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Cover Page Footnote
28-3

A CUMULATIVE APPROACH TO INEFFECTIVE ASSISTANCE:

NEW YORK'S REQUIREMENT THAT COUNSEL'S CUMULATIVE EFFORTS AMOUNT TO MEANINGFUL REPRESENTATION

SUPREME COURT OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

People v. Bodden[1]
(decided March 1, 2011)

This case concerns a conviction that was overturned based on the appellant's receiving representation that amounted to ineffective assistance of counsel. While the claim of ineffective assistance of counsel has been well established, and its parameters substantially defined, this case broadened the general scope. The court did not find any particular action by defense counsel to have amounted to ineffective assistance, but instead, by evaluating counsel's performance throughout the duration of the trial, the court held that the overall performance was so lacking that the cumulative effect of counsel's conduct amounted to a violation of a criminal defendant's constitutional right to meaningful representation.

I. ANALYSIS OF THIS CASE

The appellant, Richard Bodden, appealed his conviction on two counts of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, reckless endangerment in the first degree, and harassment in the second degree.[2] He

[1] 918 N.Y.S.2d 141 (App. Div. 2d Dep't 2011).
[2] *Id.* at 142.

also separately filed a motion pursuant to CPL § 440.10[3] in the trial court "to vacate the judgment on the ground of ineffective assistance of counsel."[4] When the trial court denied that motion, appellant appealed the denial, and the Appellate Division, Second Department consolidated the two appeals in this case.[5] The court reversed the judgment as a matter of law, finding that the cumulative effect of defense counsel's conduct throughout the trial amounted to a violation of appellant's constitutional right to meaningful representation.[6]

The representation provided to the appellant was so lacking that the trial court, prior to sentencing, stated "on the record that it was troubled by the defense counsel's performance during the trial."[7] Among the list of deplorable acts noted by the court were defense counsel's statements during jury selection–in front of prospective jury members–in which he distanced himself from his client, his failure to cross-examine an eyewitness in order to exploit weaknesses in direct testimony, and his use of an offensive term to describe the race of a person allegedly present at the time appellant was arrested.[8] When the court invited defense counsel to inspect photographs sought to be introduced by the prosecution, defense counsel declined, even though he "acknowledge[ed] that he had not seen them before."[9] Defense counsel also "offered to stipulate that a witness was 'an expert on whatever you want him to testify to,' even though the witness was a fact witness."[10] He also "offered to stipulate to [the] entire testimony [of another prosecution witness,] even though counsel acknowledged that he had 'no idea what the witness was going to testify to.' "[11]

Defense counsel's closing statements primarily focused "on the role of the jury in a democracy" with only "cursory observations

[3] N.Y. CRIM. PROC. LAW § 440.10(1)(h) (McKinney 2010) (allowing judgment made in violation of defendant's state or federal constitutional rights to be vacated in favor of a new trial).

[4] *Bodden*, 918 N.Y.S.2d at 142.

[5] *Id.*

[6] *Id.* at 142-43 ("Under these circumstances, the defendant was deprived of the effective assistance of counsel and, therefore, is entitled to a new trial").

[7] *Id.* at 142.

[8] *Id.* at 143.

[9] *Bodden*, 918 N.Y.S.2d at 143.

[10] *Id.*

[11] *Id.*

about the [prosecution's] evidence;" there were serious weaknesses in that evidence which he failed to bring to the jury's attention.[12] Also, during the prosecution's closing statements, defense counsel did not object to comments implying "the defendant's character increased the likelihood that he committed the charged crimes."[13] The court found that the cumulative effect of these actions resulted in appellant's deprivation of effective assistance of counsel, and entitled him to a new trial.[14]

In its reasoning, the court noted that under the New York standard, which it called "somewhat more favorable to defendants"[15] than the federal standard, the constitutional requirements "are met when the defense attorney provides meaningful representation."[16] The focus is on the "fairness of the process as a whole rather than its particular impact on the outcome of the case."[17] In applying the New York rule, the court did not single out any particular act or error committed by counsel as an error that amounts to ineffective assistance, but rather found that the cumulative effect of the frequent and obvious failings of counsel deprived the defendant of his right to effective assistance of counsel.[18] Counsel's representation as a whole did not amount to the "meaningful representation" that the defendant was entitled to, and rendered the judicial process unfair.[19]

II. THE FEDERAL STANDARD

In ruling that Richard Bodden had not received meaningful representation, the court upheld his right to effective assistance of counsel, a right guaranteed by the Sixth Amendment to the Constitution of the United States.[20] In interpreting this constitutional provi-

[12] *Id.*

[13] *Id.*

[14] *Bodden*, 918 N.Y.S.2d at 143.

[15] *Id.* at 142 (quoting People v. Turner, 840 N.E.2d 123, 126 (N.Y. 2005)).

[16] *Id.* (quoting People v. Stultz, 810 N.E.2d 883, 884 (N.Y. 2004)).

[17] *Id.* at 143 (quoting People v. Benevento, 697 N.E.2d 584, 588 (N.Y. 1998)).

[18] *Id.*

[19] *Bodden*, 918 N.Y.S.2d 142-43. While the New York standard does not require a showing of prejudice, and the court did not identify whether it found counsel's actions to be prejudicial, it can hardly be argued, after all of counsel's errors and failures, that the jury would not have been prejudiced by his performance. *Id.* at 143.

[20] The Sixth Amendment states, in pertinent part: "In all criminal prosecutions, the ac-

sion, the Supreme Court held in *Gideon v. Wainwright*[21] that it not only mandates provision of counsel to defendants in federal criminal trials, but also obligates the states to provide counsel to defendants in criminal trials in state courts.[22] The Court further required in *Strickland v. Washington*[23] that the assistance provided by counsel to the defendant must be "reasonably effective."[24] "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[25]

In determining whether counsel's representation was ineffective, the Court in *Strickland* established a two-part test.[26] The defendant must prove that counsel's performance was deficient, which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[27] The defendant must also show that the deficient performance of counsel prejudiced the defense, which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[28]

In evaluating whether counsel's performance was actually deficient, the court must examine the facts of that particular case and counsel's chosen course of conduct, viewed as of the time of the conduct–without the added clarity of hindsight–and determine whether it fell below the objective standard of reasonableness under prevailing professional norms.[29] The court's "scrutiny of counsel's performance must be highly deferential," thus indulging "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[30] To prove that the deficiency of counsel's performance prejudiced the defense, "[t]he defendant must show that

cused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

[21] 372 U.S. 335 (1963).

[22] *Id.* at 344.

[23] 466 U.S. 668 (1984).

[24] *Id.* at 687.

[25] *Id.* at 686.

[26] *Id.* at 687.

[27] *Id.*

[28] *Strickland*, 466 U.S. at 687.

[29] *Id.* at 689.

[30] *Id.*

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[31] In determining whether counsel's performance resulted in the required prejudice, the court must consider the totality of the evidence before the judge or jury, and "ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."[32] The defendant must prove that counsel's performance was both deficient and that it prejudiced the defense; failure to prove either part results in dismissal of the claim.[33]

A. Types of Errors That Constitute Ineffective Assistance

In *Henry v. Poole*,[34] the Second Circuit held that a single error made by defense counsel can amount to ineffective assistance of counsel.[35] When counsel advances a false alibi–an alibi for a period of time after the crime, but not covering the actual time of the crime–and relies on that false alibi throughout the trial, and in summation acknowledges that the alibi is not for the actual time of the crime, that error amounts to a reasonable probability that counsel's conduct was deficient, especially if counsel had reason to know, prior to the start of the trial, that the alibi was false.[36] Similarly, when such false alibi is so relied on, and its falsity is so clearly obvious to the jury, it is reasonable to conclude that the outcome of the trial would be preju-

[31] *Id.* at 694.

[32] *Id.* at 696.

[33] *Strickland*, 466 U.S. at 697. In applying the new standard to the facts of the case before it, the Court held that counsel's strategic choice to rely as fully as possible on his client's statements during pleading, and not investigating or introducing further character or psychological evidence, was reasonable, because it precluded the prosecution from countering any such evidence with more damning evidence of the client's criminal record. *Id.* at 698-701. Thus, failing to investigate or introduce evidence that could be of benefit to the client is not necessarily proof of deficient performance if counsel reasonably believed that not introducing such evidence, and so precluding the prosecution from introducing counter-evidence that is more detrimental, would serve the client better than the benefit of having the evidence introduced. *See id.* Based on this determination, the Court held that counsel's representation was not deficient, and so the client failed to establish a claim of ineffective assistance. *Id.*

[34] 409 F.3d 48 (2d Cir. 2005).

[35] *See id.* at 64.

[36] *Id.* at 64-65.

diced by counsel's advancement of the false alibi.[37] As such, the court held that counsel's representation fell below the standard for effective assistance.[38]

In *Cox v. Donnelly*,[39] the Second Circuit held that counsel's failure to object to a court's unconstitutional jury instruction on the intent component of the charge of murder can amount to ineffective assistance of counsel.[40] In doing so, the court emphasized the significance of whether the intent component was a central issue on which the conviction depended.[41] In a prior case, *Tsirizotakis v. LeFevre*,[42] the Second Circuit held that failure to object to a constitutionally defective intent instruction can be strategic, in that counsel might not want to make an issue of intent, as it would detract from the primary defense of justification.[43] However, in *Cox*, where the conviction depended solely on the issue of intent, failing to object to the defective jury instruction did amount to deficient performance.[44] And, given that the issue of intent was so central to the case, and the fact that the jury twice asked for clarification on the issue of intent, counsel's failure to object to the defective instruction resulted in prejudice that reasonably could have affected the outcome of the case.[45]

Other failures of counsel that amount to ineffective assistance, as held in *Carrion v. Smith*,[46] are "fail[ure] to advise [the client] of the sentencing exposure he faced if he were convicted at trial," and "fail[ure] to give [the client] advice regarding the advisability of accepting the plea offer that was sufficiently robust under the circumstances."[47] When counsel breaches a fundamental duty to the client,

[37] *Id.* at 66-67.

[38] *Id.* at 67.

[39] 387 F.3d 193 (2d Cir. 2004).

[40] *Id.* at 200.

[41] *Id.* at 199 ("[H]ere, intent was not only at issue, it was the sole issue on which [defendant]'s conviction depended at the time the defective instruction was given. . . . We therefore cannot accept the state's argument that counsel abandoned the issue of [defendant]'s intent as a tactical maneuver.").

[42] 736 F.2d 57 (2d Cir. 1984).

[43] *Id.* at 63.

[44] *Cox*, 387 F.3d at 199-200.

[45] *Id.*

[46] 644 F. Supp. 2d 452 (S.D.N.Y. 2009).

[47] *Id.* at 467 ("When a plea offer is made and there is a reasonable probability that the defendant is uncertain about the sentencing exposure he faces, whether or not he accepts the plea, a lawyer unquestionably has a duty to inform his client of the sentencing exposure he

such as loyalty, confidentiality, or in this case, the duty to inform the client of sentencing exposure, counsel's assistance falls below the objective level of reasonableness.[48]

III. THE NEW YORK STANDARD

In addition to the right to counsel guaranteed by the United States Constitution, defendants in criminal trials in New York State courts are also guaranteed the right to counsel by the New York State Constitution.[49] The Court of Appeals stated in *People v. Baldi*,[50] three years before the Supreme Court would rule on this issue, that "[t]he right to the effective assistance of counsel is guaranteed by both the Federal and [New York] State Constitutions. . . ."[51] "[T]he right 'means more than just having a person with a law degree nominally represent (defendant) upon a trial and ask questions.' "[52]

The Court recognized at that time that the lower courts had developed two different standards for reviewing effectiveness of counsel.[53] "The traditional standard has been whether the attorney's shortcomings were such as to render the 'trial a farce and a mockery

faces if he accepts the plea offer and if he does not.").

[48] *Id.* Criminal defendants are also entitled to effective assistance of counsel in the pretrial and appellate phases of their case. *See* Hill v. Lockhart, 474 U.S. 52, 58 (1985) (holding that the *Strickland* "test applies to challenges to guilty pleas based on ineffective assistance of counsel."); Missouri v. Frye, 132 S. Ct. 1399, 1404, 1410 (2012) (holding that a criminal defendant's right to effective assistance of "counsel extends to the negotiation and consideration of plea offers that lapse or are rejected."); Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012) (holding that a criminal defendant, who claims ineffective assistance of counsel during plea consideration, must show "that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court . . . that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."); Evitts v. Lucey, 469 U.S. 387, 396 (1985) (holding that criminal defendants have a right to effective assistance of appellate counsel on first appeal); Smith v. Robbins, 528 U.S. 259, 285 (2000) (holding that the proper standard for reviewing claims of ineffective assistance of appellate counsel is that enunciated in *Strickland*).

[49] The New York Constitution states, in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions. . . ." N.Y. CONST. art. I, § 6.

[50] 429 N.E.2d 400 (N.Y. 1981).

[51] *Id.* at 404.

[52] *Benevento*, 697 N.E.2d at 586 (quoting People v. Bennett, 280 N.E.2d 637, 639 (N.Y. 1972)).

[53] *Baldi*, 429 N.E.2d at 404.

of justice.' "[54] The other standard, which the court described as stricter, was whether counsel exhibited "reasonable competence."[55] The court departed from the "farce or mockery" test, and adopted the "stricter" standard–that of "meaningful representation."[56] "Under the [New York] State Constitution, 'prejudice' is examined more generally in the context of whether defendant received meaningful representation."[57] Counsel's conduct must amount to "egregious and prejudicial" error such that defendant did not receive a fair trial.[58] However, the focus of the inquiry is on the fairness of the trial, not on prejudice—whether counsel's representation, be it prejudicial or not, resulted in the defendant receiving a fair trial.[59]

In determining whether the standard was met, the court required that "the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation . . . ."[60] Further, in reviewing claims of ineffective assistance, the court must take care "to avoid both confusing true ineffectiveness [of counsel] with mere losing tactics and according undue significance to retrospective analysis."[61] Instead, " 'it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings."[62]

The court noted that counsel "is not required to argue factual innocence at the expense of a stronger defense," and can reasonably argue "his client's factual innocence, or his insanity, or both," especially if the factual innocence argument is weak.[63] Counsel's performance does not amount to ineffective assistance merely for being "unable . . . to shake [a prosecution witness's] criticism of his less experienced colleagues' [conclusions] or to induce him to modify his

[54] *Id.* (quoting People v. Aiken, 380 N.E.2d 272, 274 (N.Y. 1978)).
[55] *Baldi*, 429 N.E.2d at 405.
[56] *Id.*
[57] *Benevento*, 697 N.E.2d at 588.
[58] *Id.* (quoting People v. Flores, 639 N.E.2d 19, 21 (N.Y. 1994)).
[59] *Benevento*, 697 N.E.2d at 588.
[60] *Baldi*, 429 N.E.2d at 405.
[61] *Id.*
[62] *Benevento*, 697 N.E.2d at 587 (quoting People v. Rivera, 525 N.E.2d 698, 700 (N.Y. 1988)).
[63] *Baldi*, 429 N.E.2d at 405.

own conclusion . . ." during a weak cross-examination.[64] Counsel's taking the witness stand and giving testimony contradicting his client does not render his assistance ineffective if the testimony serves "a proper purpose[, such as] the establishment of [an] insanity defense."[65] Nor is it improper for counsel to state in summation that counsel "decline[s] to vouch for [the] client's credibility," when the weaknesses in the prosecution's case is still argued, and defenses emphasized.[66]

Similarly, in *People v. Satterfield*,[67] counsel decided not to introduce evidence to impeach a witness, but instead chose to argue that the witness's statement placing defendant at the crime scene was a misidentification.[68] Impeaching the credibility of that witness's account of the events would have worked against the defense, because counsel attempted to establish that the account was correct, apart from the misidentification.[69] The court held that such decisions fall within the spectrum of strategic options counsel may pursue, and does not amount to ineffective assistance of counsel.[70] Counsel's subjective reasons for choosing a certain trial strategy are immaterial to a determination of whether the assistance provided was effective.[71] Rather, when viewed objectively, if the facts and circumstances of the case reveal the existence of a trial strategy that might be pursued by a reasonably competent attorney, that is sufficient to dismiss a claim of ineffective assistance.[72]

In *People v. Benevento*,[73] the Court of Appeals emphasized that counsel's assistance is not ineffective purely because it does not result in the client's acquittal.[74] While the client is entitled to mea-

[64] *Id.* at 406.

[65] *Id.*

[66] *Id.* Based on these determinations, the court held that counsel's conduct was not unreasonable and did not "ma[k]e a farce [or] mockery of the trial," and so "it simply cannot be said as a matter of law that defendant was denied effective assistance of counsel." *Id.* at 407.

[67] 488 N.E.2d 834 (N.Y. 1985).

[68] *Id.* at 836-37.

[69] *Id.* at 836.

[70] *Id.* at 836-37.

[71] *Id.* at 836.

[72] *Satterfield*, 488 N.E.2d at 836.

[73] 697 N.E.2d 584 (N.Y. 1998).

[74] *Id.* at 588. This inference, logical as it is, was at the heart of the defendant's claim of ineffective assistance, and the court went to a great length to clearly state this point. *Id.*

ningful representation, that representation does not have to be perfect or errorless.[75] Even with perfect representation, a defendant in a criminal trial can still be convicted. Therefore, counsel's assistance does not have to be perfect, and the outcome of the representation is not dispositive as to its effectiveness.[76] Where counsel set a clear and reasonable strategy from opening remarks through summation, that strategy cannot be questioned as ineffective merely because the client was convicted, even if counsel stated during the opening that the client will testify and later decides not to call the client to the stand.[77]

In *People v. Turner*,[78] the Court of Appeals held that a single failing in an otherwise flawless representation by counsel can be "so 'egregious and prejudicial' " that it would deprive the client of the right to effective assistance.[79] While errors such as "overlooking a useful piece of evidence" or "failing to take maximum advantage of a *Rosario* violation" would not necessarily in and of itself amount to the degree of prejudice so as to result in ineffective assistance, there are other errors that would.[80] One such error is failure to raise a defense that is clear-cut and completely dispositive, such as a lapsed statute of limitations.[81] The court held that such a failure, absent a reasonable explanation, does amount to ineffective assistance of counsel.[82]

But the defense must also be viable for it to amount to ineffective assistance if counsel fails to raise it.[83] Failure to submit an affirmative defense that, if successful, would have been a complete defense to the crimes charged, does not necessarily amount to ineffective assistance if counsel had reason to believe the defense

[75] *Id.* at 587.

[76] *Id.* at 588.

[77] *Benevento*, 697 N.E.2d at 588-89.

[78] 840 N.E.2d 123 (N.Y. 2005).

[79] *Id.* at 126 (quoting People v. Caban, 833 N.E.2d 213, 220 (N.Y. 2005)).

[80] *Turner*, 840 N.E.2d at 126. The *Rosario* rule is an adoption of the federal *Jencks* rule, under which defense counsel may examine for itself a witness' prior statements which is in the prosecution's possession, regardless of whether it comports with the witness' testimony at trial, so long as those prior statements relates to the subject matter of the witness' testimony at trial, and contained no confidential information. People v. Rosario, 173 N.E.2d 881, 883 (N.Y. 1961).

[81] *Turner*, 840 N.E.2d at 126.

[82] *Id.*

[83] People v. Georgiou, 828 N.Y.S.2d 541, 544-45 (App. Div. 2d. Dep't 2007).

would not prevail.[84] "There can be no denial of effective assistance of . . . counsel arising from counsel's failure to 'make a motion or argument that ha[d] little or no chance of success.' "[85] In *People v. Georgiou*[86] the Appellate Division, Second Department held that "the mere fact that the defendant would have been entitled to submit the affirmative defense had his counsel requested it, does not, in and of itself, prove that he was denied effective assistance" of counsel.[87] The court said that while it was surely an error on the part of counsel not to submit the affirmative defense to the jury, there was sufficient evidence to determine that the omission was a harmless error, which had little to no effect on the outcome of the case, and as such, did not impact the fairness of the trial.[88]

IV. THE STANDARD IN OTHER STATES

The overwhelming majority of states have adopted the *Strickland* test for evaluating effectiveness of counsel under their state constitutions.[89]

[84] *Id.*

[85] People v. Caban, 833 N.E.2d 213, 220 (N.Y. 2005) (quoting *Stultz*, 810 N.E.2d at 890).

[86] 828 N.Y.S.2d 541(App. Div. 2d. Dep't 2007).

[87] *Id.* at 545.

[88] *Id.* at 546.

[89] JOHN M. BURKOFF & NANCY M. BURKOFF, INEFFECTIVE ASSISTANCE OF COUNSEL § 2:5 n.3 (2011); Alabama: Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987) ("Under the standards enunciated in *Strickland v. Washington*, and adopted by this Court in *Ex parte Baldwin*, a two-pronged test must be met before a claim of ineffective assistance of counsel is proven."); Arizona: State v. Nash, 694 P.2d 222, 227 (Ariz.1985) ("This Court adopted the second prong of *Strickland* in *Lee*. We now believe it is time to adopt *Strickland*'s first prong as well."); Arkansas: Pogue v. State, 872 S.W.2d 387, 389 (Ark. 1994) ("For those claims of ineffective counsel that we are able to reach, they must be examined in light of the standard set in *Strickland v. Washington*."); California: People v. Ledesma, 729 P.2d 839, 868 (Cal. 1987) ("In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim. The United States Supreme Court expressly enunciated this requirement in *Strickland*. And we implied as much in *Fosselman*."); Colorado: People v. Valdez, 789 P.2d 406, 410 (Colo. 1990) ("The two-prong test enunciated in *Strickland* is designed to preserve the right to effective assistance of counsel in light of the primary basis for such right—the assurance that at all critical stages of the adjudicative process a criminal defendant represented by counsel is in fact represented by an attorney of sufficient quality to ensure that the process itself is fundamentally fair."); Connecticut: Quintana v. Warden, State Prison, 593 A.2d 964, 965 (Conn. 1991) ("The . . . court concluded that the appropriate standard for examining claims of ineffective assistance of counsel was set forth in *Strickland v. Washington*. . . ."); Delaware: Smith v. State, 991 A.2d 1169, 1174 (Del. 2010) ("Ineffective assis-

tance of counsel claims are reviewed pursuant to the two-pronged standard established by the United States Supreme Court in *Strickland v. Washington*."); Florida: Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999) ("The determination of ineffectiveness pursuant to *Strickland* is a two-pronged analysis: (1) whether counsel's performance was deficient; and (2) whether the defendant was prejudiced thereby."); Georgia: Turpin v. Christenson, 497 S.E.2d 216, 222 (Ga. 1998) ("The Supreme Court of Georgia adopted the *Strickland* test in *Smith v. Francis*."); Idaho: Estrada v. State, 149 P.3d 833, 838 (Idaho 2006) ("The United States Supreme Court established the standard for a claim of ineffective assistance of counsel in *Strickland v. Washington*."); Illinois: People v. Albanese, 473 N.E.2d 1246, 1255 (Ill. 1984) ("Although we do not foresee that application of the *Strickland* rule will produce results that vary significantly from those reached under *Greer*, we hereby adopt the Supreme Court rule for challenges to effectiveness of both retained and appointed counsel. . . ."); Indiana: Davidson v. State, 763 N.E.2d 441, 444 (Ind. 2002) ("Under *Strickland v. Washington*, a claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance was deficient by falling below an objective standard of reasonableness based on prevailing professional norms; and (2) counsel's performance prejudiced the defendant so much that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (quoting *Strickland*, 466 U.S. at 694)); Iowa: State v. Dalton, 674 N.W.2d 111, 119 (Iowa 2004) ("Failure to prove either prong of the *Strickland* test results in failure of the defendant's ineffective-assistance-of-counsel claim."); Kansas: Chamberlain v. State, 694 P.2d 468, 475 (Kan. 1985) ("While the actual application of the standards from *Schoonover* as opposed to those of [*Strickland*] would in all probability effect the same result in any given case, we deem it appropriate to now adopt the [*Strickland*] holdings as the prevailing yardstick to be used in measuring the effectiveness of counsel under the Sixth Amendment."); Kentucky: *See* Norton v. Com., 63 S.W.3d 175, 177 (Ky. 2001) ("Thus, it appears that the . . . [court in *Robbins*] attempt[ed] to rephrase the *Strickland* standard, not to revise it. Nonetheless, we are compelled to overrule *Robbins* to the extent that it conflicts with *Strickland*, albeit inadvertently."); Louisiana: State v. Lentz, 844 So. 2d 837, 840 n.2 (La. 2003) ("Under the standard for ineffective assistance of counsel set out in *Strickland* and adopted by this court in *State v. Washington*, a reviewing court must reverse a conviction if the defendant establishes that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect."); Maine: Brewer v. Hagemann, 771 A.2d 1030, 1033 (Me. 2001) ("We apply the *Strickland* standard in ineffective assistance of counsel cases."); Maryland: State v. Colvin, 548 A.2d 506, 517 (Md. 1988) ("The standards established in *Strickland* apply to claims of ineffective assistance of counsel under art. 21 [of the Maryland Constitution]."); Michigan: People v. Toma, 613 N.W.2d 694, 710 (Mich. 2000) ("The Michigan Supreme Court in *Pickens* adopted the *Strickland* version of what constitutes error requiring reversal from ineffective assistance of counsel."); Minnesota: State v. Rhodes, 657 N.W.2d 823, 842 (Minn. 2003) ("We analyze ineffective assistance of counsel claims under a two-prong test set forth in *Strickland*."); Mississippi: Stringer v. State, 627 So. 2d 326, 332 (Miss. 1993) ("This Court has adopted the two-prong test for ineffective assistance of counsel set out in *Strickland*."); Missouri: *See* Deck v. State, 68 S.W.3d 418, 427 (Mo. 2002) ("To the extent that the cases relied on by the State and other Missouri cases apply a different standard, they are inconsistent with *Strickland* and should no longer be followed."); Montana: State v. Henderson, 93 P.3d 1231, 1233 (Mont. 2004) ("We have adopted the two-part *Strickland* test for measuring claims of ineffective assistance of counsel."); Nebraska: State v. Miner, 733 N.W.2d 891, 893 (Neb. 2007) ("With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in

Strickland v. Washington, an appellate court reviews such legal determinations independently of the lower court's decision."); Nevada: Means v. State, 103 P.3d 25, 31-32 (Nev. 2004) ("[W]e evaluate claims of ineffective assistance of counsel under the test established in *Strickland v. Washington*."); New Hampshire: State v. Faragi, 498 A.2d 723, 726 (N.H. 1985) ("More recently, however, we have followed the standard set out in *Strickland v. Washington*. . . ."); New Jersey: State v. DiFrisco, 645 A.2d 734, 783 (N.J. 1994) ("This Court has adopted the *Strickland* standard for determining ineffective assistance of counsel under the right to counsel provided in the New Jersey Constitution."); New Mexico: State v. Paredez, 101 P.3d 799, 804 (N.M. 2004) ("The two-part standard delineated in *Strickland v. Washington*, applies to ineffective-assistance claims. . . ."); North Carolina: State v. Braswell, 324 S.E.2d 241, 248 (N.C. 1985) ("Therefore, we expressly adopt the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution."); North Dakota: Flanagan v. State, 712 N.W.2d 602, 607 (N.D. 2006) ("In *Woehlhoff v. State*, this Court said we use the same *Strickland* test to assess ineffective assistance of counsel claims under the state constitution."); Ohio: *see* State v. Bradley, 538 N.E.2d 373, 379 (Ohio 1989) ("This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington*."); Oklahoma: Gilson v. State, 8 P.3d 883, 926 n.9 (Okla. Crim. App. 2000) ("Therefore, pursuant to *Williams*, our analysis of an ineffective assistance of counsel claim is based solely upon the two prong test set forth in *Strickland*. . . ."); Pennsylvania: Com. v. Pierce, 527 A.2d 973, 976 (Pa. 1987) ("The obvious identical textual and policy considerations in *Maroney* and *Strickland* logically lead us to hold that together they constitute the same rule. Our decisions in *Maroney* and its progeny, therefore, do not create greater or lesser protection under Article I, Section 9, of the Pennsylvania Constitution, than the present federal standard."); Rhode Island: Brennan v. Vose, 764 A.2d 168, 171 (R.I. 2001) ("This *Strickland* Test, as adopted in *Barboza v. State*, provides certain criteria that a complaining applicant must establish in order to show ineffective assistance of counsel."); South Carolina: Caprood v. State, 525 S.E.2d 514, 517 (S.C. 2000) ("*Strickland* set forth a two-prong test for determining ineffective assistance of counsel, adopted by this Court in *Cherry*."); South Dakota: Ice v. Weber, 638 N.W.2d 557, 561 (S.D. 2002) ("In reviewing ineffective assistance of counsel claims, this Court has adopted the two-part test set forth in *Strickland v. Washington*."); Tennessee: Dean v. State, 59 S.W.3d 663, 667 (Tenn. 2001) ("A constitutional claim of ineffective assistance of counsel is reviewed under the familiar standards of *Baxter v. Rose*, and *Strickland v. Washington*."); Texas: Hernandez v. State, 726 S.W.2d 53, 56-57 (Tex. Crim. App. 1986) ("In short, our constitutional and statutory provisions do not create a standard in ineffective assistance cases that is more protective of a defendant's rights than the standard put forward by the Supreme Court in *Strickland*. Accordingly, we will follow in full the *Strickland* standards in determining effective assistance and prejudice resulting therefrom."); Utah: Fernandez v. Cook, 870 P.2d 870, 874 (Utah 1993) ("To prevail, a defendant claiming ineffective assistance of counsel must meet both parts of the *Strickland* test."); Vermont: State v. Lemire, 640 A.2d 541, 542 (Vt. 1994) ("The *Strickland* standard applies to a claim of ineffective assistance of counsel on appeal."); Virginia: Yarbrough v. Warden of Sussex I State Prison, 609 S.E.2d 30, 37 (Va. 2005) ("To prevail on a claim of ineffective assistance of counsel, a petitioner must . . . satisfy both parts of the two-part test established in *Strickland*."); Washington: State v. Sandoval, 249 P.3d 1015, 1018 (Wash. 2011) ("[T]he defendant must satisfy the familiar two-part *Strickland v. Washington* test for ineffective assistance claims. . . ."); West Virginia: State v. Miller, 459 S.E.2d 114, 126 (W. Va. 1995) ("We now make it explicit, in the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland*."); Wisconsin: State v. Sanchez, 548 N.W.2d 69, 76 (Wis. 1996) ("[W]e conclude

New York, however, is not alone in having a different standard. For example, Alaska has its own standard, articulated in *Risher v State*.[90] This standard basically mirrors the *Strickland* standard, but does not require a showing of a "reasonable probability" that counsel's error(s) affected the outcome of the case, which requires a higher standard of representation than the prejudice prong in *Strickland*.[91] "*Risher* requires only that the accused create a reasonable doubt that counsel's incompetence contributed to the conviction, [whereas] *Strickland* requires that a 'reasonable probability' of a different outcome be established."[92] Similarly, Oregon only requires that "counsel's failure [have] a tendency to affect the result of his trial," which is easier to meet than *Strickland*'s requirement that defendant show a reasonable probability that, but for counsel's prejudicial ineffectiveness, defendant would not have lost at trial.[93] Hawaii also uses its own standard which requires "(1) that there were specific errors or omissions reflecting counsel's lack of skill, judgment, or diligence; and (2) that such errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense."[94] The Hawaii Supreme Court has upheld this standard, in preference to *Strickland*, because its view is that it better protects defendants' "right to effective assistance of counsel" under the Hawaii Constitution.[95] The Massachusetts Supreme Judicial Court requires a "showing that better work might have accomplished something material for the defense,"[96] and that "[r]ather than merely unreasonable, we require that challenged tactical judgments must be 'manifestly unreasonable.' "[97]

that the test for ineffective assistance of counsel articulated in *Strickland* . . . should also be the test for claims of ineffective assistance of counsel under our state constitution."); Wyoming: Asch v. State, 62 P.3d 945, 950 (Wyo. 2003) ("Under the two-prong standard articulated in *Strickland* . . . an appellant claiming ineffective assistance of counsel must demonstrate on the record that counsel's performance was deficient and that prejudice resulted.").

[90] 523 P.2d 421, 425 (Alaska 1974).

[91] Benefield v. State, No. A-5832, 1996 WL 671359, at *2 n.1 (Alaska Ct. App. Nov. 20, 1996).

[92] State v. Jones, 759 P.2d 558, 572 (Alaska Ct. App. 1988).

[93] Lichau v. Baldwin, 39 P.3d 851, 857 (Or. 2002); *Strickland*, 466 U.S. at 694.

[94] State v. Aplaca, 837 P.2d 1298, 1305 (Haw. 1992).

[95] *Id.* at 1305 n.2.

[96] Commonwealth v. Satterfield, 364 N.E.2d 1260, 1264 (Mass. 1977).

[97] Commonwealth v. White, 565 N.E.2d 1185, 1190 (Mass. 1991) (quoting Commonwealth v. Adams, 375 N.E.2d 681, 685 (Mass. 1978)).

V. COMPARISON OF THE FEDERAL AND NEW YORK STANDARDS, AND POTENTIAL IMPROVEMENTS

In comparing the federal and New York State approaches to this issue, it is noteworthy that the New York approach, first articulated in *Baldi*, predates the federal approach adopted in *Strickland*, and that New York has retained *Baldi* in preference to the federal standard.[98] The prejudice prong articulated in *Strickland* is what separates the federal and New York State approaches.[99] The *Baldi* test is not indifferent as to whether the client was prejudiced by counsel's ineffectiveness, but the client need not fully satisfy the prejudice prong of the *Strickland* test in order to prevail.[100] New York courts still regard the client's showing of prejudice as significant, but it is not an indispensable element in determining whether the representation was meaningful.[101] The focus, instead, is on the fairness of the proceedings as a whole, and not just on whether the ineffectiveness of counsel's representation prejudiced the outcome.[102] Thus, the *Baldi* test is more favorable to defendants in that it makes it easier to prevail on a claim of ineffective assistance.[103]

The Sixth Amendment provides criminal defendants with the right to counsel to ensure that the defendant receives a fair trial.[104] This was the established rule in federal courts, and, in *Gideon*, the Supreme Court held that the Fourteenth Amendment placed the same obligation on the states.[105] Prior to *Strickland*, states could claim ad-

[98] *Stultz*, 810 N.E.2d at 886.

[99] *Id.* at 887.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Turner*, 840 N.E.2d at 125-26.

[104] *Gideon*, 372 U.S. at 339-40.

> The Sixth Amendment provides, 'In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.' We have construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.

Id. (quoting Johnson v. Zerbst, 304 U.S. 458, 459 (1938)).

[105] *Id.* at 343.

> [T]he Court reemphasized what it had said about the fundamental nature of the right to counsel in this language: 'We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal

herence to the rule simply by requiring that "a warm body with a law degree" be placed next to the defendant.[106] In *Strickland*, the Court could have articulated a rule that would have required states to provide actual meaningful representation, as the ends of justice demand. However, in its attempt not to limit the potential options of attorneys to defend their clients, the Court adopted a standard that is so high that the only instances where attorneys' conduct have been found to be ineffective are such an affront to justice that no reasonable person could argue against it.

By creating such a high standard, and the resulting burden for defendants to overcome, the Court allows for such a low quality of representation to be deemed acceptable that defendants might very well be deprived of their rights. It certainly is a very complicated balance between giving attorneys latitude to attempt whatever strategy they believe best serves their clients, and protecting the rights of the clients from poor representation by their attorneys. But at what point does giving attorneys so much latitude in their strategy–to the point where they can just do the bare minimum necessary to meet the standard–become an affront to justice, and an insult to our legal system?

The government, both federal and state, allocates significant funding to the prosecution, yet public defenders are chronically underfunded and understaffed.[107] It is certainly not popular politically to increase funding to attorneys defending the indigent, and often, when budgets are cut, that funding is the first to be reduced.[108] The result being that the right to a defense attorney to assist a defendant at trial, at least for the indigent, has become the right to have an overworked and underpaid attorney who often does not have the time or the resources to best represent the client. Justice has become a luxury, something only the rich can afford.

> action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.'

Id. (quoting Grosjean v. American Press Co., 297 U.S. 233, 243-44 (1936)).

[106] *Benevento*, 697 N.E.2d at 586 (quoting *Bennett*, 280 N.E.2d at 639); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999).

[107] *See* Klein, *supra* note 106, at 1442-43.

[108] *Id.*

The New York rule, being somewhat more favorable to defendants, makes it easier for clients to prove that they were not given effective assistance, but the standard for what is deemed acceptable is essentially the same as that of *Strickland*. While the focus is on the overall fairness of the trial, and not just the outcome of the case, attorneys' actions must still be so egregious that it undermines the fairness of the trial before the courts will step in. Thus, instead of striving to give every citizen the best representation, attorneys are given free rein to do as they wish, so long as they keep above the bare minimum. This seems to be a very small step away from the "farce and mockery of justice" test that the Court of Appeals abandoned in *Baldi*.

Of the other states, forty-five have also adopted *Strickland* outright as the standard to evaluate challenges to ineffective assistance of counsel under their state constitutions.[109] Also, the five states that use their own tests, which includes New York, still only hold attorneys accountable to the same level as *Strickland*, with the difference being only in the level of proof that the client needs in order to prevail on a claim of ineffective assistance.[110] Thus, in all fifty states, as well as federal courts, the minimum level of performance by an attorney that is deemed to be acceptable is the same. The New York test, with its requirement that the representation be "meaningful," comes closest to being a higher standard, but with the interpretation of "meaningful" being, in practice, essentially the same as *Strickland*'s standard of "objective reasonableness," it, too, falls short.

In an ideal situation, with a truly adversarial system, both sides would be equal. The attorneys would be of equal skill, with equal funding and resources available to both. That, though, is not the system we have. We require not that criminal defendants receive a perfect trial, but settle for one which is deemed fair. Fairness is assumed, unless there are obvious errors. And even in such cases, the error must be so egregious that it either prejudices the jury, or affects the fairness of the judicial process as a whole, in order for the defendant to be granted relief. With court dockets as overloaded as they are, it is understandable that the judiciary seeks to limit the number of cases that have to be retried, but certainly judicial economy cannot be

[109] *See supra* text accompanying note 89.

[110] *See supra* text accompanying note 89.

more important than protecting the rights and liberties of the citizenry.

It would be easy to argue that more funding would improve the situation. With more funding, public defenders' offices could hire more attorneys, and allow more time and resources to be spent on each individual case. But, as in most problems, simply throwing money at it might help mitigate, but will not solve the issue. The problem is not only that indigent defendants are often given a lower standard of representation than what should be acceptable; the bigger problem is that society does not seem to care that this is happening.

The legal profession is considered to be self-regulating.[111] Therefore, even where society at large turns a blind eye, the legal profession itself should seek to improve the service it provides to the public. Attorneys are required to provide their client with "competent representation."[112] Where exactly "competent representation" falls on the spectrum of "objectively reasonable" and "meaningful representation" is unclear, but the legal profession can hold itself to a higher standard than that which is required by the courts. Where attorneys provide their clients with deficient representation, the Model Rules of Professional Conduct are violated even though their conduct may not have prejudiced their client. Even if the courts do not deem the level of representation to be ineffective, the bar could still require its members to improve.[113]

Increased funding, which, under the current economic climate seems difficult, if not impossible, to achieve, would not in-and-of-itself result in the desired increase in attorneys' level of performance. Nor would professional requirement of higher performance independently solve the problem. A combined approach would be a good start. However, given the realities of the present, a more reasonable solution may yet lie with the courts.

[111] Model Rules of Professional Conduct Rule 8.3 cmt. 1 ("Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct.").

[112] Model Rules of Professional Conduct Rule 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[113] *See* Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise Of The Constitutional Right To Effective Assistance Of Counsel*, 13 HASTINGS CONST. L.Q. 625, 681-92 (1986).

In the past, clients had to prove that there were one or multiple instances during their representation that their attorneys' errors amounted to unreasonably deficient assistance. In *Bodden*, the court did not require there to be an individual act or omission that was so egregious as to amount to ineffective assistance by itself. Instead, the overall level of representation was so poor, and the errors so frequent, that the court could not but find that the cumulative effect of the errors was unreasonable. This is a shift away from the requirement that there be an error or omission that in itself is deemed unreasonable in order to satisfy the *Baldi* test, and instead evaluates the overall level of representation throughout the trial as a whole to determine if it met the standard. Such a shift could be a step in the right direction. If it is no longer acceptable for attorneys to do the bare minimum for their clients so long as they do not commit any particularly atrocious error, but instead have to maintain an overall performance that is considered reasonable, it is possible that the right to effective representation of counsel, especially for the indigent, could again become meaningful.

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