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# *Bahtuoh v. Smith*, 855 F.3d 868 (8th Cir. 2017): Promising a Bleak Future for Ineffective Assistance of Counsel Claims in the Eighth Circuit

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Note*

# *Bahtuoh v. Smith*, 855 F.3d 868 (8th Cir. 2017): Promising a Bleak Future for Ineffective Assistance of Counsel Claims in the Eighth Circuit

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## I. INTRODUCTION

Imagine that a man is on trial for murder. During opening statements, the defense attorney makes promises to the jury. The attorney



* Mary R. Marcum, J.D., University of Nebraska College of Law, 2019. I thank my mother, Linda Marcum, and dear friend, Kelly Gaskell, for their unending support; Travis Cram for introducing me to the rigors of research, argumentation, and advocacy; Amy Pauli for mentoring me through law school; and the entire *Nebraska Law Review* team for their tremendous efforts.

promises that his client will testify and profess his innocence.[1] According to the attorney, the defendant's truthful testimony will clear up any ambiguities about the case. The attorney assures the jury that this testimony will demonstrate his client's innocence and asks jury members to preserve their judgments until they hear the defendant tell his story. Then, after the prosecution presents its case, the defense attorney has a change of heart. He instructs his client not to testify, and the client heeds this advice. Members of the jury are now left to consider the prosecution's case-in-chief and the defense attorney's broken promise.[2]

Two federal circuits have considered similar situations where a defense attorney reneged on opening statement promises to have a defendant testify.[3] Both cases made their way to federal court after (1) the jury returned a guilty verdict, (2) the defendants exhausted their state appeals, and (3) the defendants petitioned for habeas relief.[4] In *Ouber v. Guarino*, the First Circuit Court of Appeals found that an attorney's decision to renege on such a promise was unreasonable and ultimately prejudicial to the defendant.[5] Thus, for the First Circuit, such a decision can amount to ineffective assistance of counsel.[6] In *Bahtuoh v. Smith*, however, the Eighth Circuit recently concluded that such a decision was *reasonable* because it was merely a shift in strategy.[7] Given these two decisions, there is now a circuit split on the issue of whether an attorney's decision to not have a defendant testify—after promising the defendant's testimony in opening statements—amounts to ineffective assistance of counsel.

The Sixth Amendment to the U.S. Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [or her] defense."[8] This "counsel clause" protects a defendant's presumption of innocence by enabling that de-

1. *See* U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . .").
2. *See* Ouber v. Guarino, 293 F.3d 19, 28 (1st Cir. 2002) (discussing the negative impact on juries when a defense attorney reneges on opening statement promises to have a defendant testify); John T. "Trey" Cox III & Jason S. Bloom, *In Closing: Strategies for Creating and Arming Jurors in the Closing Argument*, 71 TEX. B.J. 266, 267 (2008) (explaining that an unfulfilled promise from opening statements can taint a lawyer's credibility); *see also* Matthew J. O'Connor, *Opening Statement Restriction Gives Prosecution Head Start*, 56 J. MO. B. 100, 100–01 (2000) (explaining the importance of opening statements and that breaking an opening statement promise may be noticed by the jury).
3. *See* Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868, 870 (8th Cir. 2017); *Ouber,* 293 F.3d at 24.
4. *See Bahtuoh III*, 855 F.3d 868; *Ouber*, 293 F.3d 19.
5. *Ouber*, 293 F.3d at 19.
6. *See id.*
7. *Bahtuoh III*, 855 F.3d at 873.
8. U.S. CONST. amend. VI.

fendant to have "ample opportunity to meet the case of the prosecution."[9] Safeguarding this presumption is vital in criminal trials because an individual's liberty—or in some instances life—is on the line.[10]

The U.S. Supreme Court has held that for the counsel clause to carry weight, it must be interpreted to mean the right to *effective* assistance of counsel.[11] Courts have not constructed an exact formula for how to effectively assist a client in every criminal trial.[12] Courts have, rather, sensibly recognized that each case carries its own unique set of facts, legal principles, and strategic options.[13] As such, the standard for effective assistance is flexible.[14] While this flexibility is affording attorneys a great deal of independence, it may also be justifying a frighteningly low bar for the quality of legal representation.[15] The recent decision of *Bahtuoh v. Smith* by the Eighth Circuit Court of Appeals represents one such case that casts doubt on whether the current standard for effective assistance of counsel truly ensures fair proceedings for criminal defendants.[16] Importantly, this case also raises the serious question of whether federal courts are relying too heavily on deferential standards of review.

This Note proceeds in the following parts. Part II provides an overview of the relevant cases and statutes leading up to the Eighth Circuit's decision in *Bahtuoh*.[17] Specifically, section II.A describes the stringent ineffective assistance of counsel standard set out by the U.S. Supreme Court in *Strickland v. Washington*.[18] Section II.B explains the heightened standard that federal courts apply when ineffective assistance of counsel claims appear on petitions for habeas relief.[19] Sec-

9. Strickland v. Washington, 466 U.S. 668, 685 (1984) (citing Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942)).

10. *See id.* As one scholar notes, "Defendants should be appointed counsel because without legal expertise, innocent defendants may face unfair proceedings, rendering them more vulnerable to wrongful convictions." Kimberly Helene Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363, 367 (2003).

11. *Strickland*, 466 U.S. at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).

12. *Id.* at 688–89.

13. *See id.*

14. *Id.*

15. *See* Zelnick, *supra* note 10, at 379 (quoting Steven 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 (1994)).

16. Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868 (8th Cir. 2017).

17. *See* 28 U.S.C. § 2254(d) (2012); *Strickland*, 466 U.S. at 689; Ouber v. Guarino, 293 F.3d 19 (1st Cir. 2002).

18. *Strickland*, 466 U.S. at 687.

19. 28 U.S.C. § 2254(d).

tion II.C then explores how the First Circuit Court of Appeals applied these two standards in *Ouber v. Guarino*.[20]

Part III of this Note provides a detailed account of the *Bahtuoh* case.[21] This Part describes the facts of the original *Bahtuoh* case at the state level[22] and explains how the case made its way into federal court.[23] Part III then details the analytical process employed by the United States District Court for the District of Minnesota[24] and the Eighth Circuit Court of Appeals[25] in rendering their decisions.

In Part IV, this Note analyzes the Eighth Circuit's decision in *Bahtuoh*.[26] Specifically, this Note questions the way in which the Eighth Circuit analyzed the state court's application of the *Strickland* standard.[27] This Part carefully reviews the state court's application of *Strickland* and explains why the Eighth Circuit should have reached a different conclusion. At the very least, it exposes missing analytical pieces from the court's decision. Part IV illustrates how the *Bahtuoh* attorney's decision to renege on his opening statement promise was clearly unreasonable—even under the stringent habeas standard. Rather than carefully analyzing the facts of the case and the state court's application of the *Strickland* standard, however, the Eighth Circuit overly adhered to the deferential standard of review to reach its conclusion. Part IV ultimately suggests that the *Bahtuoh* decision is a poignant example of the ways in which federal courts may be shackling themselves by relying too heavily on deferential standards of review.

Finally, Part IV considers how the *Bahtuoh* decision may prove harmful for future criminal defendants in the Eighth Circuit. It explores the dangers of federal courts relying too heavily on deferential standards of review when considering ineffective assistance of counsel claims. It also examines how a regressive assistance of counsel standard ultimately deprives individuals of the protection guaranteed by the Sixth Amendment. Part V concludes.

## II. BACKGROUND

### A. The *Strickland* Standard

In *Strickland v. Washington*, the U.S. Supreme Court clarified the standard that a defendant must meet in order to prevail on an ineffec-

20. *Ouber*, 293 F.3d 19.
21. *Bahtuoh III*, 855 F.3d 868.
22. State v. Bahtuoh (*Bahtuoh I*), 840 N.W.2d 804 (Minn. 2013).
23. Bahtuoh v. Smith (*Bahtuoh II*), No. 14-CV-5009, 2016 WL 2727465 (D. Minn. Apr. 12, 2016).
24. *Id.*
25. *Bahtuoh III*, 855 F.3d at 871–74.
26. *Id.*
27. *See id.* at 872.

tive assistance of counsel claim.[28] The *Strickland* Court analyzed whether a defendant on death row for three murders received effective assistance of counsel when his attorney failed to (1) obtain a psychiatric evaluation for the defendant and (2) secure character witnesses prior to the defendant's sentencing.[29] Although the Supreme Court had previously dealt with Sixth Amendment assistance of counsel issues, it had not clarified the standard for ineffective assistance of counsel.[30] Thus, the *Strickland* case gave the Court an opportunity to elaborate on what *effective* assistance of counsel means.[31]

In *Strickland*, the Court explained that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[32] To make such a determination, the Court outlined a two-pronged test.[33]

The first prong asks whether counsel was "deficient."[34] Specifically, this prong asks whether counsel's conduct "fell below an objective standard of reasonableness."[35] Individuals asserting ineffective assistance of counsel must overcome a "strong presumption" of reasonableness to satisfy this first prong.[36] The second prong asks whether counsel's performance prejudiced the defendant.[37] To satisfy this prong, the defendant must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[38]

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28. Strickland v. Washington, 466 U.S. 668, 686 (1984).
29. *Id.* at 676–77. The defendant in *Strickland* alleged other ineffective assistance of counsel claims as well, but these claims did not carry much weight for the trial court, and the Supreme Court did not include them in its conclusory analysis. *Id.* at 676, 699–700.
30. *Id.* at 683. Previously, the Court assessed Sixth Amendment assistance of counsel issues in the context of an individual being denied counsel and governmental interference with assistance of counsel. *Id.* (citing United States v. Cronic, 466 U.S. 648 (1984)).
31. *Id.* at 683, 699–700.
32. *Id.* at 686.
33. *See id*. at 687. Although this Note separates and applies these prongs sequentially, the *Strickland* Court noted that courts may apply the prongs in either order. *Id.* at 697. Further, if one prong is not satisfied, the court has no obligation to analyze the attorney's performance under the other prong. *Id.*
34. *Id.* at 687.
35. *Id.* at 688.
36. *Id.* at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'") (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).
37. *Id.* at 687.
38. *Id.* at 694. Notably, this standard is lower than the preponderance of the evidence standard used in cases where motions are made for a new trial based upon newly discovered evidence. *Id*.

Recognizing that attorneys must be able to creatively strategize, however, the Supreme Court warned against establishing an overly strict standard for reasonable professional conduct.[39] There are many different ways to effectively assist a client and "[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges." The Court feared that "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."[40] Thus, the Court did not identify a formulaic solution for how attorneys must represent their clients in order to be considered "effective."[41] Rather, the Court clarified that the fundamental question in all ineffective assistance of counsel claims is simply whether the adversarial process was fair.[42]

### B. The AEDPA Standard

After an individual exhausts available remedies in state court, that individual may pursue an ineffective assistance of counsel claim by petitioning for a writ of habeas corpus.[43] The Antiterrorism and Effective Death Penalty Act (AEDPA) amended the standard for habeas corpus claims for individuals in state custody.[44] Section 2254(d) explains that a person in state custody seeking habeas relief from a judgment in state court will only receive relief in particular situations.[45] Specifically, an individual may only obtain habeas relief if the proceeding,

> (1) resulted in a decision that was contrary to, *or* involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

39. *Id.* at 696.
40. *Id.* at 690.
41. *See id.*
42. *Id.*
43. When an individual has been convicted of a crime and is sentenced to prison, a writ of habeas corpus is a procedural tool that allows individuals to seek relief in federal court after exhausting their available remedies in state court. Meredith J. Duncan, *"Lucky" Adnan Syed: Comprehensive Changes to Improve Criminal Defense Lawyering and Better Protect Defendants' Sixth Amendment Rights*, 82 BROOK. L. REV. 1651, 1684 (2017). Habeas relief is often used as a means to challenge the validity of an individual's conviction on constitutional grounds. *Id.* at 1683. The standard for habeas relief is stringent because the justice system has an interest in finality. *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Arguably, the need for finality is uniquely important now due to the ever-increasing number of ineffective assistance of counsel claims raised. *See* Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 438 (2011) (explaining that ineffective assistance of counsel claims in habeas petitions have been the most frequently raised claims in the last thirty years).
44. *See* 28 U.S.C. § 2254(d) (2012).
45. *See id.*

> Court of the United States; *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.[46]

As the statute provides, there are two separate avenues by which an individual is entitled to habeas relief.[47] Under the first, a state court must be "wrong as a matter of law or unreasonable in its application of law in a given case."[48] In other words, the writ can be issued if the state court applies a rule that contradicts "clearly established" Supreme Court precedent or if the state court unreasonably applies the correct Supreme Court rule.[49] Under the second, the writ can be issued if the individual establishes that the "court's presumptively correct factual findings do not enjoy support in the record."[50]

The AEDPA standard was intended to give some degree of deference to state court determinations.[51] But the statute does not require outright deference to state determinations of federal law.[52] Rather, the statute requires federal courts to carefully consider how the state court applied federal law.[53] If the court believes, after considering the state court's determinations, that keeping the petitioner in custody violates the Constitution, then the state court's decision will be deemed unreasonable, and the petitioner may receive habeas relief.[54] Further, the statute requires the federal court to carefully evaluate the evidentiary record.[55] If the federal court finds that the state court's determinations cannot be reasonably supported by the evidentiary record, a petitioner may receive habeas relief.[56]

A habeas seeker must satisfy both the *Strickland* standard and the deferential AEDPA standard to be entitled to relief for an ineffective assistance of counsel claim.[57] For purposes of AEDPA, the *Strickland* standard is "clearly established Federal law" because it is a clear standard established by the Supreme Court.[58] As such, a habeas seeker

46. *Id.* (emphasis added); Williams v. Woodford, 859 F. Supp. 2d 1154, 1161 (E.D. Cal. 2012) ("Section 2254(d) operates like a two-lane highway, with each lane guarded by a tollbooth. To pass through, a petitioner must demonstrate that the state court adjudication *either* clashed with federal law (section 2254(d)(1)) *or* 'was based on an unreasonable determination of the facts' (section 2254(d)(2)).").
47. 28 U.S.C. § 2254(d).
48. Williams v. Taylor, 529 U.S. 362, 385 (2000).
49. *Id.* at 407.
50. Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868, 871 (8th Cir. 2017) (quoting Evenstad v. Carlson, 470 F.3d 777, 782 (8th Cir. 2006)).
51. *Taylor*, 529 U.S. at 386.
52. 28 U.S.C. § 2254(d); *see Taylor*, 529 U.S. at 387.
53. *Taylor*, 529 U.S. at 389.
54. *Id.*
55. Bahtuoh v. Smith (*Bahtuoh II*), No. 14-CV-5009, 2016 WL 2727465, at *6 (D. Minn. Apr. 12, 2016).
56. *Id.*
57. *See* Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868, 871 (8th Cir. 2017).
58. *Taylor*, 529 U.S. at 391.

must establish either (1) the state court *unreasonably* applied the *Strickland* standard, or (2) the state court's decision was "based on an *unreasonable* determination of the facts."[59] While an individual needs to satisfy only one of the preceding criterion to meet the AEDPA standard, the requirement of "unreasonable[ness]" makes the AEDPA standard stringent.[60] Even if the federal court finds that the state court *incorrectly* applied the *Strickland* standard, this will not be enough to meet the AEDPA standard; it must also find unreasonableness.[61] For these reasons, individuals seeking habeas relief face an uphill battle.[62]

### C. The First Circuit's Application of *Strickland* and AEDPA: *Ouber v. Guarino*

The First Circuit Court of Appeals had occasion to apply both the *Strickland* standard for ineffective assistance of counsel and the AEDPA standard for habeas relief in *Ouber v. Guarino*.[63] In *Ouber*, the petitioner was charged with trafficking cocaine.[64] The charge was based upon a single transaction that took place between the petitioner and an undercover officer—both of whom were the primary witnesses.[65] These witnesses presented conflicting testimony at the trial.[66] According to the officer, the petitioner knowingly participated in the drug transaction on behalf of her brother.[67] Unlike the officer, the petitioner testified that she was coerced into running an errand for her brother, and she claimed to not know that drugs were involved.[68] The defense presented additional testimony from a friend of the petitioner that corroborated a portion of the petitioner's testimony, but the friend did not actually witness the transaction.[69]

Ultimately, the case ended in jury deadlock.[70] The prosecution retried the petitioner, and the jury once again was unable to reach a

59. *See* 28 U.S.C. § 2254(d) (2012) (emphasis added). When federal courts are reviewing the state court determinations, those determinations "must be unreasonable, as opposed to merely incorrect" for habeas relief to be appropriate. Ouber v. Guarino, 293 F.3d 19, 26 (1st Cir. 2002) (citing *Taylor*, 529 U.S. at 410).
60. *See Bahtuoh II*, 2016 WL 2727465, at *12 ("This standard is, and was meant to be, difficult to meet.") (citing Burt v. Titlow, 571 U.S. 12, 20 (2013)).
61. *Bahtuoh III*, 855 F.3d at 871.
62. *See* Duncan, *supra* note 43, at 1703 (noting that satisfying both the *Strickland* standard and the AEDPA standard may make habeas relief for ineffective assistance of counsel claims "virtually unattainable").
63. *Ouber*, 293 F.3d at 25–26.
64. *Id.* at 21. To clarify, the petitioner was the defendant in the trial court.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 21–22.
70. *Id.* at 22.

verdict.[71] The prosecution retried the petitioner a third time and was successful in securing a conviction.[72]

Unlike the first two trials, counsel for the defense changed strategy midway through the third trial.[73] In his opening statement, counsel for the defense promised the jury four times that the petitioner would testify.[74] Counsel stressed the value of this testimony to the jury and told them that the case would revolve around the petitioner's knowledge of the drugs.[75] Thus, defense counsel instructed the jury to weigh the credibility of the petitioner's testimony against the officer's.[76] Unlike the first two trials, however, the defense rested in the third trial without calling the petitioner to testify.[77] In his closing arguments, counsel apologized to the jury for the petitioner's lack of testimony but explained that he no longer needed the defendant to testify because the prosecution did not prove its case.[78] Despite this justification, the jury returned a guilty verdict.[79]

The petitioner in *Ouber* alleged an ineffective assistance of counsel claim in state court.[80] In support of her claim, the petitioner claimed she wanted to testify, but her lawyer advised her otherwise.[81] Further, the attorney was allegedly ineffective by making opening statement promises to have the petitioner testify and later breaking this promise.[82]

The state court was unpersuaded.[83] It found that the petitioner knowingly waived her right to testify.[84] It also found the attorney's opening statements were cautiously made and that the attorney merely shifted strategy when he decided not to have the petitioner testify.[85] The petitioner was denied a new trial.[86] The Massachusetts Appeals Court affirmed this decision, and the Massachusetts Supreme Judicial Court denied further review.[87] After exhausting her options at the state level, the petitioner sought habeas relief.[88]

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71. *Id.*
72. *Id.* at 23.
73. *Id.*
74. *Id.* at 22.
75. *Id.*
76. *Id.*
77. *Id.* at 23.
78. *See id.*
79. *Id.*
80. *Id.*
81. *Id.* at 24.
82. *Id.*
83. *Id.*
84. *Id.* at 31.
85. *Id.* at 24.
86. *Id.*
87. *Id.*
88. *Id.*

The First Circuit Court of Appeals ultimately granted the *Ouber* petitioner habeas relief.[89] The First Circuit began its analysis by applying the *Strickland* standard.[90] The court emphasized that defense counsel's decision to not have the defendant testify midway through trial was unreasonable.[91] The court refused to attribute the attorney's decision to a mere strategy shift.[92] The court noted that counsel had the benefit of knowing how the prior two trials unfolded and also found that the third trial was only marginally different.[93] As such, there were not unforeseen developments that defense counsel needed to strategically account for when he decided not to have the defendant testify.[94] Thus, the First Circuit found that the attorney's conduct was unreasonable, thereby satisfying the first prong of the *Strickland* standard.[95] Moreover, the court found that counsel's decision satisfied the second prong of the *Strickland* standard because it prejudiced his client.[96] It did so because breaking an opening statement promise to have the defendant testify paints the defendant and the lawyer negatively in the eyes of the jury.[97]

The First Circuit then proceeded to criticize the state court's application of *Strickland*.[98] First, the court pointed to the fact that the attorney in *Ouber* did not fully inform his client of the possible consequences of not testifying.[99] As a result, it was irrelevant whether the petitioner waived her right to testify because the decision was not made knowingly.[100] Second, the First Circuit found it unacceptable to make an opening statement promise unconditionally and repeatedly—only to break it without justification.[101] The decision was not a valid

89. *Id.* at 25, 36. Before reaching the First Circuit Court of Appeals, the petitioner's case was heard in the United States District Court for the District of Massachusetts. *Id.* at 25. The federal district court found the petitioner was entitled to habeas relief, but for reasons somewhat different than the First Circuit. *Id.* The federal district court ordered the petitioner to be released or, in the alternative, for the petitioner to have her conviction vacated and for the petitioner to receive a new trial. *Id.* This case was then appealed to the First Circuit Court of Appeals. *Id.*

90. *Id.* at 27–28.

91. *Id.* at 28.

92. *Id.*

93. *Id.* at 29.

94. *Id.*

95. *Id.* at 30.

96. *Id.* at 28.

97. *Id.*

98. *Id.* at 31–32.

99. *Id.* at 31 (explaining that the defendant must be informed "of the consequences of the decision" to waive her right to testify).

100. *Id.* One of the justifications provided by the state court was that counsel's behavior was reasonable because the petitioner knowingly waived her right to testify. *Id.*

101. *Id.* In response to the lower court's characterization of the attorney's opening statements as a "cautious" decision, the court responded, "the record makes man-

strategy shift because there were not unexpected developments during the trial.[102] The First Circuit also explained that the only sensible outcome that could be drawn from the record was that the attorney's conduct prejudiced the defendant.[103] Ultimately, the court found that the state court "unreasonabl[y] appli[ed] . . . clearly established Federal law"[104] because the state court unreasonably applied the *Strickland* standard.[105] Accordingly, the court granted the petitioner habeas relief.[106]

Thus, *Ouber* gave the First Circuit occasion to apply both the *Strickland* standard and the AEDPA standard in the context of an attorney reneging on opening statement promises.[107] This case highlighted the *Strickland* standard's presumption of reasonableness for counsels' decisions in ineffective assistance of counsel claims.[108] The *Ouber* decision also reinforced that AEDPA demands deference to state court determinations when petitioners seek habeas relief.[109] *Ouber* demonstrates, however, that it is possible to grant a petitioner habeas relief for ineffective assistance of counsel even when the claim must be assessed through the prism of these deferential standards.[110]

## III. MAIN CASE: THE *BAHTUOH* TRILOGY

### A. *Bahtuoh I*

For a number of years, Christopher Bahtuoh was in touch with members of the I-9 gang.[111] In 2009, Bahtuoh was driving with Lamont McGee, one of the I-9 gang members.[112] While driving, Bahtuoh recognized Kyle Parker standing with a few people.[113] Parker was a member of the Taliban gang—a rival of the I-9 gang.[114] Bahtuoh drove in Parker's direction and stopped his vehicle next to Parker.[115]

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ifest that trial counsel's approach to the question of calling the petitioner as a witness—making an unconditional promise, repeating it four times over, and then breaking it without justification—was the antithesis of caution." *Id.*

102. *Id.* at 31–32.
103. *See id.* at 33–34, 35 (finding this case was exceedingly close due to the unique procedural history of two prior cases ending in deadlock, thereby magnifying the weight of the attorney's decision and its expected impact on the jury).
104. 28 U.S.C. § 2254(d) (2012).
105. *Ouber*, 293 F.3d at 35.
106. *Id.* at 36.
107. *Id.* at 34.
108. *Id.* at 25.
109. *Id.* at 20.
110. *See id.* at 36.
111. Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868, 870 (8th Cir. 2017).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

Upon stopping, McGee shot Parker in the chest.[116] Bahtuoh drove off and eventually went into hiding.[117] Parker died as a result of the shooting.[118] Prior to his death, Parker told his sister that Bahtuoh was responsible for the shooting.[119]

After six weeks passed, Bahtuoh turned himself in.[120] Bahtuoh admitted the shots that killed Parker had been fired from his vehicle.[121] A grand jury indicted Bahtuoh for first and second degree murder, and the case proceeded to trial.[122]

As part of trial strategy, Bahtuoh and his attorney determined that Bahtuoh would testify before the jury.[123] Bahtuoh's attorney incorporated this fact into his opening statements.[124] Specifically, Bahtuoh's attorney made the following statements:

> You also know that Mr. Bahtuoh has a right to remain silent. He will waive that right. He made three statements to the police. He testified before the grand jury under oath. And he's going to talk to you during this trial. And he is going to tell you the truth. . . .
>
> He also has a conviction for an aggravated robbery, and he'll tell you about that as well. . . .
>
> Mr. Bahtuoh will tell you how Lamont McGee came to get into his car, and why Mr. Bahtuoh had a good reason to believe that Lamont McGee was not armed that day. It turns out that he was armed that day, but Mr. Bahtuoh did not know that at the time they were driving around. . . .
>
> I would ask you to keep an open mind, to continue to presume Mr. Bahtuoh innocent, wait for the whole trial to unfold before you. Wait until he takes the stand and tells you what happened.[125]

Despite the initial strategy, his attorney eventually decided against having Bahtuoh testify and advised Bahtuoh as such.[126] Bahtuoh's attorney purportedly did not believe the state had strong enough evidence to convict Bahtuoh.[127] Further, Bahtuoh's attorney believed this decision was appropriate because the state had already introduced Bahtuoh's grand jury testimony into the record and as such, Bahtuoh did not need to restate this testimony.[128] During his closing arguments, Bahtuoh's attorney attempted to rectify this "stra-

116. *Id.*
117. *Id.*
118. *Id.*
119. State v. Bahtuoh (*Bahtuoh I*), 840 N.W.2d 804, 808 (Minn. 2013).
120. *Id.*
121. *Bahtuoh III*, 855 F.3d at 870.
122. *Id.*
123. *Id.*
124. *Bahtuoh I*, 840 N.W.2d at 816.
125. *Id.*
126. *Bahtuoh III*, 855 F.3d at 870.
127. *Id.*
128. *Id.*

tegic" choice to the jury.[129] Specifically, the attorney's closing arguments included the following statements:

> One of the things I want to get straight right away is that Mr. Bahtuoh did not take the stand. I told you he would. That's my fault. However, why should I put him on the stand? Why should I? When they didn't prove their case and you 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? I'm not going to do that. Because when you start doing that, you may start weighing, well, we don't like his mannerisms, we don't like him. We don't like the way he sat in the chair. Any number of things you could—you start taking the burden of proof away from the government and putting it on the defense. There was no need to put him on the stand because the government didn't prove their case and his truthful story came across in his grand jury testimony . . . .[130]

Although the jury acquitted Bahtuoh of premeditated murder in the first degree, it convicted him of first degree felony murder and second degree murder.[131] The court sentenced Bahtuoh to life in prison, with the potential to be released after thirty-one years.[132]

After the trial, Bahtuoh sought post-conviction relief due to ineffective assistance of counsel.[133] At the heart of his ineffective assistance of counsel claim, Bahtuoh argued that it was an error for counsel to promise Bahtuoh's testimony to the jury during opening statements and to later renege on that promise.[134] At his post-conviction evidentiary hearing, Bahtuoh stated he was "shocked" and "confused" at counsel's decision to not have him testify.[135] Further, Bahtuoh stated that his counsel never explained the possible ramifications of not testifying.[136]

The court did not find Bahtuoh's counsel to be ineffective.[137] First, Bahtuoh waived his right to remain silent when he originally made statements to the police about the case.[138] As such, the court reasoned

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129. *Id.*
130. *Bahtuoh I*, 840 N.W.2d at 817.
131. *Bahtuoh III*, 855 F.3d at 870.
132. *Bahtuoh I*, 840 N.W.2d at 808.
133. *Bahtuoh III*, 855 F.3d at 870. Ineffective assistance of counsel was not the only allegation forwarded by Bahtuoh following his conviction. Bahtuoh also asserted that there was insufficient evidence to sustain his conviction, that the district court gave incorrect jury instructions on accomplice liability, that there was prosecutorial misconduct, that Bahtuoh did not waive his right to testify at trial voluntarily, and that "his right to a public trial" was violated. *Bahtuoh I*, 840 N.W.2d at 808. Bahtuoh was granted only a post-conviction evidentiary hearing on his claim that he did not voluntarily waive his right to testify. *Id.* at 808–09. Procedurally, the Minnesota Supreme Court "consolidated Bahtuoh's direct and postconviction appeals into a single proceeding" for review. *Id.* at 809.
134. *Bahtuoh I*, 840 N.W.2d at 817–18.
135. *Id.* at 809. Again, this hearing was held on Bahtuoh's claim that he did not voluntarily waive his right to testify. *Id.*
136. *Id.*
137. *Id.* at 818.
138. *Id.* at 817.

that Bahtuoh's attorney had a good faith belief at the outset of trial that Bahtuoh would again waive his rights by testifying before the jury.[139] Second, the prosecution's case was apparently weaker than defense counsel originally anticipated.[140] Further, the prosecution read a portion of Bahtuoh's grand jury testimony into the record.[141] The court found these factors to be unforeseen developments for Bahtuoh's attorney.[142] Given these unforeseen developments, the court reasoned that Bahtuoh's attorney made a reasonable strategy shift by advising his client not to testify.[143] The court also noted that Bahtuoh knowingly and voluntarily waived his right to testify on the record.[144]

Finally, the court distinguished this case from *Ouber*.[145] It explained that the *Ouber* defendant's testimony was central to that case because several witnesses had testified to the defendant's reputation for truthfulness.[146] Moreover, it explained that the attorney's decision in *Ouber* was objectively unreasonable in light of its lengthy procedural history—a history which was not present in Bahtuoh's case.[147] Ultimately, the Minnesota Supreme Court denied Bahtuoh's ineffective assistance of counsel claim.[148]

### B. *Bahtuoh II*

Bahtuoh raised an ineffective assistance of counsel claim in federal court in an attempt to obtain habeas relief.[149] For Bahtuoh to successfully raise a habeas claim for relief in federal court, the Minnesota state court must have either unreasonably applied the *Strickland* standard or unreasonably determined the facts.[150] Bahtuoh argued he was entitled to habeas relief because the state court's decision was based upon an unreasonable application of law and an "unreasonable determination of the facts."[151] The court explained that to meet the rigorous standard for habeas relief, Bahtuoh needed to demonstrate that "the Minnesota Supreme Court's ruling on his ineffective assis-

139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 817–18.
143. *Id.* The court also noted, "To the extent that Bahtuoh's ineffective-assistance-of-counsel claim involves matters of trial strategy, we do not second-guess trial counsel's decisions about trial strategy." *Id.* at 818 n.3 (citing Andersen v. State, 830 N.W.2d 1, 13 (Minn. 2013)). Of course, this begs the question of whether an attorney can call anything "trial strategy" to avoid an ineffectiveness claim.
144. *Id.* at 816.
145. *Id.* at 818.
146. *Id.*
147. *Id.*
148. Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868, 871 (8th Cir. 2017).
149. *Id.*
150. *Id.*
151. *Id.*

tance claim was an error 'beyond any possibility for fairminded disagreement.'"[152]

The United States District Court for the District of Minnesota found that the state court reasonably applied the *Strickland* standard.[153] In its decision, the court described *Bahtuoh* as a "corner case."[154] The Eighth Circuit had previously held that it is not per se unreasonable for an attorney to renege on opening statement promises to present witnesses as a general matter.[155] Because the promised witness in this case was the defendant, however, the court found that this case did not neatly fit within its established precedent.[156] Ultimately, the court stated that this case "falls between the cracks[,] suggest[ing] that fairminded jurists could conclude Bahtuoh's attorney acted reasonably under the circumstances, thereby precluding habeas relief."[157] In the eyes of the federal district court, Bahtuoh's claim could not survive the first prong of the *Strickland* standard. This court also briefly addressed the second prong of the *Strickland* standard and determined that the attorney's conduct did not prejudice Bahtuoh.[158] As a result, the federal district court did not grant Bahtuoh habeas relief on the basis of ineffective assistance of counsel.[159]

### C. *Bahtuoh III*

Bahtuoh's case made its way to the Eighth Circuit Court of Appeals.[160] As the federal district court had done, the Eighth Circuit reviewed how the state court applied the *Strickland* standard, subject to the more rigorous AEDPA standard for habeas relief.[161] Thus, the Eighth Circuit assessed (1) whether the state court unreasonably applied the *Strickland* standard for ineffective assistance of counsel and (2) whether the state court's "decision was based on an unreasonable determination of the facts."[162]

In considering the first question, the Eighth Circuit was highly deferential to the state court's application of the *Strickland* standard.[163] First, the court noted the *Strickland* standard is inherently deferen-

152. Bahtuoh v. Smith (*Bahtuoh II*), No. 14-CV-5009, 2016 WL 2727465, at *12 (D. Minn. Apr. 12, 2016) (citing Harrington v. Richter, 562 U.S. 86, 103 (2011)).
153. *Id.* at *16.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at *17.
160. Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868, 868 (8th Cir. 2017).
161. *Id.* at 871.
162. *Id.*
163. *Id.* at 872.

tial because it includes the "strong presumption" of reasonableness.[164] Further, the court noted the *Strickland* standard itself is "broad and general."[165] Thus, according to the Eighth Circuit, when analyzing an ineffective assistance of counsel claim under the rigorous AEDPA standard of review, courts have significant room to find an attorney's conduct reasonable.[166] As such, the Eighth Circuit reasoned that its review should be "doubly deferential."[167]

The Eighth Circuit found that the Minnesota Supreme Court did not unreasonably apply the *Strickland* standard in *Bahtuoh I*.[168] The Eighth Circuit found it reasonable to conclude that counsel's decision to change strategy was the product of unexpected developments in the trial.[169] The court also found it reasonable to conclude that Bahtuoh's attorney did not fall below the "objective standard of reasonableness."[170]

The court supported its decision by partially relying on another Eighth Circuit case.[171] Specifically, the Eighth Circuit drew attention to *Williams v. Bowersox*, in which the court held that "failing to present witnesses promised in an opening is not always an error of a constitutional dimension."[172] In *Williams*, the attorney decided not to present a witness's testimony after the state called many of the anticipated defense witnesses.[173] Thus, in the Eighth Circuit's view, the attorney's decision in *Williams* was somewhat analogous to the attorney's decision in *Bahtuoh I*.[174]

Moreover, the Eighth Circuit supported its conclusion by citing to contrasting decisions from other courts.[175] Overall, courts have come to different conclusions on whether an attorney can renege on an

164. *Id.* (citing Harrington v. Richter, 562 U.S. 86, 104 (2011)). Notably, the presumptions embedded in the *Strickland* standard have been a source of controversy. *See* Duncan, *supra* note 43, at 1697 ("In determining the constitutionality of legal representation, the scales should not be tilted in favor of either party—not the prisoner and not the government. The purpose of ineffective assistance of counsel law is not to facilitate a finding of incompetent lawyering; neither should it be about hindering a finding of constitutionally infirm lawyering. An ineffective assistance of counsel claim should be about determining whether a criminal defendant's constitutional rights were violated, a determination that should be made without one side benefitting from presumptions.").

165. *Bahtuoh III*, 855 F.3d at 872.

166. *Id.*

167. *Id.* (citing Cullen v. Pinholster, 563 U.S. 170, 190 (2011)).

168. *Id.*

169. *Id.*

170. *See id.*

171. *Id.* (citing Williams v. Bowersox, 340 F.3d 667, 671–72 (8th Cir. 2003)).

172. *Id.* (citing *Williams*, 340 F.3d at 671–72).

173. *Id.* (citing *Williams*, 340 F.3d at 669).

174. *See id.*

175. *Id.*

opening statement promise to have a defendant testify.[176] The Eighth Circuit also referenced *Ouber* to reinforce the existence of this disagreement among courts.[177] For the Eighth Circuit, the fact that these disagreements exist supported a finding of reasonableness.[178] The Eighth Circuit found that the state court reasonably applied *Strickland* for purposes of the AEDPA standard.[179] Thus, the Eighth Circuit did not analyze Bahtuoh's case under the second prong of the *Strickland* standard—whether the conduct of Bahtuoh's attorney prejudiced Bahtuoh to the jury.[180]

Additionally, the Eighth Circuit concluded that the state court's decision was not based upon an unreasonable determination of the facts.[181] The court explained that "[a] state court['s] decision is based on an unreasonable determination of the facts only if the 'court's presumptively correct factual findings do not enjoy support in the record.'"[182] The court found that the record supported the state court's determination: the attorney was justified in his decision because the "weaknesses in the state's case" were unforeseen developments.[183] Further, the court found support in the record demonstrating that counsel "weighed the risks" of not having Bahtuoh testify.[184] Thus, the Eighth Circuit Court of Appeals denied Bahtuoh's claim for habeas relief.[185]

## IV. ANALYSIS

The Eighth Circuit did not render a careful opinion when it decided the *Bahutoh* case. Ample authority suggests that an attorney's decision to renege on an opening statement promise to have a defendant testify falls outside of the reasonable standard of professional con-

176. *Compare* Francis v. State, 183 S.W.3d 288, 301–05 (Mo. Ct. App. 2005) (finding that an attorney's decision to renege on opening statement promises to have the defendant testify did not amount to ineffective assistance of counsel), *and* Yancey v. Hall, 237 F. Supp. 2d 128, 134–35 (D. Mass. 2002) (same), *with* Williams v. Woodford, 859 F. Supp. 2d 1154, 1162–65 (E.D. Cal. 2012) (finding ineffective assistance of counsel for reneging on an opening statement promise to have defendant testify), *and* Ouber v. Guarino, 293 F.3d 19, 36 (1st Cir. 2002) (same).

177. *Bahtuoh III*, 855 F.3d at 872.

178. *Id.*

179. *Id.* at 873.

180. *Id.* As previously explained, courts are not required to analyze the attorney's performance under both prongs if the court finds that one prong is not satisfied. Strickland v. Washington, 466 U.S. 668, 697 (1984).

181. *Bahtuoh III*, 855 F.3d at 874.

182. *Id.* at 873 (citing Evenstad v. Carlson, 470 F.3d 777, 782 (8th Cir. 2006)).

183. *Id.*

184. *Id.*

185. *Id.*

duct.[186] A careful application of *Strickland* demonstrates that Bahtuoh's attorney was likely deficient, and Bahtuoh was prejudiced as a result of that deficiency. Moreover, there are compelling reasons to believe that the state court's decision was not only incorrect but also unreasonably rendered. Rather than conducting a careful review of *Bahtuoh I*, the Eighth Circuit seemed to allow its analysis to be clouded by its "doubly deferential"[187] approach. Unfortunately, this case demonstrates how such a deferential approach can set a negative precedent for what counts as acceptable legal representation in criminal cases.

### A. Application of *Strickland*: The First Prong

The attorney in *Bahtuoh* made decisions that do not rise to the level of objectively reasonable tactics. It can be objectively reasonable for an attorney to have a defendant testify and to present this information in opening statements.[188] Similarly, it can be objectively reasonable for an attorney to decide not to have a defendant testify at trial.[189] It is unreasonable, however, for an attorney to pursue *both* strategies without significant, unexpected developments in the trial.[190] As explained by the court in *Ouber*, "Taken alone, each of these decisions may have fallen within the broad universe of acceptable professional judgments. Taken together, however, they are indefensible."[191]

Attorneys are not beholden to a strict set of regimented guidelines for how to represent a criminal defendant.[192] Rather, counsel has the independence and flexibility to zealously advocate on behalf of their client in whatever way professional judgment dictates.[193] But there are still some rough guidelines that can be used for these determinations. For example, the *Strickland* Court noted that the American Bar Association (ABA) standards for Criminal Justice serve as a helpful guideline for determining what constitutes reasonable professional

186. Williams v. Woodford, 859 F. Supp. 2d 1154, 1170 (E.D. Cal. 2012) (explaining that juries will be likely to "draw negative inferences" when the promised defendant does not testify); Madrigal v. Yates, 662 F. Supp. 2d 1162, 1184 (C.D. Cal. 2009) (explaining that reneging on opening statement promises constitutes "deficient performance" when not done in response to "unforeseeable events"); Ouber v. Guarino, 293 F.3d 19, 36 (1st Cir. 2002) (finding that reneging on opening statement promise to have defendant testify amounts to a "serious error in professional judgment").

187. *Bahtuoh III*, 855 F.3d at 872 (citing Cullen v. Pinholster, 563 U.S. 170, 190 (2011)).

188. *See Ouber*, 293 F.3d at 27.

189. *See id.*

190. *Id.*

191. *Id.*

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

193. *Id.*

judgment.[194] This is because these standards represent the "bar's expression of the minimal duties owed clients."[195] Ultimately, the ABA standards and case law[196] support the conclusion that Bahtuoh's attorney acted unreasonably when he reneged on his opening statement promises.

A cursory examination of the ABA guidelines supports the inference that the so-called strategy employed by Bahtuoh's attorney was unacceptable. Notably, the guidelines provide that a defense attorney ought to anticipate the importance of preparing opening statements.[197] The guidelines provide, "Defense counsel's opening statement at trial should be confined to a fair statement of the case from the defense counsel's perspective, and discussion of evidence that defense counsel reasonably believes in good faith will be available, offered, and admitted."[198] Given these basic guidelines, Bahtuoh's attorney should have carefully considered the impact of making opening statement promises and the potential consequences of *breaking* opening statement promises.

Bahtuoh's attorney failed to consider the potential consequences of breaking his opening statement promises. Juries can be tempted to infer that a defendant is guilty when the defendant fails to testify.[199] As a result of this temptation, courts take precautionary measures to prevent juries from drawing such inferences.[200] However, these measures are imperfect, and a defense attorney can exacerbate the jury's inherent temptation of inferring guilt by drawing the jury's attention to the defendant's failure to testify.[201] Candidly stated, "[w]hen a defendant's own lawyer causes jurors to wonder why he did not testify, this is a self-inflicted wound that's bound to undermine a defendant's presumption of innocence."[202] For that reason, Bahtuoh's attorney's

194. *Id.* at 688.

195. Eva S. Nilsen, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1, 21 (1994).

196. Williams v. Woodford, 859 F. Supp. 2d 1154, 1164 (E.D. Cal. 2012); Madrigal v. Yates, 662 F. Supp. 2d 1162, 1184 (C.D. Cal. 2009); *Ouber*, 293 F.3d at 36.

197. *See* CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, standard 4-7.5 (AM. BAR ASS'N 2015). There is authority to suggest that many attorneys have a shared understanding of the importance of opening statements. *See* O'Connor, *supra* note 2, at 100 ("[M]any practitioners . . . believe that up to 80 percent of jurors decide the case during opening statements.").

198. *See* CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, standard 4-7.5 (AM. BAR ASS'N 2015).

199. *Williams*, 859 F. Supp. 2d at 1164 (E.D. Cal. 2012).

200. *Id.* (citing Carter v. Kentucky, 450 U.S. 288 (1981)) (explaining that precautionary measures include instructions not to infer guilt from a defendant's failure to testify and instructions regarding burdens of proof).

201. *Id.*

202. *Id.*

decision to renege was careless in the absence of unexpected developments during trial.

Contrary to the assertions made by the state court and by the Eighth Circuit, the attorney's decision to not have Bahtuoh testify was not based upon "unexpected" developments at trial.[203] According to those courts, the unexpected developments in this case included the possibility of Bahtuoh getting impeached on cross-examination, the fact that the prosecution presented the defendant's grand jury testimony during its case-in-chief, and the weakness of the prosecution's case.[204] All of these developments should have been reasonably foreseen at the outset of trial—prior to opening statements. Moreover, that the defense counsel "weighed the risks" of his client not testifying[205] is unpersuasive when viewed in context of the overall trial.[206]

Prior to delivering opening statements, Bahtuoh's attorney should have anticipated the possibility of Bahtuoh being impeached on cross-examination. In his closing arguments, Bahtuoh's attorney claimed that he did not want to subject his client to cross-examination by an experienced prosecutor.[207] The attorney also did not want the jury to judge the defendant based upon his mannerisms on the stand.[208] Both of these arguments fail to withstand scrutiny. First, the attorney had at least some interaction with his client prior to trial.[209] As such, the attorney should have been able to assess whether Bahtuoh was likely to be a credible witness or vulnerable to rigorous cross-examination.[210] Moreover, the attorney referenced Bahtuoh's criminal history in his opening statements, suggesting that he anticipated Bahtuoh getting impeached on the stand.[211] Second, from his own interactions

203. Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868, 873 (8th Cir. 2017).

204. *Id.*

205. *Id.* at 874.

206. *See* Ouber v. Guarino, 293 F.3d 19, 28 (1st Cir. 2002) ("[A] defendant's decision about whether to invoke the right to remain silent is a strategic choice, requiring a balancing of risks and benefits. Under *ordinary* circumstances, that is true." (emphasis added)).

207. State v. Bahtuoh (*Bahtuoh I*), 840 N.W.2d 804, 817 (Minn. 2013) ("Why would I put a 20-year-old young man up against an experienced prosecutor?").

208. *Id.* ("[Y]ou may start weighing, well, we don't like his mannerisms, we don't like him.").

209. *See Bahtuoh III*, 855 F.3d at 870 (explaining that Bahtuoh and his attorney collectively made the decision before trial that Bahtuoh would testify).

210. *See* United States *ex rel.* Hampton v. Leibach, 347 F.3d 219, 258 (7th Cir. 2003) (finding that a defense attorney should be able to reasonably assess his or her client's "strengths and weaknesses as a prospective defense witness" prior to trial); *see also Ouber*, 293 F.3d at 29 (explaining that counsel knew that the prosecution may impeach the defendant when he made the opening statement).

211. As explained by the federal district court, "In anticipation of Bahtuoh's testimony and subsequent impeachment on the stand, defense counsel went so far as to preemptively disclose during his opening statement that Bahtuoh had previously been convicted for aggravated robbery . . . even though that information would

with his client, the attorney should have been able to assess whether Bahtuoh would have unflattering mannerisms on the stand.[212] The facts do not suggest that these pre-trial assessments were altered mid-trial. As such, Bahtuoh's attorney should have considered the likelihood of impeachment at the outset of trial.

Moreover, the fact that the prosecution introduced Bahtuoh's grand jury testimony into the record was not an unexpected development. This was not a case where Bahtuoh's attorney changed or abandoned his anticipated defense mid-trial[213] or a case where the prosecution's strategy uniquely implicated the attorney's decision to have the defendant testify.[214] Bahtuoh's attorney was fully aware of the content of his client's grand-jury testimony prior to trial.[215] Even if the attorney did not believe that the prosecution would introduce the testimony into the record, the introduction of the testimony did not alter the defense's main strategy—that Bahtuoh did not believe McGee was armed.[216] At worst, the grand jury testimony may have made Bahtuoh's trial testimony redundant. However, the risk of redundancy, even when considered alongside the attorney's other justifications for not having Bahtuoh testify, did not overwhelm the potential consequences of breaking his opening statement promise.[217] As noted by one court, "By promising the jury that [the defendant] would testify, and would do so as to specific facts, the lawyer raised certain expectations in the jurors' minds, expectations that would count heavily against [the defendant] when they went unfulfilled."[218]

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not have been admissible if Bahtuoh did not testify." Bahtuoh v. Smith (*Bahtuoh II*), No. 14-CV-5009, 2016 WL 2727465, at *11 (D. Minn. Apr. 12, 2016).

212. *Bahtuoh III*, 855 F.3d at 874.

213. *See* Yancey v. Hall, 237 F. Supp. 2d 128, 134 (D. Mass. 2002); *see also* Anderson v. Butler, 858 F.2d 16, 19 (1st Cir. 1988) (explaining that the choice to abandon a defense can be a plausible strategy shift).

214. *See* Francis v. State, 183 S.W.3d 288, 301–05 (Mo. Ct. App. 2005) (finding that when the prosecution did not present evidence of damaging statements from the defendant as originally anticipated, it was reasonable for the attorney to renege on opening statement promises of the defendant testifying in order to avoid subjecting the defendant to cross-examination on those damaging statements).

215. *Id.*

216. State v. Bahtuoh (*Bahtuoh I*), 840 N.W.2d 804, 816 (Minn. 2013) ("Mr. Bahtuoh will tell you . . . why Mr. Bahtuoh had a good reason to believe that Lamont McGee was not armed that day.").

217. *See* Williams v. Woodford, 859 F. Supp. 2d 1154, 1164 (E.D. Cal. 2012). Not everyone would agree with this, however. According to the United States District Court for the District of Minnesota, having Bahtuoh testify may have resulted in Bahtuoh getting convicted of first degree premeditated murder, which would have "entombed him forever inside a penitentiary." Bahtuoh v. Smith (*Bahtuoh II*), No. 14-CV-5009, 2016 WL 2727465, at *17 (D. Minn. Apr. 12, 2016).

218. *Williams*, 859 F. Supp. 2d at 1164.

Further, the weakness of the prosecution's case did not justify a mid-trial strategy shift. Attorneys are expected to prepare for trial.[219] In light of such preparation, this argument logically shatters. Assume that Bahtuoh's attorney expected the prosecution's case to be strong at the outset of trial. It is possible that Bahtuoh's attorney believed his client's testimony would bolster his defense against a strong case. Consequently, his opening statement promise reflected a calculated belief that his client's testimony was strong evidence. If true, then Bahtuoh's attorney should not have abandoned such evidence to respond to a prosecution's allegedly weakened case.[220]

It is also possible that Bahtuoh's attorney believed, at the outset of trial, that it would be risky to have his client testify. Perhaps he was uncertain about whether his client would perform well on cross-examination, and he might have been concerned with how the jurors would receive his client. Moreover, at the end of the day, there is always a risk that a prosecution's case may prove stronger or weaker than a defense attorney initially predicts. In light of those considerations, Bahtuoh's attorney should have concluded that the value of his client's testimony at trial could easily change, depending on how the prosecutor's case unraveled. In that world, the attorney should not have made a *robust* promise that Bahtuoh would testify when he delivered his opening statement; he should have simply refrained and reserved himself the flexibility to make a sturdier judgment call after the prosecution rested its case.[221] By making the tactical decision to *promise* the jury this testimony, the attorney planted a seed of Bahtuoh's testimony in the minds of the jurors—a seed that he could not easily dig up.[222]

In short, it is a bold move for an attorney to make a promise in opening statements that his or her client will testify. Thus, a defense

219. *See* CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, standard 4-4.6 (AM. BAR ASS'N 2015).

220. *See* Ouber v. Guarino, 293 F.3d 19, 29 (1st Cir. 2002) ("[I]t remains a mystery why, in response to adverse evidence that proves stronger than expected, a lawyer should decide to abandon the only available avenue of controverting it."); *see also Williams*, 859 F. Supp. 2d at 1170 ("Sometimes, all that a defense lawyer can do is point to weaknesses in the prosecution's case. Acquittals have certainly been gained that way. But it's far harder to persuade a jury to acquit based on weaknesses in the prosecution's case when the jury has been promised exculpatory testimony from percipient witnesses, including defendant himself. The jury will draw negative inferences from the unexplained absence of the promised testimony, and these inferences will fill any gaps that might otherwise exist in the prosecution's case.").

221. *See Ouber*, 293 F.3d at 25–26 ("It is easy to imagine that, on the eve of trial, a thoughtful lawyer may remain unsure as to whether to call the defendant as a witness. If such uncertainty exists, however, it is an abecedarian principle that the lawyer must exercise some degree of circumspection. Had the petitioner's counsel temporized . . . this would be a different case.").

222. *See id.*

attorney preparing for trial must reasonably weigh both the risks and benefits of having the client testify.[223] Importantly, the attorney must also consider possible contingencies that could alter this decision. The attorney must then calculate whether, in light of those contingencies, it is reasonably safe to proclaim to members of the jury that the client will take the stand and profess his or her innocence.

To boldly promise Bahtuoh's testimony in his opening statements, the attorney should have either (1) been confident enough in his client's testimony that he would not change course unless truly unanticipated events occurred or (2) understood the inherent risks associated with having his client testify and given himself enough elasticity to change his mind. There were not truly unanticipated events that occurred in this trial. That the prosecution's case proved weaker than the attorney originally predicted was a contingency that should have been factored into the attorney's initial trial preparation.

Additionally, case law supports the conclusion that Bahtuoh's attorney was deficient. Cases from different jurisdictions have found that a defense attorney's decision to break opening statement promises can amount to ineffective assistance of counsel.[224] Although the Eighth Circuit was not bound by these cases, "[t]o the extent that inferior federal courts have decided factually similar cases, reference . . . may be especially helpful when the governing Supreme Court precedent articulates a broad principle that applies to a wide variety of factual patterns."[225] Thus, given the Eighth Circuit's admission that the *Strickland* standard was broad,[226] the court arguably should have given more consideration to factually similar cases. At the very least, these cases might have put Bahtuoh's attorney on notice of the potential consequences of his strategy shift and prompted him to consider alternative strategies.[227]

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223. *See Williams*, 859 F. Supp. 2d at 1164.

224. *See id.* at 1154, 1161, 1163 (granting habeas relief under 28 U.S.C. § 2254(d)(2) and finding ineffective assistance of counsel when the defense attorney promised the jury ten times that his client would testify); *Ouber*, 293 F.3d at 27; *see also* Anderson v. Butler, 858 F.2d 16, 18 (1st Cir. 1988) (finding ineffective assistance of counsel when the defense attorney failed to present testimony from a psychologist promised during opening statements).

225. *Ouber*, 293 F.3d at 26 (citing O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998)).

226. Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868, 872 (8th Cir. 2017) (explaining the broadness of the *Strickland* standard as a justification for its deferential approach).

227. In theory, if Bahtuoh's attorney was correct in believing the prosecution's case was weak, then after the government rested, the attorney could have made a Rule 29 motion, which allows the court to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." *See* FED. R. CRIM. P. 29. Given that the Minnesota Supreme Court found there was sufficient evidence to convict Bahtuoh, this claim may very well have been unsuccessful, but at the very least would have lend credence to the reasonableness of the attor-

It is plausible to argue counsel was reasonable because the defendant consented to the change in strategy.[228] As noted by the *Strickland* Court, "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."[229] This should not be determinative, however. Lay people generally lack the expertise necessary to make the most informed decision regarding the best legal strategy.[230] As a result, even if individuals are asked to make decisions regarding how to proceed in legal cases, many defer to the expertise of counsel.[231] In this case, the record reflects Bahtuoh's expression of "shock" when his attorney advised him not to testify,[232] suggesting that Bahtuoh was not initially comfortable with this strategy.[233] Despite Bahtuoh's consent on the record, this decision was likely informed by the advice of his attorney.[234] A client's consent should not determine whether counsel's conduct is effective because such logic would absolve the attorney merely because the client acquiesced to the attorney's improper advice.

For the foregoing reasons, Bahtuoh's attorney fell below the objective reasonableness standard. Moreover, the arguments above demonstrate that the state court's decision was not merely improper, but unreasonable. To ascertain whether the attorney's conduct was reasonable, the state court indicated that Bahtuoh's attorney had a good

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ney's conduct. *See* State v. Bahtuoh (*Bahtuoh I*), 840 N.W.2d 804, 811 (Minn. 2013).

228. The Eighth Circuit did not use this argument in support of its reasonableness analysis, relying instead on the attorney's shift in strategy. *Bahtuoh III*, 855 F.3d at 872–73. However, this claim was quite important for the state court that initially denied Bahtuoh's ineffective assistance of counsel claim. Bahtuoh v. Smith (*Bahtuoh II*), No. 14-CV-5009, 2016 WL 2727465, at *2 (D. Minn. Apr. 12, 2016) ("Bahtuoh's ineffective-assistance claim would entirely rise or fall on the question of whether his waiver of the right to testify was knowing and voluntary.").

229. Strickland v. Washington, 466 U.S. 668, 691 (1984).

230. *See* Zelnick, *supra* note 10, at 371.

231. *See* MODEL RULES OF PROF'L CONDUCT, r. 1.2 cmt. 2 (AM. BAR ASS'N 2016).

232. *Bahtuoh I*, 840 N.W.2d at 809.

233. Although the Minnesota Supreme Court was unpersuaded by Bahtuoh's claim that he did not knowingly and voluntarily waive his right to testify on the basis that Bahtuoh's post-conviction statements at the evidentiary hearing were inconsistent, the federal district court raised concerns about whether this was an accurate reading of Bahtuoh's statements. *Bahtuoh II*, 2016 WL 2727465, at *9–10 ("Bahtuoh's testimony at the colloquy, read *literally*, does not confirm that his waiver of the right to testify was knowing."). Ultimately, the court found it reasonable to conclude that Bahtuoh knowingly and voluntarily waived his right to testify and importantly, the court did not find that Bahtuoh "rebutted the factual findings of the trial court by clear and convincing evidence." *Id.* at *10.

234. *Bahtuoh I*, 840 N.W.2d at 815. This point is further evidenced by the fact that Bahtuoh raised a claim in the lower courts that he did not voluntarily and knowingly decide not to testify. *Id.* Nevertheless, the court was unpersuaded by this claim because Bahtuoh's testimony at the post-conviction evidentiary hearing was considered "internally inconsistent" and because those at the hearing were in a stronger position to ascertain Bahutoh's credibility. *Id.* at 815–16.

faith reason to believe that Bahtuoh would be willing to waive his rights and testify at the trial.[235] Moreover, the court cited to the attorney's collective justifications for not having Bahtuoh testify.[236] It found that these representations demonstrated that he "weighed the risks of Bahtuoh testifying against the risk associated with failing to fulfill the representations that he made to the jury during his opening statement."[237] Importantly, the court found that he "weighed those risks in light of new information—the strength of the State's case—that he did not know at the beginning of the trial."[238]

The state court failed, however, to carefully analyze whether the attorney's justifications were *reasonable* and how the attorney's *weighing* of those risks was reasonable. The state court did not closely explore whether the "strength of the State's case" could have been foreseen at the outset of trial or why it was reasonable for that "new information" to tip the attorney's decision in favor of breaking the promise. The state court never detailed how the explanations offered by the attorney—the possibility of impeachment, the introduction of his grand jury testimony, and the strength of the prosecution's case—collectively could justify taking the significant risk of reneging on his opening statement representations. Rather, the state court appeared to take the attorney's justifications at face-value. But as this section has attempted to illustrate, the attorney's justifications for breaking his opening statement promise seem to be objectively unreasonable when considered in the context of the overall trial.

Additionally, the state court also distinguished the facts of the present case from those of *Ouber*.[239] In particular, the court focused primarily on *Ouber*'s extensive procedural history as a guide for whether

235. *Id.* at 817.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 818. The court stated that Bahtuoh failed to "provid[e] specific facts to support his claim that trial counsel's performance was deficient," relying instead on *Ouber*. *Id.* at 817. However, it is somewhat curious that the court makes this claim when considering the specific claims being asserted in Bahtuoh's reply brief. Appellant's Reply Brief, State v. Bahtuoh, 840 N.W.2d 804 (Minn. 2013) (Nos. A10-1584, A12-1281), 2012 WL 10133625, at *7 ("Mr. Bahtuoh's promised testimony would specifically explain his relationship with the victim and the shooter and provide the jury with Mr. Bahtuoh's basis for believing the shooter was unarmed that evening. Mr. Bahtuoh's unpresented testimony would show he had no knowledge of nor intent to participate in the crime. Without Mr. Bahtuoh's testimony, that evidence was not furnished through any other means."). *Bahtuoh II* also made note of this. Bahtuoh v. Smith (*Bahtuoh II*), No. 14-CV-5009, 2016 WL 2727465, at *13 (D. Minn. Apr. 12, 2016) ("It is not entirely clear what the Minnesota Supreme Court meant by the comment, but Bahtuoh buttressed his ineffective-assistance claim with several specific factual contentions that, at a minimum, cast doubt upon the reasonableness of counsel's decision.").

the attorney exhibited reasonable professional judgment.[240] However, the court failed to explain why a different procedural history necessarily meant that Bahtuoh's attorney was not *ineffective*. The court failed to provide authority to support the contention that Bahtuoh's attorney acted reasonably. For these and the above-mentioned reasons, there are compelling arguments that the state court unreasonably applied the *Strickland* standard. Accordingly, the Eighth Circuit should have remanded the case.

Instead of carefully considering whether the attorney's conduct fell below the objective standard of reasonableness, the Eighth Circuit relied heavily on the deferential standard of review. It repeated the state court's rationale and explained that the "unexpected developments" at trial justified the attorney's decision to break his opening statement promise.[241] The Eighth Circuit indicated that there was "record support for its conclusion that the extent of the weaknesses in the state's case was unforeseen to defense counsel."[242]

But the court did not closely evaluate whether it was reasonable to characterize the weakness in the state's case as so "unexpected" that it would justify such a dramatic shift in strategy. More significantly, it did not thoroughly evaluate whether the attorney was reasonable in "weigh[ing] the risks"[243] of Bahtuoh's failure to testify in light of the attorney's opening statement representation to the jury. Rather, it simply "defer[red] to the Minnesota Supreme Court's application of the deficiency element in *Strickland*'s test under 28 U.S.C. § 2254(d) . . . ."

While the court was correct to exercise a degree of deference in rendering its decision, it was incorrect to so freely accept the state court's determinations. This section has attempted to shine light on how the attorney's conduct was unreasonable when considered in the context of Bahtuoh's overall trial. It has also tried to uncover the analytical gaps of the state court's decision. By simply deferring to the state court's determinations, however, the Eighth Circuit left many of these concerns unaddressed in its written opinion. This is cause for concern. It casts doubt on the carefulness of the Eighth Circuit's *Bahtuoh* decision and should cause one to question whether the court relied on deference at the expense of analytical diligence.

240. *Bahtuoh I*, 840 N.W.2d at 818.

241. Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868, 873 (8th Cir. 2017).

242. *Id.* The court referred to the fact that when cross-examining one of the state's witnesses, the defense attorney "was able to establish that Parker had signaled toward Bahtuoh, consistent with Bahtuoh's grand jury testimony," which "suggested that Parker had no reason to fear Bahtuoh." *Id.* It also referred to the attorney's closing statement, where he indicated that the jury heard Bahtuoh's grand jury testimony, "which he gave under oath . . . ." *Id.*

243. *Id.* at 873–74.

### B. Application of *Strickland*: The Second Prong

When a defendant is able to overcome the stringent requirements of the first prong—proving that an attorney fell below the objective standard of reasonableness—the defendant must still persuade the court that but for the attorney's conduct, the outcome of the trial would probably have been different.[244] To satisfy the second prong of the *Strickland* standard, there must have been a reasonable probability that, given the totality of the circumstances, the decision to change strategy affected the outcome of the trial.[245] As noted by the *Strickland* Court, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test . . . ."[246] In this case, counsel's decision likely had a forceful impact on the jury's verdict.

Admittedly, making a determination about prejudice is exceedingly difficult because of the issue of "hindsight blindness."[247] The *Strickland* Court stated that hindsight bias should be avoided in making determinations about prejudice, which means that the trial result cannot be used to infer prejudice.[248] However, as one scholar explains, "*Strickland*'s prejudice prong requires the court to determine whether incompetent counsel mattered, but hindsight blindness hampers its ability to do so and almost always leads to affirmance."[249] Nevertheless, even if hindsight blindness can make it difficult to assess whether prejudice resulted, that does not justify a court merely deferring to the lower court's judgment on the issue of prejudice.[250] Such

244. Strickland v. Washington, 466 U.S. 668, 694 (1984).

245. *Id.* at 695.

246. *Id.* at 693.

247. Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 189 (2016).

248. *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). The Minnesota Supreme Court specifically stated that hindsight bias should not be used. State v. Bahtuoh (*Bahtuoh I*), 840 N.W.2d 804, 817 (Minn. 2013) (citing State v. Jones, 392 N.W.2d 224, 236 (Minn. 1986)). However, it is curious that both the *Strickland* court and the court in *Bahtuoh I* cautioned against using the benefit of hindsight bias for proving deficiency in conduct when the court in *Bahtuoh III* seemed to use hindsight bias to prove counsel's conduct was reasonable. *See Bahtuoh III*, 855 F.3d at 870 (explaining that counsel's belief that the prosecution's case was weak "proved only partially correct" because Bahtuoh was not convicted of "first degree premeditated murder").

249. Griffin, *supra* note 247 (emphasis supplied).

250. Again, the Eighth Circuit declined to analyze Bahtuoh's attorney's conduct under the prejudice prong. *Bahtuoh III*, 855 F.3d at 873.

deference arguably elevates the *Strickland* standard from difficult to nearly impossible to overcome.[251]

It is reasonable to conclude that the defense attorney's so-called strategy shift altered the outcome of the trial. Specifically, opening statement promises can raise a jury's expectations and foster skepticism when those expectations fail to be satisfied.[252] As explained by the court in *Ouber*,

> When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, common sense suggests that the course of trial may be profoundly altered. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made.[253]

This effect is likely magnified by the fact that juries are more likely to remember the first and last portions of the trial.[254] As such, it is sensible to conclude that the jury harbored some degree of mistrust towards Bahtuoh's attorney for breaking his opening statement promise. Further, it is reasonable to suggest that Bahtuoh's attorney drew negative attention to this broken promise by highlighting Bahtuoh's failure to testify during closing arguments.[255] For these reasons, the jury's opinion could easily have been altered against the defendant when, after being promised this testimony, the defendant failed to testify and profess his innocence.[256]

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251. *See* Duncan, *supra* note 43, at 1700 ("[T]he science of predicting how any given proceeding would have turned out if things had gone differently is inexact at best. Thus, requiring a petitioner to prove that his proceeding would have been different is to require him to prove what is, in most cases, not provable.").

252. *See* Williams v. Woodford, 859 F. Supp. 2d 1154, 1164 (E.D. Cal. 2012).

253. Ouber v. Guarino, 293 F.3d 19, 28 (1st Cir. 2002); *see Williams*, 859 F. Supp. 2d at 1167 ("A promise in the opening statement that a witness will testify in a certain way is a pact between counsel and jury: He commits to present certain proof in exchange for the jury's implicit promise to keep an open mind until he has an opportunity to do so. Jurors take such commitments seriously and feel betrayed when the promise goes unfulfilled . . . ."*); see also* United States *ex rel.* Hampton v. Leibach, 347 F.3d 219, 259 (7th Cir. 2003) ("Promising a particular type of testimony creates an expectation in the minds of jurors, and when defense counsel without explanation fails to keep that promise, the jury may well infer that the testimony would have been adverse to his client and may also question the attorney's credibility."). Of course, the preceding statement from the Seventh Circuit Court of Appeals is not exactly on point here because the attorney in Bahtuoh's case attempted to justify his broken promise to the jury. But again, this Note questions the reasonableness of these justifications—just as it suspects a juror might.

254. Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 496 (1987).

255. State v. Bahtuoh (*Bahtuoh I*), 840 N.W.2d 804, 817 (Minn. 2013) ("Mr. Bahtuoh did not take the stand. I told you he would. That's my fault. However, why should I put him on the stand?"); *see also* Cox & Bloom, *supra* note 2, at 268 ("Relating the opening to the closing is warranted when you've complied with the contract you made with the jury in opening your case.").

256. *Williams*, 859 F. Supp. 2d at 1164.

On the other hand, it is plausible that Bahtuoh was not prejudiced by the decision to not testify. The jury heard the crux of Bahtuoh's testimony through the introduction of his grand-jury testimony.[257] Further, unlike *Ouber*, the defense in *Bahtuoh I* did not entirely center on Bahtuoh's testimony.[258] Moreover, the jury was given an instruction not to hold Bahtuoh's silence against him.[259] Nevertheless, even if jury members believe they are evaluating a case objectively, they are often driven by unconscious, extra-legal inferences.[260] As explained by one scholar,

> All of us possess some unreliable knowledge structures. These preconceptions tend to make us resist conflicting evidence and accept confirming evidence, coloring the manner in which we interpret everything in between. In addition, we may apply these preconceptions unconsciously, misleading ourselves into believing that we are evaluating data objectively. Courtroom style affects jury decisionmaking through the operation of one or more knowledge structures. Those knowledge structures might be . . . resistant to conflicting empirical evidence and judicial instructions indicating that this link is unreliable.[261]

As such, the fact that a jury heard Bahtuoh's grand jury testimony may have been irrelevant once it realized Bahtuoh would no longer testify at trial. If juries may unconsciously draw negative inferences from how an attorney presents a case,[262] and juries already harbor an inherent belief that a defendant's failure to testify is suspicious,[263] then it is logical the attorney's decision affected the jury, despite the presence of other evidence presented against Bahtuoh.

For the above-mentioned reasons, it is more than conceivable that Bahtuoh's attorney prejudiced his client by reneging on his opening statement promises. In light of this possibility, the analysis of the Minnesota Supreme Court and the Eighth Circuit Court of Appeals would have been well-served by considering whether Bahtuoh was prejudiced. Instead, both courts stopped analyzing after considering the first part of the *Strickland* standard.[264] Of course, analyzing both prongs was not technically necessary after the courts dispensed with the first prong. But the strong possibility of prejudice in this case

257. Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868, 873 (8th Cir. 2017).
258. *Bahtuoh I*, 840 N.W.2d at 818.
259. Bahtuoh v. Smith (*Bahtuoh II*), No. 14-CV-5009, 2016 WL 2727465, at *17 (D. Minn. Apr. 12, 2016).
260. Gold, *supra* note 254, at 491.
261. *Id.*
262. *Id.*
263. *See* Williams v. Woodford, 859 F. Supp. 2d 1154, 1164 (E.D. Cal. 2012); *see also* Madrigal v. Yates, 662 F. Supp. 2d 1162, 1184 (C.D. Cal. 2009) ("The jury could have surmised that the reason for Petitioner's failure to testify, after his trial attorney promised he would, was that [the attorney] had realized, at some point during trial, that Petitioner was not a credible witness or, even worse, that he would commit perjury if allowed to take the stand.").
264. Bahtuoh v. Smith (*Bahtuoh III*), 855 F.3d 868, 873 (8th Cir. 2017); State v. Bahtuoh (*Bahtuoh I*), 840 N.W.2d 804, 818 (Minn. 2013).

should have still influenced the courts' analysis. Specifically, the potential prejudice in this case should have prompted the courts to take a harder look at the reasonableness prong.

### C. The Future of Ineffective Assistance of Counsel Claims in the Eighth Circuit

The Eighth Circuit's decision in *Bahtuoh* foreshadows a concerning future for ineffective assistance of counsel claims and what passes for reasonable professional judgment. First, Bahtuoh reflects a troubling future for how federal courts might apply deferential standards of review. Under current law, courts are correct to exercise some deference when reviewing habeas petitions based upon claims of ineffective assistance of counsel. Failure to exercise deference would contravene precedent and explicit statutory standards. But this does not mean that federal courts should rely on deference to the detriment of analytical diligence. When courts rely *too heavily* on deferential standards of review, they run the risk of (1) not carefully analyzing the record before them, or (2) having their judgment clouded by this deference in situations where an attorney's conduct is truly deficient and prejudicial.

Courts do not have to fall into this deference trap. The First Circuit's *Ouber* decision provides a hopeful example of how a federal court can faithfully apply these deferential standards without sacrificing necessary analytical legwork. In *Ouber*, the court carefully reviewed the attorney's conduct in context of the overall trial to determine whether the *Strickland* prongs were satisfied.[265] It also assessed whether the state court's conclusion was sensible in light of the overall record.[266] In so doing, the First Circuit did not simply *accept* the state court's assertions and conclusions; it *assessed* whether those assertions were supported by the record and whether its conclusions were reasonable. *Ouber* thus demonstrates how a court can correctly apply these deferential standards of review while also preserving analytical rigor. Unfortunately, the *Bahtuoh* decision seems to signal a turn in the other direction.

Moreover, the *Bahtuoh* decision also seems to reflect a judicial system that defers to lawyers first and safeguards a defendant's interests second. Admittedly, the *Strickland* Court noted that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . . The purpose is simply

265. Ouber v. Guarino, 293 F.3d 19, 31 (1st Cir. 2002) (citing O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998) ("Because the state-court's characterization is not borne out by any plausible reading of the record, we deem it unreasonable.").

266. *Id.* ("Since neither the state court's opinion nor our own careful perscrutation of the record reveals an objectively reasonable ground for the state court's 'no prejudice' determination, we are constrained to set it aside.").

to ensure that criminal defendants receive a fair trial."[267] However, this statement should not be construed to mean a defendant should receive the lowest standard of legal representation. Such a construction would mean that defendants must endure the most extreme example of low-quality representation to succeed on an ineffective assistance of counsel claim.[268] At the very least, this calls into question whether courts are properly safeguarding a criminal defendant's right to receive a fair trial.

Importantly, the *Bahtuoh* decision also raises some concerns about what passes muster as reasonable professional judgment under the *Strickland* standard. As of now, the standard's presumption of reasonableness seems to be justifying a lower standard of legal representation.[269] *Bahtuoh* is one case that highlights the current low threshold for what passes as reasonable professional conduct, but it is not the only example. Even an attorney who has fallen asleep during a small portion of trial is not "objectively unreasonable" as long as the attorney was not asleep for substantial portions of the trial.[270] But *Bahtuoh* is unique because it reveals how this overly flexible standard might enable attorneys to absolve themselves of unsound judgment calls by framing them as "strategy shifts."[271] As explained by one scholar,

> 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.[272]

Unfortunately, at the same time that the standard for effective assistance of counsel is being loosened, there remains an imbalance in power between defendants—especially indigent defendants—and the state.[273] As explained by one scholar,

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

268. This worry can become even more apparent in situations where an attorney is inebriated or sleeping at trial. As explained by one scholar, "[T]he community should not have confidence in a legal system where men and women are sent to prison or executed when their attorneys slept during a key portion of the trial or when their attorneys were legally intoxicated during a critical portion of the trial." Jeffrey L. Kirchmeier, *Drinks, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 475 (1996).

269. *Strickland*, 466 U.S. at 689.

270. *See, e.g.*, Muniz v. Smith, 647 F.3d 619, 625–26 (6th Cir. 2011).

271. *Cf.* Zelnick, *supra* note 10, at 388 ("The power of the attorney to override his client's wishes is virtually absolute whenever the decision can reasonably be classified as 'trial strategy.' Moreover, courts do not hesitate in labeling a decision as trial strategy even when the decision is plainly linked to fundamental rights.").

272. *Id.* at 379 (quoting Bright, *supra* note 15, at 1858).

273. Nilsen, *supra* note 195, at 20.

> The balance of power in the criminal justice system is strongly tilted toward the state because of the resources available to the prosecution, including, most significantly, those of the police. A further imbalance is created by the extraordinary discretion the prosecution has regarding who to arrest, what to charge, and what evidence to present.[274]

Thus, while defendants face an uphill battle against the state, the *Strickland* standard entitles them to protection of the bare minimum of legal representation.[275]

When the Court rendered its decision in *Strickland*, it was concerned with creating too strict of standards.[276] The Court feared that a strict standard would stymie the ability for counsel to do their job.[277] As previously mentioned, imposing too regimented of guidelines may create a disincentive for attorneys to take appointments for representing clients.[278] However, if the courts reach a point where any decision an attorney makes can be branded as a strategy shift—such as in the *Bahtuoh* case—it justifies a criminal justice system that, rather than operating to protect a defendant's presumption of innocence, is operating to protect its attorneys.[279] In a profession designed to serve its clients and foster justice, lowering the threshold for effective assistance of counsel is arguably more detrimental to the criminal justice system than heightening its standards.

For the foregoing reasons, the standard for effective assistance of counsel should be strictly guarded. Given that lawyers are "trained in the art of persuasion,"[280] it is logical that an attorney may attempt to absolve her errors and missteps by branding them as strategic deci-

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274. *Id.*; *see also* Duncan, *supra* note 43, at 1701–02 (explaining the existence of a "discernable gap" between defense counsel and counsel for the State).

275. As explained by one scholar, "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither should our courts be respected while they continue to validate trials in which essentially unarmed prisoners are sacrificed to gladiators." Duncan *supra* note 43, at 1701.

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

277. *Id.*

278. *Id.* at 690. Further, restrictive state budgets can also make it difficult to ensure heightened standards for defense attorneys. As explained by one scholar, "states have underfunded the defense to the point that lawyers labor under crippling workloads, where triage is necessary in deciding which cases to aggressively defend, and vigorous representation is available only to those who can afford it and some lucky subset of indigent defendants." Richard E. Meyers II, *The Future of Effective Assistance of Counsel: Rereading* Cronic *and* Strickland *in Light of* Padilla*,* Frye*, and* Lafler, 45 TEX. TECH L. REV. 229, 233 (2012).

279. As explained by one scholar, "[N]either judicial economy nor an overly solicitous attitude toward the psyche of defense attorneys justify diluting a right that is a cornerstone of our adversarial system of justice." 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, 427 (1988).

280. *See* Edenfield v. Fane, 507 U.S. 761, 776 (1993).

sions.[281] While attorneys are not expected to be perfect, they should not be given carte blanche to haphazardly make trial moves without considering the implications of these decisions on their respective clients. Thus, even if the *Strickland* standard includes a strong presumption of reasonableness, the attorney's conduct must still meet the threshold of reasonability. To meet this threshold in a case where an attorney reneges on opening statement promises, the attorney should be able to "identify any benefit to be derived from such a decisional sequence" so the court can "see the combination as part and parcel of a reasoned strategy."[282] Holding attorneys to this minimum standard of reasonableness is necessary to protect defendants from lawyers making erroneous decisions during trial and later branding these decisions as strategy shifts.

In sum, when federal courts are reviewing habeas petitions for ineffective assistance of counsel, exercising too much deference may result in condoning egregious errors by counsel. The detrimental impact that these errors can have on criminal defendants should not be overlooked. As noted by the *Strickland* Court, "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."[283] If the Sixth Amendment is to have meaning in the criminal justice system, then it is vital that defendants are adequately represented.

## V. CONCLUSION

The Eighth Circuit's decision in *Bahtuoh v. Smith* created a split in the federal circuits. As of now, for the Eighth Circuit it is not necessarily ineffective assistance of counsel for a defense attorney to break opening statement promises to have a defendant testify. The Eighth Circuit's decision reaffirms the *Strickland* standard's strong presumption of reasonableness. It also affirms that federal courts must exercise a degree of deference to state court determinations when reviewing claims that arise on habeas petitions. In the process, however, the Eighth Circuit has arguably gone too far in relying on the doubly deferential approach to state court decisions on habeas review. This Note argued that in the absence of such an overly deferential standard, the court could have reasonably reached a different result. This Note further expressed concern that the *Bahtuoh* decision may have negative future implications for criminal defendants. If a point is reached where all errors may be sanctioned as strategy shifts, and fed-

281. Zelnick, *supra* note 10, at 388.

282. Ouber v. Guarino, 293 F.3d 19, 27 (1st Cir. 2002).

283. *Strickland*, 466 U.S. at 685.

eral courts are overly relying on deferential standards of review to conduct their analyses, the safeguards to one's Sixth Amendment right to assistance of counsel may begin to fade.