STATE OF LOUISIANA	*	**NO. 2017-KA-0434**
VERSUS	*	
		COURT OF APPEAL
AVERY A. YOUNG	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 489-688, SECTION "I"
Honorable Karen K. Herman, Judge
* * * * * *
Judge Rosemary Ledet
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(Court composed of Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins, Judge Regina Bartholomew Woods)

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AFFIRMED IN PART; REMANDED FOR RESENTENCING

OCOBER 11, 2017

This is the second appeal by the defendant, Avery Young, in this criminal case, involving a charge of second degree kidnapping. On Mr. Young's first appeal, this court conditionally affirmed his guilty plea to that charge, vacated his sentence, and remanded for an evidentiary hearing on the motion to withdraw his guilty plea. *State v. Young*, 11-0046 (La. App. 4 Cir. 8/17/11), 71 So.3d 565 ("*Young I*"). On remand, the district court, following an evidentiary hearing, denied the motion to withdraw Mr. Young's guilty plea and resentenced him. From that ruling, Mr. Young filed this second appeal. For the reasons that follow, we affirm in part and remand for resentencing to correct an error patent.

STATEMENT OF THE CASE

On August 25, 2009, the State charged Mr. Young with second degree kidnapping, a violation of La. R.S. 14:44.1 (count one). On September 1, 2009, Mr. Young was arraigned and entered a plea of not guilty to that charge. Before trial, both sides filed various motions, including a motion to introduce evidence of

an earlier offense filed by the State. Granting in part and denying in part the State's motion, the district court, on October 28, 2009, ruled as follows:

> [T]he State may adduce evidence of the earlier offense involving [L.B.], but with certain limitations: no mention is to be made of the gun used by Mr. Young in that matter, nor is anything which may have occurred between [L.B.] and Mr. Young prior to December 11, 2007 . . . be elicited. Indeed, [L.B.] is to be instructed by the State to only testify to the facts of Mr. Young's restraining her at his apartment against her will and his efforts to pacify her during that restraint by administering intoxicants.

On July 12, 2010, a motions hearing was held. On that same date, the State amended the bill of information to add a charge of forcible rape, a violation of La. R.S. 14:42.1 (count two), and to change the wording and date of the occurrence. Mr. Young entered a plea of not guilty to the amended bill of information.

The jury trial in this case lasted three days. On the first day (July 12, 2010), voir dire was conducted and a jury was selected. On the second day (July 13, 2010), both sides gave opening statements and the State called three witnesses—the victim, R.C.;[1] the sexual assault nurse examiner ("SANE"), Jeanne Dumestre; and a detective with the New Orleans Police Department ("NOPD") sex crimes unit, Detective Corey Lymous. On the third day (July 14, 2010), Mr. Young pleaded guilty to second-degree kidnapping; and the State dismissed, pursuant to a negotiated plea agreement with the State, the forcible rape charge.

Before sentencing, Mr. Young enrolled new counsel. On August 20, 2010, Mr. Young filed a motion for a sanity hearing, which the district court granted. On

[1] In this opinion, we use the victims' initials. *See* La. R.S. 46:1844 W(3) (providing for "the use of initials, abbreviations, or any other form of concealing the identity of the victim on all public documents.").

August 26, 2010, following a sanity hearing, the district court found Mr. Young competent to proceed. On that same date, Mr. Young filed a motion to withdraw his guilty plea and requested an evidentiary hearing on that motion. He also filed a motion to continue sentencing. The district court denied those motions and sentenced Mr. Young, in accord with the plea agreement,[2] to serve fifteen years at hard labor with credit for time served and concurrent with his parole revocation sentence in Section "C" of Orleans Parish Criminal District Court (Case Number 475-798) (the "Section 'C' Case"),[3] but without benefit of parole, probation, or suspension of sentence for the first two years. On August 30, 2010, the district court denied Mr. Young's motion to reconsider sentence.

In his prior appeal, Mr. Young argued, among other things, that the district court erred by denying the motion to withdraw his guilty plea without an evidentiary hearing. Finding merit to this argument, this court affirmed Mr. Young's conviction, vacated his sentence, and remanded for an evidentiary hearing on the motion to withdraw his guilty plea. *Young I, supra.*

On remand, Mr. Young, represented by new counsel, filed a motion to quash the indictment. On October 25, 2013, following a hearing, the district court denied the motion to quash. At that time, the evidentiary hearing on the motion to withdraw Mr. Young's guilty plea was set for December 2013.

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[2] As we noted in *Young I*, "[p]rior to taking the plea, the trial court noted that the State agreed to dismiss the forcible rape charge and promised not to file a multiple bill of information against defendant in exchange for Defendant pleading guilty to second-degree kidnapping with a sentence of fifteen years at hard labor." 11-0046 at p. 10, 71 So.3d at 572.

[3] As noted elsewhere, the record reflects that Mr. Young, at the time of the trial, was on probation for a similar offense involving a former girlfriend, L.B. On February 11, 2009, in the Section "C" Case, Mr. Young pled guilty to false imprisonment with a dangerous weapon, a violation of La. R.S. 14:46.1, and received a ten-year suspended sentence.

On August 25, 2015, Mr. Young filed a motion to recuse the district court judge (Honorable Karen Herman) on the basis that the judge could be a witness at the hearing on the motion to withdraw his guilty plea. The motion was transferred to another division for hearing. On November 4, 2015, following a recusal hearing, the motion was granted. This court denied the State's writ application. *State v. Young*, 15-1305 (La. App. 4 Cir. 1/20/16) (*unpub.*). The Louisiana Supreme Court, however, granted the State's writ application, stating that "[t]he recusal of Judge Herman is reversed. The hearing on the motion to withdraw the guilty plea shall proceed with Judge Herman presiding." *State v. Young*, 16-0300 (La. 4/8/16), 191 So.3d 579.

On January 13, 2017, the district court, following a two-day evidentiary hearing, denied the motion and re-imposed the original sentence of fifteen years at hard labor. This appeal followed.

STATEMENT OF THE FACTS

The facts regarding the offense to which Mr. Young pled guilty are set forth in detail in *Young I*. Briefly stated, Mr. Young pled guilty to the second degree kidnapping of his girlfriend, R.C., whom he held captive in his house after they argued.[4] Because the issue on this appeal relates solely to the motion to withdraw

[4] As noted earlier, only three witnesses testified at the trial before Mr. Young pled guilty on the third day of trial. One of those witnesses was the victim, R.C. In *Young I*, the victim's extensive trial testimony regarding the underlying offense was summarized as follows:

> R.C., the victim, testified at length during Defendant's trial. R.C. testified that she met Defendant while she and her sister were apartment hunting in the Mid–City area of New Orleans. When R.C. and her sister stopped to inquire about a rental, Defendant approached them, and a conversation ensued. Defendant telephoned his mother about the rental. During the conversation, R.C.'s sister and Defendant learned that they had mutual interests in photography and gardening, and exchanged phone numbers. Approximately one month later, the two women leased the apartment. In April of 2009, R.C. and Defendant began a romantic relationship.

In July 2009, Defendant underwent eye surgery. R.C. went to Defendant's house to visit with him after his surgery, and stayed from approximately 7:00 p.m. to 10:30 p.m. During that time, Defendant and R.C. engaged in consensual sexual intercourse. R.C. left Defendant's house to meet with some out-of-town friends. R.C. returned to Defendant's house at approximately 2:50 a.m., two hours later than she had advised Defendant that she would return. Defendant began to berate her for being late, and a verbal altercation ensued.

R.C. advised defendant that she was leaving the house. Defendant slammed R.C. against the bedroom door and locked the deadbolt, blocking her exit. Defendant threw R.C. to the floor and placed his knee on her ribcage, as well as a chokehold on R.C.'s neck. As she began to lose consciousness, Defendant told R.C. that she would now know how it would to feel to die. Maintaining the chokehold, Defendant picked up R.C. and placed her on the bed. Defendant repeatedly choked and slapped R.C. across the face until she lost consciousness.

Defendant continued to interrogate R.C., acting as though he was going to punch her in the face, then repeatedly slapping her with an open hand to prevent bruising. She sustained numerous cuts to the inside of her mouth which bled onto her sweatshirt. When R.C. tried to scream to get the attention of the downstairs tenant, Defendant obstructed R.C.'s breathing and told her that he would throw her out of the window if she tried to scream again. Defendant then produced hand restraints that he had used for sex play, restrained R.C.'s hands behind her back, and placed her onto the bed, advising her that this was her last day on earth and that he was going to kill both of them.

R.C. suggested to Defendant that he consider the consequences of his actions, to which he responded that there would be no consequences because they both were going to die. At one point, R.C. expressed to Defendant that she needed to use the toilet, which he allowed, but did not permit her to clean herself. Defendant then retrieved a set of shackles, removed R.C.'s clothing and shackled her to the bed.

R.C. asked Defendant for a blanket and some water, as her mouth was bleeding. Defendant denied her requests, punching R.C. several times in her solar plexus area, causing her to lose her breath, advising her that it was her last day on earth. After R.C. apologized to Defendant and expressing that she had wronged him, Defendant played R.C.'s favorite movie soundtrack. Upon hearing the music, R.C. began to cry and told Defendant she deserved to be punished; only then did Defendant give R.C. the blanket and water that she requested. He also gave her an over-the-counter painkiller when she complained of pain in her ribs and difficulty breathing. Defendant then placed a Klonopin pill in R.C.'s mouth, which she spit out. Defendant forced the pill into her mouth until it dissolved, and R.C. lost consciousness.

When R.C. awoke at approximately 6:00 a.m., she was still restrained. Despite R.C.'s adamant protests, Defendant raped R.C., and she lost consciousness again. When R.C. subsequently awoke some time later, Defendant was holding her, and she was no longer restrained. R.C. confronted Defendant about the rape, at which time Defendant began to cry and apologized for his actions. Defendant refused to allow her to leave the apartment until R.C. explained that people were expecting her and that if she did not arrive, they would become alarmed. Defendant handed R.C. her cell phone, which he had placed out of her reach, and watched as she sent a text message to her sister explaining that their appointment to see an apartment would have to be rescheduled. R.C. then

Mr. Young's guilty plea, we focus on the facts developed at the evidentiary hearing on remand on the motion to withdraw.

As noted, the evidentiary hearing was held over a two-day period. On the first day, Mr. Young called the following six witnesses: (i) Mark Nermyr, a criminal defense attorney from Arizona and Mr. Young's friend; (ii) Christian Recile, an NOPD officer and Mr. Young's friend; (iii) Veronica Young, Mr. Young's mother; (iv) Jeffrey Smith, Mr. Young's co-counsel at trial; (v) Dr. Richard Richoux, who was qualified as an expert in the field of general psychiatry; and (vi) Mr. Young. On the second day, the State called one witness—Dr. Sarah Deland, who was qualified as an expert in the field of general psychiatry.

> contacted the apartment manager to reschedule the appointment. Defendant retrieved the cell phone and again placed it out of R.C.'s reach.
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> R.C. told Defendant that because he raped her, their relationship was over, and Defendant began to cry, explaining that he was abused as a child, and that because he did not have a childhood, all he wanted was a baby. Defendant then told R.C. that he would allow her to leave on the condition that she would bear his child. Desperate to escape, R.C. agreed. After they engaged in sexual intercourse, R.C. and Defendant left the apartment together. Defendant insisted that he drive R.C. home so that he could then bring her back to his apartment; he also refused to return her cell phone. Defendant drove to a restaurant in the French Quarter.
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> Under the pretext of calling the apartment manager, R.C. retrieved her cell phone from Defendant. She entered the restaurant and sent a text message to her sister informing her that Defendant had raped her and to contact Defendant's mother, Veronica Young. R.C. erased the message and warned her sister not to respond because Defendant was reading her text messages. Defendant entered the restaurant and asked R.C. if she had contacted his mother; she answered in the affirmative. After R.C. advised Defendant that their relationship was over, he left the restaurant.
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> Shortly thereafter, R.C.'s sister arrived at the restaurant, at which time R.C. related what had occurred. That evening, R.C.'s sister and her friends convinced R.C. to report the rape to the police and to also go to the hospital. At the hospital, R.C.'s injuries were treated, and a sexual assault examination was performed. R.C. also spoke at length with a sexual assault nurse examiner ("SANE").

Young I, 11-0046 at pp. 2-6, 71 So.3d at 568–69.

To provide a background for analyzing the issue presented on appeal, we summarize the evidence presented at the evidentiary hearing. For ease of discussion, we divide the summary into the following three parts: timeline of the case; experts' testimony; and lay witnesses' testimony.

Timeline of the case

Shortly after Mr. Young's arrest, his parents retained Mr. Smith to represent their son. Mr. Smith argued all of the pre-trial motions. As the district court pointed out at the hearing, Mr. Smith alone represented Mr. Young from August 2009, when the bill of information was filed, until about five months before his trial, when a motion to associate Robert Glass as co-counsel was filed.

In late January 2010, Mr. Young's father retained Mr. Glass to represent his son. On February 1, 2010, Mr. Smith filed a motion to enroll Mr. Glass as associated counsel, which the district court granted.[5] According to Mr. Young, Mr. Glass then became lead counsel, and Mr. Smith remained on the case as "second chair." When Mr. Glass was hired to represent Mr. Young, he was suffering from Parkinson's disease;[6] Mr. Glass did not disclose this fact to his client, to Mr. Young; Mr. Young's parents; or to co-counsel, Mr. Smith.

When the jury trial commenced, Mr. Young was represented by a team of two experienced attorneys—Mr. Glass[7] and Mr. Smith.[8] Before the trial, his

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[5] Mr. Young does not raise any issue regarding the competency of either counsel during the pre-trial period. At the evidentiary hearing, Mr. Smith testified that during the time he and Mr. Glass worked together, he neither saw Mr. Glass experience any tremors nor noted any physical issues.

[6] At the evidentiary hearing, it was stipulated that Mr. Glass was diagnosed with Parkinson's disease before February 1, 2010—the date the motion was filed enrolling Mr. Glass as co-counsel.

[7] At the evidentiary hearing, Mr. Young described Mr. Glass as "mythic." He stated that Mr. Glass was "a legend in the industry," that he had an "amazing reputation," that "everyone knew who he was," and that he was "supposed to be the best." Likewise, in his appellant brief, Mr.

attorneys divided the trial tasks between themselves. As planned, on the first day of the trial, Mr. Smith handled the voir dire. As planned, on the morning of the second day of trial, Mr. Glass made the opening statement and cross-examined the victim, R.C., one of the State's key witnesses, whose testimony was extensive and lasted until the lunch break. After the victim's testimony, the trial was recessed for lunch.

Mr. Young testified that during the lunch break, he and Mr. Glass were left alone in the courtroom. At that point, Mr. Young confronted Mr. Glass with the question of whether Mr. Glass had Parkinson's disease.[9] Mr. Glass responded affirmatively that he had Parkinson's disease. According to Mr. Young, Mr. Glass added that his doctor had told him that he was not "too far along, yet" and that he did have to take medication. Mr. Young further testified that Mr. Glass then asked him whether his performance had been "that bad." Continuing, Mr. Young testified that, shortly thereafter, Mr. Glass leaned back in his chair and went to sleep in the courtroom during the lunch break.

When trial resumed that afternoon, Mr. Smith, as planned, handled the cross-examination of NOPD Detective Lymous.[10] The State's final witness for the day

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Young acknowledged that "Mr. Glass enjoyed the reputation as an elder in the criminal defense bar and he was a highly-respected and experienced criminal trial attorney."

[8] At the evidentiary hearing, Mr. Smith testified that he had been a defense attorney for thirty-six years and that he was a death-qualified defense attorney.

[9] Mr. Young testified that the confrontation was prompted by the following two factors: (1) during the defense's opening statement and cross-examination of the victim, Mr. Young observed that Mr. Glass was shaking badly and that, in Mr. Young's opinion, Mr. Glass' professional performance was terrible; and (2) as a result of Mr. Glass' performance, Mr. Young was upset and believed that "essentially, the case was lost at this point."

[10] Detective Lymous, a member of the NOPD sex crimes unit, testified that he met with the victim on July 10, 2009. The SANE nurse called the sex crimes unit when the victim was about to be discharged from the hospital. He arranged to the meet the victim at his office. The officer took a recorded statement from the victim, who identified Mr. Young as the perpetrator. The officer booked Mr. Young, and later executed a search warrant at Mr. Young's residence. No

was the SANE nurse.[11] As apparently planned, Mr. Glass handled the testimony of the SANE nurse. During the direct examination of the State's SANE nurse, Mr. Glass voiced several hearsay objections, several of which the district court sustained. Mr. Glass then cross-examined the SANE nurse.[12]

After trial was over for the day, Mr. Young spoke with his parents, who had been sequestered (and thus not in the courtroom). Mr. Young informed his parents of his views regarding Mr. Glass' performance that day and that Mr. Glass had acknowledged that he had Parkinson's disease; his parents were unaware of this fact.[13] Mr. Young also told his parents he would arrange to call them that evening.

Later that evening, Mr. Smith spoke with Mr. Glass and met with Mr. Young's parents; Mr. Smith did not recall speaking with Mr. Young on the telephone that evening. Mr. Young, in contrast, testified that Mr. Smith was present that night when he telephoned his parents and that he spoke with Mr. Smith that night. Mr. Young testified that his mother told him in the phone conversation—and Mr. Smith later confirmed it on the phone—that Mr. Smith had

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physical evidence was obtained from the residence. The officer noted that, at the time of the search, the lock on the bedroom door was not functional.

[11] Ms. Dumestre, the SANE nurse who examined the victim, testified as to the injuries the victim sustained. She stated that the victim sustained bruising and swelling to her neck and ear area and a black eye. The victim had cuts and trauma to her lip and inside her mouth. There was a linear scratch and bruising under the victim's breasts. The victim also had bruising to the lower and mid back. The vaginal examination revealed that the victim's labia were swollen, and there were lacerations on the outside of the vaginal opening. The victim also had three small tears at the vaginal opening. Ms. Dumestre testified that one generally would not have such injuries from consensual intercourse. Ms. Dumestre also testified that the medical records indicated the victim also had an injury to her carotid artery. Photographs of the victim's injuries were introduced into evidence.

[12] Mr. Young voiced no complaints regarding Mr. Glass' cross-examination of the SANE nurse. Mr. Young's two friends who sat through the opening statements and the examination of the victim—Mr. Nermyr and Mr. Recile—both testified that they did not believe they were in court for the SANE nurse's testimony.

[13] Both Mr. Young and his mother testified that they would not have hired Mr. Glass to represent Mr. Young in this case if they were aware of this fact.

spoken to Mr. Glass, that Mr. Glass had acknowledged that he could not continue, and that Mr. Glass was backing out and transferring the case to Mr. Smith. On that evening, Mr. Young testified, no decision had been reached as to how matters would proceed the next day.

On the third day of trial (July 14, 2010), no testimony was taken because there was an electrical power outage in the courthouse building that morning. As the district court judge noted on the record, she allowed the defense attorneys (Mr. Glass and Mr. Smith) and Mr. Young to use her chambers to meet in private to discuss a plea agreement. The three of them discussed the plea agreement at length that morning. Mr. Smith testified that Mr. Glass played a pivotal role in the plea agreement discussion. Mr. Smith further testified that this was not the first time a plea agreement had been discussed in this case. Mr. Young testified that Mr. Smith informed him that the trial judge had informed the defense that she would impose a fifty-year sentence if he was convicted. Mr. Young further testified that given Mr. Glass' health issues, coupled with what had happened in court on the prior day, he felt compelled to accept the plea agreement offered by the State. Mr. Smith acknowledged that he and Mr. Glass encouraged Mr. Young to accept the plea agreement. Mr. Smith, however, explained that they did so because of the strength of the State's evidence against Mr. Young, not because of Mr. Glass' performance.

During the trial, neither the attorneys nor Mr. Young advised the district court judge that Mr. Glass was suffering any symptoms from Parkinson's disease. Nor was a motion for mistrial or a motion to continue the trial filed on that basis. A few days after he was sentenced, however, Mr. Young retained new counsel, who filed the motion to withdraw Mr. Young's guilty plea based, in part, on Mr. Glass' alleged incompetence.

Expert witnesses' testimony

The testimony at the evidentiary hearing focused on Mr. Glass' competency, especially the effect, if any, of Mr. Glass' symptoms from Parkinson's disease on his performance at the trial. Although Mr. Glass was not called as a witness at the evidentiary hearing and his medical records were not offered in evidence, it was stipulated, as noted elsewhere, that Mr. Glass was diagnosed with Parkinson's disease before February 1, 2010. At the evidentiary hearing, each side called an expert to opine on whether Mr. Glass was suffering from any cognitive impairment as a result of the Parkinson's disease. The experts voiced totally divergent opinions on this issue.

Mr. Young's expert, Dr. Richoux, testified about Parkinson's disease in general. Dr. Richoux testified that, in the earliest stages of Parkinson's disease, 30 to 40 percent of Parkinson's sufferers will suffer cognitive impairment and that, "in advanced stages of Parkinson's [d]isease, probably 80 percent of Parkinson's sufferers will show an identifiable neuro[-]cognitive result." Dr. Richoux explained that the cognitive impairment that accompanies Parkinson's disease is documented in both the Diagnostic and Statistical Manual of Mental Disorders (the "DSM") and the literature in general. Indeed, he noted that the current DSM, DSM V, has a section entitled "Neuro[-]Cognitive Disorders Due to Parkinson's Disease."

Dr. Richoux further explained that a Parkinson's sufferer will have problems primarily in the following two domains (areas of brain function): (i) complex attention, and (ii) executive functioning skills. He noted, based on his experience in court testifying regularly as an expert, that these areas of brain function are important skills for a defense attorney. Complex attention, he explained, means the ability to attend to what is going on, to retain it for some time, and to formulate

thoughts about it. Executive functioning skills, he explained, primarily involve "on-the-spot" decision making. A problem in this area is reflected by a tendency to defer to others in terms of making important decisions. He stated that "Parkinson's suffers will have a tendency to abandon complex tasks." Indeed, he stated the DSM gives this as an example. Dr. Richoux, however, testified that "it's important to understand, not every single person who has a diagnosis of Parkinson's [d]isease, has the same degree of neuro[-]cognitive impairment in accompaniment with it."

Dr. Richoux acknowledged that he had no awareness of when Mr. Glass was diagnosed with Parkinson's disease and that he was not given access to Mr. Glass' medical records. Dr. Richoux further acknowledged that he had neither examined Mr. Glass nor attended the trial in this case. Dr. Richoux still further acknowledged that he had never observed Mr. Glass in a courtroom setting and thus could not make a comparison based on what the other lay witnesses at the evidentiary hearing described occurred at the trial in this case. Dr. Richoux explained that his expert opinion regarding Mr. Glass was based solely on "background knowledge about generalities concerning Parkinson's disease, and specifically, neuro[-] cognitive impairment associated with it. And then trying to parlay that with what [he] heard in the form of testimony from witnesses [at the evidentiary hearing.]"

Expressing his opinion, Dr. Richoux testified that "if I operate on the assumption that what I heard is accurate, in that regard, [Mr. Glass] could certainly correlate quite closely with, again, one of the classic examples given in the DSM in the area of impairment of Executive Functioning, when it talks about abandoning complex tasks." He further testified that "[t]o a reasonable degree of medical certainty, based on what I'm hearing, there was some degree of cognitive impairment on the part of Mr. Glass." Finally, he opined that this impacted on Mr.

Glass' conducting of the defense. Although Dr. Richoux opined that Mr. Glass had some degree of neuro-cognitive impairment, he could not quantify it.[14]

The State's expert witness, Dr. DeLand, similarly testified about Parkinson's disease in general, noting that the disease includes motor impairment and cognitive issues. Dr. DeLand testified that in the early stages of Parkinson's disease, it is common for some people not to suffer from cognitive impairment, yet to have motor impairment. She further opined that a diagnosis of cognitive impairment from Parkinson's disease cannot be made without neuro-psychological testing.

Dr. DeLand testified that her opinion in this matter was based on her review, and, *in globo* consideration, of the following items: the testimony of all the witnesses who testified at the evidentiary hearing about Mr. Glass' trial performance; Dr. Richoux's testimony at that hearing; the trial transcript, including opening statements and the direct and cross-examination of the victim and the SANE nurse; some background information; the arrest warrant; and the SANE report. Dr. DeLand testified that there was nothing in the trial transcript to cause her to believe that Mr. Glass was having any significant cognitive impairment that day. She stated that she did not have any problem following Mr. Glass' opening statement. She was able to follow the logic of his argument and his cross-examination of the victim, which she indicated made sense. She noted that he did not get "derailed," was not "tangential," and did not ask inappropriate questions or anything like that. Dr. DeLand testified that, having read the transcript, she did not disagree that Mr. Glass appeared to be having "some problems." Dr. DeLand,

[14] On cross-examination, Dr. Richoux noted that he and Dr. Salcedo examined Mr. Young in connection with his competency hearing. At that time, they determined that Mr. Young had an anti-social psychopathic type profile, which included pathological lying; conning and manipulative behavior; failure to accept responsibility for one's own actions; and taking pride with getting away with crimes.

however, opined that there was nothing from the trial transcript to indicate that Mr. Glass was suffering from any degree of cognitive impairment. To make such a determination, Dr. Deland explained that neuro-psychological testing would be necessary. Explaining the need for such testing, Dr. DeLand testified as follows:

> Well, generally, when cognitive impairments start coming on in Parkinson's, they're fairly subtle. They deal with higher executive functioning. You know, make complex decisions. Transitioning from one thought process to another—that kind of thing. And generally, it's the recommendation—if that has suspected us to get neuro psychological testing—just because that's really one of the only ways to tell that there's actually any impairment beginning. And people can go for years and have significant motor impairments, but not have any significant findings on neuro psychological testing. But otherwise, it's very hard to tell.

In sum, the experts expressed two different views on whether Mr. Glass had any degree of cognitive impairment at the time of Mr. Young's trial.

Lay witnesses' testimony

At the hearing, Mr. Young introduced the testimony of four lay witnesses who were present in the courtroom on the second day of trial when Mr. Glass gave his opening statement and cross-examined the victim—Mr. Young's two friends, Mr. Nermyr (a defense attorney) and Mr. Recile (an NOPD officer); his co-counsel, Mr. Smith; and Mr. Young. On that morning, none of the four witnesses was aware of the fact that Mr. Glass had Parkinson's disease.

All four witnesses except for Mr. Smith testified that Mr. Glass used the podium to support or to balance himself when he was speaking and that his body was shaking and he was having tremors throughout the opening statement and cross-examination of the victim. Mr. Young testified that Mr. Glass was shaking so badly that the podium was "literally wobbling." He further testified that Mr. Glass had tremors throughout that morning of trial. Mr. Nermyr testified that Mr. Glass

was suffering from tremors and shaking the whole time. Mr. Smith, on the other hand, testified that although Mr. Glass' hands were on the podium, Mr. Glass did not use the podium to balance himself. Mr. Smith also testified that he did not recall seeing the podium shaking.

All four witnesses testified that Mr. Glass dropped some of his papers, as many as three or four times. Mr. Recile testified that Mr. Glass did so at least once. Mr. Young added that Mr. Glass "couldn't even look at his notes. He dropped them so many times." Mr. Nermyr added that Mr. Glass picked up his papers without attempting to put them back in order.

Mr. Young testified that during opening statement Mr. Glass "seemed not there—distracted. . . . He just seemed lost, at times." After opening statement, Mr. Young testified that he believed that something was wrong with Mr. Glass. For this reason, he told Mr. Smith that he did not want Mr. Glass either to cross-examine the key witness (the victim) or to continue speaking. According to Mr. Young, Mr. Smith's response was that he could not take over cross-examining the victim because that was not what he and Mr. Glass had planned and because he was not prepared to do so. Mr. Young testified that Mr. Smith told him "there's nothing I can do about it." Mr. Young's perception of Mr. Glass' cross-examination of the victim was that it seemed disorganized, wandering, and made up on the spot.

Mr. Nermyr—who had neither met Mr. Glass, nor observed Mr. Glass in court before that day—described Mr. Glass' performance that morning as follows: "I saw a gentleman that looked very shaky on his feet. He was shuffling his feet when he walked from his desk to the podium;" he did not walk with a normal gait. Mr. Nermyr stated that the content of Mr. Glass' opening statement did not seem to

make any sense; Mr. Glass "talked about relationships having ups and downs; good relationships, bad relationships."

Corroborating Mr. Young's testimony regarding Mr. Young asking Mr. Smith to take over cross-examining the victim, Mr. Nermyr testified that he heard Mr. Young make a request of Mr. Smith after the victim's direct exam "will you take over? You need to take over." He did not hear Mr. Smith's response. Mr. Nermyr testified that Mr. Glass failed to object to several hearsay issues during direct examination of the victim. As to the cross-examination of the victim, Mr. Nermyr testified that Mr. Glass simply went over the victim's story that she went over on direct. Mr. Nermyr testified that Mr. Glass asked leading questions and was slow in asking questions, which allowed the victim to explain her answers.

Mr. Recile—who had met Mr. Glass before and previously had seen him appear as an attorney in court—described Mr. Glass' appearance in court on the morning of the second day of the trial as disheveled, feeble, and shaky. He explained that there did not appear to be any continuity to what Mr. Glass was saying. He testified that the person that he saw representing Mr. Young that day was not anything like the Mr. Glass he had seen on prior occasions. Mr. Smith acknowledged that he was upset when he met with Mr. Young's parents that night and that he may have characterized the trial proceeding that day as a "disaster." He pointed out that the victim had not been destroyed on the witness stand, as he had hoped.

Mr. Smith, who was Mr. Young's co-counsel, testified that Mr. Glass definitely did not do a good job in his opening statement and cross-examination of the victim. He stated that he had seen Mr. Glass give better opening statements in the past and that he did not think Mr. Glass' cross-examination was good because

the victim came off as credible to the jury. Mr. Smith explained that he was hoping Mr. Glass, in cross-examining the victim, could "pull a rabbit out of a hat" and discredit the victim. He conceded, however, that it was not a given that Mr. Glass would be able to discredit the victim given the defense was hampered by the district court's unfavorable evidentiary rulings. Those rulings, Mr. Smith explained, limited the defense's ability to cross-examine the victim. Mr. Smith further testified that during trial, Mr. Glass was slow in his thoughts and that it showed moments of reflection. Mr. Smith explained that he wanted Mr. Glass to go faster in his questioning of the victim; however, he acknowledged that was not Mr. Glass' style.

Mr. Smith testified that he did not recall Mr. Young asking him to take over after the victim's direct testimony. He, however, testified that he would not deny it. Nonetheless, he denied telling Mr. Young that he could not do it; he stressed that he had been counsel in this case since the outset. Contrary to Mr. Young's suggestion that Mr. Glass backed out of the case mid-trial, Mr. Smith testified that Mr. Glass never expressed that he was not going to be involved in the case. Mr. Smith explained that Mr. Glass requested that he handle the cross-examination of L.B., Mr. Young's former girlfriend, who was going to testify the next day about Mr. Young's prior conviction for a similar offense. Mr. Smith testified that the defense feared that L.B. was going to make a credible witness for the State. Mr. Smith further explained that he was never under the impression that he would handle one hundred percent of the remainder of the case. In particular, he testified that he was never under the impression that he would do the closing argument. Indeed, Mr. Smith testified that he still felt that Mr. Glass "at his worst" was better than him at closing argument.

DISCUSSION

Errors Patent

A review of the record for errors patent reveals one. When the district court re-sentenced Mr. Young to fifteen years at hard labor, the district court failed to state that at least two years would be served without benefit of probation, parole, or suspension of sentence.[15] The governing sentencing statute, La. R.S. 14:44.1(C), mandates that "at least two years" of the sentence be imposed without benefits.[16] "The 'at least' aspect of the governing statutes involves the district court's sentencing discretion." *State v. Dominick*, 13-0121, p. 6 (La. App. 4 Cir. 11/20/13), 129 So.3d 782, 787 (citing *State v. Tabor*, 07-0058, p. 13 (La. App. 1 Cir. 6/8/07), 965 So.2d 427, 434-35). Because the correction of this sentencing error involves sentencing discretion, the sentence is not self-correctable and cannot be corrected on appeal under La. R.S. 15:301.1(A). Thus, we remand to the district court with instructions to vacate the sentence and to resentence Mr. Young in accordance with La. R.S. 14:44.1(C). *See State v. Webb*, 13-0146, pp. 14-15 (La. App. 4 Cir. 1/30/14), 133 So.3d 258, 268.

Assignment of Error

Mr. Young's sole assignment of error is that the district court abused its discretion when it denied his motion to withdraw his guilty plea. Summarizing the

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[15] The district court's original sentence was expressly stated to be without benefit of parole, probation, or suspension of sentence for the first two years. Although the district court ordered that the original sentence be re-imposed, the minute entry reads as follows: "THE COURT WILL ORDER THE ORGINAL SENTENCE OF 8-26-10 BE REIMPOSED: 15 YEARS DOC CREDIT." Because the re-imposed sentence does not expressly contain this provision, we find it necessary to remand for resentencing.

[16] La. R.S. 14:44.1 C provides that "whoever commits the crime of second degree kidnapping shall be imprisoned at hard labor for not less than five years nor more than forty years. At least two years of the sentence imposed shall be without benefit of parole, probation or suspension of sentence."

statutory law and jurisprudence regarding motions to withdraw guilty pleas, this court in *Young I* stated as follows:

> Article 559 provides that a court "may permit a plea of guilty to be withdrawn at any time before sentence." La.C.Cr.P. art. 559(A). Likewise, the Louisiana Supreme Court in *State v. Lewis*, 421 So.2d 224 (La. 1982), held that a trial court may permit the withdrawal of a guilty plea after sentencing if the court finds that the guilty plea was not entered freely and voluntarily, or if there was an inadequate colloquy advising the defendant of the rights he was waiving by pleading guilty and therefore was constitutionally infirm. There is "no absolute right to withdraw a previously entered plea of guilty." *State v. Pichon*, 96-0886, p. 2 (La. App. 4 Cir. 11/20/96), 684 So.2d 501, 502. The withdrawal of a guilty plea is within the discretion of the trial court and is subject to reversal only if that discretion is abused or arbitrarily exercised. *State v. Johnson*, 406 So.2d 569 (La. 1981); *State v. Rhea*, 2004-0091 (La. App. 4 Cir. 5/19/04), 876 So.2d 131, *writ denied*, 2004-0901 (La. 10/1/04), 883 So.2d 1005.
>
> For a guilty plea to be found valid, there must be a showing that the defendant was informed of and waived his constitutionally guaranteed right to trial by jury, right of confrontation and right against compulsory self-incrimination. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *State ex rel Jackson v. Henderson,* 260 La. 90, 255 So.2d 85 (1971). In determining whether the defendant's plea is knowing and voluntary, the court must not only look to the colloquy concerning the waiver of rights, but also other factors which may have a bearing on the decision. *State ex rel LaFleur v. Donnelly,* 416 So.2d 82 (La. 1982); *State v. Galliano*, 396 So.2d 1288 (La. 1981); *see also State v. Calhoun*, 96-0786 (La. 5/20/97), 694 So.2d 909. Similarly, in reviewing whether the trial court abused its discretion, courts have looked to the guilty plea colloquy to determine whether the defendant was advised of the consequences of his plea and whether he voluntarily and intelligently waived his rights. *Id*.

11-0046 at pp. 7-8, 71 So.3d at 570-71; *see also State v. Joseph*, 11-0689, pp. 6-7 (La. App. 4 Cir. 6/13/12), 95 So.3d 1209, 1213.

When a defendant enters a counseled guilty plea, it is appropriate to "review the quality of counsel's representation in deciding whether the plea should be set aside." *State v. Beatty*, 391 So.2d 828, 831 (La. 1980). Here, this is Mr. Young's sole basis for seeking to withdraw his counseled guilty plea. He does not contend

that the requirements set forth in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), were not met.[17] Nor does he contend that he was mentally impaired at the time he pled guilty.[18] Rather, he only contends that his guilty plea

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[17] In *Young I*, this court expressly found that Mr. Young was properly *Boykin*-ized; we held as follows:

> In this case, in the middle of trial, defense counsel and the State announced to the trial court that a plea agreement had been reached. Prior to taking the plea, the trial court noted that the State agreed to dismiss the forcible rape charge and promised not to file a multiple bill of information against defendant in exchange for Defendant pleading guilty to second-degree kidnapping with a sentence of fifteen years at hard labor. The court conducted a lengthy colloquy during which it fully complied with the requirements of *Boykin v. Alabama, supra*, and with the statutory requirements of La.C.Cr.P. art. 556.1. The court fully advised Defendant of his rights and established that Defendant had knowingly waived them. The court further confirmed that Defendant understood that only the promises made to him in connection with the plea bargain were enforceable. The court stated that it intended to sentence Defendant to serve fifteen years at hard labor with the first two years to be served without benefit of parole, probation or suspension of sentence. The trial court also established that the plea was not the product of any force, threats, or coercion.
>
> Furthermore, when the court asked Defendant if he was satisfied with his attorney and his representation, he answered in the affirmative. The court found that there was a basis in law and fact for the plea, and it accepted the plea. The transcript also reflects that Defendant clearly responded to all questions posed by the trial court, and does not indicate that Defendant engaged in behavior that would indicate to the trial court that he was distraught, panicked or dissatisfied during the plea colloquy.

11-0046 at pp. 10-11, 71 So.3d at 572-73 (footnotes omitted).

[18] In *Young I*, we explained that this was Mr. Young's primary argument. Indeed, this argument is, as the State points out, the principal reason that prompted this court to remand for an evidentiary hearing. On this issue, we noted as follows:

> Defendant was found to be competent at the time he entered his plea of guilty. On August 26, 2010, Dr. Rafael Salcedo, a forensic psychologist, met with Defendant and Dr. Richoux, the other member of the court-appointed sanity commission. At the competency hearing, Dr. Salcedo testified that while he agreed that Defendant exhibited symptoms of post-traumatic stress disorder from a history of sexual trauma, the disorder was not the type that would so gravely impair an individual such that it would render a person incapable of understanding that he was entering a guilty plea. Additionally, Dr. Salcedo testified that there was no evidence that Defendant suffered from a psychiatric disorder at the time he entered his guilty plea on July 16, 2010 that would have impaired his ability to freely and voluntarily enter his plea. Specifically, he testified that "an individual's ability to understand the difference between entering a guilty plea and a not guilty plea is such a basic simple fundamental one that it would require either severe mental retardation or severe psychosis to override that.... Mr. Young did not report psychotic symptoms." . . .

was not voluntary, and thus he should be allowed to withdraw it, because his lead counsel was "suffering cognitive impairments that led his counsel to abandon him in the midst of trial."

The gist of Mr. Young's argument is that Mr. Glass left him without counsel, both literally and constructively. First, he contends that at the conclusion of the second day of trial, Mr. Glass had made it clear that he could not go on with the case and that he "was going to back out" as lead counsel. Mr. Glass' decision to back out, coupled with Mr. Glass' incompetent advocacy on the second day of trial, Mr. Young contends, led him to plead guilty under circumstances that now clearly "reveal he was not being afforded counsel who was competent at critical times in his trial." In support of his argument, Mr. Young cites *United States v. Cronic*, 466 U.S. 648, 659, n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), for the proposition that "the absence of counsel at critical stages of a defendant's trial undermines the fairness of the proceeding and therefore requires a presumption that the defendant was prejudiced by such deficiency." He points out that the presumption of prejudice has been applied in situations in which the absence of counsel is "literal or constructive." *See State v. Richardson*, 06-0250 (La. App. 1

> However, Dr. Zimmerman, a forensic psychologist who also examined Defendant, reached differing conclusions with respect to Defendant's mental state. Specifically, Dr. Zimmerman submitted a written report in which he concluded that Defendant's decision to enter a guilty plea was not made in a knowing and voluntary manner, and that Defendant may have been suffering from difficulties which rendered him unable to fully grasp the court proceedings and unable to assist his attorneys. Dr. Zimmerman also found that Defendant's plea was not a rational choice, but was rather a decision made out of panic and consistent with his history of making confused and irrational decisions. Defense counsel asserts that in addition to Dr. Zimmerman, counsel intended to call Defendant's parents, attorneys Robert Glass and Jeffrey Smith (Defendant's trial counsel), as well as Defendant to testify at the evidentiary hearing.

Young, 11-0046 at pp. 11-13, 71 So.3d at 573-74 (footnote omitted).

Cir. 11/3/06), 2006 WL 3113056 (*unpub*.); *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

Mr. Young's claim is distinguishable from an ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Richardson, supra* (noting that the defendant "is not alleging ineffective assistance of counsel, but rather argues constructive denial of counsel" under *Cronic, supra*). Making this distinction, the federal court in *Fusi v. O'Brien*, 621 F.3d 1, 6 (1st Cir. 2010), explained the difference as follows:

> While both *Cronic* and *Strickland* concern Sixth Amendment violations, they are distinct legal claims and the difference between the two "is not of degree but of kind." *Bell v. Cone*, 535 U.S. 685, 697, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). *Strickland* requires a case-by-case analysis of whether counsel's deficiencies affected the outcome of a trial, while *Cronic* permits a presumption of prejudice if an actual or constructive denial of counsel occurs during a critical stage of the trial. These claims, while based on similar factual underpinnings, are separate and distinct. A defendant's reliance on one theory in state court does not exhaust the other. *See Huntley v. McGrath*, 261 Fed.Appx. 4, 6 (9th Cir. 2007) (finding *Cronic* claim unexhausted when defendant only raised *Strickland* claim in state courts); *Higgins v. Cain*, No. 09-2330, 2010 WL 1855870, *6-7 (E.D. La. Feb.8, 2010) (same).

Here, as the State emphasizes, Mr. Young raises only a *Cronic* claim.

Addressing the principle of constructive denial of counsel and defining a *Cronic* claim, this court in *State v. Bradford*, 02-1452, pp. 10-11 (La. App. 4 Cir. 4/23/03), 846 So.2d 880, 887-88, stated:

> In *Cronic*, decided the same day as *Strickland v. Washington*, the Supreme Court created a very limited exception to the application of Strickland's two-part test in situations that "are so likely to prejudice the accused that the cost of litigating their effect in the particular case is unjustified." *Cronic*, 466 U.S. at 658, 104 S.Ct. at 2046. The Supreme Court identified three situations implicating the right to counsel where prejudice will be presumed. First are situations in which a defendant petitioner is denied counsel at a critical stage of a criminal proceeding (complete denial of counsel). Second, and the most relevant here, are situations in which a defendant's trial counsel

> "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659, 104 S.Ct. at 2047. Finally, prejudice is presumed when the circumstances surrounding a trial prevent a petitioner's attorney from rendering effective assistance of counsel. *Cronic*, 466 U.S. at 659-660, 104 S.Ct. at 2047. (citing *Powell v. Alabama*, 287 U.S. 45, 57-58, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).
>
> In *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), the Supreme Court clarified the scope of the *Cronic* exception to *Strickland* with regard to the failure to test the prosecution's case. The Court reiterated that the failure must be "complete," and is only applicable when "'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.' " 535 U.S. at 685, 122 S.Ct. at 1851 (quoting *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039.) (Emphasis added.)

Id. Simply stated, the principle of constructive denial of counsel means that "[a]lthough defendant is represented by counsel, the circumstances of the representation are such that defendant, in effect, is lacking the assistance of counsel." 3 Wayne R. LaFave, Jerold H. Israel, Nancy J. King, Orin S. Kerra, CRIM. PROC. § 11.10(d) (4th ed. 2016).

Mr. Young attempts to equate Mr. Glass' alleged cognitive impairment due to Parkinson's disease to sleeping counsel. Sleeping counsel, Mr. Young points out, has been held to fall within the narrow *Cronic* exception. Continuing, Mr. Young points out that the court in *Burdine* held that sleeping or "[u]nconscious counsel equates to no counsel at all. Unconscious counsel does not analyze, object, listen or in any way exercise judgment on behalf of a client." 262 F.3d at 349. Mr. Young argues, in his appellant brief, that despite Mr. Glass' physical presence at trial, "he was effectively absent and unable to analyze, object, listen or in any way exercise judgment on behalf of Mr. Young." Moreover, he argues that ineffective advocacy is worse than none. We find his argument unpersuasive, factually and legally.

Factually, the record establishes neither the degree, if any, that Mr. Glass was cognitively impaired at the time of the trial, nor that Mr. Glass abandoned Mr. Young in the middle of trial. As to the abandonment issue, co-counsel, Mr. Smith, testified that he was never under the impression that Mr. Glass was totally out of the case. Indeed, Mr. Smith indicated that he was under the impression that Mr. Glass was going to do the closing statement. Moreover, Mr. Glass was actively involved in the plea agreement discussions.

As to the cognitive impairment, Mr. Glass' medical records were not offered in evidence; and neither Dr. Richoux nor Dr. Deland examined Mr. Glass personally. Both experts testified about the symptoms and effects of Parkinson's disease in general. Neither expert, however, could state definitely if, and when, Mr. Glass had been diagnosed with Parkinson's disease or if Mr. Glass was suffering from any symptoms of Parkinson's disease at the time of trial. Regardless, even assuming, as Dr. Richoux testified, that Mr. Glass had some degree of cognitive impairment at the time of the trial, we find that the *Cronic* presumption would not apply here.

As Mr. Young contends, the jurisprudence has held that the *Cronic* presumption applies when it is established that defense slept through a substantial portion of the trial. *See Burdine, supra*. In the "sleeping counsel" case,[19] "*Cronic*

[19] In *Burdine*, the federal Fifth Circuit held that "a defendant's Sixth Amendment right to counsel is violated when that defendant's counsel is repeatedly unconscious through not insubstantial portions of the defendant's capital murder trial. Under such circumstances, *Cronic* requires that we presume that the Sixth Amendment violation prejudiced the defendant." 262 F.3d at 341; *see also Javor v. United States*, 724 F.2d 831, 833 (9th Cir. 1984) ("[W]hen an attorney for a criminal defendant sleeps through a substantial portion of the trial, such conduct is inherently prejudicial and thus no separate showing of prejudice is necessary."); *United States v. Ragin*, 820 F.3d 609, 619 (4th Cir. 2016); *Muniz v. Smith*, 647 F.3d 619, 621 (6th Cir. 2011); *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996); *see also* Kimberly Sachs, *You Snooze, You Lose, and Your Client Gets A Retrial: United States v. Ragin and Ineffective Assistance of Counsel in Sleeping*

requires us to presume prejudice because the defendant has been constructively denied counsel. For good reason—'sleeping counsel is tantamount to no counsel at all.'" *Ragin*, 820 F.3d at 619 (quoting *United States v. DiTommaso*, 817 F.2d 201, 216 (2d Cir. 1987)).

Unlike the sleeping counsel cases, courts have refused to apply a presumption of prejudice in ill-attorney cases. In refusing to do so, the jurisprudence has relied, at least in part, on the principle that "[p]er se rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman v. Thompson*, 501 U.S. 722, 737, 111 S.Ct. 2546, 2558, 115 L.Ed.2d 640 (1991). Applying this principle, the court in *Bellamy v. Cogdell*, 974 F.2d 302, 308 (2d Cir. 1992), held that a per se prejudice rule is inapposite to ill-attorney cases for the following reason:

> [T]here is simply nothing inherent in an attorney's illness that necessarily will impede a spirited defense "most of the time" to justify finding the attorney's representation per se ineffective. Rather, given the varying effects health problems can have on an individual's ability to function, claims of ineffective assistance based on attorney illness are best suited to the fact-specific prejudice inquiry mandated by *Strickland*.

Id.

To illustrate, in *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000), the defendant argued that his attorney, Egger, was ineffective because Egger had Alzheimer's disease at the time of the trial. The defendant contended that prejudice should be presumed because of Egger's Alzheimer's disease. The evidence in that case

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Lawyer Cases, 62 Vill. L. Rev. 427, 455 (2017) (extensively discussing the "sleeping counsel" cases).

showed that about eighteen months after the defendant's trial, two judges wrote the state bar association regarding Egger's declining courtroom performance. One judge described Egger as appearing confused and slow. Shortly thereafter, Egger was diagnosed by his doctor with Alzheimer's disease. Egger's doctor also opined that Egger's ability to be an effective attorney probably would have been affected at the time he tried the defendant's case.

Rejecting the defendant's argument that prejudice should be presumed under *Cronic* based on Egger's Alzheimer's disease, the court in *Dows* reasoned as follows:

> The mere fact that counsel may have suffered from a mental illness at the time of trial, however, has never been recognized by the Supreme Court as grounds to automatically presume prejudice. Moreover, in *Smith v. Ylst*, 826 F.2d 872, 876 (9th Cir. 1987), the Ninth Circuit specifically rejected this basis for presuming prejudice. In rejecting defendant's argument that prejudice should be presumed where counsel may have had a mental illness, the *Ylst* court reasoned that "mental illness is too varied in its symptoms and effects to justify a per se reversal rule without evidence that the attorney's performance fell below the constitutional norm." *Id.*
>
> The reasoning in *Ylst* applies equally well to Dows's case. Egger was diagnosed with Alzheimer's disease approximately eighteen months after Dows's trial. There is no question that by the time Egger was diagnosed, he was in the later stages of the debilitating disease and was not competent to render legal counsel.
>
> However, because of the nature of Alzheimer's disease and its varied manifestations in different individuals, neither Dows nor anyone else can prove what effects, if any, the disease had on Egger's memory and cognitive ability at the time he represented Dows at trial. Therefore, even if Egger had been in the early stages of Alzheimer's at the time of Dows's trial, this alone is not sufficient for a per se reversal of Dows's conviction by a jury. . . . [T]he best indicator of Egger's ability, or lack thereof, to represent Dows at trial was Egger's actual performance. We agree. Were the rule otherwise, trial judges might be compelled to deny defendants' choice of counsel, when they hired old lions of the bar, often to defendants' detriment.

211 F.3d at 485-86.[20] The same logic expressed in the *Dows* case regarding Alzheimer's disease applies in this case to Parkinson's disease. Given the nature of Parkinson's disease and its varied manifestations in different individuals—as even Mr. Young's own expert acknowledged—application of the *Cronic* presumption of prejudice is inappropriate here.

Nor was there a complete denial of the right to counsel. Mr. Young was represented by two very experienced defense attorneys, both of whom were knowledgeable about the case. Even assuming, as Mr. Young contends, Mr. Glass pulled out, Mr. Smith remained as counsel. Indeed, as the district court judge pointed out, it was Mr. Smith who signed the plea agreement. Moreover, Mr. Smith testified that he had represented Mr. Young before Mr. Glass was retained and that both he and Mr. Glass met with Mr. Young and investigated the case. Furthermore, there was evidence that defense counsel subjected the prosecution's case to meaningful adversarial testing. Defense counsel filed and argued several motions in limine before trial and cross-examined all the State's witnesses on the second day of trial. Mr. Smith handled voir dire and cross-examined the police officer; Mr. Glass conducted opening statement and cross-examined the victim and the SANE nurse.

For all these reasons, we find Mr. Young's reliance on the *Cronic* presumption of prejudice misplaced.[21] Stated otherwise, we find there was no

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[20] *See also State v. Edwards*, 736 N.W.2d 334, 339 (Minn. Ct. App. 2007) (rejecting defendant's contention that "he was constructively denied counsel because his mentally ill attorney was equivalent to a sleeping attorney"); *Johnson v. Norris*, 207 F.3d 515, 517-18 (8th Cir. 2000) (declining to apply *Cronic* presumption when defense attorney was diagnosed with bipolar disorder and pointing out that there was "some question" whether attorney had the disorder at the time of trial).

[21] Even under a *Strickland* analysis, Mr. Young has not met his burden to prove he was entitled to withdraw his guilty plea. He was charged with second degree kidnapping and forcible rape.

constructive denial of counsel under the *Cronic* case. Accordingly, we hold that the district court did not abuse its discretion in denying Mr. Young's motion to withdraw guilty plea.

DECREE

For the foregoing reasons, we affirm the defendant's conviction, vacate the defendant's sentence, and remand to the district court for resentencing.

AFFIRMED IN PART; REMANDED FOR RESENTENCING

He was offered a choice of plea agreements: (1) second degree kidnapping with a sentence of fifteen years, without having to register as a sex offender; or (2) forcible rape with a sentence of ten years, but he would have to register as a sex offender. As part of the plea agreement, the State also agreed not to multiple bill him based on his prior similar offense. The defense had been informed that the trial court planned to impose a fifty-year sentence in the event Mr. Young was convicted. After conferring at length with both attorneys, Mr. Young pled guilty to second degree kidnapping and was sentenced to fifteen years at hard labor.