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RIGHT TO COUNSEL

United States Constitution Amendment VI:

[A]nd to have the Assistance of Counsel for his defence.

New York Constitution Article I, Section 6:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel

SUPREME COURT OF NEW YORK

BRONX COUNTY

People v. Figueroa¹
(decided January 2, 2001)

On August 9, 2000, Raymond Figueroa moved pursuant to Criminal Procedure Law, section 440.10(1)(h),² to set aside his conviction claiming his constitutional right to a fair trial was violated.³ Figueroa claimed that his conviction should be overturned due to ineffective assistance of counsel, in violation of his rights guaranteed by the Federal⁴ and New York State⁵ Constitutions.⁶ Figueroa's primary argument was that the search of his bag was unconstitutional and that his attorney failed to argue

¹ 187 Misc. 2d 539, 722 N.Y.S.2d 336 (Sup. Ct. Bronx County 2001).

² N.Y. CRIM. PROC. LAW §440.10 (1) (h) (McKinney 2002).

³ *Figueroa*, 187 Misc. 2d at 540, 722 N.Y.S.2d. at 337.

⁴ U.S. CONST. amend. VI states in pertinent part: "[A]nd to have the Assistance of Counsel for his defence."

⁵ N.Y. CONST. art. I, § 6 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"

⁶ *Figueroa*, 187 Misc. 2d at 543, 722 N.Y.S.2d at 339.

*People v. Gokey*⁷ during a pretrial suppression hearing.⁸ The Supreme Court, Bronx County, denied Figueroa's motion to set aside his conviction on the grounds that the "defendant's motion merely serves to repeat the allegations which have already been reviewed and rejected on appeal," and because he failed to prove "any non-record-based evidence" to support his motion.⁹

A witness informed the police that a man broke into a doctor's office.¹⁰ When the police arrived, they observed Figueroa standing in the office with a pink shopping bag.¹¹ The police ordered Figueroa to "drop the bag" and subsequently arrested him.¹² The police then searched the bag and found a telephone and answering machine.¹³ On November 23, 1994, Figueroa was convicted of burglary in the second degree, and was sentenced to a term of imprisonment ranging from six to twelve years.¹⁴ Figueroa asserted two grounds on appeal.¹⁵ First, he alleged "that his conviction was against the weight of the evidence, and second, that he received ineffective assistance of trial counsel because counsel failed to argue the purported application of *People v. Gokey* during a pretrial suppression hearing."¹⁶ The appellate court determined that Figueroa did have "meaningful representation" and denied his

⁷ 60 N.Y.2d 309, 469 N.Y.S.2d 618 (1983) (holding that "[a] duffel bag that is within the immediate control or 'grabbable area' of a suspect at the time of his arrest may not be subjected to a warrantless search incident to the arrest, unless the circumstances leading to the arrest support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag").

⁸ *Figueroa*, 187 Misc. 2d at 541, 722 N.Y.S.2d at 338.

⁹ *Id.* at 549, 722 N.Y.S.2d at 343.

¹⁰ *Id.* at 547, 722 N.Y.S.2d at 342.

¹¹ *Id.*

¹² *Id.*

¹³ *Figueroa*, 187 Misc. 2d at 547, 722 N.Y.S.2d at 342.

¹⁴ *Id.* at 540, 722 N.Y.S.2d at 337. Defendant next filed a motion to vacate claiming that the People's evidence in the speedy trial hearing was insufficient, and that he had discovered new evidence. Defendant's motion was denied and an appeal followed. On appeal, defendant first claimed he was deprived his right to a speedy trial, but subsequently withdrew this appeal and filed a different one. *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

appeal.¹⁷ Figueroa then filed a petition for a writ of habeas corpus in the United States District Court, but later withdrew his petition.¹⁸ Consequently, the defendant moved to set aside his conviction pursuant to CPL 440.10(1)(h), in the Supreme Court of New York, Bronx County, claiming that he was deprived of a fair trial as a result of ineffective assistance of counsel.¹⁹

First, the court denied the motion on procedural grounds and stated that the Appellate Division, First Department, determined that the defendant had in fact received effective assistance of counsel.²⁰ The appellate division stated, “as defendant’s current claim ‘was previously determined on the merits upon an appeal from the judgment,’ his present motion must be denied.”²¹

The *Figueroa* court commenced its analysis by stating that, “[a]n indelible right to counsel is guaranteed by both the Federal and State Constitutions,” and such a right cannot exist independent of the right to effective assistance of counsel.²² “So long as 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 meanin[g]ful representation, the constitutional requirement will have been met.”²³ In *People v. Baldi*, the defendant’s initial counsel testified at trial as to the defendant’s actions, appearance at police interrogations, as well as the defendant’s confessions to several crimes.²⁴ The defendant argued that his attorney inadequately represented him in numerous

¹⁷ *Id.* at 541, 722 N.Y.S.2d at 337. In addition, the court noted that the claim was unreviewable because “it is based on facts dehors the record and trial counsel has had no opportunity to explain her trial tactics.”

¹⁸ *Figueroa*, 187 Misc. 2d at 541, 722 N.Y.S.2d at 337.

¹⁹ *Id.*

²⁰ *Id.* at 541, 722 N.Y.S.2d at 338.

²¹ *Id.* at 542, 722 N.Y.S.2d at 338-39 (quoting N.Y. Criminal Procedure Law §440.10(2)(a), which states in pertinent part: “[T]he court must deny a motion to vacate a judgement when: (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment . . .”).

²² *Id.* at 543; 722 N.Y.2d at 339; *see also* U.S. CONST. amend. VI; N.Y. CONST. art. I § 6.

²³ *People v. Baldi*, 54 N.Y.2d 137, 147, 429 N.E.2d. 400, 405, 444 N.Y.S.2d 893, 898 (1981).

²⁴ *Id.* at 144-45, 429 N.E.2d. at 404, 444 N.Y.S.2d at 897.

ways.²⁵ The prosecution countered the defendant's assertions by arguing that the attorney's conduct was a defense tactic and did not amount to incompetent or ineffective representation.²⁶ The court articulated the test for determining whether an individual has been provided adequate assistance of counsel.²⁷ The constitutional requirement is satisfied when the attorney provides "meaningful representation."²⁸ The *Baldi* court agreed with the prosecution's theory that the attorney's conduct was a defense tactic in an effort to lay a foundation for an insanity defense and affirmed the decision of the appellate division.²⁹

In *People v. Satterfield*,³⁰ the New York Court of Appeals also affirmed a decision by the appellate division involving a claim of ineffective assistance of counsel.³¹ Following a murder conviction, the defendant asserted that his attorney erred when he failed: (1) to lay a sufficient foundation when cross-examining an eyewitness, and (2) in recommending the withdrawal of the application to recall a witness.³² Citing *Baldi*, the Court of Appeals determined the defendant's right to effective assistance of counsel had been satisfied.³³ The court used the "meaningful representation" test set forth in *Baldi* and determined that the

²⁵ *Id.* at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898. The claims of inadequacy were: (1) the failure to pursue Baldi's claim of actual innocence in the first trial; (2) the handling of both defense and prosecution expert witnesses; (3) Sparrow's [defense counsel] testifying at the two trials and the *Huntley* hearing, as well as his summations; (4) Sparrow's role in bringing about the July 7 and 14, 1972 interrogations; and (5) the quality of effort made to suppress Baldi's June 21 confession. *Id.*

²⁶ *Id.* at 145, 429 N.E.2d at 404, 444 N.Y.S.2d at 897.

²⁷ *Baldi*, 54 N.Y.2d at 147, 429 N.E.2d at 405, 444 N.Y.S.2d at 898.

²⁸ *Id.*

²⁹ *Id.* at 145-48, 429 N.E.2d at 404-06, 444 N.Y.S.2d at 897-899. The court went on to state that the attorney testifying on his clients behalf was consistent with and strengthened the defense offered of insanity.

³⁰ 66 N.Y.2d 796, 488 N.E.2d 834, 497 N.Y.S.2d 903 (1985).

³¹ *Id.* at 797-99, 488 N.E.2d at 835-36, 497 N.Y.S.2d at 904-06.

³² *Id.* at 797-98, 488 N.E.2d at 835, 497 N.Y.S.2d at 904-05. The trial court held defense counsel failed to lay a foundation for admission of a police officer's report which stated that the witness told the officer that he walked around the corner for cigarettes. The trial court granted defense counsel's application to recall the witness. *Id.*

³³ *Id.* at 799, 488 N.E.2d at 835, 497 N.Y.S.2d at 906.

defendant was provided “meaningful representation” because the alleged error by the attorney amounted to a defense tactic.³⁴ Since the primary witness for the defense testified that there were four individuals at the crime scene and because the introduction of the police report would contradict their defense, the court reasoned that the decision to withdraw the application to recall the witness was a defense strategy.³⁵

Where defense counsel failed to introduce into evidence a medical report specifying crucial facts as to whether a victim could have been raped by a male, the Court of Appeals determined, again, that this did not violate the defendant’s constitutional right to effective assistance of counsel.³⁶ After being convicted of rape and sexual abuse, the defendant asserted that his attorney erred by failing to review a “vital” document, which “significantly contributed” to his conviction.³⁷ The court concluded that the trial attorney “successfully elicited testimony” from the prosecution’s medical expert “that such tears were not conclusive of penetration by a male sex organ,” and agreed with the appellate division’s ruling that the omission did not prejudice the defendant’s right to a fair trial, namely ineffective assistance of counsel.³⁸ Again, the court cited *Baldi’s* “meaningful representation” test and determined that the error did not substantially affect the defendant’s right to a “fair trial.”³⁹ They reasoned that the defendant failed to meet the burden of proving ineffective assistance of counsel.⁴⁰

The Sixth Amendment to the United States Constitution provides:

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

³⁴ *Id.*

³⁵ *Satterfield*, 66 N.Y.2d at 799, 488 N.E.2d at 835, 497 N.Y.S.2d at 906.

³⁶ *People v. Hobot*, 84 N.Y.2d 1021, 1023-24, 646 N.E.2d 1102, 1103-04, 622 N.Y.S.2d 675, 676-77 (1995).

³⁷ *Id.* The defendant claimed that a handwritten letter prepared by the general practitioner who was the initial doctor to examine the victim had a conclusion that the injuries were not consistent with a male sex organ.

³⁸ *Id.* at 1023-1024, 646 N.E.2d at 1103-04, 622 N.Y.S.2d at 676-77.

³⁹ *Id.* at 1022, 646 N.E.2d at 1103, 622 N.Y.S.2d at 676.

⁴⁰ *Id.* at 1022-24, 646 N.E.2d at 1103-04, 622 N.Y.S.2d at 676-77.

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.⁴¹

The Supreme Court in *Strickland v. Washington* stated that just because “a person who happens to be a lawyer is present at trial alongside the accused, [this] however, is not enough to satisfy the constitutional command.”⁴² The Court stated two essential ways in which the constitutional right to effective assistance of counsel is violated.⁴³ First, “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”⁴⁴ Second, an attorney may also deprive a defendant of his right to effective counsel by failing to render “adequate legal assistance.”⁴⁵

“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.”⁴⁶ The Court asserted two factors that must be satisfied to warrant reversal based on ineffective assistance of counsel.⁴⁷ “[T]he defendant must show that counsel’s performance was deficient,” and second, “the defendant must show that the deficient performance prejudiced the defense.”⁴⁸ The defendant plead guilty to three capital murder charges, and during his plea colloquy, explained to the judge that

⁴¹ U.S. CONST. amend. VI.

⁴² 466 U.S. 668, 685 (1984).

⁴³ *Id.* at 686.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Strickland*, 466 U.S. at 687.

⁴⁸ *Id.* The Court went on to state that the first factor requires a showing that defense counsel made such serious errors that the attorney was not acting as the defendant’s “counsel.” The second factor requires a showing that the attorney’s errors were so serious that it deprived the defendant of a “fair trial.” *Id.*

he was under extreme stress and that he had no significant prior record.⁴⁹ Defense counsel decided not to present evidence regarding defendant's character, psychiatric evidence, or a pre-sentence report in order to prevent the prosecution from contesting the defendant's character.⁵⁰ The defense wanted to prevent the prosecution from presenting evidence of their own regarding the defendant's state of mind in order to avoid undermining the defendant's claim of no significant criminal background.⁵¹ The defendant was subsequently sentenced to death due to numerous aggravating circumstances.⁵² The Court concluded that the actions by the defense counsel could not be found unreasonable, and even if the conduct was unreasonable, the respondent did not suffer sufficient prejudice to necessitate that his death sentence be set aside.⁵³

If an increased prison term resulted from the defense counsel's error, the petitioner has established sufficient evidence to establish *Strickland* prejudice.⁵⁴ In *Glover v. United States*, the defendant was convicted of federal labor racketeering, money laundering, and tax evasion.⁵⁵ At sentencing, the probation office recommended that these convictions be grouped together under United States Sentencing Guidelines § 3D1.2,⁵⁶ and the prosecution objected.⁵⁷ The defense counsel did not object to the grouping of the counts, and neglected to raise the issue on appeal, which resulted in the defendant's offense level to be increased by

⁴⁹ *Id.* at 672.

⁵⁰ *Id.* at 673-74.

⁵¹ *Id.*

⁵² *Strickland*, 466 U.S. at 674. The judge found that the murders were especially heinous, atrocious, and cruel, all involving repeated stabbings; the murders were involved in connection with other violent felonies; the murders were for a pecuniary gain; the murders were committed to avoid arrest and to hinder law enforcement. *Id.*

⁵³ *Id.* at 698-700.

⁵⁴ *Glover v. United States*, 531 U.S. 198, 199-200 (2001).

⁵⁵ *Id.* at 199.

⁵⁶ 18 U.S.C. § 3D1.2 (1994 & Supp. 2002), which states in pertinent part: "All counts involving substantially the same harm shall be grouped together into a single group."

⁵⁷ *Glover*, 531 U.S. at 199-201.

two.⁵⁸ Defendant contended that his attorney was ineffective because he failed to object to the grouping of the counts, or to raise the objection on appeal.⁵⁹ The Court declined to address the issue of deficient performance by counsel because that question was not raised on appeal.⁶⁰ But following the *Strickland* factors, the defense counsel's actions or inactions prejudiced the defendant's sentencing.⁶¹

Where defense counsel failed to file a timely appeal, the Supreme Court held the petitioner's right to effective assistance of counsel was violated.⁶² The defendant plead guilty to second-degree murder, and at sentencing, the judge informed the defendant that he may file an appeal within sixty days.⁶³ Subsequently, the defense counsel did not file an appeal within sixty days, and his appeal was rejected as untimely.⁶⁴ The defendant filed a federal habeas petition claiming that his attorney's failure to file a notice of appeal deprived him of his Sixth Amendment right to effective assistance of counsel.⁶⁵ The trial court found that the defendant's right was not violated, and the Court of Appeals for the Ninth Circuit reversed, finding "that a habeas petitioner need only show that his counsel's failure to file a notice of appeal was without the petitioner's consent."⁶⁶ The Supreme Court then examined the *Strickland* case, which held that defense counsel must act in a reasonable manner when defending his or her client.⁶⁷ The Supreme Court determined that the defendant's right to effective counsel was deprived, stating, "[w]e have long held that a lawyer who disregards specific instructions

⁵⁸ *Id.* at 201-02.

⁵⁹ *Id.* at 201. Defendant contended that the performance of his counsel fell below a reasonable standard both at sentencing, and on appeal, and significantly prejudiced his sentencing. *Id.*

⁶⁰ *Id.* at 204.

⁶¹ *Id.*

⁶² *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000).

⁶³ *Id.* at 473-74.

⁶⁴ *Id.* at 474.

⁶⁵ *Id.*

⁶⁶ *Flores-Ortega*, 528 U.S. at 475-76.

⁶⁷ *Id.* at 476-77.

from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.”⁶⁸

The New York courts adhere to the holding in *Baldi*, which provides for a flexible standard which varies depending on the circumstances of each representation.⁶⁹ The defendant has the burden to demonstrate that he was denied meaningful representation when bringing a claim for ineffective assistance of counsel.⁷⁰ It seems, due to the *Baldi* decision, that New York rarely seems to allow a conviction to be reversed based on the claim of ineffective assistance of counsel.⁷¹ Even though a defendant did not have the same lawyer at every stage of the proceeding, a New York court held this not to violate the individual’s constitutional right.⁷²

The federal courts uphold the right to effective assistance of counsel more often. Although the federal courts require the defendant to show that the attorney’s performance was deficient and that the deficient performance prejudiced the defense, thus depriving the defendant of a fair trial, these elements are easily satisfied.⁷³ New York courts adhere to the rule that as long as the defendant had meaningful representation, the constitutional requirement has been satisfied.⁷⁴ The courts have applied this rule very loosely, thus denying most appeals brought on the basis of ineffective assistance of counsel.⁷⁵ In contrast, the federal courts

⁶⁸ *Id.* at 477-478.

⁶⁹ *Baldi*, 54 N.Y.2d at 146, 429 N.E.2d at 404-05, 444 N.Y.S.2d at 897-98.

⁷⁰ See *People v. Diaz*, 157 A.D.2d 569; 550 N.Y.S.2d 312, 313 (1st Dep’t 1990) (citing to *People v. Baldi*, 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893; *People v. Satterfield*, 66 N.Y.2d 796, 488 N.E.2d 834, 497 N.Y.S.2d 903).

⁷¹ *Baldi*, 54 N.Y.2d at 145-48, 429 N.E.2d at 404-05, 444 N.Y.S.2d at 897-98.

⁷² See *People v. Divine*, 193 A.D.2d 562; 598 N.Y.S.2d 211 (1st Dep’t 1993) (holding that petitioner did have effective assistance of counsel due to the fact that the trial court immediately appointed an attorney whenever defendant appeared in court).

⁷³ See *Strickland*, 466 U.S. at 687.

⁷⁴ See *Baldi*, 54 N.Y.2d at 147, 429 N.E.2d at 898, 444 N.Y.S.2d at 903.

⁷⁵ See *Divine*, 193 A.D.2d at 562, 598 N.Y.S.2d at 211; *Baldi*, 54 N.Y.2d at 137, 429 N.E.2d at 400, 444 N.Y.S.2d at 893; *Satterfield*, 66 N.Y.2d at 796, 488 N.E.2d at 834, 497 N.Y.S.2d at 903.

have applied the *Baldi* rule quite narrowly, thus reversing many convictions based on ineffective assistance of counsel.⁷⁶

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⁷⁶ See *Strickland*, 466 U.S. at 668; *Glover*, 531 U.S. at 198; *Flores-Ortega*, 528 U.S. at 470.