

# In the Sixth Round, You Go Down (On Your Sword): The Practical, Constitutional, and Ethical Considerations of Deliberately Providing Ineffective Assistance of Counsel

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### INTRODUCTION

In 1984, Calvin Burdine was on trial in Texas for the murder of W.T. Wise.<sup>1</sup> His attorney, Joe Cannon, did not perform well. He failed to prepare, or call all a single witness at sentencing.<sup>2</sup> Nor did he object to completely improper arguments.<sup>3</sup> But most strikingly, Cannon repeatedly sunk his head into his chest, closed his eyes, and remained motionless for ten minutes at a time.<sup>4</sup> Spare for himself and the prosecutor, everyone else in the courtroom believed he was sleeping.<sup>5</sup> Unsurprisingly, Burdine was found guilty of murder and was sentenced to death.<sup>6</sup> Effectively, Cannon gave his own client a death sentence.

But after sixteen years, Cannon’s performance overturned his former client’s conviction.<sup>7</sup> Because his performance was so unreasonably ineffective, the Fifth Circuit determined that Cannon’s representation did not qualify as the “counsel” Burdine was guaranteed under the Sixth Amendment.<sup>8</sup> As such, his conviction

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1. *Burdine v. Johnson*, 66 F. Supp. 2d 854, 855 (S.D. Tex. 1999), *vacated and remanded*, 231 F.3d 950 (5th Cir. 2000), *reh’g en banc granted, opinion vacated*, 234 F.3d 1339 (5th Cir. 2000), and *on reh’g en banc*, 262 F.3d 336 (5th Cir. 2001), and *aff’d*, 262 F.3d 336 (5th Cir. 2001) [hereinafter *Burdine’s Habeas Review*].

2. *Protecting the Attorney/Client Relationship: “Bakesale Justice” for Calvin Burdine*, GULF REGION ADVOC. CTR., [https://gracelaw.org/justice\\_for\\_calvin\\_burdine](https://gracelaw.org/justice_for_calvin_burdine) [<https://perma.cc/V52V-66BZ>] (Last visited Apr. 21, 2025).

3. This includes failing to object to the prosecutor’s argument for the death penalty, where he successfully suggested that life in prison wouldn’t fit Burdine, who is gay, because “[s]ending a homosexual to [a male prison] certainly isn’t a very bad punishment for a homosexual.” *Id.* at Press Release, ACLU of Tx., *Gay Death Row Inmate to be Freed in Texas* (Mar. 3, 2000) (on file with author).

4. Very aptly, the jury foreman who testified that Cannon slept in trial was named Daniel Strickland. *Burdine’s Habeas Review*, *supra* note 1, at 857. In addition, two other jurors, the trial judge, and the courtroom clerk testified seeing Burdine at some level of unresponsiveness. *Id.*, 857-59.

5. *Id.* Cannon denied sleeping and claimed his closed eyes and tilted head were attempts to concentrate. *Burdine Habeas Review*, *supra* note 1, at 859. The prosecutor, Ned Morris, claimed that while presenting, he was not paying attention to the defense table. *Id.* at 857-58. It should be noted that claiming Cannon was not asleep benefits both Cannon and the prosecutor. For Cannon, it could prevent the possibility of a disciplinary hearing or public condemnation. For the prosecution, a sleeping defense attorney can result in a vacated conviction, while a deeply focusing attorney will not. This is a universal, yet bizarre feature of ineffective assistance litigation: the prosecution extolling the virtue of their opponent while a defendant derides their former counsel.

6. *Burdine Habeas Review*, *supra* note 1, at 855.

7. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

8. *Id.* at 349-50.

and death sentence were vacated.<sup>9</sup> Afterwards, Burdine negotiated with the prosecution and received a life sentence with the possibility of parole.<sup>10</sup> Through Cannon's ineffective assistance, he eventually spared Burdine from the death penalty he had once guaranteed him.

Even with Burdine's life ultimately spared, Cannon's behavior remains inexcusable.<sup>11</sup> And throughout the nation, there are numerous examples of bafflingly poor decisions by trial attorneys<sup>12</sup> and plausible justifications for unintentional ineffectiveness.<sup>13</sup>

But when reviewing cases like Burdine's sleeping attorney, Judge Michael McCormick perceived something different. As a former Texas Court of Criminal Appeals judge, he did not believe these bizarre failures were simply by-products of poor lawyering or ineptitude. Rather, he postulated that it was intentional. He commented, "[m]aybe the point was to have the jury see the sleeping lawyer and think, '[w]ell, he's not going to help the guy, so maybe it's up to us.'"<sup>14</sup>

Here lies the conundrum: Burdine avoided execution for a brutal murder solely because Cannon was too incompetent.<sup>15</sup> If Cannon raised a few obvious objections, or just remained plausibly conscious, he would be in a dead-zone: not competent enough to save Burdine from the death penalty but too competent for Burdine to receive relief on appeal. Paradoxically, Cannon *bettering* his performance in most cases only *worsens* Burdine's outcome.

This paradox strikes at the core assumption in reviewing any ineffective assistance of counsel (IAC) claim: that any deliberate strategy by a defense attorney should be reviewed with a strong presumption of competency and reasonableness.<sup>16</sup> Deliberate

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9. *Id.* at 350.

10. Lisa Teachy, *Burdine strikes deal to stay off death row*, HOUSTON CHRONICLE (June 19, 2003), <https://www.chron.com/news/houston-texas/article/burdine-strikes-deal-to-stay-off-death-row-2129530.php> [<https://perma.cc/5K2Z-TJD8>].

11. See, e.g., Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181 (2003) (arguing an ineffective counsel is equally as responsible for their client's execution as the State who sought the death penalty).

12. See, e.g., *Bevel v. State*, 221 So. 3d 1168, 1179 (Fla. 2017) (finding trial counsel only started investigating mitigation evidence less than two weeks before trial began); *Emerson-Bey v. Atty. Gen. of Md.*, No. CV JFM-12-0314, 2017 WL 3279461 (D. Md. Jul. 31, 2017) (finding trial counsel opened the door during cross-examination, allowing detective to state an unavailable eyewitness placed the defendant near the crime scene); *Hardy v. Chappell*, 849 F.3d 803, 826 (9th Cir. 2016) (finding trial counsel made no opening statement in murder trial and ignored clear proof that the Government's star witness was the real killer). To view an extensive list of successful IAC claims, see Teresa Norris and Habeas Assistance and Training Counsel, *Summaries of Public Successful Ineffective Assist of Counsel Claim Post-Wiggins v. Smith*, Capital Defense Network (2019), [https://hat.capdefnet.org/sites/cdn\\_hat/files/Assets/public/helpful\\_cases/ineffective\\_assistance\\_of\\_counsel/iac\\_post\\_wiggins\\_updated\\_123119.pdf](https://hat.capdefnet.org/sites/cdn_hat/files/Assets/public/helpful_cases/ineffective_assistance_of_counsel/iac_post_wiggins_updated_123119.pdf) [<https://perma.cc/GY4A-ZPGJ>] (last visited Feb. 23, 2025).

13. Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1589 (2020) (finding IAC claims are categorizable into four intersecting sources: personal, structural, episodic, and pervasive).

14. MAURICE CHAMMAH, LET THE LORD SORT THEM: THE RISE AND FALL OF THE DEATH PENALTY 68 (2021).

15. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

16. *Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("... a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .").

ineffectiveness violates this assumption. Because, if Cannon's closed eyes and tilted head were intentional, it did far more to save Burdine's life than any of his arguments or cross-examinations. In fact, it resulted in a better outcome than many death-row inmates with lawyers who did not fall asleep but lost regardless. If this was intentional, Burdine owes his life to deliberate IAC.

Just mentioning this concept—that a defense attorney may be deliberately ineffective—attracts impassioned responses. In the eyes of some judges and practitioners, entertaining this is no better than an insult.<sup>17</sup> For others, a defense attorney must be blind—especially in a death penalty trial—to not consider withholding some effectiveness if doing so guarantees significantly better odds of reversing on appeal.<sup>18</sup>

ABA Model Rule 1.1 requires a lawyer to “provide competent representation to a client.”<sup>19</sup> At the same time, a series of trial tactics has emerged since the Supreme Court's decision in *Strickland v. Washington*. “Falling on your sword” refers to an attorney either exaggerating or admitting to incompetent representation in the hopes that a client's interest will be better served.<sup>20</sup> This is complemented by “sandbagging”<sup>21</sup> or “getting a second bite of the apple,” where a defense attorney purposefully fails to object to statements or evidence with the aim to raise their admissibility problems on appeal.<sup>22</sup> All of these tactics would be considered incompetent if unintentional. But when employed intentionally, they seem too effective to truly be viewed as violating the competency requirement.

Part I of this Note will define the test for IAC set in *Strickland* and demonstrate that IAC has become a commonly utilized ground for relief. Then, this Note will examine the pressures and motivations that would lead a criminal defense attorney to provide ineffective assistance deliberately. The tactic is predicated on the belief that a successful IAC appeal may justify a less effective trial; the lack of consequences for providing IAC will lessen the attorney's disciplinary risks; the normalization of IAC reducing the stigma of being deemed ineffective; and

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17. See *Poindexter v. Mitchell*, 454 F.3d 564, 589-90 (6th Cir. 2006) (Craig Daughtrey, J., Concurring) (deriding a fellow judge's belief that deliberate ineffectiveness is commonplace and rational as “truly disturbing” and “. . . an affront to the dedication of the women and men who struggle tirelessly to uphold their ethical duty to investigate fully and present professionally all viable defenses available to their clients.”); see also Joel Cohen, ‘Sandbagging’ and Guilty Plea Offers, N. Y. L. J. (Dec. 13, 2011), <https://www.law.com/newyorklawjournal/almID/1202535264707> (“The shocking argument . . .— indeed, even Justice Scalia would likely have smacked him down simply for making it—was that, if the [Supreme] Court were to uphold the Missouri Court of Appeals [decision], attorneys across the country would engage in deliberate ineffective assistance by not communicating plea offers”, and a state attorney even suggesting deliberate IAC could be practiced “should arguably be subject to disciplinary action just for raising it.”).

18. Poindexter, at 589 (Boggs, C.J., concurring).

19. MODEL RULES OF PRO. CONDUCT r. 1.1 (Am. Bar Ass'n).

20. *Sandbagging*, Black's Law Dictionary (12th ed. 2024).

21. For general use, see *fall on one's sword*, COLLIN'S ENG. DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/fall-on-ones-sword> [<https://perma.cc/VYL5-G5H9>] (last visited Apr. 8, 2025). For the particular definition in the context of lawyers, see Ricks, *infra* note 105 at 1131 n.99.

22. *One-Bite Rule*, Black's Law Dictionary (12th ed. 2024).

defending against an IAC claim pits a client against their attorney. Part II of this Note examines whether deliberate ineffectiveness is possible under the *Strickland* test given the test's extreme deference to any deliberate trial strategy. The part will conclude that a defendant who received deliberate IAC will still be able to get relief, because deliberate IAC denies the defendant the right to an adversarial process crucial for a fair trial. Lastly, Part III will consider the costs that deliberate IAC imposes on the legal system and criminal defendants. The part will conclude that the legal system should not condone this practice, because it is based on a false understanding of a defense attorney's goals and forces the client through a gauntlet of unnecessary and painful litigation.

## I. BACKGROUND AND JUSTIFICATIONS

### A. *STRICKLAND V. WASHINGTON* STANDARD

The Sixth Amendment provides that in “all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”<sup>23</sup> Prior to the Warren Court's decisions in *Gideon v. Wainwright*<sup>24</sup> and *Strickland v. Washington*,<sup>25</sup> the Sixth Amendment was understood to only clarify the defendant's right to seek counsel, rather than guaranteeing the right to obtain them and their services.<sup>26</sup> Instead, a defendant's inability to procure or receive counsel was only a single factor in determining whether the defendant was deprived of due process under the Fourteenth Amendment.<sup>27</sup> This circumstantial test was discarded in *Gideon* by holding if defendants cannot afford to hire an attorney, the Sixth Amendment required the government to provide one without cost to the defendant.<sup>28</sup>

Twenty-one years later in 1984, the Court continued its expansion of the Sixth Amendment. In *Strickland v. Washington*, the Court established that the right “to counsel” did not merely promise that a bar-approved bystander would sit next to a defendant keeping them company during trial. Instead, *Strickland* held that the right to counsel entailed a right to effective counsel.<sup>29</sup> *Strickland* established the current two-pronged test used to determine if trial counsel provided ineffective assistance. First, the defendant must show that the counsel's performance was deficient by making errors so serious that they were not functioning as the counsel

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23. U.S. Const. amend. VI.

24. 372 U.S. 335 (1963).

25. 466 U.S. 668 (1984).

26. *Betts v. Brady*, 316 U.S. 455, 471 (1942) (“[The historical record] demonstrates that, in the great majority of the [s]tates, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial.”) But that does not automatically infer that a right to effective counsel did not exist. See generally Erica Hashimoto, *An Originalist Argument for a Sixth Amendment Right to Competent Counsel*, 99 IOWA L. REV. 1999 (arguing that an originalist understanding of the Sixth Amendment encompasses the quality of representation).

27. *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

28. *Gideon v. Wainwright*, 466 U.S. 668 (1984).

29. *Strickland v. Washington*, 466 U.S. 668, 669 (1984).

guaranteed by the Sixth Amendment.<sup>30</sup> Second, they must demonstrate that the deficiency prejudiced the defense to the degree that the trial verdict is unreliable.<sup>31</sup>

Almost immediately, this right to effective assistance was severely restrained. Within *Strickland*, the Court established a presumption that a counsel's performance will fall within the wide range of reasonableness that precludes IAC claims.<sup>32</sup> The temptation to harshly judge an unsuccessful performance is strong, the Court found, and a reasonableness presumption is necessary "to eliminate the distorting effects of hindsight . . . ."<sup>33</sup>

Both supporters and opponents of the *Strickland* standard describe it as all-encompassing<sup>34</sup> but also fleeting.<sup>35</sup> Simultaneously, it is the most common basis for relief sought in habeas petitions,<sup>36</sup> and also increasingly difficult to prove.<sup>37</sup> IAC has expanded beyond an attorney's performance in front of a jury,<sup>38</sup> to also encompass pretrial and postconviction assistance.<sup>39</sup> But courts have retracted the scope and definition of IAC, limiting its usefulness for criminal appellants.<sup>40</sup>

Still, most scholarly work shares the same presumption: ineffective assistance is an unfortunate and unintended consequence. These works think it is a byproduct of a counsel's drug abuse or mental illness,<sup>41</sup> or a product of an understaffed

30. *Id.*

31. *Id.*

32. *Id.* at 689.

33. *Id.*

34. *Abdullah v. Norris*, 18 F.3d 571, 573 (8th Cir. 1994) (describing IAC claims as common enough that federal courts are "quite familiar" with them); *Cunningham v. Shoop*, 23 F.4th 636, 668 (6th Cir. 2022) (describing the Sixth Circuit's IAC precedent as both broad and inconsistently applied).

35. *Strickland*, 446 U.S. at 707-708 (Marshall, J., Dissenting) ("To tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' . . . is to tell them almost nothing."); *Rogers v. Ames*, No. 19-0612, 2020 WL 6624969, at \*9 (W. Va. Nov. 12, 2020) (stating petitioners asserting IAC claims before West Virginia Supreme Court have "a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a 'wide range.'") (citing *State v. Miller*, 149 W. Va. 3, 16 (1995)).

36. Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronin's Call to Presume Prejudice from Representational Absence*, 76 TEMP. L. REV. 827, 832 (2003).

37. Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J., 1835, 1858 n.138 (1994) (Citing *Rogers v. Zant*, 13 F.3d 384 (11th Cir. 1994) (holding that no relief can be granted on ineffectiveness if any reasonable lawyer, in the circumstances, would have taken the same action)).

38. See generally Justin Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161 (arguing that the decisions in *Missouri v. Fyre* and *Lafter v. Cooper* expand the right to effective assistance in pre-trial matters).

39. *Martinez v. Ryan*, 566 U.S. 1, 11, 132 S. Ct. 1309, 1317 (2012) ("[I]f the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims."); see also *Hernandez v. United States*, 202 F.3d 486 (2d Cir. 2000) (reviewing ineffective assistance of appellate counsel under the *Strickland* test).

40. See *Shinn v. Ramirez*, 596 U.S. 366, 367 (2022) (holding federal courts reviewing habeas claims are not to conduct evidentiary hearings for claims of ineffective assistance of post-conviction or appellate counsel.).

41. Cunningham-Parmeter, *supra* note 36, at 863-86 (listing IAC claims stemming from schizophrenia, bipolar disorders, chronic alcoholism, and use of psychotropic drugs).

and underfunded public defense system.<sup>42</sup> If there are no systemic reasons, it is just a glaring oversight in a defense attorney's actions.<sup>43</sup> These explanations presume inadvertence is germane to ineffectiveness. Even when deliberate IAC—or the fear of it—is brought to reality, court opinions quickly dismiss it out of hand.<sup>44</sup> Both state and federal courts quickly, and without serious analysis, deem it not only unethical “but a bad strategy as well.”<sup>45</sup> Even the scholarly work that does touch on the concept dismisses it and does not identify IAC as a tactic to grant relief for the defendant or that it might even be effective.

If deliberate IAC is indeed impracticable and easily disincentivized, then the lack of concern is accurate and harmless. However, a review of IAC depicts a dramatic increase in claims and overturned convictions. Simultaneously, trial attorneys regard it as an increasingly feasible appellate strategy, with its frequent use nullifying any adverse consequences. Therefore, before dismissing deliberate IAC as trivial, one should first understand why it has become a mainstay in criminal post-conviction litigation, and its second-order effects.

### 1. RISE AND SUCCESS OF INEFFECTIVE ASSISTANCE CLAIMS

Let us assume that you are a death row inmate, and you want to avoid execution.<sup>46</sup> If you are unable to vacate your sentence entirely, then you want to delay your execution date as much as possible. Like 73% of death row inmates, you have lost your appeal at the state court of last resort.<sup>47</sup> Your next step is to file a writ of habeas corpus claim in federal court, in most cases.<sup>48</sup> Unlike in your trial

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42. DONALD J. FAROLE & LYNN LANGTON, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 LAB. STAT. (2007) (finding that 73% of county-based public defender offices have exceeded their maximum recommended caseload); see also Steven N. Yermish, *Ethical Issues in Indigent Defense: The Continuing Crisis of Excessive Caseloads*, 33 *Champion* 22, 23 (citing *United States v. Decoster*, 624 F.2d 196, 280 n.89 (D.C. Cir. 1976)).

43. Cunningham-Parmeter, *supra* note 36, at 869-70 (discussing *Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984), where trial counsel failed to make a single substantive statement during trial, and *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991), where trial counsel admitted there was no reasonable doubt).

44. See *United States v. Busse*, 814 F. Supp. 760, 765 (E.D. Wis. 1993) (admitting that while deliberate IAC—in the form of not properly advising client to a plea agreement's consequences—is a “legitimate concern,” it would “not be right to enact a blanket prohibition against all such claims.”); see also *United States v. Day*, 969 F.2d 39, 46 n.9 (3d Cir. 1992) (facing this “newfangled” concept of deliberate IAC, the Third Circuit declared it did not affect their decisions, because “[m]ost defense lawyers, like most lawyers in other branches of the profession, serve their clients and the judicial system with integrity.”).

45. *Day*, at 46 n.9 (claiming that disciplinary action, malpractice suits, and business losses are sufficient deterrents for the Court to “refuse [ ] presum[ing] that ineffective assistance of counsel is deliberate.”).

46. While the argument for deliberate IAC still applies for non-death penalty cases, a bulwark of successful IAC cases are for death penalty convictions. See King, *infra* note 50, at 53. However, if a trial counsel attempts to deliberately provide IAC, there is nothing preventing them from tailoring their ineffectiveness to conform with non-capital convictions.

47. Nicole L. Waters, Et Al., *Criminal Appeals in State Courts* 4 (2015). At this level, only 5% of ineffective assistance of counsel are reversed.

48. *Id.* at 12 (stating habeas corpus is a postconviction appeal, filed after an initial, direct appeal has been decided by the Court). It is also important to note that IAC claims cannot typically be presented on direct appeal for federal cases. *United States v. McClinton*, 23 F.4th 732, 737 (7th Cir. 2022). Because IAC claims almost certainly revolve around facts not presented in the record, they are “doomed to fail” on direct review. *Id.*

and direct appeal, a habeas petition is a civil action. This means you are not automatically entitled to an attorney. Still, courts appoint these routinely, and you begin your petition.<sup>49</sup>

There are nine common grounds you can raise in your habeas petition. In reality, only three positively correlate with success.<sup>50</sup> First, you could claim evidence of actual innocence, presuming it exists.<sup>51</sup> Second, you could claim to have committed your offense before you turned eighteen, suffer extreme mental impairment, or any other retroactive fact that the Supreme Court has held makes you categorically ineligible for the death penalty.<sup>52</sup> But for those who can't prove innocence and are not retroactively precluded, the only fruitful option remaining is to claim IAC.<sup>53</sup>

But by no means is IAC a pitiful last resort. In the same study, IAC was the only appealable ground that both helped avoid procedural defaults and termination and prolonged a claim's length more than any other appeal.<sup>54</sup> IAC claims increased relief probability by 8%, only performing slightly under the 11% increase for actual innocence and 10% for death-ineligibility.<sup>55</sup> It seems that even mentioning IAC will increase the relief, even if a defendant wins on some other ground. In capital petitions that did not raise an IAC claim, only 4% succeeded received relief. But an IAC accusation triples the odds of relief to 14%.<sup>56</sup> And even if the claim failed, it still delivered the benefits of delaying execution, for it takes double, or even almost triple, the amount of time for a court to deny IAC claims compared to non-IAC petitions.<sup>57</sup>

Therefore, given its effectiveness, IAC is unsurprisingly the single most popular claim.<sup>58</sup> In general, ineffective assistance of counsel claims have dominated: Over 81% of habeas petitions for capital cases cite IAC as a ground for appeal

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50. Nancy J. King, et al., Final Technical Report: Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996 89 (2007).

51. *Id.* Actual innocence, by itself, is not usually a recognized independent ground for habeas relief on the Supreme Court level, but it can be incorporated into other claims. See *Habeas Relief for State Prisoners*, GEO. L.J. ANN. REV. CRIM. PROC. 1125, 1133 (2023).

52. See King, *supra* note 50, at 89.

53. *Id.*

54. *Id.* at 84.

55. *Id.* at 89. 8% might indeed appear paltry, but there are two things to consider. First, relative to the low success rates of criminal defense, having 10% of criminal convictions be overturned remains a significant figure when ideally the number is 0%. Secondly, this 8% includes unintentional IAC. While there is no empirical study on deliberate IAC, it stands to reason that a trial counsel who deliberately engineers a strong IAC claim can do far better than the average.

56. *Id.* at 51-52.

57. *Id.* at 84 (“[IAC claims] added from 81% to 176% more days to complete than in terminated cases without an [IAC] claim.”).

58. Brandon L. Garret, *Judging Innocence*, 108 COLUM. L. REV. 55, 114 (2008); Cunningham-Parameter, *supra* note 36, at 832.

and over 50% in non-capital cases. In a review of the claims brought by exonerees for rape and murder who will eventually prove actual innocence, 29% of cases still included a claim for ineffective assistance.<sup>59</sup>

In addition to increased frequency of IAC claims, *Strickland's* scope has broadened as well. The number of ways a counsel can be ineffective have expanded far beyond trial performance. *Strickland* now applies to pretrial investigations,<sup>60</sup> post-conviction and appellate assistance,<sup>61</sup> and voir dire selection.<sup>62</sup> It covers even collateral consequences, such as advising a client that a conviction may affect their immigration status.<sup>63</sup> If the defense has no plan to take a case to trial, *Strickland* can still apply to plea negotiations as well.<sup>64</sup> And even when an entirely different lawyer errs in the courtroom, *Strickland* can assign blame to the defense counsel for failing to prevent it.<sup>65</sup> Courts are not ignorant to this trend, either.<sup>66</sup> In noticing the “routine” nature they face IAC, the Seventh Circuit glibly noted: “If we are to believe the briefs filed by appellate lawyers, the only reason defendants are convicted is the bumbling of their predecessors.”<sup>67</sup>

Snark aside, the Seventh Circuit’s underlying point is correct; there is no clear indication that there is a lawyering competency crisis that matches the intensity that IAC claims are sought. Lawyers and law students have become *more* competent, not less. The bar passage rates are approximately constant, with a notable increase prior to the 2020 pandemic.<sup>68</sup> Although the LSAT does not equate with being a good trial attorney, the average LSAT score follows an upward trend,<sup>69</sup> and the number of attorneys practicing has expanded precipitously.<sup>70</sup> All of this suggests that more attorneys are successfully passing the profession’s gatekeeping

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59. *Id.*

60. *Poindexter v. Mitchell*, 454 F.3d 564, 589-90 (6th Cir. 2006) (finding ineffective assistance by failing to investigate and present mitigating evidence during death penalty trial).

61. *Martinez v. Ryan*, 566 U.S. 1, 11, 132 S. Ct. 1309, 1317 (2012)

62. *Quintero v. Bell*, 368 F.3d 892 (6th Cir. 2004), *cert. denied*, 544 U.S. 936 (2005) (finding ineffective assistance when trial counsel did not challenge seven jurors who previously served on the co-defendant’s trial); *Mitcham v. Davis*, 103 F. Supp. 3d 1091, 1093-94 (N.D. Cal. 2015) (finding counsel ineffective by failing to raise a challenge when prosecutor struck every prospective black juror).

63. *See generally* *Padilla v. Kentucky*, 559 U.S. 356 (2010).

64. *See generally* *Missouri v. Fyre*, 556 U.S. 134 (2013) (failing to communicate plea offers to clients can be ineffective).

65. Michael D. Cicchini, *Constraining Strickland*, 7 TEX. A&M L. REV. 351, 353 (2020) (noting defense attorneys can be found ineffective for failing to prevent judicial or prosecutorial misconduct). This type of ineffectiveness is probably the easiest to deliberately partake in because it simply requires not interrupting an adversary as they make a mistake.

66. *Burris v. Farley*, 51 F.3d 655, 662 (7th Cir. 1995).

67. *Id.*

68. Karen Sloan, *Bar exam rates are up in most states as more scores roll in*, REUTERS (Oct. 4, 2024), <https://www.reuters.com/legal/legalindustry/bar-exam-pass-rates-are-up-most-states-more-scores-roll-2024-10-04/> [<https://perma.cc/4V8J-37MC>] (reporting that bar passage rates are improving to pre-2020 levels).

69. Mark Spivey, *Predicting the 2024-2025 Law School Application Cycle (Early Data)*, SPIVEY CONSULTING BLOG (Oct. 15, 2024), <https://www.spiveyconsulting.com/blog-post/predicting-the-2024-2025-law-school-application-cycle-early-data/>.

70. *Demographics*, ABA (2024) <https://www.americanbar.org/news/profile-legal-profession/demographics> (last visited Feb 25, 2025).

mechanism. Presumably, lawyers demonstrating better critical thinking skills and legal acumen should correlate to more competency. And most notably, the number of disciplinary actions against attorneys has been relatively consistent, and the number of publicly known disbarments has generally decreased.<sup>71</sup> And yet, to assume that post-conviction and appellate attorneys are filing meritable claims entails believing half of all non-capital trials are so incompetent that they cannot be considered within the definition of “counsel.”<sup>72</sup>

More bizarrely, IAC claims *increase* for death penalty trials, compared to non-capital habeas petitions.<sup>73</sup> Even though virtually every death penalty state requires a heightened showing of experience, training, and competency from the defense.<sup>74</sup> In Nevada, for example, a capital defense attorney needs to have practiced law for at least three years, have tried five felony trials to completion including one murder, and served as co-counsel on a death penalty trial under the tutelage of a more experienced death-qualified attorney.<sup>75</sup> Texas, Mississippi, Florida, Utah, and the Federal Government all require some combination of prior trial experience, good standing, and specialized training before any capital trial.<sup>76</sup> And yet, attorneys who have passed through a filter to increase competency have a *higher* chance of being accused of IAC and a significantly higher chance of a court believing it too.<sup>77</sup> Perhaps the educational seminars that Mississippi mandates for death penalty attorneys are so unimaginably bad that it makes its participants *worse* by the end. Or, something else drives IAC claims besides competency.

To summarize, IAC claims are a commonplace and successful path toward receiving postconviction relief. Yet, the rise and success of IAC is seemingly independent of a lawyer’s competency in general. In fact, IAC claims increase when a defense lawyer is preselected for competency. They correlate strongly with higher stakes, not decreased ability. In other words, ineffectiveness tends to occur when it can provide the biggest benefit to the client.

#### B. REASONS AND BENEFITS FOR PROVIDING AND THEN CLAIMING INEFFECTIVE ASSISTANCE

Of course, Joe Cannon is not a model criminal defense attorney. Nor do the *Model Rules* suggest anything approximating Cannon’s performance is tolerable.

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71. American Bar Association, 2023 Profile of the Legal Profession, 103.

72. While it is true that the 50% figure comes from convictions, which will necessarily have a disproportionately higher amount of incompetency, the vast majority of criminal trials end in a conviction. See Pew Research, *infra* note 79.

73. See King, *supra* note 50 (noting that IAC claims are present 50% of the time for non-capital petitions and 81% of time for capital petitions).

74. See *infra* notes 75-76.

75. Nev. Sup. Ct. R. 250.

76. Tex. Code Crim. Proc. Ann. art. 26.052 (West); Miss. R. Crim. P. 7.4; Ap; Fla. Stat. Ann. § 27.704 (West); Ut. R. Crim. P. 8(b); 18 U.S.C. § 3005.

77. See King, *supra* note 50, at 51 (finding petitions with IAC claims are granted relief 14% of the time, while non-capital IAC claims only receive it less than 4%).

Most attorneys, in every practice, would rather provide effective assistance than ineffective. Yet, deliberately providing IAC is not a purely theoretical loophole.<sup>78</sup> Due to its strategic advantages, lack of consequences, procedural resiliency, and the discomfort defense attorneys may feel in defending against an IAC claim, there is little in terms of preventing intentional IAC. And given the dramatic rise of IAC claims, their relative success compared to other appealable grounds, and the willingness for defense attorneys to admit IAC shows that intentionally botching a trial could eventually result in a client's only positive outcome.

### 1. PROVIDING IAC AS THE BEST OF BAD OPTIONS

Deliberate IAC may be condemned as unethical, but it is more difficult to discard it as ineffective. To start, an attorney's "effectiveness" can be misleading. Of the 71,954 defendants whose cases closed in 2022, only 290 were acquitted at trial.<sup>79</sup> Of the remainder, the majority settled through plea bargaining, but acquittals are still largely outnumbered with 1,379 defendants who were found guilty at trial.<sup>80</sup>

Given an 80% failure rate, there is no surprise to learn the many ways an attorney can lose at trial. At the start of trial, a poorly selected jury can doom your client before the prosecution presents a shred of evidence.<sup>81</sup> That is before cross-examinations, evidentiary concerns, crafting a compelling narrative, and predicting the opponent's strategy, all while having virtually no control over the decisions made by their clients pre-arrest. It is, lightly put, a difficult job.<sup>82</sup>

So, given the dismal odds and the number of ways the defense can seal their fate before deliberations, defense attorneys look prospectively for success at trial and for the future appeal. Preserving issues on the record is one of the most fundamental duties of a trial lawyer.<sup>83</sup> For deliberate IAC, a moribund defense only needs to take the step from preserving appealable issues and transition to making their own.

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78. See *supra* part I.A.

79. John Gramlich, *Fewer than 1% of federal criminal defendants were acquitted in 2022*, PEW RESEARCH CENTER (June 14, 2023) <https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022/> [<https://perma.cc/AWU8-SZ4B>].

80. *Id.*

81. Kenneth M. Mogill & William R. Nixon, Jr., *A Practical Primer on Jury Selection*, MICH. B.J., January 1986, at 52 ("There is no aspect of a criminal trial more important to the ultimate outcome than the jury selection process, yet for the average practitioner, this stage of trial is approached with minimal understanding and preparation.").

82. *DeShields v. Shannon*, 338 F. App'x 120, 125 (3d Cir. 2009) ("[Criminal defense attorneys] are typically called upon to organize and assimilate complicated and voluminous information . . . make difficult and often hurried decisions in the heat of trial . . . think creatively, act resourcefully, and advocate their client's causes with zeal and ethical sensitivity . . .").

83. *Howard v. Bouchard*, 405 F.3d 459, 480 (6th Cir. 2005). Notably, Howard was able to prove the deficient-performance prong when trial counsel failed to preserve objectionable issues. See also *Hamilton v. Ryan*, No. CV-18-8088-PCT-JJT (JFM), 2021 WL 2384073, at \*19 (D. Ariz. Mar. 16, 2021) ("Indeed, counsel is appropriately concerned with not only winning at trial but preserving objections on appeal.").

For instance, look at *Poindexter v. Mitchell*, where the Sixth Circuit found that a trial counsel provided IAC during the sentencing portion of a defendant's death penalty trial.<sup>84</sup> All judges concurred on the ineffectiveness: trial counsel's failure to investigate mitigating evidence that the defendant had a troubled and violent childhood.<sup>85</sup> But that is where the agreements end.

In his concurrence, Chief Judge Boggs pointed out a clear trend: The Sixth Circuit has routinely granted IAC for death penalty cases.<sup>86</sup> Specifically, IAC was found when trial counsel failed to investigate mitigating evidence.<sup>87</sup> Chief Judge Boggs argued that defendants often avoid the death penalty by making an IAC claim before a panel of appellate judges rather than by arguing to a jury.<sup>88</sup> As such, defendants are seemingly better off with ineffective counsel, rather than an effective one. A defendant with the former will likely be spared the death penalty upon appellate review, while a defendant with the latter will likely be executed if the effective trial counsel fails to persuade the jury.<sup>89</sup> In support, the Chief Judge restated the explanation previously given by an attorney:

If I make an all-out investigation, and analyze and present to the jury every possible mitigating circumstance, especially of the "troubled childhood" variety, it is my professional judgment that I may thereby increase the probability of this extremely repellant client escaping the death penalty from 10% to 12%. On the other hand, if I present reasonably available evidence that I think has as good a chance as any other in securing the slim chance of mercy from the jury, I will have a 50-99% chance of overturning the extremely likely death penalty judgment 10-15 years down the road. I will thus have secured many additional years of life for the client, and he may very likely avoid capital punishment altogether.<sup>90</sup>

A defense attorney who cannot comprehend this strategy would "be blind," Boggs wrote.<sup>91</sup> And based on Judge Daugherty's rebuke, a previous draft of Boggs opinion included a statement that "mildly-sentient" lawyers would appreciate the tactic's value.<sup>92</sup>

In turn, Judge Daugherty views this as an "unjustified attack directly on both the capital defense bar and indirectly on members of this Court."<sup>93</sup> To her, it is an "affront" to presume that defense attorneys "are engaged in a demented, premeditated

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84. 454 F.3d 564, 567.

85. *Id.*

86. *Id.* at 587.

87. *Id.*

88. *Id.* at 588.

89. *Id.* ("Thus, if counsel provides fully-effective assistance, and the jury simply does not buy the defense, then the defendant is likely to be executed. However, if counsel provides ineffective assistance, then the prisoner is likely to be spared, certainly for many years, and frequently forever.")

90. *Id.* at 589.

91. *Id.*

92. *Id.*

93. *Id.*

game” of “Russian Roulette” with their client’s life.<sup>94</sup> Instead, the blame lies in the “critical lack of relevant experience, an obvious lack of time or resources, or both.”<sup>95</sup>

## 2. LACK OF CONSEQUENCES

As stated before, if an attorney tries a felony and loses, there is a 50% chance that the defendant’s habeas petition will accuse them of ineffective assistance.<sup>96</sup> That increases to 80% for a capital trial.<sup>97</sup> So, why would an attorney bother to try either, just to face a 50-80% chance that their professional reputation will be publicly jeopardized, or to be served with bar complaints and malpractice lawsuits? The answer is that, in most cases, being accused of ineffective assistance does nothing of the sort. It does not jeopardize professional reputation nor does it trigger any adverse proceedings. Contrary to the decades of assurances from courts,<sup>98</sup> there are no practical consequences for IAC. In fact, deliberately fighting an IAC claim might be worse for an attorney’s career than admitting to it.

This claim may be difficult to believe. On paper, there are of course consequences. Virtually every state<sup>99</sup> has incorporated both the competency requirement of ABA Model Rule 1.1,<sup>100</sup> the diligence requirement of Model Rule 1.3,<sup>101</sup> the meritorious claim requirement of Rule 3.1,<sup>102</sup> and the candor to the tribunal requirement of *Model Rule* 3.3.<sup>103</sup> In fact, *Strickland* specifically cited professional standards, including the ABA Standards for Criminal Justice, as helpful guides to determining reasonableness even if they are not dispositive.<sup>104</sup> All these rules can be violated in IAC claims. And to believe *Strickland* critics, these ethical obligations are already violated long before an attorney stoops to the incompetency necessary to grant their former client relief.<sup>105</sup> In fact, it is difficult to imagine how a lawyer can act so deficiently that they can no longer be considered

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94. *Id.* at 589-90.

95. *Id.*

96. King, *supra* note 50.

97. *Id.*

98. Griffin v. United States, 330 F.3d 733, 739 (6th Cir. 2003) (“[B]ecause incompetent lawyers risk disciplinary action, malpractice suits, and consequent loss of business, we refuse to presume that ineffective assistance of counsel is deliberate.”) (*quoting Day*, 969 F.2d 46 n.9).

99. Alphabetical List of Jurisdictions Adopting Model Rules (Am. Bar Ass’n) (showing every state, except California, has incorporated the model rules). [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/).

100. MODEL RULES OF PROF’L. CONDUCT R. 1.1 [HEREINAFTER MODEL RULES]

101. MODEL RULES R. 1.3.

102. MODEL RULES R. 3.1.

103. MODEL RULES R. 3.3.

104. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

105. Joseph Ricks, *Raising the Bar: Establishing an Effective Remedy against Ineffective Counsel*, BYU. L. REV. 1115, 1117 (2015).

“counsel” under the Sixth Amendment but are also in complete compliance with any meaningful professional code of conduct.<sup>106</sup>

In addition to issues with the State Bar, plenty of factors ought to make deliberate IAC unappetizing for trial attorneys. After all, attorneys generally have an incentive to avoid increasing their malpractice liability, professional scorn, business losses, and limit access to appointed-cases. And, if all else fails, what type of lawyer would “play Russian Roulette” with their client?<sup>107</sup>

The answer is stark: None of the above work as an effective deterrent. Bar complaints and legal malpractice liability are virtually never the result of an IAC claim. The frequency that IAC is sought, while astounding compared to other professions, renders any professional scorn as negligible, along with any financial losses. And, to the “Russian Roulette” point, the very nature of criminal defense involves taking calculated risks. Deliberate IAC is no different in that respect.

First, disciplinary records are not a factor in IAC. As noted in Joseph Rick’s article “Rising the Bar: Establishing an Effective Remedy against Ineffective Counsel,” when the Utah Supreme Court has found ineffective assistance—something even staggering amounts of incompetency might not get—it has not sanctioned a single attorney.<sup>108</sup> Indeed, when the felony appellate process includes accusing half of all criminal defense attorneys of ineffectiveness, how could any state bar investigate and prosecute all of these claims?<sup>109</sup> Approximately 0.2% of all attorneys face some disciplinary procedures every year.<sup>110</sup> Even if the state bar would only discipline the worst quartile of lawyers whose were found ineffective, that would result in 2% of all death penalty trials ending with a defense attorney being disciplined. That would make the discipline rate ten times higher than the average for all attorneys.<sup>111</sup> Even this assumes that only a quarter of the attorneys who fail the *Strickland* test—designed to be exceedingly forgiving of poor decisions—would violate a professional rule. It is simply not feasible for the State bar to meaningfully prosecute ineffectiveness at this rate.

It is for this same reason that professional reputation interests will not prevent deliberate IAC, either. When IAC claims are the norm, instead of the exception, they no longer hold any utility as an ostracizing tool. Even if an attorney would be ashamed if their colleagues or potential clients discovered they were

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106. It should be noted that the Supreme Court held in *Nix v. Whiteside*, that a violation of the rules of ethics is not dispositive evidence of IAC. 475 U.S. 157 (1986). Yet, this opinion is silent on the inverse: IAC occurring *without* the violating a professional obligation.

107. *Poindexter v. Mitchell*, 454 F.3d 564, 589-90 (6th Cir. 2006).

108. *Strickland*, at 1117 n.17 (quoting Utah State Bar, Ethics Advisory Op. 13-04 para. 16 (Sept. 30, 2013) (Tenney, dissenting) (“The Utah Bar Journal publishes a monthly summary of all attorneys who have been professionally disciplined. I have reviewed those summaries for the past five years and cannot find a single instance in which a criminal defense lawyer was sanctioned because a court had concluded that he was ineffective under the Sixth Amendment.”)).

109. See King, *supra* note 50.

110. See ABA, *supra* note 71.

111. 3.5 divided by .2 equals 17.5.

ineffective, this assumes that someone will read the findings of an unrelated habeas petition for a several-year-old conviction.<sup>112</sup> It also assumes the court even mentions the ineffective counsel's name *at all*.<sup>113</sup>

But even if some residual shame exists and this habeas petition is unearthed, criminal defense attorneys are no strangers to harsh critiques. Defense attorneys are required to do a plethora of unpopular and odious tasks in service of their clients. After all, a defense attorney is a “demanding,” “outrageous,” “blasphemous,” “hated,” “isolated,” and “lonely” person<sup>114</sup> With zeal, they represent some of the most reviled members of society.<sup>115</sup> They are required to preclude truthful confessions if they violate *Miranda* or genuine evidence of guilt under the exclusionary rule.<sup>116</sup> They may be required to cross-examine child molestation victims too young to understand they are not their friends.<sup>117</sup> All of these services are difficult and unpopular, but defense attorneys serve their clients regardless of external scorn.<sup>118</sup> It is difficult to imagine why professional ‘tut-tutting’ for deliberate IAC would differ.<sup>119</sup>

If pressure from the state bars, courts, or colleagues cannot prevent deliberate IAC, then malpractice suits do not either. In many states, criminal malpractice suits typically require proof of actual innocence or exoneration, far exceeding the requirements of an already demanding *Strickland* standard.<sup>120</sup> Since IAC produces the greatest effect on sentencing or procedural ineffectiveness, most clients would not readily have proof of innocence. Or, they have already conceded their guilt. Even assuming they have this proof or live in the correct state, access to

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112. See King, *supra* note 50, at 39 (noting average wait-time after filing habeas petition for resolution varied between 2 to 6 years).

113. Ricks, *supra* note 105 (“Rarely, if ever, are defense attorneys named by the court that finds the counsel ineffective.”). In reviewing IAC opinions, many courts simply use the moniker “trial counsel,” to keep anonymity.

114. Quote from Clarence Darrow, famed defense attorney from the Scopes Monkey Trial. Michelle Quist Mumford, *All criminal defendants deserve the best defense lawyers*, SALT LAKE TRIBUNE (Jul. 19, 2017), <https://archive.sltrib.com/article.php?id=5527011&type=CMSID>.

115. Mark Mutz & Richard Gunderman, *Why Bad Clients Need Good Lawyers*, LAW AND LIBERTY (Jan. 5, 2022) <https://lawliberty.org/why-bad-clients-need-good-lawyers/>.

116. State v. Sewall, 136 Nev. 881, 460 P.3d 995 (2020) (suppressing custodial statement due to *Miranda* violation despite statement being tantamount to a confession to a cold case murder).

117. Abbe Smith, *Representing Rapists: The Cruelty of Cross Examination and Other Challenges for A Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255, 277 (2016) (recounting how, after cross-examining a child sex abuse victim about inconsistencies, the eleven-year-old victim wanted to talk to the defense attorney about summer camp and softball).

118. *Id.* (“Defense lawyers do not get to apologize—no matter how much we may want to. To do so would be narcissistic and vain. Victims of serious crime get to hate us. It is the least we can do for them.”).

119. As explained *infra*, social conformity appears to move defense attorneys *towards* welcoming IAC claims.

120. See Piris v. Kitching, 185 Wash.2d 856, 862, 375 P.3d 627, 630 (2016); Wiley v. Cty. of San Diego, 19 Cal. 4th 532, 79 Cal. Rptr. 2d 672, 966 P.2d 983 (1998). Yet, there are some states that do not require actual innocence for legal malpractice claims and treat them as any other negligence civil action. See Dockter v. Lozano, 2020 WY 119, 472 P.3d 362; Shaw v. State, Dept. of Admin., 861 P.2d 566, 572 (1993) (holding that actual innocence is not required to present a prima facie case, but actual guilt can be used by the public defenders as an affirmative defense); Paxman v. King, 448 P.3d 1199 (2015).

relief is still difficult. Given that over 80% of criminal defendants are indigent,<sup>121</sup> the prospect of hiring a malpractice attorney may be well outside their financial means. All of this still rests on the assumption that deliberate IAC is a negligent or unreasonable act. Given its advantages, this Note seriously doubts that assumption.

Additionally, any claims of business loss or removal from a court-appointment list are equally unlikely to come to fruition. First, this argument does not affect public defenders, who represent over 80% of criminal defendants and do not need to be hired or appointed.<sup>122</sup> Second, a non-indigent client would run into the same difficulty in finding a specific habeas corpus proceeding. They would need to know that “Habeas Corpus” is a legal term, and not a Harry Potter spell. Then, they would need to track down the federal district court finding, read 50 pages of dense legalese, and deduce the unnamed attorney’s identity, if not stated. Even if they surmount these obstacles, it won’t do them much good when 50% of Habeas petitions include a IAC claim. And as explained *infra*, there is a strong showing that an attorney fighting against IAC claims would result in more business than, at a minimum, falling on their sword and admitting ineffective assistance.

Lastly, as a stop-gap, some argue that deliberate IAC needs no extrinsic force to stop it, as it is fundamentally against a defense attorney’s motive. As the type of “women and men who struggle tirelessly to uphold their ethical duty to investigate fully and present professionally all viable defenses available to their clients,”<sup>123</sup> Judge Daughtrey in *Poindexter* states defense attorneys “serve their clients and the judicial system with integrity.”<sup>124</sup>

This praise is correct but misses the point. Defense attorneys—at least hopefully—deeply care about their client’s well-being. There is no shortage of lawyers who truly want the best outcome for their client. Not just to fulfill their legal obligation, but out of a personal, genuine desire to help their clients. And that motivation, perfectly understandable, is the primary motivator for deliberate IAC, not a deterrent. If a defense attorney can identify one good chance at a new trial and none of the assumed consequences are realized, why wouldn’t they consider pulling their punches and leaving some stones unturned in order to retain some marginal chance for the client to avoid the worst fate?

To be fair to Judge Daughtrey, it is indeed “Russian roulette.”<sup>125</sup> But every trial decision is fundamentally a game of odds. *Strickland* itself highlights the numerous and unclear options that attorneys must pick from in trial.<sup>126</sup> Even as Judge

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121. CAROLINE WOLF HARLOW, DEFENSE COUNSEL IN CRIMINAL CASES (2000).

122. *Id.*

123. *Poindexter v. Mitchell*, 454 F.3d 564, 590 (6th Cir. 2006). (6th Cir. 2006) (Daughtrey, J., Concurring).

124. *United States v. Day*, 969 F.2d 39, 46 n.9 (3d Cir. 1992).

125. *Poindexter*, at 590 (6th Cir. 2006) (Daughtrey, J., Concurring). In fact, the 1:6 odds of Russian roulette (12%) are a hair better than the IAC claim benefit (8%), but slightly worse than the odds of success with a petition that alleges IAC (14%). See King, *supra* note 50, at 51.

126. *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984). (“No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant . . . [e]ven the best criminal

Daugherty concedes, defense attorneys face enormous burdens.<sup>127</sup> They are playing a very difficult game with very bad odds. But it is precisely why it is a conceivable tactic. And if deliberate IAC claims are met with Judge Daughtrey's disbelief, then the odds just got a little better.

### 3. IAC IS A FLEXIBLE AND RESILIENT CLAIM TO RAISE ON HABEAS REVIEW

Since IAC is almost always raised by an appellate attorney, it is important to discuss what makes an IAC a successful strategy on appeal. To start, IAC is typically not raised during the direct appeal process for state convictions, either as a *per se* rule or because strong warnings cast against it.<sup>128</sup> Prisoners, both state and federal, are permitted to file petitions for writ of habeas corpus.<sup>129</sup> This has become a routine claim for federal courts. In one federal circuit court, over a third of their docket is dedicated solely to prisoner habeas corpus petitions and related prisoner civil rights suits.<sup>130</sup> In contrast, the entirety of federal criminal appeals through non-habeas means only amounted to a fifth.<sup>131</sup>

But in 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA). Aptly named, it primarily was a response to “the interminable delays in the execution of state and federal sentences” as a way to reduce the strain on the criminal justice system.<sup>132</sup> The purpose of the AEDPA was to decrease the avenues to obtain relief after a State has affirmed the conviction.<sup>133</sup> The purpose is partly for conserving judicial resources,<sup>134</sup> partly for comity (federal judiciary's respect for their state counterparts),<sup>135</sup> and partly for finality.<sup>136</sup> AEDPA accomplishes this in several ways, primarily a deluge of procedural and substantive requirements.

First, to substantively win relief, prisoners must show that the state decision contradicted clearly established federal law, or at least unreasonably applied it.<sup>137</sup> Alternatively, they can show that the state court holding was based on an

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defense attorneys would not defend a particular client in the same way.”)

127. *Id.*

128. *Commonwealth v. Moore*, No. 564 EDA 2024, 2025 WL 485972, at \*4, n. 3 (Pa. Super. Ct. Feb. 13, 2025); *State v. Robinson*, 25 Or. App. 675, 675 (1976); *United States v. Jackson*, 573 F. App'x 401, 406 (6th Cir. 2014) (“Generally, defendants may not bring ineffective assistance of counsel claims on direct appeal” unless the record is sufficiently developed).

129. 28 U.S.C. § 2254 (2006) (state prisoners); 28 U.S.C. § 2255 (2006) (federal prisoners).

130. R. Guy Cole, Jr. & Noah Litton, *The Sixth Circuit in Review*, 76 OHIO ST. L.J. 247, 255 (2015).

131. *Id.*

132. *Hohn v. United States*, 524 U.S. 236, 264 (1998) (Scalia, J., dissenting).

133. Nicholas Beekhuizen, *Post-AEDPA Compromise: Increased Habeas Corpus Relief for Capital Cases and Tighter Restrictions for Noncapital Cases*, 10 IND. J.L. & SOC. EQUAL. 321, 330 (2022).

134. Madison Gosch, *Shinn v. Ramirez: Creating A Catch-22 to Habeas Corpus Relief*, 68 S.D. L. REV. 546, 549 (2023) (“Additionally, AEDPA's proponents sought to limit the strain placed upon judicial resources following massive increases in time-consuming state prisoner habeas petitions.”).

135. *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

136. *Id.*

137. 28 U.S.C. § 2254 (d)(1)-(2).

unreasonable factual basis.<sup>138</sup> After this, the claim must survive a “harmless error” review, where prisoners undertake the arduous task of proving a substantial and injurious effect on the jury’s verdict<sup>139</sup> or some deliberate and especially egregious error.<sup>140</sup> And, any claim based on a factual issue—like Batson, culpability, and witness identification—must be proven by clear and convincing evidence if it is contrary to a state court’s findings.<sup>141</sup>

These requirements all presume that a petitioner has survived the AEDPA’s procedural gauntlet. A petitioner must make sure they have “exhausted” their options in state court, by using all state-level remedies provided. To accomplish this, petitioners must ensure that any claim raised on habeas was already presented to the state courts, to “give those [state] courts a ‘fair opportunity to apply controlling legal principles’” to the constitutional claim.<sup>142</sup> This requirement is enforced by procedural default.<sup>143</sup> If a prisoner—in reality, the prisoner’s attorneys—fails to exhaust a particular claim, Courts will be procedurally barred from reviewing the merits.<sup>144</sup> The only remedy for the petitioner is to show cause that a default was due to a violation of federal law, or that barring the petition will cause a “fundamental miscarriage of justice.”<sup>145</sup>

Assuming the petitioner has checked every box and jumped through every hoop, they still do not get relief by showing their federal rights were violated. Under the adequate state grounds doctrine in the Supreme Court, a petitioner must show that there is no independent or adequate state ground for their confinement.<sup>146</sup>

To be sure, the AEDPA is daunting and leaves very little room for error. But out of every type of claim, IAC remains the most immune from these requirements. For many of habeas’ toughest requirements, IAC is outright excused, or at least viewed much more favorably. In fact, IAC is so favorable that other types of claims can benefit from being masked as IAC claims.

First, IAC is exempted from the punishing “harmless error” standard that almost every other claim will face.<sup>147</sup> Instead of proving the harm was “substantial and injurious,” they need only the second prong of *Strickland*: a “reasonable

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138. *Id.*

139. In *Brecht v. Abrahamson*, the Supreme Court held a defendant must show actual prejudice in order to meet the substantial and injurious effect requirement. 507 U.S. 619, 637 (1993).

140. There is a rare additional path: proving a “structural defect,” where an error “necessarily rendered a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Neder v. United States*, 527 U.S. 1, 8-9 (1999).

141. *Habeas Relief for State Prisoners*, 52 *Geo. L.J. Ann. Rev. Crim. Proc.* 1125, 1143 (2023).

142. *Id.*

143. *Id.* at 1151.

144. *Id.* at 1148.

145. *Id.* at 1151-53.

146. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991), *modified*, *Martinez v. Ryan*, 566 U.S. 1 (2012) (finding that granting relief while independent and adequate state grounds exist is impermissible because it “ignores the State’s legitimate reasons for holding the prisoner.”); *see Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”).

147. *Supra* note 142 at 1139.

probability” that the trial outcome would be different.<sup>148</sup> Additionally, while the factual findings of a state court are presumed correct, ineffectiveness is a mixed question of fact and law.<sup>149</sup> As such, there is no presumption that the state court’s finding of reasonableness is correct.<sup>150</sup> Instead, the standard is only if the state court’s decision was an unreasonable application of the *Strickland* standard.<sup>151</sup> Since both the state and federal courts are reviewing the IAC for reasonableness, it effectively amounts to *de novo* review instead of requiring clear and convincing evidence.

The strategic utility of IAC is not only its lowered procedural requirements, but that it allows other claims to face a less stringent review as well. For instance, IAC claims effectively reinstated the ability to have habeas review of Fourth Amendment claims after their dismissal by the Supreme Court. In *Stone v. Powell*, ten years before *Strickland*, the Court restricted a petitioner’s ability to assert a Fourth Amendment violation claim in their habeas petition if they had the opportunity to litigate fully and fairly at the state level.<sup>152</sup> The rationale was that allowing such claims would undermine the truth-finding process, potentially exonerate guilty individuals, and offer minimal benefit to the exclusionary rule’s deterrent effect.<sup>153</sup> Because of this, petitioners were effectively excluded from raising claims out of concerns for judicial economy.<sup>154</sup>

This would remain the case, if not for IAC. As discussed, IAC can occur at virtually every stage of trial; a lawyer can be found unreasonably ineffective in converting the unreviewable Fourth Amendment claim into an IAC Fourth Amendment claim. That is, ineffectiveness for not preventing or objecting to inadmissible evidence. Just two years after *Strickland*, the Court granted relief for this claim in *Kimmelman v. Morrison*, where it found trial counsel ineffective for failing to file a timely suppression motion for a warrantless search.<sup>155</sup>

Not only did this revive Fourth Amendment claims for habeas review, but it brought them back on even stronger procedural grounds. Because IAC only requires a reasonable probability that it affected the outcome, petitioners are no longer required to show a substantial and injurious effect.<sup>156</sup> Before *Kimmelman*,

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148. *Id.* In addition to IAC, claims that the State withheld exculpatory material evidence in violation of *Brady v. Maryland* are also granted if there is a reasonable probability of a different outcome.

149. *Id.* at 1166-67.

150. *Id.*

151. *Id.* at 1167 (“Under AEDPA, state court determinations of law and mixed questions of law and fact are subject to the deferential standards of review of Section 2254(d)”).

152. 428 U.S. 465 (1976).

153. *Id.* at 490 (“Application of the rule thus deflects the truth-finding process and often frees the guilty.”).

154. *Id.* at 493 (“We adhere to the view that these considerations support the implementation of the exclusionary rule at trial and . . . on direct appeal of state-court convictions. But the additional contribution, if any, of . . . claims of state prisoners on collateral review is small in relation to the costs.”).

155. 477 U.S. 365 (1986).

156. *Id.* at 375 (“[T]he defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.”).

an attorney failing to challenge the admission of inadmissible evidence—or any substantive claims not preserved for appeal—could only get review on an unfavorable plain error review standard.<sup>157</sup> But when using IAC as a vessel for your constitutional claim, failing to object doesn't just remove the plain error penalty, it gives you a more favorable standard of review than the underlying claim itself.

To put it another way, if a trial counsel objects to the admission of evidence under the exclusionary rule and loses, they will need to ensure that they have preserved the issue by litigating and exhausting all state remedies (very little tolerance for failing to exhaust or preserve a claim), just to face a harmless error approach. But, if a trial counsel decides to do nothing, the defendant goes down a different path. Exhaustion requirements and procedural bars are much easier when both state and federal courts tend to emphatically discourage defendants from even attempting to raise an IAC claim on direct review.<sup>158</sup> And when a federal court does review these claims, they are reviewed under much more favorable standards. And, provided that the trial counsel can say the phrase “it wasn't intentional,” as needed in an evidentiary hearing, then the trial counsel is only a step away from getting his client a second trial.

Exhaustion requirements and procedural default are incredibly difficult to overcome. That is unless the prisoner—an attorney in reality—brings an IAC claim against the previous attorney for failing to preserve the issue for appeal.<sup>159</sup> Then, the “cause” requirement to get past procedural default is met.<sup>160</sup> In fairness, the Supreme Court in *Shinn v. Ramirez* limited this to state-level postconviction/appellate lawyers and limited federal courts from creating their own evidentiary record.<sup>161</sup> Still, even with that one caveat set, it is one of the only ways to definitively demonstrate cause for excuse of a procedural default.

Given this, appellate attorneys have multiple incentives to favor IAC as their most effective ground for postconviction relief. Still, the defendant's success relies on the trial counsel willingly testifying at the evidentiary hearing that they are ineffective. Not only are there no true disincentives remaining to be found ineffective, but there are incentives pulling defense attorneys *towards* cooperating with their former client's efforts to find them ineffective.

#### 4. DEFENDING AGAINST INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS PLACES TRIAL ATTORNEYS IN AN UNTENABLE POSITION

Few people become defense attorneys with the goal of increasing their client's odds of remaining incarcerated. And yet, this is precisely the position that

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157. *Supra* note 142, at 1138.

158. *Massaro v. United States*, 538 U.S. 500, 504 (2003) (“We hold that an [IAC] claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.”).

159. *Shinn v. Ramirez*, 596 U.S. 336 (2022).

160. *Brewer v. State*, 924 N.W.2d 87, 93 (N.D. 2019) (“We conclude failing to object at trial because of reliance on the record made in a pretrial motion is a basic legal error that satisfies Strickland's prong one.”)

161. *Kimmelman v. Morrison*, 477 U.S. 365 (1986).

evidentiary hearings place defense attorneys in. IAC claims, unlike other habeas claims, typically require evidentiary hearings.<sup>162</sup> In these evidentiary hearings and arguments, the roles are reversed. Here, the State is the one articulating the strength of the defendant's case, the skill and ability of the trial counsel, and how worthy of an opponent the defendant was in trial.

Because of *Strickland*'s strong presumption of an attorney's reasonableness, an evidentiary hearing is required to determine whether the attorney's actions were part of a reasonable, deliberate strategy, or if it was a mistake or an oversight.<sup>163</sup> If the error was a product of a deliberate strategy, the chances of relief are slim to none.<sup>164</sup> This puts the attorney in a dilemma: refuting the IAC claim will entail testifying against a former client. True, ABA Model Rule 1.6(b)(5) allows a defense attorney to break confidentiality to defend against IAC claims.<sup>165</sup> But there are serious considerations that may give attorneys pause before doing so.

First, as mentioned above, there is essentially no stigma on being subject to a garden-variety IAC claim, nor are there serious adverse consequences.<sup>166</sup> As such, there is little to no external pressures facing the trial counsel that would motivate the "reflex" to defend against the IAC.<sup>167</sup> Without this external pressure, what remains is a defense attorney who may be very disposed to helping their former client in any way they can.

An excellent example of this dilemma can be found in a defense practitioner article, written by Amber Vazquez Bode, detailing her experience being subjected to an IAC claim.<sup>168</sup> Vazquez's client received an eighteen-year prison sentence for a drunk-driving death case, after the judge unexpectedly refused to accept a probation sentencing deal.<sup>169</sup> Upon hearing the sentence, Vazquez Bode described her reaction:

I could feel my body shaking as I tried to console his sobbing family, who were still thanking me for the work I had done on the case. I sat in my car in the parking lot of the courthouse, which at that time was a renovated grocery store, and cried for a very long time. It was in the afternoon and it was raining. I sat in my car and weeping and strategizing what I could do to fix this for them. *It could not end like this, not on my watch.*<sup>170</sup>

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162. Doyle, Charles Federal Habeas Corpus Practice and Procedure § 21.1 (2024).

163. *Osagiede v. United States*, 543 F.3d 399, 408 (7th Cir. 2008) ("[IAC] claims generally require an evidentiary hearing if the record contains insufficient facts to explain counsel's actions as tactical . . . or if further factual development might demonstrate prejudice . . .") (internal citations omitted).

164. See *infra* part I.2.

165. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (AM. BAR ASS'N, 1983).

166. See *supra* part I.B.

167. Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 HOFSTRA L. REV. 1181, 1185 (2003).

168. Amber Vazquez Bode, *Falling on My Sword: Why I Testified Against Myself to Help a Client*, 43 AM. J. CRIM. L. 205 (2016).

169. *Id.* at 208.

170. *Id.* (emphasis added).

It was Vasquez herself who took the initiative to call an appellate attorney for her client.<sup>171</sup> She willingly offered herself as a witness to her ineffectiveness, both to the prosecutors and her client.<sup>172</sup> She wrote that she—quite literally—“could not sleep until I had righted the wrong that happened on my watch.”<sup>173</sup>

Her ineffectiveness, she claims, came from her failure to file a motion allowing the jury to determine the sentence, which lowers the sentence’s minimum.<sup>174</sup> Even though she did not want the jury to determine punishment, it would have taken the power to sentence out of the judge’s hands.<sup>175</sup> Because of this, an appellate court found that Vasquez was ineffective, and granted relief. On a new sentencing trial, her former client received a much shorter sentence.<sup>176</sup>

There is no question that Vasquez is a passionate, well-meaning, and strategic lawyer. She was given a challenging case. A local firefighter was killed after an accident with her client, who was too intoxicated to fully lift his own head.<sup>177</sup> The case’s framing was “local hero [] killed and . . . the other guy[’s blood-alcohol content] was three times the legal limit.”<sup>178</sup> The courtroom was filled with uniformed firefighters and anti-drunk driving advocacy groups in opposition to her.<sup>179</sup>

But nevertheless, she negotiated a probation agreement with the prosecutor, even though the statutory maximum was 20 years.<sup>180</sup> Agreement in pocket, she still zealously fought in trial. She found deep flaws in the State’s case and brought an expert witness to testify that her client—although drunk—was not the cause of the accident.<sup>181</sup> And she got the responding officer to admit on cross that a large amount of forensic evidence, which they based their arrest on, was destroyed in a hurricane.<sup>182</sup> She accomplished all of this despite burying three of her friend’s children and a close friend due to drunk drivers collisions.<sup>183</sup> Despite this, she still did the best for her client. By all accounts, Vasquez is a wonderful attorney. Every sentence and fact demonstrate she is a deeply principled, skillful, and formidable opponent in the courtroom. Put another way, she sounds *effective*.

But that is precisely the problem. Nothing in Vasquez’s case demonstrates the ineffectiveness her client claimed on appeal. Not legally, and certainly not normatively. The actual legal claim given is that it was unreasonable to not file a motion to give the jury sentencing powers, because there is a reasonable

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171. *Id.* at 209.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* (“I did not want the jury to assess punishment, because the prosecutor had already offered probation and I thought on a death case a jury would hammer him if they found him guilty.”).

176. *Id.* at 210.

177. *Id.* at 207.

178. *Id.* at 207.

179. *Id.* at 208.

180. *Id.*

181. *Id.* at 207.

182. *Id.*

183. *Id.* at 205.

probability they would have given her client probation.<sup>184</sup> But in reality, she had already obtained a sentencing agreement and did not want a jury to sentence her client at all.<sup>185</sup> By her own admission, this motion would be completely superfluous.<sup>186</sup> Her ‘ineffectiveness’ comes from not preparing for the judge to deny the agreement. As she admits, this was an out-of-left-field turn, which left both her and the prosecutor “shocked and dumbfounded.”<sup>187</sup> This unexpected choice is certainly brutal for Vazquez, but courts have made it explicitly clear that a reasonably effective attorney does not need to file frivolous motions.<sup>188</sup> And even if this motion would have prevented this oddball outcome, this is the exact “distorting effect of hindsight” that *Strickland* warned against and forbade.<sup>189</sup>

Putting aside the legal analysis of *Strickland*, Vasquez was not ineffective within any normative framework either. She does not put any particular blame on herself or even state she was ineffective. The reason for her client’s bad outcome is largely put on a judge, inferred to be as politically opposed to the prosecutor and inexperienced in criminal law.<sup>190</sup> It is the judge who unexpectedly discarded the agreement and sentenced the client to prison for almost four times longer than the prosecution requested.<sup>191</sup> The motivation for her filing was not that she views herself as incompetent, but that she cared about her client too deeply to allow him to spend the majority of his life in prison. It was self-sacrifice, not atonement, that lead her to testify that she was ineffective.

Let us say an attorney in Vazquez’s position did not want to be found ineffective, did not care about her former client’s prison sentence, and would contest that outcome during an evidentiary hearing. In that scenario, there may very well be reputational loss or a stigma. In effect, the defense attorney would take the side of the prosecution. Not only would they be harming their former client, they would also be damaging another defense attorney’s case. For public defenders, that may mean opposing your own co-worker’s efforts if the appellate division handles the case. But, private defense attorneys stand to lose just as much. In criminal law, private attorneys often rely on referrals for their businesses.<sup>192</sup> They

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184. *Ramirez v. State*, 301 S.W.3d 410, 419 (Tex. App. 2009) (“The prosecutor’s opinion of the appropriateness of probation, his offer of probation following the jury’s finding of Ramirez’s guilt, and Ramirez’s eligibility for probation establish a reasonable probability that Ramirez would have received probation from the jury.”).

185. Vazquez Bode, *supra* note 168, at 209.

186. *Id.* (“I did not want the jury to assess punishment, because the prosecutor had already offered probation and I thought on a death case a jury would hammer him if they found him guilty.”).

187. *Id.* at 208.

188. *United States v. Nersesian*, 824 F.2d 1294, 1322 (2d Cir. 1987) (“Counsel certainly is not required to engage in the filing of futile or frivolous motions.”).

189. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

190. Vazquez Bode, *supra* note 168 at 208.

191. *Id.*

192. Joshua Barron THE BUSINESS OF CRIMINAL LAW: HOW TO BUILD A CRIMINAL DEFENSE PRACTICE YOU AND YOUR CLIENTS WILL LOVE 55 (noting that referrals are the best client obtainment strategy, far exceeding paid targeted or awareness advertisements).

could jeopardize their future by gaining a reputation as too stubborn to help their clients. Given how strongly Vazquez believes that her role is to help her former clients at all costs, it may be very unlikely she would view attorneys who fight against their clients during evidentiary hearings as worthy of a referral.

And lastly, this finding of IAC did not seem to harm Vazquez in any permanent way. When she was found ineffective, her county's criminal appointment system had a policy of temporarily removing ineffective attorneys from their appointment list.<sup>193</sup> But Vazquez was apparently able to immediately explain the situation to the county's presiding judge.<sup>194</sup>

Nothing in Vazquez's case demonstrates that her failure to file the motion was intentional. Vazquez suddenly remembered that the motion could help, but what would it accomplish? What if the Judge granted the motion, a jury decided the case, and her client got a more severe outcome than her sentencing agreement? If Vazquez knew that she could file the motion and not doing so could grant her client a second chance later on, then Vazquez would absolutely be more competent and more effective in total by indulging in one instance of ineffectiveness. As this article demonstrates, IAC is not an all-or-nothing venture. Somehow, an attorney's competency can be increased with some ineffectiveness, not decreased.

Given the difficult odds that require defense attorneys to take risks, the lack of consequences for providing IAC, the relative ease that IAC can be brought on federal review, and the incentives to help both your clients and business, IAC cannot be properly described anymore as "usually a bad strategy."<sup>195</sup> It is a relatively risk-free method of increasing your client's appellate chances. Even if putting maximum effort into representation may increase the chances of winning at trial, it comes at the cost of the defendant's ability to appeal the probable conviction. Deliberate IAC cannot be waived away as a bad strategy. For many serious cases, *it is* the strategy.

## II. IS INTENTIONAL INEFFECTIVENESS SUFFICIENT FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

If a lawyer intentionally provides a client with ineffective assistance in order to aid a client's efforts to appeal, the question remains as to whether a deliberate, intentional act by a counsel can be considered ineffective assistance under *Strickland*.

At first glance, the question answers itself. *Strickland* prohibits ineffective assistance that reasonably changes the outcome. If the attorney tailors their representation to do exactly that, then the attorney should be ineffective. However, the *Strickland* test is based on the proposition that a "reasonable trial strategy" and "unreasonable errors" are two separate categories, incapable of overlap. As

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193. Vazquez Bode, *supra* note 168 at 209-10.

194. *Id.* at 210.

195. *United States v. Day*, 969 F.2d at 46 n.9.

discussed in Part I, this is incorrect. Unreasonableness in the correct dose is a reasonable trial strategy, and sometimes the best one. And yet, some appellate courts now routinely view any poor action—provided it was conscious and intentional—to be a trial strategy that is immune from relief. When these two categories converge, and now some errors are a part of a tactical and reasonable strategy, the question remains as to whether the *Strickland* test still applies.

This analysis applies only if trial counsel explicitly admits to deliberate ineffectiveness, or if the Court finds it deliberate despite testimony to the opposite. Since evidentiary hearings for trial counsel can significantly contribute to the record, an attorney who can plausibly identify another reason for the error that was not intentional may avoid this issue entirely. However, courts can accept or reject a trial counsel's testimony during an evidentiary hearing.

#### A. STRICKLAND'S TEXTUAL ANALYSIS

First, the text of *Strickland* does little, but not nothing, to aid this analysis. Famously (or infamously), *Strickland* does not provide any guidance to lower courts on how to determine whether a particular action is ineffective.<sup>196</sup> It only provides that ineffective assistance occurs when the trial counsel's performance is unreasonable given the totality of the circumstances.<sup>197</sup> Reasonableness, in turn, is reviewed under "prevailing professional norms."<sup>198</sup> This is a part of the Court's effort to restrain itself from prescribing a universal standard. *Strickland* states that the Sixth Amendment's definition of "counsel" relies on "the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions."<sup>199</sup> Besides mentioning that an effective counsel shall avoid conflicts of interest, generally advocate for the defendant's cause, and participate in the adversarial process of a proceeding, any particular standard is left to later determination.<sup>200</sup> In fact, the Court's reluctance to specify any more standards is partly based on its fear that it would "interfere with the constitutionally protected independence of counsel."<sup>201</sup>

Before discussing what can be gleaned from the text, there are two problems with *Strickland's* reasoning.

First, *Strickland's* framework is predicated on viewing two categories as distinct and nonoverlapping: unreasonable errors that render the counsel ineffective and a wide range of reasonable, deliberate strategies. With deliberate IAC, they are one in the same. Deliberately providing ineffective assistance at certain points

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196. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). ("More specific guidelines [beyond reasonableness] are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance.")

197. *Id.* at 695.

198. *Id.* at 668.

199. *Id.*

200. *Id.*

201. *Id.* at 689.

results in one of the strongest grounds for appeal possible in a habeas petition.<sup>202</sup> Given this, it can be difficult to argue that deliberate IAC can be considered objectively unreasonable, even if it uses unreasonable errors.

Secondly, the *Strickland* boundary between reasonableness and ineffectiveness is the “professional norms” of the criminal defense. According to *Strickland*, actions taken against professional norms can indicate unreasonableness.<sup>203</sup> Yet, the professional norm has incorporated ineffectiveness as within boundary.<sup>204</sup> When the chief judge of the Sixth Circuit derides a lawyer as being “blind” for not at least considering it,<sup>205</sup> admitting or deliberately providing IAC cannot be fairly considered outside of professional norms.

But still, *Strickland* provides some answers to this question. First, *Strickland* does not inquire into the motive for unreasonable ineffectiveness. *Strickland* reviews the intentions of deliberate strategies and prescribes the presumption of reasonableness. However, once the error is deemed unintentional, the inquiry mostly ends.<sup>206</sup> So, if there is ineffectiveness, *Strickland* suggests that on some level, Courts may be disinterested in the particular individual motive of the attorney, once they are found ineffective.

*Strickland*'s second solution provides its basis for demanding certain conduct out of defense attorneys: the right to counsel and fair trial in the Sixth Amendment.<sup>207</sup> As the court explains, the essence of a fair trial is “one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.”<sup>208</sup> This includes providing assistance and loyalty to the defendant which includes a duty to advocate the defendant’s cause.<sup>209</sup> It also includes consulting and informing the defendants of any important developments. And lastly, it involves performing all of these obligations with “such skill and knowledge as will render the trial a reliable adversarial testing process.”<sup>210</sup> While the Court cautions against using this as a “checklist for judicial evaluation,”<sup>211</sup> it still indicates that the concepts of strategic decisions or professional norms are not free-standing. They are moored to the understanding that defense attorneys must engage in the adversarial system, and against the prosecution.

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202. King, *supra* note 50.

203. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

204. *See Supra* part I.B.

205. *Poindexter v. Mitchell*, 454 F.3d 564, 589-90 (6th Cir. 2006) (Craig Daughtrey, J., Concurring).

206. As discussed *infra*, the Supreme Court has found certain actions to be ineffective per se, regardless of deliberateness. This includes a conflict of interest, violating client autonomy, or a clearly erroneous understanding of the law. *See Primus, supra* note 13, at 1581.

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

208. *Id.*

209. *Id.* at 692.

210. *Id.* at 668.

211. *Id.*

However, deciding effectiveness requires more than just *Strickland*. While it remains crucial to IAC cases, defendants today must review the four decades of development and evolution of the *Strickland* standard as well.

1. DEVELOPMENTS OF *STRICKLAND* TEST IN CIRCUIT COURTS HEAVILY FAVOR  
DELIBERATENESS AS THE MOST IMPORTANT FACTOR

While *Strickland* remains a seminal case in IAC, it is not accurate to say that a defendant today is only applying the *Strickland* standard. Instead, they apply a derivative, changed and molded by circuit courts. Even if they apply *Strickland* by name, the actual test applied by courts will vary.

At least, a deviation from *Strickland* would explain the extreme differences in circuit outcomes. In the four years following *Strickland*, only half of the circuits had reserved a single conviction due to IAC.<sup>212</sup> This gap has persisted into the 21st century. Petitioners with an IAC claim have a 50% chance of relief in the Ninth Circuit, a 33% chance of relief in the Sixth, and only a 1.4% chance in the Fifth.<sup>213</sup> Federal district courts in the Ninth Circuit are 50% more likely to grant a habeas evidentiary hearing than their counterparts in the Fifth Circuit.<sup>214</sup> Circuits even have competing applications of *Strickland* within themselves. In the Sixth Circuit, more than half of the IAC decisions included a dissent, indicating that the Circuit's own judges have different assessments of IAC.<sup>215</sup> Some individual federal districts, like the Eastern District of Pennsylvania, have an uncommonly high rate of reversing convictions due to IAC at 75%.<sup>216</sup> And yet in the same time period, the District of Nevada, Central District of California, and the Middle District of Florida granted no relief for any claim at all.<sup>217</sup> Given this variation, even if all federal courts use the same formal process of *Strickland*, they are applying very different rules in practice.

Some states and circuits, especially in southern states, have interpreted *Strickland* to require showing that not a single competent or reasonable lawyer would have done the same.<sup>218</sup> In the Tenth Circuit, an adequately informed

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212. Martin C. Calhoun, *How to Thread the Needle: Toward A Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 458 (1988).

213. Christopher Seeds, *Strategy's Refuge*, 99 J. CRIM. L. & CRIMINOLOGY 987, 1017 (2009) ("Together, the Sixth Circuit and Ninth Circuit have granted relief on sentencing ineffectiveness claims since Williams more than the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits combined . . .").

214. Carol S. Steiker, *Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869, 1902 (2006). While this covers all habeas claims, IAC is the most common of them.

215. Seeds, *supra* note 213, at 1019-20.

216. King, *supra* note 50, at 52.

217. *Id.*

218. *Beltran-Gonzales v. State*, 317 Ga. 168, 173, 891 S.E.2d 801, 806 (2023) ("Overcoming that presumption [that trial counsel is reasonable] requires an appellant to show that no reasonable lawyer would have done what his lawyer did, or would have failed to do what his lawyer did not.") (quoting *Evans v. State*, 315 Ga. 607, 611 (2023)); *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) ("[A] petitioner must establish that no competent counsel would have taken the action that his counsel did take.").

strategic choice is “virtually unchallengeable.”<sup>219</sup> Indeed, some critics note that a trial counsel can use the term “strategy” to insulate against any type of IAC claim.<sup>220</sup>

This belief—that intentional acts will effectively determine effectiveness—has been criticized as the “magic words” conceptualization of *Strickland*.<sup>221</sup> Under this interpretation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional conduct. So, the dividing line between ineffectiveness and reasonableness is not the action itself, but it’s intentionality. This standard is criticized not only as being extremely deferential,<sup>222</sup> but also as being implemented to effectively permit anything deemed a conscious trial strategy without raising an IAC claim. As Steven Bright noted:

Much less than mediocre assistance passes muster under the *Strickland* standard. Errors in judgment and other mistakes may readily be characterized as “strategy” or “tactics” and thus are beyond review. Indeed, courts employ a lesser standard for judging the competence of lawyers in a capital case than the standard for malpractice for doctors, accountants, and architects.<sup>223</sup>

Indeed, this interpretation of *Strickland* seems to neglect the test’s objectivity. But, there has been some pushback from the “magic words” theory. In the early 2000s, the Court “breathed new life”<sup>224</sup> into the standard by finding that a failure to investigate mitigating evidence in capital murder trials was ineffective.<sup>225</sup> In *Wiggins v. Smith*, the Court disregarded the trial counsel’s explanation for not presenting mitigating evidence as a “post-hoc” justification and found him ineffective despite his claimed strategy.<sup>226</sup> Here, if a trial counsel did not investigate or know mitigating evidence exists, then the failure to pursue it could not be considered “strategic.”

This did not just deprioritize the trial counsel’s intent in IAC claims. It deviated from the *Strickland* standard significantly. Instead of *Strickland*’s very cautious approach against prescribing the specific actions that a defense attorney must

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219. *Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir. 2002).

220. Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 522 (2009).

221. *Id.*

222. Note: Sara R. Faber, *Competency, Counsel, and Criminal Defendants’ Inability to Participate*, 67 DUKE L.J. 1219, 1234 (2018).

223. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1858. As an example of this claim, Bright mentions the Fifth Circuit’s opinion in *Romero v. Lynaugh*, 884 F.2d 871 (5th Cir. 1989), where a defense attorney’s death penalty sentencing argument was only “[y]ou are an extremely intelligent jury. You’ve got that man’s life in your hands. You can take it or not. That’s all I have to say.” The Circuit Court ruled that this closing argument was a “dramatic ploy” and, therefore, not ineffective. Notably, the Circuit used the defense counsel’s more reasonable actions, such as being prepared and reviewing the record, as evidence that he was effective. *Id.* at 877. This could be a prime example of how courts may be predisposed to find deliberate IAC as self-defeating.

224. Smith, *supra* note 220, at 515.

225. See *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

226. *Wiggins*, at 526-27.

take, the Supreme Court determined that defense attorneys have an affirmative duty to investigate mitigating and aggravating evidence.<sup>227</sup> While these are all capital cases, there is no reason why it cannot apply to all serious crimes regardless of sentencing.

B. DELIBERATE INEFFECTIVENESS UNDER STRICKLAND WILL STILL BE CONSIDERED INEFFECTIVE

Given *Strickland*'s text, and the following developments, an attorney who provides deliberate ineffectiveness should still be considered ineffective, regardless of a later trial strategy.

First, *Strickland*'s operative test is not determining whether a trial counsel's ineffectiveness was deliberate, or even reasonable. Properly understood, these are indicators of *Strickland*'s real target: ensuring that a criminal defendant has the right to counsel and a fair proceeding.<sup>228</sup> And, as *Strickland* notes, this can only be understood as a portion of the adversarial trial process. The function of the trial counsel is "to make the adversarial testing process work in the particular case," and their decisions should be judged at the time of counsel's conduct.<sup>229</sup> The underlying standard and goal of a defense attorney is not simply to benefit the client, but to "to ensure that the adversarial testing process works to produce a just result under the standards governing decision."<sup>230</sup>

Nothing about deliberate IAC furthers the adversarial goal of a trial. It is not acting adverse to the prosecution; it is capitulating to them. When a trial counsel deliberately fails to object or investigate, it is a form of surrender in the trial process. It is allowing the prosecution to present evidence—no matter how one-sided, improper, or inappropriate—to a jury, without any recourse. While the idea is that a later adversarial process might be on more friendly terms, a trial counsel is primarily responsible for aiding the defendant in the actual and immediate "particular case."<sup>231</sup> Not the hypothetical case that may exist years in the future.

For that reason, a trial counsel's intentionality in their ineffectiveness is not relevant to the *Strickland* inquiry. As *Strickland* concludes, an attorney's adherence to professional norms and a strategy is only relevant if it furthers the ultimate end goal: to make the trial a process to test evidence adversarially.<sup>232</sup> Failing to grant defendants this ability flatly denies defendants their entitlement to have "ample opportunity to meet the case of the prosecution."<sup>233</sup>

To argue for the alternative—that *Strickland* foregoes these types of deliberate strategies—would confuse the underlying goal of *Strickland* (to give a defendant

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227. Smith, *supra* note 220.

228. *Strickland v. Washington*, 466 U.S. 668, 684 (1984).

229. *Id.* at 690.

230. *Id.* at 687.

231. *Id.* at 690.

232. *Id.* at 685.

233. *Id.* at 685.

a fair, adversarial trial) with the means of achieving that goal (deliberate trial strategies). It would return the *Strickland* analysis to simply requiring “magic words” of intention, a standard that the Supreme Court has parted from.<sup>234</sup>

### III. ETHICAL STANDARD FOR DELIBERATELY PROVIDING INEFFECTIVE ASSISTANCE

Part II argues that the *Strickland* standard, correctly viewed, would find that ineffective assistance is an objective test, and reviewing courts should only review the trial counsel’s deficiencies, intentional or not. And as Part I demonstrates, the mechanisms we use to discourage this practice are eroded, while the benefits to the client remain.

In turn, these two results raise the question: As a normative matter, should the criminal justice system tolerate widespread, nonchalant accusations of IAC, or instances of deliberate IAC?

To answer, a resounding “no” is appropriate. IAC may very well benefit an individual client. Indeed, as Joe Burdine finally found value in a sleeping lawyer. But that benefit tolls a heavy price on the public and criminal defendants’ confidence in defense attorneys. It also removes finality, harming every participant in the justice system.

#### A. DEGRADING TRUST IN DEFENSE ATTORNEYS AND THE CRIMINAL JUSTICE SYSTEM

As a cognizable strategy, deliberate IAC presumes two things: the trial attorney can determine the goal of their representation (performing inadequately in hopes for a better appeal) and decreasing time spent in incarceration or death row is the best measure of effectiveness. However, both assumptions are inaccurate. Under the *Model Rules of Professional Conduct*, and empirical evidence in addition indicates criminal defendants themselves have a different understanding of what constitutes successful representation.

Clarence Darrow, the famed 20th century criminal attorney, described an effective defense attorney as accepting that “few love a spokesman for the despised and the damned.”<sup>235</sup> But at a minimum, the specified “few” ought to include the despised and the damned themselves.<sup>236</sup> Yet, despite the growing amount of relief that defendants have received from IAC, criminal defendants largely dislike their attorneys, and their representation. In one study, only 22% of

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234. Seeds, *supra* note 213.

235. See Mumford, *supra* note 114.

236. This subsection will largely focus on a criminal defendant’s perspective. However, virtually all of the problems mentioned will also affect the perception of the criminal justice system from the public at-large. See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 951 (2006) (“Perhaps because of these factors, nearly three-quarters of Americans lack much confidence and trust in the criminal justice system.”).

former clients view their representation with satisfaction.<sup>237</sup> If given the opportunity, over 80% of former clients would have chosen a different counsel if given the chance.<sup>238</sup> Clients often feel “forced” into plea bargains by their attorneys.<sup>239</sup>

In turn, studies have demonstrated that criminal defense attorneys start their relationships by presuming a client lacks trust in them.<sup>240</sup> Criminal defendants routinely question their competency and loyalty according to a study of 200 public defenders.<sup>241</sup> Frequently, clients tell their court-appointed attorneys, “[t]his doesn’t look very good. I think I really need to hire a real lawyer.”<sup>242</sup> Other clients deride them as secretly aligned and “in-bed” with the prosecutors.<sup>243</sup> When a large bulwark of defendants will claim ineffective assistance at some point in their appellate process, it is difficult to blame them.

But, this alone doesn’t disturb the underlying argument for deliberate IAC, at least on the surface. A defense attorney may argue that a client’s preference is irrelevant, because an attorney’s performance should be judged by the outcome of the case.<sup>244</sup> An attorney’s role is to maximize their client’s benefit, regardless of their client’s satisfaction with the attorney.<sup>245</sup> As such, deliberate IAC advances a client’s interest in the long term, making it automatically effective.

This view categorically misunderstands who determines “effectiveness” and mistakenly gives the lawyer the power to define it. But in fact, clients are the ones who judge what constitutes effectiveness, not their lawyers. As specified in *ABA Rule 1.2*, the client determines the goal, not the attorney.<sup>246</sup> “Effectiveness” is best understood by how well the attorney’s actions comport with the client’s goals. Not what an attorney determines the client’s goal to be.

As research indicates, clients do not share this myopic view of case outcome as the only “goal.” Instead, empirical research indicates that clients care deeply about perceptions of fair treatment as well, which deliberate IAC denies them. In a study with inmates in Arkansas—all former clients of a lawyer—researchers asked the prisoners for their views of defense attorneys’ positive and negative traits.

When the respondents described what an “ideal attorney” would be, they did not fixate on ‘whatever reduces my sentence the most.’ In fact, they prioritize plenty of actions as more important and desirable than case outcome. The most

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237. Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client’s Perspective: Empirical Findings and Implications for Legal Practice*, 25 *LAW & PSYCH. REV.* 81, 86 (2001).

238. *Id.* at 96, n. 66.

239. *Id.* at 88.

240. Marcus Boccannini, et al., *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 *LAW & PSYCH. REV.* 97, 105 (2002).

241. *Id.* at 98, n. 5 (citing David R. Lynch, *Effects on Public Defenders in General and on Their Relationships with Clients and Prosecutors in Particular*, 26 *CRIM. JUST. & BEHAV.* 217, 225-30 (1999)).

242. Lynch, *supra* note 241 at 226.

243. *Id.*

244. Boccaccini, *supra* note 237 at 94-95.

245. *Id.*

246. MODEL RULES R 1.2.

important characteristic that clients desire is loyalty.<sup>247</sup> Clients want someone “totally committed to [their] defense,” and someone who will “aggressively represent [their] interests.”<sup>248</sup> They want someone who will “defend [them] and not help the state to prosecute [them],” and will “give a damn” about the verdict at trial, instead of “trying to get through it with as little effort on their part as possible.”<sup>249</sup> In describing attorneys they dislike, they include attorneys who “sold them out”<sup>250</sup> and appeared to work for the state, not for them. Yet, deliberate IAC can be described exactly as the process of selling them out to the state. Even if it includes the noble hope of buying them back in the future, it is precisely the type of attorneys that defendants do not want.

Even when describing competency and lawyering ability, former clients still do not only care about the eventual outcome. Clients wanted an attorney with legal knowledge, experience, research, trial preparation, and courtroom speaking skills.<sup>251</sup> In other words, clients want *effectiveness*, even more than a better outcome. When asked to describe what this ideal attorney would do, former clients say they would be “not afraid of the prosecuting attorney” and “cover all angles of my case.”<sup>252</sup> The ideal attorney would thoroughly investigate, “make sure all the evidence is good,” and “make a good argument for me in court.”<sup>253</sup> While some wanted an attorney “who could find and use loopholes in the legal system” or get “a lesser sentence,”<sup>254</sup> the majority of responses show that criminal defendants want their defense attorney to take part in the adversarial process, and do not want capitulation.

And yet, deliberate IAC entails ignoring what clients deem effective or desirable in favor of the trial counsel’s preference. It involves jettisoning all these traits from their representation that clients would prefer to preserve what the trial counsel believes is crucial. So, a lawyer who fails to investigate, fails to object, or even fails to stay awake through trial may well very be a legally successful advocate but not a conscientious or empathic one their clients prefer. As a telling example, Calvin Burdine wrote a letter to his soon-to-be-sleeping attorney, Joe Cannon:

What I feel would be the best possible defence [sic] at this present time would be for me to get some psychiatric evaluation . . . I DO ADMIT that I need some drastic help, I have for along [sic] time, I am powerless over my own dicisions [sic], I have tried for several years to become my own man and failed at it miserably. . . I just pray that the Court will show some murcey [sic] to a very broken down individual.<sup>255</sup>

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247. Boccaccini, *supra* note 237, at 95.

248. *Id.* at 98.

249. *Id.*

250. *Id.*

251. *Id.* at 99.

252. *Id.*

253. *Id.*

254. *Id.* at 99.

255. Amnesty International, *infra* note 261.

Calvin Burdine did not just want a calculated and favorable verdict. He wanted some level of fairness out of his trial. He believed that he had severe mental deficiencies, felt remorse for his failures, and wanted his lawyer to highlight these facts. He was wishing for a merciful outcome, of course, but it is deeper than mere self-interest. He wants the court to listen to him, and recognize his perspective in its decisions. And ironically, he appears more ready to admit to his failures before a judge than his own attorney was. He ultimately wants a fair trial. Someone may respond that a fair trial would likely result in an unappealable execution and, therefore, is not in his interest. But, Burdine's interests are for Burdine to decide, and his wishes should still be reflected in his attorney's actions.

Even if outcomes mattered more than client satisfaction, deliberate IAC's focus on ends justifying means is not just out of step with their clients. It will inevitably harm the outcome as well. Once defendants believe their attorney is loyal and hardworking, they are more likely to aide and participate in their defense.<sup>256</sup> This includes being "'upfront' and 'more open and honest' . . . [from] the outset."<sup>257</sup> In the study, one participant stated that if they received better counsel, "I would have been able to tell him what really happened and maybe have gotten a reduced sentence."<sup>258</sup> And yet, deliberate IAC would forego the benefits of having a client give more candor. Instead, it casts defendants as irrelevant extras in their own trials, who's advice or trust has no material benefit.

A client's confidence in his lawyer, and the attorney-client relationship, is "critical to our system of justice."<sup>259</sup> Deliberate IAC only prevails when it derogates this understanding by shifting the attorney-client relationship into the hands of an attorney. It treats the client as a passive observer in their own criminal case and is out of step with what a majority of clients actually want from their attorney. For these reasons, deliberate IAC poses a serious challenge to the interests of their own clients, and the interests of a fair justice system at large.

#### B. DEPRIVING FINALITY, FOR THE VICTIM, DEFENDANT, AND SOCIETY ALIKE

On Fifth Circuit stationary, Calvin Burdine benefitted from his sleeping lawyer. After all, he was spared the death penalty that he likely otherwise could have received. But this depiction is nothing more than a sanitized fiction. In truth, his appellate process was tortuous.

For 15 years, Calvin Burdine was a "dead man walking,"<sup>260</sup> unsure if the guards who fed and clothed him would eventually tie him down and kill him, in front of

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256. *Id.* at 102.

257. *Id.*

258. *Id.*

259. *United States v. Bergeson*, 425 F.3d 1221, 1226 (9th Cir. 2005).

260. A phrase for those awaiting execution on death row. John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 NE. UNIV. L. REV. 1, 37 (2019).

family and strangers alike. He was given at least six different dates for his own death.<sup>261</sup> At least twice, they turned into full-blown mock executions. In one instance in 1987, prison officials were seemingly unaware that Burdine's execution was vacated by a judge the month before.<sup>262</sup> Despite showing the certified order to the guards, Burdine was ignored and not allowed to speak to his attorney.<sup>263</sup> He was still forced to write his will, order his "last" meal, take his "last" shower, and speak to his mother for the "last" time.<sup>264</sup> Only in the five hours before his execution did prison officials find the stay of execution.<sup>265</sup> Eight years later, Burdine faced death yet again, only to be spared by a judge yet again. But this time, with only 45 minutes to spare.<sup>266</sup>

Between each execution date and brushes with death, Burdine's existence was reduced to indigent begging—in the form of prolonged legal battles involving many different attorneys, arguments, and courts. Before the Supreme Court refused to alter the Fifth Circuit's vacating order, every victory was hollow, and every defeat was inconclusive. He was almost free, but never sure. He was almost doomed, but never fully. At no point did Burdine have any control over his fate. The time specifically reserved for his input—the trial—was squandered by Cannon.

Even when he was eventually granted a new trial in 1999, it was stripped away from him a year later by a Fifth Circuit panel.<sup>267</sup> It was only after losing *six* times that an *en banc* panel of 15 judges spare his life by a single-vote margin.<sup>268</sup> Leading up to this, each cycle of appeal was an esoteric back-and-forth between his attorneys and Texas, where they argued abstract constitutional law and procedural policy, used Latin terms, and navigated an entirely new habeas procedure under the ADEPA halfway through his appeal. Even if lawyers could find the through-line, one could forgive a defendant in Burdine's shoes from viewing this spew of legalese and Latin as nothing more than arbitrary.

If Texas intentionally subjected Burdine to this treatment, it would be reprehensible.<sup>269</sup> Mock executions are widely recognized as a form of torture.<sup>270</sup> Even in the 19<sup>th</sup> century, the Supreme Court noted that a four-week's uncertainty about the execution date is "one of the most horrible feelings" an individual could feel,<sup>271</sup> to say nothing about 15 years. But, this torment came from Joe Cannon's performance. To be sure, Texas prison officials in the 1980s should have had a

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261. Amnesty International, *Death Penalty in Texas: Lethal Injustice*, AMR/51/10/98, 1 March 1998, <https://www.refworld.org/reference/countryrep/amnesty/1998/en/23603> [accessed 23 March 2025].

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Texas Death Row Inmate to Be Released By Sunday Night*, NEWS ON 6, (March 3, 2000) <https://www.newson6.com/story/5e3685e02f69d76f6209b656/texas-death-row-inmate-to-be-released-by-sunday-night>.

267. *See Burdine's Habeas Review*, *supra* note 1.

268. *See Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

269. *See Are Last-Minute Stays of Execution a Form of Torture?*, AMNESTY INTERNATIONAL, (December 10, 2008) <https://www.amnestyusa.org/blog/are-last-minute-stays-of-execution-a-form-of-torture>.

270. *See generally* Bessler, *supra* note 260.

271. *In re Medley*, 134 U.S. 160, 172 (1890).

better paperwork system to avoid unlawfully executing inmates. But this nightmare of uncertainty began because Burdine's appellate lawyers were attempting to undo Cannon's ineffectiveness. Eventually, they succeeded. And eventually, Cannon's performance saved Burdine's life, but that does not obscure how Cannon put his client through more agony than any prison could.

This is what remains of a justice system—and a prisoner's life—without finality. First popularized in Paul Bator's article,<sup>272</sup> "finality" arises from the belief that, at a certain point, ceasing litigation is more valuable than continuing to examine a legal or factual issue.<sup>273</sup> Because no legal process can definitively locate the unquestionable truth, finality is a conservation of resources.<sup>274</sup> While this includes economic resources, it also involves all the intellectual, moral, and political resources that society invests into its legal system.<sup>275</sup> According to Chief Justice Warren Burger, few things have plagued the criminal justice system or "lowered public confidence in the courts [more] than the interminable appeals, the retrials, and the lack of finality."<sup>276</sup>

Finality is traditionally viewed to benefit the state, rather than the convicted defendant.<sup>277</sup> The typical balancing test pins the state's interests in finality against the defendant's interest in exercising their individual rights.<sup>278</sup> To the extent that finality has been critiqued, it is through the belief that finality harms *both* society and the defendant alike, and allowing more appellate review would benefit all.<sup>279</sup>

Although this is the traditional approach to finality, it is not clear that finality must stand in opposition to the defendant's interest. It is not entirely settled that allowing more administrative remedies, more appellate processes, and more "bites of the apple" are invariably in the defendant's interests. As Justice Harlan noted: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."<sup>280</sup> And as Bator argued, expanding appellate rights is incompatible with rehabilitation.<sup>281</sup> It is incongruent for a criminal justice system to condemn individuals and demand them to change their ways, while signaling it cannot trust itself to make this demand in the first place.<sup>282</sup> Effectively, it can signal to the defendant that society's condemnation is

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272. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 451 (1963).

273. Note: Jeffrey G. Ho, *Finality, Comity, and Retroactivity in Criminal Procedure: Reimagining the Teague Doctrine After Edwards v. Vannoy*, 73 STAN. L. REV. 1551, 1572 (2021).

274. *Id.* at 1573.

275. Bator, *supra* note 272, at 261.

276. *Evitts v. Lucey*, 469 U.S. 387, 405-06 (1985) (Burger, C.J., dissenting).

277. Ho, *supra* note 273, at 1596.

278. *Id.* (depicting dispute between state's desire to conserve resources against defendant's individual rights).

279. Ho, *supra* note 273.

280. *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part).

281. Bator, *supra* note 272 at 452.

282. *Id.*

uncertain and amendable. Either on the defendant's guilt or if society delivered the appropriate sentence.<sup>283</sup>

Deliberate IAC—without question—eschews finality. It is predicated on a view that trials are not a pursuit of truth but a spawning pool for the real battle: the appellate process. For a criminal defendant, it means that a conviction to a period of years in prison, or to death itself, entails taking up the mantle of litigating against the state for possibly years to decades. It instills a fundamental uncertainty into the defendant's life and makes it impossible for them to leave the hostile and caustic adversarial process.

The role of a defense attorney is not to blindly seek legal success at any cost. Under a narrow view of deliberate IAC, the gambit may increase the chance that a client serves only 20 years of incarceration instead of 30, thus being deemed a legal success. However, it overlooks the quality of those years. If the former results in 20 years of relentless litigation and a quarter-century of never accepting a sentence as reality, it might be much worse than 30 years spent pursuing acceptance and even happiness.

Acceptance is a fundamental part of the human condition. It is an essential part in overcoming grief, surmounting problems, and finding happiness. Despite the punitive and often squalid conditions that prisoners face, it is entirely possible to find joy and growth within prison.<sup>284</sup> But a lack of finality puts an end to that. It places the defendant in a situation where they cannot accept society's verdict. It keeps the defendant transfixed on an adversarial process: just enough hope for a reversal that they cannot ignore it but not enough to guarantee freedom. For many people, finding acceptance is a difficult task. They do not receive effective assistance when their trial counsel renders it impossible.

#### IV. CONCLUSION

Deliberate IAC is not a fluke. Nor is it a bad strategy. It is a perfectly rational tactic that a defense attorney may pursue that carries very little risk while ostensibly serving their client. And, if a court believes an attorney has been deliberately ineffective, it should grant that defendant relief. But that does not mean that deliberate IAC *helps* the defendant or is condonable. It usurps the defendant's autonomy and forces them through a gauntlet of appellate and post-conviction litigation. Understandably, a defense attorney may want to maximize their client's success is commendable. But it should not be at the expense of their right to a fair trial and their right to a zealous courtroom advocate.

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283. *Id.* (“... [The] process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place. The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility.”)

284. Ety Elisha, Yael Idisis, Natti Ronel, *Window of opportunity: Social acceptance and life transformation in the rehabilitation of imprisoned sex offenders*, *AGGRESSION AND VIOLENT BEHAV.* 323, 330 (2012) (“The findings also indicate that a traumatic event such as incarceration may lead to positive changes that include a perception of imprisonment as an opportunity for life transformation.”).