SUPREME COURT OF THE UNITED STATES

No. 01–400

RICKY BELL, WARDEN, PETITIONER *v.* GARY BRADFORD CONE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 28, 2002]

JUSTICE STEVENS, dissenting.

In my judgment, the Court of Appeals correctly concluded that during the penalty phase of respondent's capital murder trial, his counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *United States* v. *Cronic*, 466 U. S. 648, 659 (1984). Counsel's shortcomings included a failure to interview witnesses who could have provided mitigating evidence; a failure to introduce available mitigating evidence; and the failure to make any closing argument or plea for his client's life at the conclusion of the penalty phase. Furthermore, respondent's counsel was, subsequent to trial, diagnosed with a mental illness that rendered him unqualified to practice law, and that apparently led to his suicide. See App. 88–89. These circumstances "justify a presumption that respondent's conviction was insufficiently reliable to satisfy the Constitution." *Cronic*, 466 U. S., at 662.

I

Certain facts about respondent, Gary Cone, are not in dispute. Cone was a "gentle child," of exceptional intelligence, with an outstanding academic record in high school. App. 62–63. His father was an officer in the United States Army and a firm disciplinarian. He apparently enjoyed a loving relationship with his older brother and with both of

his sisters. At age 8 or 9, however, Cone witnessed the drowning of his older brother. In 1966, at age 18, respondent enlisted in the Army and was sent to Germany. He was eventually transferred to Vietnam, where he served as a supply clerk until 1969. His service in Vietnam involved, among other things, transporting corpses and performing long hours of guard duty. He was awarded the Bronze Star, and he received an honorable discharge.

After returning to the States, Cone graduated from college and, although qualified to enter law school, never enrolled. According to Cone, he began to use drugs—mainly amphetamines—while in Vietnam, in order to perform extended guard duties, and he continued to do so after his discharge from the Army. In an apparent effort to fund this growing drug habit, he committed robberies, and, in 1972, after college but before law school, he was convicted of armed robbery and incarcerated in Oklahoma until 1979. While he was in prison, his father died and his fiancée, whom he met while in college, was raped and murdered. After his release from prison, he kept in touch with his mother (who lived in Arkansas) and his sister (who lived in Chicago), but did not stay in one place. The lack of evidence of gainful employment post-1979, coupled with evidence of travels to Florida and Hawaii, suggests that Cone supported himself and his drug habit by criminal activity.

The Court has fairly described the facts of respondent's crime. *Ante*, at 1–2. However, in order to understand both why *Cronic* applies in the present case, and how counsel completely failed respondent at the penalty phase, I describe the events at trial in more detail. In his opening statement at the guilt phase of the trial, respondent's counsel, John Dice, admitted to the jury that Cone had committed the crimes for which he was charged, but explained that he was not guilty by reason of insanity—a condition brought on by excessive drug use that resulted

from "Vietnam Veterans Syndrome." See, *e.g.*, Tr. 956–957.[1] Dice explained to the jury that Cone's time in Vietnam had transformed him, leading to his insanity, and Dice promised several witnesses in aid of this insanity defense, including Cone's sister Susan, Cone's mother, and his two aunts, all of whom would "testify about the Gary Cone that they knew," *id.*, at 953, that is, the pre-Vietnam Cone. Dice also advised the jury that he would prove that the victim's sister had written a letter of forgiveness to Cone's mother—"one of the most loving letters I've ever read in my life," in Dice's words. *Id.*, at 965–966.[2]

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[1] Dice claims credit for developing this defense, but these claims are unsubstantiated and appear exaggerated from Dice's testimony. See State Postconviction Tr. 92. Nonetheless, such a defense was in its early stages at the time of respondent's 1982 trial, and has become more widely asserted. See generally Levin, Defense of the Vietnam Veteran with Post-Traumatic Stress Disorder, 46 Am. Jur. Trials 441 (1993 and Supp. 2001). Furthermore, as of 1980, the American Psychiatric Association began formally to recognize posttraumatic stress disorder (PTSD), which can derive from disturbing war experiences. See American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders 463–468 (rev. 4th ed. 2000).

The PTSD from which respondent allegedly suffered would sensibly have been used by Dice as mitigation in the penalty phase. See Levin, 46 Am. Jur. Trials §37. However, its viability as the guilt phase defense in this case was unlikely at best, because insanity in this context applies when "[t]he veteran who believes he is again in combat . . . attacks one whom he believes to be an enemy soldier." Davidson, Note, Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War, 29 Wm. & Mary L. Rev. 415, 424 (1988). Cone was not in combat and his crime did not fit this description.

[2] This letter's mitigating effect would have been significant. It read, in part: "Even tho I am still in shock over the tragic death of my dear brother and his wife, I want you to know that you and your family have my prayers and deepest sympathy. I am also praying for Gary. We know he must have been out of his mind to have done the things he did. May God forgive him." Record, Exh. 29. See Tr. 1280–1281 (referencing letter, marked as Exhibit 29, which was never submitted to the jury).

Despite these promises, after the State's affirmative case in the guilt phase, Dice presented only three witnesses in support of the insanity defense: Cone's mother testified about his behavior after his return from Vietnam, but the court largely precluded her from discussing Cone's pre-Vietnam life; a clinical psychologist testified about posttraumatic stress resulting from Cone's Vietnam service; and a neuropharmacologist testified about Cone's drug use and its effects. Through these witnesses, Dice attempted to paint a picture of a normal person who fell victim to "amphetamine psychosis" and became a "junkie of such unbelievable proportions that it would have been impossible for him to form any intent." *Id.*, at 957. Cone was not a witness at the guilt phase, though he did take the stand outside the presence of the jury to waive his right to testify.

In its rebuttal case, the State adduced the testimony of Aileen Blankman, whom Cone visited in Florida approximately one day after the murders. She testified that respondent neither used drugs while visiting her, nor appeared to have recently used drugs, thereby calling into question his claim of drug addiction. According to Dice's co-counsel, Blankman's testimony "utterly destroyed our defense. We were totally unprepared for that." State Postconviction Tr. 42. Dice knew of Blankman's contact with Cone after the murders, and was "absolutely" aware that Blankman was a possible prosecution witness, but Dice failed to interview her before the trial. *Id.*, at 138.[3] In guilt phase rebuttal, the State also introduced its own

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[3] With respect to this failure, Dice explained: "So, we could have interviewed her, but we didn't. I don't know, maybe she was devastating and maybe she wasn't, but let's say that we had interviewed her, you know, what would it have changed? If she'd come up here and she'd testified, she would have testified the same way I assume." State Postconviction Tr. 140.

medical experts to challenge the defense experts' testimony concerning Cone's alleged insanity. Although the State's experts questioned Cone's claim of Vietnam Veterans Syndrome, their testimony focused on Cone's failure to satisfy the insanity standard. See Tr. 1957, 1983. It took less than two hours for the jury to return a guilty verdict on all counts.

Dice's stated attitude toward the penalty phase must frame our consideration of the constitutional standard applicable to this case. Once his "Vietnam Veterans Syndrome" defense was rejected in the guilt phase, it appears that Dice approached the penalty phase with a sense of hopelessness because his "basic tactic was to try to convince the jury that Gary Cone was insane at the time of the commission of these acts, and the jury rejected that." State Postconviction Tr. 109. Dice perceived that the guilt phase evidence concerning Cone's mental health "made absolutely no difference to the jury," *id.*, at 159, and that the jurors "weren't buying any of it," *id.*, at 156, even though that evidence had been introduced to the jury through the lens of the insanity defense, not as mitigation for the death penalty.[4] Dice's co-counsel echoed the sentiment that death was a foregone conclusion: "I don't recall too much on any discussion, really, about the penalty stage, mainly because my own feeling about the case law as it was then, and I guess as it still is, is that when a jury is [*Witherspoon*ed] in,[5] it's a fixed jury. They're going to

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[4] It is true that the jury was instructed to consider mitigation from the guilt phase, and also true that Dice's brief penalty phase opening referenced the mental health evidence from the guilt phase, *ante*, at 3–4, but the jury's whole view of that testimony was influenced by its relation to the debunked insanity defense. Although the State's experts may have been successful in undermining Cone's claim to insanity, they did not necessarily undermine the potential mitigating effect of Cone's mental health evidence.

[5] Her comments refer to *Witherspoon* v. *Illinois*, 391 U. S. 510, 518

find a death penalty. . . . It was almost a hopeless feeling that the way the problem was going to be solved was through the Court of Appeals, not through any jury verdict." *Id.*, at 39. Indeed, Dice expressed this hopelessness even before the trial began; he testified that he told Cone's mother "the first day I met her, that if [the prosecutor] does not elect to offer life in this case, your boy is going to the chair and there's not going to be a darn thing . . . I'm going to be able to do to stop it except to maybe screw up the prosecution." *Id.*, at 108. Moreover, Dice's testimony in state postconviction reveals his "radical" view of the penalty phase. *Id.*, at 122. When asked if the purpose of the penalty phase was to "individualize the defendant," Dice replied "[t]hat's your view of it as a lawyer, not mine," *id.*, at 124, and when asked why a capital proceeding is bifurcated, Dice replied "God only knows," *id.*, at 125.[6] His co-counsel's postconviction testimony confirms Dice's misguided views. Discussing the penalty phase, co-counsel stated: "I don't believe I understood the separate nature of it. I don't believe that I understood the necessity . . . of perhaps producing more evidence in mitigating circumstances, in that phase also." *Id.*, at 49.

The parties agree that Dice did four things in the penalty phase. See Brief for Respondent 36. First, he made a

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(1968) (finding no general constitutional bar to a state's "exclusion of jurors opposed to capital punishment," *i.e.*, "death-qualification" of a jury, because of no proof that such a bar "results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction").

[6] Dice's comments concerning the penalty phase are not only erroneous in content, but inappropriate in tone. For example, when asked about capital sentencing, he rejected the notion that the Constitution requires an individualized death penalty decision: "The reason's political as far as I'm concerned. The method is insanity . . . . I don't care whether it's legal or not. When you kill people who kill people to show that killing people is wrong, it's insane." State Postconviction Tr. 124.

brief opening argument in the penalty phase asking for mercy. Second, in this opening, he referenced the evidence concerning Vietnam Veterans Syndrome that had been presented in the guilt phase. Third, he brought out on cross-examination of the State's witness who presented court records of respondent's prior convictions that Cone had been awarded the Bronze Star in Vietnam, though he did not explain the significance of that decoration to the jury because he made no closing remarks after the cross-examination. And, fourth, outside of the jury's presence, he successfully objected to the State's introduction of two photographs of the murder victims. Aside from doing these things, however, Dice did nothing before or during the penalty phase—he did not interview witnesses aside from those relevant to the guilt phase; he did not present testimony relevant to mitigation from the witnesses who were available; and he made no plea for Cone's life or closing remarks after the State's case.

Dice conceded that he did not interview various people from Cone's past, such as his high school teachers and classmates, who could have testified that Cone was a good person who did not engage in criminal behavior pre-Vietnam. Dice agreed that such witnesses would likely have been available if Dice had, in his words, "been stupid enough to put them on." State Postconviction Tr. 104. Apparently, Dice did not interview these individuals in preparation for the penalty phase, because he assumed that the State's cross-examination of those witnesses would emphasize the seriousness of Cone's post-Vietnam criminal behavior. *Id.*, at 104–105, 137. Dice's reasoning is doubtful to say the least because, regardless of the State of Tennessee law, see *ante*, at 13, n. 3, these post-Vietnam crimes were already known to the jury through the State's penalty phase evidence of respondent's prior convictions. Further, it is hard to imagine how evidence of Cone's post-Vietnam behavior would change their assessments—

indeed, Dice's whole case was that Cone had changed.[7]

Dice also failed to present to the jury mitigation evidence that he did have on hand. He admitted that other witnesses—including those whose testimony he promised to the jury in the guilt phase opening, such as Cone's mother, sister, and aunts—had been interviewed and were available to testify at the penalty phase. Dice had ready access to other mitigation evidence as well: testimony from Cone himself (in which he could have, among other things, expressed remorse and discussed his brother's drowning and his fiancée's murder), the letter of forgiveness from the victim's sister, the Bronze Star, and the medical experts. Dice's *post hoc* reasons for not putting on these additional witnesses and evidence are puzzling, but appear to rest largely on his incorrect assumption that the guilt phase record already included "what little mitigating circumstances we had," State Postconviction Tr. 133, and his fear of the prosecutor, "who by all accounts was an extremely effective advocate," *ante*, at 5; see, *e.g.*, State Postconviction Tr. 105, 107–108, 123, 136, 137.

Although the guilt phase evidence included information about Cone's post-Vietnam behavior, it told the jury little

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[7]The Court's brief descriptions of Dice's reasoning for his choices, see *ante*, at 12–14, gives this reasoning more legitimacy than it merits. Only by reading Dice's lengthy answers from the postconviction hearing is it clear how confused and misguided Dice was. For example, with respect to the supposed damage that these mitigation witnesses could do, Dice speaks in generalities about unsubstantiated fears: "Picture this scenario. You've got them on the stand; once you've put on this trial for life, as we call it, you and I, and the burden is what now? It's only preponderance of the evidence. Comes now the skilled prosecutor, Mr. Strother, over there, and says, oh, he was a good student in high school; right? And Vietnam affected his mind; right? What about all the robberies he pulled? They have him in prison in Oklahoma. I mean, he was in prison once. Did you know about those things? And how about this and that, you know, and other things Mr. Cone told me about?" State Postconviction Tr. 104–105.

about Cone's earlier life.[8] During the guilt phase, Dice had a difficult enough time convincing the court to allow him to present evidence of respondent's post-Vietnam behavior and drug addiction as an insanity defense, that he did not seriously attempt to introduce evidence of respondent's childhood. However, such evidence would have been permissible mitigation in the penalty phase. This evidence would have revealed Cone to be "a quiet, studious child," with "absolutely no suggestion of any behavioral disturbance, even in adolescence." App. 93. Indeed, his mother could have described him as a "perfect" child, *ibid.*, and she "absolutely" wanted to testify at the penalty hearing to make a plea for Cone's life, but Dice "wouldn't put her on even if she'd wanted to," because he "did not feel that she did well on the stand," and because of "the cross-examination skills of the District Attorney involved." State Postconviction Tr. 97–98, 193. Dice's claim that she had not made a good witness at the guilt phase, see *ante*, at 12, is contradicted by the transcript of her straightforward trial testimony, Tr. 1631–1656, and his desire not to subject her to cross-examination is surely an insufficient reason, absent more, to prevent her from asking the jury to spare her son's life.

Dice also did not call as witnesses in mitigation either of Cone's sisters or his aunt, all of whom were promised in Dice's opening statement. Dice's statement that Cone's sister Sue "did not want to testify," *ante*, at 13, is contradicted by his opening statement. And his fear that she might have been questioned "about the fact that [Cone] called her from the [victims'] house just after the killings," *ibid.*, is unfounded: Evidence of this call was already in the record, and further reference to the call could do no

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[8] Cf. Levin, 46 Am. Jur. Trials §37 ("Counsel needs to clearly draw the contrast in the client from before and after Vietnam").

conceivable additional harm to Cone's case. Indeed, Dice's justification for not calling Sue merely illustrates Dice's extraordinary fear of his adversaries. Dice's explanation for his failure to call Cone's other sister, Rita, is even more unsatisfying: "I think that we had a letter exchange or a phone call. My tactics do not necessarily involve putting the family on down here because, again, . . . I thought that we were in a position which we should say was tenuous from the outset." State Postconviction Tr. 136. His failure to call Cone's aunt is unexplained. His failure to offer into evidence the letter written by the victim's sister, offering her prayers for Cone, is also unexplained. See n. 2, *supra*.

Dice did not put Cone on the stand during the penalty phase, forfeiting the opportunity for him to express the remorse he apparently felt, see Tr. 1675. Dice testified that he discussed with Cone the possibility of testifying, but opted not to call him at the penalty phase because of fear that respondent might "lash out if pressed on cross-examination." *Ante*, at 13. He also claimed that Cone made the decision not to testify at the penalty phase because Cone feared the prosecutor. In Dice's words, Cone "realized that [the prosecutor] was a very intelligent and skilled cross-examiner and [Cone] felt that he would go off if he took the stand." State Postconviction Tr. 103. However, this explanation conspicuously echoes Dice's *own* fears about the prosecutor's prowess. Furthermore, respondent testified that Dice never "urged [him] as to the importance of testifying at the penalty stage," *id.*, at 204, and Dice testified that his duties did not include urging Cone to testify, *id.*, at 119. Given the undisputed evidence of Cone's intelligence and no indication that his behavior in the courtroom was anything but exemplary, it is difficult to imagine why any competent lawyer would so readily abandon any effort to persuade his client to take the stand when his life was at stake. Dice's claim that he did no more than permit Cone to reach his own decision about

testifying in the penalty phase is simply not credible. Rather, it appears that Dice, fearful of the prosecutor, did not specifically discuss testifying in the penalty phase with Cone, but rather discussed with him the possibility of taking the stand on only one occasion—during the guilt phase of the trial.[9]

Dice's failure to recall the medical experts who testified in the guilt phase is a closer question, and may have been justified by his belief that they could not add anything that had not already been presented to the jury.[10] Nevertheless, had they been called, Dice could have made the point, likely lost on the jury as a result of Dice's "strategy," that the experts' appraisal of Cone had mitigating significance, even if it did not establish his insanity. For there is a vast difference between insanity—which the defense utterly failed to prove—and the possible mitigating effect of drug addiction incurred as a result of honorable service

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[9] This conclusion follows from Cone's testimony that he was only consulted once, in a three-person conference, about testifying, before he got on the stand to state that he would not be testifying. State Postconviction Tr. 203–204. Cone initially recalled that this meeting occurred in the penalty stage, though he then expressed uncertainty on this point; however, he remained certain that there had been only one meeting. See *ibid*. The conference must have concerned the guilt phase, because it was during the guilt phase that Cone waived his right to testify. See Tr. 1865–1866. Furthermore, Dice's co-counsel does not remember a discussion concerning Cone's possible testimony at the penalty phase, State Postconviction Tr. 35, 48; Dice himself testified repeatedly that Cone does not lie, *id.*, at 117, 120, 139, 141; and Dice himself was unable to state for certain that Cone was consulted about penalty phase testimony, *id.*, at 118.

[10] Indeed, had counsel's performance not been so completely deficient, this would be the sort of strategic choice about which counsel would be owed deference under *Strickland* v. *Washington*, 466 U. S. 668, 689 (1984). In this case, however, because of Dice's total failure in the penalty phase, it is difficult to credit even arguably reasonable choices as the result of "reasonable professional judgment," *id.*, at 690. See *infra*, at 17.

in the military. By not emphasizing this distinction, Dice made it far less likely that the jury would treat either the trauma resulting from Cone's tour of duty in Vietnam[11] or other traumatic events in his life[12] as mitigating. And, again, the reason for Dice's failure is that Dice himself failed to appreciate this distinction, for he believed that the "jury had completely rejected" the experts' testimony after losing at the guilt phase. *Id.*, at 156.

In addition to performing no penalty phase investigation and failing to introduce available mitigation, Dice made no closing statement after the State's affirmative case for death. Rather, Dice's "strategy" was to rely on his brief penalty phase opening statement. This opening statement did refer to the evidence of drug addiction and the expert testimony already in the record, though it is unclear to what end, as Dice believed that the jury had "completely rejected" this testimony, *ibid.* Dice's statement also explained that respondent's drug abuse began under the "stress and strain of combat service," Tr. 2118, even though the jurors knew that Cone had not been in combat. Otherwise, Dice failed to describe the substantial mitigating evidence of which he was aware: Cone's Bronze

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[11] "Although not a combat soldier in Vietnam, Gary described disturbing and traumatic experiences while there. For example, the stench from the corpses, and the way in which they were stored in refrigerators alongside food; witnessing death; being required, even on occasion to fire a weapon; the long hours of guard duty; and the escalating drug abuse, often ostensibly sanctioned by superior officers." App. 96.

[12] According to a defense psychologist's report about Cone, the major traumas in his life have been: "witnessing his brother's body being removed from the lake"; "[h]is grandmother's death, just after high school graduation. Gary lived with her, and clearly viewed her as a safe haven from his father"; "[d]uty in Vietnam, 1968–1969. Although not a combat soldier, experiences were beyond the realm of normal experiences for a 20-year-old"; and the "[r]ape and murder of his fiancée in December 1972." *Id.,* at 102.

Star; his good character before entering the military; the deaths in his family; the rape and murder of his fiancée; and his loving relationships with his mother, his sisters, and his aunt. At best, Dice's opening statement and plea for Cone's life was perfunctory; indeed, it occupies only 4½ of the total 2,158 trial transcript pages.

Dice's decision not to make a closing argument was most strongly motivated by his fear that his adversary would make a persuasive argument depicting Cone as a heartless killer. At all costs, Dice wanted to avoid the prosecutor "slash[ing] me to pieces on rebuttal," as "[h]e's done . . . a hundred times." State Postconviction Tr. 123. Dice hoped that by not making a closing statement, the prosecutor would "kind of follo[w] me right down the primrose path." *Id.*, at 107. Of course, at the time Dice waived closing argument, the aggravating circumstances had already been proved, and Dice knew that the judge would instruct the jury to return a verdict of death unless the jurors were persuaded that the aggravating circumstances were outweighed by mitigating evidence. Perhaps that burden was insurmountable, but the jury must have viewed the absence of any argument in response to the State's case for death as Dice's concession that no case for life could be made. A closing argument provided the only chance to avoid the inevitable outcome of the "primrose path"—a death sentence.[13]

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[13] In his postconviction testimony, Dice offered another reason for waiving closing argument. He claimed that the State, in its penalty phase case, had "screw[ed] up the aggravated circumstances" by arguing to the jury an aggravating factor that was unsupported by the evidence—that the lives of two or more people other than the victims were endangered by the defendant. State Postconviction Tr. 108. Dice testified that he was concerned that if he made a closing argument, the State might realize its mistake and correct the error in its rebuttal closing argument. See *id.*, at 103–104. Not only is Dice's explanation incredible, but, unsurprisingly, Dice's "strategy" did not work "per-

Both of the experienced criminal lawyers who testified as expert witnesses in the state postconviction proceedings refused to state categorically that it would never be appropriate to waive closing argument, to fail to put the defendant on the stand during the penalty phase of the trial, or to offer no mitigating evidence in the penalty phase. Both witnesses agreed, however, that Dice's tactical decisions were highly abnormal, and perhaps unprecedented in a capital case.

II

On these facts, and as a result of Dice's overwhelming failure at the penalty phase, the Court of Appeals properly concluded that *Cronic* controls the Sixth Amendment claim in this case, and that prejudice to respondent should be presumed. Given Dice's repeated and unequivocal testimony about Cone's truthfulness, together with Cone's apparent feelings of remorse, see Tr. 1675, Dice's decision not to offer Cone's testimony in the penalty phase is simply bewildering. And his decisions to present no mitigation case in the penalty phase,[14] and to offer no closing argument in the face of the prosecution's request for

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fectly," as Dice claimed it did, *id.*, at 103, because the State Supreme Court found any error concerning the aggravators to be harmless, *State* v. *Cone*, 665 S. W. 2d 87, 95 (Tenn. 1984). More importantly, such a "strategy" is never appropriate; counsel's hope for an appellate victory concerning one trial error cannot justify abdication of his duty as advocate for the remainder of the proceeding.

[14] Cf. *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989) ("If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse'" (quoting *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring))).

death,[15] are nothing short of incredible. Moreover, Dice's explanations for his decisions were not only uncorroborated, but were, in my judgment, patently unsatisfactory. Indeed, his rambling and often incoherent descriptions of his unusual trial strategy lend strong support to the Court of Appeals' evaluation of this case and its decision not to defer to Dice's lack of meaningful participation in the penalty phase as "strategy."[16]

Although the state courts did not have the benefit of evidence concerning Dice's mental health, it appears from Dice's medical records that he suffered from a severe mental impairment. He began treatment for this illness a couple of years after trial, and he committed suicide approximately six months after the postconviction hearing in this case. See App. 88–89. The symptoms of his disorder included "confused thinking, impaired memory, inability to concentrate for more than a short period of time, paranoia, grandiosity, [and] inappropriate behavior." *Id.*, at 88. While these mental health problems may have onset after Cone's trial, a complete reading of the trial transcript and an assessment of Dice's actions at trial suggest this not to be the case.

A theme of fear of possible counterthrusts by his adversaries permeates Dice's loquacious explanations of his tactical decisions. But fear of the opponent cannot justify such absolute dereliction of a lawyer's duty to the client—especially a client facing death. For "[t]he very premise of our adversary system of criminal justice is that partisan

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[15] Cf. *Herring* v. *New York,* 422 U. S. 853, 862 (1975) ("In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment").

[16] Dice's main explanation of his decision to waive closing argument at the close of the penalty hearing is quoted in an appendix to this opinion.

advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U. S. 853, 862 (1975). There may be cases in which such timidity is consistent with a "meaningful adversarial testing" of the prosecution's case, *Cronic*, 466 U. S., at 659, but my examination of the record has produced a firm conviction that this is not such a case.

The Court claims that *Cronic*'s second prong only applies when "counsel failed to oppose the prosecution throughout the sentencing proceeding *as a whole*." *Ante*, at 10 (emphasis added). But that is exactly what Dice did. It is true, as the Court claims, that respondent's complaints about Dice's performance can be framed as complaints about what Dice failed to do "at specific points," *ibid.* However, when those complaints concern "points" that encompass all of counsel's fundamental duties at a capital sentencing proceeding—performing a mitigation investigation, putting on available mitigation evidence, and making a plea for the defendant's life after the State has asked for death—counsel *has* failed "entirely," *ibid.* (quoting *Cronic*, 466 U. S., at 659). The Court of Appeals' conclusion in this regard exemplifies a court's proper use of its judgment to recognize when failures "at specific points" amount to an "entir[e] fail[ure]" within the meaning of *Cronic*. We recognized the importance of the exercise of such judgment in *Strickland* v. *Washington*, 466 U. S. 668 (1984), in which we explained that Sixth Amendment principles are "not . . . mechanical rules," and that "[i]n every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.*, at 698.

The majority also claims that *Cronic*'s second prong does not apply because this Court has previously analyzed

claims "of the same ilk," *ante*, at 10, under *Strickland*, not *Cronic*. However, in none of our previous cases applying *Strickland* to a penalty phase ineffectiveness claim did the challenged attorney not only fail to conduct a penalty phase investigation, but also fail to put on available mitigation evidence and fail to make a closing argument asking to spare the defendant's life. See *Williams* v. *Taylor*, 529 U. S. 362 (2000); *Burger* v. *Kemp*, 483 U. S. 776 (1987); and *Darden* v. *Wainwright*, 477 U. S. 168 (1986). Furthermore, in none of these cases was there evidence that counsel had as "radical" a view of the penalty phase as Dice's, and in none of these cases was the lawyer's own mental health called into question, as it has been here. It is, of course, true that a "total" failure claim, which we confront here, could theoretically be analyzed under *Strickland*. However, as *Cronic* makes clear, see *ante*, at 8–9, although *Strickland could* apply in all Sixth Amendment right to counsel cases, it does not.

Moreover, presuming prejudice when counsel has entirely failed to function as an adversary makes sense, for three reasons. First, counsel's complete failure to advocate, coupled here with his likely mental illness, undermines *Strickland*'s basic assumption: that counsel has "made all significant decisions in the exercise of reasonable professional judgment." 466 U. S., at 690. Second, a proper *Strickland* inquiry is difficult, if not impossible, to conduct when counsel has completely abdicated his role as advocate, because the abdication results in an incomplete trial record from which a court cannot properly evaluate whether a defendant has or has not suffered prejudice from the attorney's conduct. Finally, counsel's total failure as an adversary renders "the likelihood that the verdict is unreliable" to be "so high that a case-by-case inquiry is unnecessary." *Mickens* v. *Taylor*, 535 U. S. ___, ___ (2002) (slip op., at 3).

The Court's holding today is entirely consistent with its

recent decision in *Mickens*. In both cases, according to the Court, a presumption that every lawyer in every capital case has performed ethically, diligently, and competently is appropriate because such performance generally characterizes the members of an honorable profession. It is nevertheless true that there are rare cases in which blind reliance on that presumption, or uncritical analysis of a lawyer's proffered explanations for aberrant behavior in the courtroom, may result in the denial of the constitutional "right to the effective assistance of counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970). The importance of protecting this right in capital cases cannot be overstated.[17] Effective representation provides "the means through which the other rights of the person on trial are secured." *Cronic*, 466 U. S., at 653. For that reason, there is "a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable" whenever defense counsel "entirely fails to subject the

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[17] A recent, comprehensive report issued by the Governor's Commission reviewing Illinois' capital punishment system concluded: "'Providing qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing, and execution of capital defendants. It is also a safeguard far too often ignored.'" Report of the Governor's Commission on Capital Punishment 105 (2002) (quoting Constitution Project, Mandatory Justice: Eighteen Reforms to the Death Penalty 6 (2001)).

Members of this Court have similarly recognized both the importance of qualified counsel in death cases, and the frequent lack thereof. See, *e.g.*, *McFarland* v. *Scott*, 512 U. S. 1256 (1994) (BLACKMUN, J., dissenting from denial of certiorari) (describing the "crisis in trial and state postconviction legal representation for capital defendants"); Lane, O'Connor Expresses Death Penalty Doubt; Justice Says Innocent May Be Killed, Washington Post, July 4, 2001, p. A1 (reporting JUSTICE O'CONNOR's comment that "Perhaps it's time to look at minimum standards for appointed counsel in death cases" and JUSTICE GINSBURG's comment that "I have yet to see a death case, among the dozens coming to the Supreme Court on the eve of execution petitions, in which the defendant was well represented at trial").

prosecution's case to meaningful adversary testing." *Id.*, at 659. That is exactly what happened in the penalty phase of Gary Cone's trial.

I respectfully dissent.

APPENDIX TO OPINION OF STEVENS, J.

Excerpt from Dice's Postconviction Testimony in which he explains his reasons for waiving closing argument:

"Q: While we're on that subject, will you summarize for us all the reasons that you had at that time, and not at this time, but at that time, for waiver of final argument in the penalty phase of the Cone matter?

"A: Okay. Number one; I thought that we had put on almost every mitigating circumstance that we had. Okay? In the first phase of the trial.

"Number two; I managed to sucker Mr. Patterson and Mr. Strother into putting on my Bronze Star decoration without having my defendant testify, which I felt was pretty good trial tactics. I know when I asked Mr. Blackwell that question, one of the two of them over there became unglued. Okay.

"Number three; I thought the trial judge had lost control of the case. He allowed Mr. Strother to call me unethical twice in front of the jury, and he did several things in there which had made my client extremely angry. I forgive Mr. Strother for that. I don't think he really believes it, but he's a trial lawyer and he took the position.

"Okay. I'm saying the general feeling of that was going—the trial was not being conducted neutrally by the judge. Okay.

"The other thing that got to me about the aspects of why to waive, I knew again that they were so much out for blood that they'd screw up their own trial in terms of what the jury was going to find.

"Okay. Another factor is that my defendant told me that he would probably explode on the stand with anger if General Strother cross-examined him, and I know Don Strother to be an extremely competent cross-examiner.

"Q: Just so we'll be clear now. I've asked you to name the reasons for waiving final argument. Was whether or not what you just said about Mr. Cone possibly exploding, did that have anything to do with waiving final argument?

"A: Absolutely it did. I didn't make that decision at the last moment at all, Mr. Kopernak. That decision was carefully planned out. When the jury was only out for an hour, when they were only out for an hour, and I think it was close to that, and long before the trial I considered that as a trial tactic. Now, all these factors were being considered, not just one.

"Q: Okay. Go ahead, please.

"A: Okay.

"Q: Do you want me to go over those so you'll—(Interrupted)

"A: No, because I recall most of them pretty clearly. You know, we'd had all those things go on, and some of the things which had happened in the trial, and when Ural Adams had done that in the Groseclose case and he and I had spent so much time talking about whether or not to do it, I considered that perhaps because of the nature of the opposition in this particular case, that it might be an effective tactic. And I'll tell you this much. Let's say that when we'd gotten down there that Mr. Strother had gotten up and made the first argument, I might not have waived at all if I knew that Patterson was going to make the kill argument. I might not have made it. But once Patterson made the first argument, and then those statements that were reported in the press where Mr. Patterson said, well, we're here because it's wrong to kill people. I'll never

forget that one as long as I live. Okay. When he made that portion in another portion of the trial. So, what I chose to do is to make my closing argument in my opening argument and then suckered them along because they'd already made that mistake, as far as I was concerned. Okay? And see whether or not the jury would take what little mitigating circumstances we had and give us a verdict and keep him alive." State Postconviction Tr. 130–133.