which the majority violated this doctrine: (1) by allowing Burdine to raise this issue eleven years after the trial; (2) by allowing withheld evidence—the fact that Burdine knew his attorney was sleeping at trial because he nudged him to wake up—to be presented during oral argument; and (3) by viewing the record in a way that would justify its result.⁸⁸

Beginning with the third reason, Judge Barksdale chided the majority for acting as a fact-finder.⁸⁹ He found no link between the state court’s finding that Cannon “dozed and actually fell asleep during portions of [Burdine’s] trial on the merits”⁹⁰ and the majority’s conclusion that “Cannon was ‘repeatedly unconscious’ during ‘substantial’ portions of the trial.”⁹¹ In addition to rejecting the majority’s holding, Judge Barksdale questioned the wording of the majority’s opinion.⁹²

84. *Id.* at 357 (Barksdale, J., dissenting) (explaining that “bad facts”—the “deplorable” sleeping by a court-appointed counsel—have led to the majority’s “bad law”).

85. *Id.* at 358 (Barksdale, J., dissenting).

86. *Id.* at 359 (Barksdale, J., dissenting).

87. *Id.* at 359–60 (Barksdale, J., dissenting) (explaining that, in such an instance, “resulting prejudice is so likely”).

88. *Id.* at 360 (Barksdale, J., dissenting).

89. *Id.* at 361 (Barksdale, J., dissenting) (“We are not a state habeas court; we cannot make factual findings.”).

90. *Id.* (Barksdale, J., dissenting) (quoting *Ex parte Burdine*, No. 379444-B, at 13 (183d Dist. Ct., Harris County, Tex. Apr. 4, 1995)).

91. *Id.* (Barksdale, J., dissenting) (emphasis omitted) (arguing that the state court did not address the difference between dozing and sleeping nor did it state that this dozing or sleeping reached such a level as to render Cannon unconscious).

92. *Id.* at 363 (Barksdale, J., dissenting) (“Is ‘not insubstantial’ the same as

Within his discussion, Judge Barksdale focused on the majority's choice of the term "not insubstantial."⁹³ He criticized the majority for not defining what it meant by this term, arguing that, in not doing so, it left no guidance for future courts.⁹⁴ In this vein, he also rebuked the majority for choosing to limit the holding to the facts before it.⁹⁵

Turning to his second reason, Judge Barksdale argued that the court should not have allowed Burdine to introduce new evidence—the fact that Burdine nudged Cannon to wake up—at oral argument.⁹⁶ Judge Barksdale maintained that, with this new evidence before the court, Burdine could not withhold evidence from the state habeas proceeding—which possibly pinpointed when Cannon slept—and continue to pursue presumed prejudice.⁹⁷ Judge Barksdale reasoned that, had the state habeas court known about this evidence, it may not have come to the conclusion it did.⁹⁸ In fact, Judge Barksdale concluded that, had Burdine mentioned this evidence to the state habeas court, that court would have found that Cannon's sleeping did not occur at a critical stage of the trial.⁹⁹

Following a thorough review of the procedural history, Judge Barksdale considered the merits of the claim, despite the withheld evidence.¹⁰⁰ He debated whether the majority created a new rule or whether the holding fell within the *Cronic* standard.¹⁰¹ In support of his conclusion that the majority had indeed announced a new rule, Judge Barksdale looked to Texas state court precedent to determine whether "at the time petitioner's conviction became final [a state court] would have felt compelled by existing precedent to conclude that the rule sought by petitioner is required by the Constitution."¹⁰² Surveying

'substantial?').

93. *Id.* at 363 & n.5. (Barksdale, J., dissenting) (referring to *Black's Law Dictionary* for the definition of the phrase "substantial right" and concluding that the majority did not address whether Burdine's "substantial right" had been violated).

94. *Id.* at 363 (Barksdale, J., dissenting) (stating that "[t]his rule . . . will result in uncertainty and undermine accuracy").

95. *Id.* (Barksdale, J., dissenting) (explaining that, while the majority expressly limited its holding to the facts before it, lower courts will look to it for guidance).

96. *Id.* at 364–65 (Barksdale, J., dissenting) (citing two interviews, prior to oral argument, with *National Public Radio* and *Good Morning America* in which Burdine and his appellate attorney made references to Burdine nudging Cannon to wake him up).

97. *Id.* at 365 (Barksdale, J., dissenting).

98. *Id.* at 366 (Barksdale, J., dissenting).

99. *Id.* at 367 (Barksdale, J., dissenting).

100. *Id.* at 374 (Barksdale, J., dissenting) (concluding that "[i]n the alternative, the claim still fails").

101. *Id.* at 374–82 (Barksdale, J., dissenting).

102. *Id.* at 378 (Barksdale, J., dissenting) (describing this factor as a "key

the “legal landscape” circa 1987, the year Burdine’s conviction became final, Judge Barksdale found that Texas courts would not have presumed prejudice in this situation.¹⁰³

Judge Barksdale then considered whether the majority’s holding could fall under the *Cronic* standard.¹⁰⁴ He distinguished this case from *Cronic* by noting that cases cited in *Cronic* referred to attorneys who were absent because the government prevented them from being present.¹⁰⁵ He also asserted that, in those cases, the stage at which counsel was absent could be “easily identifiable,” as opposed to the record in Burdine’s case.¹⁰⁶ Reviewing cases after *Cronic*, Judge Barksdale cited several examples where courts limited presumed prejudice to “very narrow circumstances, where the defendant receives no meaningful assistance of counsel.”¹⁰⁷ He then referred to a Fifth Circuit case, decided in March 2000 and relied on by the majority, as yet another example.¹⁰⁸

In *United States v. Russell*, the Fifth Circuit found presumed prejudice where Russell’s attorney was physically absent.¹⁰⁹ The *Burdine* majority had noted that the court did not require Russell to prove that the outcome of his case would have been different with the presence of counsel.¹¹⁰ However, Judge Barksdale distinguished *Russell*, stating that, unlike Burdine, the defendant in *Russell* could pinpoint his attorney’s absence during a critical stage of the trial.¹¹¹

Assuming arguendo that the majority did not adopt a new rule, Judge Barksdale reviewed the facts before the court.¹¹² He maintained that the court could not presume prejudice where: (1) the prosecutor and the judge at Burdine’s trial stated they did not see Cannon sleeping;¹¹³ (2) Burdine could not pinpoint, nor did the record indicate, when his counsel slept;¹¹⁴ and (3) sleeping during unidentified portions of the trial required a case-specific

component” in deciding whether a rule is a “new rule” under the *Teague* analysis).

103. *Id.* at 379 (Barksdale, J., dissenting).

104. *Id.* at 378–82 (Barksdale, J., dissenting).

105. *Id.* at 381 (Barksdale, J., dissenting).

106. *Id.* at 382 (Barksdale, J., dissenting).

107. *Id.* at 384 (Barksdale, J., dissenting) (referencing *Smith v. Robbins*, 528 U.S. 259 (2000) and *Anders v. California*, 386 U.S. 738 (1967)).

108. *Id.* at 388 (Barksdale, J., dissenting) (discussing *United States v. Russell*, 205 F.3d 768 (5th Cir. 2000)).

109. *United States v. Russell*, 205 F.3d 768, 772 (5th Cir. 2000).

110. *Burdine*, 262 F.3d at 348.

111. *Id.* at 388 (Barksdale, J., dissenting).

112. *Id.* at 393–97 (Barksdale, J., dissenting).

113. *Id.* at 393 (Barksdale, J., dissenting).

114. *Id.* (Barksdale, J., dissenting).

inquiry.¹¹⁵ Furthermore, he distinguished two other cases in which the Second and Ninth Circuits each found presumed prejudice where an attorney was more obviously sleeping.¹¹⁶ Upon further review of Burdine's trial record, Judge Barksdale ultimately concluded that "Cannon provided meaningful assistance to Burdine" and, therefore, Burdine should have been required to prove actual prejudice.¹¹⁷

III. ANALYSIS

A. *The History of the Sixth Amendment Right to Counsel*

1. *The Sixth Amendment and the Colonies.* The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."¹¹⁸ This right arose out of a concern that innocent people who lacked knowledge of the law were being tried for crimes without representation, a commonplace practice in England until 1836.¹¹⁹ Unwilling to continue the English tradition of denying counsel to those charged with a felony, several American colonies included language in their respective state constitutions granting representation.¹²⁰ While the Sixth Amendment remains the backbone for decisions involving a right to counsel, courts have expanded upon the Amendment's language and its meaning over the years.¹²¹

2. *Powell v. State of Alabama: Applying the Sixth Amendment to the States.* In 1932, the U.S. Supreme Court made its first major statement about the Sixth Amendment right to

115. *Id.* at 393-94 (Barksdale, J., dissenting).

116. *Id.* at 396 (Barksdale, J., dissenting) (citing *Javor v. United States*, 724 F.2d 831, 833-34 (9th Cir. 1984) and *Tippins v. Walker*, 77 F.3d 682, 687-89 (2d Cir. 1996)).

117. *Id.* at 402 (Barksdale, J., dissenting).

118. U.S. CONST. amend. VI.

119. *See Powell v. Alabama*, 287 U.S. 45, 59-65 (1932) (chronicling the history of the Sixth Amendment); *see also* Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 438-39 & n.12 (1993) (explaining the origins of the Sixth Amendment and courts' definitions of the word "counsel" throughout the years).

120. *See Powell*, 287 U.S. at 61-64 (demonstrating the importance of the Sixth Amendment to the states through an examination of state constitutions with "right to counsel" language included); *see also* Green, *supra* note 119, at 438 (recognizing that some colonies had laws in place regarding right to counsel before the American Revolution).

121. *See* Green, *supra* note 119, at 439 (observing that the Supreme Court's modern decisions build upon the early themes of access to counsel and choice of counsel).

counsel in *Powell v. Alabama*.¹²² In *Powell*, seven African-American males were convicted and sentenced to death for the rape of two Caucasian females.¹²³ For purposes of the arraignment, the trial judge appointed “all the members of the bar” to represent the defendants.¹²⁴ No one came forward on the first day of trial.¹²⁵

On appeal, the Supreme Court considered whether the Sixth Amendment right to counsel applied to the states through the Due Process Clause of the Fourteenth Amendment.¹²⁶ Answering affirmatively, the Court stated that “the right to the aid of counsel is of this fundamental character.”¹²⁷ The Court found that not only did the trial judge fail to give Powell enough time to obtain counsel, but the judge also had a duty to appoint counsel where the defendant could not afford one.¹²⁸ The Court felt this duty to appoint was a “logical corollary” to the right to counsel afforded under the Constitution, at least where capital cases were concerned.¹²⁹ However, the Court limited its holding to the facts of the case before it.¹³⁰

3. *Gideon v. Wainwright: The Supreme Court Revisits Powell*. In *Gideon v. Wainwright*, the Supreme Court reiterated its decision in *Powell* to make the Sixth Amendment applicable to the states.¹³¹ In *Gideon*, a man accused of breaking and entering

122. 287 U.S. 45, 52 (1932).

123. *Id.* at 49.

124. *Id.*

125. *Id.* at 53.

126. *Id.* at 52; see U.S. CONST. amend. XIV, § 1 (stating that “nor shall any State deprive any person of life, liberty, or property, without due process of law”).

127. *Powell*, 287 U.S. at 68.

128. *Id.* at 71 (concluding that, “in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him”).

129. *Id.* at 71–72.

130. *Id.* (“Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine.”).

131. *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (“This same principle was recognized, explained, and applied in *Powell*.”). For an in-depth look at the state of the criminal justice system since *Gideon*, see Symposium, *Gideon—A Generation Later*, 58 MD. L. REV. 1333 (1999). Anthony Lewis, a columnist with *The New York Times* prefaced his remarks at the symposium with the following statement:

[L]adies and gentlemen, I have to tell you that the romance has faded. I said in my book that it would be an enormous social task to bring to life the dream of *Gideon v. Wainwright*—the dream of a vast, diverse country in which every man charged with a crime will be capably defended no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense. That has not happened.

in Florida asked the trial court to appoint counsel for him.¹³² The trial judge denied the request, concluding that state law did not afford him appointed representation.¹³³ Gideon proceeded pro se and the jury found him guilty.¹³⁴ The Florida Supreme Court subsequently denied Gideon's petition for habeas corpus.¹³⁵ In reversing this decision, the U.S. Supreme Court held—as it did in *Powell*—that “those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgement are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.”¹³⁶ Unlike the Court in *Powell*, the *Gideon* Court did not limit its holding to the facts, but spoke broadly of an accused's right to an attorney if he or she cannot afford one.¹³⁷

4. *Strickland v. Washington: Extending the Sixth Amendment's Language to Include a Right to Effective Counsel.* While the Court in *Powell* only briefly mentioned the words “denial of effective and substantial aid” when referring to the right to counsel,¹³⁸ the Court crystallized the notion of effective assistance of counsel with its decision in *Strickland v. Washington*.¹³⁹ In doing so, the Court stated:

That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.¹⁴⁰

While the Court in *Strickland* recognized that an earlier decision, *McMann v. Richardson*, had first concluded that “the right to counsel is the right to the effective assistance of

Id. at 1338.

132. *Gideon*, 372 U.S. at 336–37.

133. *Id.* at 337 (noting that Mr. Gideon responded by saying, “[t]he United States Supreme Court says I am entitled to be represented by Counsel”).

134. *Id.*

135. *Id.*

136. *Id.* at 341.

137. *Id.* at 344 (“[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”).

138. *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

139. 466 U.S. 668, 685 (1984).

140. *Id.*

counsel,”¹⁴¹ the *Strickland* Court observed that no court had expounded on the reasoning for such a conclusion.¹⁴² The Court stated that the reason for requiring effective assistance of counsel lies in “ensur[ing] a fair trial.”¹⁴³ If the Sixth Amendment is the backbone of ineffective assistance of counsel claims, a two-prong approach set forth by the Court in *Strickland* acts as the legs on which such claims can stand or fall.¹⁴⁴

Like Burdine, David Leroy Washington was convicted of murder and sentenced to death.¹⁴⁵ The Florida Supreme Court affirmed his conviction and sentencing on direct appeal.¹⁴⁶ Washington sought collateral relief, citing six claims of ineffective assistance of counsel.¹⁴⁷ His claims, like those of Burdine, failed at the state level.¹⁴⁸ Washington took his claims to the federal district court through a petition for a writ of habeas corpus, which, after an evidentiary hearing, the court denied.¹⁴⁹ On appeal, the Fifth Circuit¹⁵⁰ announced a standard for ineffective assistance of counsel¹⁵¹ and remanded the case for consideration based on the new standard.¹⁵²

With the federal courts of appeals and state courts establishing variations of an “ineffective assistance of counsel test,” the U.S. Supreme Court granted certiorari.¹⁵³ In an opinion delivered by Justice O’Connor, the Court announced a uniform rule, articulating what has become the *Strickland* two-prong standard for ineffective assistance of counsel claims.¹⁵⁴ The test

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

142. *Id.* at 686.

143. *Id.* at 686, 689 (noting that the Sixth Amendment was not fashioned “to improve the quality of legal representation”).

144. See *id.* at 687 (stating that “[u]nless a defendant makes both showings [of the two-prong standard], it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process”).

145. *Id.* at 675.

146. *Id.*

147. *Id.* (alleging counsel’s ineffectiveness for failing to: (1) move for a continuance; (2) request a psychiatric report; (3) put on character witnesses; (4) request a presentence investigation report; (5) articulate “meaningful” arguments at sentencing; and (6) review the medical examiner’s reports or cross-examine the medical experts).

148. *Id.* at 676–78.

149. *Id.* at 678–79.

150. *Id.* at 679 (noting that Florida is now in the Eleventh Circuit).

151. *Id.* at 682 (stating that the defendant must demonstrate (1) that the ineffectiveness “resulted in actual and substantial disadvantage to the course of his defense,” and (2) upon such a finding, the burden fell to the prosecution to show “that the constitutionally deficient performance was, in light of all the evidence, harmless beyond a reasonable doubt” (quoting *Rose v. Lundy*, 455 U.S. 509 (1982))).

152. *Id.* at 683.

153. *Id.* at 684.

154. *Id.* at 687–88, 694.

requires a defendant to show that (1) “counsel’s representation fell below an objective standard of reasonableness,”¹⁵⁵ and (2) there exists “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹⁵⁶ Satisfied with this test, the Court refused to set out specific guidelines for attorneys to follow.¹⁵⁷ Rather, it left the appellate courts to conduct a case-by-case analysis using the *Strickland* two-prong standard.¹⁵⁸ In doing so, the Court instructed lower courts to review an attorney’s representation with a great deal of deference.¹⁵⁹

Regarding situations where prejudice could be presumed, the Court identified “[a]ctual or constructive denial of the assistance of counsel altogether” as one such instance.¹⁶⁰ The Court also recognized an attorney’s conflict of interest as another area where a standard similar to, but not entirely like, presumed prejudice could be employed.¹⁶¹ All other situations, including those involving an attorney’s performance, should be resolved using the two-prong standard, according to the Court.¹⁶² Despite its elaboration on what constitutes effective counsel, the Court’s commentary on the subject did not end there.

5. *United States v. Cronin: The Supreme Court Elaborates on Situations Where Prejudice May Be Presumed.* On the same day as its opinion in *Strickland*, the Supreme Court handed down further instruction regarding ineffective assistance of counsel in *United States v. Cronin*.¹⁶³ In *Cronin*, three defendants were charged with mail fraud.¹⁶⁴ The trial court appointed an inexperienced real estate lawyer to represent one of the defendants, but granted the lawyer only twenty-five days to prepare.¹⁶⁵ After his conviction, the defendant brought an

155. *Id.* at 687–88.

156. *Id.* at 687, 694.

157. *See id.* at 688–89 (expressing concern that the creation of stringent rules would frustrate the goal of zealous representation).

158. *Id.* at 690.

159. *Id.* at 689–90 (referring to extensive hindsight review as “intrusive”).

160. *Id.* at 692.

161. *Id.* (noting that in these cases, “[p]rejudice is presumed only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance’” (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980))).

162. *Id.* at 693 (stating that “actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice”).

163. 466 U.S. 648 (1984).

164. *Id.* at 649.

165. *Id.* (pointing out that the Government had taken “over four and one half years

ineffective assistance of counsel claim before the Court of Appeals for the Tenth Circuit.¹⁶⁶ The court of appeals overturned the district court's ruling, holding that the defendant's right to the effective assistance of counsel had been violated.¹⁶⁷

Reversing the Tenth Circuit, the Supreme Court discussed the importance of the Sixth Amendment at length.¹⁶⁸ Looking to the language of the Sixth Amendment, the Court stated that "[t]he Amendment requires not merely the provision of counsel to the accused, but 'Assistance,' which is to be 'for his defence.' . . . If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated."¹⁶⁹ Of importance to the "sleeping attorney" cases, the Court described instances where prejudice need not be proved, but could be presumed.¹⁷⁰ Among those instances mentioned by the Court were the "complete denial of counsel," where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," or where "surrounding circumstances" would prevent even a competent attorney from doing his job.¹⁷¹ In a footnote relied on by the *Burdine* majority, the Court stated 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."¹⁷² However, where a defendant brings "claims based on specified errors made by counsel," the Court deferred to the *Strickland* two-prong test.¹⁷³

B. The "Sleeping Attorney" Cases—Tippins v. Walker and Javor v. United States

Prior to the Fifth Circuit's decision in *Burdine*, only two other circuit courts had addressed the issue of ineffective assistance of counsel involving a sleeping defense attorney.¹⁷⁴ While the facts are similar to those in *Burdine*, and the ultimate

to investigate the case").

166. *Id.* at 650.

167. *Id.*

168. *Id.* at 653–58 (using the word "fundamental" to describe the Sixth Amendment right to counsel).

169. *Id.* at 654.

170. *Id.* at 658 ("There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.").

171. *Id.* at 659–61.

172. *Id.* at 659 n.25 (citing numerous Supreme Court cases from 1945 through 1976).

173. *Id.* at 666 n.41 (requiring a showing of actual prejudice).

174. See *Tippins v. Walker*, 77 F.3d 682, 684 (2d Cir. 1996); *Javor v. United States*, 724 F.2d 831, 832 (9th Cir. 1984).

conclusions are the same, each circuit crafted a slightly different standard for determining when prejudice can be presumed as a result of slumbering counsel.¹⁷⁵ The variations on the same holding are reminiscent of pre-*Strickland* case law.¹⁷⁶ Unlike *Strickland*, however, the Supreme Court has yet to directly address the issue of whether an attorney's sleeping during trial constitutes prejudice per se, and if so, under what circumstances.

The Ninth Circuit announced its decision in *Javor v. United States* prior to the Supreme Court's ruling in *Strickland v. Washington*.¹⁷⁷ In *Javor*, the Ninth Circuit found prejudice could be presumed where the defense counsel slept "because unconscious or sleeping counsel is equivalent to no counsel at all."¹⁷⁸ Ten years after a jury conviction for possession and sale of heroin, Javor filed an original petition for writ of habeas corpus with the Ninth Circuit, claiming ineffective assistance of counsel.¹⁷⁹ The Ninth Circuit referred the claim to a U.S. magistrate judge who found that, although Javor's trial attorney slept during a "substantial" part of the trial, Javor did not demonstrate prejudice as a result.¹⁸⁰ Javor appealed and the Ninth Circuit remanded the case to the district court for an evidentiary hearing on the matter.¹⁸¹ This time, the same

175. See *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (en banc) ("[T]he repeated unconsciousness of Burdine's counsel through not insubstantial portions of the critical guilt-innocence phase . . . warrants a presumption of prejudice."), *cert. denied*, 122 S. Ct. 2347 (2002); *Tippins*, 77 F.3d at 687 ("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."); *Javor*, 724 F.2d at 833 ("[W]hen an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial.").

176. See *Strickland v. Washington*, 466 U.S. 688, 683-84 (1984) (noting that many courts were using the "reasonably effective assistance" standard for an attorney's performance, but with regard to the prejudice that a defendant needed to demonstrate, "the lower courts have adopted tests that purport to differ in more than formulation").

177. See *Javor*, 724 F.2d at 832; see also 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, 460 (1996) (noting that *Javor* preceded *Strickland* and discussing the *Javor* court's holding). The timing is significant because the Court in *Strickland* made only one reference to the *Javor* decision. *Strickland*, 466 U.S. at 703 n.2 (Brennan, J., dissenting). In Justice Brennan's dissent, *Javor* is cited for the following proposition: "Indeed, counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice." *Id.*

178. *Javor*, 724 F.2d at 834; see also *Burdine v. Johnson*, 66 F. Supp. 2d 854, 863, 866 (S.D. Tex. 1999) (adopting this language from the *Javor* court and applying it in Burdine's case), *aff'd en banc*, 262 F.3d 336 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2347 (2002).

179. *Javor*, 724 F.2d at 832.

180. *Id.*

181. *Id.* at 833.

magistrate judge found that the attorney acted effectively on behalf of his client.¹⁸² In reversing the magistrate's decision, the Ninth Circuit held that prejudice is presumed when an attorney for a criminal defendant sleeps through a "substantial portion of the trial."¹⁸³ While the majority did not specifically express whether its holding constituted a per se rule, the dissent criticized it for creating one on facts not egregious enough to warrant that type of rule.¹⁸⁴

The Second Circuit criticized the Ninth Circuit's vague language in *Javor* and sought to limit its meaning in *Tippins v. Walker*.¹⁸⁵ After a jury convicted Tippins of criminal sale and possession of a controlled substance, he requested the order be vacated due to ineffective assistance of counsel.¹⁸⁶ The court denied this motion, stating that the record did not indicate "how long he slept, or what portion of the testimony he missed, if any."¹⁸⁷ In addition, the judge found that Tippins had not demonstrated prejudice.¹⁸⁸ Tippins filed a writ of habeas corpus with a federal district court and, using language identical to the *Javor* court, the district court found that prejudice could be presumed because Tippins's attorney slept for a "substantial" portion of the trial.¹⁸⁹ Looking specifically at the language in *Javor*, the *Tippins* court reasoned that the word "substantial" did not provide enough guidance for courts reviewing such situations.¹⁹⁰ As a result, the *Tippins* court expanded the language, finding that prejudice could be presumed when "counsel was repeatedly unconscious at trial for periods of time in which defendant's interests were at stake."¹⁹¹

182. *Id.* (noting the magistrate's conclusion that defense counsel "presented as adequate a defense as the facts appear to have permitted").

183. *Id.*

184. *Id.* at 835–36 (Anderson, J., dissenting).

185. 77 F.3d 682, 685 (2d Cir. 1996) (describing the language in *Javor* as "unhelpful"); see also *Burdine v. Johnson*, 66 F. Supp. 2d 854, 863–64 (S.D. Tex. 1999) (observing that "the Second Circuit took the sleeping counsel per se ineffective assistance of counsel analysis a step further than the Ninth Circuit had in *Javor*"), *aff'd en banc*, 262 F.3d 336 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 2347 (2002); Kirchmeier, *supra* note 177, at 461 (noting that "the Second Circuit rejected the *Javor* test").

186. *Tippins*, 77 F.3d at 683–84.

187. *Id.* at 684 (internal quotation marks omitted).

188. *Id.*

189. *Id.* at 684–85.

190. *Id.* at 685.

191. *Id.* at 687.

C. *The Fifth Circuit's Creation of a Third Standard Adds to the Confusion*

While all three circuit courts came to the same conclusion—that the *Strickland* test does not apply in cases involving sleeping attorneys¹⁹²—their standards for when a sleeping attorney's conduct is so egregious that prejudice can be presumed differ. How greatly is difficult to discern. In its *en banc* decision, the Fifth Circuit chose not to adopt either the *Javor* “substantial portion of the trial”¹⁹³ or the *Tippins* “repeatedly unconscious at trial for periods . . . [when] defendant's interests were at stake” tests.¹⁹⁴ Rather, the Fifth Circuit combined the two to form an even more nebulous rule: “repeated unconsciousness . . . through not insubstantial portions of the critical guilt-innocence phase of [a] capital murder trial warrants a presumption of prejudice.”¹⁹⁵ However, the court then limited this rule to the specific facts of the case before it.¹⁹⁶ It appears evident from its decision that the *Tippins* court chose its words to refine the *Javor* test.¹⁹⁷ The Fifth Circuit, on the other hand, offered no such explanation for declining to follow either *Javor* or *Tippins* and, instead, created its own standard.¹⁹⁸ Nor, as the dissent observed, did the Fifth Circuit majority choose to explain why it selected the semantics it did or what the words themselves meant.¹⁹⁹

As a result, what may be enough sleep at the right time to constitute presumed prejudice for one court may not be adequate proof for another court. For example, in *Javor*, the same magistrate judge made two completely opposite recommendations based on the same evidence of the attorney's

192. Refer to notes 61, 183, 191 *supra* and accompanying text (citing the holdings of *Burdine*, *Javor*, and *Tippins*).

193. *Javor v. United States*, 724 F.2d 831, 833–34 (9th Cir. 1984).

194. *Tippins*, 77 F.3d at 687 (2d Cir. 1996).

195. *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (*en banc*), *cert. denied*, 122 S. Ct. 2347 (2002). Judge Barksdale described the majority's decision to limit its holding after creating a rule as “rais[ing] result-driven jurisprudence to a new level.” *Id.* at 359 (Barksdale, J., dissenting).

196. *Id.* at 349.

197. Refer to notes 185–91 *supra* and accompanying text (noting the *Tippins* court's actions).

198. Refer to note 192 *supra* and the accompanying text (stating the *Burdine* standard). See James M. Donovan, *Burdine v. Johnson—To Sleep, Perchance to Get a New Trial: Presumed Prejudice Arising from Sleeping Counsel*, 47 LOY. L. REV. 1585, 1600–02 (2001) (analyzing Judge Benavides' possible intentions and hypothesizing as to his use of the *Javor* and *Tippins* tests when formulating the majority's standard).

199. See *Burdine*, 262 F.3d at 363 (Barksdale, J., dissenting) (criticizing the majority for not offering any guidance to federal habeas courts as to how to determine whether sleeping is “not insubstantial”); Donovan, *supra* note 198, at 1602–03 (noting that the Fifth Circuit created a new interpretation of “substantial”).

sleep.²⁰⁰ He first found that “petitioner’s trial counsel was asleep or dozing, and not alert to proceedings, during a substantial part of the trial.”²⁰¹ In his second set of recommendations on remand from the Ninth Circuit, the magistrate noted that “petitioner’s attorney made appropriate motions and objections, gave vigorous and legally adequate argument in support thereof, and was frequently successful in convincing the court.”²⁰² Similarly, in *Burdine*, the majority and the dissent came to different conclusions based on the same factual findings before them.²⁰³ While the majority recognized the attorney as “repeatedly asleep, and hence unconscious,”²⁰⁴ the dissent discounted his behavior as only “‘dozing,’ ‘nodding,’ [and] ‘bobbing his head.’”²⁰⁵

As of yet, no Texas court has applied the standard set forth in *Burdine* to a sleeping attorney situation. However, the Fifth Circuit has rendered two decisions in which defendants have likened their attorneys’ ineffectiveness to that of *Burdine*’s counsel.²⁰⁶ In *Mayo v. Cockrell*, decided in March 2002, Mayo argued that he was denied effective assistance of counsel during the post-trial, pre-appeal phase.²⁰⁷ Mayo’s attorney did not file a motion for new trial or investigate jury misconduct,²⁰⁸ assuming that Mayo had retained an appellate lawyer.²⁰⁹

Writing for the majority, Judge Jones, a dissenter in *Burdine*, stated that the court would not decide whether the right to counsel extends to the post-trial, pre-appeal time period.²¹⁰

200. Refer to notes 179–82 *supra* and accompanying text (recounting the magistrate judge’s findings).

201. *Javor v. United States*, 724 F.2d 831, 832 (9th Cir. 1984) (observing that defense counsel slept during presentation of evidence relevant to both the prosecution case against the defendant and to his defense).

202. *Id.* at 833.

203. Refer to note 31 *supra* and accompanying text (detailing the trial court’s findings at the evidentiary hearing).

204. *Burdine*, 262 F.3d at 349.

205. *Id.* at 361–62 (Barksdale, J., dissenting) (arguing that the majority lacked evidentiary and legal support for its finding that defense counsel was “repeatedly unconscious”).

206. See *Riddle v. Cockrell*, 288 F.3d 713, 718 (5th Cir. 2002) *petition for cert. filed*; ___ U.S.L.W. ___ (U.S. July 15, 2002) (No. 02-5650); *Mayo v. Cockrell*, 287 F.3d 336, 339 (5th Cir. 2002).

207. *Mayo*, 287 F.3d at 338–39. Mayo argued that criminal defendants are constitutionally entitled to effective assistance of counsel at every “critical stage” of prosecution and through the conclusion of direct appeal. *Id.*

208. *Id.* at 337–38 (noting that one of the jurors had a prior misdemeanor conviction and failed to state this on the jury questionnaire).

209. *Id.* (explaining that Mayo’s attorney did not handle appeals and that Mayo was advised to hire another attorney).

210. *Id.* at 339 (“But it is unnecessary, in resolving this appeal, to render such a broad decision.”).

However, in a lengthy footnote, Judge Jones explored this very issue.²¹¹ She stated that the majority's opinion in *Burdine* did not address whether this phase of a case qualified as a "critical stage."²¹² She reiterated that the *Burdine* decision only applied to those facts and "offers no hope that other habeas defendants may succeed in obtaining case-specific relief under *Cronic* or *Teague*."²¹³

In a dissent, Judge DeMoss, who sided with the majority in *Burdine*, took issue with Judge Jones's interpretation of "critical stage."²¹⁴ Quoting the *Burdine en banc* decision, Judge DeMoss stated that the post-trial, pre-appeal stage fell within the parameters of a "critical stage" of a criminal proceeding.²¹⁵ Thus, it is apparent that the members of the court are in disagreement over the meaning of "critical stage" less than one year since they articulated such a standard in the *Burdine* decision. The court's discord over such an important part of its own standard provides evidence that the standard requires more specificity.

Additionally, less than a month later, the Fifth Circuit decided *Riddle v. Cockrell*, in which Riddle claimed he was denied effective assistance of counsel when his attorney failed to object to a witness's testimony during the guilt/innocence phase of the trial.²¹⁶ The court maintained its promise to limit *Burdine* to its facts and held that prejudice could not be presumed in Riddle's case.²¹⁷ Here, a unanimous panel stated that Riddle's attorney could not be "analogized to the semi-conscious performance of defense counsel in *Burdine*."²¹⁸

While the Fifth Circuit's standard remains untested in sleeping attorney cases, several examples exist of instances where defendants have attempted to utilize the Second and Ninth Circuit tests to no avail.²¹⁹ For example, in *Ortiz v. Artuz*, a

211. *Id.* at 340 n.3.

212. *Id.*

213. *Id.*

214. *See id.* at 343-46 (DeMoss, J., dissenting).

215. *Id.* at 346 (DeMoss, J., dissenting).

216. *Riddle v. Cockrell*, 288 F.3d 713, 717 (5th Cir. 2002) *petition for cert. filed*; ___ U.S.L.W. ___ (U.S. July 15, 2002) (No. 02-5650).

217. *See id.* at 718.

218. *Id.* (arguing that, although a reasonable attorney might have objected during closing arguments, not objecting cannot be equated with an attorney sleeping during trial).

219. *See Ortiz v. Artuz*, 113 F. Supp. 2d 327, 341-42 (E.D.N.Y. 2000) (concluding that defense attorney's sleeping did not constitute a per se violation and was subject to *Strickland* analysis), *aff'd*, 2002 WL 126131 (2d Cir. 2002) (unpublished decision), *cert. denied*, 122 S. Ct. 2367 (2002); *United States v. Muyet*, 994 F. Supp. 550, 560 (S.D.N.Y. 1998) (same); *Prada-Cordero v. United States*, 95 F. Supp. 2d 76, 81-82 (D. P.R. 2000) (same).

case decided by the Eastern District of New York in September 2000, the court found that counsel's sleeping did not reach the level of unconsciousness identified in *Tippins*.²²⁰ A jury convicted Ortiz of second-degree murder in state court, and, after exhausting his appeals, he filed a writ of habeas corpus with the federal district court.²²¹ Ortiz alleged, among other things, that his Sixth Amendment right to counsel had been denied when his attorney slept in court.²²² Although the state court observed Ortiz's attorney sleeping "at times," the federal district court found that Ortiz could not produce evidence that his attorney was "repeatedly unconscious at trial for periods of time in which petitioner's interests were at stake."²²³

Likewise, in *Prada-Cordero v. United States*, the District Court of Puerto Rico rejected the defendant's ineffective assistance of counsel claim where his attorney allegedly slept.²²⁴ After recognizing the *Javor* test, the court stated that *Tippins* had "cautioned against such a broadly-applied rule [*Javor's* 'substantial' rule] in cases where attorneys have slept during trials."²²⁵ Nevertheless, the court proceeded to use the "substantial" language of *Javor*, finding that the state court "did not observe . . . sleeping either for a substantial portion of the trial or to the extent . . . allege[d]."²²⁶ The court also noted that the trial transcript did not show signs of slumber, but rather indicated the attorney's participation.²²⁷

As a result of having three variations of the "sleeping attorney" standard, district courts could eventually come to different conclusions depending on which test they use. Such a scenario is likely with the *Javor* and *Tippins* tests because the former only requires an amount of time while the latter also requires the defendant's interests to be at stake.²²⁸ Although

220. *Ortiz*, 113 F. Supp. 2d at 341–42 (noting that there was no showing that petitioner's counsel was repeatedly unconscious through critical portions of the defendant's trial).

221. *Id.* at 332.

222. *Id.*

223. *Id.* at 342 (explaining that the defendant did not provide evidence as to "the frequency of counsel's unconsciousness" nor the "specific occasion in which counsel slept").

224. *Prada-Cordero*, 95 F. Supp. 2d at 81–82.

225. *Id.* at 81 (stating that the *Javor* court held that the conduct of an attorney who has slept through a substantial part of a criminal trial automatically constitutes prejudice per se).

226. *Id.* at 82 (noting that the record indicated defense counsel was paying attention to proceedings and actively participating in the trial).

227. *Id.* (observing that defense counsel vigorously cross-examined government witnesses and subjected the prosecutor's case to meaningful adversarial testing).

228. Refer to notes 183, 191 *supra* and accompanying text (quoting the holdings of *Javor* and *Tippins*, respectively); see also Kirchmeier, *supra* note 177, at 467–69

some may argue that the differences are just a matter of semantics, the Fifth Circuit obviously felt that “substantial” or “repeated unconsciousness” did not adequately describe the level of sleep required. However, as the dissent in *Burdine* pointed out, any number of definitions can be assigned to the majority’s “not insubstantial” standard.²²⁹

Therefore, the standard needs to be more specific.²³⁰ The U.S. Supreme Court recently declined the opportunity to set a uniform standard when the Court denied certiorari on the *Burdine* case.²³¹ If the Supreme Court eventually creates such a standard, the standard’s language should address the amount of sleep necessary to meet the threshold for presuming prejudice.²³² One scholar has suggested a hybrid test based on *Javor* and *Tippins* that would set forth what constitutes a long enough or significant enough absence from the proceedings to presume prejudice.²³³ In *Strickland*, the Supreme Court cautioned against creating strict guidelines for determining ineffective assistance of counsel.²³⁴ The Court stated that “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.”²³⁵ However, as the *Tippins* court astutely noted, “the buried assumption in our *Strickland* cases is that counsel is present and conscious to exercise judgment.”²³⁶

(suggesting that the *Javor* test “does not give specific guidance to courts” while “the *Tippins* test is too narrow”).

229. *Burdine v. Johnson*, 262 F.3d 336, 362 (5th Cir. 2001) (en banc) (Barksdale, J., dissenting) (questioning whether the majority intends “substantially” to be determined by the length of sleep or by the significance of the evidence presented while counsel slept and its impact on the defense), *cert. denied*, 122 S. Ct. 2347 (2002).

230. See Kirchmeier, *supra* note 177, at 466–69 (recommending a specific test).

231. *Cockrell v. Burdine*, 122 S. Ct. 2347 (2002).

232. See Kirchmeier, *supra* note 177, at 466–69 (offering a possible test for presumed prejudice); see also *Burdine*, 262 F.3d at 363 (Barksdale, J., dissenting) (criticizing the majority’s use of the term “not insubstantial” and stating that “the rule must be shaped so that it can be applied . . . in future cases”).

233. See Kirchmeier, *supra* note 177, at 468–69 (proposing “a refined version of the *Javor* and *Tippins* tests”). One commentator has recommended a test that would presume prejudice: “(1) if counsel sleeps through a relatively large portion of the overall trial proceedings; (2) if counsel sleeps during a large amount of time; or (3) if counsel sleeps through specific critical portions of the trial.” *Id.* at 469.

234. *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984) (explaining that the Sixth Amendment refers simply to “counsel” and does not specify the particular requirement of effective assistance); see also Kirchmeier, *supra* note 177, at 468–69 (criticizing the *Tippins* rule as being too strict, stating that future courts will need more room to assess claims than *Tippins* currently provides).

235. *Strickland*, 466 U.S. at 688–89.

236. *Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996).

D. Who Is Responsible for Detecting the “Not Insubstantial” Slumber?

Among all of these tests—both specific and vague—arises yet another problem. How does a reviewing court make a determination on something that is not transcribed in the record?²³⁷ Some claims of ineffective assistance of counsel are easily discernible from a review of the record—whether an attorney did or did not cross-examine a witness,²³⁸ whether an attorney “opened the door” to damaging evidence,²³⁹ whether an attorney gave an opening statement.²⁴⁰ The instances of per se prejudice announced in *Strickland*—“actual or constructive denial of the assistance of counsel altogether” and conflicts of interest—are also easily recognizable, even without the trial record.²⁴¹ However, no one will find a notation such as “Defendant’s attorney snoring” in the record. Expressing this frustration, the Ninth Circuit stated:

The difficulty in proving prejudice on a record which cannot show “absence” or failure to act is illustrated by these two reports [the findings from the magistrate judge]—the first which solidly found incompetence by virtue of absence, and second which was based on Javor’s attorney’s participation when awake and discounted the fact of his absence to find that Javor had adequate assistance.²⁴²

The court later returned to this problem, noting that “the evil lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made.”²⁴³

237. See Kirchmeier, *supra* note 177, at 466 & n.217 (acknowledging Justice Marshall’s dissent in *Strickland* and stating that “[w]here counsel is asleep, the difficulty of estimating prejudice can be insurmountable”); see also *Tippins*, 77 F.3d at 686 (recognizing that “the ordinary analytical tools for identifying prejudice are unavailable. . . [as prejudice] may not be visible in the record”).

238. See, e.g., *Dixon v. Snyder*, 266 F.3d 693, 702–03 (7th Cir. 2001) (applying the *Strickland* test to counsel’s failure to cross-examine a key witness).

239. See, e.g., *United States v. Patel*, 1993 WL 147469, at *3–*4 (N.D. Ill. 1993) (reviewing counsel’s decision to put the defendant on the stand, thereby opening the door to questioning).

240. See, e.g., *Huffington v. Nuth*, 140 F.3d 572, 583 (4th Cir. 1998) (reviewing counsel’s decision to waive an opening statement).

241. *Strickland v. Washington*, 466 U.S. 668, 692–693 (1984) (acknowledging that cases of actual or constructive denial of the assistance of counsel are easy to identify and, hence, a case-by-case inquiry into prejudice is not needed).

242. *Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984).

243. *Id.* at 834 (quoting *Cooper v. Fitzharris*, 586 F.2d 1325, 1327 (9th Cir. 1978)).

To combat this problem, the lower courts in the “sleeping attorney” cases held evidentiary hearings.²⁴⁴ However, this procedure relies 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.²⁴⁵ In *Burdine*, three jurors and the deputy clerk testified at the evidentiary hearing to witnessing the attorney’s slumber.²⁴⁶ However, the prosecutor and another juror gave statements saying they did not see Burdine’s attorney napping.²⁴⁷ Therefore, if someone does not come forward with tales of bobbing heads, snoring, or the like, for a period of time satisfying the standard, then the entire claim falls apart unless the defendant can satisfy the *Strickland* test.²⁴⁸ When a defendant’s life is at stake, this can hardly be the best approach. This problem does not go away—in fact it may be worse—if you reduce the three circuit tests to actual minutes, as one scholar suggests.²⁴⁹ With such a test, who should be the timekeeper?

1. *Placing Responsibility with the Trial Judge.* Some courts and scholars have placed the responsibility for monitoring a lawyer’s competence with the trial judge.²⁵⁰ Judge William

244. See *id.* at 833; see also *Burdine v. Johnson*, 262 F.3d 336, 339 (5th Cir. 2001) (en banc), cert. denied, 122 S. Ct. 2347 (2002); *Tippins v. Walker*, 77 F.3d 682, 684 (2d Cir. 1996).

245. Kirchmeier, *supra* note 177, at 469 (“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.”).

246. Refer to note 31 *supra* and accompanying text (reviewing the evidentiary findings that Burdine’s counsel slept during trial).

247. Refer to note 31 *supra* and accompanying text (reviewing the evidentiary findings). Accounts of the judge’s testimony differ. Compare *Burdine*, 262 F.3d at 339 (stating that the judge testified he did *not* witness the sleeping) with *Burdine v. Johnson*, 66 F. Supp. 2d 854, 858 (S.D. Tex. 1999) (noting that the trial judge, while unable to recall much, saw the attorney close his eyes several times).

248. See Kirchmeier, *supra* note 177, at 469–70 (explaining that the test proposed would not be easy for a defendant to overcome for this very reason).

249. See *id.* at 468–69 (stating that presumed prejudice should be found where an attorney sleeps for ten minutes in an hour-long trial).

250. See *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984) (“It is entirely possible that many courts should exercise their supervisory powers to take greater precautions to ensure that counsel in serious criminal cases are qualified.”); *Tippins v. Walker*, 77 F.3d 682, 688 (2d Cir. 1996) (describing attorneys who may use sleep as a trial strategy, and stating that “trial judges are well-positioned to detect, guard against, and penalize such a tactical abuse of the right to counsel”); 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, 1334–35 (2000) (stating that the trial judge should be allowed to address an attorney’s incompetence mid-trial); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 48 (2002) (calling for trial judges to, among other things, ensure that a thorough record of the attorney’s behavior is created at the trial level);

Schwarzer, a U.S. District Judge for the Northern District of California, has argued that the trial judge is in the best position to evaluate a lawyer's competence at each stage of a proceeding, from appointment and trial preparation through the trial itself.²⁵¹ While admitting that monitoring is made more difficult during a trial—due to the fact that trial strategies can vary—he concluded that “the judge nevertheless ought continuously to be conscious of threats to the fairness of the trial.”²⁵² More recently, a former district court judge co-authored a similar suggestion, applying the proposal to numerous situations, including those involving sleeping attorneys.²⁵³ However, both the *Tippins* court and the *Burdine* dissenters have balked at such an idea.²⁵⁴ In *Tippins*, the court stated that “we cannot count on a trial judge to serve as the defense lawyer's alarm clock whenever matters arise that touch the client's interest.”²⁵⁵ Likewise, the *Burdine* dissent, criticizing the implications of the majority's holding, remarked:

[T]he rule imposes a new obligation on the States in our circuit, by requiring trial judges and prosecutors to closely and unceasingly monitor defense counsel throughout trial to ensure defense counsel is awake. If counsel closes his eyes even momentarily, the trial judge or prosecutor had best stop the trial and inquire, “Are you awake?”²⁵⁶

While some scholars may argue that such a question is not too much to ask to ensure fairness in the proceeding,²⁵⁷ the fact remains that, at least in *Burdine*'s case, contrary to four other witnesses, the judge stated for the record that he did not see actual sleeping occur.²⁵⁸

William W. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 633 (1980) (proposing that a trial judge take direct action when an attorney is incompetent).

251. Schwarzer, *supra* note 250, at 651–65.

252. *Id.* at 661–62; see also Laurence A. Steckman & Peter Daily, *Attorney Inaction as Trial Strategy: A Study of the Effects of Judicial Use of Non-Action Neutral Language on the Analysis and Adjudication of Claims of Ineffective Assistance of Counsel Under the Sixth Amendment*, 6 J. SUFFOLK ACAD. L. 89, 128–29 (1989) (arguing that courts should look to see if the attorney's silence is reasonable and, if so, it should be considered “legitimate” trial strategy).

253. See Burnett & Burnett, *supra* note 250, at 1349 (proposing that trial judges take the initiative to see that the defendant is receiving a fair trial at the proceeding itself by holding an *ex parte* inquiry and then moving to more serious action if necessary).

254. *Tippins*, 77 F.3d at 690; *Burdine v. Johnson*, 262 F.3d 336, 363–64 (5th Cir. 2001) (en banc), *cert. denied*, 122 S. Ct. 2347 (2002).

255. *Tippins*, 77 F.3d at 690 (stating that the defendant should not be responsible for alerting his attorney to important issues either).

256. *Burdine*, 262 F.3d at 363–64 (Barksdale, J., dissenting).

257. Refer to notes 250–53 *supra* and accompanying text.

258. *Burdine*, 262 F.3d at 339 (noting that the judge also did not recall discussing Cannon's competency with the court coordinator and the prosecutor).

2. *Reforming the Criminal Defense System.*

The court appointed Atticus to defend him. Atticus *aimed* to defend him. That's what they didn't like about it.²⁵⁹

Some scholars have proposed that the justice system should simply require more qualified attorneys in the first place.²⁶⁰ Of course, such an endeavor requires adequate funding from the State.²⁶¹ Fueled by the *Burdine* case, Texas took its first steps toward this goal in the 2001 legislative session, passing the Texas Fair Defense Act, which went into effect January 1, 2002.²⁶² The Act calls for an increase in experience among appointed criminal defense attorneys and an increase in their compensation.²⁶³ The Act also changes the process by which judges appoint attorneys, now requiring judges to select from a list of five attorneys randomly generated by computer.²⁶⁴ Critics of the bill argue that it will not improve the quality of counsel.²⁶⁵

259. HARPER LEE, *TO KILL A MOCKINGBIRD* 174 (J.B. Lippincott Co. 1980) (1960) (describing the confusion of the townspeople when Atticus Finch wanted to represent an African-American man on trial for rape) (emphasis added).

260. See, e.g., Rebecca Copeland, *Getting It Right From the Beginning: A Critical Examination of Current Criminal Defense in Texas and Proposal for a Statewide Public Defender System*, 32 ST. MARY'S L.J. 493, 499–501 (2001) (using *Burdine* as an example of the breakdown in Texas's appointment system); Green, *supra* note 119, at 495–99 (highlighting the damage unqualified attorneys can do in capital criminal cases); Paul J. Kelly, Jr., *Are We Prepared to Offer Effective Assistance of Counsel?*, 45 ST. LOUIS U. L.J. 1089, 1093 (2001) (“Though we know that constitutional ineffectiveness is different than professional competence, it is naïve to think that the former does not have an effect upon the latter.”).

261. See, e.g., Anita Davis, *Symposium Addresses Indigent Criminal Defense in Texas*, 64 TEX. B.J. 120, 120 (2001) (citing a lack of funding as the biggest obstacle to solving indigent defense problems); Deborah L. Rhode, *Symposium, The Constitution of Equal Citizenship for a Good Society: Access to Justice*, 69 FORDHAM L. REV. 1785, 1801 (2001) (“Not only have courts been reluctant to set aside convictions for ineffective assistance of counsel, they have been equally unwilling to address the financial and caseload pressures that produce it.”); Fox Butterfield, *Texas Spends Little on Public Defenders for Poor Criminal Defendants, Report Says*, N.Y. TIMES, Dec. 20, 2000, at A31 (discussing a study conducted by the Texas Appleseed Foundation which calculated the amount of money Texas spends on attorneys for criminal defendants at \$4.65 per person).

262. S.B. 7, 2001 Leg., 77th Sess. (Tex. 2001); see also Fox Butterfield, *Texas Nears Creation of State Public-Defender System*, N.Y. TIMES, Apr. 6, 2001, at A14 (quoting State Senator Rodney Ellis, the bill's main sponsor, as saying the “stories about lawyers sleeping through death-penalty murder trials” helped get the bill passed); Janet Elliott, *Perry Signs Bills Banning Profiling, Setting Standards for Legal Defense*, HOUS. CHRON., June 15, 2001, at 37A (quoting State Senator Ellis as saying the bill “is a significant first step toward creating a criminal justice system that Texas can be proud of”).

263. See S.B. 7, 2001 Leg., 77th Sess. (Tex. 2001).

264. See *id.*; see also Steve Brewer, *Reformed Defense Act Scrutinized: Judges Say Mandate Benefits Lawyers, Not Poor Defendants*, HOUS. CHRON., Feb. 17, 2002, at 37A (comparing the old and new systems by which attorneys are appointed in Texas).

265. See Brewer, *supra* note 264, at 37A.

While the Act may be a step in the right direction, the Calvin Burdines of Texas need a more immediate solution to escape execution.

E. Solution: A Video Transcript

Until the justice system can ensure that attorneys will not sleep during trial, something must be done to protect the rights of defendants. A means of monitoring attorney behavior that would conclusively show whether an attorney slept for the requisite time would be an ideal solution. As it stands right now, “[s]tructural limitations arise because an appellate court is bound by the record of the trial court; it lacks the benefit of observing counsel in action.”²⁶⁶ Such an objective could be achieved most effectively through the use of a video camera or cameras placed in the courtroom.²⁶⁷ The camera would not replace the transcriptionist. Rather, the camera would record the proceedings, acting as a video supplement to the audio trial record.²⁶⁸ Technology has progressed to such an extent that this type of equipment in the courtroom is now possible.²⁶⁹

Rather than relying on courtroom participants to come forward with evidence of sleeping, a reviewing court could simply watch the video and pinpoint signs of slumber just as it would other evidence of ineffective assistance of counsel in a trial record.²⁷⁰ This would resolve one of the dissenting opinion’s concerns in *Burdine*—that participants may not correctly recall the attorney’s slumbering because Burdine did not raise the claim until eleven years after the trial.²⁷¹ Likewise, it would protect a defendant’s interests in the event no one came forward

266. Schwarzer, *supra* note 250, at 642–43 (explaining that, as a result, counsel’s preparation and performance are difficult to evaluate).

267. For a discussion of the usefulness of videotaping in appellate review of ineffective assistance of counsel claims in general, see Robert C. Owen & Melissa Mather, *Thawing Out the “Cold Record”: Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. APP. PRAC. & PROCESS 411, 430–33 (2000).

268. See Winton Woods, *Firms Take Courtrooms to the Next Level*, 37 ARIZ. ATT’Y 46, 46–47 (2001) (describing the set-up of a courtroom where the record will be captured through the use of a high-level audiovisual recording system).

269. See *id.* This type of system is expected to cost less than a transcriptionist. *Id.* at 46. Courts in Arizona are already experimenting with these “e-courtrooms.” *Id.*; see also Owen & Mather, *supra* note 267, at 411–14 (describing appellate judges’ reluctance to use such technology).

270. See Owen & Mather, *supra* note 267, at 433 (suggesting an independent review of ineffective assistance of counsel claims).

271. *Burdine v. Johnson*, 262 F.3d 336, 393 (5th Cir. 2001) (en banc) (Barksdale, J., dissenting), *cert. denied*, 122 S. Ct. 2347 (2002).

with evidence, or the evidence did not illustrate the full extent, of his counsel's sleeping.

This solution would also reduce the likelihood that courts would reach two different conclusions based on the same video trial record. For example, in *Burdine*, this mechanism could have resolved at least some of the differences between the majority and dissenting opinions. As discussed earlier, the majority found that Burdine's attorney was "repeated[ly] unconscious[] . . . through not insubstantial portions of the critical guilt-innocence phase."²⁷² On the exact same record, the dissent concluded that "a determination of precisely when counsel slept has been rendered impossible due to the passage of time and the lack of any indication in the trial transcript."²⁷³

Additionally, several by-products could result from such a procedure. The dissenters in *Burdine* expressed concern about defendants bringing bogus claims.²⁷⁴ They even went so far as to suggest that a defendant may remain silent about his attorney's slumber if he feels he could bring it up on a habeas review and win the claim.²⁷⁵ If a defendant knows that a video transcript will be made available to the reviewing court, it would seem logical that he would be less likely to raise a meritless claim. Likewise, if attorneys are aware that their behavior is being monitored by video, they may be deterred from sleeping.²⁷⁶ Moreover, privacy concerns should not be an issue. Attorneys already agree to have their every word taken down by a court reporter; this would simply add another dimension to that same concept. It seems that if the judicial system is willing to allow cameras in the courtroom for media purposes,²⁷⁷ then why not for the arguably more important Sixth Amendment purpose of "ensur[ing] that criminal defendants receive a fair trial."²⁷⁸

272. *Id.* at 349.

273. *Id.* at 393 (Barksdale, J., dissenting).

274. *Id.* at 391 (Barksdale, J., dissenting).

275. *Id.* (Barksdale, J., dissenting).

276. See Schwarzer, *supra* note 250, at 665 (suggesting a similar conclusion when lawyers are aware that trial judges are monitoring their behavior).

277. Several commentators have discussed the propriety of cameras in the courtroom. See, e.g., *Judicial Conference Nixes Cameras in Courtrooms*, 67 DEF. COUNS. J. 429, 429 (2000) (discussing the negative implications of a bill that would allow media cameras in federal courtrooms); Bruce Moyer, *Courtroom Cameras Legislation Could Pass Congress*, 48 FED. LAW. 6, 6 (2001) (noting that forty-eight states allow cameras in state court proceedings); Henry Schleiff, *Cameras in the Courtroom: A View in Support of More Access*, 28 HUM. RTS. Q. 14, 14 (2001) (advocating cameras in the courtroom as a means by which the public can view the judicial system).

278. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); see also Owen & Mather, *supra* note 267, at 421 (arguing for videotape review of death penalty cases).

IV. CONCLUSION

While the Fifth Circuit finally reached the correct conclusion in its *en banc* decision by holding that Burdine need not show actual prejudice,²⁷⁹ the standard announced by the court does little to clarify what is actually required in these circumstances. When breaking down the court's language, several questions arise. First, as the dissent pointed out, what does "not insubstantial" mean?²⁸⁰ Second, how does a court quantify such an amount?²⁸¹ Third, what are the "critical" periods where a person's Sixth Amendment right could be violated?²⁸²

No matter what standard a court adopts, another question presents itself—who, if anyone, is keeping track of the sleep necessary to find presumed prejudice? The current system of an evidentiary hearing is simply not enough, especially when a defendant's life is at stake.²⁸³ It requires witnesses to (1) remember what they saw, and (2) come forward to testify to it. This presumes that participants are watching the defense attorney, in addition to concentrating on their roles in the justice system. Even then, a witness's recollection of a sleeping attorney may not adequately demonstrate the elements of "time" or "critical stage" to justify presumed prejudice. This simply cannot be what the Framers intended when they drafted the Sixth Amendment. Fortunately for Burdine, he will get another chance when the State of Texas retries him later this year.²⁸⁴

By denying certiorari on the *Burdine* case, the U.S. Supreme Court left three standards viable in three circuits. If the Supreme Court decides to address this issue in the future, it should announce a definitive standard by which courts can assess these "sleeping attorney" claims. In addition, the Court should devise a

279. Refer to notes 54–58 *supra* and accompanying text (analyzing the Fifth Circuit's holding).

280. Refer to notes 92–95 *supra* and accompanying text (criticizing the majority for its choice of words).

281. Refer to note 197–205 *supra* and accompanying text (explaining that different judges came to different conclusions when reviewing the same record).

282. See *Burdine v. Johnson*, 262 F.3d 336, 389 (5th Cir. 2001) (*en banc*) (Barksdale, J., dissenting) ("[D]espite its disclaimer, [the majority] has, in effect, adopted a rule that the entire guilt-innocence phase of a capital murder trial is a critical stage."), *cert. denied*, 122 S. Ct. 2347 (2002).

283. See *Owen & Mather*, *supra* note 267, at 433 (arriving at a similar conclusion for all death penalty cases).

284. See Carol Christian, *Judge Provides Evidence to Burdine Prosecutors: No Attorney Yet; October Trial Date Set*, HOUS. CHRON., July 4, 2002, at 36A (stating that jury selection is scheduled to begin on October 7, 2002); Patty Reinert & Mike Tolson, *Texas Inmate Wins 'Dozing Lawyer' Case: Next Step: A New Trial*, HOUS. CHRON., June 4, 2002, at 1A (stating that prosecutors plan to retry Burdine rather than release him).

means for ensuring the fairness subscribed to in the Sixth Amendment. Until defendants can be guaranteed that they are receiving effective counsel, introducing videotape transcripts would ensure that defense counsel's behavior is adequately monitored. While video cameras in the courtroom might sound like an extreme idea, it is no less extreme than a court finding effective assistance of counsel while an attorney sleeps.

Kristina G. Van Arsdel