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Constraining Strickland

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CONSTRAINING *STRICKLAND*

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When a convicted defendant pursues an ineffective assistance of counsel ("IAC") claim on appeal—for example, by alleging that the defense lawyer failed to call an important witness at trial—the defendant must satisfy Strickland*'s two-part test. This requires a showing that (1) defense counsel performed deficiently, and (2) this deficient performance prejudiced the defendant's case.*

The Strickland *test is intentionally difficult for a defendant to satisfy, and courts reject nearly all IAC claims. The primary justification for this is that prosecutors and judges should not have to retry defendants because of defense counsel's errors, as such errors are completely outside the government's control.*

Strangely, however, courts have dramatically expanded Strickland*'s two-part test beyond its original purpose. In addition to using it to analyze defense counsel's performance, courts also use it to blame defense counsel for prosecutorial and judicial misconduct. When a prosecutor cheats or a judge is incompetent, courts turn* Strickland*'s two-part test on the defense lawyer to answer for the failure to object to the prosecutor's misconduct or to educate the judge on the spot, in the middle of trial.* Strickland*, in effect, now requires the defense lawyer to do three jobs in one: his or her own, the prosecutor's, and the judge's.*

This bizarre expansion of Strickland *is not supported by law or logic, and it creates serious problems for defense lawyers. Further, by viewing acts of prosecutorial and judicial misconduct through* Strickland*'s lens—a framework that was never intended to protect prosecutors and judges from their own misdeeds—courts are also harming defendants' chances on appeal and damaging the integrity of the criminal justice system.*

This Article demonstrates how courts have improperly expanded Strickland*, explains the resulting harms, and advocates for clear, simple, and theoretically sound legal reform. That is, courts must hold prosecutors and judges accountable for their own misconduct, rather than diverting blame to the defense lawyer through* Strickland*'s ill-suited IAC framework.*

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I. INTRODUCTION

The criminal defense lawyer's job is, in many ways, incredibly difficult. On a practical dimension, this is best illustrated by comparing the defense lawyer's job to the prosecutor's. On the day of trial, the prosecutor will often marshal a small army to help convict the defendant. This prosecutorial support group may include an assigned victim-witness coordinator to manage the state's trial witnesses, a paralegal on standby at the office to chase down missing items or conduct mid-trial research, an investigating police detective to sit second-chair and assist in all aspects of the trial,[1] a government-paid expert witness to put the gloss of expertise on the prosecutor's arguments,[2] and sometimes even a prosecutor-in-chief—or, in less kind words, a biased judge—to help prosecute the state's case from the bench.[3]

By comparison, many defense lawyers run a solo or small firm practice, and their clients typically have little money for the attorney's fees, let alone for expert witnesses and investigators. The idea of a witness coordinator, an on-call paralegal, or a second-chair at trial is almost unheard of. And even the most optimistic defense lawyer can only hope for an impartial application of the law, but certainly not

1. In my experience, prosecutors nearly always use a detective as "co-counsel" at trial, which courts routinely permit. *See* WIS. STAT. § 906.15(2)(b) (2018) (Exclusion of witnesses from the courtroom during trial does not apply to "[a]n officer or employee of a party which is not a natural person designated as its representative by its attorney.").

2. For example, when a prosecutor contends that the timing or surrounding circumstances of an allegation is evidence of its truthfulness, the prosecutor often calls an expert witness to bless this theory of the case. *See*, *e.g.*, State v. Smith, 2016 WI App 8, ¶¶ 1–6, 366 Wis. 2d 613, 617–21, 874 N.W.2d 610, 611–13 (using a social worker as an expert witness to indirectly vouch for the complaining witness's allegation).

3. Many trial court judges are effectively prosecutors in robes. One example is the trial judge who encouraged the prosecutor to object at various points during the trial, prompting defense counsel to ask, "Judge, do we have two prosecutors here?" Then, whenever the prosecutor would decline to object, the judge would simply "sustain objections never made . . . ." Johnson v. State, 722 A.2d 873, 877 (Md. 1999). For more examples of judges prosecuting from the bench, see Charles Sevilla, *Protecting the Client, the Case and Yourself from an Unruly Jurist*, CHAMPION, Aug. 2004, at 28; Abbe Smith, *Judges as Bullies*, 46 HOFSTRA L. REV. 253 (2017).

pro-defense advocacy, from the bench. Things are even worse for the public-defender attorney, whom the government saddles with a staggering workload and virtually no trial resources. One such defender laments, "We have only nine investigators to handle more than 18,000 felony and misdemeanor cases each year."[4]

Despite this uneven playing field, the criminal defense lawyer must pursue a legally sound theory of the client's case and adequately perform at all phases of trial. Committing a misstep in the trial-preparation stage, the jury selection process, opening statements, cross- or direct-examination, the jury-instruction conference, or closing arguments could subject the lawyer to the defendant's subsequent claim of ineffective assistance of counsel ("IAC").[5] This Sixth Amendment claim is based on, and often accompanied by, a claim that defense counsel violated his or her ethical duties of competence and diligence, among other obligations.[6]

As bleak as this picture is, however, it fails to adequately capture the true difficulty of the defense lawyer's job. In addition to advocating for the client, defense counsel must also monitor the prosecutor and simultaneously perform the role of trial judge. Essentially, the defense lawyer must perform three jobs in one. For example, counsel's failure to immediately object to, and then instantly formulate and request a remedy for, the prosecutor's intentional misconduct at trial will normally subject the defense lawyer to an IAC claim.[7] Similarly, counsel's failure to call immediate attention to the trial judge's errors, and then educate the judge on the spot about the applicable law and how to rule, will also subject the defense lawyer to claims of ineffectiveness.[8]

Holding the defense lawyer accountable for the prosecutor's and judge's misconduct is a philosophically flawed approach, detached from law and logic.[9] Further, this approach creates serious problems for defense counsel,[10] makes it more difficult for the defendant to obtain post-conviction relief for prosecutorial and judicial misconduct,[11] and creates perverse incentives for prosecutors and judges which, in

4. Tina Peng, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html?utm_term=.11f4502876e7 [https://perma.cc/9XG8-5QRX].

5. *See infra* Part II; *see also* Steven Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483, 488–92 (1976) (discussing examples of ineffective assistance at numerous stages of the trial process).

6. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1, 1.3 (AM. BAR ASS'N 2016). These rules are typically adopted, often verbatim, by state supreme courts.

7. *See infra* Section III.B.

8. *See infra* Section III.A.

9. *See infra* Part IV.

10. *See infra* Section V.B.

11. *See infra* Section V.A.

turn, negatively impact the integrity of the criminal justice system.[12] Consequently, this Article advocates for clear, simple, and logical legal reform to correct this deeply flawed approach and the very serious problems it has created.[13]

Part II identifies the *Strickland* two-part test that governs defendants' post-conviction IAC claims. In order to win a new trial, the defendant must show that counsel performed deficiently (for example, by failing to call a defense witness) and that such deficiency prejudiced the case.[14] Part III then demonstrates how courts have greatly expanded this *Strickland* test. It is now commonly used to hold defense counsel responsible not only for his or her own performance, but also for failing to monitor the prosecutor and educate the judge during trial.

Part IV explains how filtering prosecutorial and judicial misconduct through *Strickland*'s IAC framework is completely unjustified by the facts, holding, and legal theory of *Strickland*. Part V then demonstrates the harm to defendants, defense lawyers, and the criminal justice system when *Strickland* is used to blame defense counsel for the actions of unethical prosecutors and judges.

Part VI advocates for a clear, simple, and theoretically sound approach to defendants' IAC claims when such claims are based on acts of prosecutorial and judicial misconduct. The government's misdeeds should *not* be filtered through *Strickland*'s two-part test. Instead, they should be analyzed directly, based on the prosecutor's and judge's own ethical rules and constitutional obligations to the defendant. Finally, Part VII explains the tremendous benefits that would flow from this proposed legal reform.

II. *STRICKLAND*'S TWO-PART TEST

The Sixth Amendment guarantees that every person charged with a crime receives the effective assistance of counsel in his or her defense.[15] The landmark case on point—the case that is cited every day

12. *See infra* Section V.C.

13. *See infra* Parts VI & VII.

14. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

15. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."). Further, "[i]t has long been recognized that the right to counsel is the right to the *effective* assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (emphasis added). For the history and development of the right, see Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 428–40 (1996); Sara Mayeux, *Ineffective Assistance of Counsel Before* Powell v. Alabama: *Lessons from History for the Future of the Right to Counsel*, 99 IOWA L. REV. 2161 (2014) (discussing the history of IAC from the late 1800s through *Powell*, in its various forms and under its various labels); Jennifer Williams, *Criminal Law—The Sixth Amendment Right to Counsel—The Supreme Court Minimizes the Right to the Effective Assistance of Counsel by Maximizing the Deference Awarded to Barely Competent Defense Attorneys*, 28

in post-conviction and appellate decisions throughout the country—is *Strickland v. Washington*.[16] In *Strickland*, the defendant alleged that he received ineffective assistance at the sentencing phase of his case.[17] In deciding whether defense counsel was ineffective, the Court announced its now-famous two-part test:

> *First*, the defendant must show that counsel's performance was *deficient*. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance *prejudiced* the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes *both* showings, it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable.[18]

With regard to the first prong, what constitutes deficient performance depends upon the facts of the particular case and the prevailing norms of professional practice.[19] These prevailing norms are often found in attorney ethics rules and practice guides, such as "The Defense Function" in the ABA Standards for Criminal Justice.[20]

For example, attorney ethics rules require defense counsel to maintain competence in the law,[21] to act diligently on the client's behalf,[22] and to avoid conflicts of interest when representing the client.[23] The ABA guidelines are more specific. With regard to the ethical duty of diligence, for example, the guideline identifies and explains defense

U. ARK. LITTLE ROCK L. REV. 149, 153–65 (2005) (discussing the history of IAC from early English common law through *Nixon*).

16. Strickland, 466 U.S. at 668.

17. *Id.* at 675–76.

18. *Id.* at 687 (emphasis added).

19. Sometimes, however, an attorney's ineffectiveness is caused by the system in which he or she works, which is often the case with state-funded public defender programs and private bar appointments for the indigent. For numerous examples of such systemic problems that result in IAC through no fault of the individual defense lawyer, see Laurence A. Benner, *Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263 (2009); Richard Klein, *The Constitutionalizing of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1452 (1999).

20. *Strickland*, 466 U.S. at 688.

21. *See, e.g.*, WIS. SUP. CT. R. 20:1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

22. *See id.* R. 20:1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

23. *See id.* R. 20:1.7 ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest."). Conflicts of interest can arise in peculiar circumstances. *See* Veronica J. Finkelstein, *Better Not Call Saul: The Impact of Criminal Attorneys on Their Clients' Sixth Amendment Right to Effective Assistance of Counsel*, 83 U. CIN. L. REV. 1215 (2015) (discussing counsel's conflict of interest when representing a defendant with whom counsel conspired to commit a crime).

counsel's duties to investigate the case,[24] to keep the client informed,[25] and to follow discovery procedures,[26] among other obligations.

In *Strickland*, the defendant–respondent alleged that his counsel failed to act diligently and perform competently at the sentencing hearing.[27] More specifically:

> Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts.[28]

The Court analyzed the facts of the case—including what counsel did and did not do and why he acted or refrained from acting—and concluded that "[c]ounsel's strategy choice was well within the range of professionally reasonable judgments . . . ."[29] The defendant's failure on this first prong—whether counsel's performance was *deficient*—doomed his IAC claim.[30] Nonetheless, the Court went on to analyze the second prong.

The Court held, "With respect to the *prejudice* component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile."[31] Worse yet, with regard to the pre-sentence investigation and psychological reports the defendant–respondent said counsel should have obtained, "admission of the evidence respondent now offers might even have been harmful to his case . . . ."[32]

Strickland's two-part test is very difficult for the defendant to satisfy. First, when determining whether defense counsel's performance was deficient, "[j]udicial scrutiny of counsel's performance must be *highly deferential*. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence . . . ."[33]

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24. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-4.1 (AM. BAR ASS'N 1993) https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.pdf [https://perma.cc/76Q4-A2ZX].

25. *Id.* Standard 4-2.1.

26. *Id.* Standard 4-4.5.

27. Strickland v. Washington, 466 U.S. 668, 675 (1984).

28. *Id.*

29. *Id.* at 699.

30. *Id.* at 700.

31. *Id.* at 699–700 (emphasis added).

32. *Id.* at 700.

33. *Id.* at 689 (emphasis added). Some argue that courts have been *too* deferential to defense counsel when evaluating their performance under *Strickland*'s first prong. *See* Stephen F. Smith, *Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515,

And second, because counsel has to make numerous strategic decisions before, during, and even after trial (in cases where there is a conviction), every case will inevitably involve some sort of misstep or sub-optimal decision. Therefore, the court must also find resulting *prejudice* before counsel can be branded as ineffective.[34]

Unfortunately, *Strickland*'s theoretical soundness was soon destroyed in practice. As the next Part explains, courts dramatically expanded *Strickland*'s application in ways that are not only unjustified, but harmful.

III. THE BIZARRE EXPANSION OF *STRICKLAND*

As discussed above, *Strickland*'s two-part test was designed for cases where *defense counsel* allegedly did or failed to do something, thus placing his or her performance outside the range of prevailing norms as dictated by ethics rules and other performance standards. Despite this, and rather bizarrely, courts now routinely apply *Strickland* to shift blame to defense counsel for prosecutorial and even judicial misconduct—two things for which the *Strickland* test was never intended and is ill-suited to do.[35]

This broad application of *Strickland* results in courts finding defense lawyers ineffective based on "claims that [have] little to do with whether or not defense counsel was deficient in the performance of his or her duties."[36] This unfortunate and harmful trend has made "defense counsel the ultimate gatekeeper of all error at the trial level."[37] That is, "Errors of *all parties* to a criminal trial [are] attributable to defense counsel . . . ."[38]

For our purposes, "errors" mean judicial and prosecutorial misconduct. Misconduct is defined as the violation of an ethical duty which,

516–17 (2009) ("For many years under *Strickland*, the Court . . . refused to hold defense attorneys to the minimum standards of conduct prescribed by the legal profession, and blindly deferred to strategic and tactical decisions by counsel.").

34. *Strickland*, 466 U.S. at 687. However, not all forms of IAC claims require a showing of prejudice. *See* Kirchmeier, *supra* note 15, at 427 ("Courts have not required defendants to make the *Strickland* showing of prejudice . . . where defense counsel was not licensed to practice law, where counsel's performance or behavior was extremely egregious, or where counsel had a conflict of interest.").

35. *See infra* Part IV.

36. Jon M. Woodruff, Note, *Plain Error by Another Name: Are Ineffective Assistance of Counsel Claims a Suitable Alternative to Plain Error Review in Iowa?*, 102 IOWA L. REV. 1811, 1820 (2017). Woodruff's note specifically refers to Iowa's refusal to adopt a plain error standard for cases where defense counsel did not object to trial errors, including judicial errors and prosecutorial misconduct. However, the same reasoning also applies in states where plain error review is available but more difficult to satisfy than *Strickland*'s prejudice prong. See *infra* Section V.A. of this Article for further discussion of the incentives behind this blame-shifting to defense counsel.

37. Woodruff, *supra* note 36, at 1835 (discussing Iowa's refusal to adopt a plain error standard for cases where defense counsel failed to object at trial, no matter how justifiable the reason for failing to do so).

38. *Id.* (emphasis added).

in turn, violates the defendant's rights. Because judges have an ethical duty to be competent in the law, judicial misconduct also includes incompetence.[39] The following two Sections provide an example of each form of misconduct (judicial and prosecutorial) and explain how defense lawyers are left "holding the bag" for the government's failures.

A. *Judicial Misconduct*

Harris v. Thompson provides an example of a defense lawyer being held accountable for judicial misconduct when the defense lawyer attempted to call as a witness a six-year-old child, Diante, who was an eyewitness to the alleged crime.[40] Diante was also on the prosecutor's witness list; however, upon realizing that Diante may actually hurt the government's case, the prosecutor craftily "moved to disqualify him as incompetent to testify."[41]

Upon learning of this abrupt change in position, the trial judge *should have* instantly put the prosecutor on the spot by asking: "What did you learn between the date you filed your witness list and today that now leads you to assert that Diante is incompetent to testify?" Instead, the trial judge decided to hold a hearing so the defense could demonstrate Diante's competence.[42]

At the hearing, the defense appeared to meet the burden the trial judge placed on it.[43] Nonetheless, after the defense lawyer established Diante's competency, the judge condescendingly stated that "[d]efense counsel misperceives what the issue is with regard to witness competency . . . ."[44] The judge then determined that Diante was *not* competent to testify, thus leaving the defense unable to call the only eyewitness to the alleged crime.[45]

In reality, it turned out to be the trial judge who "misperceive[d] what the issue [was] with regard to witness competency."[46] Contrary to the judge's over-confident declaration, the applicable trial rule actually *presumes* competency and places the burden "on the party opposing competency" to demonstrate incompetence.[47] Ironically, it was the judge who was incompetent *in the law*, thus violating the ethics rule that "[a] judge shall perform judicial and administrative duties, *competently and diligently*."[48] And while demonstrating his own igno-

39. MODEL CODE OF JUDICIAL CONDUCT r. 2.5(A) (AM. BAR ASS'N 2007).
40. Harris v. Thompson, 698 F.3d 609, 612 (7th Cir. 2012).
41. *Id.* at 616.
42. *Id.* ("[T]he Defense, it's their witness whom they're attempting to call. They shall bear the burden of proof in demonstrating Diante's competency.")
43. *See id.* at 620.
44. *Id.*
45. *Id.* at 620–21 (emphasis added).
46. *Id.* at 620.
47. *Id.* at 613 (emphasis added).
48. MODEL CODE OF JUDICIAL CONDUCT r. 2.5(A) (AM. BAR ASS'N 2007) (emphasis added).

rance, the judge also violated the defendant's constitutional rights, including the right to call witnesses and to present a defense.[49]

Even though the defense lawyer performed his duties effectively by identifying and attempting to call the relevant witness, and despite the trial judge's "glaring failure at the competency hearing,"[50] the appellate court nonetheless turned the *Strickland* standard on defense counsel.[51] The court then blamed counsel "for the failure *to correct the judge's mistake*," thus branding the defense lawyer deficient and, due to the resulting prejudice to the defendant, constitutionally ineffective.[52]

More specifically, the court held that if counsel had properly monitored the trial judge and done his job for him, "it is reasonably likely that Diante would have been allowed to testify."[53] Amazingly, the court reached this conclusion even though the trial judge had already conceded, with surprising candor: "I found Diante not competent to testify, and that would have been . . . my finding *regardless of whether I had articulated the correct burden of proof*."[54]

Not only was the trial judge wrong about the law—and wrong again when he finally applied the correct law to the facts of the case—but he also made it perfectly clear that his errors were immune to correction.[55] Nonetheless, the appellate court declared that this was all defense counsel's fault.[56] The defense lawyer was therefore held accountable and the trial judge suffered no consequence for his failure to understand, and to apply in good faith, incredibly basic procedural law that constitutes an essential part of the judge's job.

B. *Prosecutorial Misconduct*

Shifting gears from judicial to prosecutorial misconduct, an example of a defense lawyer being held to answer for a prosecutor's misdeeds can be found in *Jordan v. Hepp*, in which the jury's verdict was likely to hinge on its determination of witness credibility.[57] Understanding this, the prosecutor made the following argument to the jury:

> Now, the big question here is the credibility. Who do you believe? . . . Somebody's lying. Who is it? [The detective's] going to put her whole career and her future on the line for this case? She does this everyday. She's investigating homicide cases everyday for years.

49. *See* U.S. CONST. amend. VI.
50. Harris v. Thompson, 698 F.3d 609, 637 (7th Cir. 2012).
51. *Id.* at 639.
52. *Id.* at 644 (emphasis added).
53. *Id.* at 640.
54. *Id.* at 621 (emphasis added).
55. *See id.* at 621.
56. *See id.* at 650.
57. Jordan v. Hepp, 831 F.3d 837, 847–48 (7th Cir. 2016).

> Who has the most to lose based on your verdict in this case? Her or him?[58]

The prosecutor's argument "is a textbook case of improper vouching."[59] That is, "By arguing that the detective would lose her job by giving false testimony, the prosecutor 'convey[ed] the impression that evidence not known to the jury'—namely, that the detective would face career repercussions for false testimony—'supports the charges against the defendant.'"[60] In other words, "The prosecutor relied on evidence *not in the record* but that appeared to be within his personal knowledge: that the detective would lose her job if she wasn't telling the truth."[61]

Admittedly, relative to other forms of improper prosecutorial argument, vouching falls near the mild end of the spectrum.[62] Nonetheless, it is a clear violation of black-letter law, and the prosecutor who makes this argument violates his or her ethical duty as "minister of justice,"[63] among other ethical duties.[64] This, in turn, violates the defendant's constitutional rights:

> Due process . . . forbids a prosecutor to urge a jury to rely on evidence that is not in the record, whether that evidence is from newspaper accounts, the Internet, or the prosecutor's own mouth. It requires the jury to be left alone to do its own job, evaluating the evidence the trial judge admitted, and coming to its own independent conclusion (as opposed to one dictated by the prosecutor).[65]

What, then, did the court do when faced with this issue on appeal? It immediately pivoted to the defense lawyer and even identified him, but not the unethical prosecutor, by name: "In Jordan's trial, Bohach failed to object to any of the prosecutor's improper statements. Our first question is whether that failure rendered his performance ineffective under *Strickland*."[66]

Under basic principles of logic and fairness, the prosecutor should be held to answer for his or her own ethical violations. Nonetheless, a court, once again, placed the defense lawyer in its crosshairs for a government agent's misconduct. The prosecutor violated well-established

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58. *Id.* at 847.
59. *Id.*
60. *Id.*
61. *Id.* at 847–48 (emphasis added).
62. *See* Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 896–912 (2018) (discussing ten different types of improper arguments).
63. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2017) ("This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice").
64. *Id.* at r. 3.4(e) ("A lawyer shall not . . . in trial . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to . . . the credibility of a witness . . . or the guilt or innocence of an accused . . . .").
65. *Jordan*, 831 F.3d at 848.
66. *Id.*

law to win a conviction by improper means. However, it was the defense lawyer, not the prosecutor, who was called out by name and told to account for *his* alleged deficiencies in the courtroom: namely, the failure to immediately, on the spot and in the middle of trial, identify, object to, and formulate and request a remedy for the prosecutor's unethical tactics.[67]

IV. SQUARE PEGS, ROUND HOLE

Prosecutors and judges commit misconduct, in countless variations, every day in our state and federal criminal courts. The precise form of the misconduct will change from case to case and ranges from incompetence to blatant, intentional wrongdoing. However, in nearly all cases, it is the defense lawyer who will be blamed for failing to monitor the prosecutor and perform the trial judge's job—all while simultaneously fulfilling counsel's own ethical and professional obligations. This blame-shifting tactic can produce "absurd findings of constitutionally inadequate representation" by defense counsel, especially when the judge's or prosecutor's misconduct (for which counsel is blamed) is extreme.[68]

For example, when a trial judge "made inappropriate comments and threats and assessed repeated fines" against defense counsel *in front of the jury* and then actively "limited the defense's ability to present a case," the defense lawyer was still potentially on the hook "because he did not object to the judge's comments or move for a mistrial."[69] Similarly, a prosecutor "attacked defense counsel in closing argument, calling his opening statement 'a whole-hearted fabrication' and saying either defense counsel 'flat out lied to you' in opening or [the defendant] lied on the stand: 'Either way, I wouldn't believe either of them as far as I can throw them.'"[70] Despite the prosecutor's gross misconduct, the first question in the appellate court's analysis was this: Did defense counsel "object to the prosecutor's closing"?[71]

While such blame-shifting is maddening to the defense lawyer, it is highly beneficial to the prosecutor and judge. Much to their delight, the courts' use of *Strickland*'s IAC framework completely relieves

67. *Id.* at 849–50 (The court remanded the case, *thirteen years* after the trial, for the defense lawyer to explain whether he had "a strategic reason for his failure to object to the [prosecutor's] vouching.").

68. Woodruff, *supra* note 36, at 1812–13 (discussing absurd findings of deficient performance by defense counsel in cases where courts abuse the IAC framework).

69. Oade v. State, 960 P.2d 336, 338 (Nev. 1998).

70. *Improper Closing Argument Earns Prosecutor an OLR Referral, but Doesn't Get Defendant a New Trial*, ON POINT (Sept. 24, 2014), http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/improper-closing-argument-earns-prosecutor-an-olr-referral-but-doesnt-get-defendant-a-new-trial/ [https://perma.cc/4A3N-K4ZC].

71. *Id.*

these government agents of their own ethical obligations.[72] However, using *Strickland* under these circumstances is like trying to jam two square pegs into a round hole. *Strickland* simply was not designed for prosecutorial and judicial misconduct. This is obvious for at least four reasons.

First, the facts of *Strickland* involve defense counsel's alleged failure to fulfill *counsel's own* obligations under the applicable ethics rules, the prevailing standards of practice, and the Sixth Amendment.[73] *Strickland* does not involve counsel's alleged failure to monitor the prosecutor or educate the trial judge, nor does it involve counsel's alleged failure to ensure that these two government agents comply with their own ethics rules, professional standards, and constitutional obligations.[74]

Second, the sources cited in *Strickland*—the ethics rules and ABA practice standards—once again do not address defense counsel's supposed duty to monitor or otherwise referee the presumably competent and impartial magistrate (the trial judge) or the so-called minister of justice (the prosecutor).[75]

Third, the pre-*Strickland* history of IAC cases does not impose a burden on defense counsel to ensure that the prosecutor and judge follow the law.[76] In fact, these pre-*Strickland* cases drew "a fundamental distinction between incompetence claims . . . and outside interference claims" where the problem was caused by the government's action rather than defense counsel's acts or omissions.[77]

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72. *See* Woodruff, *supra* note 36, at 1835–36 (discussing how Iowa's refusal to confront prosecutorial and judicial misconduct not objected to at trial, except through the IAC framework, "ignores the important responsibilities borne by the court and the prosecution").

73. *Strickland* was recently expanded to include defense counsel's performance during the pretrial stages of the criminal process, including plea bargaining. *See* Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1189–90 (2012). It has long applied, of course, to other pretrial obligations. *See* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1108–09 (2004).

74. *See* Woodruff, *supra* note 36, at 1835 (arguing, in the context of Iowa's refusal to adopt the plain error doctrine, that "there are a number of conceivable errors arising from attorney or judicial conduct that would (or should) be difficult to shoehorn into an [IAC] appeal, because they do not implicate a defendant's Sixth Amendment right to counsel").

75. *See* WIS. SUP. CT. R. 20:1.1, 20:1.3, 20:1.7 (on ethics rules). *See* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standards 4-4.1, 4-2.1, 4-4.5 (AM. BAR ASS'N 1993), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.pdf [https://perma.cc/76Q4-A2ZX] (on practice standards).

76. *See generally* Mayeux, *supra* note 15 (discussing the history and origin of modern IAC law which is rooted in defense counsel's failure to perform his or her ethical obligations, not in prosecutorial cheating or judicial bias or incompetence).

77. *See* Maureen R. Green, Comment, *A Coherent Approach to Ineffective Assistance of Counsel Claims*, 71 CALIF. L. REV. 1516, 1520 (1983) (discussing cases in

Fourth, and most significantly, the *Strickland* test is intentionally difficult for the defendant to satisfy, thus making it difficult for him or her to win a new trial.[78] This is because "[t]he government is *not responsible for*, and hence *not able to prevent*, attorney errors that will result in reversal of a conviction or sentence."[79] *Strickland*'s difficult-to-satisfy test therefore ensures that prosecutors and judges are not constantly retrying cases *due to defense counsel's errors*—something that is completely outside the government's control.

However, that same reasoning mandates that *Strickland* not apply to instances of prosecutorial and judicial misconduct—actions that are *within* the government's control. With regard to a prosecutor's misconduct, "because the prosecution is directly responsible" for it, such misconduct is "easy for the government to prevent."[80] The government, therefore, must not be allowed to use *Strickland* to protect the prosecution from itself. In cases of judicial misconduct, the *Strickland* test is a horrible fit for the same reason: the government must not be allowed to use *Strickland* to protect the judge from his or her own incompetence, bias, or other misconduct—things for which the judge is responsible and, therefore, can prevent.

Despite this, whenever a prosecutor or judge breaks the rules—including well-established legal principles and even their own ethics rules—thus violating the defendant's constitutional rights, the appellate courts routinely turn to *Strickland*'s two-part test.[81] This ensures that blame for the prosecutor's or judge's misconduct shifts to defense counsel. In short, the courts' use of the *Strickland* standard means that the defense lawyer must literally do three jobs in one: his or her own, the prosecutor's, and the judge's.

This raises the following question: As long as the defendant gets his kick at a post-conviction cat—some cat, any cat—who cares whether the prosecutor, the judge, or the defense lawyer is held to answer for the misconduct at trial?

V. NATURAL CONSEQUENCES

The answer to the above question—who cares?—is that the defendant cares, the defense lawyer cares, and those interested in the integrity of the criminal justice system care. The practice of cramming acts of prosecutorial and judicial misconduct through *Strickland*'s IAC fil-

which the trial judge committed misconduct that interfered with defense counsel's performance).

78. *See* Kirchmeier, *supra* note 15, at 438–39 (describing the *Strickland* hurdle as "insurmountable" for the defendant).

79. Strickland v. Washington, 466 U.S. 668, 693 (1984) (emphasis added).

80. *Id.* at 692.

81. Woodruff, *supra* note 36, at 1835–36.

ter "is ill-conceived and negatively impacts defense counsel, defendants, and [the] judicial system in general."[82]

A. *Harm to the Defendant*

When the defendant's appellate lawyer files a post-conviction motion or appeal alleging IAC for counsel's failure to monitor the prosecutor or educate the judge, the defendant suffers great harm. One reason is that, as explained earlier, the *Strickland* two-part test was intentionally designed to be difficult for the defendant to satisfy.[83] The reason is that the test is supposed to apply only to defense counsel's errors, thus protecting prosecutors and judges from having to retry cases based on errors completely out of their control.[84]

In fact, the test is so tough to satisfy that defendants rarely get past the first prong on deficient performance.[85] Without deficient performance, of course, there can be no violation of the Sixth Amendment right to the effective assistance of counsel, and the defendant's IAC post-conviction motion or appeal necessarily fails.[86]

For example, assume that the defendant's appellate lawyer alleges IAC for defense counsel's failure to object to the prosecutor's improper closing argument. Under the first prong, the court must give great deference to counsel's judgment and decision-making at that point in time.[87] As long as the defense lawyer had *a reason* for not objecting, the court will accept that reason and will not find deficient

82. *Id.* at 1832 (discussing Iowa's failure to adopt the plain error standard and its use of *Strickland*'s IAC framework for matters unrelated to defense counsel's performance). Woodruff identifies an even more harmful effect—an effect beyond the scope of this Article—of overusing *Strickland*'s IAC framework: "These [Iowa] cases require that trial counsel object based not only on what the law was at the time of the trial, but to accurately predict future developments in the law and to object at trial based on this knowledge of future events." *Id.*

83. *See* Kirchmeier, *supra* note 15, at 438–39.

84. Strickland, 466 U.S. at 693.

85. *See* Mayeux, *supra* note 15, at 2162 ("Although rarely successful, IAC claims now comprise the majority of challenges to criminal convictions in the United States.") (footnote omitted) (citing numerous sources including state and federal statistics); Williams, *supra* note 15, at 168–69 ("The United States Supreme Court has stated that a defense counsel's performance is not deficient if it falls within 'the wide range of reasonable professional assistance.' . . . The *Nixon* decision goes one step further in widening what the courts can determine to be reasonable assistance.").

86. Even when courts find deficient performance, they will often go out of their way to *avoid* finding prejudice to the defendant's case. *See* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 1 UTAH L. REV. 1, 1 (2004) ("Courts rarely reverse convictions for [IAC], even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable.") (citing, among other sources, Kirchmeier, *supra* note 15, at 426–27.).

87. Strickland v. Washington, 466 U.S. 668, 689 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential.").

performance. And in reality, there is nearly always a reason for counsel's failure to object to the prosecutor's improper closing argument.[88]

> [T]he conventional wisdom within the field of trial advocacy is that attorneys should not object during closing arguments "unless things are terrible" . . . . [C]ounsel may be concerned about irritating the judge or jury by interrupting opposing counsel, which can heighten jurors' general tendencies to favor prosecutors over defense counsel. More specifically, defense counsel may be concerned about the jury's likely reaction if her objection is overruled. A trial court decision to overrule an objection . . . may actually encourage the jury to rely on those comments.[89]

Additionally, even if the defense lawyer wants to object, doing so is not easy. While a prosecutor may put a great deal of forethought into an improper closing argument, such cheating often surprises defense counsel in the heat of battle. It is "difficult for defense counsel to quickly identify the problem and raise an objection in seconds at trial. Even if defense counsel is troubled by the prosecutor's comments, these conditions make it difficult for defense counsel to articulate their objections quickly."[90]

The risk and difficulty of objecting serves as a *built-in reason* for courts to deny IAC claims when such claims are rooted in the prosecutor's misconduct. This means that, under *Strickland*'s IAC framework, because the defense lawyer acted within the very wide range of professional norms, his or her snap decision-making at trial cannot be deemed deficient (*Strickland*'s first prong). As a result, the defendant's IAC claim fails, no matter how harmful the prosecutor's misconduct was to the case (*Strickland*'s second prong, which the appellate court rarely reaches).

While it is difficult and risky for defense counsel to object to a prosecutor's misconduct, the levels of difficulty and risk are even greater when correcting a judge in front of the jury for his or her bias, incompetence, or other forms of misconduct. Defense lawyers "are, understandably, loath to challenge the propriety of a trial judge's utterances, *for fear of antagonizing him and thereby prejudicing a client's case*."[91] Once again, this legitimate, built-in reason for not ob-

88. This is true with regard to most IAC claims. *See* Klein, *supra* note 19, at 1459 ("Can't *every* decision that an attorney makes be characterized as part of the lawyer's strategy?").

89. Mary Nicol Bowman, *Mitigating Foul Blows*, 49 GA. L. REV. 309, 357 (2015) (footnotes omitted). The defense lawyer's concern about drawing further attention to objectionable information is supported by empirical evidence. *See* Shari S. Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1592 (2012) (discussing and citing an empirical study on the effect of overruled objections).

90. Bowman, *supra* note 89, at 356 (footnote omitted).

91. Oade v. State, 960 P.2d 336, 338 (Nev. 1998) (emphasis added) (internal citations omitted).

jecting essentially dooms any IAC claim before the appellate court even gets to *Strickland*'s second prong.

Given the near impossibility of satisfying *Strickland*'s first prong, why doesn't the defendant's appellate lawyer simply go after the offending prosecutor or judge directly, instead of targeting defense counsel with *Strickland*'s IAC framework? As explained in Section VI.A. of this Article, this could be the better route, depending on the particular state's law. However, the appellate lawyer's concern is this: when he or she bypasses the defense lawyer and goes after the offending prosecutor or judge directly, the "plain error" doctrine may be invoked.[92]

The potential problem is that the plain error doctrine could, at least *in theory*, be more difficult for a defendant to satisfy than *Strickland*'s second (prejudice) prong.[93] (That will not matter, of course, if the defendant cannot get past *Strickland*'s first prong.) But in practice, these different standards—*Strickland*'s prejudice prong and plain error—are probably distinctions without a difference. In reality, courts often reach their predetermined conclusion to affirm the defendant's conviction and then merely parrot the legal standard after the fact.[94]

Much like *Strickland*'s prejudice prong, plain error tests are worded rather ominously. One author framed the test this way: "[R]eversal on appeal will only occur if" the government's misconduct "seriously affected the fairness, integrity, or public reputation of the proceeding."[95] Other courts have held that "the plain error standard

92. Nearly all states use the plain error doctrine. For the history and purpose of the doctrine, see Woodruff, *supra* note 36, at 1813–18.

93. This is not always the case, however, as some plain error tests appear easier for the defendant to satisfy. *See id.* at 1817 (discussing the Illinois plain error framework which can be satisfied by showing either (1) any severity of error in a close case or (2) a serious error regardless of the strength of the state's case). *See also infra* Section VI.A. for further discussion of plain error.

94. In what should be embarrassing to the courts, they are often in such a rush to affirm the conviction that they will even parrot the *wrong* legal standard. This is true not only in the IAC context, but in other contexts as well. *See, e.g.*, Jensen v. Clements, 800 F.3d 892, 903–04 (7th Cir. 2015) ("Despite this long line of cases establishing the test for harmless error, the Wisconsin appellate court's reasoning reads as though it is conducting an evaluation of whether there was sufficient evidence to support the verdict, not whether the error in admitting [evidence] *affected* the jury's verdict. . . . That is very different than the harmless error test under clearly established Supreme Court law.") (emphasis added) (granting the defendant's petition for a new trial due to appellate court's application of the wrong test); State v. Knapp, 2010 WI App 71, ¶ 5, 325 Wis. 2d 402, 786 N.W.2d 489 ("Knapp argues that the trial court erroneously exercised its discretion in denying his motion for a mistrial by deciding it under the 'manifest necessity' standard. Knapp is correct that the court erred . . . . In addressing Knapp's motion, the court should have determined whether alleged error was *sufficiently prejudicial* to warrant a mistrial.") (emphasis added) (affirming the outcome despite trial court's application of the wrong test).

95. Anthony Flores, *You Can't Say That, or Maybe You Can: An Analysis of Michigan Prosecutor Closing Argument Law*, 88 U. DET. MERCY L. REV. 273, 283 (2010).

additionally requires that [the defendant] 'establish not only that the [government misconduct] denied him a fair trial, but also that the outcome of the proceedings would have been different absent the [misconduct].'"[96] Yet other courts require the defendant to leap a bizarre hurdle of demonstrating that the government's misconduct was somehow unusual, as "[p]lain error review is ordinarily limited to 'blockbusters' and does not 'consider the ordinary backfires—whether or not harmful to a litigant's cause—which may mar a trial record.'"[97]

Quite to the client's detriment, then, defense counsel must perform his or her own duties at trial while simultaneously monitoring the prosecutor and educating the trial judge. Counsel's failure to do all three jobs at once will invoke *Strickland* or, in the alternative, the plain error test—both of which make it incredibly difficult for the defendant to obtain a new trial.[98]

B. *Harm to the Defense Lawyer*

Holding defense counsel responsible for the prosecutor's and judge's performance makes the defense lawyer's job exponentially more difficult than it already is. As explained in Part I, the criminal process is stacked heavily in favor of the state to begin with, and the defense lawyer must perform his or her own trial duties with little or no assistance and few resources. On top of this, doing the job of the prosecutor and the judge can be exhausting, if not impossible. Such responsibilities take up a tremendous amount of time and attention—both before and during trial—that could be better spent planning a defense and focusing on counsel's own obligations.[99]

The preposterousness of this current state of affairs is best illustrated by a sports analogy—nearly any sport will do. Simply put, no legitimate sport would ever implement a set of rules that required one of the teams, or one of the competitors in an individual sport, to (1) play the game and follow its rules, *and* (2) monitor and report the other team's or player's cheating, *and* (3) educate the referee by identifying and correcting all of his or her errors.

A sport that employed this framework could not exist. Using American football as an example, all it took was one missed pass-interference call by one referee in one playoff game to the detriment of one team to cause a league-wide uproar and subsequent off-season

96. United States v. Anderson, 303 F.3d 847, 854 (7th Cir. 2002) (internal citation omitted).

97. United States v. Roberts, 119 F.3d 1006, 1014 (1st Cir. 1997) (internal citation omitted).

98. See *infra* Section VI.A. for further discussion of the plain error test as an alternative to *Strickland*'s IAC test.

99. Time-consuming pretrial measures designed to prevent government misconduct include the motion *in limine*. *See* Cicchini, *supra* note 62, at 923–24 (discussing the use of the motion *in limine* to anticipate and prevent prosecutorial misconduct in closing arguments).

changes in the rules.[100] If only the criminal defense lawyer—who, instead of playing a game against other players on the football field, defends our liberties against government agents in the courtroom—could generate the same collective moral outrage.

In addition to increasing the difficulty of the defense lawyer's job by outrageous proportions—something that also indirectly (if not directly) harms the defendant's chances of success at the jury trial—*Strickland*'s focus on defense counsel instead of the offending government agents creates other, longer-lasting problems for the defense lawyer.

First, courts often take years to decide a defendant's IAC claim.[101] This means that, years after the prosecutor cheats or the judge fails to do his or her job at trial, the defense lawyer will likely have to prepare for and testify at the IAC hearing.[102] This preparation will include locating the client's file, re-reading it and the trial transcript, and attempting to recall his or her decision-making process when failing to object to the government's misconduct years earlier. Attempting to recreate such history takes an enormous amount of time—time that is uncompensated and can be better spent defending current clients.

As an example of the sheer absurdity of this burden, consider a case discussed earlier. In *Jordan v. Hepp*, the defendant was tried in 2003.[103] In closing arguments to the jury, the prosecutor violated ethical obligations and a basic rule of trial practice by vouching for the state's witnesses.[104] *Thirteen years later*, in 2016, the appellate court targeted the defense lawyer: "We instruct the district court to hold a hearing . . . to allow the parties to present evidence about whether [the defense lawyer] *had a strategic reason for failing to object* to the prosecution's improper vouching for the witness's credibility."[105]

100. *See* Andrew Beaton, *After the Infamous Blown Call in New Orleans, the NFL Makes Penalty Reviewable*, WALL STREET J. (Mar. 27, 2019), https://www.wsj.com/articles/after-the-infamous-blown-call-in-new-orleans-the-nfl-makes-penalty-reviewable-11553697887 [https://perma.cc/V3KQ-H5J2].

101. *See* Cicchini, *supra* note 62, at 921.

102. The defense lawyer will usually be subpoenaed to testify as to the reasons for his or her decisions made years earlier at the trial. *See* Richard Van Rheenen, *Inequitable Treatment of Ineffective Assistance Litigants*, 19 IND. L. REV. 159, 160 (1986) ("Obtaining an evidentiary hearing is critical to the success of most ineffective assistance claims.").

103. Jordan v. Hepp, 831 F.3d 837, 841 (7th Cir. 2016).

104. *Id.* at 846 (discussing "the rule providing that a prosecutor may not urge a jury to base its decision on information known to the prosecutor but not presented at trial"). In addition, the case was initially tried in a Wisconsin court, and one of the state's applicable ethics rules is that a lawyer shall not, "in trial . . . assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to . . . the credibility of a witness . . . ." WIS. SUP. CT. R. 20:3.4(e). Further, the state's ethics rule on the special responsibilities of the prosecutor anoints him or her as "minister of justice," a title that "carries with it specific obligations to see that the defendant is accorded procedural justice . . . ." WIS. SUP. CT. R. 20:3.8, ABA cmt. 1.

105. *Jordan*, 831 F.3d at 850 (emphasis added).

(From the defendant's perspective, of course, this thirteen year delay gives new meaning to the phrase "justice delayed is justice denied.")

Second, as explained earlier, most of the time there *is* a reason for defense counsel's failure to object to the prosecutor's cheating or the judge's erroneous trial rulings.[106] As a result, the court will not find defense counsel deficient and the defendant's IAC claim will fail. But what if, at the time the government committed misconduct at trial, the defense lawyer was focusing on his or her own job duties instead of closely monitoring the prosecutor or judge? Or what if, as was likely the case in *Jordan*, it is impossible for counsel to remember what he or she was thinking during that one split second thirteen years earlier?

In cases like this, there is a much greater chance that defense counsel—who is often personally named in the appellate court's published opinion—will be branded as deficient and, therefore, ineffective for the entire legal community and prospective clients to see.[107] Given today's easy access to information through the internet, including social media and attorney-rating websites, this type of unfair branding could be career threatening for a defense lawyer.

Third, the court finding a defense attorney ineffective could lead to the reporting of an ethics violation. That is, except in cases where the judge actively prevented the defense lawyer from being effective,[108] a finding of ineffectiveness is usually strong evidence of the defense lawyer's failure to comply with the ethics rules—typically, the rules requiring competence and diligence. As one appellate court acknowledged when identifying and discussing an attorney's unethical behavior at trial, courts are obligated to report such misconduct.[109] "Therefore," the court held, "we direct the clerk of this court to send a copy of this opinion to the Office of Lawyer Regulation for any action it deems appropriate."[110]

Fourth, regardless of whether the court actually finds the defense attorney ineffective or in violation of the ethics rules, merely being accused of such things can impact the attorney's ability to obtain work. In Wisconsin, for example, the Office of the State Public Defender ("SPD") certifies lawyers for case appointments by the agency.[111] The SPD's application specifically asks, "Have you ever been the subject of *a claim* of ineffective assistance of counsel?"[112]

106. *See supra* notes 88–91 and accompanying text.

107. *See, e.g.*, *Jordan*, 831 F.3d at 850.

108. *See, e.g.*, Oade v. State, 960 P.2d 336, 338 (Nev. 1998) ("Oade argues that the district court judge made inappropriate comments and threats and assessed repeated fines, which . . . limited the defense's ability to present a case . . . .").

109. State v. Mayer, 2014 WI App 110, ¶ 19, 357 Wis. 2d 722, 855 N.W.2d 904.

110. *Id.*

111. *Assigned Counsel Division: General Certification Application*, WIS. ST. PUB. DEFENDERS (Feb. 7, 2010), https://www.wispd.org/images/ACD_Forms/General%20Certification%20Application.pdf [https://perma.cc/SY72-JYD6].

112. *Id.* (emphasis added).

Of course, if the answer to the question did not affect the SPD's decision to certify a lawyer, the SPD would not ask the question in the first place. Similarly, if a finding of ineffectiveness is what mattered, the SPD would not ask whether the attorney has merely "been the subject of a claim" of ineffectiveness.

Fifth, a finding of IAC "may expose an attorney to financial liability."[113] For example, in Iowa, a statute "specifically contemplates civil financial liability for appointed counsel when: (1) a court finds that a conviction occurred because of [IAC]; and (2) the ineffective counsel is the proximate cause of the damage."[114] In addition, states may also recognize "a common law legal malpractice claim that can be asserted against any attorney . . . so the potential for civil liability as a result of [IAC] claims is certainly not limited to appointed counsel."[115]

In sum, applying *Strickland* to situations for which its framework was not intended—specifically, using it to blame defense counsel for the prosecutor's or judge's misconduct—not only makes defense counsel's job far more difficult, but also creates long-lasting, serious consequences for the defense lawyer while the government agent who committed the misconduct typically skates free.

C. *Harm to the System*

Holding defense lawyers accountable for prosecutorial and judicial misconduct also harms the criminal justice system more generally. First, IAC claims usually require a post-conviction evidentiary hearing for the defense lawyer to testify.[116] The reason is that "[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*."[117] As discussed earlier, this takes a great deal of the defense lawyer's time and energy. But he or she is not the only person involved in the process, and IAC hearings consume public resources as well.[118]

Second, filtering prosecutorial and judicial misconduct through *Strickland*'s IAC framework lets prosecutors and trial judges off the hook for their own misconduct, thus creating perverse incentives and even encouraging further misbehavior.[119] This blame-shifting is one reason that appellate courts, when they eventually grow tired of hear-

113. Woodruff, *supra* note 36, at 1833.
114. *Id.* at 1833–34.
115. *Id.* at 1834.
116. *See* Van Rheenen, *supra* note 102, at 160.
117. Strickland v. Washington, 466 U.S. 668, 689 (1984) (emphasis added).
118. *See infra* Part VII.
119. Cicchini, *supra* note 62, at 888–89.

ing appeals rooted in acts of prosecutorial misconduct, pathetically grovel to prosecutors, all but begging them to stop cheating at trial.[120]

For example, after allowing repeated acts of prosecutorial misconduct without consequence, one appellate court again let the prosecutor off the hook while lamenting: "[I]t is disheartening, to say the least, to learn that [the prosecutor] takes 'pride' in our admonitions, apparently because we did not reverse the judgment rendered. We most earnestly urge counsel to reconsider her approach . . . ."[121] One judge described such begging as undesirable "helpless piety."[122]

Of course, there is no incentive for cheating prosecutors to "reconsider [their] approach" when, under *Strickland*'s IAC framework, it is defense lawyers who are held to answer for their *reaction to* prosecutorial misconduct, rather than prosecutors being held to account for their commission of the misconduct in the first place.[123]

Third, it is also likely (though difficult to quantitatively verify) that the public loses confidence in, and respect for, the criminal justice system when judges are ignorant of the law and prosecutors are lawless.[124] Here, once again, an analogy is useful: professional wrestling is considered pure entertainment, rather than a legitimate sport, for good reason.

Fourth, the Supreme Court in *Strickland* even warned, long before courts expanded the two-part test to hold defense lawyers accountable for the government's misconduct, that "intrusive post-trial inquiry into [defense] attorney performance" would be detrimental.[125] Such inquiries 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."[126] These concerns increase, of course, when defense counsel is put under the microscope and criticized for his or her decision-making when faced with an unethical prosecutor or judge. This is a level of intrusiveness the Supreme Court could not even imagine when it decided *Strickland*.

120. *See* United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting).

121. People v. Congious, No. B0202709 (Cal. Ct. App. Dec. 4, 1987).

122. *Antonelli Fireworks Co.*, 155 F.2d at 661.

123. Cicchini, *supra* note 62, at 894.

124. Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431 (2004) (With regard to "incompetent" judges, "These bad judges terrorize courtrooms, impair the functioning of the legal system, and undermine public confidence in the law."); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 958 (1998) (With regard to prosecutorial misconduct, "[T]here is an incalculable cost in damaged integrity [to the judicial system itself] that may be difficult to repair, and which affects the social fabric in a manner that implicates more widespread consequences.").

125. Strickland v. Washington, 466 U.S. 668, 690 (1984).

126. *Id.*

VI. Legal Reform: Allocating Blame

Legal reform for addressing IAC claims—when such claims are rooted in prosecutorial or judicial misconduct rather than true defense-lawyer error—must focus on allocating blame to the offending prosecutor or judge.[127] Defendants' appellate lawyers and the courts have the ability to reform the status quo—each group in its own way.

A. *Using Plain Error*

When a defendant's appellate lawyer sees prosecutorial or judicial misconduct in the trial transcript, the knee-jerk reaction is to invoke *Strickland*'s two-part IAC framework and blame the defense lawyer for failing to object to the prosecutor or educate the trial judge. That is good for the unethical prosecutor and judge, as they are let off the hook for their unethical behavior. However, it is bad for the defense lawyer, and it may actually be bad for the defendant as well.[128] The appellate lawyer may not be doing the defendant any good by attempting to shift blame to defense counsel, as *Strickland*'s IAC framework may actually be more difficult to satisfy than the plain error standard or other standards.

First, recall that IAC claims rarely succeed.[129] And those that do succeed are likely based on true defense-lawyer errors—such as, for example, failing to investigate the case or call a witness—rather than on the counsel's failure to monitor the prosecutor or educate the trial judge during the heat of battle.[130] As discussed earlier, the primary reason for defendants' low success rate is the built-in explanation for

127. Cicchini, *supra* note 62, at 920.

128. *See* Woodruff, *supra* note 36, at 1835 (urging the adoption of a plain error framework because *Strickland*'s IAC framework is of little help to defendants and is unfair to defense counsel).

129. Mayeux, *supra* note 15, at 2162; Bibas, *supra* note 86, at 1; Kirchmeier, *supra* note 15, at 438.

130. Often, even truly deficient performance *by the defense lawyer* is not enough to show prejudice. And if a court refuses to reverse a conviction when "the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable," it is unlikely to do so when the lawyer merely fails to lodge an objection on the spur of the moment and in the heat of battle at trial. Bibas, *supra* note 86, at 1. In a recent, extreme case of attorney misconduct, the Supreme Court of Wisconsin disciplined defense counsel for multiple ethics violations, including the *failure to maintain his law license* during the representation. In addition, the attorney's other ethics violations "prevent[ed] [the defendant] from adequately understanding and participating in his own defense . . . ." State v. Cooper, 2019 WI 73, ¶ 9, 387 Wis. 2d 439, 929 N.W.2d 192. Nonetheless, when it came to finding deficient performance under *Strickland*, the court refused. "It's almost like an Einsteinian multiverse. In one universe the lawyer's misconduct is so awful that he receives consecutive license suspensions. In a parallel universe, where a criminal defendant's due process rights are stake, the same conduct is not bad enough to grant relief." *SCOW: Professional Misconduct Warranting Suspension Does Not Demonstrate Ineffective Assistance of Counsel*, On Point (June 24, 2019), http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/scow-professional-misconduct-warranting-suspension-does-demonstrate-ineffective-assistance-of-counsel/ [https://perma.cc/YRE5-BBYM].

defense counsel's failure to object: it was reasonable trial strategy.[131] Because of this, defendants, unable to prove deficient performance, are doomed by *Strickland*'s first prong and never even get to the prejudice prong. The result: no matter how prejudicial the prosecutor's or judge's misconduct, the defendant loses the IAC claim.

Second, *Strickland*'s second (prejudice) prong—assuming the defendant's IAC claim even makes it that far—might be just as difficult to satisfy as the plain error test. Here, the law varies greatly by state, and appellate counsel will have to carefully research the standards in his or her jurisdiction. The Illinois plain error test, for example, appears on its face to be fairly liberal and easy to satisfy compared to *Strickland*'s second (prejudice) prong.[132] Other states may employ a more difficult-to-satisfy plain error test.[133] Nonetheless, the following intra-state illustration will be helpful.

In Wisconsin, when a defense lawyer fails to object to a prosecutor's improper closing argument, for example, the error is waived, but the appellate lawyer can still attack the prosecutor's misconduct directly under the plain error doctrine.[134] Under this test, the defendant will win a new trial if the prosecutor's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[135] Further, "the existence of plain error will turn on the facts of the particular case. The quantum of evidence properly admitted and the seriousness of the error involved are particularly important."[136] Serious error "may tip the scales in favor of reversal in a close case, even though the same [error] would be harmless in the context of a case demonstrating overwhelming evidence of guilt."[137]

Compare that to *Strickland*'s second (prejudice) prong (assuming the defendant's IAC claim somehow satisfies the first prong). "[T]he defendant must show that the deficient performance [of defense counsel in failing to object or correct the judge] prejudiced the defense.[138] This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[139] Further, the defendant must show by "a probability sufficient to undermine confidence in the outcome" that, "but for counsel's unprofes-

131. *See supra* Section V.A.

132. Woodruff, *supra* note 36, at 1817.

133. *See id.*

134. State v. Cameron, 2016 WI App 54, ¶ 11, 370 Wis. 2d 661, 885 N.W.2d (emphasis added) (citing State v. Davidson, 2000 WI 91, ¶ 88, 236 Wis. 2d 537, 613 N.W.2d 606.).

135. *Id.* at ¶ 18.

136. *Id.* at ¶ 11 (citing State v. Jorgensen, 2008 WI App 60, ¶ 22, 310 Wis. 2d 138, 754 N.W.2d 77).

137. *Id.*

138. Strickland v. Washington, 466 U.S. 668, 687 (1984) (emphasis added).

139. *Id.*

sional errors, the result of the proceeding would have been different."[140]

And to complete the picture, assume defense counsel did everything right at trial: counsel lodged a timely objection to the prosecutor's closing argument and then, in accordance with applicable procedural laws, moved for a mistrial, which the trial court denied. What is the legal standard on post-conviction motion or appeal then? To continue with our intra-state illustration, "A trial court addressing a motion for a mistrial 'must decide, in light of the entire facts and circumstances, whether the defendant can receive a fair trial' despite the claimed error.[141] The court must grant the motion if it determines that the claimed error is sufficiently prejudicial to warrant a mistrial."[142]

Whether read by a lawyer, a linguist, or merely a literate adult, these tests are, at least functionally, indistinguishable. One hinges on whether the trial was "infected . . . with unfairness,"[143] the other two on whether it was a "fair trial."[144] One focuses on the "seriousness of the error,"[145] and another on whether the "errors were so serious."[146] As far as the error's impact, one is concerned with whether the error was "harmless in the context of [the] case,"[147] another asks whether the error was "sufficiently prejudicial" in light of the "entire facts and circumstances,"[148] and another requires a showing that the error "prejudiced the defense."[149]

These supposedly different standards are nothing more than nonsensical distinctions that merely pay lip service to fairness and due process. Given this, the appellate lawyer must ask whether, in the given jurisdiction, there is a true advantage to the client in cramming acts of prosecutorial and judicial misconduct through *Strickland*'s ill-suited, two-step IAC framework.[150] If there is not, then the appellate lawyer may instead choose to go after the prosecutor or judge directly via the plain error doctrine or some other state-specific doctrine.[151]

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140. *Id.* at 694 (emphasis added).

141. State v. Knapp, 2010 WI App 71, ¶ 4, 325 Wis. 2d 402, 786 N.W.2d 489 (internal citation omitted).

142. *Id.*

143. State v. Cameron, 2016 WI App 54, ¶ 18, 370 Wis. 2d 66, 885 N.W.2d 611.

144. *Strickland*, 466 U.S. at 687; *Knapp*, 2010 WI App 71, at ¶ 4.

145. *Cameron*, 2016 WI App 54, at ¶ 11.

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

147. *Cameron*, 2016 WI App 54, at ¶ 11.

148. *Knapp*, 2010 WI App 71, at ¶ 4.

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

150. *See* Woodruff, *supra* note 36, at 1835 (discussing the different goals of the plain error and IAC tests).

151. Once again, the analysis is highly state-law specific and may vary based on the precise type of error alleged and even state-law burden-shifting mechanisms. For example, plain error claims may have the disadvantage of being limited to only certain types of error, but once an error qualifies for the analysis, the burden may shift to the state to prove the error was harmless. *See, e.g.*, State v. Jorgenson, 2008 WI App 60, ¶

If appellate lawyers would consistently use plain error—and, in the process, explain to appellate courts why *Strickland* should not be used to blame defense lawyers for the actions of unethical government agents—the appellate courts might, eventually, do something about prosecutorial and judicial misconduct. As one court warned in the context of repeated prosecutorial misconduct, "If [the improper argument] continues, the appellate courts will be compelled, as appellant's counsel argues, to fashion a special remedy and reverse convictions so obtained to provide an effective means of deterring further misconduct."[152]

On the other hand, if appellate lawyers continue to blame defense lawyers, through *Strickland*, for the government's misconduct, the unethical prosecutors and judges will likely escape responsibility, and appellate courts will likely continue to deny defendants' IAC claims.

B. *Simplifying* Strickland

While the above Section presents a complicated, state- and fact-specific strategic choice for appellate lawyers,[153] true legal reform by the courts would be incredibly easy to implement. In states where the plain error test *is* more difficult to satisfy than *Strickland*'s second (prejudice) prong, state appellate courts can simply continue with *Strickland*, but eliminate its first prong whenever the defendant's IAC claim is rooted in acts of prosecutorial or judicial misconduct as opposed to true defense-counsel errors. This puts all of the focus on the second prong—the harm caused by the prosecutor or judge—thereby incorporating the directness of the plain error standard while maintaining *Strickland*'s easier-to-satisfy test for demonstrating prejudice.

23, 310 Wis. 2d 138, 754 N.W.2d 77. The analysis may also be fact specific. For example, the appellate lawyer might want to *first* ask defense counsel, before filing the post-conviction motion or appeal, why he or she failed to respond to prosecutorial or judicial misconduct at trial. If counsel reveals that he or she remembers the misconduct but made a split-second decision not to object to avoid drawing further attention to the prosecutor's remarks, or to avoid inflaming the already agitated trial judge, such information might factor into the appellate lawyer's decision of whether to pursue IAC or plain error. That is, such information, if revealed at a post-conviction evidentiary hearing, could doom an IAC claim before it even gets to *Strickland*'s second prong, thus making a plain error claim the better option. In addition to IAC and plain error, some states may also offer appellate lawyers a third option for certain types of error: an "interest of justice" claim. *See, e.g.*, State v. Bvocik, 2010 WI App 49, ¶ 1, 324 Wis. 2d 352, 781 N.W.2d 719. This may bring an additional advantage in that the defendant may not have to demonstrate prejudice at all. *See, e.g.*, State v. Hicks, 549 N.W.2d 435 (Wis. 1996). Yet another consideration in choice of claim may be the preservation of post-conviction avenues in federal court once a defendant's state court remedies are exhausted. That topic, however, like many of the other jurisdiction- and fact-specific nuances discussed in this footnote, is beyond the scope of this Article.

152. Briggs v. State, 455 So. 2d 519, 522 (Fla. Dist. Ct. App. 1984).

153. *See supra* note 151 & Section VI.A.

State courts are free to modify *Strickland*'s two-part test, or any other U.S. Supreme Court rule or test, as long as they provide defendants with greater protection than is afforded by the U.S. Constitution.[154] And the reformed *Strickland* standard proposed in this Section would, in fact, provide greater protection. By eliminating the first prong—determining whether defense counsel had a strategic reason for not objecting to the government's misconduct—it reduces the number of hurdles the defendant must leap to obtain a new trial. That is, once a court determines that prosecutorial or judicial misconduct occurred, the court simply determines whether it prejudiced the defendant.[155]

Neither is there anything unique about this proposed legal reform. Courts have already eliminated or modified one of the two *Strickland* prongs under certain circumstances.[156] Courts should extend this practice and eliminate the first prong whenever a judge's or prosecutor's misconduct, as opposed to a genuine defense-counsel error, is at the root of a defendant's IAC claim.

This proposed legal reform is theoretically sound; it recognizes and is based on the ethical and constitutional obligations of prosecutors and judges. For example, if a defense lawyer fails to effectively cross-examine the state's witnesses, he or she violates the ethical duties of competence and diligence which, in turn, implicates the constitutional right to the effective assistance of counsel[157] and the right of confrontation.[158] Likewise, prosecutors and judges also have ethical duties and constitutional obligations to the defendant.[159] Given these independent obligations, instead of reviewing prosecutorial and judicial misconduct indirectly through the defense lawyer and the IAC frame-

154. *See* Klein, *supra* note 19, at 1471 (discussing Hawaii's rejection of *Strickland*).

155. Strickland v. Washington, 466 U.S. 668, 687 (1984). The court must first find that the prosecutor or judge committed misconduct. But the court must do so regardless of whether it analyzes the case under *Strickland* or plain error. In this sense, *Strickland* could be thought of as a three-part test: (1) Did a prosecutor or judge commit misconduct?; (2) Did defense counsel perform deficiently in failing to object and/or seek a remedy?; and (3) Was the defendant prejudiced by defense counsel's deficient performance? Similarly, the plain error test would become a two-part test: (1) Did a prosecutor or judge commit misconduct?; and (2) Was the defendant prejudiced by the prosecutor's or judge's misconduct? This is a generalization, of course, as the plain error standard is state-specific and may incorporate a formal test for the type of error that qualifies for the analysis.

156. *See* Kirchmeier, *supra* note 15, at 440–55 (discussing numerous circumstances in which the defendant is *not* required to satisfy the prejudice prong of the two-part test). Similarly, under the first prong regarding deficient performance, courts have already adjusted their analysis for things *outside of defense counsel's control* that affect his or her decision-making. *See* Klein, *supra* note 19, at 1459 ("limitations of time and money may affect strategic decisions, and . . . these choices are owed deference.").

157. *See Strickland*, 466 U.S. at 688.

158. For more discussion on the constitutional right of confrontation, see generally Crawford v. Washington, 541 U.S. 36 (2004).

159. *See supra* Part III.

work, appellate courts should simply review the government's misconduct directly. This is best illustrated by returning to the fact patterns of two cases discussed earlier.

If, for example, a prosecutor vouches for the state's witnesses during closing argument, the prosecutor violates not only a basic rule of trial procedure[160] but also the ethical duty as a "minister of justice," which includes "specific obligations to see that the defendant is accorded procedural justice."[161] This, in turn, implicates the defendant's constitutional right to due process, among other rights.[162]

Similarly, when a judge fails to understand the statute governing witness competency and prevents a defense witness from testifying,[163] the judge violates a basic rule of trial procedure and the judge's ethical duty of competence in the law (if the judge was genuinely ignorant)[164] or the ethical duty of impartiality (if the judge's "mistake" was actually disguised judicial bias).[165] In turn, this implicates the defendant's constitutional right to present a defense,[166] and, in the case of judicial bias, the due process right to an unbiased tribunal.[167]

Given that judges and prosecutors have their own ethics rules and constitutional obligations, appellate courts have a basis for analyzing judicial and prosecutorial misconduct *independently* of the defense lawyer. Judges' and prosecutors' misdeeds should not be "shoehorned" into the *Strickland* IAC framework or analyzed through defense counsel's ethics rules and constitutional obligations, all of which are separate and distinct.[168]

Prosecutors and judges are likely to oppose the above legal reform, pointing to the contemporaneous objection rule. As one appellate court put it, the defendant (through his or her appellate lawyer) "cannot sing a song to us that was not first sung in trial court" by defense

160. *See* Jordan v. Hepp, 831 F.3d 837, 847 (7th Cir. 2016) (discussing "improper vouching").

161. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2017).

162. *Jordan*, 831 F.3d at 847 ("The Court expresses its concerns about vouching in constitutional terms: 'Due process requires that the accused receive a trial by an impartial jury free from outside influences.'") (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 553 (1976)).

163. *See* Harris v. Thompson, 698 F.3d 609, 612 (7th Cir. 2012).

164. MODEL CODE OF JUDICIAL CONDUCT r. 2.5(A) (AM. BAR ASS'N 2007) ("A judge shall perform judicial and administrative duties, competently and diligently.").

165. *Id.* r. 2.2 (2007) (requiring that "[the] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.").

166. *See* Holmes v. South Carolina, 547 U.S. 319, 331 (2006).

167. *See, e.g.*, Johnson v. State, 722 A.2d 873, 878 (Md. 1999) ("[F]undamental to a defendant's right to a fair trial is an impartial and disinterested judge."); State v. Gudgeon, 2006 WI App 143, ¶ 10, 295 Wis. 2d 189, 720 N.W.2d 114 ("A biased tribunal . . . constitutes a 'structural error.'").

168. *See* Woodruff, *supra* note 36, at 1834–35 (discussing how acts of prosecutorial and judicial misconduct are forced into the IAC framework and blamed on defense counsel).

(trial) counsel.[169] However, the policy behind the general rule that defense counsel must first object at trial to preserve errors for review is *not* implicated when a prosecutor or judge causes the problem.

In other words, the defendant's conviction "will *not* ordinarily be set aside for error not brought to the attention of the trial court" (through objection by defense counsel).[170] "This practice is founded upon considerations of *fairness to the court and to the parties*" as it allows the court to terminate the offending conduct and provide a remedy on the spot.[171] But when the court (the judge) or the opposing party (the prosecutor) commits the misconduct, all considerations of fairness "to the court and to the parties" go out the window.[172] To apply the court's song analogy cited earlier, the prosecutor or judge cannot cause a problem at trial and then later complain of unfairness because defense counsel did not react to the government's misconduct at trial.[173]

Holding judges and prosecutors responsible for their own behavior is a very modest proposal. In fact, there is a strong argument to be made that much more is required of our so-called ministers of justice (prosecutors) and our neutral and detached magistrates (judges). This is particularly true regarding judges. "A trial judge 'does not serve his purpose or function by being merely an umpire, a referee, a symbol, or an ornament.'"[174] Additionally, judges have an obligation to actively protect defendants' rights before and during trial.[175]

However, defense lawyers in the trenches of trial practice know that such lofty proclamations are, at best, illusory. Quite to the contrary, many judges openly and proudly serve as the second prosecutor in the courtroom.[176] Given this harsh reality, this Article advocates for a legal standard whereby judges are merely required to perform as unbi-

169. State v. Rutledge, 600 N.W.2d 324, 325 (Iowa 1999).

170. United States v. Atkinson, 297 U.S. 157, 159 (1936) (emphasis added).

171. *Id.* (emphasis added).

172. *Id.*

173. *See Rutledge*, 600 N.W.2d at 325.

174. Peter A. Joy, *A Judge's Duty to Do Justice: Ensuring the Accused's Right to the Effective Assistance of Counsel*, 46 HOFSTRA L. REV. 139, 140 (2017) (quoting Alfred Gitelson & Bruce L. Gitelson, *A Trial Judge's Credo Must Include His Affirmative Duty to Be an Instrumentality of Justice*, 7 SANTA CLARA L. REV. 7, 8 (1966)); *see also* Patrick S. Metze, *Speaking Truth to Power: The Obligation of the Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH L. REV. 163, 195 (2012) ("[T]he Supreme Court in *Cuyler v. Sullivan* confirmed a long established duty upon the trial court—a duty to the Constitution and a duty to the defendant—to protect the defendant and his right to a fair trial by enforcing this fundamental right of freedom: the right to effective, adequate assistance at all critical stages of the prosecution . . . ."); William W. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980).

175. *See* Joy, *supra* note 174, at 155–56.

176. *See* Sevilla, *supra* note 3 (discussing multiple examples of pro-state advocacy from the bench); Smith, *supra* note 3, at 267–71 (discussing examples of "biased bullies" on the bench); Johnson v. State, 722 A.2d 873, 877 (1999) (judge actively playing role of prosecutor from the bench).

ased umpires or referees—the bare *minimum* the Constitution requires—and defense lawyers are not responsible for educating them and are not held accountable for judicial failures.

Analyzing prosecutorial and judicial misconduct directly, instead of criticizing defense counsel for not properly monitoring the prosecutor or educating the trial judge, removes the defense lawyer from the equation. Such a direct approach goes straight to the source: the unethical prosecutor or judge. Further, as discussed below, implementing this efficient, direct-to-the-point legal reform would produce tremendous benefits; it would solve the numerous problems created by the staggering overuse and gross misapplication of *Strickland*.

VII. The Benefits of Reform

The above-described legal reform is not only simple and easy to implement, but would also produce numerous benefits merely by cutting an unnecessary, counterproductive, and harmful step out of *Strickland*'s two-part IAC framework. This would be accomplished either by appellate lawyers using the plain error test (whenever the state's plain error test is the equivalent of, or easier to satisfy than, *Strickland*'s second prong) or by appellate courts maintaining the *Strickland* framework but eliminating its first prong (whenever the state's plain error test is more difficult to satisfy than *Strickland*'s second prong). There are at least six identifiable benefits to this proposed reform.

First, nothing in this new framework would change defense counsel's options for dealing with prosecutorial and judicial misconduct at trial. Counsel may still object if he or she chooses to do so. Objecting is sometimes wise, as it may terminate the government's misconduct before it causes too much harm, and it also allows defense counsel to request a remedy such as a curative instruction.[177]

Second, while defense counsel may still object if he or she chooses to do so, this new, simplified framework relieves the defense lawyer from the *obligation* to do so. It saves the defense lawyer from having to perform three jobs in one. No longer would defense counsel be held

177. This approach makes more intuitive sense in the case of prosecutorial misconduct than judicial misconduct. *See generally* Cicchini, *supra* note 62, at 913–22 (discussing objecting to a prosecutor's misconduct during closing arguments). Conversely, it may not be reasonable to expect that lodging an objection over judicial misconduct, *to the very same judge that is committing the misconduct*, will bear much fruit. In fact, it could further aggravate the situation. *See* Oade v. State, 960 P.2d 336, 338 (Nev. 1998) (discussing counsel's reluctance to challenge the trial judge "for fear of antagonizing him and thereby prejudicing a client's case"). However, under *Strickland*'s existing two-part test, it may be a necessary step in most circumstances. *See* Section III.A. Therefore, given the current state of the law in many jurisdictions, a legitimate approach for defense counsel at trial is to object to, and request remedies for, all acts of judicial misconduct (as well as prosecutorial misconduct), or the failure to do so could lead to an IAC claim.

accountable, after the fact, for failing to properly monitor the prosecutor's compliance with ethics and trial rules, or for failing to correct and educate the judge in the middle of trial.[178]

Third, under this new, simplified framework, the defendant actually has a chance of winning a new trial based on acts of prosecutorial and judicial misconduct. No longer could the appellate court preserve a marred conviction by invoking defense counsel's reasonable trial strategy when declining to object, or by invoking a (possibly) more-difficult-to-satisfy prejudice standard under the plain error doctrine.[179]

Fourth, eliminating *Strickland*'s first prong—which requires an inquiry, often years later, into defense counsel's thought process at trial—will save defense counsel a great deal of wasted time.[180] It will also save a tremendous amount of court resources that are now being used in an absurd attempt to reconstruct the defense lawyer's thinking several years after the fact. These currently wasted resources include the judge's time, the time and cost of courtroom personnel such as court reporters, and the cost of transporting incarcerated defendants for post-conviction hearings.

Fifth, this new approach would protect defense lawyers from the numerous consequences of IAC claims, including the risk of professional discipline, when such claims are based on the acts of government agents over which defense counsel has no control.[181] Eliminating *Strickland*'s first prong—whether directly by the courts or indirectly through appellate counsel's use of the plain error test in lieu of *Strickland*—rightly places the blame where it belongs: on the judge or prosecutor that violated his or her ethics rules and the defendant's constitutional rights.

Sixth and finally, placing blame where it belongs and analyzing prosecutorial and judicial misconduct directly, instead of through the existing IAC lens, will create highly desirable incentives and deterrents.[182] Once prosecutors realize that their ethics violations will no longer be covered up by *Strickland*'s first prong, but are more likely to result in the reversal of a conviction and the referral of their misconduct to the ethics board, prosecutors will stop breaking the rules. Once judges realize that their incompetence, bias, and other forms of misconduct are more likely to result in a second trial, judges will begin to take an interest in, and responsibility for, their own ethical and professional obligations.

In sum, when the players in the appellate court system stop misusing *Strickland*'s IAC framework to blame defense counsel and sweep prosecutorial and judicial misconduct under the rug, these govern-

178. *See supra* Section III.C.
179. *See supra* Section V.A.
180. *See supra* Section V.B.
181. *See supra* Section V.B.
182. *See supra* Section V.C.

ment agents will begin to comply with their own ethical and professional obligations and will demonstrate more respect for the defendant's constitutional rights.

VIII. Conclusion

Strickland's two-part test was designed to ensure defendants their constitutional right to the effective assistance of counsel. For example, when defense counsel fails to adequately prepare for trial, effectively cross-examine the state's witnesses, subpoena defense witnesses, or make a cogent and logically consistent closing argument, he or she breaches the ethical duties of competence and diligence which, in turn, constitutes deficient performance.[183]

Such allegations of deficient performance may serve as the foundation for a convicted defendant's Sixth Amendment IAC claim. When such a claim is made, the post-conviction or appellate court engages in a two-part analysis: Did defense counsel, in fact, perform deficiently, and, if so, did the deficiency prejudice the defendant? If the answer to both questions is yes, then the court may grant the defendant's IAC post-conviction motion or appeal, and the defendant may get a new trial.[184]

This two-part framework is useful, but it is intended only for *defense counsel's* breach of ethical or professional duties. In fact, *Strickland*'s underlying theory is clear: the two-part test should be difficult for the defendant to satisfy so that judges and prosecutors do not have to retry cases *because of defense counsel's errors*, as such errors fall entirely outside the control of judges and prosecutors.[185]

Unfortunately and bizarrely, however, courts have dramatically expanded *Strickland* to make defense counsel responsible not only for his or her own errors, but also for judicial and prosecutorial misconduct—things that *are directly within the control* of those government agents and are therefore ill-suited to *Strickland*'s two-part test.[186] This unjustified blame-shifting to defense counsel benefits unethical judges and prosecutors by relieving them of their professional obligations, and it causes identifiable and serious harm to defendants, defense lawyers, and the general integrity of the criminal justice system.[187]

This Article proposes an incredibly simple legal reform. Instead of filtering acts of judicial and prosecutorial misconduct through *Strickland*'s ill-suited, two-part IAC framework, the post-conviction and appeals processes should go straight to the source of the problem and analyze judicial and prosecutorial misconduct directly.[188] This new,

183. *See supra* Part II.
184. *See supra* Part II.
185. *See supra* Part IV.
186. *See supra* Part III.
187. *See supra* Part V.
188. *See supra* Part VI.

simplified approach is theoretically sound. Defense counsel need not and should not be held to answer, through *Strickland*'s existing IAC framework, for prosecutorial and judicial misconduct. These government agents *also* have ethical obligations to the defendant, the violation of which also implicates the defendant's constitutional rights.[189] Their actions should therefore be evaluated independent of defense counsel.

This streamlined, direct approach yields several benefits: it relieves the defense lawyer from having to monitor the prosecutor and educate the judge at trial; it gives the defendant a reasonable chance of obtaining relief for prosecutorial and judicial misconduct; it simplifies the post-conviction analysis and saves a tremendous amount of public resources; it protects defense counsel from ethics complaints for ethical violations committed by the prosecutor or judge; and, by placing blame where blame belongs, it provides incentives for prosecutors and judges to follow their own ethical obligations which will restore integrity to the criminal process.[190]

189. *See supra* Part III & Section IV.B.
190. *See supra* Part VI.