PREVENTATIVE PRESCRIPTION FOR THE PREJUDICE PROBLEM: THE IMPOSSIBILITY OF PREVAILING ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AND A COLLATERAL REMEDY

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INTRODUCTION

"A jury consists of [twelve] persons chosen to decide who has the better lawyer."[1] In an ideal world, this quote would have no basis. But in reality, it represents the power that lawyers hold in the determination of a criminal case, separate from the facts and the law. The art and profession of lawyering is dependent on the truth that a case is more than just the alleged facts. A case is the manner in which the facts are introduced—when facts are introduced, how facts are introduced, which facts are introduced, and so much more. The quality of an attorney in a given case is, oftentimes, outcome determinative.

It is important to recognize that lawyers hold the fate of one's life and liberty in their hands. What does this look like from a criminal defendant's perspective? What does it mean to go to prison? To be absent from the lives of your loved ones? To have your rights stripped away? Or worse, to be sentenced to death? No matter the sentence, criminal cases change the trajectory of people's lives.

Recognizing this, it is paramount that lawyers are held to a standard that gives defendants the adequate representation they are entitled to under the law. As established by the Sixth Amendment, criminal defendants possess the right to have a lawyer assist in their defense irrespective of their ability to pay.[2] This guaranteed right applies to both federal prosecutions and state prosecutions.[3] But defendants are not just guaranteed counsel, they are guaranteed counsel that is effective.[4] That is because "if the right to counsel guaranteed by the Constitution is to serve its

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1. Curt Clark, *A Jury Consists of 12 Persons Chosen to Decide Who Has the Better Lawyer.*, THE NEWTOWN BEE: ARCHIVE (July 15, 2005, 12:00 AM), https://www.newtownbee.com/07152005/a-jury-consists-of-12-persons-chosen-to-decide-who-has-the-better-lawyer/ (quoting Robert Lee Frost).

2. U.S. CONST. amend. VI; *Right to Counsel*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/right_to_counsel (last visited Nov. 8, 2023) (explaining the right to counsel and a bit of its history).

3. Gideon v. Wainwright, 372 U.S. 335, 341 (1963).

4. McMann v. Richardson, 397 U.S. 759, 771 (1970).

purpose, defendants cannot be left to the mercies of incompetent counsel[.]"[5] Therefore, "the right to counsel is the right to the effective assistance of counsel."[6]

This sounds achievable, in theory. However, in reality, the right to effective assistance of counsel is not as concrete or tangible as one would hope. In fact, in far too many cases, this right is virtually nonexistent. For instance, a criminal defense attorney in Georgia, who was later disbarred, had admitted to defending a borderline intellectually functioning defendant, Robert Wayne Holsey, "while drinking up to a quart of vodka each evening, the equivalent of about 21 shots."[7] Holsey was convicted and put to death.[8] If the law recognizes that one's intoxication renders them incapable of operating a vehicle,[9] is it logical that the law refuses to recognize that one's intoxication renders them incapable of operating effectively at trial?

This case is just one example in which counsel's actions go far beyond "bad lawyering," yet the defendant's fate remains unchanged. It is worth noting that in a defendant's pursuit of an ineffective assistance of counsel claim, they likely do not seek to prevail on the basis that their attorney was simply mediocre at trial. Considering the state of public defense systems across the United States, it follows that most often, those who pursue ineffective assistance of counsel claims seek recourse because the representation was so abysmal to the point of deprivation of a constitutional guarantee.

Importantly, the purpose of this Note is not to place blame on defense attorneys, who are often overburdened and underpaid. Rather, this Note focuses on the vindication of defendants' rights to a fair and adequate trial in cases where it has been established that their defense attorney acted below a baseline standard of reasonableness. Simply put, a right without a remedy is not a right at all.

Part I of this Note establishes the emergence of the Sixth Amendment's right to effective assistance of counsel in a criminal proceeding and the type of claim to be asserted when this right has been violated. Part I then briefly introduces the threat that exists to that right. Part II outlines the test established in the Supreme Court case *Strickland v. Washington* that must be satisfied in order to prevail on ineffective assistance of counsel claims.[10] Part II also exemplifies the way in which the *Strickland* test has been applied by previous cases. Part III outlines the exceptions to the *Strickland* test as established by *United States v. Cronic*.[11] Part IV explores recent developments in the context of ineffective assistance of counsel claims by the Supreme Court. Part V overviews some of the proposed remedies to the difficulty of prevailing on ineffective assistance of counsel claims. Lastly, part VI of this Note will introduce a proposed remedy for this issue—prevention.

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5. *Id.*

6. *Id.* at n.14.

7. Ken Armstrong, *What Can You Do with a Drunken Lawyer? Not Much. Which May Be Why Robert Holsey is Dead.*, THE MARSHALL PROJECT (Dec. 10, 2014, 10:50 AM), https://www.themarshallproject.org/2014/12/10/what-can-you-do-with-a-drunken-lawyer.

8. *Id.*

9. 36 C.F.R. § 4.23 (2023).

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

11. United States v. Cronic, 466 U.S. 648, 658 (1984).

I. THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defence.*[12]

The Sixth Amendment affords protections to the accused in an effort to achieve a fair system of justice. To achieve this goal, the Supreme Court has emphasized that this fundamental right is essential to fair trials.[13] "Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'"[14]

The right to counsel was only applied to federal prosecutions until 1963.[15] In *Gideon v. Wainwright*, the Supreme Court held that the right also applies to state prosecutions for felony offenses.[16] This right attaches "when the government's role shifts from investigation to accusation" or "after the first formal charging proceeding[.]"[17] The importance of the right to effective counsel has been emphasized by the Supreme Court several times as a core American value. For example, in *Gideon*, the Court noted that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[18] The Supreme Court even went on to say that lawyers are necessities and not luxuries.[19] In *United States v. Cronic*, the Supreme Court stated that "[attorneys] are the means through which the… rights of the person on trial are secured."[20] The establishment of this right was an imperative step towards a more fair and just criminal justice system in America.

A. Ineffective Assistance of Counsel: A Claim for This Constitutional Right

With the guarantee to effective assistance being a well-established constitutional right, convicted criminal defendants can bring ineffective assistance claims when their attorney acted so ineffectively, so as to render them deprived of

12. U.S. CONST. amend. VI (emphasis added).
13. Powell v. Alabama, 287 U.S. 45, 70 (1932).
14. *Cronic*, 466 U.S. at 656 (quoting Cuyler v. Sullivan, 446 U.S. 335, 343 (1980)).
15. Gideon v. Wainwright, 372 U.S. 335 (1963).
16. *Id.* at 342.
17. Moran v. Burbine, 475 U.S. 412, 428-30 (1986).
18. *Gideon*, 372 U.S. at 344.
19. *Id.*
20. United States v. Cronic, 466 U.S. 648, 653 (1984).

their constitutional rights. As one can imagine, ineffective assistance of counsel can occur at any of the numerous stages of the trial process.[21]

There is a seemingly infinite number of ways in which a defense attorney can fall below what would be considered a reasonable standard of lawyering.[22] Erroneous conduct can occur at the pretrial stage. There are several examples. Attorneys could fail to thoroughly investigate the facts to formulate a strong defense; fail to investigate the applicable law; neglect the filing of proper pretrial motions; or engage in inadequate plea bargaining.[23] Erroneous conduct at the trial stage can consist of failing to make an opening or closing statement, failing to introduce key evidence or key witnesses, inadequately cross-examining witnesses, failing to object when proper, conveying inappropriate information to jurors, and so on.[24] Post-trial errors include failing to inform defendants of their right to appeal, failing to file a timely notice of appeal, or even failing to assign proper grounds in a motion for a new trial.[25]

Some of these failures, especially during trial, are endemic. However, it is worth noting here that this isn't always due to carelessness or incompetence. Many instances of faulty lawyering are attributable to a lack of funding and resources. Public defender offices all across the United States have experienced outrageously high caseloads coupled with a serious lack of funding.[26] As noted by New Orleans public defender, Tina Peng, "the constitutional guarantee of effective representation for all has fallen short[]" as a result of the nationwide funding crisis.[27] Further, the consequences of this imbalance can be devastating: "An unconstitutionally high caseload means … that I miss filing important motions, that I am unable to properly prepare for every trial, that I have serious conversations about plea bargains with my clients in open court because I did not spend enough time conducting confidential visits with them in jail."[28]

In 2015, the American Civil Liberties Union ("ACLU") filed a class action lawsuit against the state of Idaho. The lawsuit called upon the court to:

> [F]orce the state to fix its unconstitutional system of public defense, which deprives thousands of Idahoans of their Sixth Amendment right to adequate legal

21. *See generally* Steven Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483, 488-92 (1976) (discussing examples of ineffective assistance at various stages of trial).

22. *Id.*

23. *Id.* at 485-88.

24. *Id.* at 488-92.

25. *Id.* at 492.

26. *See NLADA, BPDA, and ACCD Joint Statement on the New National Public Defense Workload Study*, NAT'L LEGAL AID & DEF. ASS'N (Sept. 12, 2023), https://www.nlada.org/public-defense_workload_study (discussing defender offices calling on state and local governments nationwide to reduce overwhelming caseloads and adequately fund public defense to uphold the Sixth Amendment right to counsel).

27. Tina Peng, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST: OP. (Sept. 3, 2015, 5:13 PM), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken--its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html.

28. *Id.*

> representation and withholds the resources needed by public defenders throughout the state to effectively represent those prosecuted by state government.[29]

Similarly, in 2017, the ACLU and others brought another a class action against the state of Missouri over the state's "disastrous" public defender system.[30] Anthony Rothert, Legal Director at the ACLU of Missouri, went so far as to say, "[t]his chronic underfunding has resulted in an equally chronic constitutional crisis in Missouri that has cost the livelihood of thousands of Missourians who are denied justice because their attorneys couldn't devote the necessary time or resources to their cases."[31]

The unsettling condition of the public defender systems in the United States is even more unsettling when put in the context of this Note. Ineffective assistance of counsel claims are supposed to provide relief for the unfortunate defendants that fall victim to ineffective counsel. And as established, there are not only innumerable opportunities under which defense counsel can devastate a case, but also an underfunded public-defense system in need of resources. This lack of adequate counsel is one of the primary reasons that the virtual impossibility of prevailing on ineffective assistance of counsel claims is so troubling.

II. THE *STRICKLAND* STANDARD

The Supreme Court established the current standard for adequate representation under the Sixth Amendment in 1984.[32] That case, *Strickland v. Washington*, established a two-prong test.[33] The first prong, known as the performance prong, examines "whether counsel's performance is deficient under the circumstances, with performance being measured under the standard of prevailing professional norms[.]"[34] The second prong, known as the prejudice prong, looks at "[w]hether the lawyer's supposed subpar conduct affected, with reasonable probability, the trial's outcome[.]"[35] To determine the answer to this inquiry, the court applies a but-for causation analysis. Essentially, the lawyer's conduct affected, with reasonable probability, the trial's outcome if "but for counsel's unprofessional errors, the results of the proceeding would have been different[.]"[36] "A defendant who is unable to [satisfy the prejudice prong] is not

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29. *ACLU Sues Idaho Over Defective Public Defense System*, ACLU: PRESS RELEASES (June 17, 2015, 10:45 AM), https://www.aclu.org/press-releases/aclu-sues-idaho-over-defective-public-defense-system.

30. *ACLU Sues Missouri Over Disastrous Public Defender System*, ACLU: PRESS RELEASES (Mar. 9, 2017, 12:30 AM), https://www.aclu.org/press-releases/aclu-sues-missouri-over-disastrous-public-defender-system.

31. *Id.*

32. *Amdt6.6.5.6 Prejudice Resulting from Deficient Representation Under Strickland*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-6/prejudice-resulting-from-deficient-representation-under-strickland (last visited Nov. 8, 2023).

33. Strickland v. Washington, 466 U.S. 668, 687 (1984).

34. *Right to Counsel*, *supra* note 2.

35. *Id.*

36. *Id.*

entitled to any remedy, even when their rights have technically been infringed."[37] Notably, the Court in *Strickland* pointed out that in the evaluation of ineffective assistance, a court must award trial counsel with a high level of deference and even "indulge a strong presumption that counsel's performance was within the wide range of reasonable professional assistance."[38]

While it is generally easy to satisfy prong one, the second prong has proven to be a high hurdle.[39] This prong presents two practical problems—it has proven itself to be both far too discretionary, and much too difficult of a burden to overcome. In the nearly forty years since *Strickland*, the disparate effect the prejudice test has had on cases completely undermines the criminal justice system.

For example, in *McFarland v. Texas*, defense counsel had slept through the majority of the trial.[40] Counsel stated that the reason he had slept through most of the trial was because he found it "boring."[41] He also stated that he was seventy-two years old and he would "customarily take a short nap in the afternoon."[42] The trial judge had noticed very early on that the defense attorney was in-and-out of sleep, and the judge therefore decided to appoint co-counsel with no capital experience.[43] The fact that co-counsel was present and awake made it so that McFarland could not prevail on his appeal.[44] Regardless of the fact that there wasn't any physical evidence tying the defendant to the crime, the lead attorney barely consulted with co-counsel, and the defense put on no evidence, there was an inexperienced attorney present who was not in dreamland.[45] This compelling collection of contrary evidence was insufficient to satisfy the prejudice prong and save McFarland from death row.[46]

In *People v. Garrison*, defense counsel was an alcoholic who, during trial, "drank in the morning, during court recesses, and throughout the evening."[47] The

37. Aziza Asad, *Shifting the Burden: Presuming Prejudice for Failing to Contact an Alibi Witness*, 54 SUFFOLK U. L. REV. 319, 325-26 (2021).

38. *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, OPEN SOC'Y FOUND.: PUBL'N: THE CONST. PROJECT 39 (Apr. 2009), https://www.opensocietyfoundations.org/publications/justice-denied-americas-continuing-neglect-our-constitutional-right-counsel (quoting *Strickland*, 466 U.S. at 689).

39. *See, e.g.*, Hill v. Lockhart, 474 U.S. 52, 57 (1985) (stating the Court ruled that the petitioner's allegation that he received ineffective assistance of counsel due to counsel's erroneous advice regarding parole eligibility was insufficient to satisfy the prejudice prong of the *Strickland* test. The Court explained that petitioner must have asserted that he would not have decided to plead guilty, and that he would have instead insisted on going to trial if counsel had informed him correctly of his parole eligibility date).

40. McFarland v. State, 928 S.W.2d 482, 505 (Tex. Crim. App. 1996); Ex parte McFarland, 163 S.W.3d 743, 752 (Tex. Crim. App. 2005).

41. Keri Blakinger, *Judge Rejects Appeal from Houston Prisoner Whose Lawyer Slept During Trial*, HOUS. CHRON.: NEWS HOUS. & TEX. (Apr. 8, 2019, 5:30 PM), https://www.chron.com/news/houston-texas/article/Judge-rejects-appeal-from-Houston-death-row-13751264.php#photo-14373952.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Ex parte McFarland, 163 S.W.3d 743, 760 (Tex. Crim. App. 2005).

47. People v. Garrison, 765 P.2d 419, 440 (Cal. 1989).

attorney was even arrested on the second day of trial "for driving to the courthouse with a .27 blood-alcohol content."[48] The court found that "mere" alcohol dependency is not enough to render defense counsel incompetent for purposes of ineffective assistance of counsel because "there was no evidence that his courtroom performance was adversely affected or his judgment impaired."[49] The logic that because there is no evidence of adverse effects in performance or judgment impairment, they are effective, although drunk, is flawed. This argument would be preposterous in the context of operating a vehicle while intoxicated, yet it is somehow considered acceptable when made by the court.

In *Smith v. Ylst*, defendant's ineffective-assistance-of-counsel claim failed because he did not show "specific errors" that prejudiced him.[50] In that case, defense counsel's behavior was completely erratic. Counsel's investigator stated that he had "smoked marijuana one evening during the course of the trial and that while discussing the case he fluctuated between laughter and stupor."[51] Defense counsel had told his secretary that "he was crazy and wanted to go to an insane asylum."[52] He also accused his own associate of being part of a conspiracy and trying to take over his practice.[53] Lastly, psychiatric reports concluded that defense counsel "exhibited a paranoid psychotic reaction."[54] In response to counsel's behavior, the prosecuting attorney stated that "[the defense attorney] acted no differently than any other criminal defense attorney."[55] The motion for a new trial was denied by the trial court because "even if [defense counsel] was having some kind of breakdown, the record and my recollection do not show any way in which the trial was distorted or the effectiveness of defense counsel was impaired by whatever condition he had."[56] Again, this reasoning, which boils down to "he seemed fine to me," leaves much to be desired.

These cases exemplify the fact that the test established by *Strickland* is too flimsy. At bottom, sporadic, faulty reasoning is routinely upheld as sufficient to satisfy the *Strickland* standard. There is simply too much discretion. As Justice Thurgood Marshall noted in his *Strickland* dissent, "[the first prong (the performance prong)] is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts."[57] Justice Marshall's opinion of the prejudice prong is, as imaginable, much more critical. He cites two reasons. First, he notes the difficulty of ascertaining if a "trial in which [the defendant] was ineffectively represented would have fared better if his lawyer had been

48. *Id.*
49. *Id.* at 441.
50. Smith v. Ylst, 826 F.2d 872, 876 (9th Cir. 1987).
51. *Id.* at 874.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* (internal quotation marks omitted).
57. Strickland v. Washington, 466 U.S. 668, 707 (1984) (Marshall, J., dissenting).

competent."[58] He continued on to say that "it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer."[59] Justice Marshall's second objection to the prejudice prong rested upon his contention that the constitutional guarantee of effective assistance of counsel "also functions to ensure that convictions are obtained only through fundamentally fair procedures."[60] Further, Justice Marshall said that the satisfaction of the first prong, "a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards[,] requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby."[61]

III. PER SE PREJUDICE

There are, surprisingly, cases in which defense counsel's conduct is so egregious that the prejudice prong of the *Strickland* test is per se satisfied. Per se, in this case, can be defined as automatically. In *United States v. Cronic*, *Strickland*'s companion case decided in 1984, the Court held: "[t]here are … circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[62]

> *Cronic* notes four situations where courts have found per se ineffectiveness: (1) where there has been a "complete denial of counsel"; (2) where the accused is denied the presence of counsel at "a critical stage," such as arraignment; (3) "[when] counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (4) where circumstances are so prejudiced against the defendant that competent counsel could not render effective assistance.[63]

One well-established circumstance in which courts will find per se prejudice is when defense counsel is not licensed to practice law.[64] Courts reason that since the counsel had not met the substantive requirements for bar admission, the defendant was deprived of actual legal representation.[65] However, this per se prejudice finding can be said to actually be "an extension of the requirement that

58. *Id.* at 710.

59. *Id.*

60. *Id.* at 711.

61. *Id.* at 712.

62. United States v. Cronic, 466 U.S. 648, 658 (1984).

63. Moody v. United States, 2010 U.S. Dist. LEXIS 37572, at *11 (quoting *Cronic*, 466 U.S. at 659-61).

64. *See* United States v. Novak, 903 F.2d 883, 886 (2d Cir. 1990) (finding per se prejudice because defense counsel was not licensed to practice law. Defense counsel obtained admission to the bar through fraudulent means). *See also* State v. Newcome, 577 N.E.2d 125, 126 (Ohio Ct. App. 1989) (finding violation right to effective counsel and requiring reversal where counsel was suspended from the practice of law).

65. *Id.* at 887.

criminal defendants have an attorney," rather than an exception to the *Strickland* test.[66]

Another well-established circumstance where courts generally hold that no showing of prejudice is required is "in cases where a defendant's ineffective assistance of counsel claim is based on the argument that the defendant was denied representation or access to counsel[.]"[67] A showing of prejudice was not required in *Geders v. United States*, where the defendant was denied access to counsel during a seventeen-hour overnight recess during trial.[68] Similarly, in *Penson v. Ohio*, defendant was denied appointment of counsel on appeal after the court granted his appellate counsel leave to withdraw from representing his client without filing a proper brief.[69]

In cases where defendant has received representation, defense counsel's behavior may still be egregious enough to be per se prejudicial. Examples of instances where courts found defense counsel's behavior to be egregious enough to be considered per se prejudicial have included: counsel being present at trial but refusing to participate, counsel failing to file an appellate brief or filing an especially deficient one, and counsel failing to file an appeal at all.[70] During closing arguments in *United States v. Swanson*, the defense attorney pointed out inconsistencies in the witness testimony and stated to the jury "I don't think it really overall comes to the level of raising reasonable doubt."[71] He continued, "the only reason I point this out, not because I am trying to raise reasonable doubt now, because again I don't want to insult your intelligence."[72] The conclusion of the defense attorney's closing argument included a seemingly indifferent stance, telling the jurors not to "ever look back" and agonize on the decision should they find his client guilty.[73] The court found that defense counsel had effectively abandoned his client at a critical stage of the trial and, therefore, was per se prejudicially ineffective.[74] Another disturbing example of egregious behavior

66. 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, 446 (1996).

67. *Id.* at 443.

68. Geders v. United States, 425 U.S. 80, 91 (1976).

69. Penson v. Ohio, 488 U.S. 75, 78 (1988). *See also* Garland v. Cox, 472 F.2d 875, 879 (4th Cir. 1973) (explaining that where defendant shows late appointment of counsel, court presumes ineffective assistance of counsel), *cert. denied*, 414 U.S. 908, 908 (1973).

70. Kirchmeier, *supra* note 66, at 441. *See* Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (finding the Petitioner was per se prejudiced where counsel failed to consult with petitioner, had no knowledge of the facts, and acted merely as a spectator by failing to make any comment during the entire hearing, evidenced by the transcript). *See also* Siverson v. O'Leary, 764 F.2d 1208, 1216 (7th Cir. 1985) (holding that the defendant does not have to make a showing under Strickland prejudice prong where counsel was absent during jury deliberations and the return of the verdict); Reyes-Vasquez v. United States, 865 F. Supp. 1539, 1543 (S.D. Fla. 1994) (holding that prejudice was presumed when counsel did not participate in trial because he believed that an appeal of his pretrial motions would be successful).

71. United States v. Swanson, 943 F.2d 1070, 1071 (9th Cir. 1991) (internal quotation marks omitted).

72. *Id.*

73. *Id.*

74. *Id.* at 1075.

constituting per se prejudice is found in *Frazer v. United States*. Defense counsel in *Frazer* verbally assaulted the defendant, including a racial slur, and threatened to be ineffective if the defendant insisted upon going to trial.[75] The court found that, taking the alleged threat to be true, it constituted a constructive denial of counsel.[76]

It may seem obvious that such egregious behaviors as seen in the previous examples are prejudicial. However, it is worth noting that while these behaviors were found to be per se prejudicial in those cases, under the discretionary framework of the *Strickland* test, some of those same behaviors can be found to be permissible.

Prejudice is not required to be shown for ineffective assistance violations where defense counsel had a conflict of interest in the matter if there was an objection made in that regard during trial.[77] Under *Holloway v. Arkansas*, "cases where an objection was made at trial to a conflict of interest and the trial judge failed to adequately address the alleged conflict, reversal is automatic without a showing of prejudice[.]"[78] When the conflict of interest of defense counsel is not raised during trial, only a limited presumption of prejudice is applied when the conflict has an adverse impact under the *Cuyler v. Sullivan* standard.[79] Under the *Cuyler* standard, the defendant must show that an actual conflict of interest existed that adversely affected the attorney.[80] The "adverse effect" requirement requires a likelihood that "counsel's conduct of particular aspects of the trial or counsel's advocacy on behalf of the defendant[]" was affected by the conflict.[81]

In sum, cases where courts have found defense counsel's conduct to automatically satisfy the prejudice prong of the *Strickland* test can be generally categorized into the following categories: "(1) cases where the defendant had no counsel or outside circumstances effectively prevented a defendant from having counsel; (2) cases where counsel was not admitted to the bar; (3) cases where counsel's performance or behavior was extremely egregious; and (4) cases where counsel had a conflict of interest."[82]

IV. TREND FORECASTING THE STATE OF INEFFECTIVE ASSISTANCE CLAIMS

In 2022, the Supreme Court further cemented the flimsiness of the *Strickland* test. In *Andrus v. Texas*, a state habeas court recommended that the defendant's death sentence be vacated "after an [eight]-day hearing that uncovered a plethora of mitigating evidence that trial counsel had failed to investigate or present."[83] The

75. Frazer v. United States, 18 F.3d 778, 780 (9th Cir. 1994).

76. *Id.* at 788.

77. Kirchmeier, *supra* note 66, at 450.

78. *Id.*

79. *Id.*

80. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980).

81. Kirchmeier, *supra* note 66, at 454 (quoting Frazer v. United States, 18 F.3d 778, 787 (9th Cir. 1994)).

82. *Id.* at 441.

83. Andrus v. Texas, No. 21-6001, slip op. at 1 (U.S. June 13, 2022) [hereinafter *Andrus II*] (Sotomayor, J., dissenting).

state habeas court found that the defendant had received ineffective assistance of counsel.[84] The Court of Criminal Appeals of Texas then reversed, and the Supreme Court summarily vacated and remanded.[85] The Supreme Court "held that [defense] counsel had rendered constitutionally deficient performance… based on an apparent tidal wave of compelling and powerful mitigating evidence in the habeas record, none of which counsel presented to the jury…[and] several specific failures to investigate and rebut the State's case in aggravation."[86] This finding by the Supreme Court surely is compelling. However, the Court of Criminal Appeals of Texas promptly failed to follow the Supreme Court's directive. On remand the court held, in a 5-4 decision, that "[the defendant] failed to establish prejudice (and therefore denied habeas relief) based on its disagreement with, and rejection of, the determinations underlying [the Supreme Court's] holding that Andrus' counsel had rendered deficient performance."[87] Unfortunately, as a result, the petition for a writ of certiorari was denied by the Supreme Court because, although "the Texas court's opinion was irreconcilable with [the Supreme Court's] prior decision[,]" it was "barred by vertical *stare decisis* and the law of the case."[88]

The procedural posture of *Andrus* alone is indicative of a serious issue in this area of the law. The holding of the Court of Criminal Appeals is entirely preposterous and outright incorrect. Justice Sotomayor went as far as to state in her dissent that this case "cries out for intervention."[89] Unfortunately, this case is just one of many that demonstrates the dreadful state of the Sixth Amendment right to effective assistance of counsel.

Improvements in this flawed area of the criminal justice system do not appear to be on the horizon. *Andrus* is a case that is demonstrative of what is currently being accepted and occurring in American courts.[90] The fact that such a case had played out this way, as recently as 2022, and in the Supreme Court no less, is cause for alarm for three reasons. First, it makes it reasonable to assume that situations like this are commonplace. Second, of the many similar cases, the majority of them are not litigated all the way up to the Supreme Court. Third, of the convictions that are challenged on appeal, *Andrus* reveals that even if there is a compelling case, it is near impossible to prevail. Most people do not get as many chances as the defendant did in *Andrus*. For such a stark example of ineffectiveness to be acknowledged and scrutinized by members of the Supreme Court, and the conviction upheld, leaves little hope.

This negative forecast on the direction of ineffective assistance of counsel claims also arises from another recent Supreme Court case, *Shinn v. Ramirez*.[91]

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84. *Id.*

85. Andrus v. Texas, No. 18-9674, slip op. at 2 (U.S. June 15, 2020) [hereinafter *Andrus I*] (per curiam).

86. *Andrus II*, slip op. at 2 (Sotomayor, J., dissenting) (internal quotation marks omitted).

87. *Id.*

88. *Id.* (emphasis in original).

89. *Id.*

90. *Andrus II*, slip op. at 2 (Sotomayor, J., dissenting).

91. Shinn v. Ramirez, 142 S. Ct. 1718, 1728 (2022).

The effect of this case increases the difficulty of proving the second prong of the *Strickland* test for ineffective assistance of counsel claims with evidence.

A. Ineffective Assistance of Counsel Claims Foreclosed from Review

Why is it so hard to prevail on an ineffective assistance claim? Oftentimes, simply because the critical evidence, or even the claim itself, is foreclosed from review.

Before getting to *Shinn v. Ramirez*, we must first recognize the precedent that was set forth in *Martinez v. Ryan* and *Trevino v. Thaler*, decided in 2012 and 2013, respectively.[92] As a rule, if a state prisoner has a federal claim, it must first be presented "to the state court in accordance with state procedures."[93] If the prisoner "fail[s] to do so, and the state court would dismiss the claim on that basis, the [federal] claim is procedurally defaulted[]" and will not be considered by a federal court.[94] Procedural default can, however, be overcome if the prisoner "demonstrate[s] cause to excuse the procedural defect and actual prejudice if the federal court were to decline to hear this claim."[95] The Court in *Shinn*, directly referencing *Martinez*, stated "that ineffective assistance of postconviction counsel is cause to forgive procedural default of an ineffective-assistance-of-trial-counsel claim, but only if the State required the prisoner to raise that claim for the first time during state postconviction proceedings."[96] The Court in *Trevino* added to the idea established by *Martinez*, and held that this exception for ineffective assistance of counsel claims "applies if the State's judicial system effectively forecloses direct review of trial-ineffective-assistance claims."[97] *Martinez* and *Trevino* "provided a critical safeguard for defendants sentenced to death who had deficient lawyers both at trial and in postconviction proceedings."[98]

Shinn is about the cases of two men, Barry Jones and David Ramirez, who "received constitutionally ineffective assistance at trial[]" and were sentenced to death in Arizona.[99] Jones's trial lawyer failed to investigate and present salient evidence, including evidence that the victim may have been injured at an earlier time by someone else.[100] Under Arizona law, a defendant can only challenge the ineffectiveness of his trial lawyer at the state postconviction review stage.[101]

92. Martinez v. Ryan, 566 U.S. 1 (2012); Trevino v. Thaler, 569 U.S. 413 (2013).

93. *Shinn*, 142 S. Ct. at 1728.

94. *Id.* (internal quotation marks omitted).

95. *Id.* (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)) (internal quotation marks omitted).

96. *Id.* at 1733 (citing Martinez v. Ryan, 566 U.S. 1, 9 (2012)) (internal quotation marks omitted).

97. *Id.* (citing *Trevino*, 569 U.S. at 431-32).

98. *Supreme Court Restricts Review of Ineffective Assistance of Counsel Claims in Death Penalty Cases*, EQUAL JUST. INITIATIVE: NEWS (May 25, 2022), https://eji.org/news/supreme-court-restricts-review-of-ineffective-counsel-claims-in-death-penalty-cases/ [hereinafter *Supreme Court Restricts Review*].

99. *Id.*

100. Jones v. Shinn, 943 F.3d 1211, 1236 (9th Cir. 2019).

101. *Supreme Court Restricts Review*, *supra* note 98.

Jones's court appointed postconviction lawyer failed to investigate and failed to raise a claim for ineffective assistance of the trial lawyer.[102] In federal habeas proceedings, Jones was finally—for the first time—appointed competent counsel. Jones's new defense attorney presented evidence that his previous two attorneys failed to set forth.[103] The federal court ruled that Jones's trial and both of his postconviction lawyers were ineffective and, therefore, granted him a new trial.[104]

Similarly, Ramirez's trial lawyer failed to investigate and present critical evidence. Ramirez's trial lawyer failed to present evidence of Ramirez's intellectual disability, failed to provide relevant and potentially mitigating evidence to the psychologist who evaluated Ramirez, and subsequently relied on the psychologist's report, despite possessing contrary facts.[105] His postconviction lawyer also failed to investigate and did not raise the claim for ineffective assistance of the trial lawyer.[106] When Ramirez's appointed counsel finally presented the evidence in federal habeas proceedings, the Ninth Circuit held that the evidence was substantial and ordered an evidentiary hearing.[107]

The Antiterrorism and Effective Death Penalty Act ("AEDPA") is "a federal law passed in 1996 that severely restricts incarcerated and death-sentenced people's access to federal habeas corpus review[.]"[108] The prosecutors in both cases filed appeals based on the argument that a federal court is barred from considering any evidence that was not in the underlying state-court record due to AEDPA, regardless of the fact that the ineffective-assistance claim is allowed to be raised in federal court as established in *Martinez* and *Trevino*.[109]

The Supreme Court ruled in favor of the government, holding "that a federal court may not consider new evidence outside the state-court record in deciding whether the state violated a person's Sixth Amendment right to effective assistance of counsel at trial."[110] This ruling is devastating for those asserting ineffective assistance claims arising out of counsel's failure to present salient evidence at trial. Justice Sotomayor, in her dissent, clearly articulated the obvious flaw: "Ineffective-assistance claims frequently turn on errors of omission: evidence that was not obtained, witnesses that were not contacted, experts who were not retained, or investigative leads that were not pursued."[111] *Shinn* tilts the criminal justice system in the exact opposite direction. *Martinez* recognized that "the evidentiary basis for a claim of ineffective assistance…often turns on evidence outside the trial record."[112] And yet, that crucial consideration is completely disregarded by this

102. *Id.*
103. *Id.*
104. *Id.*
105. Ramirez v. Ryan, 937 F.3d 1230, 1244-45 (9th Cir. 2019).
106. *Id.* at 1248.
107. *Id.*
108. *Supreme Court Restricts Review*, *supra* note 98.
109. *Id.*
110. *Id.*
111. Shinn v. Ramirez, 142 S. Ct. 1718, 1746 (2022) (Sotomayor, J., dissenting).
112. Martinez v. Ryan, 566 U.S. 1, 12 (2012).

ruling. A few short years later, these errors of omission are now foreclosed from federal court review.

V. EXISTING PROPOSALS

Since the Supreme Court's ruling in *Strickland* in 1984, there have been dozens of law review articles and works written in direct criticism of the test it established. And with that, there have been many different proposals for a more reasonable standard. The *Strickland* test and the effect that it has had on cases throughout the years is highly saturated with criticism and yet, the trend in this area of the law is somehow moving in the direction of more narrowness and stringency.

A. Proposals Suggesting a Modification of the Strickland *Test*

It is unsurprising that the prejudice prong of the *Strickland* test is heavily criticized most by those in disagreement with the current standard. Just two years after *Strickland* was decided, the 1986 Comment *The Strickland Standard for Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process* by Richard Gabriel became one of many law review articles that highlighted the problematic prejudice prong of the *Strickland* test.[113] Gabriel noted that the prejudice prong "reverses the usual presumption that a defendant is innocent until proven guilty."[114] He cited to *United States v. DeCoster*, which held that "[a] requirement that the defendant show prejudice…shifts the burden [of proving his case] to him and makes him establish the likelihood of his innocence."[115]

More recently, Jennifer M. Allen of University of Minnesota Law School, proposed in her 2009 law review article "to abandon the prejudice prong of the *Strickland* test[]" altogether.[116] According to Allen, the sufficient test is "whether counsel's actions were unreasonable under contemporary standards of professional conduct, given the totality of the circumstances."[117] Further, Allen argued that a showing of unreasonable conduct by defense counsel "should compel a new trial… in order to protect fundamental procedural guarantees under the Constitution."[118]

Similarly, Lissa Griffin, Professor of Law at Pace University School of Law, contended in her law review article that, with respect to the evaluation of ineffectiveness of appellate counsel claims, "[t]here is simply no justification for

113. Richard Gabriel, Comment, *The Strickland Standard for Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1276-79 (1984).

114. *Id.* at 1277.

115. United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973).

116. Jennifer M. Allen, *Free for All a Free for All: The Supreme Court's Abdication of Duty in Failing to Establish Standards for Indigent Defense*, 27 L. & INEQ. 365, 401 (2009) (internal quotation marks omitted).

117. *Id.*

118. *Id.*

a separate prejudice requirement[.]"[119] Griffin reasoned that the existence of the prejudice requirement in the appellate courts allows too much federal intrusion into the state courts since they would have "to second guess or predict the outcome of state issues[.]"[120]

B. Proposals Suggesting the Establishment of Additional Guidelines and Supervision of Defense Attorneys

Others have taken a different approach and suggest remedial measures. One remedial measure has been suggested in the form of establishing specific guidelines for defense attorneys to follow with respect to their handling of certain cases.[121] Another suggestion is the implementation of a disciplinary body "to keep an eye on criminal defense attorneys[.]"[122] Lastly, establishing a requirement of the court to actively make determinations regarding the adequacy of defense counsel's efforts at the conclusion of trial.[123]

Adam Lamparello, Associate Professor of Law at Loyola College of Law, suggests that "there should exist… a Death Penalty Representation Commission [in each state] that promulgates detailed guidelines that require each attorney to undertake specific steps[,]" and requires defense counsel "to certify to the trial court that each of these steps have been taken and explain in depth how such evidence is likely to be presented to the jury at the penalty phase."[124] Such a proposal would undoubtedly stack additional burdens on already overburdened, under-resourced defense attorneys and may cause adverse results.

In Meredith J. Duncan's article, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, she urges a strong disciplinary process consisting of an automatic "referral system [that] would operate to report automatically the conduct of any lawyer who is the subject of an ineffective assistance of counsel claim… to the appropriate disciplinary body."[125] She further contends that one step that the legal system should take "to ensure that criminal defendants receive competent counsel to which they are entitled[]" is to "encourag[e] trial judges to document and report instances of poor criminal defense lawyer[ing]."[126]

Remedial measures, such as the implementation of a disciplinary body solely for defense attorneys, or the imposition of rigid guidelines that govern how defense attorneys conduct cases, imply that defense attorneys are acting purposefully neglectful. Yet, as outlined, this is not the case. Undoubtedly there are attorneys

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119. Lissa Griffin, *The Right to Effective Assistance of Appellate Counsel*, 97 W. VA. L. REV. 1, 47 (1994).

120. *Id.* at 48.

121. *See, e.g.*, Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 103 (2010).

122. Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 45 (2002).

123. Lamparello, *supra* note 121, at 146-48.

124. *Id.* at 103.

125. Duncan, *supra* note 122, at 46.

126. *Id.* at 45.

who might neglect their duty in a case, but there is robust evidence of a more probable explanation as to why defense attorneys are not always able to put their 100% into a case.[127]

C. Proposals Suggesting an Expansion of the Per Se Umbrella

Another category of proposed remedies consists of expanding the list of circumstances that would automatically satisfy the prejudice prong of the *Strickland* test. As mentioned, the rule for presumed prejudice was articulated in *United States v. Cronic* and said that "[no specific showing of prejudice is required] if the accused is denied counsel at a critical stage of his trial [or] if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing[.]"[128] Based on the case law, it seems that per se prejudice is triggered only where there is practically an absence of representation,[129] where ethical issues have occurred such as counsel engaging in extremely egregious behavior,[130] or where counsel is not licensed to practice law.[131]

In a 2017 article titled *You Snooze, You Lose, and Your Client Gets a Retrial:* United States v. Ragin *and Ineffective Assistance of Counsel in Sleeping Lawyer Cases*, Kimberly Sachs highlights the fact that an attorney sleeping during trial does not fall meet the per se prejudice threshold and "the rules used to determine prejudice in sleeping lawyer cases vary from circuit to circuit[.]"[132] Sachs focuses on the Fourth Circuit's "substantial portion rule" that requires that defense counsel sleep for a "substantial portion" of trial before there can be a finding of prejudice.[133] She argues that the rule articulated by the Fourth Circuit is "vague and imprecise" and she, therefore, calls "for a clearer rule that finds a presumption of prejudice when an attorney sleeps during a critical portion of trial."[134]

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127. *See* Peng, *supra* note 27.

128. United States v. Cronic, 466 U.S. 648, 659 (1984).

129. *See* Harding v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989) (presuming prejudice when defense counsel in a state criminal proceeding remained silent through most of trial and did not object when the court directed a verdict against the defendant). *See also* Martin v. Rose, 744 F.2d 1245, 1250-51 (6th Cir. 1984) (refusing to participate at trial because he thought participation would waive pretrial motions or make their denial harmless error, court found ineffective assistance of counsel without any showing of prejudice); Cannon v. Berry, 727 F.2d 1020, 1023-24 (11th Cir. 1984) (holding that defendant does not have to show actual prejudice to get habeas relief on ground of ineffective assistance of counsel when appellate counsel failed to file a brief on direct appeal from state trial court conviction); Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (presuming prejudice where the attorney merely "stood in" during defendant's sentencing).

130. *See* Howard v. State, 783 S.W.2d 61, 62 (Ark. 1990) (finding the prejudice prong automatically satisfied due to a record that revealed that counsel was having sexual relations with the defendant).

131. *See* United States v. Novak, 903 F.2d 883, 886 (2d Cir. 1990) (finding per se prejudice because defense counsel was not licensed to practice law).

132. Kimberly Sachs, *You Snooze, You Lose, and Your Client Gets a Retrial:* United States v. Ragin *and Ineffective Assistance of Counsel in Sleeping Lawyer Cases*, 62 VILL. L. REV. 427, 441 (2017).

133. United States v. Ragin, 820 F.3d 609, 612 (4th Cir. 2016).

134. Sachs, *supra* note 132, at 430.

Another proposal that seeks to add to the list of circumstances that would constitute a presumption of prejudice in ineffective assistance of counsel cases is in a recent note titled *Shifting the Burden: Presuming Prejudice for Failing to Contact an Alibi Witness* by Aziza Asad.[135] Asad argues that "courts should consider the failure to contact an alibi witness tantamount to a constructive denial counsel under *Cronic* such that the failure to contact an alibi witness creates a presumption of prejudice against the defendant."[136]

Similarly, there is also the proposal that the failure to pursue a beneficial plea bargain should be considered presumptively prejudicial.[137] Assistant Professor of Law and Director of the Criminal Defense Clinic at Syracuse University College of Law, Todd Berger, argues in his article that the prejudice prong should be abandoned when defense counsel fails to pursue a beneficial plea bargain because "it is extremely difficult, if not impossible, to conclude that the defendant was not prejudiced by counsel's failing to seek a plea bargain."[138]

VI. PROPOSAL: PREVENTION

As outlined above, there have been various proposals that attack the *Strickland* standard directly. Unfortunately, each of these proposals would require the Supreme Court to overturn *Strickland v. Washington*. This is unlikely to occur on account of the Supreme Court's recent treatment of the issue in *Andrus v. Texas* and *Shinn v. Ramirez* in 2022.[139] This Note proposes that the solution is to repair the broken public defense system federally as a collateral remedy for the problematic *Strickland* test. This approach is the legal version of preventative medicine.

Reforming public defender systems across the country will have a strong impact on defense attorneys' ability to litigate their cases more efficiently, and in turn, reduce the number of instances where counsel performs ineffectively. According to a special report by the Bureau of Justice Statistics, "[a]pproximately 95% of criminal defendants are charged in State courts, with the remainder tried in Federal courts."[140] Further, it is estimated that "[n]ationwide,… 80% of people facing criminal charges in state courts use court-appointed public defenders."[141] With the vast majority of criminal defendants being charged in state courts, and the vast majority of those criminal defendants being represented by court appointed public defenders, the state public defense systems are vital to America's criminal justice system and the right to counsel.

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135. Asad, *supra* note 37, at 334.

136. *Id.* at 344.

137. Todd A. Berger, *After Frye and Lafler: The Constitutional Right to Defense Counsel Who Plea Bargains*, 38 AM. J. TRIAL ADVOC. 121, 200-01 (2014).

138. *Id.* at 134.

139. *See supra* Section IV.

140. *Bureau of Justice Statistics Special Report: Defense Counsel in Criminal Cases*, U.S. DEP'T JUST.: OFFICE OF JUST. PROGRAMS 4 (Nov. 2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf.

141. Erika Bolstad, *Public Defenders Were Scarce Before COVID. It's Much Worse Now.*, ANYLAW (Nov. 22, 2023, 10:30 PM), https://www.anylaw.com/media/2022/06/30/oregon-public-defenders-were-scarce-before-covid-its-much-worse-now/.

A. A Glance at the State of The Public Defense Systems Nationwide, and Its Deficits

There is an ongoing nationwide crisis with respect to the protection of the right to counsel for those accused of crimes.[142] The most recent comprehensive research report on the national public defense workload reveals the truth that public defenders are extraordinarily overburdened and underfunded with striking caseloads and budget shortages.[143] According to the ACLU, an example of these striking caseloads can be seen in Fresno, California, where "public defenders were handling a minimum of 418 felony cases and 1,375 misdemeanor cases per year—national standards set maximum felony and misdemeanor caseloads at 150 and 400… and experts advise that even those are too high[.]"[144] Similarly, "[t]he Missouri State Public Defender office fell short of the constitutionally acceptable minimum number of work hours in 97 percent of the 80,000 cases they handled."[145] Pew Charitable Trusts ("PEW") reported that in 2022 "hundreds of lawyers who work for public defense agencies have quit their jobs in the past year, citing low pay and severe overwork."[146]

As shocking as it seems, these examples are by no means isolated incidents. In 2019, then "Sen. Kamala Harris [] elevated the crisis of federal and state governments' disregard for protecting the right to counsel for people charged with crimes."[147] "She did so by introducing the Ensuring Quality Access to Legal Defense Act (EQUAL Defense Act)[.]"[148] The purpose of "the bill [is to] direct[] the Department of Justice (DOJ) to award grants to state and local governments, tribal organizations, and public defender offices for public defense."[149] Those who receive grants will be required "to establish a data collection process, develop workload limits, and satisfy specific compensation requires (e.g., pay parity between public defenders and prosecutors)."[150] The current status of the bill is "introduced."[151]

This bill is a great step in the right direction. However, it is important to recognize that there is a huge need for reform on an individualized level. The funding and additional procedural requirements provided by the bill are very necessary, but they must be used to remedy the specific issues in a given state. For

142. *ACLU Responds to National Public Defense Workload Study*, ACLU (Sept. 12, 2023), https://www.aclu.org/press-releases/aclu-responds-to-national-public-defense-workload-study.

143. Nicholas M. Pace et al., *National Public Defense Workload Study*, RAND CORP. (2023), https://www.rand.org/pubs/research_reports/RRA2559-1.html.

144. *Id.*

145. *Id.*

146. Bolstad, *supra* note 141.

147. Kanya Bennett & Ezekiel Edwards, *Our Government Has Failed to Defend the Sixth Amendment*, ACLU: NEWS & COMMENTARY (May 16, 2019), https://www.aclu.org/news/criminal-law-reform/our-government-has-failed-defend-sixth-amendment.

148. *Id.*

149. EQUAL DEFENSE ACT OF 2021, SUMMARY: H.R.1408, 117TH CONG. (2021), https://www.congress.gov/bill/117th-congress/house-bill/1408.

150. *Id.*

151. *Id.*

that to be possible, each state must conduct investigations into their public defense systems in order to more accurately target the deficits within the system.

In the previously mentioned ACLU class action lawsuit against the State of Idaho for the unconstitutional state of their public defender system,[152] the ACLU cited to a report on an investigation of Idaho's public defender system by the National Legal Aid and Defender Association ("NLADA").[153] This report

> [I]dentified a number of specific areas of concern with respect to trial-level indigent-defense services delivery in Idaho… [including] the widespread use of fixed-fee contracts; extraordinarily high attorney caseloads and workloads; inadequate, and often nonexistent, investigation of cases; lack of structural safeguards to protect the independence of defenders; lack of adequate representation of children in juvenile and criminal court; lack of sufficient supervision; lack of performance-based standards; lack of ongoing training and professional development; and lack of any meaningful funding from the State.[154]

The ACLU has pointed out the host of structural problems that lie within the rural counties of the State of Nevada's public defense system in their class action lawsuit *Davis v. Nevada*.[155] In its Complaint, the ACLU asserted that "[t]he State does nothing to ensure that the rural counties have the funding, policies, programs, guidelines, or other essential resources to [ensure] constitutionally adequate legal representation."[156] The problems resulting from the State's lack of oversight and contribution are similar to the issues found in Idaho's public defense system, but not all the same. Problems include:

> [N]o compensation for attorney travel time and costs; [c]ontracts that require attorneys to obtain a court order to pay any investigators or expert witnesses; [c]ontracts that include appellate work where the fees are already inadequate for trial level work; [and] [n]on-lawyer government officials selecting which attorneys receive the contracts[.][157]

Such issues are disappointing and discouraging for not only indigent defendants in need of legal representation, but also for the public defenders who are devoting their time, energy, and expertise to a system that doesn't seem to take them seriously.

There have been victories resulting from the ACLU's advocacy toward better functioning public defense systems across the country. However, filing lawsuits "to address the failures and harms to people who cannot afford counsel[]" is not

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152. *ACLU Sues Idaho*, *supra* note 29.

153. Complaint ¶ 1, Tucker v. State, 394 P.3d 54 (Idaho 2017) (No. CV-OC-2015-10240), https://www.aclu.org/legal-document/tucker-et-al-v-state-idaho-et-al-complaint.

154. *Id.* ¶ 37.

155. *Davis v. Nevada*, ACLU: CT. CASES: CRIM. L. REFORM (Aug. 24, 2020), https://www.aclu.org/cases/davis-v-nevada.

156. Complaint ¶ 7, Davis v. State (Nev. 1st Dist. Ct. Oct. 15, 2018) (No. 170C02771B), https://www.aclu.org/legal-document/davis-v-nevada-first-amended-complaint.

157. *Id.* ¶ 8.

enough.[158] There shouldn't be a need for lawsuits across the country, resulting from constitutionally deficient public defense systems, in the first place. In addition to the dedication of federal funds to public defense systems through bills like the EQUAL Defense Act,[159] there should be greater structural protections in place as well.

B. Fixed Statutory Case Loads

There is an undeniable need for intervention within many of the state public defense systems across the country. Since the repercussions of this need for intervention fall upon a constitutional right, the burden of taking steps towards the establishment of safeguards is on the federal government rather than state governments. Under the operation of the current state public defense systems, there is insufficient infrastructure to ensure functionality. It has been shown that many states are incapable of dedicating the proper attention and resources to their public defense systems.[160]

A course of action more specific than the introduction of broad funding bills is the establishment of a federal statute that would set a cap on the workload of public defense attorneys. It is apparent that the number of new charges being brought and prosecuted is extremely disproportionate to the available public defense attorneys and resources.[161] The establishment of a federal statute would prevent the overburdening of public defenders because it would force changes to be made in order to comply with the statute. Possible modifications that could be implemented, in order for the workloads to be within the limits of the statute, include hiring additional public defense attorneys, prosecuting cases more selectively, or a bit of both.

C. Compliance with the Statutory Caseload Cap

Hiring additional public defenders so there are enough hands on deck to adequately handle cases is critical because the shortage of public defenders across the country is dire.[162] According to a class action lawsuit in Wisconsin, as of August 2022, there was backlog of approximately 35,000 criminal cases.[163] A study by the National Association of Criminal Defense Lawyers ("NACDL") conducted in Rhode Island found that the Rhode Island Public Defenders "would require 136 full-time equivalent attorneys to provide the necessary minimum level

158. Bennett & Edwards, *supra* note 147.

159. EQUAL, *supra* note 149.

160. Pace et al., *supra* note 143.

161. *Id.*

162. John Gross, *Why Our Public Defense Systems are Collapsing*, NAT'L ASS'N FOR PUB. DEF. (June 5, 2023), https://publicdefenders.us/blogs/why-our-public-defense-systems-are-collapsing/.

163. Andy Pierrotti, *The Sixth: Public Defender Shortage*, INVESTIGATE TV: INVESTIGATIONS (Dec. 5, 2022, 1:29 PM), https://www.investigatetv.com/2022/12/05/sixth-public-defender-shortage/.

of representation needed for the average" number of cases assigned each year.[164] This is startling considering the fact that, "[a]s of July 2017, there were only 49 public defenders in the entire state."[165] Judges in some places even have to dismiss cases altogether due to a lack of public defense attorneys able to handle the cases brought. In Multnomah County of Oregon state, for example, nearly 300 cases were dismissed in 2022 due to the shortage.[166]

The second adjustment that can be made to comply with a statutory caseload cap is on the prosecution's side. Prosecutors should be mindful of the deficits that lie within the public defender offices that will be handling the cases they choose to prosecute. This mindful prosecuting should include a discretionary balancing test between protecting the public and not overburdening the judicial system with cases that are less serious than others. It is not ideal for prosecutors to have to pick and choose between crimes, but it makes the most sense with the current state of public defense systems. The NACDL conducted a report called *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* where it was concluded that "[n]ationwide, state and local governments are wasting millions of tax dollars to prosecute petty offenses, creating huge deficits in their budgets and violating the constitutional rights of citizens ha[u]led into court."[167]

One possible issue in the way of accomplishing the goal of hiring an influx of new public defenders is the lack of a saturated applicant pool. It is unsurprising that the applicant pool for a position that lacks adequate funding and resources, and is in a state of crisis with respect to its workloads, would not be very abundant.[168] It is unlikely very many attorneys are going to apply to a position where it has been found that every attorney in that office "would have to work more than 26 hours a day during the work week to cover the caseload," especially when there are better paying positions that do not have such strenuous and demanding work.[169] A practical way to incentivize public defender positions would be to increase the salaries for said positions.

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164. *The Rhode Island Project: A Study of the Rhode Island Public Defender System and Attorney Workload Standards*, NAT'L ASS'N CRIM. DEF. LAWS.: NACDL REPORTS (Nov. 16, 2017), https://www.nacdl.org/Document/TheRhodeIslandProjectStudyofRIPDSystemandWorkloads.

165. *Id.*

166. Claire Rush, *Ore. Public Defender Shortage: Nearly 300 Cases Dismissed*, POLICE 1: LEGAL (Nov. 24, 2022), https://www.police1.com/legal/articles/ore-public-defender-shortage-nearly-300-cases-dismissed-PQINgFfgSkLJndrE/.

167. *Taxpayers' Millions Down the Drain—Along with Constitution*, NAT'L ASS'N CRIM. DEF. LAWS.: NEWS RELEASE (Apr. 28, 2009), https://www.nacdl.org/newsrelease/NewsRelease-04-28-2009.

168. Matt Perez, *Low Pay a Deterrent to Would-Be Public Defenders*, LAW360 (Oct. 17, 2021, 8:02 PM), https://www.law360.com/articles/1430492/low-pay-a-deterrent-to-would-be-public-defenders.

169. Rush, *supra* note 166.

D. Bridging the Pay Gap Between Prosecutors and Defense Attorneys

Prosecutors and public defenders serve important roles in America's criminal justice system. Both positions have the purpose of protecting the public and are deserving of just compensation. However, as Rosalie Joy, Vice President of Defender Legal Services at NLADA notes, "[p]arity with city law departments [and] prosecutor agencies is largely nonexistent."[170] She continues on to say that whether an attorney is in a traditional public defender's office, a court appointed system or a contract system where the court has a standing agreement to have a local law firm provide public defense services, you never "really ever see that the rate of pay for those lawyers is equal to or comparable to a prosecutor's office, even though they're all lawyers, [and] they're all skilled at practicing criminal law[.]"[171] This parity is not uncommon and tends to be the case throughout the United States.[172] Therefore, in addition to a federal statute that would ensure a workload that would make it possible for public defense attorneys to dedicate the necessary amount of time to each of their cases, public defense attorneys should receive the same compensation as the local prosecuting attorneys in their respective region.

CONCLUSION

The purpose of the Sixth Amendment is to guarantee the right to effective assistance of counsel. This right, tremendously important to the institution of criminal justice, is denied continually without an adequate remedy. Claims of ineffective assistance of counsel are routinely dismissed due to the outdated and stringent standard established in *Strickland v. Washington*. Unfortunately, attempts to overrule the *Strickland* test over the years have failed time and time again. Further, recent case law presents a negative forecast with respect to easing the tremendous difficulty of prevailing on ineffective assistance of counsel claims.[173]

This Note takes the approach of shifting the course of action to remedy the issue. The approach seeks to remedy the issue collaterally, in response to said negative forecast. The focus shifts to prevention rather than redress, prescribing the legal version of preventative medicine, in recognition of the overburdened and underfunded state of public defense systems throughout the United States.[174] The implementation of a federal statute setting a cap on the workload of public

170. Perez, *supra* note 168.

171. *Id.* (internal quotation marks omitted).

172. Michaela Paukner, *Lawmakers Trying to Less Discrepancy Between Pay for Prosecutors, Public Defenders*, WIS. L. J. (Oct. 31, 2019), https://wislawjournal.com/2019/10/31/lawmakers-trying-to-less-discrepancy-between-pay-for-prosecutors-public-defenders/. *See also* Nancy Molnar, *Public Defender Seeks Salary Parity with Prosecutors*, TIMES REP.: LOC. (Oct. 24, 2017, 7:57 AM), https://www.timesreporter.com/story/news/local/2017/10/24/public-defender-seeks-salary-parity/18120125007/; Whittney Evans, *Public Defenders Say Pay Parity Critical to Justice System Reform*, VA. PUB. MEDIA: NEWS (Apr. 23, 2021, 1:04 PM), https://www.vpm.org/news/2021-04-23/public-defenders-say-pay-parity-critical-to-justice-system-reforms.

173. *See supra* Section V.

174. Pace et al., *supra* note 143.

defenders would provide much needed structural support, and the parity in pay between public defenders and prosecutors would be bridged. Change must be implemented in order to honor the Sixth Amendment right to effective assistance of counsel, for "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."[175]

175. Marbury v. Madison, 5 U.S. 137, 147 (1803) (citing 3 Bl. Com. 109).