A BROKEN SHIELD: INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN CASES OF RACIST DEFENSE ATTORNEYS

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Defense attorneys are not immune to racism, and a defense attorney who holds racist beliefs about their client's race fundamentally calls into question the representation received. Under the Sixth Amendment, all criminal defendants have the right to the effective assistance of counsel. To prevail on an ineffective assistance of counsel claim, the U.S. Supreme Court held in Strickland v. Washington *that a criminal defendant must prove that their counsel's performance was deficient and that the deficiency prejudiced the defense. The Supreme Court supplemented the* Strickland *standard in* Cuyler v. Sullivan *and* United States v. Cronic, *holding that a conflict of interest that adversely affects the representation received or a denial of counsel will satisfy the* Strickland *prejudice prong.*

Criminal defendants with racist counsel often have difficulty proving that their counsel's racism prejudiced their defense under Strickland, *particularly when there is not a direct connection between the racism and the defendant. This challenge creates a gap in protection for criminal defendants with racist defense attorneys under the* Strickland *standard. Since racism should not be tolerated in any form, this Note argues that courts should utilize the* Sullivan *standard when analyzing ineffective assistance of counsel claims of racist defense attorneys, as a defense attorney who is racist toward their client's racial group is conflicted. However, this Note deviates from the* Sullivan *standard by arguing that criminal defendants should not have to prove* Sullivan *prejudice—how the attorney's racism adversely affected the representation. Instead, courts should view a defense attorney who harbors racist beliefs about their client's race as having an inherently prejudicial conflict of interest, warranting a new trial in accordance with the guarantees of the Sixth Amendment.*

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INTRODUCTION

Imagine: you are charged with a crime and face imprisonment. You cannot afford a lawyer, but one is appointed to you. Your lawyer urges you to take a plea deal, which you ultimately accept. Years later, you find out that your lawyer holds overtly racist beliefs toward the very racial group you

belong to. This is where Anthony Dew found himself in 2021, five years after his attorney urged him to accept a plea deal that sentenced him to concurrent terms of incarceration of eight to ten years.[1]

In March 2015, Dew, a Black, Muslim man, was indicted on nineteen charges, including five counts of trafficking a person for sexual servitude and one count of rape.[2] In February 2016, Richard Doyle was appointed to represent Dew.[3] In one of Dew and Doyle's first meetings, Dew wore a kufi prayer cap due to his Islamic faith.[4] Doyle demanded that Dew remove the kufi, instructing Dew, "don't come in this room like that ever."[5] Only two weeks later, Doyle left a meeting without saying a word to Dew upon seeing Dew wearing his kufi.[6] Shortly before Dew's trial date, Doyle told Dew not to wear "that shit," referring to the kufi, in front of a court officer.[7]

Despite Doyle's problematic behavior, Dew at the time did not realize the extent of Doyle's animus toward Black and Muslim people.[8] Unbeknownst to Dew, from 2014 to 2017, Doyle made and shared numerous racist social media posts about Black and Muslim people.[9] Among these posts were statements calling for violence against Muslims, anti-Muslim slurs, comments that mocked Black people, and references to Doyle's clients as "thugs."[10] Doyle made these posts while representing Dew.[11]

Upon learning of these racist posts in 2021,[12] Dew filed a motion for a new trial and for leave to withdraw his guilty pleas, arguing that Doyle's racism was an actual conflict of interest that violated Dew's right to effective assistance of counsel under the Sixth Amendment to the U.S. Constitution and article 12 of the Massachusetts Declaration of Rights.[13] As Dew's motion attorney argued, "If you have an internal set of beliefs which put you at odds with the defendant being a person, how can you possibly say that you represent him with undivided loyalty?"[14] In the first court decision of its kind, the Massachusetts Supreme Judicial Court vacated Dew's convictions and ordered a new trial, finding that Doyle's documented racist views created

1. *See* Commonwealth v. Dew, 210 N.E.3d 904, 907–08 (2023).

2. *See id.* at 907. Further charges included assault and battery with a dangerous weapon, assault and battery, possession with intent to distribute a class A drug, distribution of a class A drug, and distribution of a class B drug. *See* Second Amended Brief for the Defendant on Appeal at 14, Commonwealth v. Dew, 210 N.E.3d 904 (2023) (No. SJC-13356).

3. *See Dew*, 210 N.E.3d at 907.

4. *See id.* A kufi is a brimless hat traditionally worn by Muslim men. *See* Second Amended Brief for the Defendant on Appeal, *supra* note 2, at 18.

5. *See Dew*, 210 N.E.3d at 907.

6. *Id.*

7. *Id.*

8. *See id.* at 909.

9. *See id.* at 908.

10. *See id.* at 908–09; *see also infra* note 205.

11. *See Dew*, 210 N.E.3d at 908.

12. Dew learned from another lawyer that Doyle was in trouble with the Committee for Public Counsel Services over the social media posts. *See* Email from Edward B. Gaffney, Defense Attorney, to author (Oct. 6, 2023, 4:55 PM) (on file with the author).

13. *See Dew*, 210 N.E.3d at 909.

14. Telephone Interview with Edward B. Gaffney, Defense Attorney (Sept. 7, 2023).

an actual conflict of interest that violated Dew's right to the effective assistance of counsel.[15]

The Sixth Amendment provides that every criminal defendant has the right to the assistance of counsel.[16] The right to counsel is considered with "peculiar sacredness"[17] as the assistance of an attorney is necessary to provide criminal defendants with a fair trial.[18] However, racism pervades our criminal justice system, including the legal profession.[19] The legal profession is among the least diverse professions in the United States[20] and is racially unrepresentative of American society.[21] Criminal defense lawyers are not immune to racism.[22] Indeed, lawyers like Doyle, who harbor racist beliefs toward the clients they represent, further entrench what is already a systemically racist criminal justice system when their biases impede on the effectiveness of the representation they provide.[23]

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15. *See Dew*, 210 N.E.3d at 914–15 ("Doyle's animus against persons of the Muslim faith and his racism against Black persons, demonstrated by his social media posts . . . and manifest in his treatment of the defendant—a Black, Muslim man—during the representation, presented an actual conflict of interest in this case.").

16. U.S. CONST. amend. VI; *see also* Strickland v. Washington, 466 U.S. 668, 685 (1984) ("[A] person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained.").

17. Avery v. Alabama, 308 U.S. 444, 447 (1940).

18. *See Strickland*, 466 U.S. at 684 ("In a long line of cases . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."); *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1034 (1995) ("[M]ost Americans believe that in our highly legalized society, it is fundamentally unfair to deprive people of their liberty or property without giving them an opportunity to present their side of the story in its best light.").

19. *See* Christina John, Russell G. Pearce, Aundray Jermaine Archer, Sarah Medina Camiscoli, Aron Pines, Maryam Salmanova & Vira Tarnavska, *Subversive Legal Education: Reformist Steps Toward Abolitionist Visions*, 90 FORDHAM L. REV. 2089, 2097 (2022) ("The American legal system has long been the engine of White supremacy, through conquest, enslavement, and Jim Crow, and later through facially neutral laws that, despite the civil rights movement, continue to maintain disparate White power and wealth.").

20. *See generally* Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (May 27, 2015, 8:25 AM), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/ [https://perma.cc/W3UU-CRRS]. *See also* Hassan Kanu, *'Exclusionary and Classist': Why the Legal Profession Is Getting Whiter*, REUTERS (Aug. 10, 2021, 7:49 PM), https://www.reuters.com/legal/legalindustry/exclusionary-classist-why-legal-profession-is-getting-whiter-2021-08-10/ [https://perma.cc/6ZEM-P4HE] ("[T]he legal profession in America has remained overwhelmingly white and male over the last decade and . . . racial diversity among lawyers has actually regressed in some respects.").

21. *See* Atinuke O. Adediran & Shaun Ossei-Owusu, *The Racial Reckoning of Public Interest Law*, 12 CAL. L. REV. ONLINE 1, 2 (2021); *see also* AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 33 (2020), https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf [https://perma.cc/MD7A-C9X2].

22. Adediran & Ossei-Owusu, *supra* note 21, at 2 ("Public defenders, legal aid attorneys, and pro bono lawyers can harbor hazardous racial biases.").

23. *See* John et al., *supra* note 19, at 2097–98.

Commonwealth v. Dew[24] was a significant decision as it has been historically difficult for criminal defendants with racist attorneys to find recourse, especially when racism is not reflected on the record.[25] This difficulty is due to the U.S. Supreme Court's ineffective assistance of counsel standard, articulated in *Strickland v. Washington*,[26] which requires criminal defendants to prove that their counsel's deficient performance was prejudicial to their case.[27] As racism can impact a defendant's representation in various, invisible ways,[28] defendants are often unsuccessful in petitioning for ineffective assistance of counsel under this standard.[29] Accordingly, there is a gap in protection for defendants who determine that their defense counsel harbored racist views toward their racial group during the representation.[30] This Note will analyze the Supreme Court's standards for ineffective assistance of counsel and will argue that a defense attorney who is racist toward their client's race has an inherently prejudicial conflict of interest such that a new trial is warranted.

Part I of this Note details the Sixth Amendment case law pertaining to the right of counsel, the ineffective assistance of counsel standards, and the ethical obligations of counsel. It then examines the role of defense attorneys and the implications of racism in the defense bar. Part II outlines approaches courts have utilized to analyze ineffective assistance of counsel claims when criminal defendants allege that their defense attorney harbored racist views toward their racial group during the representation. Finally, Part III recommends a conflict-of-interest approach for defendants with racist counsel, putting forth the proposal that such attorneys should be viewed as inherently prejudicial.

I. THE RIGHT TO COUNSEL AND THE IMPLICATIONS OF A RACIST DEFENSE ATTORNEY

To protect the fundamental right to a fair trial, the Supreme Court has established that all criminal defendants have a right to counsel under the Sixth Amendment.[31] As such, the Supreme Court has created various ineffective assistance of counsel standards.[32] This Note first examines the constitutional right to counsel in Part I.A and the Supreme Court's ineffective

24. 210 N.E.3d 904 (2023).

25. *See* Alexis Hoag-Fordjour, *Choice of Counsel*, INQUEST (Mar. 9, 2023), https://inquest.org/choice-of-counsel/ [https://perma.cc/5ZC8-Q6X2] ("There is little recourse if an indigent defendant believes their appointed lawyer's racial bias negatively impacted their case."); *see also infra* Part II.A.2.

26. 466 U.S. 668 (1984).

27. *See id.* at 687.

28. *See* Peter A. Joy & Kevin C. McMunigal, *The Right to (Unbiased) Counsel*, CRIM. JUST., Summer 2023, at 58, 60.

29. *See infra* Part II.A.2.

30. *See* Hoag-Fordjour, *supra* note 25 ("At the root of the problem is that the ineffective assistance of counsel standard does not account for racism.").

31. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *see also Strickland*, 466 U.S. at 684.

32. *See infra* Part I.B.

assistance of counsel standards in Part I.B. Part I.C then turns to the ethical obligations of counsel. Finally, Part I.D discusses racist defense attorneys and the impact of a racist defense attorney on representation.

A. The Right to Counsel

The Sixth Amendment was drafted to protect criminal defendants' rights, entitling such individuals to procedural and substantive protections to ensure they receive a fair trial.[33] In particular, the Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[34] Originally, the Sixth Amendment's right to counsel language was interpreted to mean that only defendants who could afford counsel must receive "the assistance of counsel of [their] own selection."[35] However, the right to counsel evolved to ensure that all criminal defendants have the right to an attorney.[36]

In the Supreme Court's first major case on the right to counsel, *Powell v. Alabama*,[37] the Court held that the necessity of counsel is so vital to the United States's adversarial system that a court's failure to appoint counsel in a capital case was a denial of due process under the Fourteenth Amendment.[38] The Court found the right to counsel necessary in capital cases[39] because criminal defendants often have "no skill in the science of law," lacking the ability to defend themselves and establish their innocence.[40] As such, the "right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[41] Accordingly, a court's refusal to hear a defendant's attorney would be considered a denial of

33. *See* Andrew Cohen & David Carroll, *The Right to an Attorney: Theory vs. Practice*, BRENNAN CTR. FOR JUST. (Dec. 20, 2021), https://www.brennancenter.org/our-work/analysis-opinion/right-attorney-theory-vs-practice [https://perma.cc/4D95-QRQE]; *see also Strickland*, 466 U.S. at 685 ("[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.").

34. U.S. CONST. amend. VI.

35. Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 417 (1988).

36. *See generally Gideon*, 372 U.S. 335.

37. 287 U.S. 45 (1932). In *Powell*, nine young, Black teenagers were accused of raping two White women on a train in Scottsboro, Alabama. *Id.* at 51. At the time, rape was a capital offense. *See* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 8 (2013). These teenagers were subjected to rushed trials with minimal counsel and all-White juries. *Id.*; *see also* Shaun Ossei-Owusu, *The Sixth Amendment Facade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1192 (2019).

38. *Powell*, 287 U.S. at 71; *see also* U.S. CONST. amend. XIV. Before *Powell*, a criminal defendant could obtain a lawyer, but the government had no affirmative duty to provide one. *See* Ossei-Owusu, *supra* note 37, at 1168; *see also* United States v. Van Duzee, 140 U.S. 169, 173 (1891) ("There is . . . no general obligation on the part of the government . . . to . . . retain counsel for defendants or prisoners.").

39. The ruling in *Powell* was narrowly applied to the facts of the case. *See* King, *supra* note 37, at 9. Indeed, the Court expressly refused to consider whether counsel is necessary in cases not involving the death penalty. *See Powell*, 287 U.S. at 71; *see also* Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

40. *See Powell*, 287 U.S. at 69.

41. *Id.* at 68–69.

a hearing—a due process violation.[42] Indeed, the Court found that the right to the aid of counsel is of "fundamental character."[43] Thus, the *Powell* decision held that in capital cases, the right to counsel stems from a state's obligation to provide defendants with a fair trial, grounding its decision in the Fourteenth Amendment.[44]

Six years after *Powell*, the Court enshrined the right to counsel found in the Sixth Amendment in *Johnson v. Zerbst*,[45] holding that the federal government must provide criminal defendants with an attorney in federal court.[46] This expansion was minimal due to the relatively small federal docket;[47] indeed, the Court expressly refused to expand the right to appointed counsel to all state criminal proceedings.[48] The limitations on the right to counsel at that time were exemplified in *Betts v. Brady*,[49] in which Smith Betts was charged with robbery in Maryland and could not afford a defense lawyer.[50] Despite Betts's request for an attorney, the state did not appoint a lawyer to Betts's defense, which the Supreme Court deemed permissible as the robbery charge was not a federal or capital proceeding.[51] Further, the Court in *Betts* created the "fundamental fairness" doctrine or "special circumstances" test, instructing state courts to examine the appointment of

42. *See id.* at 69.

43. *Id.* at 68.

44. *See id.* at 71; *see also* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE 697 (6th ed. 2017). The defendants in *Powell* were retried with a prominent defense attorney acting as their representative. *See* Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379, 399 (2009). Despite the Supreme Court's *Powell* decision, the assistance of a defense attorney did not solve the racism evident in the country at the time, as the jury convicted the defendants again after only minutes of deliberation. *See id.* at 402; *see also id.* at 398–99, 402 ("The Supreme Court's ruling seemed only to make Alabama whites more defensive . . . after what the *Birmingham Post* called the high court's 'stinging rebuke' of the state supreme court, anyone publicly expressing doubts about the defendants' guilt or the fairness of their trials was courting physical danger.").

45. 304 U.S. 458 (1938); *see id.* at 467 ("Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.").

46. *See id.* at 463 ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."); *see also* King, *supra* note 37, at 9; Ossei-Owusu, *supra* note 37, at 1195.

47. *See* Ossei-Owusu, *supra* note 37, at 1195.

48. *See id.*

49. 316 U.S. 455 (1942).

50. *See id.* at 456–57.

51. *See id.* at 471 ("[W]e are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case."). This limitation on the right to counsel can be seen through the lens of the battle to incorporate the Sixth Amendment. *See* Ossei-Owusu, *supra* note 37, at 1195. On the other hand, *Betts* can be viewed through a racial lens: whereas *Powell* dealt with Black defendants, Betts was White. *See* Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 28 (1942) ("The decision can be most satisfactorily explained as a muffled and possibly unconscious ruling against Federal intervention in the absence of a showing that the case involves some national interest, such as that in the minorities problem.").

counsel on a case-by-case basis.[52] Under this test, state courts had the power to appoint counsel in circumstances in which they deemed it "required in the interest of fairness."[53]

Leading scholars such as Professor Gabriel J. Chin and Professor Shaun Ossei-Owusu observe the critical role of race in the evolution of the right to counsel.[54] Between *Powell* and the Supreme Court's monumental right-to-counsel decision in *Gideon v. Wainwright*,[55] right-to-counsel cases at the Supreme Court were informed by the *Betts* special circumstances test[56] and considered "some of the most spectacular versions of race, namely ignorance, poverty, and illiteracy."[57] Indeed, throughout the 1940s and 1950s, illiterate, Black defendants were the most common parties in the Supreme Court's right-to-counsel proceedings, suggesting "race's importance in influencing the Court's jurisprudence during this period."[58] Further, the cases decided in favor of Black defendants at the federal and state level tended to have patronizing and denigrating language,[59] with the Supreme Court often describing Black defendants as "ignorant n[******]."[60] Such language implied that Black defendants' ignorance was due to their race and that a lawyer could remedy a defendant's racial ignorance.[61]

The Supreme Court finally expanded the reach of the Sixth Amendment's right to counsel thirty years after *Powell* in *Gideon v. Wainwright*, declaring that any criminal defendant "too poor to hire a lawyer" must be appointed counsel to ensure a fair trial.[62] Thus, the Court rejected the case-by-case

52. *See Betts*, 316 U.S. at 471–72; *see also* Ossei-Owusu, *supra* note 37, at 1196.

53. *Betts*, 316 U.S. at 472.

54. *See generally* Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236 (2013); Ossei-Owusu, *supra* note 37.

55. 372 U.S. 335 (1963).

56. *See* Ossei-Owusu, *supra* note 37, at 1196; *see also* Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215, 221 (2003) ("In each of [the special circumstances] cases, the Court explained why counsel was necessary in that particular case to promote fundamental fairness.").

57. *See* Ossei-Owusu, *supra* note 37, at 1201 ("[The Court's] cases . . . demonstrate that race had a seat at the table by way of the 'special circumstances' test.").

58. *Id.* at 1197; *see also id.* at 1201 ("Race haunted much of this jurisprudence.").

59. *See* Chin, *supra* note 54, at 2239 ("The Supreme Court . . . often recognized and remedied injustices faced by African-American defendants. But courts did not do so using the language of rights and justice; instead, they frequently rested their decisions on African-American ignorance and incompetence.").

60. *See id.* at 2241; *see also* Fikes v. Alabama, 352 U.S. 191, 196 (1957) (describing the defendant as an "uneducated N[****], certainly of low mentality, if not mentally ill"); Chandler v. Fretag, 348 U.S. 3, 4 (1954) (referring to the defendant as a "middle-aged N[****] of little education"); Ward v. Texas, 316 U.S. 547, 555 (1942) (referring to the defendant as an "ignorant n[****]").

61. *See* Chin, *supra* note 54, at 2242.

62. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[R]eason and reflection require us to recognize that in 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."). *Powell* and *Gideon* both involved felony charges, but there was no language in either case limiting the reach of the Sixth Amendment's right to counsel exclusively to felony cases. *See* King, *supra* note 37, at 11; *see also* James J. Tomkovicz, *An Introduction to Fifty Years of* Gideon, 99 IOWA L. REV. 1875, 1878 (2014). The Court eventually clarified the breadth of *Gideon*, holding that "absent a knowing and intelligent waiver, no person may be imprisoned

approach created in *Betts* and implemented a categorical right to counsel to all criminal defendants.[63] *Gideon* recognized lawyers as "necessities, not luxuries," in the U.S. legal system,[64] emphasizing that a fair trial cannot be achieved without the aid of counsel.[65] *Gideon* was monumental in guaranteeing defense counsel to those unable to afford it[66] and establishing a fundamental legal protection for criminal defendants.[67]

B. Ineffective Assistance of Counsel Standards

The mere presence of an attorney is not sufficient to meet the Sixth Amendment's right to counsel mandate;[68] the right to counsel is the right to the *effective assistance* of counsel.[69] As the Sixth Amendment envisions an attorney's role as essential to the U.S. criminal justice system, a criminal defendant must be assisted by an attorney "who plays the role necessary to ensure that the trial is fair."[70] When a defendant believes that their lawyer was ineffective, there are several standards the Supreme Court has developed to determine a valid ineffective assistance of counsel claim.[71] Part I.B.1 will examine the basic standard for ineffective assistance of counsel claims under *Strickland v. Washington*. Part I.B.2 will discuss alternative ways the

for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

63. *See Gideon*, 372 U.S. at 345 ("Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree."); *see also* King, *supra* note 37, at 9; Ossei-Owusu, *supra* note 37, at 1206 ("The Court's abandonment of the test and the related logic put forth by early legal reformers represented a new approach to a longstanding tradition of considering race in right to counsel jurisprudence.").

64. *See Gideon*, 372 U.S. at 344.

65. *See id.* ("[O]ur . . . constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."); *see also* King, *supra* note 37, at 10 ("[T]he need for a professional prosecutor makes clear the need for a defense attorney."); Schaefer, *supra* note 39, at 8 ("Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.").

66. *See Gideon*, 372 U.S. at 344; *see also* Hoag-Fordjour, *supra* note 25 ("In guaranteeing defense counsel to people too poor to afford representation, the court extended the Founders' promise of fairness and equality to the criminally accused.").

67. *See* Yasmin Cader & Emma Andersson, *Celebrating 60 Years of* Gideon v. Wainwright, ACLU (Mar. 18, 2023), https://www.aclu.org/news/criminal-law-reform/celebrating-sixty-years-of-gideon-v-wainwright [https://perma.cc/3PKT-GU9S].

68. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984).

69. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[D]efendants facing felony charges are entitled to the effective assistance of competent counsel."); *see also* United States v. Cronic, 466 U.S. 648, 654 (1984) ("The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but 'Assistance,' which is to be 'for his defence.'"); Avery v. Alabama, 308 U.S. 444, 446 (1940) (stating that if there was no effective assistance of counsel standard, it would "convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel").

70. *Strickland*, 466 U.S. at 685.

71. *See infra* Parts I.B.1–2.

Supreme Court has held courts can analyze ineffective assistance of counsel claims.

1. *Strickland v. Washington*

In *Strickland v. Washington*, the Court set forth the standard for what a criminal defendant must show to prove ineffective assistance of counsel in violation of the Sixth Amendment.[72] To prevail on an ineffective assistance of counsel claim, a defendant must show that (1) their counsel's performance was deficient and (2) the deficient performance prejudiced the defense.[73] The first prong of the *Strickland* standard requires criminal defendants to show that their attorney's representation fell below an objective standard of reasonableness, with reasonableness measured by "prevailing professional norms."[74] Courts must examine "whether counsel's assistance was reasonable considering all the circumstances"[75] and must consider the facts of the particular case viewed at the time of the attorney's conduct.[76] Although the Court listed an attorney's fundamental duties—including the duty of loyalty, the duty to avoid a conflict of interest, and the duty to advocate for the defendant's cause—as relevant to the reasonableness inquiry, the Court noted that there cannot be a rigid set of rules dictating an attorney's conduct.[77] Indeed, the purpose of the Sixth Amendment's right to counsel is to ensure that criminal defendants receive a fair trial, not to improve the legal quality of representation.[78]

Additionally, the Court held that reviewing courts must be highly deferential to attorneys' performances under the first *Strickland* prong.[79] Specifically, the defendant must overcome the presumption that the attorney's actions "might be considered sound trial strategy."[80] The Court deemed such a deferential approach necessary to limit "intrusive" ineffective assistance challenges, which the Court believed would proliferate upon unfavorable decisions to defendants.[81] Indeed, the Court acknowledged the

72. *See Strickland*, 466 U.S. at 687.

73. *See id.*; Tomkovicz, *supra* note 62, at 1883 ("*Strickland v. Washington* gave content to the right *Gideon* deemed fundamental by affirming and defining a constitutional entitlement to *effective* assistance.").

74. *See Strickland*, 466 U.S. at 688; *see also* Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 700 (2011) ("Under the first prong of this test, a defendant has to overcome a strong presumption of competence to show that his lawyer fell below prevailing professional norms in an unreasonable manner.").

75. *Strickland*, 466 U.S. at 688.

76. *See id.* at 690.

77. *See id.* at 689 ("Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." (citing United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir. 1976))).

78. *See id.* at 689; *see also* Engle v. Isaac, 456 U.S. 107, 134 (1982) ("We have long recognized . . . that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.").

79. *See Strickland*, 466 U.S. at 689.

80. *Id.* (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

81. *See id.* at 690.

temptation defendants face to second-guess their counsel's strategy after an adverse ruling and how easy it is for a court to conclude that a counsel's act or omission was unreasonable after their strategy proved unsuccessful.[82] Further, the Court believed such intrusive challenges could adversely impact a defense attorney's performance by impairing a defense attorney's independence, discouraging a defense attorney's willingness to accept assigned cases, and undermining attorney-client trust.[83] Therefore, the Court held that every effort must be made "to eliminate the distorting effects of hindsight," as there are countless ways to provide professional, competent, and effective counsel for a given case, even when the result is not one the parties hoped for.[84]

To summarize, the first prong of the *Strickland* test requires a criminal defendant to identify the acts or omissions of their attorney that were not the result of reasonable professional judgment.[85] A reviewing court must then determine whether the acts or omissions were outside the range of professionally competent assistance, considering the counsel's function "to make the adversarial testing process work in a particular case" and the presumption of adequate assistance.[86]

An attorney's error, even if outside professional standards, does not automatically qualify as ineffective assistance of counsel.[87] Accordingly, the second prong of the *Strickland* test requires any deficiencies in an attorney's performance to be prejudicial to the defense.[88] Namely, a criminal defendant must prove that their "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[89] "Attorney errors come in an infinite variety" and cannot be classified by prejudicial value.[90] Indeed, "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."[91] Thus, a criminal defendant must show that, but for the counsel's unprofessional errors, there is a reasonable probability that the result of the case would have been different.[92]

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82. *See id.* at 689; *see also* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 343 (1983) ("Trials appear in a different light after all the evidence is in and a verdict has been rendered. At that point it is possible to see that had counsel made different evidentiary, strategic, or tactical choices, the result might have been more favorable.").

83. *See Strickland*, 466 U.S. at 690.

84. *See id.* at 689; *see also* Engle v. Isaac, 456 U.S. 107, 133–34 (1982) ("Every trial presents a myriad of possible claims.").

85. *See Strickland*, 466 U.S. at 690.

86. *See id.*

87. *See id.* at 691.

88. *Id.* at 692.

89. *Id.* at 687; *see also* Lockhart v. Fretwell, 506 U.S. 364, 372 (1993) ("Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.").

90. *See Strickland*, 466 U.S. at 693.

91. *Id.*

92. *See id.* at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."); *see also* Roberts, *supra* note 74, at 700 ("Many courts have

Finally, the Court explained that the *Strickland* standard does not consist of "mechanical rules."[93] Instead, *Strickland* is meant to guide a reviewing court's decision, with the ultimate focus being on the fundamental fairness of the challenged proceeding.[94] Therefore, courts analyzing an ineffective assistance of counsel claim should focus on whether the result of the challenged proceeding is unreliable due to a failure in the adversarial process.[95]

The *Strickland* test has been subject to a multitude of criticisms, namely for the difficulty defendants face in meeting the standard.[96] *Strickland* critics have deemed the two-pronged standard to be "an almost insurmountable hurdle for defendants claiming ineffective assistance."[97] Critics argue that the deference afforded to attorneys indicates that the Court was more concerned about the judicial economy and attorneys' reputations than the capabilities of defense attorneys.[98]

Both *Strickland* prongs have been individually subject to criticism.[99] Critics have characterized the first prong, the deficient performance prong, as overly challenging for defendants to meet due to the deference it affords

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interpreted this 'different outcome' inquiry to mean a different trial outcome—namely, acquittal, or conviction on a lesser charge. Sometimes, courts interpret 'different outcome' to include the likelihood of a lower sentence *after* a trial."). The Supreme Court clarified that courts cannot solely examine a case's outcome in its prejudice prong analysis; they must also determine whether the outcome was obtained through fair and reliable means. *See Lockhart*, 506 U.S. at 369–70.

93. *See Strickland*, 466 U.S. at 696.

94. *See id.*

95. *See id.*

96. *See* Carissa Byrne Hessick, *Proving Prejudice for Ineffective Assistance Claims After* Frye, 25 FED. SENT'G REP. 147, 150 (2012) ("The *Strickland* test is . . . notoriously difficult for defendants to meet, and the number of successful ineffective assistance claims is quite low."); *see also* McFarland v. Scott, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) ("Ten years after the articulation of [the *Strickland*] standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'" (quoting *Strickland*, 466 U.S. at 685)); *cf.* Alexis Hoag-Fordjour, *White Is Right: The Racial Construction of Effective Assistance of Counsel*, 98 N.Y.U. L. REV. 770, 825–29 (2023) (analyzing *Strickland* through critical race theory).

97. *See* Calhoun, *supra* note 35, at 427; *see also* Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. RICH. L. REV. 1327, 1352 (1995) ("After *Strickland*, the courts will rarely, if ever, seriously review cases of substandard lawyering . . . .").

98. *See* Calhoun, *supra* note 35, at 427; *see also* Clarke, *supra* note 97, at 1357 ("Trial judges (particularly in small rural jurisdictions where all bar members and judges know each other intimately) may well be reluctant to criticize trial counsel's performance. *Strickland* invites the court to take the path of least resistance—to simply find that even if errors occurred, those errors did not prejudice the defendant."); Richard Klein, *Civil Rights in Crisis: The Racial Impact of the Denial of the Sixth Amendment Right to Counsel*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 163, 182 (2015) ("Courts are not *highly deferential* when evaluating the work of a doctor, an architect, or an accountant; why should the work of a defense attorney be treated differently? The injury suffered by a defendant whose liberty may have been sacrificed due to an incompetent attorney suffers far more than the client of a negligent accountant or architect.").

99. *See* Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1584–85 (2020).

attorneys.[100] The second prong, the prejudice prong, has been deemed too high of a standard for criminal defendants to meet.[101] Justice Thurgood Marshall criticized the prejudice prong in his *Strickland* dissent, pointing out that it is often difficult for a defendant to prove prejudice on the "cold record."[102] Further, Justice Marshall believed that prejudice should not be a consideration in ineffective assistance of counsel claims at all.[103] Instead, he argued "that a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby."[104] Despite *Strickland*'s critics, the *Strickland* test has remained the standard for federal courts assessing ineffective assistance of counsel claims.[105]

100. *See id.*; *see also Strickland*, 466 U.S. at 708 (Marshall, J., dissenting) ("[T]he majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes 'professional' representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel."); Richard 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, 633–34 (1986) ("The primary reason appellate courts give for denying ineffective assistance claims is that the court does not wish to second-guess a lawyer's decisions concerning proper trial strategy or tactics."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20 n.74 (1997) ("After-the-fact rationalizations of defense attorney choices carry weight, while after-the-fact assessments of the consequences of those choices do not. The upshot is that only the kind of choice that is unjustifiable *on its face* can be the basis for a finding of attorney ineffectiveness."); *see, e.g.*, Hoag-Fordjour, *supra* note 25 ("[W]hen evaluating whether counsel's performance was deficient, courts rely on a presumption of professional reasonableness and competency—a set of presumptions based on white norms.").

101. *See* Cecelia Klingele, *Vindicating the Right to Counsel*, 25 FED. SENT'G REP. 87, 87 (2012) ("*Strickland*'s prejudice prong has proven to be a formidable obstacle in vindicating the right to counsel."); *see also* Elizabeth Connelly, *The Striking Similarities Between the Business Judgment Doctrine and the* Strickland *Test*, 18 GEO. J. LEGAL ETHICS 669, 671 (2005) ("[O]pponents of the prejudice prong argue that '[i]n practice, . . . almost nothing short of proof of actual innocence will merit a reversal of conviction, however unfairly obtained.'"); *see also* Richard L. Gabriel, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1277 (1986) ("The prejudice inquiry . . . is inappropriate in the context of defining a defendant's sixth amendment rights."); Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1931–32 (1994) (arguing that the *Strickland* prejudice prong is difficult to overcome in capital cases); *cf.* William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 145–47 (1995) (arguing that the prejudice prong of *Strickland* has unincorporated the right to counsel).

102. *See Strickland*, 466 U.S. at 710 (Marshall, J., dissenting); *see also* Calhoun, *supra* note 35, at 434 ("Often the record may not reflect the damage visited upon the defendant's case by counsel's ineffective assistance.").

103. *See Strickland*, 466 U.S. at 711–12 (Marshall, J., dissenting).

104. *Id.* at 712.

105. *See* Garza v. Idaho, 139 S. Ct. 738, 743–44 (2019) (using *Strickland* as the ineffective assistance of counsel standard); Farhane v. United States, 77 F.4th 123, 126 (2d Cir. 2023) (same); Tryon v. Quick, 81 F.4th 1110, 1141 (10th Cir. 2023) (same); Ayala v. Medeiros, 638 F. Supp. 3d 38, 68 (D. Mass. 2022) (same).

2. Extending *Strickland*: *Cuyler v. Sullivan* and *United States v. Cronic*

Two Supreme Court cases provide additional mechanisms for satisfying the *Strickland* prejudice prong.[106] First, under the *Cuyler v. Sullivan*[107] standard, a defendant can meet the prejudice requirement in *Strickland* by "establish[ing] that an actual conflict of interest adversely affected his lawyer's performance."[108] An actual conflict of interest occurs when the potential for misconduct is deemed intolerable.[109] Defense attorneys have an ethical duty to avoid conflicting representation and report conflicts of interest to the court when they arise during trial.[110] When a defense attorney has a conflict of interest with their client, they breach the fundamental duty of loyalty to their client.[111] However, the impact of a conflicting defense attorney is often difficult to measure.[112]

Notably, criminal defendants pursuing a *Sullivan* conflict-of-interest claim must still show that the conflict of interest adversely affected their attorney's performance.[113] Indeed, *Sullivan* is not a per se prejudice standard as the adverse effect requirement operates similarly to the prejudice prong of the *Strickland* standard, requiring defendants to prove how the conflict impacted the representation.[114] Thus, to satisfy the *Strickland* prejudice prong using the *Sullivan* standard, a criminal defendant must prove that their counsel had

106. *See* Paul Messick, Note, *Represented by a Racist: Why Courts Rarely Grant Relief to Clients of Racist Lawyers*, 109 CALIF. L. REV. 1231, 1235 (2021).

107. 446 U.S. 335 (1980).

108. *Id.* at 350; *see also* Tyler Daniels, Note, *Presumed Prejudice: When Should Reviewing State Courts Assume a Defendant's Conflicted Counsel Negatively Impacted the Outcome of Trial?*, 49 FORDHAM URB. L.J. 221, 236 (2021) ("The *Sullivan* exception negates the second prong of the *Strickland* test—requiring a demonstration of prejudice."). The Supreme Court has not defined "adverse effect," leading courts to apply different standards. Most federal circuit courts, including the First, Second, Fifth, Sixth, Ninth, and Tenth, require a two-part standard for defendants to show "that some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken *due to* the attorney's other loyalties or interests." West v. People, 341 P.3d 520, 531–32 (Colo. 2015) (quoting United States v. Levy, 25 F.3d 146, 157 (2d Cir. 1994)). Other circuit courts, including the Fourth and Eighth Circuits, require an additional showing that the alternative strategy was "objectively reasonable" under the facts known at the time. *See id. But see Sullivan*, 446 U.S. at 355 (Marshall, J., dissenting in part) (finding that the standard under the Sixth Amendment should be "whether an actual, relevant conflict of interests existed during the proceedings. If it did, the conviction must be reversed.").

109. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 807 n.18 (1987).

110. *See Sullivan*, 446 U.S. at 346; *see also* Commonwealth v. Dew, 210 N.E.3d 904, 912 (2023) (stating that the Constitution guarantees criminal defendants the right "to the untrammeled and unimpaired assistance of counsel free of any conflict of interest" (quoting Commonwealth v. Hodge, 386 Mass. 165, 167 (1982))).

111. *See* Strickland v. Washington, 466 U.S. 668, 692 (1984); *see infra* note 127 and accompanying text.

112. *See Strickland*, 466 U.S. at 692; *see also* Joy & McMunigal, *supra* note 28, at 60.

113. *See Sullivan*, 446 U.S. at 350; *see also* LAFAVE ET AL., *supra* note 44, at 785 (stating that the *Sullivan* standard requires "a showing both that (1) counsel was placed in a situation where conflicting loyalties pointed in opposite directions (an 'actual conflict'), and (2) counsel proceeded to act against the defendant's interests").

114. *See Strickland*, 466 U.S. at 692.

an actual conflict of interest by representing them and that the conflict adversely affected the representation received.[115] As *Sullivan* focuses on the prejudice prong of the *Strickland* test, criminal defendants making a conflict-of-interest claim must still meet the first prong of *Strickland* by showing that their counsel's performance was deficient.[116] If criminal defendants can demonstrate an actual conflict of interest, the defendant can likely show that their counsel's performance fell below an objective standard of reasonableness, meeting the first prong of *Strickland*.[117]

The second Supreme Court case to elaborate on the *Strickland* prejudice prong is *United States v. Cronic*,[118] in which the Court held that an actual or constructive denial of the assistance of counsel is legally presumed to result in prejudice.[119] The Court identified three instances in which the circumstances are so likely to prejudice the criminal defendant that proving prejudice is unnecessary: (1) where the assistance of counsel has been completely denied, (2) where counsel has failed to subject the prosecution's case to meaningful adversarial testing, and (3) where specific circumstances suggest that there is only a minute chance that even competent counsel could provide effective assistance.[120] In such circumstances, prejudice is so likely and easy to identify that a case-by-case prejudicial inquiry is not worth the cost.[121]

C. Ethical Obligations of Counsel

What attributes must an attorney possess to qualify as effective? Although the Court in *Strickland* noted that there cannot be a rigid set of rules dictating an attorney's conduct,[122] as the attorney-client relationship is one of agency, there are ground rules in which lawyers, as agents, must serve their clients,

115. *See Sullivan*, 446 U.S. at 350.

116. *See* Mickens v. Taylor, 535 U.S. 162, 174 (2002); *see also* Daniels, *supra* note 108, at 236.

117. *See* Daniels, *supra* note 108, at 236–37.

118. 466 U.S. 648 (1984).

119. *Id.*

120. *See id.* at 658–60; *see also* Allison Stephens, *A Method to the Madness: The Importance of Proving Prejudice in the Context of the Guilty Plea*, 39 GA. L. REV. 1487, 1491 (2005). For the third instance of per se prejudice identified by the Court, the Court used *Powell* as an example. In *Powell*, the Court held that the appointment of counsel was so indefinite and close to the trial that there was, in effect, a denial of counsel as "under [the] circumstances the likelihood that counsel could have performed as an effective adversary was so remote." *See Cronic*, 466 U.S. at 660–61 (citing Powell v. Alabama, 287 U.S. 45, 58 (1932)); *cf.* Kimberly Sachs, Note, *You Snooze, You Lose, and Your Client Gets a Retrial:* United States v. Ragin *and Ineffective Assistance of Counsel in Sleeping Lawyer Cases*, 62 VILL. L. REV. 427, 437–42 (2017) (explaining that *Cronic* has been applied by four circuits, with somewhat different tests, when attorneys sleep through portions of trials).

121. *See Cronic*, 466 U.S. at 656 ("When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred." (footnote omitted)); *see also* Strickland v. Washington, 466 U.S. 668, 692 (1984).

122. *See supra* note 77 and accompanying text.

the principals.[123] Indeed, attorneys have duties and obligations to their clients, including "competence, diligence and zealousness, communication, confidentiality, and loyalty."[124] Attorneys must provide competent representation, meaning that they must possess "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[125] Further, the duty of loyalty is a core value of the legal profession that the Supreme Court described as "perhaps the most basic of counsel's duties."[126] A conflicted attorney inherently divides the loyalty of counsel, threatening the guarantee of effective assistance of counsel.[127] Thus, attorneys have an ethical duty to avoid representing clients they are conflicted with, as such conflict may impair the attorney's ability to represent clients properly.[128]

There are varying definitions of actual conflicts of interest in criminal cases.[129] The Supreme Court has held that an actual conflict of interest occurs when the potential for misconduct is deemed intolerable.[130] Under the American Bar Association's Model Rules for Professional Conduct ("Model Rules"), Rule 1.7 states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[131] Rule 1.7

123. *See* GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING 2-3 (4th ed. 2017).

124. *See id.*; *see also* CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION § 4-1.2(b) (AM. BAR ASS'N 2017) ("Defense counsel have the difficult task of serving both as officers of the court and as loyal and zealous advocates for their clients.").

125. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983). An attorney's failure to comply with other ethical rules may constitute a lack of competence. *See* ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 26 (9th ed. 2019).

126. *See Strickland*, 466 U.S. at 692; *see also* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); N.Y. RULES OF PRO. CONDUCT pmbl. (N.Y. STATE BAR ASS'N 2022) ("The touchstone of the client-lawyer relationship is the lawyer's obligation . . . to act with loyalty during the period of the representation."); HAZARD, JR. ET AL., *supra* note 123, at 11-3 ("Loyalty to clients is one of the core values of the legal profession.").

127. *See* Daniels, *supra* note 108, at 223; *see also* Mark W. Shiner, *Conflicts of Interest Challenges Post* Mickens v. Taylor*: Redefining the Defendant's Burden in Concurrent, Successive, and Personal Interest Conflicts*, 60 WASH. & LEE L. REV. 965, 971 (2003) ("A conflict of interest threatens the guarantee of effective counsel not because of what it causes an attorney to do, but because of what it might keep an attorney from doing."). Sanctions for conflict-of-interest violations include disciplinary action, motions to disqualify counsel, civil liability, forfeiture of fees, criminal charges, and malpractice liability. *See* HAZARD, JR. ET AL., *supra* note 123, at 11-50 to 11-51; *see also* MONROE H. FREEMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 9.01 (5th ed. 2016).

128. *See* HAZARD, JR. ET AL., *supra* note 123, at 5-16.

129. *See* Joy & McMunigal, *supra* note 28, at 59. The Restatement of the Law Governing Lawyers characterizes a conflict of interest as "a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interest or by the lawyer's duties to another current client, a former client, or a third person." RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 121 (AM. L. INST. 2000).

130. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 807 n.18 (1987).

131. MODEL RULES OF PRO. CONDUCT r. 1.7(a). A conflicted lawyer can still represent their client, but only if certain safeguards are met and the conflict is not strictly prohibited. *See* HAZARD, JR. ET AL., *supra* note 123, at 11-21. These safeguards include the lawyer believing they can competently and diligently represent the client and the informed consent, confirmed

articulates that a concurrent conflict of interest includes attorney-client relations in which "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."[132] A lawyer's personal interests include their political, social, and emotional interests as well as their thoughts, beliefs, feelings, and creeds.[133] The Model Rules also recognize several personal conflicts of interest that are strictly prohibited.[134] The prohibited conflicts share the attributes of being a high risk to a lawyer's ability to represent their client adequately and are challenging to monitor.[135]

Per American Bar Association standards, defense attorneys have an obligation to acknowledge and manage explicit and implicit racial biases throughout the course of their professional work.[136] However, the Supreme Court has not recognized racism itself to be a conflict of interest.[137] Further, although the Model Rules have additionally not deemed racism a conflict of interest, Rule 8.4(g) states that discrimination on the basis of race by a lawyer in the practice of law is professional misconduct.[138] However, only a minority of states have adopted Rule 8.4(g) or an equivalent antibias rule.[139] Many critics of Rule 8.4(g) consider the rule to be a violation of lawyers' First Amendment rights in addition to being unconstitutionally vague.[140]

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in writing, from the client. *See* MODEL RULES OF PRO. CONDUCT r. 1.7(b); *see also* HAZARD, JR. ET AL., *supra* note 123, at 5-16 to 5-17 ("Where a lawyer has proceeded in the face of [a conflict of interest] without obtaining informed consent from the affected clients, or where the lawyer has obtained consent, but the conflict is 'non-consentable,' there is a breach of the ethical duty of loyalty."). This Note will not examine circumstances in which a racist attorney seeks a client's consent, instead examining only circumstances in which the racism becomes evident after the representation.

132. *See* MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2).

133. *See* 1 ROY D. SIMON, NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 425 (2020–2021 ed. 2020); *see also* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 10 ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.").

134. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.8(c), (d), (j); *see also* Joy & McMunigal, *supra* note 28, at 60. *But see* HAZARD, JR. ET AL., *supra* note 123, at 11-5 ("Despite the long-standing and universal understanding in the profession and in the courts that *some* conflicts of interest are intolerable and cannot be allowed to occur or continue, more benign conflicts are pervasive throughout the legal profession, and are in fact inevitable.").

135. *See* Joy & McMunigal, *supra* note 28, at 60; *see also* Strickland v. Washington, 466 U.S. 668, 692 (1984) ("[I]t is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.").

136. *See* CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION §§ 4-1.1(d), 4-1.6 (AM. BAR ASS'N 2017); *see also* Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93, 125 (2021).

137. *See* Mayfield v. Woodford, 270 F.3d 915, 925 (9th Cir. 2001).

138. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016).

139. *See* Nellie Q. Barnard & Christopher Heredia, *Efforts Toward Improved Diversity and Inclusion Through the Anti-bias Rule*, FED. BAR ASS'N (Dec. 15, 2021), https://www.fedbar.org/blog/efforts-toward-improved-diversity-and-inclusion-through-the-anti-bias-rule/ [https://perma.cc/2NN5-EQER]; *see also* Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 198 (2017).

140. *See* Bradley S. Abramson, *ABA Model Rule 8.4(g): Constitutional and Other Concerns for Matrimonial Lawyers*, 31 J. AM. ACAD. MATRIM. LAW. 283, 288–301 (2019); *see also* Debra Cassens Weiss, *Federal Appeals Court Tosses Lawyer's Challenge to Anti-bias*

Finally, there is no rule of professional conduct deeming it impermissible for lawyers to discriminate in a private capacity, outside the practice of law.[141]

D. Racist Defense Attorneys

Despite *Gideon*'s guarantee of counsel, fairness and equality to indigent criminal defendants remains unfulfilled.[142] The American legal system has been an engine of White supremacy "through conquest, enslavement, and Jim Crow, and later through facially neutral laws that, despite the civil rights movement, continue to maintain disparate White power and wealth."[143] Indeed, the United States's criminal justice system is systemically racist,[144] and such racism pervades the legal profession.[145] Criminal defense lawyers are not immune to racism and can harbor hazardous racial biases.[146] Such biases are particularly problematic for indigent Black defendants like Dew, as racial bias can impact the quality of defense they receive.[147]

Ethics Rule, ABA J. (Aug. 31, 2023, 8:55 AM), https://www.abajournal.com/web/article/federal-appeals-court-tosses-lawyers-challenge-to-anti-bias-ethics-rule [https://perma.cc/8U7Y-TG35].

141. *See* Alex B. Long, *Of Prosecutors and Prejudice (or "Do Prosecutors Have an Ethical Obligation Not to Say Racist Stuff on Social Media?")*, 55 U.C. DAVIS L. REV. 1717, 1723 (2022). At least one court has affirmed a character and fitness committee's holding that a racist individual should not be admitted to the bar. *See* Hale v. Comm. on Character & Fitness for Ill., No. 01-C-5065, 2002 WL 398524, at *5 (N.D. Ill. Mar. 13, 2002), *aff'd*, 335 F.3d 678 (7th Cir. 2003).

142. *See* Hoag-Fordjour, *supra* note 25; *see also* Klein, *supra* note 98, at 184–87.

143. John et al., *supra* note 19, at 2097; *see also* Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 56 (2021) ("Quite simply, law is haunted by race.").

144. *See* John et al., *supra* note 19, at 2097; *see also* William Quigley, *Racism: The Crime in Criminal Justice*, 13 LOY. J. PUB. INT. L 417, 417 (2012) ("The biggest crime in the U.S. criminal justice system is that it is a race-based institution where African-Americans are directly targeted and punished in a much more aggressive way than [W]hite people."); Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 999, 1008 (2013) ("Indisputably, race plays a significant role in whether a person is thrust into the criminal justice system at all and how (s)he is treated once in it.").

145. *See* John et al., *supra* note 19, at 2098 ("The legal profession recapitulates White people's disproportionate representation, power, and resources—discriminatory impact occurs at every step through admission to the bar." (footnote omitted)); *see also* Ellis v. Harrison, 891 F.3d 1160, 1167 (9th Cir. 2018) (Nguyen, J., concurring) ("People of color are still underrepresented in the legal profession but overrepresented among criminal defendants and face greater odds of conviction and higher average sentences."), *rev'd on reh'g en banc*, 947 F.3d 555 (9th Cir. 2020); Rhode, *supra* note 20; *cf.* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868–69 (2017) (explaining that racial bias is "a familiar and recurring evil that, if left unaddressed, . . . risk[s] systemic injury to the administration of justice").

146. Adediran & Ossei-Owusu, *supra* note 21, at 2; *see* Rapping, *supra* note 144, at 1009; *see also* Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 760 (2012) ("No one is immune from racial bias.").

147. *See* Hoag-Fordjour, *supra* note 25 ("Given the lack of racial diversity within the legal profession—less than 5 percent of lawyers are Black—the system overwhelmingly appoints white lawyers to represent Black defendants. This often intersects disastrously with racial bias, whether that be implicit bias or . . . overt racism.").

Racism can impact every facet of representation.[148] Defense attorneys carry out countless discretionary actions and inactions on behalf of their clients.[149] If an act or omission is derived from racial animus, it is often difficult to pinpoint precisely how that racism impairs an attorney's performance.[150] Such racial animus need not be explicit;[151] implicit biases can also impact criminal defense work.[152] Implicit biases may affect how a defense attorney evaluates a case, impact attorney-client meetings,[153] and create biased acceptance of punishments.[154] As such, racial bias, whether explicit or implicit, calls into question every action and inaction of a defense attorney.[155]

Furthermore, although racism can impact representation, there is a belief that defense attorneys do not need to share the same worldview as their clients.[156] Indeed, "[c]riminal defense attorneys are accustomed to representing individuals who commit reprehensible acts, and [the criminal justice system] assume[s] that they can set aside any personal distaste for

148. *See generally* Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413 (2011).

149. *See* Ellis v. Harrison, 947 F.3d 555, 562 (9th Cir. 2020) (en banc) (Nguyen, J., concurring); *cf.* FREEMAN & SMITH, *supra* note 127, § 2.03 ("[T]he [defense] lawyer is the client's 'champion against a hostile world'—a zealous advocate against the government itself." (footnote omitted) (citing CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION 145–46 (AM. BAR ASS'N 1971)).

150. *See Ellis*, 947 F.3d at 562 (en banc) (Nguyen, J., concurring); *see also* Commonwealth v. Dew, 210 N.E.3d 904, 913 (2023) ("[I]t is impossible to know what different choices [a nonconflicted] counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." (quoting United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006))).

151. *See* Lyon, *supra* note 146, at 758 ("Explicit bias refers to the kinds of bias that people knowingly express and sometimes embrace."). There are several procedural safeguards in the United States's criminal justice system to ward off explicit racial bias. *See id.*; *see also* Rose v. Mitchell, 443 U.S. 545, 556 (1979) (holding that discrimination on the basis of race in selecting grand jurors "strikes at the fundamental values of our judicial system and our society as a whole"). *See generally* Batson v. Kentucky, 476 U.S. 79 (1986) (holding that the defense can object if they believe the prosecution is exercising peremptory strikes on the basis of race).

152. *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2629 (2013) ("Implicit racial biases refer to the unconscious associations we make about racial groups."); *see also* Rapping, *supra* note 144, at 1011 ("[Implicit racial bias] affects us all regardless of whether we believe ourselves to be free of racial biases, have positive associations with members of other races, or are members of a minority group, including African American." (footnotes omitted)).

153. Implicit biases can affect how attorneys interpret their client's facial expressions and behaviors, negatively influence attorney behavior, cause attorneys to treat clients in stereotypical ways, and create mutual distrust between the attorney and client. *See* Richardson & Goff, *supra* note 152, at 2637–38.

154. *See id.* at 2635–41; *see also* Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 650 (2017).

155. *See Dew*, 210 N.E.3d at 913 ("[W]hen a counsel's professional judgment is impaired by an actual conflict of interest, every action, and inaction, is called into question, and we cannot be confident that the outcome of the proceedings is fair and just.").

156. *See* Ellis v. Harrison, 947 F.3d 555, 563 (9th Cir. 2020) (en banc) (Nguyen, J., concurring).

such clients during the representation."[157] Thus, once attorneys walk into the courtroom, the belief is that they can leave their differences of worldview at the door and become zealous advocates for their clients.[158] Whether racism qualifies as a defense attorney's worldview may impact how judges interpret the severity of racism from defense counsel.[159] Further, whether a defense attorney's racism makes their representation ineffective is currently unsettled.

II. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARDS FOR DEFENDANTS WITH RACIST ATTORNEYS

Which ineffective assistance of counsel standard should courts utilize when a defense attorney harbors racist views toward their client's race? Although *Strickland* is the standard for assessing ineffective assistance of counsel claims, the test can be problematic for defendants with racist defense attorneys due to the challenge of identifying exactly how racism impacts a defense.[160] The *Strickland* ineffective assistance of counsel standard requires a prejudicial showing, which is nearly impossible for most defendants affected by racist counsel to prove when racism is not on the record.[161] Further, the Supreme Court has not articulated the extent to which prejudice should be presumed from extreme racism of defense counsel.[162] In addition to *Strickland*, courts have used *Sullivan* and *Cronic* to assess cases of racist defense attorneys.[163] Part II.A will examine the *Strickland* approach to ineffective assistance of counsel claims dealing with racist defense attorneys, while Part II.B will examine the conflict-of-interest and denial-of-counsel approaches.

157. *See id.* At the extreme of this sentiment, defense attorneys have represented the enemy throughout American history. *See* Amy Porter, *Representing the Reprehensible and Identity Conflicts in Legal Representation*, 14 TEMP. POL. & CIV. RTS. L. REV. 143, 145 (2004).

158. *See Ellis*, 947 F.3d at 563 (en banc) (Nguyen, J., concurring) ("The Sixth Amendment does not demand that a criminal defendant and [their] counsel share a worldview—merely that the attorney loyally represent the client's interests.").

159. *See* Commonwealth v. Dew, No. 1584CR10164, 2022 WL 19265161, at *5 (Mass. Super. Ct. Aug. 29, 2022) (holding that a defense attorney and client do not need to share the same worldview), *rev'd*, 210 N.E.3d 904 (2023). *But see* Brief for NAACP Legal Def. & Educ. Fund, Inc. & New Eng. Innocence Project as Amici Curiae Supporting Appellant at 38, Commonwealth v. Dew, 210 N.E.3d 904 (2023) (No. SJC-13356) ("When someone publicly expresses such hateful language about a group of people, we know that hate does not disappear when they put on a suit and walk into the courtroom.").

160. *See* Hoag-Fordjour, *supra* note 25 ("There is little recourse if an indigent defendant believes their appointed lawyer's racial bias negatively impacted their case."); *see also* Keith Swisher, *Disqualifying Defense Counsel: The Curse of the Sixth Amendment*, 45 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 374, 385–86 (2014) ("On the back end, courts rarely reverse the trial court's disqualification order or the defendants' convictions on the basis of conflicted or otherwise ineffective representation.").

161. *See* Joy & McMunigal, *supra* note 28, at 60.

162. *See Ellis*, 947 F.3d at 560 (en banc) (Nguyen, J., concurring) (citing Mayfield v. Woodford, 270 F.3d 915, 925 (9th Cir. 2001) (en banc)).

163. *See infra* Parts II.A–B.

A. Strickland *Approach*

As the basic standard for ineffective assistance of counsel claims, courts have utilized the *Strickland* two-pronged test to analyze cases in which a defense attorney harbors racist views toward their client's race.[164] When racism is apparent on the record, *Strickland* is a straightforward test.[165] However, apparent racism on the record is not the norm, and it is often difficult to meet the *Strickland* standard when a smoking gun is missing from the record.[166] This section will examine *Strickland* claims when racism is on and off the record, and the resulting ineffective assistance of counsel holdings from the respective courts.

1. Applying *Strickland* When Racism Is Apparent on the Record: *State v. Davis*

In the case of *State v. Davis*,[167] Henry Davis, a Black man, was accused of stabbing an elderly White woman.[168] During voir dire, Davis's White defense attorney spoke to an all-White panel of potential jurors about the jurors' feelings toward Black people, stating, "*Sometimes I just don't like black people. Sometimes black people make me mad just because they're black.*"[169] The defense attorney claimed to have made these statements in an attempt to get the jurors to acknowledge their hidden feelings about race.[170] Davis was eventually convicted of murder, robbery with a deadly weapon, and burglary with a battery and was given the death penalty.[171] In a motion for post-conviction relief, Davis argued, among other things, that he should be granted a new trial because of his defense attorney's comments during voir dire.[172] The trial court deemed the attorney's comments a legitimate tactical approach by counsel, denying Davis's motion for a new trial.[173]

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164. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that a successful showing of ineffective assistance of counsel requires (1) a criminal defendant's counsel's performance to be deficient, and (2) that the deficient performance prejudiced the defense).

165. *See* Messick, *supra* note 106, at 1236 ("To let stand a verdict where a lawyer used racist language to describe his client in the courtroom casts doubt on the verdict because the lawyer's animus may infect jurors' decision-making."); *see also* Dean v. Narvaiza, 502 P.3d 177, 181 (2022) (holding that defense counsel's statements to jurors that Black people have stereotypical attributes constituted ineffective assistance of counsel under *Strickland*); Illinois v. Sanders, 182 N.E.3d 151, 156 (Ill. App. Ct. 2020) (holding that counsel inserting racial stereotypes and personal racist biases into his closing argument constituted ineffective assistance of counsel under *Strickland*).

166. *See* Messick, *supra* note 106, at 1236; *see also* Michael Tracy, *Race as a Mitigating Factor in Death Penalty Sentencing*, 7 GEO. J.L. & MOD. CRITICAL RACE PERSP. 151, 155 (2015) ("Naturally, such smoking guns are rare."). For a similar analysis, see Messick, *supra* note 106, at 1236–37.

167. 872 So. 2d 250 (Fla. 2004).

168. *See id.* at 251.

169. *Id.* at 252.

170. *Id.*

171. *Id.* at 253.

172. *See id.*

173. *Id.*

The Supreme Court of Florida disagreed.[174] Applying *Strickland*, the court held that Davis's counsel's comments about his own racial prejudice constituted deficient performance under the first prong of *Strickland*.[175] Namely, the court believed that the comments either unnecessarily alienated jurors who did not have the same racist views or legitimized racial prejudice and, in either case, did not achieve counsel's goal of bringing racial animus out into the open.[176] With regard to the second prong of *Strickland*, the court held that there was evidence on the record to suggest that counsel's expressed racism during voir dire "create[d] an unacceptable risk that prejudice clouded counsel's judgment and diminished the force of his advocacy."[177] Indeed, the court held that counsel's failure to bring forth two witnesses whose testimony would have implicated others in the murder, his decision not to explore standard mitigation testimony, and the reprisal of counsel's racism in his closing argument suggested that "improper racial considerations compromised counsel's representation."[178] Thus, the court held that the racism evident on the record undermined the court's confidence in the verdict, granting Davis a new trial on ineffective assistance of counsel grounds.[179]

2. Applying *Strickland* When Racism Is Not Apparent on the Record: *State v. Yarbrough* and *Jones v. Campbell*

It is difficult to meet the *Strickland* ineffective assistance of counsel standard in instances in which, unlike *Davis*, there is no apparent racism on the record.[180] Namely, when racist behavior occurs outside the courtroom, ineffective assistance of counsel claims fail because prejudice cannot be shown.[181] *State v. Yarbrough*[182] illustrates the difficulty of successfully petitioning for ineffective assistance of counsel under *Strickland* in such cases. Defendant Kevin Yarbrough was convicted of aggravated murder and conspiracy to commit aggravated murder.[183] Yarbrough's defense attorney told another attorney after the trial that "he knew black people he liked, but

174. *See id.* ("[W]e conclude that the expressions of racial animus voiced by trial counsel during voir dire so seriously affected the fairness and reliability of the proceedings that our confidence in the jury's verdicts of guilt is undermined.").

175. *Id.* at 256.

176. *See id.* at 255 ("We condemn these statements not because counsel chose to discuss the topic of race in voir dire, which is permissible, but because he did so in a manner that fatally compromised his ability to effectively represent Davis in his capital trial and created a reasonable probability of unreliable convictions.").

177. *Id.* at 256.

178. *Id.* at 257.

179. *See id.*

180. *See* Messick, *supra* note 106, at 1236; *see also* Tracy, *supra* note 166, at 155 ("Naturally, such smoking guns are rare.").

181. *See* Messick, *supra* note 106, at 1235 ("When racist lawyers are involved, the barrier to habeas relief under *Strickland* arises from difficulties in establishing that a lawyer's racism caused the constitutionally deficient performance.").

182. No. 17-2000-10, 2001 Ohio App. LEXIS 1930 (Ohio Ct. App. Apr. 30, 2001).

183. *Id.* at *2.

that [Yarbrough] was a n[*****]."[184] Although the court found such behavior "grossly inappropriate, offensive, and distasteful," the court concluded that there was no evidence on the record to show that the defense attorney's statement prejudiced the trial.[185]

In *Jones v. Campbell*,[186] the court also held that alleged racism by defense counsel did not prejudice the representation received due to a lack of connection between the racism and the defendant.[187] In *Jones*, an Alabama jury found Aaron Lee Jones guilty of capital murder.[188] Jones brought forth testimony from the legal secretary of his post-conviction counsel in his federal habeas corpus petition, in which counsel had told the secretary "something to the effect of 'that n[*****] is going to fry.'"[189] Accordingly, Jones petitioned for a new trial on the grounds that this racism made his attorney ineffective.[190] Although the court ruled that Jones's claim of ineffective assistance of counsel was procedurally defaulted,[191] the court also found the claim meritless.[192] Like *Yarbrough*, the court ruled that there was no evidence to prove the racist statement affected counsel's level of representation.[193] The court noted that the alleged racist statement happened about thirteen years after Jones's trial, there was no evidence of the attorney making any racist remarks to Jones himself, the statement was made after the representation occurred, and the statement was made to the legal secretary, not Jones.[194]

These cases reveal a similar pattern of courts requiring a direct link between counsel's racism and their client to meet the *Strickland* prejudice prong.[195] Namely, courts look for concrete evidence on the record that counsel's racism impacted the representation instead of analyzing the potential, invisible implications of a racist defense attorney.[196] Finding such

184. *Id.* at *15–16.
185. *Id.* at *16.
186. 436 F.3d 1285 (11th Cir. 2006).
187. *See id.* at 1304.
188. *Id.* at 1288.
189. *Id.* at 1304.
190. *See id.* at 1303.
191. *See id.* at 1304 ("[W]e decline to consider the merits of this claim because Jones did not clearly present this issue to the district court as a specific, enumerated claim of ineffective assistance of counsel.").
192. *See id.* at 1304–05.
193. *See id.*
194. *See id.*
195. *See* Edwards v. Ryan, No. CV-14-1547-PHX-DJH, 2015 U.S. Dist. LEXIS 106712, at *14 (D. Ariz. July 22, 2015) (holding that even if counsel's performance was deficient due to racially derogatory comments made during plea negotiations, there was no demonstrated prejudice); *see also* United States v. Farr, 297 F.3d 651, 659 (7th Cir. 2002) (holding that although counsel referring to the defendant as "brother" throughout the trial was questionable, there was no demonstrated prejudice).
196. *See* State v. Davis, 872 So. 2d 250, 256 (2004); *see also* Messick, *supra* note 106, at 1237 ("Courts' refusal to consider the pernicious, invisible effects of racism on representation may be a reaction to the difficulty of constraining a rule that would grant habeas relief solely on the basis of a lawyer's racist actions outside the courtroom absent any clear representational failure on the cold record.").

a prominent link is rare, as usually the record does not reflect blatant racism.[197] Courts' caution in handling cases in which racism is not explicitly on the record reveals the difficulty in assessing how racist statements by counsel out of court should be handled.[198] As explained in *Strickland*, courts do not want to encourage the proliferation of ineffective assistance of counsel claims such that the justice system becomes undermined by intrusive, posttrial challenges.[199] However, this caution makes the *Strickland* test a high hurdle for defendants with racist defense attorneys to meet when there is not racism apparent on the record.[200]

B. Alternative Approaches

Courts have applied standards other than *Strickland* to ineffective assistance of counsel claims premised on defense attorneys harboring racist views about their client's race.[201] Namely, courts have analyzed such claims utilizing conflict-of-interest and denial-of-counsel standards.[202] This section will focus on two prominent cases using these alternative standards.

1. Conflict-of-Interest Approach

In the first ruling of its kind, the Massachusetts Supreme Judicial Court held in *Commonwealth v. Dew* that an appointed defense attorney's racism toward Black and Muslim people was a conflict of interest to his Black, Muslim client, vacated his client's convictions, and ordered a new trial.[203] This motion proceeding began when Anthony Dew, an indigent Black man of Islamic faith who was convicted on a number of sex trafficking-related charges, filed a motion for a new trial and to withdraw his guilty pleas after learning that his appointed defense attorney, Richard Doyle,[204] made

197. *See* Calhoun, *supra* note 35, at 434; *see also* Telephone Interview with Edward B. Gaffney, *supra* note 14 ("In the context of a racist lawyer, you cannot use [the *Strickland* test] because if you do, you just eliminate racism from the question . . . . If you apply [*Strickland*] to a case . . . like in Dew's . . . the record as it was did not show on its face anything that Doyle did that was harmful.").

198. *See* Messick, *supra* note 106, at 1237.

199. *See* Strickland v. Washington, 466 U.S. 668, 690 (1984).

200. *See* Sullivan v. Fairman, 819 F.2d 1382, 1391 (7th Cir. 1987) ("[W]e expect that few petitioners will be able to pass through the 'eye of the needle' created by *Strickland*." (footnote omitted)); *see also* Calhoun, *supra* note 35, at 427; Messick, *supra* note 106, at 1235 ("[C]ourts are loath to connect a lawyer's racist comments to his representation of a particular client unless those comments were made in a courtroom or to the client directly.").

201. *See infra* Parts II.B.1–2.

202. *See infra* Parts II.B.1–2.

203. *See generally* Commonwealth v. Dew, 210 N.E.3d 904 (2023). Massachusetts is the only state that has held that an attorney's racism constitutes a conflict of interest. *In Judicial First, Massachusetts Supreme Court Reverses Conviction of Black Muslim Man Represented by Racist, Islamophobic Court-Appointed Attorney*, LEGAL DEF. FUND (June 15, 2023), https://www.naacpldf.org/press-release/in-judicial-first-massachusetts-supreme-court-reverses-conviction-of-black-muslim-man-represented-by-racist-islamophobic-court-appointed-attorney/ [https://perma.cc/X4U4-XBFP].

204. Doyle died in 2021, the same year that Dew became aware of Doyle's posts. *See Dew*, 210 N.E.3d at 909 n.14.

numerous racist social media posts about Black and Muslim people on Facebook, even while representing Dew.[205] Additionally, Doyle had made numerous derogatory comments about Dew's kufi prayer cap in preparation for trial.[206]

Prior to Dew's discovery of Doyle's social media posts, the posts were reported to the Committee for Public Counsel Services (CPCS).[207] CPCS investigated the social media posts and concluded in 2017 that based on the posts, Doyle had an actual conflict of interest representing non-Caucasian and Muslim clients.[208] As a result, CPCS suspended Doyle from taking criminal case assignments for a year and required him to complete ethics and cultural competency courses.[209]

After learning about these posts, Dew filed a motion for a new trial, arguing that Doyle had an actual conflict of interest which violated his right to effective assistance of counsel under the Massachusetts Declaration of Rights and the Sixth Amendment.[210] During the motion proceeding, the Commonwealth acknowledged that Doyle was racist but argued that Doyle's racism did not impact the level of representation that Dew received.[211] The motion judge agreed with the Commonwealth, concluding, among other things, that "no matter how disturbing Doyle's personal views were, there [was] no indication in the factual record . . . that they influenced Doyle's representation of the defendant."[212]

On appeal, the Massachusetts Supreme Judicial Court took a different approach, finding that Doyle's racism against Muslim and Black people, evident through his pattern of social media posts and manifested through his

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205. Doyle's posts included a picture of Black men wearing gear in support of former President Donald J. Trump with the caption, "5 minutes after Trump legalizes weed in all 50 states." Brief for NAACP Legal Def. & Educ. Fund, Inc. & New Eng. Innocence Project as Amici Curiae Supporting Appellant, *supra* note 159, at 13. Another post had a picture of Black children looking distraught with the caption: "Don't glorify shooting people then cry like a b[****] when someone you love gets shot." *Id.* Doyle had also referred to his clients in his social media posts as "[a]ssorted thugs and bad guys." *Id.* Further examples of Doyle's social media posts can be seen in Brief for NAACP Legal Def. & Educ. Fund, Inc. & New Eng. Innocence Project as Amici Curiae Supporting Appellant, *supra* note 159, at 13–14 and *Dew*, 210 N.E.3d at 908 nn.9–10.

206. *See supra* notes 4–7 and accompanying text.

207. *See* Brief for NAACP Legal Def. & Educ. Fund, Inc. & New Eng. Innocence Project as Amici Curiae Supporting Appellant, *supra* note 159, at 12–13. CPCS consists of fifteen members appointed by the Governor, the Speaker of the House of Representatives, the President of the Senate, and the Massachusetts Supreme Judicial Court to oversee "the provision of legal representation to indigent persons in criminal and civil cases and administrative proceedings in which there is a right to counsel." *Committee Members*, COMM. FOR PUB. COUNS. SERVS., https://www.publiccounsel.net/committee/ [https://perma.cc/T7PA-3MEK] (last visited Nov. 14, 2024).

208. *See* Brief for NAACP Legal Def. & Educ. Fund, Inc. & New Eng. Innocence Project as Amici Curiae Supporting Appellant, *supra* note 159, at 15. CPCS also concluded that Doyle had conflicts with undocumented individuals and people who are not cisgendered. *Id.* at 15 n.5.

209. *See id.* at 15; *see also Dew*, 210 N.E.3d at 909.

210. *See Dew*, 210 N.E.3d at 909.

211. *See* Telephone Interview with Edward B. Gaffney, *supra* note 14.

212. *Dew*, 210 N.E.3d at 910 n.16 (alteration in original).

derogatory comments toward Dew's kufi prayer cap, was an actual conflict of interest.[213] The court held that Doyle's treatment of Dew revealed that Doyle could not "divorce his animus from his conduct as the defendant's counsel."[214] There were not a few, stray social media posts or comments made in the wake of a shocking event; the pattern of racist posting coupled with Doyle's behavior toward Dew revealed that Doyle's biases impacted his legal abilities.[215]

The Massachusetts Supreme Judicial Court did not utilize the *Strickland* or *Sullivan* standards but instead based its decision on article 12 of the Massachusetts Declaration of Rights.[216] Article 12 independently guarantees the right to effective assistance of counsel in Massachusetts and provides greater safeguards than the Sixth Amendment.[217] The Supreme Judicial Court has interpreted article 12 to mean that if a defendant establishes an actual conflict of interest, they are entitled to a new trial without a showing of prejudice, which departs from the *Strickland* and *Sullivan* standards that require a prejudicial showing.[218] Therefore, a prejudicial showing is unnecessary in Massachusetts once an actual conflict of interest is present, as a court "cannot be confident that the outcome of the proceedings is fair and just."[219] Indeed, the impact of a conflicted defense attorney on the representation received is likely to be pervasive, though it may manifest in unpredictable ways.[220] Thus, in Massachusetts, a conflicted attorney has "infect[ed] the defendant's representation to the point where 'prejudice is

213. *See id.* at 914.
214. *Id.* at 915.
215. *See id.*
216. Mass. CONST. pt. 1, art. XII.
217. *See* Commonwealth v. Hodge, 386 Mass. 165, 169 (1982).
218. *See Dew*, 210 N.E.3d at 912–13 ("[U]nder art. 12, if a defendant establishes an actual conflict of interest, he is entitled to a new trial without a further showing; he need not demonstrate that the conflict adversely affected his lawyer's performance or resulted in actual prejudice." (quoting Commonwealth v. Mosher, 455 Mass. 811, 819 (2010))); *see also Hodge*, 386 Mass. at 170 ("Such a fundamental right should not depend upon a defendant's ability to meet such an impossible burden [of proving prejudice] . . . ."); Brief for NAACP Legal Def. & Educ. Fund, Inc. & New Eng. Innocence Project as Amici Curiae Supporting Appellant, *supra* note 159, at 17 ("Under Massachusetts law, a conflicted lawyer is never harmless."). If the Massachusetts Supreme Judicial Court had utilized the *Sullivan* standard, *Dew* may have turned out like *Mayfield v. Woodford*, 270 F.3d 915 (9th Cir. 2001), in which the *Sullivan* standard was used to analyze an ineffective assistance of counsel claim of a racist defense attorney. *See generally id.* As the *Sullivan* standard requires criminal defendants to prove prejudice, the *Mayfield* court held that the defense attorney's racism was not prejudicial to the representation received. *See id.* at 925 ("Mayfield has not demonstrated that [the defense attorney] performed poorly *because of* the alleged conflicts."). Because the Massachusetts Supreme Judicial Court utilized the Massachusetts standard in *Dew*, proving prejudice was unnecessary. *See Dew*, 210 N.E.3d at 912–13.
219. *Dew*, 210 N.E.3d at 913.
220. *Id.* (quoting *Mosher*, 455 Mass. at 819); *see also* United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) ("It is impossible to know what different choices [a nonconflicted] counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings."); Second Amended Brief for the Defendant on Appeal, *supra* note 2, at 20 ("For it is impossible to know what decisions Attorney Doyle would have made if he had not been afflicted by racism and religious bigotry.").

"inherent in the situation," such that no impartial observer could reasonably conclude that the attorney is able to serve the defendant with undivided loyalty.'"[221] Notably, the Massachusetts Supreme Judicial Court recognized that it was difficult and speculative to ask a defendant to prove how their attorney's racism may have impacted the representation.[222]

Turning to the facts of Dew's case, the court concluded that it was not certain whether Doyle's racial animus motivated his actions or omissions while representing Dew.[223] On one hand, it is unclear whether an attorney without such racist views would have negotiated a better plea deal for Dew.[224] However, on the other hand, the court could not presume zealous advocacy on Doyle's part given Doyle's racist views toward Black and Muslim individuals like Dew.[225] In this way, the Massachusetts Supreme Judicial Court held that defense attorneys who display racial animus toward their client's race have a conflict of interest such that a new trial ought to be ordered to remedy the injustice faced by the defendant.[226]

2. Denial-of-Counsel Approach

Another approach to assessing ineffective assistance of counsel claims in the case of a racist defense attorney is evident in Judge Jacqueline H. Nguyen's concurrence in *Ellis v. Harrison*,[227] in which she applied the *Cronic* standard.[228] Namely, Judge Nguyen believed that a defense counsel's racism could have impacted the trial in invisible ways, creating, in effect, a denial of counsel such that habeas relief was warranted.[229]

Ezzard Ellis was convicted of special circumstance murder, attempted murder, and two counts of robbery in 1996.[230] In 2003, Ellis was sent a newspaper article about his appointed defense attorney, Donald Ames, whose own daughters reported Ames's "frequent use of deprecating remarks and racial slurs about his clients."[231] Ellis obtained declarations on Ames's

221. *Dew*, 210 N.E.3d at 914 (quoting *Mosher*, 455 Mass. at 819–20).

222. *See id.* at 915–16. Doyle's representation included decisions on pretrial options, investigation, discovery, development of the defense theory, and the plea. There is evidence that Doyle's racism impacted these decisions: Doyle did not file a motion to suppress or contact the Commonwealth about a possible guilty plea until the first day of trial. *See* Second Amended Brief for the Defendant on Appeal, *supra* note 2, at 34 n.23.

223. *See Dew*, 210 N.E.3d at 915.

224. *See id.*

225. *See id.*

226. *See id.* at 915–16.

227. 947 F.3d 555 (9th Cir. 2020) (en banc). The opinion of the majority is an order directing the district court to grant a conditional writ of habeas corpus. *Id.* at 555–56. Judge Nguyen's concurrence explains the legal conclusions the majority must have utilized to grant relief. *See* Messick, *supra* note 106, at 1233.

228. *Ellis*, 947 F.3d at 563 (en banc) (Nguyen, J., concurring) ("Defense counsel's documented extreme racist animus for a client creates an egregious circumstance that warrants the *Cronic* presumption of prejudice without searching the record . . . .").

229. *See id.*

230. *See* Ellis v. Harrison, 891 F.3d 1160, 1163 (9th Cir. 2018), *rev'd on reh'g en banc*, 947 F.3d 555 (9th Cir. 2020).

231. *Id.*

racism from Ames's daughters as well as people who had worked with Ames,[232] and eventually filed a federal habeas corpus petition.[233]

A unanimous three-judge panel of the U.S. Court of Appeals for the Ninth Circuit denied habeas, referring to the *Strickland* standard.[234] The judges found that Ellis could not identify acts or omissions by Ames that fell below a standard of reasonableness, thus failing the first prong of *Strickland*.[235] Additionally, the judges found that Ellis's case lacked prejudice, the second necessity in the *Strickland* test.[236]

Ellis petitioned for, and received, a rehearing en banc.[237] In the *Ellis* en banc decision, the court—in a two-paragraph decision—granted habeas relief after the state conceded it was warranted.[238] In Judge Nguyen's concurrence, which only two other judges signed onto,[239] she addressed the ineffective assistance of counsel aspect of the case that the majority failed to delve into.[240] Emphasizing that the purpose of the right to effective counsel is to ensure a fair trial, Judge Nguyen noted that "[a] trial is fundamentally unfair if defense counsel harbors extreme and deep-rooted ill will toward the defendant on account of his race."[241] She explained that because a defense attorney makes countless discretionary decisions, racism will inherently impact such representation even if there is no way to pinpoint exactly how the defense is impaired.[242]

Instead of concluding that a racist defense attorney is a conflict of interest, as the Massachusetts Supreme Judicial Court did in *Dew*, Judge Nguyen found Ames's racist behavior to be egregious enough that a complete denial

232. Ames's daughters said Ames had "contempt for people of other races and ethnic groups," recalling one client who Ames had referred to as a "n[*****]" who "got what he deserved." *Id.* Those who worked with Ames said he used racist terms to describe his clients and "consistently refer[red] to his African American employees as 'n[******].'" *Id.* (first alteration in original).

233. *See id.* at 1164.

234. *See id.* at 1166.

235. *See id.*

236. *See id.*

237. *See* Ellis v. Harrison, 947 F.3d 555 (9th Cir. 2020) (en banc).

238. *See id.* at 556 ("In light of the State's concession that habeas relief is warranted, we summarily reverse the district court's denial of Ellis's petition."); *see also* Unofficial Transcript of Oral Argument at 8, Ellis v. Harrison, 947 F.3d 555 (9th Cir. 2020) (en banc) (No. 16-56188), 2018 WL 9522247 ("When a criminal defense attorney harbors extreme animus towards the defendant's racial group, it creates a great likelihood that the attorney will perform ineffectively but in ways that are not likely to be apparent on the cold record. Under such circumstances, the court should apply a rule of per se prejudice under the Cronic framework and to allow this Court to reach this important question and to adopt such a rule.").

239. *See* Messick, *supra* note 106, at 1242 (arguing that the state supporting the habeas petition created justiciability issues for some of the judges because the parties were no longer truly adverse to one another).

240. *See Ellis*, 947 F.3d at 556 (en banc) (Nguyen, J., concurring) ("I write separately because I strongly disagree with the majority's refusal to explain its decision . . . . The parties have asked us, and we are obligated, to decide whether Ellis received the effective assistance of counsel guaranteed by the Sixth Amendment."); *see also* Messick, *supra* note 106, at 1233.

241. *Ellis*, 947 F.3d at 562 (en banc) (Nguyen, J., concurring).

242. *See id.*

of counsel was warranted under *Cronic*.[243] Thus, a showing of prejudice was unnecessary in Ellis's case.[244] Judge Nguyen did qualify her concurrence, noting that not every defense attorney who utters a racial epithet constitutes ineffective counsel, as the Sixth Amendment does not require an attorney and client to share the same worldview.[245] However, she explained that when a lawyer's racist beliefs are extreme and deep-rooted, it would be impossible for them to represent a non-White client fairly.[246] Thus, clear evidence of racism from a defense attorney should be presumptively prejudicial to a criminal defendant's trial.[247]

III. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS OF RACIST DEFENSE ATTORNEYS SHOULD BE ANALYZED THROUGH AN INHERENTLY PREJUDICIAL CONFLICT-OF-INTEREST STANDARD

Effective assistance of counsel has not been granted to all criminal defendants despite the guarantees of the Sixth Amendment.[248] Namely, the criminal justice system, and even defense attorneys themselves, are not immune to racism.[249] Although the Supreme Court has created standards to analyze ineffective assistance of counsel claims—namely through *Strickland*, *Sullivan*, and *Cronic*[250]—it is often difficult for criminal defendants with racist defense attorneys to successfully plead ineffective assistance of counsel claims when the racism is not apparent on the record.[251]

To address this gap in protection, this part argues that ineffective assistance of counsel claims in which a defense attorney harbors racial animus toward their client's race should be analyzed through the *Sullivan* conflict-of-interest standard. Further, this Note proposes that defense attorney racism toward their client's race is an inherently prejudicial conflict of interest and should be grounds for a new trial without a showing of prejudice under *Sullivan*. Part III.A examines the deficiencies in utilizing the *Strickland* and *Cronic* standards in assessing ineffective assistance of counsel claims of racist defense attorneys, whereas Part III.B discusses the endorsed inherently prejudicial conflict-of-interest approach.

243. *See id.* at 563.
244. *See id.*
245. *See id.* ("Criminal defense attorneys are accustomed to representing individuals who commit reprehensible acts, and we assume that they can set aside any personal distaste for such clients during the representation.").
246. *See id.* at 564.
247. *See id.*
248. *See* U.S. CONST. amend. VI; *supra* note 142 and accompanying text.
249. *See supra* Part I.D.
250. *See supra* Part I.B.
251. *See supra* notes 180–81 and accompanying text.

A. Pitfalls of Utilizing the Strickland *or* Cronic *Standards in Cases of Racist Defense Attorneys*

As discussed in Part II.A.2, *Strickland* is a problematically high standard for criminal defendants who cannot point to racism on the record.[252] Namely, prejudice is difficult to prove without a direct link between the racist attorney and the defendant.[253] Again, racism is often not on the record,[254] and its impact on the level of representation is usually unknown,[255] making the *Strickland* prejudice prong a high hurdle for criminal defendants with racist counsel.[256] By using *Strickland* as the standard for measuring such ineffective assistance of counsel claims, courts ultimately take race out of the analysis. That is, if there is no evidence of racism on the record itself, all courts are able to examine is whether the attorney did or did not do their job, with a high level of deference to attorneys.[257] This undermines the purpose of the right to effective counsel, disregards the entirety of the defendant's claim, and ignores the role racism and bias play in decision-making. Thus, the *Strickland* approach is defective in circumstances in which a defense attorney is racist toward their client's racial group due to the high bar of prejudice criminal defendants are required to meet.

A *Cronic* approach in these cases also offers subpar protection for criminal defendants who have received racist representation. In *Ellis*, Judge Nguyen wrote in her concurrence that a racist defense attorney is equivalent to the denial of counsel, as a racist defense attorney can never fairly or adequately represent their client.[258] Accordingly, Judge Nguyen stated that in cases of explicit racism, prejudice should be presumed.[259] Although Judge Nguyen rightly recognized the need to presume prejudice in cases of racist defense attorneys, using a denial-of-counsel approach can be inconsistent with the facts of the case. For example, in *Commonwealth v. Dew*, Doyle did represent Dew. Indeed, Dew's motion attorney noted, "[I]t would be virtually impossible to take the trial transcript and then make the argument 'it's like [Dew] didn't have a lawyer at all.'"[260] Although having a defense attorney who harbors racial animus toward their client's race undermines the *confidence* of courts in the fairness of the outcome, ineffective assistance of

252. *See supra* Part II.A.2.

253. *See supra* note 195 and accompanying text.

254. *See supra* note 166 and accompanying text.

255. *See* Ellis v. Harrison, 947 F.3d 555, 562 (9th Cir. 2020) (en banc) (Nguyen, J., concurring) ("An attorney's nonverbal cues conveying racist contempt for the defendant—such as a sigh, a roll of the eyes, or a half-hearted closing argument—will never appear in the transcript but will no doubt influence the jury . . . . Even harder to measure is the effect of actions that defense counsel fails to take for no reason other than racist indifference to the defendant's fate.").

256. *See supra* note 200 and accompanying text.

257. *See supra* Part II.A.2; *see also* Oral Argument at 16:12, Commonwealth v. Dew, 210 N.E.3d 904 (2023) (No. SJC-13356), https://www.youtube.com/watch?v=yWl6788YmjM [https://perma.cc/5C26-RP4N]; *supra* note 79 and accompanying text.

258. *See Ellis*, 947 F.3d at 564 (en banc) (Nguyen, J., concurring).

259. *See id.*

260. Telephone Interview with Edward B. Gaffney, *supra* note 14.

counsel claims premised on racist defense attorneys thus far are not situations in which counsel did absolutely nothing for their client. Indeed, these are not attorneys who fell asleep during trial.[261] In fact, this is the dichotomy of the issue itself—though the attorneys hold racist beliefs about their client's race, they advocated for their clients in some capacity. Although it is often difficult to pinpoint exactly how racism impacts a defense, it is equally challenging in many cases to argue that a racist defense attorney is a *complete* denial of counsel, whether constructively or literally.[262]

B. Applying an Inherently Prejudicial Conflict-of-Interest Standard to Racist Defense Attorneys

Ineffective assistance of counsel claims based on defense attorneys who harbor racist beliefs about their client's race should be analyzed through the *Sullivan* standard as a conflict of interest.[263] However, this Note deviates from the federal standard by arguing that the conflicted representation should be viewed as inherently prejudicial and criminal defendants should thus be granted a new trial without needing to show *Sullivan* prejudice.[264] Part III.B.1 categorizes defense attorneys who are racist toward their client's race as having conflicts of interest, and Part III.B.2 argues that racist defense attorneys should be considered inherently prejudicial.

1. Racism Is a Conflict of Interest

When attorneys harbor racist beliefs about their client's race, such racism should be viewed as a conflict of interest, thus warranting a *Sullivan* analysis.[265] Prohibited conflicts of interest are characterized by their high risk and inability to be monitored.[266] A defense attorney who is explicitly racist toward the racial group their client belongs to, whether in court or out of court, presents a high risk to the level of representation the client will receive; racism toward one's client cripples counsel's obligation to provide the client with undivided loyalty.[267] Although an attorney can claim to leave their biases at the courtroom door, such an understanding of bias is dated; biases, both implicit and explicit, cannot be left at the courtroom door.[268] Further, being racist toward a racial group that your client belongs to is

261. *Cf.* Sachs, *supra* note 120.

262. *See supra* note 260 and accompanying text. *But see* Sheri Lynn Johnson, *Racial Antagonism, Sexual Betrayal, Graft, and More: Rethinking and Remedying the Universe of Defense Counsel Failings*, 97 WASH. U. L. REV. 57, 99–100 (2019) (arguing that racist lawyers should be analyzed under the *Cronic* standard).

263. *See supra* Part I.B.2.

264. *See supra* note 226 and accompanying text.

265. Racism is a personal interest or belief of a lawyer. *See* MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS'N 1983).

266. *See supra* note 135.

267. *See supra* note 126.

268. *See generally* Edkins, *supra* note 148. *See also* Brief for NAACP Legal Def. & Educ. Fund, Inc. & New Eng. Innocence Project as Amici Curiae Supporting Appellant, *supra* note 159, at 38 ("When someone publicly expresses such hateful language about a group of people, we know that hate does not disappear when they put on a suit and walk into the courtroom.").

entirely different from disagreeing with your client's actions.[269] Indeed, representation by a racist defense attorney is not a situation in which the attorney believes their client committed reprehensible crimes, but that the client is reprehensible themself.[270]

Additionally, when a defense attorney harbors racist beliefs toward their client's race, the impact of such racism on the level of representation received is difficult to monitor.[271] Hours of work go into representation before entering the courtroom, and the impact of a racist defense attorney on said representation is unknown, particularly with no evidence of racism on the record.[272] Although there may be objective actions or inactions that courts can measure, such as an improper investigation, it will generally be speculative as to how counsel's bias impacted their actions or inactions.[273] Courts cannot determine whether the defense attorney spent less time on the case than they would have if the client was a different race, whether the jury picked up hostility in the attorney-client relationship, or whether the attorney's case theory was not as strong as it would have been with a client of a different race.[274] This difficulty in monitoring the effects of a racist defense attorney is precisely why the prejudice aspect of ineffective assistance of counsel claims is so problematic for criminal defendants whose defense attorneys harbor racial animus toward their racial group. Regardless of the ultimate impact, an attorney who harbors racist beliefs about their client's race undermines the legitimacy and reliability that the representation was fair and just.[275]

Finally, as *Sullivan* is one mechanism to satisfy *Strickland*'s prejudice prong, the first prong of *Strickland* must still be met in ineffective assistance of counsel claims; namely, the defendant must prove their counsel's performance was deficient.[276] By establishing that racist defense attorneys should be categorized as having conflicts of interest, conflicted defense attorneys violate counsel's ethical obligations to their client, making their representation deficient from professional standards and satisfying the first prong of *Strickland*.[277]

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269. *See* Brief for NAACP Legal Def. & Educ. Fund, Inc. & New Eng. Innocence Project as Amici Curiae Supporting Appellant, *supra* note 159, at 38 ("There is a critical difference between not liking something someone has allegedly done and hating someone for who they are."); *see also* Buck v. Davis, 137 S. Ct. 759, 778 (2017) ("Our law punishes people for what they do, not who they are.").

270. Oral Argument, *supra* note 257, at 13:34.

271. *See supra* note 222 and accompanying text.

272. *See supra* note 150.

273. *See* Ellis v. Harrison, 947 F.3d 555, 562 (9th Cir. 2020) (en banc) (Nguyen, J., concurring); *supra* note 242 and accompanying text; *supra* note 222 and accompanying text.

274. *See supra* note 150; *supra* note 95 and accompanying text.

275. *See* Lockhart v. Fretwell, 506 U.S. 364, 369–70 (1993); *see also* Commonwealth v. Dew, 210 N.E.3d 904, 912 (2023); *supra* note 95 and accompanying text.

276. *See supra* note 116 and accompanying text.

277. *See* HAZARD, JR. ET AL., *supra* note 123, at 5-16.

2. Deviating from *Sullivan*: Defense Attorneys Who Harbor Racist Beliefs About Their Client's Race Should Be Viewed as Inherently Prejudicial

Although this Note argues that ineffective assistance of counsel claims in which defense attorneys harbor racist views toward their client's race should be examined under a conflict-of-interest approach, this Note deviates from the *Sullivan* standard by endorsing the position that such conflicted attorneys are inherently prejudicial; thus, defendants should not have to prove how their counsel's racism adversely affected the representation to receive a new trial.[278] This would mean that a criminal defendant making an ineffective assistance of counsel claim of a racist defense attorney must prove deficient performance under the first prong of the *Strickland* standard[279] and an actual conflict of interest by way of the modified *Sullivan* standard to be granted a new trial.

Most states are not as expansive in their right to counsel as Massachusetts's article 12.[280] Thus, under the *Sullivan* standard, criminal defendants must show that a conflict of interest adversely affected their lawyer's performance.[281] However, as discussed throughout this Note, proving prejudice in the context of a racist defense attorney is often near-impossible, especially when racism is not on the record.[282] The inability of courts or defendants to adequately measure the prejudicial effect of a racist defense attorney is precisely why prejudice must be presumed when a defendant has a defense attorney who is racist toward the defendant's race. It goes against the spirit of the right to effective counsel to put the burden on a criminal defendant to prove prejudice when their defense counsel, the very person charged with zealously representing their cause against the government, harbors racial animosity toward their very being. Indeed, the purpose of the Sixth Amendment is to provide criminal defendants with a fair trial,[283] and a trial is fundamentally not fair if a criminal defendant has an attorney who harbors racist beliefs about the defendant's race.[284] Thus, courts should not be highly deferential[285] to a criminal defense attorney who harbors racist beliefs about their client's race—the stakes are far too high for the defendant.[286]

Putting the burden on criminal defendants in these circumstances is not only inconsistent with the spirit of a criminal defendant's constitutional right

278. *See Dew*, 210 N.E.3d at 914; *see also supra* note 104 and accompanying text.
279. *See supra* note 116 and accompanying text.
280. *See supra* note 218; *see also* Daniels, *supra* note 108, at 237–49 (listing approaches to conflict-of-interest cases in different states).
281. *See* Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).
282. *See supra* note 181; *see also supra* Part II.A.2.
283. *See* Cohen & Carroll, *supra* note 33.
284. *See* Ellis v. Harrison, 947 F.3d 555, 562 (9th Cir. 2020) (en banc) (Nguyen, J., concurring).
285. *See supra* note 98 and accompanying text.
286. *See* Klein, *supra* note 98, at 182.

to effective counsel, but it also undermines the criminal justice system,[287] as placing the burden on the defendant undermines the notions of equality and justice that the criminal justice system is supposed to embody.[288] Indeed, a standard in which a defendant must prove prejudice in circumstances of a racist defense attorney sends the message "that the criminal legal system tolerates bias and signals that ours is a system of justice for some rather than justice for all."[289]

A fear courts may have when it comes to the proposed standard are scenarios in which criminal defendants bring evidence of one-off text messages or racist statements made by counsel decades ago, resulting in an onslaught of ineffective assistance of counsel claims.[290] Should one racist statement be considered grounds for a new trial? This Note does not argue that there must be a bright-line rule regarding what qualifies as a racist defense attorney. Instead, the racism inquiry should be a fact-intensive inquiry for each case—it does not seem beyond the abilities of a court to assess whether the evidence brought before it sustains an allegation of racism. *Dew* exemplifies this situation: the Massachusetts Supreme Judicial Court was able to deduce from Doyle's years of racist social media posts and Doyle's conduct toward Dew that Doyle had racist beliefs toward Black and Muslim people that constituted a conflict of interest to Dew.[291] Further, as in *Dew*, it should not matter if an attorney's racist statements do not expressly connect to their client.[292] If a court concludes that an attorney has explicit and unmistakable racist views about their client's race, such bias should be grounds for a new trial.[293]

CONCLUSION

A defense attorney who is racist toward their client's race fundamentally calls into question the representation received. A defense attorney is meant

287. *See* Commonwealth v. Dew, 210 N.E.3d 904, 917 (2023) (Cypher, J., concurring) ("Public confidence in the integrity of the criminal justice system is essential to its ability to function.").

288. *See* Oral Argument, *supra* note 257, at 1:05:25 ("How do we ensure that people have confidence in our criminal legal system if you are saying the defendant . . . has to somehow show that his or her lawyer was racist and that it affected them?").

289. *See* Brief for NAACP Legal Def. & Educ. Fund, Inc. & New Eng. Innocence Project as Amici Curiae Supporting Appellant, *supra* note 159, at 40.

290. *See supra* note 81.

291. *See Dew*, 210 N.E.3d at 916.

292. *See supra* note 205.

293. *See* Sheri Lynn Johnson, John H. Blume & Patrick M. Wilson, *Racial Epithets in the Criminal Process*, 2011 MICH. ST. L. REV. 755, 786 ("[E]ven if the lawyer has not made such a remark about a particular defendant, referring to any client or accused by a racial slur is such a gross deviation from professional standards that it demonstrates strength of bias that should be presumed to affect actions taken with respect to other clients of the same race."). *But see* Ellis v. Harrison, 947 F.3d 555, 563 (9th Cir. 2020) (en banc) (Nguyen, J., concurring) ("An attorney's racist statement outside the courtroom that has nothing to do with a client, though contemptible and potentially sanctionable, does not in and of itself call for the reversal of every criminal conviction involving a defendant of the targeted race in which the attorney participated." (footnote omitted)).

to be a zealous advocate for their client and uphold the guarantees of the Sixth Amendment. To prevail on an ineffective assistance of counsel claim, the Supreme Court held in *Strickland v. Washington* that a criminal defendant must prove that their counsel's performance was deficient and that the deficiency prejudiced the defense.[294] In *Sullivan* and *Cronic*, the Court supplemented the *Strickland* standard by holding that a conflict of interest that adversely affects the representation received[295] or a denial of counsel[296] will satisfy *Strickland*'s prejudice prong.

Despite the ineffective assistance of counsel framework created by the Court, *Strickland* leaves a gap in protection for criminal defendants with racist counsel. Namely, the prejudice prong is often difficult for defendants to meet, particularly when there is not a direct connection between the racism and the defendant. Racism should not be tolerated in any form; thus, courts should not utilize *Strickland* when addressing ineffective assistance of counsel claims of racist defense attorneys.

To adequately address a defense attorney who harbors racial animus toward their client's race, a *Sullivan* approach should be utilized as a defense attorney who is racist toward their client's race is conflicted. However, criminal defendants in such circumstances should not have to prove how their attorney's racism adversely affected the representation as required by the *Sullivan* standard.[297] Instead, courts should view a racist defense attorney as having an inherently prejudicial conflict of interest, warranting a new trial in accordance with the guarantees of the Sixth Amendment.

294. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).
295. *See* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980).
296. *See* United States v. Cronic, 466 U.S. 648, 659–60 (1984).
297. *See Sullivan*, 446 U.S. at 350.