

5-24-2018

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Recommended Citation

Alexandre Bou-Rhodes, *When the Defendant Doesn't Testify: The Eighth Circuit Considers a Reasonable Broken Promise in Bahtuoh v. Smith*, 59 B.C.L. Rev. E. Supp. 520 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss9/30>

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WHEN THE DEFENDANT DOESN'T TESTIFY: THE EIGHTH CIRCUIT CONSIDERS A REASONABLE BROKEN PROMISE IN *BAHTUOH v. SMITH*

Abstract: In 2017, in *Bahtuoh v. Smith*, the Eighth Circuit held that a criminal defendant's counsel was not ineffective for promising the jury that the defendant would testify, but failing to deliver on that promise. This Comment argues that the Eighth Circuit's decision is in line with the decisions of other circuits in ineffective assistance of counsel cases where counsel promised the defendant's testimony but later reneged on that promise. Courts should consider in their analysis, however, the impact such a decision may have on the jury, and that a stricter standard for evaluating counsel's trial performance could adversely affect indigent defendants.

INTRODUCTION

In the United States, filing a writ of habeas corpus in federal court can be a state prisoner's last significant chance at appellate review; the action is available only after a prisoner has exhausted all applicable state court remedies.¹ As many as 18,000 habeas corpus claims are filed in federal district courts every year.² These claims constitute one of every fourteen civil cases filed in the district courts.³ An issue often raised in habeas actions is ineffective assistance of counsel.⁴

¹ 28 U.S.C. § 2254(b)(1) (2012); see *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995)) (noting that a state must have the chance to review and correct infringements of a prisoner's federal rights before federal review is appropriate). Federal prisoners, on the other hand, may obtain relief under 28 U.S.C. § 2255. 28 U.S.C. § 2255. Under that statute, federal prisoners may make a motion requesting the district court to vacate, set aside, or correct the sentence. *Id.* Following the final order of the district court, the prisoner may file a writ of habeas corpus to the appropriate appellate court. *Id.*

² NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS I (2007).

³ *Id.* On average, non-capital habeas claims take more than nine months from start to finish. *Id.* at 7. Successful claims are rare: out of a sample of more than 2,000 non-capital habeas petitions, only seven were granted. *Id.* at 9. A court ordering an evidentiary hearing was found to be a significant factor that increased the likelihood relief would be granted in capital cases. *Id.* at 10. In *Cullen v. Pinholster*, however, the U.S. Supreme Court held that review of all habeas corpus petitions challenging state court proceedings are limited to the record developed by the state court. 563 U.S. 170, 181 (2011).

⁴ See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 114 (2008) (referring to a study finding that nearly half of post-conviction relief appeals involve an ineffective assistance of counsel claim).

In Minnesota in 2013, Christopher Bahtuoh, a state prisoner, argued that his counsel was ineffective because his attorney promised the jury that Bahtuoh would testify in his murder trial, but later decided against it.⁵ Bahtuoh exhausted his available avenues for state relief without triumph.⁶ He then turned to the federal courts.⁷ The United States District Court for the District of Minnesota denied relief.⁸ He appealed to the United States Court of Appeals for the Eighth Circuit and, in 2017, in *Bahtuoh v. Smith (Bahtuoh II)*, the Eighth Circuit denied relief, holding that the Minnesota Supreme Court did not unreasonably determine that Bahtuoh's counsel was not ineffective.⁹

Part I of this Comment details the factual background and procedural history of *Bahtuoh II*.¹⁰ Part II examines the law governing the Eighth Circuit's adjudication of this case and examines other Circuit decisions dealing with similar ineffective assistance of counsel habeas corpus claims.¹¹ Part III argues that the Eighth Circuit's decision is harmonious with those of its sister Circuits.¹²

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On April 28, 2009, Christopher Bahtuoh was driving through Minneapolis, Minnesota, with Lamont McGee sitting in his passenger seat.¹³ McGee was a gang member; Bahtuoh was not, though he associated with members of McGee's gang.¹⁴ Bahtuoh and McGee drove by Kyle Parker, a member of a rival gang, whom Bahtuoh knew from school.¹⁵ Upon spotting Parker, Bahtuoh turned the car around and stopped near Parker.¹⁶ Several moments later, McGee shot and killed Parker, and Bahtuoh accelerated the car away.¹⁷ At the grand jury proceedings, Bahtuoh testified that Parker had

⁵ See *State v. Bahtuoh (Bahtuoh I)*, 840 N.W.2d 804, 816 (Minn. 2013), *aff'd*, 855 F.3d 868 (8th Cir. 2017).

⁶ *Bahtuoh v. Smith (Bahtuoh II)*, 855 F.3d 868, 871 (8th Cir. 2017).

⁷ See *id.*

⁸ See *id.* (noting that the district court adopted the recommendation of the magistrate judge to deny Bahtuoh's habeas petition).

⁹ *Id.* at 873.

¹⁰ See *infra* notes 13–41 and accompanying text.

¹¹ See *infra* notes 42–85 and accompanying text.

¹² See *infra* notes 86–109 and accompanying text.

¹³ See *Bahtuoh II*, 855 F.3d at 870; *Bahtuoh I*, 840 N.W.2d at 808.

¹⁴ *Bahtuoh II*, 855 F.3d at 870. McGee was a member of the “I-9” gang. *Id.*

¹⁵ *Id.* Parker was a member of the “Taliban” gang. *Id.*

¹⁶ *Id.*

¹⁷ *Id.* There was conflicting testimony regarding whether the conversation that took place before the shots were fired was aggressive. See Appellant's Brief at 11, 12, *Bahtuoh II*, 855 F.3d 868 (No. 16-2279). Approaching the car before being shot, Parker told his friends that “Fat Chris,” a moniker for Bahtuoh, was a “nobody.” *Id.* at 10. Holding her dying brother, Parker's sister asked him who was responsible and Parker responded, “Chris. Fat Chris.” *Id.*

flagged him down, and that he had not seen McGee's gun until McGee pulled it on Parker.¹⁸ Bahtuoh was indicted in state court on an accomplice theory of four counts of first-degree murder and two counts of second-degree murder.¹⁹ He pleaded not guilty and his case was subsequently tried to a jury.²⁰

During opening statements at trial, Bahtuoh's counsel told the jury that Bahtuoh would waive his right to remain silent and testify, and that they, the jury, should maintain open minds regarding the facts of the case until they had heard this testimony.²¹ At the close of the state's presentation of their case, counsel decided to change strategies.²² Because the State had introduced into evidence Bahtuoh's grand jury testimony, which Bahtuoh's trial testimony would closely mirror, and because counsel believed that the State had not met its burden of proof, he advised Bahtuoh not to testify.²³ Bahtuoh heeded his counsel's advice, and the defense rested without presenting any evidence.²⁴ In counsel's closing argument, he explained his change of strategy to the jury, saying that he chose not to put Bahtuoh on the stand because Bahtuoh's "truthful" story was portrayed through the grand jury

¹⁸ Appellant's Brief, *supra* note 17, at 14.

¹⁹ *Id.* at 3. Someone convicted of first-degree murder in Minnesota is automatically sentenced to life imprisonment. MINN. STAT. § 609.185(a) (2017). They are eligible for parole after serving thirty years of that life sentence. *Id.* § 244.05 subd. 4(b). Someone convicted of second-degree murder may be sentenced to at most forty years in prison. *Id.* § 609.19 subd. 1.

²⁰ Appellant's Brief, *supra* note 17, at 3.

²¹ *Bahtuoh II*, 855 F.3d at 870. Counsel made this strategic decision after he and Bahtuoh, before trial, collectively decided that this would be an appropriate course of action. *Id.* Counsel stated to the jury:

You also know that Mr. Bahtuoh has a right to remain silent. He will waive that right [H]e is going to tell you the truth I would ask you to keep an open mind Wait until he takes the stand and tells you what happened.

Bahtuoh I, 840 N.W.2d at 816. Counsel promised the jury that they would hear certain evidence that could only come from Bahtuoh; for example, that the victim was not his enemy and that he had reason to believe that McGee, the shooter, was not armed that day. Appellant's Brief, *supra* note 17, at 9.

²² *See Bahtuoh II*, 855 F.3d at 870 (noting that counsel decided to alter courses in part because he believed the State's evidence was insufficient to meet its burden).

²³ *Id.* Through Bahtuoh's grand jury testimony, the jury heard from Bahtuoh's perspective that Parker flagged him down, that he had not seen McGee's gun until he pulled it on Parker, that he went into hiding following the shooting, and that he was not a gang member, but did associate with such individuals. Appellant's Brief, *supra* note 17, at 14, 15. Counsel's prediction about the strength of the State's case proved to be, in part, true. *Bahtuoh II*, 855 F.3d at 870. The jury acquitted Bahtuoh of two counts of first-degree murder. *Bahtuoh I*, 840 N.W.2d at 808.

²⁴ *Bahtuoh II*, 855 F.3d at 870. In the record of the colloquy in which Bahtuoh informed the court that he would not testify, counsel stated that he had spoken with Bahtuoh "on several occasions" about whether he should waive his Fifth Amendment privilege, and that they had discussed the "pros and cons" of each option. Appellant's Brief, *supra* note 17, at 12. Bahtuoh answered in the affirmative that he had received time to consider his options. *Id.* at 13. He stated "I will not testify," and indicated that he did not require more time to consider his decision. *Id.*

testimony, and that the government had not proved its case.²⁵ Bahtuoh was subsequently convicted on two of the four counts of first-degree murder and two counts of second-degree murder, and was sentenced to life imprisonment with the possibility of parole after serving thirty-one years.²⁶

Bahtuoh first sought postconviction relief in the state court by arguing, *inter alia*, that he had received ineffective assistance of counsel.²⁷ The court denied relief.²⁸ He then appealed to the Minnesota Supreme Court, where he argued several claims, including ineffective assistance of counsel.²⁹ The state supreme court also denied relief and affirmed his conviction.³⁰ Bahtuoh then turned to the federal courts, filing a habeas corpus petition under 28 U.S.C. § 2254 and positing several claims, among them ineffective assistance of counsel.³¹ A United States magistrate judge issued a Report and Recommendation to deny the habeas claim, which the United States District Court for the District of Minnesota adopted.³² The district court issued a certificate of appealability for the ineffective assistance of counsel claim.³³

²⁵ *Bahtuoh II*, 855 F.3d at 870. Counsel asked the jury to fault him for Bahtuoh's decision not to take the stand: "Mr. Bahtuoh did not take the stand. I told you he would. That's my fault." Appellant's Brief, *supra* note 17, at 15. He further explained,

[W]hy should I put him on the stand? . . . When they didn't prove their case and got his grand jury testimony read to you, which he gave under oath . . . which exonerates him. Why would I put a 20-year-old young man up against an experienced prosecutor?

Id.

²⁶ See *Bahtuoh I*, 840 N.W.2d at 808.

²⁷ *Id.* Bahtuoh also argued that the trial court incorrectly instructed the jury on accomplice liability, that he did not voluntarily waive his right to testify, that he should have been granted a mistrial due to prosecutorial misconduct, and that he was denied the right to a public trial. *Id.*

²⁸ *Id.* at 809. Having promptly denied his other post-conviction relief claims, the court held an evidentiary hearing on Bahtuoh's claim that he did not voluntarily waive his right to testify. *Id.* at 808–09. He was the only witness to testify at the hearing, and he stated that, contrary to the trial colloquy record, trial counsel had not advised him about the pros and cons of testifying, but had told him to simply state that he understood the questions he would be asked during the colloquy. *Id.* at 809.

²⁹ *Id.* at 807–08. Bahtuoh also argued that the record was factually insufficient to support his conviction, that the accomplice liability instruction was legally incorrect, that he was coerced into not testifying at trial, that the district court abused its discretion in denying his motion for a new trial, that the jury's verdicts were legally inconsistent, and that he should have been granted an evidentiary hearing on whether he was denied a public trial. *Id.*

³⁰ *Id.* at 808.

³¹ *Bahtuoh II*, 855 F.3d at 871.

³² *Id.* The Federal Rules of Civil Procedure allow for a magistrate judge to hear a prisoner's petition that challenges her "conditions of confinement." FED. R. CIV. P. 72(b)(1). The magistrate judge then enters a recommended disposition of the issue. *Id.* If a party objects to the recommendation, then a district court judge will review the magistrate judge's recommendation and can elect to accept, reject, or modify the recommendation. FED. R. CIV. P. 72(b)(3).

³³ *Bahtuoh II*, 855 F.3d at 871. For a prisoner to appeal a district court's denial of a habeas corpus petition, the district court must first issue a certificate of appealability. 28 U.S.C. § 2253(c)

Bahtuoh embraced the opportunity to appeal this aspect of his habeas claim to the United States Court of Appeals for the Eighth Circuit; he argued that the Minnesota Supreme Court unreasonably applied the law and unreasonably determined the facts in deciding his ineffective assistance of counsel claim.³⁴

The Eighth Circuit was restricted in its review of the effectiveness of counsel's assistance because 28 U.S.C. § 2254 requires deference to the state court's adjudication of the claim, and because the ineffective assistance of counsel standard announced by the Supreme Court in *Strickland v. Washington* requires that federal appellate courts presume trial counsel's representation was acceptable.³⁵ The Eighth Circuit endorsed the Minnesota Supreme Court's determination that counsel's decision to advise Bahtuoh not to testify was sound strategy, and thus not ineffective assistance.³⁶ The court noted that, through Bahtuoh's grand jury testimony being read into evidence and counsel's cross-examination of state witnesses, the jury heard the evidence counsel had promised during his opening statement.³⁷ Specifically, the jury heard that Bahtuoh knew the victim and that he was unaware McGee had a gun.³⁸ The court also observed that counsel based his decision on his partially correct belief that the state had not met its burden in proving Bahtuoh guilty.³⁹ Because the state court considered these "unexpected developments" in determining whether counsel's assistance was reasonable, the Eighth Circuit declined to find the state appellate court's application of the *Strickland* standard

(2012) (requiring the petitioner to make a "substantial showing" of a constitutional right violation for a certificate of appealability to issue, and requiring the issuing court to specify for which issues the showing has been made); see *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003) (noting that a state prisoner seeking appeal of a district court's habeas ruling is not automatically entitled to appellate review of that decision, and that an appeals court lacks jurisdiction to review such a ruling unless a certificate of appealability has been issued).

³⁴ *Bahtuoh II*, 855 F.3d at 871. Bahtuoh claimed that the Minnesota Supreme Court was unreasonable in determining that counsel's decision to urge Bahtuoh not to testify, after promising the jury that Bahtuoh would testify, was not objectively unreasonable. *Id.* He claimed that the state supreme court unreasonably determined the facts in finding that counsel did not foresee the weaknesses in the State's case, and in finding that counsel considered the risks of not calling Bahtuoh to testify when he cautioned him against testifying. *Id.* at 873.

³⁵ *Id.* at 871, 872. The Court noted that its review of the Minnesota Supreme Court's application of the *Strickland v. Washington* standard is "doubly deferential," because the court must accord deference to counsel's trial strategy as well as to the state court's adjudication of the reasonableness of that strategy. *Id.* (citing *Cullen*, 563 U.S. at 190).

³⁶ *Id.* at 873.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* When the verdicts were read, Bahtuoh was found not guilty on two of the six murder counts. *Bahtuoh I*, 840 N.W.2d at 808.

unreasonable.⁴⁰ The Eighth Circuit also concluded that the Minnesota Supreme Court did not unreasonably determine the facts.⁴¹

II. LEGAL BACKGROUND OF HABEAS CORPUS PETITIONS FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Section A of this Part will detail the history and Supreme Court interpretation of aspects of habeas corpus petitions.⁴² Section B will describe the standard for an ineffective assistance of counsel claim.⁴³ Section C will analyze how federal courts have applied the ineffective assistance of counsel standard to broken promises made by defense counsel.⁴⁴

A. Habeas Corpus Petitions for State Prisoners

The habeas corpus petition is a venerated feature of the American justice system, providing defendants a “bulwark” from fundamentally unfair convictions.⁴⁵ The writ of habeas corpus, in part, provides a citizen convicted in a state court the opportunity to have the constitutionality of her conviction reviewed by a federal court.⁴⁶ In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (“AEDPA”), which modified the role of the federal courts when considering state prisoners’ habeas claims.⁴⁷

⁴⁰ *Bahtuoh II*, 855 F.3d at 873. Having found no ineffective assistance of counsel, the Eighth Circuit was not compelled to consider, as required under the second prong of the *Strickland* test, whether counsel’s assistance prejudiced the trial. *Id.* at 871, 873.

⁴¹ *Id.* at 874. Bahtuoh argued that the Minnesota Supreme Court unreasonably determined that the extent of the weaknesses of the State’s case were unforeseen to counsel and that counsel weighed the risks of not having Bahtuoh testify. *Id.* at 873. If the state court’s factual conclusions are supported by the record, then it did not unreasonably determine the facts. *Evenstad v. Carlson*, 470 F.3d 777, 782 (8th Cir. 2006). Based on the trial record, the Eighth Circuit found that counsel was only partially correct about the extent of the weaknesses in the State’s case. *Bahtuoh II*, 855 F.3d at 873. For example, counsel established through cross-examination that the victim had motioned towards Bahtuoh, which supported Bahtuoh’s grand jury testimony. *Id.* The Eighth Circuit also found that the trial record demonstrated that counsel weighed the risks of Bahtuoh testifying. *Id.* at 874. Counsel stated during the colloquy when Bahtuoh informed the court that he would not testify that he had spoken to Bahtuoh about the issue and that they had weighed the “pros and cons” of not testifying. *Id.*

⁴² See *infra* notes 45–54 and accompanying text.

⁴³ See *infra* notes 55–64 and accompanying text.

⁴⁴ See *infra* notes 65–85 and accompanying text.

⁴⁵ *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)).

⁴⁶ 28 U.S.C. § 2254 (2012); John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 SUP. CT. L. REV. 271, 273 (1996).

⁴⁷ 28 U.S.C. § 2254(d). The statute mandates that a petition for a writ of habeas corpus originating from a defendant in state custody, whose claim has already been decided on the merits in the state court, will not be issued unless the state court adjudication: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . or

In particular, AEDPA mandates that federal courts provide increased deference to the decisions of state courts that have already adjudicated claims raised in habeas petitions.⁴⁸ AEDPA allows federal courts to grant a writ of habeas corpus under 28 U.S.C. § 2254 when the claim was previously adjudicated in state court.⁴⁹ A federal court may grant a habeas claim if the state court's decision unreasonably applied "clearly established Federal law."⁵⁰ In 2000, in *Williams v. Taylor*, the United States Supreme Court held that under this provision of AEDPA, federal courts may grant a habeas claim if the state court unreasonably applied a governing legal principle established by the Supreme Court to the facts of the defendant's case.⁵¹ This requires that the state court decision be objectively unreasonable, not merely incorrect or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.*

⁴⁸ See Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868, 1869–70 (1997) (noting that before the passage of Antiterrorism and Effective Death Penalty Act ("AEDPA"), federal courts performed an independent review of mixed question cases, while after they presumed state court decisions to be correct). Prior to passage of the AEDPA, federal courts split habeas claims that had been adjudicated by state courts into three categories: those presenting questions of fact, those presenting mixed questions of fact and law, and those presenting questions of law. *Id.* at 1869. In question of fact claims, state court decisions were provided deference, and a federal court could independently review the decision only if it believed there was reason to do so, or one of eight statutory exceptions was met. 28 U.S.C. § 2254(d); see *Townsend v. Sain*, 372 U.S. 293, 318 (1963) (observing that a district court judge has the discretion to accept the findings of the state court with regard to a habeas claim), *rev'd on other grounds*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992). In mixed question of fact and law claims, federal courts undertook an independent review. See *Thompson v. Keohane*, 516 U.S. 99, 112–13 (1995) (holding that whether a suspect was "in custody" for the purposes of *Miranda* warnings was a mixed question of fact and law, justifying independent review). In question of law cases, federal courts undertook independent reviews of legal questions. *Miller v. Fenton*, 474 U.S. 104, 110 (1985) (holding that voluntariness of a confession is a legal question requiring independent federal consideration). AEDPA was, in part, an effort to reduce the ability of federal courts to review habeas petitions. See *Bell v. Cone*, 535 U.S. 685, 693 (2002) (noting that AEDPA was intended to prevent retrials in federal court and to provide finality to state court decisions); see also Tommy Zippelman, *The Ineffective Assistance of Counsel Era*, 63 SUP. CT. L. REV. 425, 428 (2011) (noting that federal habeas doctrine has evolved to favor finality). In effect, however, habeas claims increased following the enactment of AEDPA. JOHN SCALIA, U.S. DEP'T OF JUSTICE, NJC 189430, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000, at 7 (2002) (determining that 18,000 more habeas petitions were filed because of AEDPA between April 1996 and September 2000).

⁴⁹ 28 U.S.C. § 2254.

⁵⁰ *Id.* § 2254(d)(1). The provision also allows federal courts to grant habeas claims if the state court decision was "contrary to . . . clearly established federal law." *Id.* The Supreme Court has held that under this provision, a federal court may grant a habeas claim if a state court reached a conclusion contrary to the Supreme Court on an issue of law, or if the state court decides the case differently than the Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000).

⁵¹ *Williams*, 529 U.S. at 413.

erroneous.⁵² A state court decision is not objectively unreasonable if “fair-minded jurists” could reach differing conclusions as to its soundness.⁵³ A federal court may also grant a habeas claim if the state court’s decision was based on an unreasonable determination of the facts before it.⁵⁴

B. The Constitutional Requirements of Ineffective Assistance of Counsel Claims

The Sixth Amendment to the United States Constitution guarantees criminal defendants the “Assistance of Counsel for his defence.”⁵⁵ This provision is not met, however, if “a person who happens to be a lawyer” stands next to the defendant during the trial.⁵⁶ The Supreme Court has concluded that because the implied purpose of the Sixth Amendment is to produce a fair trial, the right to counsel means the right to the effective assistance of counsel.⁵⁷

In *Strickland v. Washington*, the Supreme Court elucidated a standard on which claims of “actual ineffectiveness” of counsel’s assistance should be

⁵² *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). It is not enough that the decision is incorrect in the court’s independent judgment. *Williams*, 529 U.S. at 411; *see also* U.S. *ex rel.* Hampton v. Leibach, 347 F.3d 219, 245 (7th Cir. 2003) (finding that “[u]nreasonable means something more than mistaken”) (citing *Woodford v. Visciotti*, 537 U.S. 19, 24, 25 (2002) (internal quotations omitted)).

⁵³ *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

⁵⁴ 28 U.S.C. § 2254(d)(2). A state court decision unreasonably determines the facts if the court’s factual findings, which are presumed to be correct, are not supported by the record. *Evenstad v. Carlson*, 470 F.3d 777, 782 (8th Cir. 2006).

⁵⁵ U.S. CONST. amend. VI. Juveniles are also provided with counsel during delinquency proceedings, although this was not always the case. *See* Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 428–29 (2017) (discussing the historical evolution of the role of defense counsel in delinquency proceedings).

⁵⁶ *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

⁵⁷ *Id.* at 685–86 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). In *Cuyler v. Sullivan*, the Court held that, because a criminal trial is state action, both privately retained and court appointed counsel are held to the effectiveness standards read into the Sixth Amendment. 446 U.S. 335, 344–45 (1980). Research indicates that, despite prevailing beliefs, court appointed counsel are about as effective as privately retained counsel at achieving favorable outcomes for clients. Richard D. Hartley et al., *Do You Get What You Pay For? Type of Counsel and Its Effect on Criminal Court Outcomes*, 38 J. CRIM. JUST. 1063, 1064 (2010). At trial in state court in the seventy-five largest counties in the United States, 4.4% and 4.3% of defendants were found guilty when represented by appointed and retained counsel, respectively. CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, NJC 179023, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000). *But see* Derwyn Bunton, Opinion, *No Lawyer to Spare for Poor in New Orleans*, N.Y. TIMES, Feb. 19, 2016, at A31 (noting that the New Orleans Public Defender’s office ceased accepting new cases to represent indigent clients as a result of a history of budget cuts, and that the office’s workload is twice that recommended by the American Bar Association).

analyzed.⁵⁸ The *Strickland* standard has two prongs that a defendant must prove.⁵⁹ First, a defendant must demonstrate that her trial counsel's representation was "deficient," in other words, that it fell below an "objective standard of reasonableness."⁶⁰ The Supreme Court intentionally described a vague standard to ensure the preservation of defense counsel's wide latitude in deciding trial strategy.⁶¹ Further, because with hindsight any decision could be deemed unwise or unreasonable, a defendant must overcome a presumption that the challenged trial strategy was sound.⁶² Even if a court determines that counsel provided ineffective assistance, because the purpose of the Sixth Amendment is to provide a fair trial, the second prong of the *Strickland* standard requires the defendant to prove that the ineffectiveness actually prejudiced the defense for the conviction to be overturned.⁶³ The Court held that a defendant must show there was a "reasonable probability" that without counsel's errors, the outcome at trial would have been different.⁶⁴

C. Federal Courts Have Not Unanimously Found That Breaking a Promise Made in Opening Statements Is Ineffective Assistance of Counsel

Courts other than the Eight Circuit have decided habeas claims of ineffective assistance of counsel where counsel promises the defendant will testify but does not call the defendant to testify.⁶⁵ In federal courts, the dis-

⁵⁸ *Strickland*, 466 U.S. at 684. The Court had previously concluded that the government can violate the right to effective assistance of counsel in certain situations where it hinders the ability of counsel to make independent strategy judgments. *Id.* at 686. The Court in part developed the standard to provide guidance to the circuit courts, which had adopted varying, although substantially similar, tests for ineffective assistance of counsel claims. *Id.* at 684. The claim in *Strickland v. Washington* concerned a defendant's claim of ineffective assistance of counsel in a capital sentencing proceeding. *Id.* at 686. The Court concluded that a capital sentencing proceeding, but not a normal sentencing proceeding, which can be an informal proceeding, is similar enough to a trial that the ineffectiveness standards elucidated apply to both. *Id.* at 686–87.

⁵⁹ *Id.* at 687.

⁶⁰ *Id.* at 687–88.

⁶¹ *Id.* at 688–89 (citing *United States v. Decoster*, 624 F.2d 196, 208 (D.C. Cir. 1976)). The purpose of the Sixth Amendment, the Court stated, is to provide a fair trial for the defendant, not to raise the bar of representation standards. *Id.* at 689.

⁶² *Id.* at 689. The defendant must identify specific acts or omissions that constituted unreasonable strategy. *Id.* at 690.

⁶³ *Id.* at 691–92.

⁶⁴ *Id.* at 694. A "reasonable probability" means a probability that erodes a court's certainty in the outcome of the proceeding. *Id.* The Court rejected the higher preponderance of evidence standard, which is used in assessing claims that newly discovered evidence warrants a new trial, because a trial can be rendered prejudicial by ineffective assistance of counsel even if the ineffective assistance cannot be shown by a preponderance of evidence to have affected the outcome. *Id.* at 693–94.

⁶⁵ See *Hampton*, 347 F.3d at 257, 258; *Ouber v. Gaurino*, 293 F.3d 19, 27 (1st Cir. 2002); *Madrigal v. Yates*, 662 F. Supp. 2d 1162, 1180 (C.D. Cal. 2009).

positive issue for deciding such claims is whether the about-face is predicated on unforeseen circumstances.⁶⁶

In 2002, in *Ouber v. Gaurino*, the United States Court of Appeals for the First Circuit applied the *Strickland* standard to a scenario where counsel reneged on a promise to call the defendant to testify.⁶⁷ In two consecutive state court criminal trials, the juries could not agree on the defendant's guilt, and the judge declared mistrials.⁶⁸ During both trials, the defendant elected to testify to explain her side of the story.⁶⁹ The government, keen on seeing justice done, presented the case to a jury a third time, but despite counsel's promise to the jury that the defendant would testify, she did not, and the jury convicted.⁷⁰ A habeas claim of ineffective assistance of counsel followed, and the First Circuit agreed with the defendant that counsel's decision not to call the defendant to testify constituted ineffective assistance.⁷¹

⁶⁶ See *Hampton*, 347 F.3d at 257, 258; *Ouber*, 293 F.3d at 27; *Madrigal*, 662 F. Supp. 2d. at 1184; see also *Robinson v. United States*, 744 F. Supp. 2d. 684, 693 (E.D. Mich. 2010) (finding counsel's decision not to call the defendant after promising defendant's testimony in his opening statement was unreasonable absent an unforeseen event warranting a change in strategy).

⁶⁷ See *Ouber*, 293 F.3d at 27. The defendant in *Ouber* was indicted under state law for trafficking in cocaine. *Id.* at 21. The defendant was alleged to have sold two ounces of cocaine to an undercover police officer. *Id.* The officer testified that he entered the defendant's car, the defendant handed him two envelopes, he confirmed with the defendant the quantity of cocaine therein, he gave her the money, and he opened the envelopes to check their contents. *Id.* The defendant maintained that she, the defendant, assented to help her brother carry out an errand that she did not believe was related to drug dealing. *Id.* She testified that she did not hand the officer the envelopes, they were sitting on the passenger seat, that they never conversed about the cocaine, and that the officer never checked the contents of the envelopes. *Id.*

⁶⁸ *Id.* at 22. At the second trial, the presentation of evidence proceeded much like the first trial. *Id.*

⁶⁹ *Id.* at 23.

⁷⁰ *Id.* at 22, 23. During counsel's opening statements, he promised four times that the defendant would testify and that her testimony would be crucial to the jury's decision. *Id.* at 22. Counsel stated, "The case is going to come down to what happened in that car and what your findings are as you listen to the credibility and the testimony of [the police officer] versus what you[r] findings are as you listen to the testimony of [the defendant]." *Id.* He went on to say, "you're going to have to decide the truth and veracity of those two witnesses; and that will be your ultimate decision in this case." *Id.* The defense presented the same witnesses it had during the preceding two trials, until counsel elected not to call the defendant as a witness. *Id.* at 23. Counsel apologized in his closings for not providing "more of a case." *Id.* He claimed that the police officer's testimony, considered in tandem with the testimony of a defense witness, allowed the jury to conclude that the defendant was ignorant as to the contents of the envelope. *Id.* The jury was deadlocked. *Id.* The trial judge instructed the jury to deliberate further, and eventually they returned a guilty verdict. *Id.* In Massachusetts, where the case was tried, case law allows judges to provide an instruction encouraging deadlocked juries to reach a consensus. See *Commonwealth v. Rodriguez*, 300 N.E.2d 192, 200 (Mass. 1973).

⁷¹ *Ouber*, 293 F.3d at 20, 27, 30. The trial judge denied the defendant's motion for a new trial, a decision the Massachusetts Appeals Court affirmed. *Id.* at 24. The state supreme court declined to hear the case. *Id.* The appellate court described counsel's opening remarks regarding the defendant's proffered testimony as "neither dramatic nor memorable." *Id.* The defendant desired to testify. *Id.* She was, however, dissuaded by counsel. *Id.* In an on the record conversation about her

The First Circuit concluded that counsel broke his promise to provide critical testimony.⁷² Because there were no unforeseeable events “forcing” counsel to change strategies, counsel’s decision was “an error in professional judgment.”⁷³ In so holding, the First Circuit did allow that, in certain circumstances, unforeseen developments may justify changes in trial strategy.⁷⁴ The First Circuit also concluded that the state court’s reading of the trial record was unreasonable, disagreeing with the state court’s characterization of counsel’s decision as cautious.⁷⁵

Similarly, in 2003, in *U.S. ex rel. Hampton v. Leibach*, the United States Court of Appeals for the Seventh Circuit concluded that defense counsel’s promise in his opening statements that the defendant would testify that he was not involved in the alleged criminal acts, and counsel’s later breaking of that promise, was unreasonable.⁷⁶ Important to the court’s decision was the lack of any unforeseeable events occurring at trial that would have justi-

decision, however, counsel never notified her of the negative impact that his earlier promises might have if she did not testify. *Id.* The Federal District Court for the District of Massachusetts granted the defendant’s habeas claim, overturning the state appellate court’s decision. *Id.* at 20.

⁷² *Id.* at 27.

⁷³ *Id.* The court noted that counsel placed the defendant’s testimony at the center of his defense, but decided not to have her testify “with no discernible justification.” *Id.* at 27, 35. The court found no remarkable change in the defense’s case from the time counsel made his promise to the time he elected not to call the defendant. *Id.* at 35–36. His decision thus constituted a “serious error in professional judgment . . .” *Id.* at 36.

⁷⁴ *Id.* at 29. “[U]nexpected developments sometimes may warrant changes in previously unannounced trial strategies.” *Id.* But here, counsel had the remarkable benefit of his experience during the first two trials, where the defendant testified, and the outcome was favorable to her. *Id.* At the third trial, when counsel decided not to have the defendant testify, he was presented with essentially the same situation as he had encountered in the previous two trials. *Id.* The previous trials thus served as a “meaningful benchmark” in helping the court determine that counsel’s decision affected the outcome of the trial. *Id.* at 36. Later, in *Yeboah-Sefah v. Ficco*, the First Circuit concluded that promising testimony from psychologists and psychiatrists, but not calling any to testify, was not dramatic enough of a broken promise to justify habeas relief. *See* 556 F.3d 53, 76, 78 (1st Cir. 2009). In that case, defense counsel at best made an implied promise to present expert medical testimony to support a lack of criminal responsibility defense. *Id.* at 76. Counsel stated in his opening that “psychologists and psychiatrists will talk about the medical affects [sic] of [the defendant’s] medication” and that there would be “testimony by experts.” *Id.* at 77 n.17. The jurors did hear testimony from a psychologist and a psychiatrist over the course of the trial, but not the expert contemplated by the defense. *Id.* at 77, 78. The court concluded that even if there was an implied promise, it was not the dramatic type of promise, the breach of which would allow a court to overturn a conviction. *Id.* at 78.

⁷⁵ *Uber*, 293 F.3d at 31.

⁷⁶ *Hampton*, 347 F.3d at 257, 258. Here the defendant, eighteen years old at the time of his arrest and having never been arrested previously, was convicted of deviate sexual assault, attempted rape, robbery, and aggravated battery for events that took place at a concert. *Id.* at 221, 222. He was sentenced to sixty years in prison. *Id.* at 221. Counsel told the jury in his opening statement that “Mr. Hampton will testify and tell you that he was at the concert. Mr. Hampton will tell you that he saw what happened but was not involved with it.” *Id.* at 257.

fied counsel's change in strategy.⁷⁷ The court also noted that the jury was promised an alternate version of events from those presented by the State.⁷⁸ In not calling the defendant to testify, the jury was left bereft of that different story, and counsel essentially conveyed to the jury that the condemning testimony of the state's witnesses was correct.⁷⁹ Although the court found counsel's decision unreasonable, it also found that such a decision, standing alone, did not sufficiently prejudice the defendant to warrant habeas relief.⁸⁰

Likewise, in 2009, in *Madrigal v. Yates*, the United States District Court for the Western District of California, relying in part upon *Ouber* and *Hampton*, concluded that counsel's assistance was ineffective where, in his opening remarks, he promised that the defendant would testify but later decided not to call him.⁸¹ The defendant's counsel in *Madrigal* did not explain to the jury during his closing arguments why he did not call the defendant, and the court found no unforeseeable events that would have warranted such a change in strategy.⁸²

In 2002, in *Yancey v. Hall*, on the other hand, the United States District Court for the District of Massachusetts concluded that counsel's unfulfilled promise in his opening statement, that the defendant would testify, did not constitute ineffective assistance.⁸³ The court ruled that, although counsel's

⁷⁷ *Id.* at 257, 258. Counsel justified his decision not to call the defendant on his fear that the defendant's testimony would render him guilty by association. *Id.* at 258. But this disadvantage of the defendant's testimony was as apparent at the beginning of the case as it was at the time counsel could call the defendant to testify. *Id.* It is not a "legitimate" trial strategy to make promises but break them "for reasons that were apparent at the time the promises were made . . ." *Id.* at 259.

⁷⁸ *Id.* at 258.

⁷⁹ *Id.* The court commented that counsel essentially told the jury two versions of the events existed, but in the end the jury was left only with the State's version of events. *Id.*

⁸⁰ *Id.* at 260. The court affirmed the defendant's habeas petition claim of ineffective assistance of counsel because counsel also failed to investigate potentially exculpatory witnesses, whose names the defendant provided to counsel. *Id.* at 247, 260.

⁸¹ *Madrigal*, 662 F. Supp. 2d. at 1180, 1183–84. In this case, the defendant was convicted of attempted murder and the use of a handgun in association with a street gang. *Id.* at 1166–67. In his opening remarks, counsel stated that "you're going to hear from my client. He'll explain to you who he believes did that crime he is charged with . . . he's basically signing his own death warrant by testifying in open court that a fellow gang member committed this crime." *Id.* at 1180.

⁸² *Id.* at 1184 (quoting *Ouber*, 293 F.3d at 29). The defendant claimed that, at trial, he was ready to testify about his alibi, and the reasons he believed another individual was the shooter, but that counsel, without forewarning the defendant, elected not to call the defendant as a witness. *Id.* at 1180. At an evidentiary hearing on the ineffective assistance of counsel claim, however, counsel argued that the co-defendant threatened his client during the trial, and for that reason did not put him on the stand. *Id.* at 1180–81. The defendant countered that, despite the unabated threats on his life, from the beginning of his incarceration through to trial, he was willing to testify to secure his innocence. *Id.* at 1181. Defense counsel had written in a letter that he did not call the defendant because the defendant had not wanted to testify. *Id.* at 1182. The court credited the defendant's version of events. *Id.* at 1181.

⁸³ *Yancey v. Hall*, 237 F. Supp. 2d. 128, 132, 134, 136 (D. Mass. 2002). Here, the defendant was convicted of distribution of cocaine in a school zone. *Id.* at 129. The prosecution presented

decision involved a “significant misstep,” when considered within the context of the entire trial, that misstep did not amount to ineffective assistance of counsel.⁸⁴ Counsel did not make the defendant’s testimony the focal point of the defense, or tell the jury multiple times that the defendant would testify, and counsel presented a defense that did not rely on the promised testimony from the defendant.⁸⁵

III. THE EIGHTH CIRCUIT CORRECTLY APPLIED THE INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

In *Bahtuoh v. Smith*, the Eighth Circuit correctly applied the emerging federal analysis for ineffective assistance of counsel claims when the defendant’s counsel promises the defendant’s testimony but does not deliver it.⁸⁶ At the start of the trial, Bahtuoh’s counsel could not have anticipated that the State would have Bahtuoh’s grand jury testimony read into evidence.⁸⁷ Counsel was also able to cross-examine the prosecution’s witnesses.⁸⁸ Together, these two opportunities allowed counsel to enter into evidence, albeit indirectly, the information that he anticipated providing to the jury through the direct testimony of Bahtuoh, which was promised.⁸⁹

Counsel’s decision to break his promise in *Bahtuoh* is different from those cases in which other courts have deemed counsels’ broken promises unreasonable.⁹⁰ Bahtuoh’s case is distinguishable from the remarkable cir-

evidence that the defendant had sold twenty dollars’ worth of crack to an undercover police officer. *Id.* The defendant was sentenced to consecutive five- and two-year sentences. *Id.* at 130. During opening statements at trial, counsel stated, “[Y]ou will find that [the defendant] will tell you, and we’ll show that . . . [the defendant] was not there . . .” *Id.* at 129. At the close of the government’s case, the defense rested without presenting any evidence. *Id.* at 130.

⁸⁴ *Id.* at 135.

⁸⁵ *Id.*

⁸⁶ See U.S. *ex rel.* Hampton v. Leibach, 347 F.3d 219, 257, 258 (7th Cir. 2003); Ouber v. Gaurino, 293 F.3d 19, 27 (1st Cir. 2002). In *Williams v. Bowersox*, the Eighth Circuit examined a partially similar case. See generally 340 F.3d 667 (8th Cir. 2003). The defendant was convicted of first degree murder, arising from the shooting of a fourteen-year-old boy, and was sentenced to life imprisonment without the opportunity of parole. *Id.* at 668. On appeal, the defendant argued that counsel was ineffective because he did not call certain witnesses whose testimony was implied in the defense’s opening statement. *Id.* In rejecting the defendant’s claim, the court noted counsel’s decision to reconsider presenting the promised witnesses and counsel’s reasons for changing strategy, including his belief that he had overcome the State’s case through his cross-examination of its witnesses. *Id.* at 669, 672.

⁸⁷ See *Bahtuoh II*, 855 F.3d 868, 873 (8th Cir. 2017).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See *Hampton*, 347 F.3d at 257, 259; *Ouber*, 293 F.3d at 22, 23, 27. In *Hampton*, counsel promised the defendant’s testimony and ultimately decided not to call him to the stand, but that decision was predicated on factors as apparent to counsel at the beginning of trial, when he made his opening statements, as at the time he elected not to call the defendant to the stand. See 347 F.3d at 257, 259. The court concluded that counsel made an unreasonable decision by not calling the defend-

cumstances in *Ouber v. Guarino*.⁹¹ Bahtuoh's counsel did not have the benefit of two previous and nearly identical trials on which to base his strategy.⁹² Although the defense in both *Ouber* and *Bahtuoh* was centered around the defendant's testimony, in *Ouber* counsel did not fulfill his promises to the jury about what the defendant's testimony would hold using other evidence.⁹³ On the other hand, in *Bahtuoh*, counsel did not require the defendant's testimony in order to provide the with jury the evidence he promised in his opening.⁹⁴

The circumstances in *Bahtouh* are also distinguishable from those in *U.S. ex rel. Hampton v. Leibach*.⁹⁵ In *Hampton*, counsel justified his change in strategy on reasons that were apparent at the beginning of the trial, and never delivered the promised alternate version of events to contrast the government's story.⁹⁶ In *Bahtouh*, however, counsel could not have known at the outset that the government would read Bahtuoh's grand jury testimony into evidence.⁹⁷ That testimony presented the jury with the alternate version of events counsel promised in his opening statement.⁹⁸ Additionally, it allowed Bahtuoh's version of events to enter into evidence without exposing Bahtuoh to cross-examination by an experienced prosecutor.⁹⁹

When assessing the reasonableness of defense counsel's decision to break her promise, courts should examine, in addition to whether unforeseen circumstances support the decision, whether counsel considered the

ant to testify after promising as much, but alone that decision was not enough to warrant habeas relief. *See id.* In *Ouber*, counsel promised that the defendant would testify and decided later not to call her to the stand. *See* 293 F.3d at 22, 23, 27. Counsel had the experience of two previous trials, however, in which the defendant did testify and the outcome was favorable to her, to draw from when preparing for the third trial. *See id.* Events in the third trial proceeded in a similar fashion to the first two, so there were no unforeseeable events to justify counsel breaking his promise in opening statements. *See id.*

⁹¹ *Compare Bahtuoh II*, 855 F.3d at 870 (describing only one trial where counsel represented petitioner), *with Ouber*, 293 F.3d at 29 (noting that counsel represented petitioner at two previous trials for the same offense before representing her for a third time at the trial at issue).

⁹² *See Bahtuoh II*, 855 F.3d at 870.

⁹³ *Compare id.* (noting that counsel believed the State had already introduced most of the evidence that he planned to introduce through the defendant's testimony), *with Ouber*, 293 F.3d at 29–30 (finding that another witness who testified could not adequately testify as the defendant may have).

⁹⁴ *See Bahtuoh II*, 855 F.3d at 873.

⁹⁵ *Compare id.* (noting that Bahtuoh's counsel neither could have predicted that Bahtuoh's relationship with the victim, nor that Bahtuoh didn't know the shooter was armed, would come into evidence without his having to call Bahtuoh to testify as promised), *with Hampton*, 347 F.3d at 257, 258 (finding that the defendant's version of events did not come into evidence when the defendant did not testify as counsel promised).

⁹⁶ *Hampton*, 347 F.3d at 257, 258.

⁹⁷ *See Bahtuoh II*, 855 F.3d at 873.

⁹⁸ *Id.*

⁹⁹ *See Bahtuoh I*, 840 N.W.2d 804, 817 (Minn. 2013) (quoting Bahtuoh's counsel's closing argument).

impact that such a reversal may have on the jury.¹⁰⁰ Making a promise in opening statements and not delivering on that promise is a near universally disdained trial technique.¹⁰¹ In any given trial, however, there is a litany of potential tactics that counsel can legitimately wield.¹⁰² There are few rigid requirements for counsel to meet in order to be considered constitutionally effective.¹⁰³ Depending on the circumstances, even significant decisions, such as waiving an opening statement entirely, can be considered sound strategy.¹⁰⁴ But when counsel promises to present the defendant and reneges

¹⁰⁰ See *Green v. United States*, 365 U.S. 301, 304 (1961) (noting that not even the best counsel may be able to speak for the defendant with “halting eloquence,” as the defendant himself might); *Saese v. McDonald*, 725 F.3d 1045, 1049 (9th Cir. 2013) (noting that when counsel breaks a promise with the jury, he ruptures the jury’s trust in his client, impacting the juror’s ability to maintain an open mind); *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166–67 (3d Cir. 1993) (commenting that the rationale for finding ineffective assistance of counsel when counsel fails to deliver promised testimony is that the jury may infer that the witness was “unwilling or unable” to provide the testimony).

¹⁰¹ See *Saese*, 725 F.3d at 1049 (noting that when counsel breaks a promise with the jury, he ruptures the jury’s trust in his client, impacting the jurors’ collective ability to maintain an open mind); *Anderson v. Butler*, 858 F.2d 16, 17 (1st Cir. 1988) (remarking that failing to produce promised evidence can be quite damaging); see also DOMINIC J. GIANNA & LISA A. MARCY, *OPENING STATEMENTS: WINNING IN THE BEGINNING BY WINNING THE BEGINNING* § 16:2 (2015–2016 ed. 2015) (instructing practitioners to “never, ever” make promises in openings that cannot be kept, because doing so is a self-inflicted fatal blow to the case); Michael J. Ahlen, *Opening Statements in Jury Trials: What Are the Legal Limits?*, 71 N.D. L. REV. 701, 706 (1995) (noting that failing to keep a promise made during opening statements negatively demerits the defense’s case). Indeed, one criminal trial practice manual recommends maintaining a checklist of promises the opposition made during their opening statements so as to highlight for the jury any unfulfilled promises. LAURIE L. LEVENSON, *WEST’S CALIFORNIA CRIMINAL PROCEDURE* § 23:40 (2016).

¹⁰² See *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984) (instructing courts to embrace a presumption that “counsel’s conduct falls within the wide range of reasonable professional assistance”); see also *Williams v. Woodford*, 859 F. Supp. 2d 1154, 1170 (E.D. Cal. 2012) (noting that a strategy of promising and delivering exculpatory evidence or of poking holes in the prosecution’s case is a reasonable trial strategy, but telling the jury one will occur but instead following through on the other is “a recipe for failure”). But see, e.g., *Turner v. Maryland*, 318 F.2d 852, 853–54 (4th Cir. 1963) (condemning counsel for not communicating with the defendant for the two weeks before trial commenced in order to ascertain whether any information relevant to his defense existed, but denying relief because the defendant in fact possessed no such information).

¹⁰³ See *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (requiring counsel to inform her defendant about the deportation risks associated with the defendant’s plea); *Strickland*, 466 U.S. at 688 (noting the duties of counsel to confer with the defendant regarding important decisions, keep the defendant abreast of important developments throughout the prosecution’s case, and employ enough skill and knowledge to produce a fair trial, but allowing that this list of duties is not exhaustive); see also *Williams*, 340 F.3d at 671–72 (stating that not delivering testimony promised in an opening is not always constitutionally deficient assistance of counsel); *Ouber*, 293 F.3d at 27 (noting that the intricacies of trials inevitably involve multiple mistakes, and only the most serious mistakes violate the Sixth Amendment guarantee of effective assistance of counsel).

¹⁰⁴ See *People v. Paneglina*, 199 Cal. Rptr. 916, 918 (Cal. Ct. App. 1984) (noting that counsel is not obliged to make an opening statement, and that it can be reasonable trial strategy to wait until the State has closed its case before making an opening statement in order to preserve the element of surprise).

on that promise, courts must proceed with caution because of the negative impact an unfulfilled promise may have on a jury.¹⁰⁵

Critics of the two-prong *Strickland v. Washington* analysis argue that the standard upon which counsel's performance is judged is not demanding enough.¹⁰⁶ As the Supreme Court noted in *Strickland*, however, holding counsel to a higher standard could paradoxically harm defendants.¹⁰⁷ Instead of raising the bar of criminal defense representation, a stricter standard could make court appointed attorneys, knowing that their strategies may be open to scrutiny and criticism by appellate courts, hesitant to take indigent cases.¹⁰⁸ The current standard thus allows for counsel taking indigent cases to be reasonably sure that their trial decisions will not be overly critiqued, and indigent clients can rely on willing counsel for their defense.¹⁰⁹

CONCLUSION

In *Bahtouh v. Smith*, the Eighth Circuit concluded that the breaking of a promise to the jury that the defendant would testify by defense counsel did not constitute ineffective assistance of counsel. The Court applied the *Strickland v. Washington* ineffective assistance of counsel standard, which allows for a broad range of potential trial tactics, only the most unreasonable of which are deemed constitutionally deficient. The Eighth Circuit's decision in *Bahtouh* is in accord with other circuit's decisions regarding a defense counsel's broken promise that the defendant would testify. Federal courts will not disturb the outcome of a trial where counsel promised the

¹⁰⁵ See *Hampton*, 347 F.3d at 259 (noting that breaking a promise to the jury undercuts the jury's trust in the defendant and her attorney); *McAleese*, 1 F.3d at 166–67 (explaining that the reason for concluding that breaking a promise made in openings constitutes ineffective assistance of counsel is because the jury may draw negative inferences from the lack of the promised testimony). This impact may be mitigated when, as in *Bahtouh*'s case, the defense can explain the broken promise in closing arguments. See *Bahtouh II*, 855 F.3d at 870 (counsel explained during closing arguments that he opted not to have *Bahtouh* testify because the government didn't prove their case and his truthful story came across in his grand jury testimony).

¹⁰⁶ See, e.g., 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, 1857–58 (1994) (lamenting that the standard for judging counsel is whether the representation was ineffective instead of requiring the representation to be effective); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Counsel*, 13 HASTINGS CONST. L.Q. 625, 639, 640 (1986) (considering *Strickland v. Washington* among the decisions that “seriously undermined” the defendant's ability to bring an ineffective assistance of counsel claim).

¹⁰⁷ *Strickland*, 466 U.S. at 690 (noting that use of a more “intrusive” standard to evaluate counsel's performance could “dampen the ardor” of counsel and dissuade counsel from accepting indigent cases).

¹⁰⁸ *Id.* The Court also noted the possibility that after the first trial, a second would ensue to examine counsel's tactical decisions. *Id.*

¹⁰⁹ See *id.* (stating that more intense judicial scrutiny of counsel's decisions could “undermine” trust between counsel and her client).

jury the defendant's testimony but then broke the promise as long as the change in tactic is predicated on unforeseen circumstances that arose during the trial. When considering whether such a decision is unreasonable, however, courts should consider whether counsel weighed the possible effects that a broken promise could have on the jury. Because a lawyer's broken promise can negatively reflect on her client, and possibly influence the jury's evaluation of the case, courts ought to hold defense counsel accountable for considering the impact such a decision might have on the jury. This would add depth to the court's analysis of such decisions, without creating a high standard for counsel, which critics worry could lead to fewer lawyers being willing to take on indigent defense assignments.

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Preferred Cite: Alexandre Bou-Rhodes, Comment, *When the Defendant Doesn't Testify: The Eighth Circuit Considers a Reasonable Broken Promise in Bahtouh v. Smith*, 57 B.C. L. REV. E. SUPP. 520 (2018), <http://lawdigitalcommons.bc.edu/bclr/vol59/iss9/520/>.