No.
In the Supreme Court of Washington

State of Washington
v.
Gerry Gene Greatreaks II

Motion for Discretionary Review
TREATED AS A PETITION FOR REVIEW

Harry Williams, WSBA # 41020
Law Office of Harry Williams
PO Box 22438, Seattle, WA 98122-0438
206.240.1958

Table of Authorities

CASES

STATUTES

Identity of Moving Party

Petitioner is Gary Greatreaks.

Decision below

On April 8, 2025, Division II held in a published decision that Greatreak's lawyer provided effective assistance under the *Cronic* standard. App. 1.

While Greatreaks' lawyer did not advocate for Greatreaks during a sentencing in which he received a 480-month sentence, the court determined that the State performed any work the defense needed to do; according to the court of appeals, defense counsel's silence was golden.

Issues presented for review

1. This case presents a significant issue under the United States Constitution and an issue of substantial public

interest because it asks the Court to interpret the *Cronic* doctrine, an issue on which this Court has not spoken definitively and which divides other courts.

2. The court of appeals created a new rule for cases at sentencing: unless the prosecutor fails to adequately support a plea agreement or casts unfair aspersions on the defendant, the court will not find a *Cronic* violation—even where defense counsel fails to speak on behalf of the client after testimony from the victim after having failed to file a sentencing memo or prepare the client to speak on his own behalf after a guilty plea.

a. The court of appeals' rule is not supported by case law from the United States Supreme Court and other courts.

b. The court of appeals substituted a prosecutor's support for a plea agreement that contains an agreed

sentencing recommendation for the duty of counsel to advocate for a sentence.

c. In emphasizing the prosecutor's role, the court of appeals ignored the victim's emotional statement, which required some reply by counsel to support the agreed sentence.

Statement of the case

On January 22, 2024, Lewis County law enforcement investigated a report that a 9-year-old (A.S.) was being sexually abused. CP 8.

As specified in Greatreaks' plea deal, between January 13th, 2024, and January 22nd, 2024, in Lewis County, Washington, Greatreaks had sexual contact with A.S. on

two separate occasions. 2RP 9.[1] Greatreaks further admitted that between January 13 and January 22, 2024, he caused A.S. to have sexual intercourse with A.S.'s mother. 2RP 9.

Greatreaks was arrested on January 24, 2024. CP 17.

On the morning of February 29, 2024, the case was called for a trial confirmation hearing. 1RP. Greatreaks appeared by Webex. 1RP 3.

The State confirmed it was ready for trial. In response, Greatreaks' counsel told the court he had not received "pretty significant" new discovery, and defense counsel entered the hearing assuming that the State would ask for a

---

[1] 1RP refers to the RP from the morning of February 29. 2RP is the RP from the afternoon of February 29 (change of plea) and sentencing (March 27).

reset. 1RP 3. The State promised to get Greatreaks the discovery later that day. The discovery was a phone download. 1RP 4.

That afternoon, on February 29, 2024, Greatreaks signed a guilty plea. That same afternoon, again on February 29, a change of plea hearing was held. Greatreaks attended by video link. 2RP. Greatreaks' counsel did not mention the new discovery or whether he had reviewed it. There is no indication on the record that the attorney and client could speak privately.

The court noted the accelerated way the case was proceeding:

> Court: Okay. The case was charged on January 24th, just about 30 days ago. And do you feel that you have had adequate time to speak to your attorney, to talk to him about your options, and that's why you're pleading guilty today?
>
> Defendant: Yes.

2RP 8.

On March 27, 2024, sentencing was held. The State endorsed the plea bargain and the agreed sentence of 300 months.

Next, A.S. spoke about the hurt these incidents caused him. 2RP 19-20. A.S. claimed that Greatreaks kicked him with a steel-toed boot, that he wanted revenge on Greatreaks, and that he tried to kill himself by falling down the stairs. A.S. said Greatreaks threatened him with his fist, had "always been rude to him," and that he "would rather watch him die in a cell than see him again." None of the statements A.S. made were backed up by allegations elsewhere in the record: neither the Declaration of Probable Cause, CP 8-15, the Statement on Plea of Guilty, CP 55-65, or the initial information, CP1-6, contains such allegations. A.S. spoke of physical abuse, not sexual abuse.

After A.S. spoke, Greatreak's counsel made no argument for his client or in support of the sentence. Counsel did not point out that the agreed sentence was negotiated to incorporate harm to A.S. Counsel did not point out that the Greatreaks already agreed to an indeterminate sentence that would mean he would be in his 70s at his earliest release date. Counsel's entire statement simply repeated some logistical details:

> As [the prosecutor] started out, the [2022] case has been dragging on for quite some time. I will let the Court know, I think I am Mr. Greatreaks' third attorney. And when I was appointed in mid-December [2023], Mr. Greatreaks and I got together and we went over the facts of the case. And I would say, they were pretty straightforward. So I don't know why it had dragged out.
>
> But given the new case, we were able to come to a resolution. I would -- quite honestly, I would say fairly quickly given the complexities of both cases

> And as [the prosecutor] indicated, we have talked multiple times and negotiated quite a bit on both of these cases, and they are agreed recommendations in all respects with regard to both cases.

2RP 21.

Counsel presented no context and no words in support of the agreed sentence. Counsel did not file a sentencing memo. Although Greatreaks had admitted guilt, counsel instructed Greatreaks not to agree to an interview for the Presentence Investigation Report. 2RP 9. Although Greatreaks had admitted guilt, the attorney did not prepare Greatreaks to say anything at sentencing. 2RP 21.

The court did not impose the agreed sentence, an indeterminate sentence of 300 months. Instead, the court sentenced Greatreaks to 180 months for cases under a 2022 cause number, 300 months for the 2024 convictions, and ran the terms consecutively. In support of the

exceptional sentence, the court found that the multiple current offenses resulted in a high offender score, and the court determined that this meant some of the crimes were unpunished. 2RP 23.

Counsel filed a notice of appeal but neglected to file an appeal of the 2022 cases that were sentenced simultaneously. CP 112-129.

Argument why review should be granted

A. This Court should take review and issue a definitive statement on the application of *Cronic*

This Court has not spoken definitively on the application of *Cronic*, and it should take this case to clarify the application of *Cronic*.

Where, as here, the sentencing court has discretion to enter an exceptional sentence, and defense counsel fails to

advocate at sentencing, the defendant is denied counsel under *Cronic*.

Strickland and *Cronic* frame the analysis of claims for ineffective assistance of counsel. Under *Strickland*, a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance resulted in actual prejudice. *Strickland v. Washington*, 466 U.S.668 (1984). Deficient performance means that counsel's conduct fell below an objective standard of reasonableness for competent attorneys. *Id*., at 688. Actual prejudice means a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors. *Id*., at 694.

Strickland recognized that sometimes "prejudice is presumed." *Id*., at 692. As relevant to Greatreaks' case, in *United States v. Cronic*, 466 U.S. 648, 657 (1984), the

Supreme Court named two scenarios where prejudice is presumed: (1) when counsel is denied at a critical stage of the proceeding; and (2) when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," which constitutes an "actual breakdown of the adversarial process. . . ".

This Court has not spoken conclusively on the application of *Cronic*, and it should take this case to clarify the application of *Cronic*. Where, as here, the sentencing court has discretion to enter an exceptional sentence, and defense counsel fails to advocate at sentencing, the defendant is denied counsel under *Cronic* and the case must be remanded for a new sentencing.

B. The court of appeals misapplied *Cronic*

The court appeals began by citing the Connecticut Supreme Court, which found that "no consensus exists

whether counsel's mere silence or lack of advocacy at a sentencing hearing amounts to a complete breakdown in the adversarial process." *Davis v. Comm'r of Corr.*, 319 Conn. 548, 557, 126 A.3d 538 (2015). Slip. op. at 7.

According to the court of appeals, the "common thread among the cases addressing constructive denial under *Cronic* is whether any sort of strategic reasoning (or something reasonably in the defendant's interests) can be discerned in defense counsel's conduct." Slip op. 8.

If that is the standard, it was not met here. The court of appeals found the prosecutor's support for the agreement sufficient to allow Greatreaks' counsel to remain silent. The State, "speaking first, advocated for the joint recommendation with an explanation of the benefits of avoiding a trial while, at the same time, 'significantly' punishing the defendant." Slip op. 10 (citing RP at 18).

Based on the prosecutor's endorsement, "There was no clear need for defense counsel to actively advocate for the superior court to accept the plea agreement because the State had just done so." Slip op. 10.

This analysis misses the mark. Facing ten simultaneous sex offense convictions, Greatreaks faced the real possibility of an exceptional sentence—one that was, in fact, imposed. The defense did not follow the prosecutor directly; instead, after the prosecutor, the victim gave a statement.

Despite this, counsel did not engage in any advocacy, but made remarks about procedural benchmarks:

> Counsel stated that the 2022 case had been "dragging on for some time" and that he was Greatreaks' third lawyer. These statements are not advocacy and might even be construed against Greatreaks. 2RP 21.

> Counsel explained that a resolution was made quickly "given the complexities of the case," but did not explain those complexities or advocate that the resolution—particularly the agreed sentence—was appropriate. 2RP 21.
>
> Counsel stated that he talked multiple times to the prosecutor and that "they are agreed recommendations in all respects with regard to both cases." This merely states what the plea says; it is not advocacy for why the court should accept the recommendation. 2RP 21.

Counsel said no words advocating for his client. In mathematical notation, this is the set of words counsel spoke that were advocacy:

{}

Counsel's statements were not advocacy because they did not provide reasons for the trial court to enter the agreed sentence.

As the Seventh Circuit noted in *Miller v. Martin*, 481 F.3d 468, 473 (7th Cir. 2007), "To hold that 'strategy' justified

[counsel]'s decision [to present no evidence or argument at sentencing] would be to make a mockery of the word." Counsel's silence was not golden; instead, counsel's silence cost Greatreaks 180 months behind iron bars.

C. The court of appeal's rule ignores the dynamics of sentencing

The court of appeals' heavy reliance on the prosecutor's actions ignores the dynamics of this case, where the prosecutor spoke but was followed by emotional testimony from the child victim. 2RP 19-20. Greatreaks' lawyer needed to advocate to balance the impact of the victim's testimony and avoid an exceptional sentence.

An analogy: It's like the court of appeals ruled that there was no need to warn about a dish being spicy because the prosecutor described the recipe. But here, after the recipe was put together, hot peppers were added (the child's

testimony). Ignoring the addition of peppers would not make the dish less spicy. Counsel needed to react. Instead, counsel recited some words about his interactions with the prosecutor but not a word about Greatreaks or the need to impose the agreed sentence.

The court of appeals was doubly wrong when it wrote, "There was no clear need for defense counsel to actively advocate for the superior court to accept the plea agreement because the State had just done so." Slip op. 10. It was wrong 1) because of the victim's testimony and 2) because of the possibility of an exceptional sentence. Counsel's job at sentencing was contextualizing the testimony and advocating for the agreed sentence. And the court of appeals repeatedly emphasizes the "plea agreement," slip op. 9-10, but it is the sentence that mattered here.

Advocacy remains necessary even in cases with an agreed sentence recommendation because under RCW § 9.94A.431(2), "the sentencing judge is not bound by any recommendations contained in an allowed plea agreement." This is especially true when an exceptional upward sentence is a foreseeable outcome in a case resolving ten serious, simultaneous charges. Given that 10 felony charges were being sentenced simultaneously, CP 94, any competent counsel would have recognized the possibility of an exceptional sentence. And "'any amount of [additional] jail time has Sixth Amendment significance.'" *Lafler v. Cooper*, 566 U.S. 156, 165 (2012) (alteration in original) (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001).

As this Court noted in *State v. Talley*, 134 Wn.2d 176, 186, 949 P.2d 358 (1998), an agreed recommendation does

not mean the sentencing court "should be faced with a one-sided hearing." An attorney has "an obligation as an officer of the court to participate in the hearing and present evidence that will help the court make its decision." Greatreaks' counsel did neither.

D. The court of appeals rule is inconsistent with appellate opinions analyzing similar facts

The court of appeals' decision is out of step with precedent from other jurisdictions that have addressed similar circumstances. Before the court of appeals, Greatreaks relied on the Seventh Circuit's decision in *Lewis v. Zatecky*, 993 F.3d 994 (7th Cir. 2021). The court of appeals did not cite the case, much less distinguish it.

In *Lewis*, the Seventh Circuit found a *Cronic* violation under similar circumstances. After the Indiana state court failed to find "prejudice" in counsel's failure to advocate at

sentencing, the Seventh Circuit granted relief. Counsel uttered "two short sentences." *Id*. at 1006. In *Lewis*, as here, counsel did not arrange for the defendant to speak. *Id*. Just as in *Lewis*, Greatreak's attorney "gave up on" him and "left him entirely without the assistance of counsel at the sentencing stage." *Id*. at 1006. This Court should hold, just as the court did in *Lewis*, that "Rare though *Cronic* cases may be," "this one qualifies." *Id*.

Lewis emphasizes "state courts must reasonably apply the rules squarely established by [the Supreme Court]'s holdings to the facts of each case." *Id*., citing *White v. Woodall*, 572 U.S. 415, 427 (2014). That means that courts "must pay heed to *Cronic*'s core holding: that a showing of prejudice is not necessary for 'situations in which counsel has entirely failed to function as the client's advocate.'"

Lewis, 993 F.3d at 1003, citing *Florida v. Nixon*, 543 U.S. 175, 189 (2004).

Instead of reasonably applying the Supreme Court's rule, the court of appeals unreasonably applied a rule it made up.

The court of appeals chose to examine cases less on point and less persuasive than *Lewis*, then discerned its prosecutor-centric test.

According to the court of appeals, a "common thread" in *Cronic* caselaw "is whether any sort of strategic reasoning (or something reasonably in the defendant's interests) can be discerned in defense counsel's conduct." Slip op. 8. But the cases it cites do not support Greatreaks' lawyer doing nothing here.

The court of appeals relied on the unpublished, per curium decision in *United States v. Gooding*. 594 F. App'x

129 (4th Cir. 2014). *Gooding* is distinguishable. In *Gooding*, the defendant, "with counsel at his side, delivered a heartfelt allocutory statement expressing remorse for his criminal conduct and asserting a desire to change his ways." *Id*. The prosecution did not simply endorse the agreed sentence but commended Gooding for his "vast assistance" and urged the court to issue a sentence well below the guidelines. *Id*. Under those circumstances, the Fourth Circuit could not "say a defense lawyer would be unwise to sit back and let the Government do the talking." *Id*.

The court of appeals also misread *Patroso*. *Patrasso v. Nelson*, 121 F.3d 297 (7th Cir. 1997). Slip op. 10. The court of appeals focused on the prosecutor's actions in *Patrosso*, but the Seventh Circuit focused on defense counsel: "Counsel must make a significant effort, based on

reasonable investigation and logical argument, to mitigate his client's punishment." *Id*. at 303-04.

Similarly, the district court in *Gardiner* noted that "by not addressing the issue of an appropriate sentence, Attorney Violette gave up the opportunity to marshal salient facts in the presentence report and to present any mitigating circumstances surrounding Petitioner's conduct, both of which were considered by the Supreme Court in *Mempa v. Rhay*, [] to be important functions of counsel at sentencing. Thus, he did not fulfill in any respect the function of counsel, and in fact, Petitioner, who had desired counsel to represent him, could have done as well without counsel as with him present." *Gardiner v. United States*, 679 F. Supp. 1143, 1146 (D. Me. 1988). Again, in *Gardiner*, defense counsel's performance, not the prosecutor's, is key to a *Cronic* analysis.

The court of appeals cited *Warner* for the proposition that silence can be a strategy. Slip op. 11. But *Warner* is a different case: it is a trial with two codefendants, in which Warner's counsel "moved for a directed verdict on the firearms count of the indictment, moved for a mistrial three times, recommended that Warner not take the stand when called by a codefendant, and questioned one juror during trial. He also argued to the court during the sentencing hearing." *Warner v. Ford*, 752 F.2d 622, 624 (11th Cir. 1985). The question in *Warner* was not a lack of advocacy but whether the advocacy was sufficient. The *Warner* court rejected a *Cronic* analysis, not because of silence, but because of various gaps, such as not giving an opening statement or filing pretrial motions. *See, e.g.*, *Reyes-Vasquez v. United States*, 865 F. Supp. 1539, 1547 (S.D. Fla. 1994)(distinguishing *Warner* where there were no

codefendants and prosecution's case never subject to adversarial testing).

In contrast, Greatreaks did not speak at sentencing or submit a written statement, although he pled guilty. The State did not thank Greatreaks for his vast assistance or recommend a sentence below the Guidelines.

The court of appeals' decision is also out of step with the sparse case law in Washington on *Cronic* cases.

The lead Washington case is *McCabe*. *State v. McCabe*, 25 Wn. App. 2d 456, 523 P.3d 271 (2023). While counsel in McCabe tried to make a *Cronic* argument, counsel did much more at sentencing in *McCabe* than in Greatreaks' case. Counsel in *McCabe* proposed (unavailable) sentencing options and made a cursory sentencing argument that was not calculated to persuade. Counsel also requested a competency exam. *Id*. at 12. Maybe that's

bad lawyering, but it is lawyering. Here, in contrast, there was no argument and no proposed sentencing options. You do not need a bar license to say Greatreaks' attorney's words because they are a recitation of procedural facts, not legal advocacy. Greatreaks' lawyer requested that Greatreaks not have him participate in the presentence investigation. RP 11-12. Greatreaks' lawyer stood quiet while his client got a 480-month indeterminate sentence.

Division Three found a *Cronic* violation at sentencing in *Ramirez*. *Matter of Ramirez*, 22 Wn. App. 2d 1051 (2022)(unpublished). In *Ramirez*, counsel failed to file any briefing and "just asked for a $5 per month payment plan." *Ramirez*, 22 Wn. App. 2d 1051 (2022) at *25. Greatreaks' counsel did not ask for anything.

While prejudice is not part of the *Cronic* analysis, Greatreaks suffered. A three hundred-month sentence

would have meant that Greatreaks would be in his 70s before his first review hearing, if he accrued all earned time credits. With a 480-month sentence, even if he earns maximum earned time credits, Greatreaks will not be eligible for a release hearing until he is 85. The court sentenced Greatreaks to die in prison without hearing from his lawyer.

This Court's guidance is needed to clarify when silence or minimal participation at sentencing constitutes a *Cronic* violation in Washington. The constitutional right to counsel demands more than access to a warm body with a bar card. *State v. Anderson*, 19 Wn. App. 2d 556, 562, 497 P.3d 880 (2021).

E. First principles show that Greatreaks was denied counsel at a critical stage.

A defendant has the right to counsel during sentencing.

Lafler v. Cooper, 566 U.S. 156, 165 (2012). The need to represent a client does not disappear with a plea agreement and an agreed sentence.

Almost sixty years ago, in a case out of Washington stemming from plea agreements, the Supreme Court found not only a right to counsel at sentencing but that that assistance of counsel "assume[s] increased significance when it is considered that . . . the eventual imposition of sentence on the prior plea of guilty is based on the alleged commission of offenses for which the accused is never tried." *Mempa v. Rhay*, 389 U.S. 128, 136-37 (1967). Sentencing is a critical stage, and where, as here, the sentencing court has discretion to determine the sentence, a defendant has the right to counsel, and that counsel must do more than simply show up to the sentencing. At sentencing, "Counsel must make a significant effort, based

on reasonable investigation and logical argument, to mitigate his client's punishment." *Eddmonds v. Peters*, 93 F.3d 1307, 1319 (7th Cir.1996)(internal punctuation and citations omitted).

The United States Supreme Court revisited *Cronic* in the sentencing context in *Bell v. Cone*, 535 U.S. 685, 697 (2002). In *Bell*, counsel presented no mitigating evidence at a capital sentencing hearing and waived closing argument to avert rebuttal from the prosecution. *Id*. At the sentencing hearing, however, counsel pleaded for the defendant's life in his opening statement and cross-examined the state's witnesses. *Id*. The court clarified that counsel's failure to advocate for the defendant during the sentencing proceeding must be "complete," rather than at "specific points," for there to be a complete breakdown in the adversarial process. *Id*. That is, because counsel advocated

during parts of the sentencing hearing and gave a viable rationale to support his actions, the court ultimately concluded that *Cronic* did not apply. *Id*.

The court of appeals cited but misunderstood *Bell*. In citing *Bell*'s "as a whole" language, the court of appeals focused on the prosecutor endorsing the agreed recommendation. Slip op. at 10. But the whole context, especially the whole context of Greatreaks' counsel's action, shows the lack of advocacy. Counsel filed no memo. Counsel made no opening statement. In the 167 words he spoke, counsel never stated a reason for the court to adopt the parties' recommendation, never humanized his client. Counsel failed to have Greatreaks participate in the PSI interview or give a statement at sentencing. Advocacy was completely lacking at every point in Greatreaks' sentencing.

V. Conclusion

The court should reverse the court of appeals and remand for a resentencing where counsel can represent Greatreaks.

Certificate of Compliance

I certify that this document contains 4232 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted on April 28, 2025,

s/Harry Williams

Harry Williams, WSBA #41020

Attorney for Appellant

Declaration of Service

I declare that I mailed this document to

Gerry G Greatreaks
Doc# 441659
Washington Corrections Center
PO Box 900
Shelton, WA 98584

on October 11, 2024.

s/ Harry Williams, Wash. Bar No. 41020

Filed
Washington State
Court of Appeals
Division Two

April 8, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GERRY GENE GREATREAKS, II, Appellant.	No. 59439-1-II PUBLISHED OPINION

PRICE, J. — Gerry G. Greatreaks appeals his sentence for rape of a child in the first degree and two counts of child molestation in the first degree. Greatreaks argues that he was constructively denied counsel under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), because his defense attorney failed to do more to advocate at his sentencing hearing for the agreed upon sentence in his plea agreement. Greatreaks also alleges that the superior court abused its discretion by imposing an exceptional sentence that is clearly excessive and by imposing a community custody condition that is unrelated to his offense. We affirm.

FACTS

In November 2022, Greatreaks was charged with multiple sex offenses involving a "net nanny" operation.[1]

In January 2024, while he was on pretrial release for that case, Greatreaks was accused of a different sexual assault crime. A woman reported to Lewis County detectives that Greatreaks had sexually abused her nine-year-old son. The woman described that when she and Greatreaks were having sexual intercourse, on several occasions Greatreaks forced her son to participate in sexual activities with her.

Following an investigation into this new allegation, the State charged Greatreaks with four counts of first degree rape of a child, three counts of first degree child molestation, and one count of sexual exploitation of a minor.

In February 2024, Greatreaks reached an agreement with the State to plead guilty to both cases. As part of the global settlement, the State amended the information for the new case, dropping five of the eight counts.[2] The three remaining charges were two counts of first degree child molestation and one count of first degree rape of a child.

[1] A "net nanny" operation typically refers to a sting operation "designed to catch would-be sexual abusers before they have a chance to sexually assault an actual child." *See State v. Stott*, 29 Wn. App. 2d 55, 69, 542 P.3d 1018 (2023), *review denied*, 3 Wn.3d 1002 (2024). The operation generally involves law enforcement posing online as children or parents of children to offer opportunities for child sexual assault. *See generally id.* at 59 (describing a Washington State Patrol sergeant posing as a fictitious 13-year-old girl exchanging messages and setting up a meeting with the defendant as part of a net nanny operation).

[2] Our record does not include the original charges for Greatreaks' first case, but he pled guilty to two counts of attempted second degree rape of a child and five counts of first degree possession of depictions of minor engaged in sexually explicit conduct.

Based on Greatreaks' criminal history, the State agreed to recommend indeterminate sentences with the minimum sentences within the standard ranges. For the first degree child molestation charges, the State agreed to recommend a minimum sentence of 198 months, and for the first degree rape of a child charge, the State agreed to recommend a minimum sentence of 300 months. The State's agreement also included lifetime community custody and sex offender registration. The parties' joint recommendation for the earlier net nanny case was for a minimum sentence of 180 months, but the parties agreed to recommend that the two cases would run concurrently so that the total minimum time in custody was 300 months.

The superior court sentenced both cases at the same hearing. The State urged the superior court to adopt the agreement reached between the parties:

> I think the resolution that we've reached holds the defendant accountable, and it is a benefit to the State in that the victim doesn't have to relive these things, and—nor would he have to testify, potentially, against his own mother. Which I think would have been a very difficult thing to have occurred, given the things I know about the case.
>
> So while the crimes that are at issue, especially the second case, are very disturbing, and I think there's no way you get around that, this plea resolution allows this case to be resolved, and it significantly punishes the defendant. And that's why I've agreed to it. So I'd ask the [c]ourt to adopt the agreement that the parties have reached.

Verbatim Rep. of Proc. (Mar. 27, 2024) (VRP) at 17-18. The State also asked the superior court to impose standard community custody conditions and restitution for the victim.

The young victim then spoke to the superior court. The victim said that during his mother's relationship with Greatreaks, Greatreaks kicked him with a steel-toed boot, called him profane names, and threatened him with his fist. As a result of the trauma from Greatreaks' abuse, the

victim said that he had nightmares, that he "felt like [he] wasn't loved or cared about," and that he had attempted to kill himself. VRP at 20.

The defense counsel spoke next. He explained that Greatreaks' first case had been "dragging on for quite some time" and that he was Greatreaks' third attorney on the case. VRP at 21. Despite this and despite the complexities in both of Greatreaks' cases, the defense explained that they were able to negotiate an acceptable plea agreement with the State. Defense counsel stated,

> And as [the State] indicated, we have talked multiple times and negotiated quite a bit on both of these cases, and they are agreed recommendations in all respects with regard to both cases.

VRP at 21. Defense counsel made no further statement.

The superior court then thanked the parties for their statements and expressed appreciation for their ability to come to a plea agreement, especially given the benefit to the victim:

> Well, I appreciate the remarks from [the State] about how we got here. And I understand, having served many years as the prosecutor, the risks of going to trial and the damage that can be done—the severe damage that can be inflicted on victims who have to testify at trial.
>
> And so it's significant that Mr. Greatreaks gave up his right to a trial and saved everyone, and especially [the victim] from, having to testify in this case. Which, given the indignities that he's been through already, would be adding much more to that. So that's one of the . . . things that I value in somebody taking responsibility and sparing everyone the ordeal of having a case like this or cases like this go to trial.

VRP at 22.

When the superior court imposed its sentence, it departed from the parties' agreed recommendation. While the superior court agreed to the proposed minimum sentences in the plea

agreement, it imposed an exceptional sentence by running the sentences for the two cases consecutively, instead of concurrently, for a total of 480 months. The court explained,

> The departure is that, rather than run all of these concurrent, I am going to find substantial and compelling reasons to depart from the guidelines, and under 9.94A.535(2)(c), which indicates that the [c]ourt can impose an exceptional sentence when the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.
>
> [Greatreaks] has nine-plus points on each of these. I didn't count how many exactly he had on each of these counts, but each of them is nine-plus. And so I'm going to run Count[] I of the [first case] and Count III of the [second case] consecutive as an exceptional sentence.

VRP at 23. The superior court also imposed lifetime community custody, a lifetime sexual assault protection order for the victim, and required Greatreaks to register as a sex offender. Among other community custody conditions, condition 6 prohibited Greatreaks from consuming alcohol or drugs, and condition 9 required Greatreaks to submit to random urinalysis and breathalyzer tests.

Greatreaks appeals.

ANALYSIS

Greatreaks makes three arguments in this appeal: (1) that he was constructively denied counsel under *United States v. Cronic*, 466 U.S. 648, (2) that the superior court erred by imposing a clearly excessive sentence, and (3) that his community custody condition related to drug and alcohol testing is not crime related.

I. CONSTRUCTIVE DENIAL OF COUNSEL

Greatreaks first alleges that during sentencing his attorney said so few words that he was constructively denied counsel under *Cronic*. 466 U.S. 648. We disagree.

Typically, a defendant brings an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). To prevail, they must prove that their counsel's conduct fell below an objective standard of reasonableness and that their counsel's deficient performance prejudiced the outcome of their case. *Id.* at 687-88. Counsel's errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* at 687. Greatreaks clarifies that he is *not* making a claim of ineffective assistance of counsel under *Strickland*.

Instead, Greatreaks points to the rare exception to *Strickland* derived from the United States Supreme Court decision in *Cronic*. 466 U.S. at 658-60. There, the Court recognized that there are some circumstances that are so likely prejudicial "that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. Prejudice will be presumed if a defendant can prove: (1) they have been completely denied counsel at a critical stage of trial, (2) their counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," constructively denying them counsel, or (3) their counsel, although competent, was put in a situation in which no attorney could provide effective representation. *Id.*; *see also State v. McCabe*, 25 Wn. App. 2d 456, 461, 523 P.3d 271, *review denied*, 1 Wn.3d 1014, 530 P.3d 186 (2023). Greatreaks argues that this case falls under the second *Cronic* category—constructive denial of counsel.

Claims for constructive denial of counsel are "few and far between" and "limited to [cases] in which the defendant's counsel was so uninvolved that the attorney may as well have not been present in court at all." *McCabe*, 25 Wn. App. 2d at 463. It is not enough that a defendant's counsel simply performed poorly—" 'bad lawyering, regardless of *how* bad, does not support the presumption [of prejudice]; more is required.' " *Id.* at 464 (alteration in original) (quoting

McInereny v. Puckett, 919 F.2d 350, 353 (5th Cir. 1990)). There must be a " 'breakdown in the adversarial process.' " *Id.* (quoting *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 675, 101 P.3d 1 (2004)).

"[T]he specific proceeding must [also] be viewed 'as a whole,' not by assessing any claimed ineffectiveness 'at specific points.' " *Id.* at 463 (quoting *Bell v. Cone*, 535 U.S. 685, 697, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)). A defendant, for example, cannot isolate specific moments or comments within their counsel's closing argument to support a claim under *Cronic*, such errors " 'are plainly of the same ilk as other specific attorney errors we have held subject to *Strickland*'s performance and prejudice components.' " *Id.* at 463 (quoting *Bell*, 535 U.S. at 697-98).

Because denial of counsel claims under *Cronic* are rare, its application can be challenging and is heavily dependent on the specific facts. As noted by the Connecticut Supreme Court, even amongst multiple federal and state jurisdictions, "no consensus exists whether counsel's mere silence or lack of advocacy at a sentencing hearing amounts to a complete breakdown in the adversarial process." *Davis v. Comm'r of Corr.*, 319 Conn. 548, 557, 126 A.3d 538 (2015). *Compare Gonzalez v. United States*, 722 F.3d 118, 135-36 (2d Cir. 2013) (rejecting the application of *Cronic* even though defense counsel "did little more than simply attend" the sentencing hearing), *with Phillips v. White*, 851 F.3d 567, 572, 581 (6th Cir. 2017) (applying *Cronic* because defense counsel failed to investigate or present mitigating evidence and declined to make any argument or sentencing); *see also Warner v. Ford*, 752 F.2d 622, 625 (11th Cir. 1985) ("Whether [silence as a] strategy is so defective as to negate the need for a showing of prejudice to establish ineffective assistance of counsel must be judged on a case-by-case basis.").

A common thread among the cases addressing constructive denial under *Cronic* is whether any sort of strategic reasoning (or something reasonably in the defendant's interests) can be discerned in defense counsel's conduct. *See, e.g., United States v. Gooding*, 594 F. App'x. 123, 129 (4th Cir. 2014) (unpublished) (explaining that because the prosecution made statements favorable to the defendant and presented no evidence against him at sentence that it was reasonable for defense counsel to "sit back and let the Government do the talking");[3] *Davis*, 319 Conn. at 559-60, 564 (considering whether defense counsel's limited advocacy and agreement with the prosecution could be construed as strategic when deciding whether to apply *Cronic* or *Strickland*); *see, e.g., Florida v. Nixon*, 543 U.S. 175, 191-92, 125 S. Ct. 551, 160 L. Ed.2d 565 (2004) (holding that defense attorney's decision to concede defendant's guilt during capital case did not amount to constructive denial of counsel because it was a strategic choice to persuade the jury to not impose the death penalty).

When defense counsel is silent in the face of the State presenting evidence *against* the defendant, a constructive denial of counsel is more likely to be found. For example, in *Patrasso v. Nelson*, the State presented aggravating factors at sentencing and defense counsel made no response. 121 F.3d 297, 303-05 (7th Cir. 1997). The Seventh Circuit found a *Cronic* violation, reasoning that defense counsel not only "failed to offer mitigating evidence," but "[they also] made no effort to contradict the prosecution's case or to seek out mitigating factors." *Id.* at 304. Similarly, in *Gardiner v. United States*, the United States District Court for the District of Maine

[3] Federal Rules of Appellate Procedure 32.1 permits citing to unpublished federal judicial opinions issued after 2007 so long as they are designated as such. S*ee also* GR 14.1(b) (permits citing to unpublished decisions from other jurisdictions if permitted by the law of the other jurisdiction).

noted that defense counsel's silence was a complete failure because they did not "make a powerful, or even a weak, statement" in response to the State's presentation which characterized the defendant as " 'an amoral, antisocial individual, who has no regard for the rights or the welfare of other people or society in general.' " 679 F. Supp. 1143, 1146 (D. Me. 1988). In both cases, counsel's silence was an abandonment of the defendant in the face of the State's adversary litigation.

Greatreaks likens his situation to these egregious examples, arguing that his defense attorney was no more than "a warm body with a bar card." Reply Br. of Appellant at 2, 8. Greatreaks alleges that counsel's minimal comments constituted a complete failure to put the prosecution through adversarial testing. He counts the number of words spoken by his counsel and builds a bar graph that compares the words spoken (167) to the months imposed (480). He claims that even though his counsel was physically present, "he may as well have been absent." Reply Br. of Appellant at 11 (citing *Cronic*, 466 U.S. at 654, n.11). He further alleges that of the few comments his counsel made, some may actually have been harmful, such as comments that "[his] 2022 cases had been 'dragging on for some time' " and that he was Greatreaks' third attorney. Reply Br. of Appellant at 4.

We disagree that this case rises to the level of a *Cronic* constructive denial of counsel. Greatreaks' counsel was able to negotiate a plea agreement where the State reduced his charges from eight counts to three. The plea agreement also resulted in a joint sentencing recommendation that both counsel were obligated to support. *See State v. Molnar*, 198 Wn.2d 500, 512, 497 P.3d 858 (2021) ("In every case, the State has a 'good faith obligation to effectuate the plea agreement.' " (quoting *State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997))). Then, the

State, speaking first, advocated for the joint recommendation with an explanation of the benefits of avoiding a trial while, at the same time, "significantly" punishing the defendant. VRP at 18. He finished with a strong personal endorsement of the agreement, stating, "And that's why I've agreed to it." VRP at 18.

Greatreaks' counsel's limited presentation must be viewed in the context of his hearing " 'as a whole.' " *See McCabe*, 25 Wn. App. 2d at 463 (quoting *Bell*, 535 U.S. at 697). The prosecutor made no detailed recitation of the egregious facts of crimes, nor can the prosecutor's statements reasonably be seen as disparaging Greatreaks. Moreover, the prosecutor gave a strong personal endorsement of the agreed recommendation. Unlike *Patrasso* and *Gardiner*, the State presented no evidence against Greatreaks. *See Patrasso*, 121 F.3d at 304; *Gardiner*, 679 F. Supp. at 1146. There was no clear need for defense counsel to actively advocate for the superior court to accept the plea agreement because the State had just done so. There was no abandonment of the defendant by defense counsel because there was no adversarial litigation to contest. On these facts, it was a viable strategy to "let the Government do the talking." *See Gooding*, 594 F. App'x. at 129 (unpublished).

Greatreaks appears to reject the idea that a limited presentation by defense counsel can ever be an acceptable strategy when sentencing on an agreed recommendation because the superior court can always depart from that recommendation. Such a view is too simplistic. One can readily conceive of different scenarios when an aggressive defense might be necessary, such as when the prosecutor fails to adequately support the agreement or when the prosecutor casts unfair aspersions on the defendant. But we have found no authority to suggest that a defense counsel is always required to aggressively advocate with an active presentation at an agreed sentencing in order to

avoid violating *Cronic*. Indeed, the opposite is true—there can be no blanket rule. Sometimes advocacy in a particular set of circumstances requires defense counsel *to say less*, sometimes it requires defense counsel *to say more*. *See Warner*, 752 F.2d at 625 (noting that defense counsel's silence can be strategic in particular circumstances).

From a review of the entire context of the sentencing hearing, this is not the rare case when a constructive denial of counsel under *Cronic* occurred. Thus, we hold that defense counsel's limited presentation at sentencing did not amount to a constructive denial of counsel or a breakdown of the adversarial process.

II. EXCEPTIONAL SENTENCE

Greatreaks separately argues that the length of his sentence is clearly excessive and shocks the conscience. We disagree.

We may review an exceptional sentence to determine whether the sentence is clearly excessive. RCW 9.94A.585(4). We review whether a sentence is clearly excessive for an abuse of discretion. *State v. Ritchie*, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995). The superior court abuses its discretion when a sentence is based on untenable grounds or reasons or it is a decision no reasonable person would make. *Id.* If based on proper reasons, "we will find a sentence excessive only if its length, in light of the record, 'shocks the conscience.' " *State v. Kolesnik*, 146 Wn. App. 790, 805, 192 P.3d 937 (2008) (quoting *State v. Vaughn*, 83 Wn. App. 669, 681, 924 P.2d 27 (1996)), *review denied*, 165 Wn.2d 1050 (2009).

Greatreaks does not challenge the superior court's basis for the exceptional sentence; he only asserts that his "sentence shocks the conscience." Br. of Appellant at 26. Greatreaks claims he is not minimizing the seriousness of his crimes, but he argues that his defense counsel's failure

to investigate mitigating circumstances led to him having a one-sided sentencing hearing that ultimately led to an excessive sentence.

We disagree that Greatreaks' sentence shocks the conscience. The superior court commended Greatreaks for taking accountability for his crimes and pleading guilty, as well as the attorneys on both sides for negotiating a plea deal. Despite this, the superior court reasoned that his sentences should run consecutively because of the serious nature of Greatreaks' crimes and because his high offender score resulted in some of the current offenses going unpunished. Without question, Greatreaks' offender score was high and his crimes were horrific, involving sexual and physical abuse of a nine-year-old boy *while* Greatreaks was on pretrial release for net nanny charges. Given these circumstances, we cannot say that Greatreaks' sentence shocks the conscience.

III. COMMUNITY CUSTODY CONDITION 9

Finally, Greatreaks challenges his community custody condition related to testing for drugs and alcohol. He argues that community custody condition 9, which requires him to submit to random urinalysis and breathalyzer testing, must be stricken because it is not "crime-related." Br. of Appellant at 28. The State concedes that neither drugs nor alcohol contributed to Greatreaks' crimes and, accordingly, condition 9 should be stricken.

We do not accept the State's concession. *See State v. Lewis*, 62 Wn. App. 350, 351, 814 P.2d 232, *review denied*, 118 Wn.2d 1003 (1991) (courts are not bound to accept an erroneous

concession from the State). The challenged condition does not need to be crime related. *See State v. Nelson*, No. 102942-0, slip op. at 27 (Wash. Mar. 27, 2025).[4]

In *Nelson*, our Supreme Court resolved a then-existing split among divisions of the Court of Appeals and held that a condition requiring random drug and alcohol testing does not need to be crime related. *Id.* *Nelson* noted that trial courts have statutory authority to impose prohibitions on drug and alcohol use. *Id.* And once imposed, *Nelson* explained that the State had a compelling interest in monitoring compliance:

> Protection of the public is achieved not merely by preventing similar crimes but by ensuring the person on community custody is willing and able to comply with all applicable legal requirements. The State cannot possibly do so without the necessary tools "to monitor compliance with a validly imposed [sentencing] condition." Thus, the State has a compelling interest in monitoring Nelson's compliance with his valid community custody conditions prohibiting drug and alcohol use, regardless of the specific facts of his underlying offenses.

Id. at 31 (alteration in original) (emphasis omitted) (quoting *State v. Olsen*, 189 Wn.2d 118, 126, 399 P.3d 1141 (2017)).

Here, consistent with *Nelson*, the superior court had the authority to impose conditions that prohibited Greatreaks from using drugs or alcohol. Once these conditions were imposed, the superior court was also entitled to impose random compliance testing regardless of any role that drugs or alcohol may have played in the underlying crimes. Thus, we affirm community custody condition 9.

[4] https://www.courts.wa.gov/opinions/pdf/1029420.pdf.

CONCLUSION

We affirm.

PRICE, J.

We concur:

VELJACIC, A.C.J.

GLASGOW, J.

LAW OFFICE OF HARRY WILLIAMS LLC

April 28, 2025 - 1:55 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	59439-1
Appellate Court Case Title:	State of Washington, Respondent v. Gerry G. Greatreaks, II, Appellant
Superior Court Case Number:	24-1-00039-3

The following documents have been uploaded:

- 594391_Motion_20250428135133D2013064_2225.pdf
  This File Contains:
  Motion 1 - Discretionary Review
  The Original File Name was Greatreaks MDR.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- sara.tagartbeigh@lewiscountywa.gov

Comments:

Sender Name: Harry Williams - Email: harry@harrywilliamslaw.com
Address:
PO BOX 22438
SEATTLE, WA, 98122-0438
Phone: 206-240-1958

Note: The Filing Id is 20250428135133D2013064