



1992

## Ineffective Assistance of Counsel

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### Recommended Citation

(1992) "Ineffective Assistance of Counsel," *Touro Law Review*. Vol. 8: No. 3, Article 30.  
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol8/iss3/30>

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## INEFFECTIVE ASSISTANCE OF COUNSEL

*N.Y. CONST. art. I, § 6:*

*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 . . . .*

*U.S. CONST. amend. VI:*

*In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.*

### SUPREME COURT, APPELLATE DIVISION

#### SECOND DEPARTMENT

People v. Kilstein<sup>574</sup>  
(decided June 24, 1991)

The defendant, Matthew Kilstein, moved to vacate his criminal conviction of, *inter alia*, rape and sexual abuse on the ground of ineffective assistance of counsel.<sup>575</sup> The right to effective assistance of counsel is guaranteed by the Sixth Amendment of the United States Constitution<sup>576</sup> and by article I, section 6 of the New York State Constitution.<sup>577</sup> The court reversed defendant's conviction and ordered a new trial, holding that defendant was denied his constitutional right to effective assistance of counsel.<sup>578</sup>

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574. 571 N.Y.S.2d 781 (2d Dep't), *appeal denied*, 78 N.Y.2d 1012, 581 N.E.2d 1066, 575 N.Y.S.2d 820 (1991).

575. *Id.* at 782.

576. U.S. CONST. amend. VI.

577. N.Y. CONST. art. I, § 6; *see also* People v. Baldi, 54 N.Y.2d 137, 146, 429 N.E.2d 400, 404, 444 N.Y.S.2d 893, 897 (1981) ("The right to the effective assistance of counsel is guaranteed by both the Federal and State Constitutions . . .").

578. *Kilstein*, 571 N.Y.S.2d at 782.

Defendant claimed that his counsel failed to provide him with effective assistance, in part, because counsel failed to move to dismiss two rape indictments, both of which occurred two years prior to being reported, "on the ground that the dates were too vaguely described."<sup>579</sup> Other deficiencies in counsel's performance included his: 1) waiving of both trial by jury and an opening statement; 2) failing to oppose various applications made by the prosecutor; 3) relying solely upon the complaining witness' credibility; 4) conducting only a superficial cross examination of the complaining witness; and 5) only reluctantly presenting a closing argument that "contained almost no evidentiary detail and consisted of little more than the terse assertion that the 'testimony [did] not show the guilt of th[e] defendant.'"<sup>580</sup>

The court admitted that some of defendant's claims could fall into the class of assertions admonished by the court of appeals, in *People v. Baldi*,<sup>581</sup> as mere criticism of losing trial tactics.<sup>582</sup>

579. *Id.*

580. *Id.*

581. 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981).

582. *Id.* at 146, 429 N.E.2d at 405, 444 N.Y.S.2d at 898. *See also* *People v. Vegerano*, N.Y. L.J., Dec. 10, 1991, at 23 (Sup. Ct. New York County 1991). In *Vegerano*, the court denied defendant's claim that he was denied effective assistance because counsel failed to call as witnesses at defendant's trial, the defendant's mother, his common law wife and her mother. The court held that failure to call these witnesses was mere trial strategy. Counsel realized that their testimony was not at all credible and would only hurt the defendant's case. Noting that counsel made all "appropriate pre-trial motions, engaged in extensive cross-examination of witnesses, attempted to call witnesses in defendant's behalf, made objections to the presentation of evidence . . . and presented summation arguments," the court held that defendant was not denied effective assistance of counsel. *Id.* In *People v. Polanco*, N.Y. L.J., Aug. 30, 1991, at 21 (Sup. Ct. Kings County 1991), the court denied defendant's contention that he was denied effective assistance of counsel due to trial counsel's failure to utilize coroner's reports and photographs, to call certain witnesses and to exploit defendant's diabetic condition. The court deemed such failures mere trial tactics and stated that the record indicated that trial counsel competently presented a theory of self defense and was able to undermine parts of the prosecution's case against defendant. Thus, representation was not ineffective. *Id.*

However, the court ultimately held that in the aggregate, counsel failed to provide defendant with effective representation. In *Baldi*, the New York Court of Appeals asserted that meaningful representation is measured by “the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation . . . .”<sup>583</sup> In light of this general guideline, the *Kilstein* court concluded that “the circumstances of this case, viewed in their totality, reveal that the defense counsel failed to provide meaningful representation and that he was so completely unprepared and so uninterested in and unfamiliar with the details of the defendant’s case ‘as to doom the defense to failure.’”<sup>584</sup>

In reaching its conclusion, the court also relied on *People v. Angellilo*,<sup>585</sup> in which counsel’s failure to re-familiarize himself with a case, raise certain defenses, and make an opening statement demonstrated ineffective assistance.<sup>586</sup> The *Kilstein* court also referred to *People v. Worthy*,<sup>587</sup> which held that the failure to make an adequate closing argument, to call witnesses on defendant’s behalf, to focus upon critical issues, and to point out weaknesses in the case against defendant’s co-defendant, deprived defendant of meaningful representation of counsel.<sup>588</sup>

The United States Supreme Court has established a test for use in ineffective assistance of counsel cases. The guidelines set forth in *Strickland v. Washington*<sup>589</sup> impose a substantial burden upon a defendant seeking to prove an ineffective assistance claim. In *Strickland*, the Supreme Court imposed a burden on a defendant to prove:

First, . . . that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel

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

584. *Kilstein*, 571 N.Y.S.2d at 782 (quoting *People v. Angellilo*, 91 A.D.2d 666, 667, 457 N.Y.S.2d 118, 119 (2d Dep’t 1982)).

585. 91 A.D.2d 666, 457 N.Y.S.2d 118 (2d Dep’t 1982) (court held that defendant was denied effective assistance of counsel under both the federal and state constitutions). *Id.* at 667, 457 N.Y.S.2d at 119.

586. *Id.*

587. 112 A.D.2d 454, 492 N.Y.S.2d 423 (2d Dep’t 1985).

588. *Id.* at 455-56, 492 N.Y.S.2d at 424-25.

was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.<sup>590</sup>

The Court reasoned that since the purpose of the effective assistance requirement is to ensure a fair trial,<sup>591</sup> the objective standard by which to measure counsel's work must be one of reasonableness under the "prevailing professional norms."<sup>592</sup> Thus, the burden is on the defendant to identify particular acts or omissions by defense counsel that ultimately resulted in prejudice to the defendant.<sup>593</sup> It must also be likely that this prejudice produced a different result at trial.<sup>594</sup> Further, the Court established a presumption that counsel provided adequate assistance and acted reasonably.<sup>595</sup>

While the New York Court of Appeals has not accepted the *Strickland* analysis,<sup>596</sup> it has not expressly rejected it either.<sup>597</sup> The court has preferred to rely upon its own prior case law<sup>598</sup> and the loosely articulated standard which the *Kilstein* court ultimately relied upon: "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 meaningful representation, the constitutional requirement will have been met."<sup>599</sup>

589. 466 U.S. 668 (1984).

590. *Id.* at 687.

591. *Id.* at 688.

592. *Id.*

593. *Id.* at 692.

594. *Id.* at 693.

595. *Id.* at 689.

596. *People v. Vilardi*, 76 N.Y.2d 67, 74 n.3, 556 N.E.2d 915, 918 n.3, 556 N.Y.S.2d 518, 521 n.3 (1990).

597. *Id.* at 83 n.2, 555 N.E.2d at 924 n.2, 556 N.Y.S.2d at 527 n.2 (Simons, J., concurring).

598. *Id.*

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