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Court of Appeals of New York, People v. Berroa

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COURT OF APPEALS OF NEW YORK

People v. Berroa[1]
(decided November 21, 2002)

Dario Berroa was convicted of murder in the second degree and was sentenced to twenty-five years to life in prison.[2] He appealed his conviction, and argued that he was deprived his constitutional right of "conflict-free" counsel under both the Sixth Amendment to the Federal Constitution[3] and Article 1, Section 6 of the New York State Constitution.[4] The Appellate Division, Second Department rejected Berroa's "ineffective assistance of counsel claim" and affirmed his conviction.[5] A dissenting Justice, however, granted the defendant leave to appeal his ineffective assistance of counsel claim to the New York Court of Appeals.[6] The New York Court of Appeals reversed the lower court's decision and held that defense counsel's stipulation[7] had the effect of creating and enhancing the attorney-client conflict, which had "a substantial relation to the conduct of the defense."[8] Accordingly, the case was remanded to the lower court for a retrial.[9]

Berroa was charged with murder in the second degree and related offenses that stemmed from a killing that occurred in June

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[1] 99 N.Y.2d 134, 782 N.E.2d 1148, 753 N.Y.S.2d 12 (2002).

[2] *Id.* at 138, 782 N.E.2d at 1148, 753 N.Y.S.2d at 15.

[3] U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

[4] N.Y. CONST. art. I., § 6 provides 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 . . . ."

[5] *Berroa,* 99 N.Y.2d at 138, 782 N.E.2d at 1148, 753 N.Y.S.2d at 15.

[6] *Id.*

[7] *Id.* at 137, 782 N.E.2d at 1148, 753 N.Y.S.2d at 14. Defense's stipulation read:

> It is stipulated and agreed by [defense counsel] that prior to their appearing in New York to give testimony in this case, [the defense witnesses] had spoken with her and that neither Miss Santiago and Miss Torres told [defense counsel] that the defendant Dario Berroa had been in Philadelphia specifically on June 22nd, 1994.

Id.

[8] *Id.* at 142, 782 NE.2d at 1155, 753 N.Y.S.2d at 19.

[9] *Id.* at 143, 782 NE.2d at 1155, 753 N.Y.S.2d at 19.

of 1994.[10] At trial, the defense offered a misidentification theory.[11] Prior to the start of the defendant's case, the prosecutor sought confirmation that a "no alibi" defense would be used because the required notice of alibi[12] had not been filed.[13] Additionally, the prosecutor understood a misidentification defense could also implicate an alibi for the defendant.[14] However, defense counsel assured the court that an alibi witness would not be offered because defense witnesses, including the defendant, could not recall their whereabouts during the time of the shooting.[15] Moreover, defense counsel explained that the witnesses' testimony was being proffered to show that at the time of the shooting, the defendant had a "distinctive yellow-orange" hair color.[16]

The testimony of the prosecution's key witnesses included the deceased's brother and two-eye witnesses, who testified that the defendant shot the victim at "point blank range."[17] Additionally, these witnesses testified that the defendant's impetus for the shooting was a "drug turf dispute" and that the defendant had black hair and unique green eyes.[18] Thereafter, the defense sought to establish its misidentification defense.[19] The defendant called two witnesses, Vivian Rivera and Iris Santiago. The defendant's girlfriend, Iris Santiago, testified that the defendant's

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[10] *Berroa,* 99 N.Y.2d at 135, 782 N.E.2d at 1149, 753 N.Y.S.2d at 13.

[11] *Id.*

[12] N.Y. C.P.L. § 250.20 (McKinney 2002) Notice of alibi provides in pertinent part:

> [T]hat if the defendant intends to offer a trial defense that at the time of the commission of the crime charged he was at some place or places other than the scene of the crime, and to call witnesses in support such defense, he must, within eight days of service of such demand [by the people] . . . a "notice of alibi" reciting (a) the place or places where the defendant claims to have been a the time in question, and (b) the names, the residential addresses, the places of employment and the addresses thereof of every such alibi witness upon whom he intends to rely.

[13] *Berroa,* 99 N.Y.2d at 136, 782 N.E.2d at 1148, 753 N.Y.S.2d at 14.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 135, 782 N.E.2d at 1148, 753 N.Y.S.2d at 13.

[18] *Berroa*, 99 N.Y.2d at 136, 782 N.E.2d at 1148, 753 N.Y.S.2d at 14.

[19] *Id.*

hair color had been yellow-orange since 1992.[20] However, Miss Santiago's testimony revealed an alibi for the defendant.[21] She indicated that two days before the murder, she and the defendant were in Philadelphia and they remained there until two days after the shooting.[22] The court informed defense counsel that Miss Santiago's testimony was problematic because it provided an alibi that had not been previously revealed to the prosecutor.[23] The court, however, allowed the witness's testimony but reserved its ruling with respect to the defendant's newly uncovered alibi.[24]

Following the close of the defendant's girlfriend's testimony, the court requested counsels' input on how to "proceed."[25] Defense counsel made clear that she had not encouraged any of the defense witnesses' silence regarding the alibi and further stated none of the defense witnesses previously questioned had been able to recall their whereabouts on the day of the shooting.[26] On the other hand, the prosecution requested that the testimony of the defendant's girlfriend should be admissible and alluded to the fact that the prosecution would attempt to discover when she first disclosed the defendant's alibi.[27] Furthermore, defense counsel explained that none of the attorneys working on the case requested silence on the part of any witness, and therefore, assistance from defense counsel to clarify the confusion was unnecessary.[28] Intervening, the court expressed its reservations about the possibility of defense counsel being called as a witness and warned that "it was not desirable for defense counsel to be called as a witness to impeach any of the defense witnesses."[29] Consequently, the trial was allowed to resume after

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[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Berroa*, at 136, 782 N.E.2d at 1148, 753 N.Y.S.2d at 14.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id. But see* People v. Dawson, 50 N.Y.2d 311, 317, 406 N.E.2d 771, 774, 428 N.Y.S.2d. 914, 918 (1980) (stating that "an alibi witness is under no obligation to come forward . . . such silence may not be used as a means of discrediting the witness's testimony, either upon cross-examination or during . . . summation.").

[28] *Berroa,* 99 N.Y.2d at 137, 782 N.E.2d at 1148, 753 N.Y.S.2d at 14.

[29] *Id.*

defense counsel indicated that she would be amendable to a stipulation asserting that she was not aware of an alibi prior to trial.[30] Upon resumption of the trial, both of the defense witnesses testified that they had informed defense counsel of the alibi prior to the start of the trial.[31] Similarly, the defendant testified that he had yellow-orange hair and that he was in Philadelphia at the time of the shooting, although he did not recall this fact until after hearing the testimony of defense witnesses.[32]

At the end of the defense's case, the court and defense counsel drafted a stipulation[33] in which defense counsel denied having any knowledge of the existence of an alibi prior to the start of the trial.[34] This stipulation[35] was then read to the jury prior to the prosecution's rebuttal case.[36] During closing arguments, defense counsel continued to assert its misidentification defense and stated that the jury could consider the alibi testimony, but should also take into consideration her stipulation when weighing the credibility of the alibi testimony.[37] The jury returned a verdict of guilty.[38]

On appeal to the Court of Appeals, the defendant argued that he was deprived of his constitutional right of effective assistance of counsel because there was a conflict of interest when his attorney stipulated that she was unaware of the defendant's alibi prior to the start of the trial.[39] In addition, the defendant argued that the stipulation transformed his advocate into his adversary, so as to set his advocate's credibility in opposition to the credibility of the other defense witnesses.[40] The Court of Appeals agreed with the defendant and reversed and remanded for a retrial.[41] The court opined that the conflict that confronted

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[30] *Id.*
[31] *Id.* at 137, 782 N.E.2d at 1148, 753 N.Y.S.2d at 15.
[32] *Id.*
[33] *See supra* note 7.
[34] *Berroa,* 99 N.Y.2d at 137, 782 N.E.2d at 1148, 753 N.Y.S.2d at 15.
[35] *See supra* note 7.
[36] *Berroa,* 99 N.Y.2d at 137, 782 N.E.2d at 1148, 753 N.Y.S.2d at 15.
[37] *Id.* at 138, 782 N.E.2d at 1148, 753 N.Y.S.2d at 15.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Berroa,* 99 N.Y.2d at 139, 782 N.E.2d at 1148, 753 N.Y.S.2d at 16.

defense counsel was not one of competing loyalties, but the fact that she was the only source capable of impeaching the other key defense witnesses and "thus stood to be called as a witness."[42] Consequently, defense counsel had an ethical obligation[43] to withdraw from acting as the defendant's advocate when it became apparent that she was in a position to be called as a witness "on a significant issue other than on behalf of the client" and it was blatantly obvious that the testimony would be "prejudicial to the client."[44] Therefore, the New York Court of Appeals held that as a matter of law the defendant was deprived of meaningful representation.[45]

The focus of the court's analysis was the attempted rectification of the dilemma that unfolded before the court with the testimony of the defendant's witnesses and not the reason for the disclosure by defense counsel.[46] The court explained "the right to effective assistance of counsel in a criminal proceeding is guaranteed by the New York and Federal Constitutions."[47] Additionally, the court in rejecting the People's argument that "a testimonial stipulation may constitute a legitimate trial strategy even when the facts stipulated may be prejudicial to the

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[42] *Id.*

[43] 22 N.Y.C.R.R. § 1200.21(d) (McKinney 2002) provides in pertinent part:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as witness on a significant issue on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw form acting as an advocate before the tribunal.

Id.; *see also,* People v. Paperno, 54 N.Y.2d 294, 299-300, 445 N.E.2d 797, 800, 445 N.Y.S.2d 119, 122 (1981). *But see* S & S Hotel Ventures Ltd. P'ship v. S. H. Corp., 69 N.Y.2d 437, 443 508 N.E.2d 647, 650, 515 N.Y.S.2d 735, 738 (1987) (holding that the Code establishes ethical standards to guide attorneys and they are not to be applied rigidly or as though they are controlling statutory authority or decisional law).

[44] *Berroa,* 99 N.Y.2d at 139, 782 N.E.2d at 1148, 753 N.Y.S.2d at 16.

[45] *Id.* at 143, 782 N.E.2d at 1148, 753 N.Y.S.2d at 19.

[46] *Id.* at 138, 782 N.E.2d at 1148, 753 N.Y.S.2d at 15.

[47] *Id.*

defendant,"[48] asserted "[o]ur State standard for effective assistance of counsel 'has long been whether the defendant was afforded *meaningful representation.*'"[49] The New York courts in adopting the meaningful representation standard focus on the "fairness of the process as a whole rather than its particular impact on the outcome of the case."[50] Therefore, the fact that the defendant may have been acquitted but for the attorney's error's is not dispositive under the meaningful representation standard.[51]

In *People v. Baldi*,[52] the New York Court of Appeals reversed the appellate division's decision and reinstated both orders of conviction, stating that the right to effective assistance of

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[48] *Id.* at 140, 782 N.E.2d at 1148, 753 N.Y.S.2d at 17; *see also,* People v. Baldi, 54 N.Y.2d 137, 151, 429 N.E.2d 400, 407, 444 N.Y.S.2d 893, 900 (1981); State v. Crespo, 718 A.2d 925, 938, 940 (Conn. 1998) (holding that there was no conflict of interest where the defense attorney stipulated to facts regarding his participation in the initial investigation, but constituted a legitimate trial tactic); People v. Beals, 643 N.E.2d 789, 792-94 (Ill. 1994) (holding that the use of stipulations by defense counsel regarding the description of the shooter and that defendant wore a red Addidas jacket during an argument prior to the victim's shooting did not amount to a conflict of interest or the deprivation of effective assistance of counsel but was the result of legitimate trail tactics, and thus, the defendant failed to overcome the "strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance").

[49] *Id.* at 138, 782 N.E.2d at 1148, 753 N.Y.S.2d at 15 (emphasis added) (quoting People v. Henry, 95 N.Y.2d 563, 565, 744 N.E.2d 112, 113, 721 N.Y.S.2d 577, 578 (2000); People v. Benevento, 91 N.Y2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998)); *see also* People v. Henry, 95 N.Y.2d 563, 565 744 N.E.2d 112, 113, 721 N.Y.S.2d 577, 578 (2000); People v. Benevento, 91 N.Y.2d 708, 712, 697 N.E.2d 584, 587, 674 N.Y.S.2d 629, 632 (1998); People v. Satterfield, 66 N.Y.2d 796, 799, 488 N.E.2d 834, 836, 497 N.Y.S.2d 903, 906 (1985).

[50] *Benevento*, 91 N.Y.2d at 714, 697 N.E.2d at 588, 674 N.Y.S.2d at 633; *see also* Strickland v. Wash., 466 U.S. 668, 687, 694 (1984) (articulating the federal standard, which requires a defendant to show (1) that the attorney's performance was deficient, and (2) but for counsel's unprofessional errors, there is a reasonable probability the outcome of the proceedings would have been different in order to overcome the strong presumption of effective representation.) Additionally, the Supreme Court has held that "the touchstone of the second prong of the analysis is whether counsel's performance rendered the proceeding fundamentally unfair or left an unreliable result. *Henry*, 95 N.Y.2d at 566, 744 N.E.2d at 114, 721 N.Y.S.2d at 579 (quoting Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993)).

[51] *Benevento*, 91 N.Y.2d at 714, 697 N.E.2d at 588, 674 N.Y.S.2d at 633.

[52] 54 N.Y.2d at 137, 429 N.E.2d at 400, 444 N.Y.S.2d at 893.

counsel as guaranteed by both the Federal and New York State Constitutions is not quantifiable, but must be evaluated according to the particular circumstances of each representation.[53] After being convicted of murder in the second-degree and attempted murder in two separate trials, the defendant argued that he had been denied effective assistance of counsel because his attorney testified as a witness regarding his observations of the defendant's composure during police interviews.[54] During the interviews, the defendant confessed to the murder of a fifteen year old girl along with three other murders and ten assaults on women, in addition to the prior attempted murder of a police officer, which stemmed from the burglary of a home.[55]

In rejecting Baldi's claim, the court stated that its most vital concern in reviewing ineffective assistance of counsel claims was to avoid "confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis."[56] The court explained that satisfaction of the constitutional requirement of meaningful representation must not be viewed in hindsight, but at the time of the actual representation.[57] Based upon the evidence, law, and circumstances of the particular case, it must be established that the attorney represented the client to best of his ability.[58] Although, defense counsel may have offered contradictory evidence with respect to his client's position, it was done in an attempt to establish the insanity defense, and in addition, defense counsel was not the only source of the incriminating evidence against the defendant.[59] Thus, the decision by the defense attorney to take the stand was "consistent with and strengthened the insanity defense" asserted at trial and helped to

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[53] *Id.* at 146, 429 N.E.2d at 404, 444 N.Y.S.2d at 897.

[54] *Id.* at 143-44, 429 N.E.2d at 403, 444 N.Y.S.2d at 896.

[55] *Id.* at 141, 144, 429 N.E.2d at 402, 403, 444 N.Y.S.2d at 895, 896. In evaluating whether or not the defense counsel has been diligent in safeguarding his client's right the court explained that it would be remiss to require a defense counsel not to allow his client to cooperate with the police where the client is being offered immunity regarding other crimes. *Id.* at 150, 429 N.E.2d at 406-07, 444 N.Y.S.2d at 899-900.

[56] *Id.* at 146, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

[57] *Baldi,* 54 N.Y.2d at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

[58] *Id.*

[59] *Id.* at 148-49, 429 N.E.2d at 405-06, 444 N.Y.S.2d at 898-99.

lessen the prejudicial effect of the evidence against his client.[60] Therefore, it was a tactical approach, although a losing one, chosen by counsel, who made a "valiant effort to establish his client's lack of criminal responsibility."[61] Thus, the court determined that tactical errors in hindsight must not be escalated into ineffective assistance of counsel.[62]

Likewise, in *People v. Harris*,[63] the New York Court of Appeals explained that in order for a defendant to prevail on an ineffective assistance of counsel claim, the defendant must demonstrate that a potential conflict of interest existed and the conduct of his defense was affected by the operation of the conflict.[64] A mere showing of a substantial possibility of the existence of a conflict, without more, will not suffice to prove that the defendant is entitled to a reversal and a new trial.[65] The *Harris* court rejected the defendants' ineffective assistance of counsel argument and affirmed their convictions.[66] The court held that there was no indication that the representation by the attorney was compromised by the potential conflict, even though the defendants' attorneys had previously represented the confidential informant as well as the prosecution's chief witness.[67] However, the court did note that the better practice would have been to conduct a hearing to investigate the potential conflict; nonetheless, the court did not commit reversible error by not doing so.[68]

Additionally, New York courts reject the stricter federal standard of ineffective assistance of counsel. The federal standard requires the defendant to show prejudice in the outcome of the process in order to overcome the strong presumption of effective assistance of counsel and to adhere to the application of the meaningful representation test.[69] However, the New York

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[60] *Id.* at 148, 429 N.E.2d at 406, 444 N.Y.S.2d at 899.

[61] *Id.* at 151, 429 N.E.2d at 407, 444 N.Y.S.2d at 900.

[62] *Baldi*, 54 N.Y.2d at 151, 429 N.E.2d at 407, 444 N.Y.S.2d at 900.

[63] 99 N.Y.2d 202, 783 N.E.2d 502, 753 N.Y.S.2d 437 (2002).

[64] *Id.* at 210, 783 N.E.2d at 506, 753 N.Y.S.2d at 441.

[65] People v. Alicea, 61 N.Y.2d 23, 31, 459 N.E.2d 177, 181, 471 N.Y.S.2d 68, 72 (1983).

[66] *Harris*, 99 N.Y.2d at 211-12, 783 N.E.2d at 502, 753 N.Y.S.2d at 437.

[67] *Id.* at 212, 783 N.E.2d at 502, 753 N.Y.S.2d at 437.

[68] *Id.*

[69] *See supra* note 46.

Constitutional standard of meaning representation includes the prejudicial element to ensure that the process as a whole is fundamentally fair as opposed to the "particular impact on the outcome of the case."[70] Thus, there is no requirement for the defendant to show "specific" prejudice in an ineffective assistance of counsel claim in the New York courts.[71] Therefore, in New York, the court must examine whether the potential conflict actually affected the conduct of the defense, so as to make the defendant's right to a fair trial prejudiced.[72] Thus, the trial judge plays a very distinct and vital role in assuring that a defendant has not had his right to a fair trial compromised.[73]

The prosecutor in *Berroa* argued that a stipulation by defense might be a legitimate trial strategy and sought to use *People v. Beals*[74] and *State v. Crespo*[75] as precedent for its assertion.[76] In *Beals*, the Illinois Supreme Court applied the federal standard set forth in *Strickland v. Washington*,[77] and held that the defendant was not deprived of his constitutional right to effective assistance of counsel.[78] In order to assert an effective assistance of counsel claim under the federal standard, the defendant must establish:[79]

1. That counsel's performance was deficient, which requires a showing of severe errors so that counsel

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[70] *Henry*, 95 N.Y.2d at 565, 744 N.E.2d at 114, 721 N.Y.S.2d at 579; *see also, Benevento*, 91 N.Y.2d at 714, 697 N.E.2d at 588, 674 N.Y.S.2d at 633; People v. Ortiz, 76 N.Y.2d 652, 657, 564 N.E.2d 630, 633, 563 N.Y.S.2d 20, 23 (1990); *Alicea*, 61 N.Y.2d at, 30, 459 N.E.2d at 181, 471 N.Y.S.2d at 71.

[71] *Ortiz*, 76 N.Y.2d at 657, 564 N.E.2d at 633, 563 N.Y.S.2d at 23.

[72] *Id.* at 657, 564 N.E.2d at 634, 563 N.Y.S.2d at 24; *Benevento*, 91 N.Y.2d at 713, 697 N.E.2d at 588, 674 N.Y.S.2d at 633.

[73] *See, McDonald*, 68 N.Y.2d at 12-13, 496 N.E.2d at 849, 505 N.Y.S.2d at 830; People v. Mattison, 67 N.Y.2d 462, 468, 494 N.E.2d 1374, 1377, 503 N.Y.S.2d 709, 712 (1986); People v. Gomberg, 38 N.Y.2d 307, 313, 342 N.E.2d 550, 553, 379 N.Y.S.2d 769 (1975).

[74] 643 N.E.2d 789 (Ill. 1994).

[75] 718 A.2d 925 (Conn. 1998).

[76] *Berroa*, 99 N.Y.2d at 140, 782 N.E.2d at 1148, 753 N.Y.S.2d at 19.

[77] 466 U.S. 668 (1984).

[78] *Beals*, 643 N.E.2d at 795.

[79] *Id.* at 793 (citing *Strickland*, 466 U.S. at 687).

was not functioning as the "counsel" guaranteed by the Sixth Amendment.[80]

2. That the deficient performance prejudiced the defense such the severity of the errors deprived the defendant of a fair trial, resulting in reliable results.[81]

Thus, if the defendant is unable to make a showing of both components, it cannot be ruled that the conviction was a result of a breakdown in the adversary process, which rendered unreliable results.[82] However, the defendant must be able to show that the outcome of his case was prejudicial as a result of counsel's conflict of interest. Thus, the Illinois Supreme Court determined that the defendant failed to show that "'but for' defense counsel's stipulations, the outcome of the defendant's trial would have been different."[83] Therefore, in *Beals*, the defendant failed to overcome the strong presumption that counsel's conduct was within a "wide range of reasonable professional assistance."[84]

Additionally, in *Crespo*, the defendant appealed his conviction of murder, alleging ineffective assistance of counsel because of his attorney's participation in the initial investigation.[85] The Supreme Court of Connecticut held there was no denial of

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[80] *Id.* at 794. (explaining that the defendant was unable to satisfy this prong of the test because counsel's stipulation effectively prevented the State from calling the defendant's sister as a witness against the defendant, thereby minimizing the prejudicial effect of the inconsistent statements.)

[81] *Id.* at 794 (explaining that the defendant failed to satisfy the first prong, and that the reviewing court need not consider the prejudicial effect on the outcome of the trial because "the reviewing court dispose of the claim by applying either component and, if it is not prove[n], need not consider the other component"); *see also, Strickland,* 466 U.S. at 697.

[82] *Beals*, 643 N.E.2d at 794.

[83] *Id.*

[84] *Id.; see also Strickland,* 466 U.S. at 689.

[85] *Crespo*, 718 A.2d at 935. Crespo's attorney, after being informed by the defendant in the presence of the defendant's brother in-law and sister that he had killed the victim and where the body was located, contacted the office of the state's attorney, drafted a written consent to search the storage bin where the body was located and provided the key to the bin, as well as informed the police that the person who provided the key was in his office. *Id.*

"conflict-free" assistance of counsel.[86] The Supreme Court of Connecticut further explained that in order for a defendant to establish a violation of his Sixth Amendment right, he must overcome a two-pronged analysis.[87] Firstly, the defendant must establish that counsel was actively representing conflicting interests, and secondly, the defendant must show that the actual conflict had an adverse impact on his representation.[88] In this case, the court reasoned that the defendant failed to demonstrate that his "attorney's conflict of interest impeded [the] paramount duty of loyalty" to him.[89] Therefore, Supreme Court of Connecticut determined that it was possible for the trial court to conclude that the defense attorney's stipulation was in the best interest of the defendant and did not constitute ineffective assistance of counsel because based upon the record, the prosecutor could have proven every essential fact in the stipulation.[90]

The New York Court of Appeals stated in *People v. McDonald*,[91] that the role of the trial judge in ensuring that the right to effective assistance of counsel and the right to retain counsel of one's choice do not clash.[92] The court held that although the initial burden lies with defense counsel to recognize the existence of a potential conflict of interest and to alert the defendant to such conflict in order to obtain the client's informed consent to continue the representation in lieu of the risks, the prosecutor is also obligated to inform the court of any possible conflicts that may be inferred from facts within his or her possession.[93] Moreover, the trial judge also owes the defendant an

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[86] *Id.* at 937.
[87] *Id.* at 938.
[88] *Id.*
[89] *Id.* at 939.
[90] *Crespo*, 718 A.2d. at 939-40.
[91] 68 N.Y.2d 1, 496 N.E.2d 844, 505 N.Y.S.2d 824 (1986).
[92] *Id.* at 8, 496 N.E.2d at 847, 505 N.Y.S.2d at 827; *Gomberg*, 38 N.Y.2d at 313, 342 N.E.2d at 553, 379 N.Y.S.2d at 769. *But Cf.*, *Berroa*, where the New York Court of Appeals did not address the defendant's argument that the attorney failed to obtain a knowing and voluntary waiver of his right to "conflict-free" counsel. *Berroa*, 99 N.Y.2d at 143, 783 N.E.2d at 1148, 753 N.Y.S.2d at 19, n3. The court found that the defendant was denied his constitutional right of effective assistance of counsel under both the Federal and New York Constitutions. *Id.* at 143, 783 N.E.2d at 1148, 753 N.Y.S.2d at 19.
[93] *McDonald*, 68 N.Y.2d at 8, 496 N.E.2d at 847, 505 N.Y.S.2d at 827.

independent duty to protect his or her constitutional right to effective assistance of counsel.[94] Therefore, the trial judge is required to conduct a "record inquiry" hearing so as to inform a defendant of the possibility or existence of a possible conflict and give the defendant the opportunity to seek new counsel, thus waiving his right to raise an ineffective assistance of counsel argument.[95] Thus, the *McDonald* court determined that the trial judge should have conducted an independent inquiry[96] after being notified that defense counsel also represented the company,[97] and therefore, held that the defense counsel "labored under an actual conflict" by representing both the defendant and the company, who was the victim in the instant case.[98] Additionally, the court stated that it was the defendant's decision, not the attorney's, to decide if he would accept the risks associated with the attorney's strategy on how best to impeach the People's principle witness, who was the secretary-treasurer of the company that defense counsel also represented.[99]

In summation, although a defendant is guaranteed the right to effective assistance of counsel under both the Federal and New York State Constitutions, the standard that will be used to determine the defendant's ineffective assistance of counsel claim

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[94] *Id.*

[95] *Id.* at 8, 496 N.E.2d at 847, 505 N.Y.S.2d at 827 (citing *Gomberg*, 38 N.Y.2d at 315, 342 N.E.2d at 555, 379 N.Y.S.2d at 769); *see also*, People v. Lombardo, 61 N.Y.2d 97, 102, 460 N.E.2d 1074, 1075, 472 N.Y.S.2d 589, 590 (1984); *Harris*, 99 N.Y.2d at 211, 783 N.E.2d at 502, 753 N.Y.S.2d at 437; *Mattison*, 67 N.Y.2d at 468, 494 N.E.2d at 1377, 503 N.Y.S.2d at 712; People v. Krausz, 84 N.Y.2d 953, 955, 644 N.E.2d 1377, 1378, 620 N.Y.S.2d 821, 822 (1994).

[96] The trial judge is required to conduct an inquiry on the record, known as a *Gomberg* inquiry, of each and every defendant whose defense is potentially subject to a conflict of interest, so as to ascertain whether or not the defendant is aware of the potential risks involved, and if the defendant is knowingly choosing to proceed under such risks, thereby waiving an ineffective assistance of counsel claim on appeal. *McDonald*, 68 N.Y.2d at 8, 496 N.E.2d at 847, 505 N.Y.S.2d at 827 (citing *Gomberg*, 38 N.Y.2d at 315, 342 N.E.2d at 555, 379 N.Y.S.2d at 769).

[97] Defendant James McDonald was charged with arson in the third degree for intentionally setting fire to a shed belonging to the Lyell Exchange Lumber Company. *McDonald*, 68 N.Y.2d at 4, 496 N.E.2d at 844, 505 N.Y.S.2d at 824.

[98] *Id.* at 9, 496 N.E.2d at 848, 505 N.Y.S.2d at 828.

[99] *Id.* at 12, 496 N.E.2d at 849, 505 N.Y.S.2d at 829.

will depend on which tribunal the case is tried in. If the defendant brought the challenge under the New York State Constitution, the defendant will be provided with a more flexible standard by which his allegation will be viewed.[100] However, if the challenge is brought under the Federal Constitution, the defendant will be faced with a much stricter approach in evaluating the claim.[101] Additionally, the focus of the inquiry is entirely different within the two systems—the State of New York's focus as previously noted, is on the overall fairness of the proceeding.[102] whereas the federal focus is based upon whether the attorney's perceived deficient performance had a prejudicial impact on the case's result.[103] Furthermore, the New York courts, unlike the Federal courts, have refused to invoke a harmless error analysis with respect to challenges brought under an ineffective assistance of counsel argument.[104] Therefore, a finding that "but for" the errors committed by counsel, the defendant would have been acquitted is not dispositive under New York's constitutional guarantee of effective assistance of counsel, however, under the federal standard it may be a dispositive determination.[105]

Marcia Miller

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[100] *Henry*, 95 N.Y.2d at 565, 744 N.E.2d at 113, 721 N.Y.S.2d at 578; *Baldi*, 54 N.Y2d at 146, 429 N.E.2d at 404, 444 N.Y.S.2d at 897.

[101] *Henry*, 95 N.Y.2d at 566, 744 N.E.2d at 114, 721 N.Y.S.2d at 579; *Beals*, 643 N.E.2d at 504; *Crespo*, 718 A.2d at 938.

[102] *Henry*, 95 N.Y.2d at 566, 744 N.E.2d at 114, 721 N.Y.S.2d at 577.

[103] *Id.*

[104] *Benevento*, 91 N.Y.2d at 714, 697 N.E2d at 588, 674 N.Y.S.2d at 633.

[105] *Id.*; *Beals*, 643 N.E.2d at 794.

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