another example, it would be unjust to find legitimate prejudice in a defense attorney's interference with a defendant's perjured testimony, even if that testimony could have altered a trial's outcome.[345] In *Lafler v. Cooper*, four dissenters further would have imposed a fundamental fairness overlay to foreclose relief whenever a defendant proceeded to trial after turning down a plea offer because of incompetent advice of counsel.[346] In their view, conviction after a full and fair trial cannot be prejudicial in a constitutional sense, even if a forgone plea would have yielded lesser charges or punishment. This view did not prevail, however.

A second category of recognized exceptions to the application of the "outcome determinative" prejudice test includes the relatively limited number of cases in which prejudice is presumed. This presumption occurs when there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[347] These situations, the Court explained in *United States v. Cronic*, involve some kind of "breakdown of the adversarial process," and include actual or constructive denial of counsel, denial of such basics as the right to effective cross-examination, or failure of counsel to subject the prosecution's case to meaningful adversarial testing.[348] "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show

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[345] 529 U.S. at 391–93. The latter example references Nix. v. Whiteside, 475 U.S. 157, 175–76 (1986).

[346] 566 U.S. ___, No. 10–209, slip op. (2012) (Scalia, J., with Roberts, C.J., and Thomas, J., dissenting); 566 U.S. ___, No. 10–209, slip op. (2012) (Alito, J., dissenting).

[347] United States v. Cronic, 466 U.S. 648, 658 (1984).

[348] 466 U.S. at 657, 659. *But see* Bell v. Cone, 535 U.S. 685 (2002) (failure to introduce mitigating evidence and waiver of closing argument in penalty phase of death penalty case was not failure to test prosecution's case, where mitigating evidence had been presented during guilt phase and where waiver of argument deprived skilled prosecutor of an opportunity for rebuttal); Mickens v. Taylor, 535 U.S. 162 (2002) (failure of judge who knew or should have known of an attorney's conflicting interest to inquire as to whether such conflict was prejudicial not grounds for automatic reversal). In Wright v. Van Patten, 128 S. Ct. 743 (2008) (per curiam), the Supreme Court noted that it has never ruled on whether, during a plea hearing at which the defendant pleads guilty, defense counsel's being linked to the courtroom by speaker phone, rather than being physically present, is likely to result in such poor performance that *Cronic* should apply. The fact that the Court has never ruled on the question means that "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law,'" and, as a consequence, under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), the defendant is not entitled to *habeas* relief. Id. at 748 (quoting Carey v. Musladin, 549 U.S. 70, 77 (2006), as to which see "Limitations on *Habeas Corpus* Review of Capital Sentences" under Eighth Amendment, *infra*.