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SILENCE AS A TRIAL STRATEGY AFTER *STRICKLAND* AND *CRONIC*: INEFFECTIVE ASSISTANCE OF COUNSEL?

I. INTRODUCTION

The Sixth Amendment of the Constitution provides that an accused has the right to have the "assistance of counsel for his defense."¹ Justice Southerland described the dimension of a criminal defendant's disadvantage without the aid of counsel in *Powell v. Alabama*.² The defendant simply "lacks the skill and knowledge adequately to prepare his defense, even though he have a perfect one,"³ and stands in danger of being convicted not because he is guilty, but because "he does not know how to establish his innocence."⁴ Thus, the defendant "requires the guiding hand of counsel at every step in the proceedings against him."⁵

Moreover, counsel has the affirmative obligation to provide "effective" assistance to the defendant.⁶ In 1984 the Supreme Court articulated standards for judging whether counsel's performance meets this minimum requirement, or whether it is ineffective, in *Strickland v. Washington*.⁷

1. U.S. CONST. amend. VI. The right to counsel as a matter of due process in capital cases was established in *Powell v. Alabama*, 287 U.S. 45 (1932). The aid of counsel was deemed a fundamental right guaranteed by the sixth amendment and made obligatory upon the States through the fourteenth amendment in *Gideon v. Wainwright*, 372 U.S. 335, 342 (1962).

2. *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (a criminal defendant is a layperson who is unskilled in the "science of law," incapable of determining whether an indictment is good or bad, may go to trial without a "proper charge," has no understanding of the rules of evidence, and may be convicted upon improperly introduced or irrelevant evidence). For a functional analysis of the role of counsel, see Levine, *Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications For Professional Regulation*, 15 TOLEDO L. REV. 1275, 1336-69 (1984) [hereinafter *Levine*].

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

4. *Id.*

5. *Id.* The right to counsel attaches upon the advent of formal judicial proceedings and extends to all "critical stages" of the proceeding, *Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1983-1984*, 73 GEO. L.J. 573-75 (1984) (and cases cited therein) [hereinafter *Fourteenth Annual Review*].

6. *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

7. *Strickland*, 466 U.S. 668, 687 (the defendant must make a two part showing: (1) that counsel's performance was deficient, and (2) that such performance was prejudicial to the defense). See *supra* notes 4-6 and accompanying text. This standard has been found lacking

Lower federal and state appellate courts have been examining defense tactics and strategies to determine whether a particular attorney's performance has in fact been inadequate following the direction given by the Supreme Court.⁸ One such defense strategy

for failing to provide uniform guidelines for attorney conduct, and by placing an unfair burden upon the defendant in requiring him to show prejudice, *Strickland*, 466 U.S. at 707-10 (Marshall J., dissenting); Berger, *The Supreme Court and Defense Counsel: Old Roads New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 81-96 (1986) [hereinafter *Berger*]; Comment, *Judicial Jabberwocky or Uniform Constitutional Protection? Strickland v. Washington and National Standards for Ineffective Assistance of Counsel Claims*, 1985 UTAH L. REV. 723, 732-38 (1985) [hereinafter *Judicial Jabberwocky*]; Gross, *Sixth Amendment—Defendant's Dual Burden in Claims of Ineffective Assistance of Counsel, Strickland v. Washington*, 75 J. CRIM. L. & CRIMINOLOGY 755, 770-75 (1984). For a criticism of *Strickland* for not taking into account the nature and purposes of the advocacy system and equal protection, see Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE, 59-64 (1986) [hereinafter *Goodpaster*].

8. The following are decisions based on the standards set forth in *Strickland* and *United States v. Cronin*, 466 U.S. 648 (1984) (where certain circumstances surrounding the representation can be shown, specific errors of counsel need not be alleged, and prejudice will be presumed); *Kimmelman v. Morrison*, 106 S. Ct. 2574 (1986) (counsel's failure to file a timely suppression motion was not strategic but resulted from failure to conduct pretrial discovery and was unreasonable); *Nix v. Whiteside*, 106 S. Ct. 988, 997 (1986) (counsel's threat to withdraw from representing defendant and to disclose to the court that the defendant might commit perjury fell "well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*"); *Wise v. Smith*, 735 F.2d 735 (2d Cir. 1984) (the cumulative effect of counsel's alleged omissions did not amount to denial of ineffective counsel, but even if counsel's performance was constitutionally defective, there was no prejudice since evidence against defendant was overwhelming); *Moore v. Maggio*, 740 F.2d 308 (5th Cir. 1984) (finding counsel's failure to seek certain mitigating witnesses and call others to testify during sentencing phase reasonable, and no prejudice to the defense), *reh'g denied*, 106 S. Ct. 19 (1985); *Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984) (failure to participate in trial was totally unreasonable trial tactic which prejudiced the defense); *Siverson v. O'Leary*, 764 F.2d 1208 (7th Cir. 1985) (defense counsel's absence during jury deliberations amounted to counsel not functioning as counsel guaranteed by the sixth amendment, using pre-*Strickland* prejudice standard of harmless error); *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir. 1984) (failure to investigate, interview key prosecution witnesses, and interview defense witnesses before testifying was less than reasonable assistance, but defendant was not deprived of a fair trial), *cert. denied*, 105 S. Ct. 1221 (1985); *United States v. Peterson*, 777 F.2d 482 (9th Cir. 1985) (attorney sleeping, but not through substantial portion of the proceeding, is not ineffective and defendant failed to show prejudice), *cert. denied*, 107 S. Ct. 154 (1986); *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984) (counsel's preparation for trial fell "far below acceptable levels [and] qualified them only as spectators," and therefore prejudice need not be shown), *cert. denied*, 105 S. Ct. 218 (1984); *Aldrich v. Wainwright*, 777 F.2d 630 (11th Cir. 1985) (attorney's performance in failing to take depositions was deficient, but defendant failed to show prejudice), *cert. denied*, 107 S. Ct. 324 (1986); *Smith v. Wainwright*, 777 F.2d 609, 616, 617 (11th Cir. 1985) ("[b]eing merely a spectator to the state's presentation of evidence will not meet the standard for effective assistance of counsel," and failure to suppress the defendant's confessions was "extremely prejudicial" to the defendant), *cert. denied*, 106 S. Ct. 3275 (1986); *Messer v. Kemp*, 760 F.2d 1080 (11th Cir. 1985) (counsel's low key strategy which included failure to object to admission of many items of evidence, to cross-examine many witnesses, and to make opening statement or present mitigating factors in sentencing phase was not unreasonable, and defendant failed to show prejudice), *cert. denied*, 106 S. Ct.

involves counsel's non-participation in the trial process itself.⁹ A lawyer may justify his non-participation, for example, on the basis of having had too little time to prepare for trial or because of unfavorable pretrial rulings. Counsel reacts by literally standing "mute" throughout the proceedings. Some courts have reversed convictions where counsel remained silent while others have regarded silence as a viable, even if unsuccessful, trial tactic or strategy, thereby refusing to reverse on the grounds of ineffective assistance of counsel.¹⁰

This article addresses the strategy of silence and its relationship to the defendant, the adversarial process and the Constitution. It will argue that a silent strategy places the defendant in danger of conviction not because he is guilty, but because counsel has withdrawn his guiding hand, and that silence amounts to constructive denial of the right to effective assistance of counsel. It suggests that trial judges should play a larger role in ensuring that defendants are not robbed of their constitutional rights by attorney silence.

II. JUDGING CLAIMS OF ACTUAL INEFFECTIVENESS

By 1984 most circuit courts of appeal had replaced the "farce and mockery" standard with a standard of "reasonably competent assis-

864 (1986); *Warner v. Ford*, 752 F.2d 662 (11th Cir. 1985) (counsel playing inactive role at trial was reasonable trial strategy under the circumstances, and was found not to prejudice the defendant in light of overwhelming evidence against him); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985) (counsel's failure to search out mitigating character evidence for penalty phase of trial could not be considered mere tactic, but deprived defendant of effective assistance of counsel); *United States v. Sutton*, 794 F.2d 1415 (9th Cir. 1986) (joint representation of co-defendants was not prejudicial, and counsel's advice to the defendant to plead guilty was reasonable under the circumstances); *United States v. Ellison*, 798 F.2d 1102 (7th Cir. 1986) (defendant demonstrated an actual conflict of interest where counsel was functioning under fear of his own self-incrimination, the trial judge failed to adequately advise the defendant so that defendant might waive his right to conflict free representation, and thus, the defendant was denied the effective assistance of counsel); *Code v. Montgomery*, 799 F.2d 1482 (11th Cir. 1986) (failure to contact alibi witnesses where counsel's sole strategy was to conduct an alibi defense, and failure to request a continuance fell below professional standards and was prejudicial); *United States v. Driver*, 798 F.2d 248 (7th Cir. 1986) (counsel's failure to make objections during jury selection, failure to object to improper prosecution comment, and failure to submit instructions concerning multiple conspiracies was within range of reasonableness); *Green v. Arn*, 615 F. Supp. 1231 (N.D. Ohio 1985) (absence of counsel for a period of two hours during trial is ineffectiveness per se, requiring no showing of prejudice); *Johnson v. Kemp*, 615 F. Supp. 355 (S.D. Georgia 1985) (strategy of silence can only be reasonable if counsel has made reasonable investigation for mitigating evidence, otherwise such strategy is unreasonable, and in this case was unsound and prejudicial).

9. See *infra* notes 50-124 and accompanying text.

10. *Id.*

tance" in judging claims of ineffective counsel.¹¹ Thus, the focus of inquiry had moved from a defendant's right to counsel as was established by *Powell*,¹² to whether the defendant had been afforded that right through counsel's actual performance.¹³

A. *Strickland v. Washington*: Evaluating Performance and Prejudice

Strickland v. Washington was the first Supreme Court decision to articulate standards for judging actual ineffectiveness claims.¹⁴ The trial judge in *Strickland* had sentenced the defendant to death following three convictions for murder.¹⁵ The defendant collaterally attacked the verdict, first in state courts and then in the federal courts, after having been granted a writ of habeas corpus.¹⁶ One of the grounds for attack was that his court appointed counsel had failed to effectively assist him during sentencing.¹⁷ The defendant asserted that counsel failed to adequately investigate, and failed to present mitigating circumstances during the sentencing proceeding.¹⁸

The Supreme Court reversed the decision of the Eleventh Circuit Court of Appeals and set forth the standards applicable to collateral federal attacks, direct appeals, and claims of ineffectiveness in habeas corpus proceedings.¹⁹ A defendant seeking to have a conviction or death sentence set aside because of ineffective assistance by counsel must make a two-pronged showing: First, that counsel's per-

11. *Trapnell v. United States*, 725 F.2d 149, 152, 153 (2d Cir. 1983), and cases therein, (quoting *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950)) ("A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the court and make the proceedings a farce and mockery of justice."). See also *Strickland*, 466 U.S. at 712. However, compare Justice Marshall's dissent in which he notes that the majority overstates the extent to which the lower courts are in accord on the proper test for ineffectiveness claims, 466 U.S. at 714 (Marshall, J., dissenting).

12. *Powell*, 287 U.S. 45 (1932); see *supra* note 1 and accompanying text.

13. *Berger*, *supra* note 7, at 27.

14. 466 U.S. at 675.

15. *Id.* at 675.

16. *Id.* at 675-83. 28 U.S.C. § 2254 (1982) permits a federal court to hear a state prisoner's claim of a violation of his constitutional rights, after he has exhausted his state remedies. The concept of silence acting as a procedural default or deliberate bypass precluding federal review is beyond the scope of this article. See *Wainwright v. Sykes*, 433 U.S. 72 (1977). For a discussion of procedural default, see Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617 (1984) [hereinafter *Guttenberg*].

17. *Strickland*, 466 U.S. at 675.

18. *Id.* at 675, 678.

19. *Id.* at 697, 698. These standards apply to trial and capital sentencing proceedings, *id.* at 686. Counsel's performance and any resulting prejudice are mixed questions of law and fact, *id.* at 698.

formance was deficient in that there were specific errors made which were outside the range of reasonable professional judgment, and second, that the deficient performance prejudiced the defense so that but for the alleged errors, the outcome of the proceeding would have been different.²⁰ In reviewing counsel's conduct, the defendant has the burden of overcoming the presumption that counsel's conduct was a part of a sound trial strategy, since evaluating ineffectiveness is inherently difficult.²¹ In addition, the majority stated that a reviewing court may dispose of an ineffectiveness claim if it so chooses, by first finding a lack of prejudice to the defendant without any inquiry into counsel's performance.²²

In applying these standards to the case before it, the Court found that counsel had made a sound strategic choice in deciding not to investigate for further mitigating evidence, and in limiting testimony about the defendant's character to the prior plea colloquy.²³ The Court observed, however, that counsel does have the duty to make an investigation that is reasonable "or make a reasonable decision that makes particular investigations unnecessary."²⁴ In this case, the Court held that the aggravating circumstances were "overwhelming," precluding a different outcome even if mitigating factors had been presented.²⁵

In examining whether counsel's performance was reasonable under the first part of the test, and despite inherent difficulties in judging ineffectiveness, the Court specifically refrained from elevating professional standards to a constitutional level, because it reasoned that counsel would lose independence in choosing trial tactics.²⁶ More-

20. *Id.* at 687. See the criticism of these required showings, *supra* note 7.

21. 466 U.S. at 689.

22. *Id.* at 697. But see Justice Marshall's dissent where he points out that the burden on the defendant to show prejudice is overwhelming, especially since the "evidence of injury to the defendant" may be absent just because of counsel's ineffectiveness, 466 U.S. at 710 (Marshall, J., dissenting).

23. *Id.* at 699. Counsel relied upon the defendant's earlier expression of remorse and the trial judge's reputation for placing importance in taking responsibility for one's acts, *id.* at 673.

24. *Id.* at 691.

25. *Id.* at 700. *Strickland* has been criticized for its very focus on the "outcome" of the trial, rather than on the "process," especially where the prosecution does have a strong case against the defendant, Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L. Q. 625, 645 (1986).

26. *Strickland*, 466 U.S. at 689. Under the Model Code of Professional Responsibility, a lawyer has a duty to represent his client zealously, and can only make the strategic and tactical decisions such as whether to call or cross-examine witnesses, and whether to accept or reject jurors "after consultation with his client." MODEL CODE OF PROFESSIONAL RESPONS-

over, detailing rules of conduct "could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause."²⁷

Justice O'Connor's opinion went further to say that under certain circumstances the defendant need not affirmatively prove prejudice, for it will be presumed.²⁸ Where the state has interfered with counsel's assistance, or where an actual conflict of interest exists, there will be a legal presumption of prejudice.²⁹ Such actual conflicts of interest may be found out by trial judges who can "make early inquiry in certain situations likely to give rise to conflicts."³⁰

B. United States v. Cronin and Constructive Denial of the Effective Assistance of Counsel

The defendant in this case attacked his conviction for mail fraud on the ground that his counsel was inexperienced in criminal defense, and that counsel had insufficient time to prepare for trial.³¹ The Supreme Court reversed the finding of the Court of Appeals for the Tenth Circuit that counsel had provided ineffective assistance, and that no specific errors need be shown because prejudice would be presumed.³²

Justice Stevens wrote that there need be no inquiry into the conduct of the trial, nor is there any need to show prejudice where circumstances surrounding the representation result in an actual denial of counsel altogether³³ or constructive denial of the effective assis-

BILITY DR 7-101 (1986). The defendant has the exclusive right to decide whether to waive a jury trial, or whether to testify on his own behalf, after consultation with counsel, STANDARDS FOR THE DEFENSE FUNCTION 4-5.2 (1982 Supp.). For a striking example of where the Supreme Court does use and comes close to raising ABA professional standards to a constitutional level where counsel's ethical obligation of loyalty to his client conflicts with counsel's ethical duty to the court, see *Nix v. Whiteside*, 106 S. Ct. 988, 995-97 (1986); *See also* *People v. McKenzie*, 34 Cal. 3d 616, 668 P.2d 769, 194 Cal. Rptr. 462 (1983) (counsel standing mute through trial was found to be ineffective assistance of counsel through the application of professional standards and state law).

27. *Strickland*, 466 U.S. at 689.

28. *Id.* at 692.

29. *Id.*

30. *Id.*

31. *Cronin*, 466 U.S. at 649, 665, 663.

32. *Id.* at 666, 667. The fact that counsel has 25 days to prepare compared to four and one-half years of Governmental investigation, did not constitute insufficient time to prepare since there was no dispute as to whether the transactions occurred, but only a question of intent to defraud, *id.* at 664. Counsel's dominant experience in real estate transactions was rather deemed beneficial to the defense since this was a criminal case involving financial transactions, *id.* at 665.

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

tance of counsel.³⁴ The opinion in *Cronic* cites *Powell* as the paradigm of constructive denial of counsel, since the manner of appointment of counsel made the likelihood that counsel could have performed as an "effective" advocate remote.³⁵ Other circumstances in which the defendant is constructively denied the right to effective assistance of counsel are found where counsel acts under an actual conflict of interest,³⁶ or where there is denial of counsel at a "critical stage of his trial,"³⁷ or where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," such as where the defendant is denied the right of "effective cross-examination."³⁸ Counsel may make "demonstrable errors" without violating the sixth amendment, but where the "process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."³⁹ Where the adversarial process has broken down, it is presumed to be unreliable, and no prejudice need be shown.⁴⁰ Even

34. *Id.* at 659-62. See *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir. 1985) ("a presumption of prejudice would be proper where counsel's representation was so deficient as to amount in every respect to no representation at all").

35. *Id.* at 661-62. The trial court in *Powell* had appointed "all members of the bar" for arraignment proceedings, and had assumed that they would continue if no one else came forward, *Powell*, 287 U.S. at 57. The morning of the trial a lawyer did appear to assist whoever was appointed, but refused to take over the case since he had no time to prepare and was unfamiliar with Alabama procedure, *Powell*, 287 U.S. at 53-57. "Such a designation, even if made for all purposes, would in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel." *Id.* at 56; *Cronic*, 466 U.S. at 660.

36. *Cuyler v. Sullivan*, 446 U.S. 335 (1980). Even where a defendant raises no objection at trial, if he can show that his attorney was functioning under an actual conflict of interest affecting the representation, he need not demonstrate prejudice to receive relief, *Cuyler*, 446 U.S. at 359-50. The court need not initiate an inquiry as to a possible conflict of interest, unless it knows or reasonably should know that one exists, *id.* at 347. Multiple representation does not violate the sixth amendment unless there is a conflict of interest, and may work to provide strength to a common defense against a common attack. *Id.* at 348, (citing *Holloway v. Arkansas*, 435 U.S. 475 (1978)). However, "unconstitutional multiple representation is never harmless error. . . [and] the conflict itself demonstrat[es] a denial of the 'right to have the effective assistance of counsel.'" *Cuyler*, 446 U.S. at 439. See also *Strickland*, 466 U.S. at 692.

37. *Cronic*, 466 U.S. at 659 (citing cases where the Court found constitutional error because counsel was "either totally absent or prevented from assisting the accused during a critical stage of the proceeding," thus there was no need to show prejudice, *id.* at 659 n.25).

38. *Id.* (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). The defendant has a sixth amendment right to be confronted with those "witnesses against him," and that right includes the right to cross-examination, *Davis*, 415 U.S. at 316. Cross-examination is the means by which credibility is challenged, and exposing a witness' motives for testifying is an "important function of the constitutionally protected right of cross-examination," *Davis*, 415 U.S. at 317. Denial of effective cross-examination "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.*

39. *Cronic*, 466 U.S. at 656-57.

40. *Id.* at 657-58.

though the Court in *Cronic* did not presume prejudice to the defense, nor did it find ineffective assistance of counsel, it did define constructive ineffective assistance and recognized that the purpose of providing effective assistance is to arm the defendant against the State as adversary.⁴¹

III. WAIVER OF THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

An important factor in determining whether counsel's assistance has been ineffective where counsel employs a silent trial strategy is whether the right to the effective assistance of counsel has been waived. The Supreme Court held in *Brewer v. Williams*⁴² that the right to counsel is "indispensable to the fair administration of our adversary system of criminal justice,"⁴³ and that right does not depend on the defendant's request for counsel.⁴⁴

Moreover, the only way in which a defendant may waive his right to the effective assistance of counsel is through an intentional relinquishment of that right.⁴⁵ There must be an understanding of the right to counsel as well as relinquishment of that right, and this standard applies to critical phases of pretrial proceedings, and to the trial itself.⁴⁶ Courts must "indulge in every reasonable presumption against waiver."⁴⁷ In the case before it, the Court found the fact that the defendant made incriminating statements after having been read the famous "Christian burial speech," did not mean that he had relinquished his right to counsel after it had attached.⁴⁸ The Court

41. *Id.* at 657. ("[W]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators,") (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied sub nom. Seileff v. Williams*, 423 U.S. 876 (1975)); *Kimmelman v. Morrison*, 106 S. Ct. 2574, 2583 (counsel's performance is ineffective where it upsets the "adversarial balance" between the prosecution and the defense rendering the process unfair and the result unreliable).

42. 430 U.S. 387 (1976).

43. *Id.* at 398. *See also Powell*, 287 U.S. at 72 (a defendant in a capital case must be assigned counsel to face the "whole power of the state against him"); *Strickland*, 466 U.S. at 685 (counsel's skill and knowledge are necessary to provide "ample opportunity to meet the case of the prosecution,")(quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276 (1942), and citing to *Powell*, 287 U.S. at 68-69)); *See Strickland*, 466 U.S. at 688 (counsel owes the defendant the duties of loyalty, avoidance of conflict of interest, assistance and advocacy).

44. *Brewer*, 430 U.S. at 404.

45. *Id.* at 404 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

46. *Id.* at 404.

47. *Id.*

48. *Id.* at 392, 405.

would not infer a valid waiver from the defendant's subsequent conduct.⁴⁹

IV. SILENCE AS A DEFENSE STRATEGY

A. *Martin v. Rose*: Silence as Constitutional Error

The Court of Appeals for the Sixth Circuit, applying the Supreme Court standards articulated in *Strickland* and *Cronic*, held that the defendant in *Martin v. Rose* had not waived, and was therefore denied his constitutional right to the effective assistance of counsel where his counsel remained silent through the trial.⁵⁰

1. Factual Background

Martin was convicted of criminal sexual conduct, incest, and crimes against nature.⁵¹ Since his trial had been delayed for two years, his lawyer moved to dismiss on the ground that Martin had been denied a speedy trial, and alternatively, moved for a continuance on the ground that he was unprepared for trial.⁵² The trial court denied these motions, as well as having denied other pretrial motions.⁵³

Counsel, without having participated in jury selection, and before any witnesses were called, made the following announcement to the jury:

Ladies and Gentlemen, I want to say this, just to satisfy your curiosity [sic] and for my own personal self. We have relied on certain Motions in this suit, and so the defendant has pled not guilty, and we'll sit here. But, I as an attorney won't ask questions or make any argument or object or do any that type thing because we are relying on our motions. So we'll be here, but don't think that my lack of participation is, uh, that I'm a dummy over here, and I don't know what's going on. But we'll just be sitting. . . .⁵⁴

The trial court did not question either counsel or the defendant regarding counsel's planned conduct.⁵⁵ Counsel adhered to his strategy by not cross-examining witnesses, by not objecting to the admis-

49. *Id.* See *Harding v. Lewis*, 641 F. Supp. 979, 992 (D. Ariz. 1986) (there was a knowing and intelligent waiver of the right to counsel, even though the trial judge failed to make a "perfect waiver inquiry").

50. *Martin v. Rose*, 744 F.2d 1245, 1249, 1252 (1984).

51. *Id.* at 1247.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

sion of evidence, by not calling any defense witnesses, by not making any closing argument, and by not making any objections to the charge to the jury.⁵⁶ After a trial which lasted less than a day, the jury found Martin guilty of all charges, save one which the prosecution had dropped because it was not supported by testimony.⁵⁷

The State's case consisted of uncorroborated testimony from Martin's stepdaughters that Martin had "beat[en] their mother and then forced them to perform sexual acts with him."⁵⁸ Medical evidence was inconclusive as to whether they had had sexual intercourse.⁵⁹ The defendant was convicted and given the maximum sentence on each count, including a term of life imprisonment for each count of criminal sexual conduct.⁶⁰

It was not until a hearing on a motion for a new trial that Martin did have the opportunity to testify and deny the charges against him.⁶¹ It was only then that evidence surfaced showing that the stepdaughters might have fabricated their story.⁶² The court denied the motion for a new trial and afterward, for the first time, inquired as to Martin's satisfaction with his attorney.⁶³ On appeal, the Tennessee Court of Criminal Appeals affirmed all but two convictions.⁶⁴

During the hearing on the subsequent habeas corpus petition, it was revealed that Martin was illiterate, possessed a third grade education, and that although Martin was told by counsel that he would not participate, Martin neither understood the reason behind nor the consequences of his attorney's conduct.⁶⁵ Counsel testified that after the trial, Martin's ex-wife, who was the step-daughter's mother, gave him an affidavit stating that Martin was innocent and that their grandmother had encouraged them to make-up the story.⁶⁶ Counsel also stated that his strategy of silence was grounded in his unpreparedness and his fear that his pretrial motions would be waived, or deemed harmless error.⁶⁷

56. *Id.* Counsel erroneously believed that by putting on a defense, he would be waiving his motions to dismiss, *id.* at 1248-49.

57. *Id.* at 1248.

58. *Id.* at 1247.

59. *Id.* at 1248-49.

60. *Id.* at 1248.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

2. Sixth Circuit Analysis

The Sixth Circuit examined the reasoning of Martin's counsel. The court suggested that counsel might have meant that he was concerned that if he put on an adequate defense that a reviewing court would find that the defendant had not been prejudiced, and would not reverse the trial court's denial of the dismissal motions.⁶⁸ Under the first prong of *Strickland*, the court found counsel's trial strategy to be unreasonable in that counsel utterly gave up a known defense⁶⁹ in a gamble for reversal on appeal, and as a consequence did not hold the prosecution to its burden of proof.⁷⁰ This was "not an exercise of reasonable professional judgment."⁷¹

The Court of Appeals for the Sixth Circuit found that Martin had been prejudiced by his counsel's omissions since Martin's testimony and denial could otherwise have been heard, and that counsel could have cross-examined the stepdaughters even without Martin's testimony.⁷² This created a reasonable probability that but for counsel's non-participation, the result of the trial would have been different.⁷³ Therefore, since the strategy was professionally unreasonable and prejudicial, counsel's assistance was held to be ineffective.⁷⁴

In citing to *Cronic*, the court compared counsel's conduct not to where counsel is absent from a critical stage of the proceeding—which itself would give rise to a presumption of prejudice—but to counsel being absent from the entire proceeding.⁷⁵ Because of this behavior, Martin was deprived of the right to subject the State's case to "the crucible of meaningful adversarial testing—the essence of the right to effective assistance of counsel."⁷⁶ Under *Cronic*, this type of trial strategy renders the adversarial process presumptively unreliable.⁷⁷ The court observed that despite Martin's plea of not guilty, counsel's tactics compelled conviction by the jury.⁷⁸ Counsel's

68. *Id.* at 1249.

69. *Id.*

70. *Id.* at 1250.

71. *Id.* (citing *Strickland*, 466 U.S. at 690). The court invoked Justice O'Connor's direction in *Strickland* that reviewing courts should be mindful that counsel's function is to make the adversary process work.

72. *Id.* at 1251.

73. *Id.*

74. *Id.*

75. *Id.* at 1250 (citing *Cronic*, 466 U.S. at 659 n.25).

76. *Martin*, 744 F.2d at 1250.

77. *Id.* (citing *Cronic*, 466 U.S. at 659).

78. *Martin*, 744 F.2d at 1250.

absenting himself through silence was "constitutional error even without any showing of prejudice."⁷⁹

3. The Waiver Issue

Critical to the determination was the court's finding that Martin had not made a voluntary, knowing and intelligent waiver of the right to the assistance of counsel.⁸⁰ Noting that such a waiver could be implied rather than express, nevertheless, in looking at the background, experience and conduct of the defendant the court found that Martin had not made a knowing and intelligent waiver.⁸¹

Neither counsel nor the court explained what might happen if counsel did not participate in the trial. During the course of the trial, Martin requested "that trial counsel act, *e.g.* by cross-examining witnesses," which demonstrated that Martin's assent was not a knowing and intelligent waiver.⁸²

4. The Trial Judge's Role

The Sixth Circuit then addressed the fear expressed by the lower courts that if counsel's representation were judged to be ineffective, other attorneys might deliberately engage in tactical silence in order for their clients to obtain new trials.⁸³ The court responded to this concern by stating that here there was no evidence of such a maneuver, and that it would not "assume that members of the bar will coldbloodedly adopt the bizarre and irresponsible stratagem of abandoning clients at trial."⁸⁴

The court went further. It recommended that faced with such a proposed strategy, the court can inquire as to whether the defendant understands that if he agrees to the strategy, he will be waiving his right to the effective assistance of counsel.⁸⁵ If necessary, the court could use its contempt power against counsel, or utilize the disciplinary machinery of the bar.⁸⁶

Martin illustrates how the strategy of silence falls below the standard of reasonableness in terms of attorney performance, as well as

79. *Id.* at 1251.

80. *Id.* at 1251-52.

81. *Id.* at 1251.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 1251-52.

86. See Schwarzer, *Dealing With Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980) [hereinafter *Schwarzer*]. See also *supra* note 22 and accompanying text.

how it operates to prejudice the defense. The court went so far as to say that counsel's commitment to silence constituted an absence of counsel, and was therefore prejudicial per se.⁸⁷ By contrast, the Eleventh Circuit held that the use of silence was merely an unsuccessful trial tactic in *Warner v. Ford*.⁸⁸

B. Warner v. Ford: Silence as A Reasonable Professional Choice

1. Factual Background

The defendant Warner, one of three codefendants, was indicted on counts of theft and violation of the state firearms act.⁸⁹ All three codefendants were tried on the same day, and while the other two defendants had counsel who represented them "vigorously," Warner's counsel maintained what he characterized as a "low profile."⁹⁰ Counsel's activity consisted of moving for a directed verdict on one count, moving for a mistrial, recommending that Warner not take the stand, questioning one juror during the trial, and arguing to the court during sentencing.⁹¹ On the other hand counsel for the two codefendants presented defenses in which they asserted no knowledge of the circumstances of the case, blamed Warner for the crime, and then again blamed Warner in their closing arguments.⁹² Warner's counsel, Kane, did not participate in jury selection, did not make any pretrial motions or opening statement, did not cross-examine any of the State's witnesses, did not object to the codefendants' strategy of blaming his client for the crime, did not object to any evidence offered against Warner, did not produce character witnesses or evidence on behalf of Warner, and did not make a closing argument or request any jury instructions.⁹³ All three were convicted on all counts and received 19 year sentences.⁹⁴

87. *Martin*, 744 F.2d at 1250-51.

88. 752 F.2d 622 (11th Cir. 1985).

89. *Id.* at 623.

90. *Id.* at 623, 625. The opinion states that Warner's attorney argued before the trial court that his representation had been ineffective, "indicating that he may have harbored some doubt as to the adequacy of his performance," *id.*

91. *Id.* at 624.

92. *Id.*

93. *Id.* at 623-24. *Cf.* *House v. Balkcom*, 725 F.2d 608, 618 (11th Cir. 1984) ("abysmal ignorance of trial tactics" found to be ineffective assistance of counsel), *cert. denied*, 105 S. Ct. 218 (1984).

94. *Id.* at 624. These sentences were reduced to 15 years due to requests by the prosecution and Kane for reconsideration.

2. Eleventh Circuit Analysis

The Court of Appeals for the Eleventh Circuit held that counsel's silence was sound—indeed, the “best trial strategy available,” rather than a failure to put the prosecution's case to proper adversarial testing as did the Sixth Circuit in *Martin*.⁹⁵ Counsel's reasons for standing mute emanated from his lack of faith in the defendant's case and his prior successful use of the silent strategy in other multiple defendant cases.⁹⁶ Essentially, counsel relied upon, and in some measure arranged for, codefendants' counsel to challenge the prosecution's case.⁹⁷

The court held this conduct not to be constitutionally defective, and not prejudicial to “the obviously guilty [defendant].”⁹⁸ It distinguished *Martin* since in that case the defendant denied the charges against him, the testimony of the complaining witnesses was suspect, Martin himself was the sole defendant and did not have codefendants' counsel cross-examining state witnesses, the evidence against Martin was not as overwhelming as it was against the defendant in *Warner*, and that defense counsel in *Martin* asserted that he was unprepared, whereas counsel in *Warner* made no such assertion.⁹⁹

Although the court acknowledged that counsel engaged in a “silent strategy,”¹⁰⁰ and invoked the words of *Strickland* and *Cronic*,¹⁰¹ it failed to analyze the strategy in light of the purpose of the assistance of counsel.¹⁰² The Eleventh Circuit never looked beyond

95. *Id.* at 624, 625.

96. *Id.* at 625.

97. *Id.* “Since [defense attorney] Kane knew codefendants' counsel to be very aggressive trial lawyers, he anticipated they would thoroughly cross-examine the Government's witnesses. He also arranged for them to ‘handle the voire dire’ and for additional peremptory strikes to be given to one of codefendant's counsel,” *id.* Although defense counsel testified that he discussed the silent strategy with defendant throughout the trial, there was no mention of a knowing waiver in the opinion, *id.* The court of appeals thought it noteworthy that the defendant admitted at the evidentiary hearing that he could think of nothing his counsel should have done, *id.* The author believes that a defendant does not have the responsibility of doing the thinking for his lawyer.

98. *Warner*, 752 F.2d at 624, 625.

99. *Id.* at 624-25.

100. *Id.* at 625.

101. *Id.* at 624-25.

102. See discussion of counsel's role as advocate according to *Strickland* and *Cronic*, *supra* notes 6, 8, 19 and accompanying text. The functional objective of defense counsel is the persuasion of the decision maker: 1) To affect the selection of facts so that the maximum favorable to his client, and the minimum unfavorable are presented before the decision maker, 2) to “shape the perception of the decision-maker's perception of the facts to accord with the desired conclusion,” 3) to make a “coherent framework” for putting the facts in order, Levine, *supra* note 2 at 1338. See also the opinion in *Martin*, 744 F.2d at 1250 (counsel's non-per-

presuming that under the circumstances, counsel's conduct "might be considered sound trial strategy."¹⁰³ This part of the *Strickland* rule lies in the Court's interest in avoiding strict rules for judging the variety of reasonable trial techniques which might lead to "the proliferation of ineffectiveness challenges,"¹⁰⁴ and "dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."¹⁰⁵ *Strickland*, while criticized for not providing definitive guidelines for attorney conduct, does not suggest that the presumption should be worked backwards to shield verdicts arrived at through an unreliable process, resulting in insulating trial tactics which are outside the reasonableness range.¹⁰⁶

In *Warner*, the court did not look at the conduct in light of the circumstances, "keep[ing] in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case."¹⁰⁷ Here counsel did not assume his critical role as the advocate for the defendant, holding the government to its burden of proof. Rather, counsel sought to achieve this result by proxy. Kane abandoned his own client and permitted Warner's defense to ride on the defense advanced by the co-defendants, which blamed his own client for the crimes.¹⁰⁸ Warner's counsel abdicated both his constitutional role as assistant and his functional role as "shaper" of the jury's perceptions of the defendant and the surrounding circumstances of the crime.¹⁰⁹ Furthermore, although the court opinion states that Warner "discussed" Kane's strategy with him at the trial, it does not say that Warner expressly or impliedly waived his constitutional right to the effective assistance of counsel.¹¹⁰

formance compelled conviction by the jury); "[D]efense counsel plays a critical role in shaping a fact-finder's and sentencer's perceptions of a defendant and the circumstances of her alleged crimes," *Goodpaster*, *supra* note 7, at 66.

103. *Warner*, 752 F.2d at 625.

104. *Strickland*, 466 U.S. at 690.

105. *Id.*

106. *Id.* Justice Marshall's dissent asserts that *Strickland* does not prevent the possibility that a "manifestly" guilty defendant could be convicted after a trial in which he received representation from a "manifestly ineffective attorney," *Strickland*, 466 U.S. at 711.

107. *Strickland*, 466 U.S. at 690.

108. *Warner*, 752 F.2d at 624. It can be argued that this strategic choice created an actual conflict of interest, which would give rise to a presumption of prejudice and constitutional error, *see supra* note 33.

109. *See supra* note 99.

110. *Warner*, 752 F.2d at 626. *See also supra* notes 42-49 and accompanying text. "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel

C. *United States v. Sanchez*: Silence by Default

Recently, the Second Circuit had occasion to visit the issue of a strategy of silence in *United States v. Sanchez*.¹¹¹ This case involved a defendant who was tried *in absentia*.¹¹² The court recognized that defense counsel's silence may violate a defendant's sixth amendment rights, citing *Martin*, but distinguished the case before it by recognizing that counsel's silence was due to his client's uncooperativeness and absence.¹¹³ Counsel was unable to investigate any possible defense.¹¹⁴ The Second Circuit held that where the client prevents the possibility of a defense by not communicating with counsel, counsel's silence is a reasonable strategy under *Strickland*.¹¹⁵ Counsel under these circumstances has no obligation to investigate, or cross-examine witnesses, or make statements based on the absence of information from the client.¹¹⁶

Counsel had participated to the extent that he had objected to the trial *in absentia*, objected to jury instructions, and moved for judgment of acquittal.¹¹⁷

The Second Circuit noted that where there exists "some reasonable basis for an active defense, defense counsel's silence may amount to a violation of a defendant's sixth amendment rights."¹¹⁸ However, the defendant cannot effectively force counsel to forgo any defense and be silent, and then challenge the inactivity as ineffective assis-

must hold the prosecution to its heavy burden of proof beyond reasonable doubt," *Cronic*, 466 U.S. at 656-57 n.19.

111. 790 F.2d 245 (2d Cir. 1986). Several state courts have also examined the matter: *People v. McKenzie*, 34 Cal. 3d 616, 668 P.2d 769, 194 Cal. Rptr. 462 (1983) (a pre-*Strickland* case which held that silence constituted ineffective assistance of counsel, and outlined methods which trial judge's might use to handle this tactic); *State v. Harvey*, 692 S.W.2d 290, 292-93 (Mo. 1985) (applying *Strickland*, *Cronic*, and *Martin*, the court held that counsel's silent strategy constructively denied the defendant of his constitutional right to counsel, and that there had been no waiver); *People v. Shelly*, 156 Cal. App. 3d 521, 528, 202 Cal. Rptr. 874, 878 (1984) (A refusal to participate is not among reasonable choices, and counsel thereby is not functioning as a vigorous advocate, citing ABA Standards, Defense Function. Characterizing counsel's conduct as "tactical does not insulate it from constitutional scrutiny," since counsel can rob him of his constitutional right to effective assistance of counsel if counsel chooses a tactic which would not be chosen by ordinary and prudent defense counsel.).

112. 790 F.2d 245, 251 (2d Cir. 1986) (court found that the defendant, by his conduct of absence, had waived his right to attend his trial).

113. *Id.* at 253.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 254 (citing *Martin*, 744 F.2d 1245, 1250-51).

tance of counsel.¹¹⁹ There was no opportunity for the trial court to inquire as to any waiver of the assistance of counsel, since the defendant was nowhere to be found.

V. A TRIAL JUDGE'S ROLE

A trial judge has the ability to deal with defense counsel who stands silent beside his client. There is authority for judicial oversight and sua sponte intervention where the court has reason to know that counsel may be acting under potential conflict of interest.¹²⁰

Recognizing that intervention stands to jeopardize the confidential relationship between the defendant and his counsel, nevertheless, the preservation of "the adversary process militates more strongly in favor of intervention than against it."¹²¹ Silence in *Martin* was held to be constructive denial of counsel and prejudicial per se, similar to when counsel is absent from a critical stage in the proceeding.¹²² *Strickland* finds that trial courts can "make early inquiry in certain situations likely to give rise to conflicts," and where such conflicts exist, there is prejudice per se.¹²³ Where it appears that the strategy of silence is developing, the court can treat the situation similarly by making the appropriate inquiry.¹²⁴

VI. CONCLUSION

From *Powell* to *Strickland* to *Cronic*, it is recognized that lawyers have the exclusive franchise to the legal knowledge of how to estab-

119. *Sanchez*, 790 F.2d at 253.

120. *Strickland*, 466 U.S. at 692 (trial courts can make early inquiry as to whether an actual conflict of interest exists); *Cuyler*, 466 U.S. at 346 n.10 and authorities cited therein (advocating the exercise of judicial supervision and inquiry as to conflicts); see also *Schwarzer*, *supra* note 86, at 655-64 (guidelines for intervening, albeit with caution, include: Pretrial monitoring to determine whether counsel has made reasonable efforts to investigate, making inquiry to satisfy the court that waiver by the defendant is as a result of the defendant's decision "based on competent legal advice," questioning counsel when a default appears imminent, advising the defendant of the right to change counsel when necessary, and raising the issue of questionable counsel conduct with counsel at sidebar once there are circumstances to justify concern).

121. *Schwarzer*, *supra* note 86, at 638.

122. See *Martin*, 744 F.2d at 1250.

123. *Strickland*, 466 U.S. at 692 (citing to FED. R. CRIM. P. 44 (c)).

124. *Martin*, 744 F.2d at 1251; *Shelly*, 156 Cal. App. 3d at 529, 202 Cal. Rptr. at 879 (trial judge should supervise and intervene, in the fact of silence, since allowing the defendant to face the prosecution without counsel and absent a waiver hinders the judicial system); *McKenzie*, 34 Cal. 3d at 626, 668 P.2d at 775, 194 Cal. Rptr. at 468 (trial judge has obligation to "assure that a criminal defendant is afforded a bona fide and fair adversary adjudication," and must use judicial power and sanctions against counsel where counsel refuses to participate).

lish a defense. The right to access to those who possess that knowledge is embodied in the sixth amendment.

From the opinions discussed above, it appears that where a reviewing court's focus is on the prejudice prong of *Strickland*, that is to say the question is whether the defendant would have been convicted anyway, counsel's silence will be seen merely as an unsuccessful trial tactic.¹²⁵ But where the weight of the inquiry is whether counsel's performance was unreasonable and constitutionally deficient, under *Strickland* and *Cronic*, silence will amount to a denial of the effective assistance of counsel in the absence of waiver.¹²⁶

Justice Marshall believes that the focus ought to be on counsel's performance.¹²⁷ After criticizing the majority for imposing the burden of showing prejudice on a defendant, he says:

[T]he assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. . . . Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer.¹²⁸

Silence is not simply a harmless error which counsel might make. Silence is not counsel exercising his best professional judgment on the issue of whether to rest after the prosecution's case for failure of the prosecution to meet its burden of proof, or whether to forgo making an opening statement, or whether to call or cross-examine certain witnesses, or whether to call the defendant to testify. Silence is a unilateral predetermined decision to do nothing. Counsel, by deliberately engaging in such conduct, is saying that he is, in fact, refusing to participate in the trial. It is as if he were not only absent from a critical part of the proceeding, but absent from the entire proceeding.

Under a *Cronic* approach, this strategy is prejudicial per se, and its use amounts to constitutional error. The same rationale which the Supreme Court uses in *Cronic* to find an actual conflict of interest or

125. *Warner*, 752 F.2d at 625.

126. *Martin*, 744 F.2d at 1250 (citing to *Cronic*, the Sixth Circuit held that counsel's conduct denied the defendant the right to subject the prosecution's case to proper adversarial testing, recognizing that counsel's behavior was the equivalent of absence from the entire proceeding, and therefrom resulted in constitutional error without the need to show prejudice).

127. *Strickland*, 466 U.S. at 711 (Marshall, J., dissenting).

128. *Id.* at 710 (Justice Marshall states further, "[T]he difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.").

a denial of counsel at a critical stage of the proceeding to be a constructive denial of the effective assistance of counsel, ought to apply to where counsel employs a strategy of silence. According to *Martin*, silence is not among reasonable strategies available to defense counsel. It is even less reasonable when it is a kind of disobedience in the face of unfavorable trial rulings, or a gamble on a reversal.

Absent a valid waiver, a defendant automatically suffers prejudice when counsel stands mute. The resulting verdict is never reliable since there is not only a breakdown of the adversarial process, it ceases to exist.

Moreover, as recommended by reviewing judges and scholars, trial judges can and should play a more active role in safeguarding the defendant's sixth amendment rights. Judges who do less are giving counsel the power to deny the defendant the right to effective assistance of counsel—a power which the court itself does not possess. When counsel clearly abdicates his role in protecting the defendant's rights, the trial judge must not also remain silent.

Jo Ellen Silberstein

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