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ATTACKING THE UNCONSTITUTIONAL "MEANINGFUL REPRESENTATION" STANDARD

I. Overview

"The rule of law is a law of rules."[1] But when it comes to ineffective-assistance-of-counsel ("IAC") litigation in New York, nothing could be further from the truth. IAC litigation in our state is arbitrary and subjective. We have virtually no rules. Instead, the only rule seems to be that courts should assess whether, given the "totality" of the circumstances, counsel's representation was "meaningful" and the trial seemed "fair."[2] The New York Court of Appeals has also held that a "single error" can only constitute ineffective assistance if the error is "clear cut and dispositive," another

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* The Center for Appellate Litigation's Impact Litigation Project seeks legal reform by fighting for legal rulings in criminal and civil cases that bolster liberty. The Project's goal is to develop legal theories with an eye towards obtaining a favorable decision from the New York appellate courts, federal habeas courts, or the U.S. Supreme Court. One of the Project's principal functions is to circulate memoranda to appellate attorneys that appellate defenders and post-conviction counsel can use to change the law. This is first series of the monthly Appellate Impact Litigation Series. Any questions or comments can be directed to the Project's Director, Matthew Bova (mbova@cfal.org; 212-577-2523, ext. 543).

[1] *Fields v. Murray*, 49 F.3d 1024, 1047 (4th Cir. 1995) (Ervin, C.J., dissenting); Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

[2] *People v. Henry*, 95 N.Y.2d 563, 565-66 (2000), *habeas relief granted on IAC grounds by Henry v. Poole*, 409 F.3d 48 (2d Cir. 2005); *People v. Flores*, 84 N.Y.2d 184, 187 (1994), *habeas relief granted on IAC grounds by Flores v. Demskie*, 215 F.3d 293 (2d Cir. 2000); *People v. Benevento*, 91 N.Y.2d 708, 713-14 (1998).

vague standard that seems to limit relief to cases where counsel failed to seek dismissal of the charges.[3] These subjective standards are no standards at all, predictably producing arbitrary and result-oriented rulings.

New York's flawed IAC standards are a grave problem. IAC claims are by far the most common claims raised by appellate/post-conviction attorneys. It is critical, therefore, that we fight for logical, clear, and workable rules. This memorandum seeks to lay out a framework for doing so by summarizing the constitutional problems with our IAC law and providing concrete templates for briefs and motion practice.

II. The "meaningful representation" standard, which focuses on both the proceeding's fairness and counsel's competency "as a whole," violates *Strickland*.

A. New York's Subjective Standard

The Court of Appeals has long held that the state-constitutional "meaningful representation" standard requires an assessment of counsel's "overall performance."[4] The touchstone of this vague analysis is whether counsel's overall performance rendered the trial "unfair."[5] Under this "well-settled" New York approach,[6] a court

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[3] *People v. Jennings*, 37 N.Y.3d 1078, 1079 (2021); *People v. Thompson*, 21 N.Y.3d 555, 560 (2013); *People v. Keating*, 18 N.Y.3d 932, 934 (2012); *People v. Turner*, 5 N.Y.3d 476, 481 (2005).

[4] *Benevento*, 91 N.Y.2d at 712-14; *Turner*, 5 N.Y.3d at 480-81.

[5] *Benevento*, 91 N.Y.2d at 714 ("While the inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case.").

[6] *Benevento*, 91 N.Y.2d at 714.

considers everything counsel did (or did not do) and then assesses, on balance, whether counsel's performance seemed meaningful, or at least meaningful enough to ensure a fair trial.[7] As Judge Jacobs of the Second Circuit has explained, this focus on "overall performance"[8] essentially "averages out the lawyer's performance": a prejudicial error can be offset by competent performance elsewhere.[9]

Appellate defenders are familiar with the tedious drill here. We allege ineffective assistance and identify particular errors or omissions. The State then responds with a mind-numbing list of everything counsel did in the case from start to finish, most of which is utterly irrelevant to the identified error(s). For example, if the defense alleges that counsel failed to cross-examine a complainant with impeachment evidence, the State may answer that counsel delivered a "cogent" opening statement, objected to hearsay, and cross-examined a police officer. It would not be surprising if the State relied on counsel's "good working relationship" with the client or a client's statement at sentencing that he was "satisfied" with counsel's representation. After all, under a subjective overall-performance test, everything goes.

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[7] *E.g.*, *id.* at 712-14; *People v. Sequeros*, 185 A.D.3d 1061, 1061 (2d Dept. 2020) ("[V]iewing the record as a whole and counsel's performance in totality, [counsel provided] meaningful representation.").

[8] *Turner*, 5 N.Y.3d at 480-81.

[9] *Rosario v. Ercole*, 617 F.3d 683, 686 (2d Cir. 2010) (Jacobs, C.J., dissenting from denial of rehearing en banc).

B. New York's Standards Violate *Strickland*.

1. *Strickland* demands a focus on the *identified* errors, not everything counsel did throughout the case.

New York's approach, which does not focus on the unreasonableness and prejudicial impact of the identified errors, violates *Strickland v. Washington*.[10] *Strickland* does not permit a court to analyze counsel's every move and then grade counsel's performance in its "totality." Instead, *Strickland* analysis is error specific: "[A defendant alleging] ineffective assistance must *identify the acts or omissions* of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, *the identified acts or omissions* were outside the wide range of professionally competent assistance."[11] In turn, a court must assess whether these identified errors prejudiced the defense.[12] *Strickland* held that the test for prejudice "finds its roots in the [*Brady* materiality] test . . . The defendant must show . . . a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[13] *Strickland* leaves no doubt about the

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[10] 466 U.S. 668 (1984).

[11] *Strickland*, 466 U.S. at 690 (emphasis added).

[12] *Id.* at 693-94.

[13] *Id.* at 694; *accord Cronic v. United States*, 466 U.S. 648, 657 n.20 (1984) (decided the same day as *Strickland*) ("The Court of Appeals focused on counsel's overall representation of respondent, as opposed to any specific error or omission counsel may have made. Of course, the type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole—

unconstitutionality of the New York ineffective-assistance test, which does not focus on the identified error but instead examines counsel's representation "as a whole."

Kimmelman v. Morrison[14] further dooms an overall-performance standard. There, the State argued that counsel's failure to file a suppression motion was not ineffective because counsel did other things well, such as cross-examine witnesses at trial.[15] *Kimmelman* rejected that approach, confirming that "*Strickland* requires a reviewing court to 'determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'"[16] "Overall performance" may "generally" be relevant to "determine whether the 'identified acts, or omissions'" were objectively unreasonable because other stages of the trial may indicate the *reason* counsel engaged in the identified conduct.[17] But, where counsel makes a prejudicial blunder at one stage, good performance at another cannot, as the government argued in *Kimmelman*, "lift counsel's performance back into the realm of professional acceptability."[18] And because counsel's overall

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specific errors and omissions may be the focus of a claim of ineffective assistance as well.") (citing *Strickland*, 466 U.S. at 693-96).

[14] 477 U.S. 365 (1986).

[15] *Id.* at 385-86.

[16] *Id.* at 386 (quoting *Strickland*, 466 U.S. at 690).

[17] *Id.* at 386.

[18] *Id.* at 385-86.

performance at trial provided "no better explanation" and "shed no light" on the reasonableness of counsel's pretrial-suppression blunder, it had no relevance.[19]

Kimmelman and *Strickland* confirm that a court does not place all of counsel's conduct on a scale and then assess whether, in the aggregate, the overall representation seemed meaningful and the trial appeared fair. Similarly, these cases confirm that the Sixth Amendment does not permit a court to determine whether "good" performance during one stage offset "bad" performance elsewhere, producing, on balance, a "fair" process. Instead, *Strickland* mandates the approach that applies to virtually all constitutional claims: (1) assess the error; and (2) assess the harm worked by that error.[20] This is not rocket science.

Post-*Strickland* and *Kimmelman*, the Supreme Court has specifically rejected the overall-fairness standard that New York Courts routinely employ. In *Williams v. Taylor*,[21] on deferential habeas review,[22] the Supreme Court reviewed a Virginia Supreme Court decision which, in assessing sentencing counsel's failure to present mitigating evidence, refused to apply *Strickland*'s reasonable-probability-prejudice

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[19] *Id.* at 386.

[20] *Strickland*, 466 U.S. at 686-94.

[21] 529 U.S. 362 (2000).

[22] 28 U.S.C. 2254(d)(1).

standard.[23] Instead, the Virginia high court read *Lockhart v. Fretwell*[24] as "modifying" *Strickland*'s reasonable-probability rule to instead require a free-standing assessment of whether counsel's blunders rendered the trial "fundamentally unfair."[25] The Virginia trial court, on the other hand, had assessed whether there was a reasonable probability that the "unprofessional errors" affected the result, defining a "reasonable probability" as one "sufficient to undermine confidence in the outcome."[26]

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[23] 529 U.S. at 394 (quoting Virginia Supreme Court decision); *Strickland*, 466 U.S. at 694.

[24] *Lockhart v. Fretwell*, 506 U.S. 364 (1993). *Lockhart* addressed a rare and unique class of IAC claims: defense counsel unreasonably failed to rely on an appellate precedent at sentencing but, by the time the IAC claim was heard on appeal, that precedent had been overruled. *Lockhart* held that prejudice is assessed by the law that exists at the time of an appellate court's IAC determination, not the law that existed when the attorney blundered. *Id.* at 370-71. In so holding, the Court commented that the "[t]he touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding," adding that "the 'prejudice' component of the *Strickland* test . . . focuses on . . . whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Id.* at 370, 372. In turn, the Court held that "[t]he result of the sentencing proceeding in the present case was neither unfair nor unreliable" because the governing law no longer recognized the right that trial counsel failed to invoke. *Id.* at 371-72. "Unreliability or unfairness," the Court held, "does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372; *see also id.* at 370 & 370 n.3 (citing *Nix v. Whiteside*, 475 U.S. 157, 175-76 (1985) (the defense could not show defendant was prejudiced by counsel's "failure" to present "perjured testimony" because the law does not recognize a right to acquittal based on perjury)).

[25] *Williams*, 529 U.S. at 372, 390-92.

[26] *Id.* at 395 (Stevens, J., for a majority); *id.* at 413-15 (O'Connor, J., for a majority). *Williams* produced two majority opinions.

Williams held that the trial court "analyzed the ineffective-assistance claim under the correct standard; the Virginia Supreme Court did not."[27] *Williams* clarified that the *Lockhart* fundamental-fairness approach only governs in "unusual" circumstances: counsel's blunder did not deprive the client of a "substantive or procedural right to which the law entitles him."[28] As *Williams* explained, that test has only been met in rare IAC claims, such as the claim that counsel "failed" to elicit a client's perjury on the stand.[29]

Unfortunately, the New York Court of Appeals has failed to notice the *Williams* Court's rejection of a "fair trial" standard. Eight months *after Williams* rejected that

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[27] *Id.* at 395.

[28] *Id.* at 393 & 393 n.18 (limiting *Lockhart* and *Nix* to scenarios where a "'defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry'") (quoting *Lockhart*, 506 U.S. at 373 (O'Connor, J., concurring)).

[29] 529 U.S. at 392 (citing *Nix*, 475 U.S. at 175-76 (rejecting *Strickland* claim where counsel purportedly failed to elicit perjury from the client on the stand because the law does not recognize a right to perjury and thus the defendant suffered no cognizable prejudice)); *Williams*, 529 U.S. at 393 n.18, 414-15.

To be sure, as *Lockhart* observed, language from *Strickland* suggests that the prejudice analysis focuses on overall fairness. *Lockhart*, 506 U.S. at 369 ("a criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable'") (quoting *Strickland*, 466 U.S. at 687); *see also Strickland*, 466 U.S. at 686 ("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."); *id.* at 696 ("[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding"). But *Williams* explicitly held that fundamental fairness is not the governing prejudice standard—instead the outcome-focused "reasonable-probability" standard controls. 529 U.S. at 390-95 (Stevens, J.); *id.* at 413-15 (O'Connor, J.); *see also Weaver v. Massachusetts*, 137 S. Ct. 1899, 1915 (Alito, J., concurring).

precise approach, the Court of Appeals, in *People v. Henry* (later overturned on habeas review), footnoted the suggestion that under *Strickland* and *Lockhart,* a "defendant must demonstrate. . . a 'reasonable probability' that the outcome of the proceedings would have been different. The United States 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."[30] *Henry* interpreted the governing law in the precise manner that *Williams* rejected just a few months earlier.

C. The Second Circuit has also rejected New York's overall-performance approach.

The Second Circuit has similarly held that New York's focus on overall fairness violates *Strickland*. In *Rosario v. Ercole*, Judge Wesley (for the panel majority) explained that the "New York standard is not without its problems" and "creates the danger" that courts might "look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial. That would produce an absurd result inconsistent with New York constitutional jurisprudence and the mandates of *Strickland*."[31] The Second Circuit made the same point in *Henry* five years earlier: "[The New York Court of Appeals'] reliance on 'counsel's competency in all other respects' failed to apply the *Strickland* standard at all."[32]

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[30] *People v. Henry*, 95 N.Y.2d 563, 566 n* (2000) (citing *Lockhart*, 506 U.S. at 369-70).

[31] 601 F.3d 118, 125-26 (2d Cir. 2010).

[32] *Henry v. Poole*, 409 F.3d 48, 72 (2d Cir. 2005) (quoting *Henry*, 95 N.Y.2d at 566); *see also Rosario*, 601 F.3d at 138 (Straub, J., dissenting) ("It is axiomatic that, even

Unfortunately, the *Rosario* panel declined to find that New York's meaningful-representation standard was "contrary to"[33] *Strickland* because, if interpreted as an alternative—and "more generous" avenue for relief (as the Court of Appeals has stated it should be)—that standard grants more protection than *Strickland*.[34] The Second Circuit added the dubious observation that "it is hard to envision a scenario where an error that meets the prejudice prong of *Strickland* would not also affect the fundamental fairness of the proceeding," thus satisfying the state standard.[35]

Later, the Second Circuit denied rehearing *en banc* and issued four separate opinions.[36] In each opinion, the Court's Judges recommended that New York courts separately analyze ineffective-assistance claims under the federal and state standards to ensure that winning *Strickland* claims are not ignored.[37] As Judge

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if defense counsel had performed superbly throughout the bulk of the proceedings, they would still be found ineffective under the Sixth Amendment if deficient in a material way, albeit only for a moment and not deliberately, and that deficiency prejudiced the defendant.").

[33] 28 U.S.C. § 2254(d)(1).

[34] 601 F.3d at 125 ("Even if the errors are harmless in the sense that the outcome would remain the same, a defendant may still meet the New York prejudice standard by demonstrating that the proceedings were fundamentally unfair."); *see also Benevento*, 91 N.Y.2d at 714 (New York "refuse[s] to apply the harmless error doctrine in cases involving substantiated claims of ineffective assistance").

[35] 601 F.3d at 125.

[36] 617 F.3d 683 (2d Cir. 2010).

[37] *Id.* at 685 (Wesley, J.) ("New York state courts would be wise to engage in separate assessments of counsel's performance under both the federal and the state standards. Such an exercise would ensure that the prejudicial effect of each error is evaluated with regard to outcome and would guarantee that defendants get the quality of overall representation guaranteed under New York state law. This

Jacobs pressed, the analytical "shift" from counsel's "specific mistake" to counsel's "broader performance . . . concerns me and should concern the entire Court."[38] And like Judge Wesley, Judge Jacobs explained that unnecessary "conflict can be avoided by [the state courts'] separate consideration of counsel's performance under the *Strickland* standard . . . [W]ithout some further vigilance in the state courts, the issue will be presented to us one day in a case in which fact-findings do not blur focus on the constitutional question, and an in banc panel of this Court may be convened to deal with it."[39]

Judge Pooler's separate dissenting opinion added that "[t]he state standard can act to deny relief despite an egregious error from counsel so long as counsel provides an overall meaningful representation. . . . At least we all can agree that the New York state courts would be wise to evaluate counsels' performances separately under the federal and the state standards. Doing so will likely prevent future defendants from being penalized by a lacuna in a state standard that we have upheld because it supposedly works to their benefit."[40]

Rosario rightly condemns the classic New York approach of excusing attorney blunders because counsel seemed to do well during other stages of the proceeding.

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vigilance will also alleviate the risk that the federal courts will[,] [under habeas review,] force state courts to abandon New York's generous standard for one akin to the more restrictive federal model.").

[38] *Id.* at 687.

[39] *Id.* at 687-88.

[40] *Id.* at 688.

But *Rosario* also shows just how pernicious New York jurisprudence in this area can be. Relying on the Court of Appeals' statement that the New York prejudice standard is "somewhat more favorable" to defendants,[41] *Rosario* held that the failure to satisfy the New York standard necessarily defeats a *federal* claim too.[42] But this is wrong in theory and wrong in practice. Even if a trial seemed "fair" given counsel's overall performance (e.g., counsel exposed several holes in the State's case and generally appeared competent), unreasonable blunder(s) may nevertheless undermine confidence in the outcome, thus satisfying the *Strickland* test. Where a relatively competent attorney commits an important blunder(s), the federal standard *is* satisfied; the New York standard may not be.

D. The Meaningful-Representation Standard is Arbitrary and Subjective.

A court cannot assess, with any precision or consistency, whether, on balance, counsel's representation seemed "meaningful" and the trial seemed "fair." This subjective approach "provides no workable principle,"[43] inviting courts to decide claims based on how they feel about counsel's representation and a defendant's

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[41] *Turner*, 5 N.Y.3d at 480 ("Our ineffective assistance cases have departed from the second ('but for') prong of *Strickland*, adopting a rule somewhat more favorable to defendants.").

[42] 601 F.3d at 125.

[43] *Cf. Strickland*, 466 U.S. at 693 ("Respondent suggests requiring a showing that the errors 'impaired the presentation of the defense.' That standard, however, provides no workable principle. Since any error, if it is indeed an error, 'impairs' the presentation of the defense, the proposed standard is inadequate, because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.").

apparent guilt. Just like "reliability" in the Confrontation Clause context, "meaningful representation" and free-standing assessments of "fairness" are "amorphous, if not entirely subjective, concept[s]."[44] These flimsy standards allow a court to determine whether, in a particular case, granting relief seems "just"—precisely the kind of arbitrary "judge-empowering" our Constitution typically prohibits.[45]

Ironically, the now-outdated "farce and mockery" standard, which focused on "the fairness of a trial as a whole, instead of particular instances of attorney misconduct,"[46] was repeatedly criticized as subjective and arbitrary. As the Sixth Circuit once observed, "The phrase 'farce and mockery' has no obvious intrinsic meaning. What may appear a 'farce' to one court may seem a humdrum proceeding to another. The meaning of the Sixth Amendment does not, of course, vary with the sensibilities and subjective judgments of various courts. The law demands objective explanation, so as to ensure the even dispensation of justice." [47] Unfortunately, just

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[44] *Crawford v. Washington*, 541 U.S. 36, 63 (2004).

[45] *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 2022 WL 2251305, *10 (U.S. June 23, 2022).

[46] Bruce Andrew Green, *A Functional Analysis of the Effective Assistance of Counsel*, 80 Colum. L. Rev. 1053, 1059 (1980) ("For example, failure to raise a potentially exculpatory defense, although concededly unreasonable and prejudicial, might not be deemed to render a trial a farce and mockery if counsel's representation was otherwise professional and adequate.").

[47] *Beasley v. United States*, 491 F.2d 687, 692 (6th Cir. 1974); *see also Cooper v. Fitzharris*, 586 F.2d 1325, 1329-30 (9th Cir. 1978); Lafave, 3 Crim. Proc. § 11.10(a) (4th ed.) (same).

like the "phrase 'farce and mockery,'" the phrase "meaningful representation" lacks "obvious intrinsic meaning" and leaves the analysis up to the "sensibilities and subjective judgments" of a reviewing judge.[48]

E. *Strickland*'s *Brady* origins undermine an overall-performance test.

The origins of the *Strickland* prejudice standard further doom an overall-performance approach. *Strickland* expressly borrowed its prejudice standard from the *Brady* materiality standard.[49] In analyzing materiality under *Brady*, a court does not analyze the suppressed evidence in light of the prosecution's disclosures "as a whole," giving the prosecutor extra credit for other disclosures. Instead, a court focuses *exclusively* on the prejudiced worked by the identified evidence suppression. That same logic demands an error-specific approach to *Strickland* claims.

F. The First Department, With a One-Sentence Opinion, Echoes *Rosario v. Ercole.*

The First Department has dealt a quiet (and one-sentence) blow to the "overall competency" standard. Quoting Second Circuit law, *People v. Jones*[50] held that "[u]nder both the state and federal standards, a single, prejudicial error may constitute ineffective assistance, regardless of whether counsel's overall performance 'bespoke of general competency.'" And in turn, the Appellate Division found counsel ineffective where counsel unreasonably failed to seek a lesser-included instruction.

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[48] *Beasley*, 491 F.2d at 692.

[49] 466 U.S. at 693-94.

[50] 167 A.D.3d 443, 443 (1st Dept. 2018) (quoting *Rosario*, 601 F.3d at 124-26).

Jones is a positive development. But it is a one-sentence needle in the haystack of decisions focusing on fundamental fairness and overall performance.[51]

III. The Impossible-to-Satisfy "Clear Cut and Dispositive" "Standard"

The Court of Appeals has suggested another arbitrary standard: a "single error" can only constitute ineffective assistance if counsel omitted a "clear cut" and "dispositive" motion or defense.[52] This vague theory is a rehash of the mistaken view that the ineffective-assistance touchstone is fundamental fairness and overall competency. If counsel just did *one* thing wrong but did a whole lot right, the theory goes, the trial is essentially "fair" and counsel's overall performance was adequate. But as shown above, these vague standards do not control. Instead, the error-specific approach does. While it may be harder to show that a single error (as opposed to two, three, or nineteen) undermined confidence in the trial's outcome, it does not follow that the substantive prejudice standard actually changes in so-called "single error" cases.

Again, the *Brady* origins of the *Strickland* standard confirm the point. No one would suggest that a prosecutor's suppression of a "single" piece of exculpatory evidence only requires reversal if that evidence was "clear cut" and "dispositive" of the government's ability to prove guilt. There is no logical reason why the *Strickland* prejudice standard should work any differently.

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[51] *See, e.g.*, *People v. Graham*, 201 A.D.3d 143, 150 (1st Dept. 2021); *People v. Mendoza*, 33 N.Y.3d 414, 419 (2019).

[52] *People v. Jennings*, 37 N.Y.3d 1078, 1079 (2021); *People v. Flowers*, 28 N.Y.3d 536, 541 (2016); *People v. Santiago*, 22 N.Y.3d 740, 751 (2014).

The Court of Appeals itself has even suggested, in several cases, that it does not matter whether a lawyer's single omission involved a "clear cut and dispositive" error. In doing so, the Court has created a confusing split within its own case law.

Turner, often cited for the "clear cut and dispositive" standard,[53] actually held, in finding counsel ineffective, that although a "reasonable defense lawyer . . . might have doubted that the statute of limitations argument was a *clear winner*[,] no reasonable defense lawyer could have found it so weak as to be not worth raising."[54] Thus, regardless of whether the argument is a "clear winner," counsel can still be ineffective for unreasonably omitting a meritorious argument.[55]

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[53] Dictum from *Turner* used the "clear-cut and dispositive" language in distinguishing prior cases. 5 N.Y.3d at 480-81 ("[S]uch errors as overlooking a useful piece of evidence (citing *People v. Hobot*, 84 N.Y.2d 1021 (1995)) or failing to take maximum advantage of a *Rosario* violation (citing *Flores*, 84 N.Y.2d 184), do not in themselves render counsel constitutionally ineffective where his or her overall performance is adequate. But neither *Hobot* nor *Flores* involved the failure to raise a defense as clear-cut and completely dispositive as a statute of limitations. Such a failure . . . is hard to reconcile with [the] right to the effective assistance").

This dictum violates *Strickland* (*e.g.*, *Rosario*, 601 F.3d at 124-26 (it would be "absurd" to ignore a single prejudicial error because counsel's overall performance seemed adequate)) and misreads *Flores* and *Hobot*. Those cases do not hold that an unreasonable and prejudicial blunder can be ignored because counsel otherwise performed competently. Instead, those cases reject relief because the defendants failed to show that counsel's single error was unreasonable and/or prejudicial—that is, those defendants failed to even satisfy *Strickland*. *Flores*, 84 N.Y.2d at 187-88 (holding that the defendant failed to prove that counsel's omission was not the result of a strategic rationale); *Hobot*, 84 N.Y.2d at 1023-24 (failure to review a doctor's report (and ultimately call the doctor to testify for the defense) was not prejudicial because that doctor would not have provided helpful testimony).

[54] 5 N.Y.3d at 483 (emphasis added).

[55] *People v. Heidgen [McPherson]*, 22 N.Y.3d 259, 278 (2013) (failure to raise complicated depraved-indifference argument for dismissal was ineffective even though it was *not* a "'clear winner'") (quoting *Turner*, 5 N.Y.3d at 483); *People v.*

Again, Supreme Court precedent is on point. That Court has repeatedly found a single error ineffective because it satisfied the *Strickland* deficient-performance and prejudice tests—not because the error was "clear cut and dispositive." In *Hinton v. Alabama*,[56] counsel failed to retain a more-qualified ballistics expert than the expert he presented at trial because he mistakenly believed Alabama law capped state-expert funding at $1,000.[57] The *Hinton* Court held that the appeal involved a "straightforward application" of *Strickland*—that is, the standard deficient-performance and prejudice tests.[58] And "having established deficient performance" due to counsel's "mistake of law," the Court held that Hinton "must also 'show . . . a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"[59] *Hinton* did not subject this so-called "single error" to a "clear cut and dispositive" standard.[60]

Clermont, 22 N.Y.3d 931, 934 (2013) (counsel ineffective in failing to raise an argument that was "close under our complex *De Bour* jurisprudence").

[56] 571 U.S. 263 (2014) (per curiam).

[57] *Id.* at 273.

[58] *Id.* at 272 (citing *Strickland*, 466 U.S. at 685-87 and *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010)).

[59] *Id.* at 275 (quoting *Strickland*, 466 U.S. at 693-94).

[60] *See also Rompilla v. Beard*, 545 U.S. 374, 383-93 (2005) (single error in failing to review a file constituted deficient performance).

In the end, a clear-cut and dispositive requirement would limit *Strickland* claims to obvious dismissal arguments. Where that limitation comes from is anyone's guess. Like so many other illogical rules of constitutional law, all that "rule" has to say for itself is that it makes it easier for the government to win.

IV. The Path Forward

We should not abandon the state standard entirely. The state standard is valuable where: (1) the evidence was overwhelming (thus undermining a federal prejudice claim) but (2) counsel made horrible blunder(s) and/or appears to have been lazy and unprepared.[61] The state standard's focus on the "integrity of the process" and its rejection of "the harmless error doctrine" in the IAC context is helpful in this class of cases.[62]

The problem, however, is that New York courts reject powerful *federal*-IAC claims—where prejudice under *Strickland can be* shown—because defendants cannot meet New York's vague overall-unfairness standard. That is wrong and should end. To avoid that problem, our courts should, as the Second Circuit has recommended, consider the federal claim first and then, if that claim fails, assess the state claim.

Furthermore, correctly interpreted, *Strickland* can pack a decent punch. While we will certainly still lose many cases under *Strickland*, let's at least give our clients the

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[61] *People v. Wright* is a great example of how the state standard is valuable where the defendant cannot satisfy the federal test. 61 Misc. 3d 757, 772-73 (Sup. Ct. N.Y. Cty. 2018) (Farber, J.).

[62] *Benevento*, 91 N.Y.2d at 714.

best shot possible by fighting against a state standard that, while masquerading as a liberal innovation, routinely provides *less* relief than federal standards.

Below are some specific strategies for fighting back:

1. Where appropriate, **challenge** the State's reliance on counsel's performance "as a whole" and instead insist on an error-specific approach. Below are some sample responses for use in 440 or Appellate Division litigation.

2. **Insist** (citing to *Rosario v. Ercole*) that courts consider the state and federal claims independently, perhaps by dropping a footnote in motion papers or an appellate brief asking for such consideration.

3. If the appellate or 440 court's reliance on an overall-performance or clear-cut-and-dispositive standard (instead of a *Strickland* error-specific approach) made a difference, you should **seek leave to the Appellate Division and/or the Court of Appeals** on that ground. In doing so, highlight that:

    a. the Second Circuit has criticized the meaningful representation standard as potentially producing unconstitutional results;

    b. the First Department itself has said so too;

    c. Supreme Court authority prohibits an overall-performance approach and instead require a court to focus on the identified error or omission; and

    d. (if the clear-cut-and-dispositive standard is employed), the Court of Appeals itself has rejected it, creating a confusing split in our law.

4. **Seek federal habeas relief**. Habeas relief will be potentially available in *Strickland* cases, especially where the state court overtly applies the wrong standard, thus mandating de novo review in federal court.

5. **Seek cert** where the case presents this federal constitutional question.

SAMPLE RESPONSES

SCENARIO #1: The State argues that defense counsel did *other* things well.

To get ahead of this argument, you can say the following in your opening papers (when describing the governing principles) or in reply:

> **POSSIBLE RESPONSE:** It is constitutionally irrelevant whether counsel may have performed competently during other stages of the proceeding. The *Strickland* inquiry focuses on whether the "identified acts or omissions" constitute deficient performance and were prejudicial.[63] Thus, when reviewing an ineffective-assistance claim, a court does not assess counsel's "competency in all other respects" by analyzing whether, beyond the identified errors, counsel may have done other things well.[64]

SCENARIO #2: The state claims that counsel's failure to suppress/preclude evidence was not ineffective assistance because counsel handled the evidence "effectively" during trial.

> **POSSIBLE RESPONSE**: The State contends that counsel was not ineffective in failing to suppress **[e.g., DNA evidence]** because counsel seems to have handled the evidence competently during trial by, for

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[63] *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (inquiry focuses on the "'identified acts or omissions'"; conduct beyond those acts/omissions is only relevant if it sheds light on whether those identified errors were reasonable) (quoting *Strickland*, 466 U.S. at 690); *Rosario v. Ercole*, 601 F.3d 118, 124-26 (2d Cir. 2010); *People v. Jones*, 167 A.D.3d 443, 443 (1st Dept. 2018).

[64] *Jones*, 167 A.D.3d at 443 ("Under both the state and federal standards, a single, prejudicial error may constitute ineffective assistance, regardless of whether counsel's overall performance 'bespoke of general competency'") (quoting *Rosario*, 601 F.3d at 124-26); *Rosario*, 601 F.3d at 124-26 (even a single prejudicial error may constitute ineffective assistance regardless of whether counsel's overall performance "bespoke of general competency"; it would be "absurd" to suggest that a court can "look past" a prejudicial error if "counsel conducted himself in a way that bespoke of general competency throughout the trial."); *Henry v. Poole*, 409 F.3d 48, 72 (2d Cir. 2005) ("reliance on counsel's competency in all other respects fails to apply the *Strickland* standard at all") (quotation marks omitted).

instance, cross-examining the forensic witness about that evidence. But as the First Department, Second Circuit, and United States Supreme Court have held, apparently competent performance during a trial cannot offset an unreasonable failure to suppress evidence before trial. *People v. Jones*, 167 A.D.3d 443, 443 (1st Dept. 2018) (citing *Rosario v. Ercole*, 601 F.3d 118, 124-26 (2d Cir. 2010)); *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986). Indeed, no competent attorney chooses to roll the dice with a jury by challenging damaging evidence before the jury instead of simply deleting it from the case. *E.g.*, *United States v. Nolan*, 956 F.3d 71, 81, 83 (2d Cir. 2020); *Ege v. Yukins*, 485 F.3d 364, 379 (6th Cir. 2007).

SCENARIO #3: The State argues that counsel weakened its case in other ways.

POSSIBLE RESPONSE: To the extent the State is arguing that counsel's failure to impeach **[X WITNESS]** was not prejudicial because counsel weakened the State's case **[or that witness]** in other ways, that suggestion fails too. The fact that, absent counsel's blunder, the State's case was already weakened *confirms* prejudice; it does not undermine it.[65]

[65] *Strickland*, 466 U.S. at 695-96 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"); *Henry v. Poole*, 409 F.3d 48, 66-67 (2d Cir. 2005) (the fact that counsel presented a solid misidentification case bolstered the prejudice worked by his unreasonable presentation of false alibi evidence); *see also People v. Hunter*, 11 N.Y.3d 1, 6 (2008) (holding, in a *Brady* case, that because the State's case already had potential problems and the undisclosed evidence "would have added a little more doubt," the suppression of exculpatory evidence was prejudicial because it was "reasonably probable that a little more doubt would have been enough"); *Strickland*, 466 U.S. at 693-94 (*Strickland* prejudice analysis matches *Brady* prejudice analysis); *see also Turner v. United States*, 137 S. Ct. 1885, 1893 (2017) ("We of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence.").

SCENARIO #4: The State Claims We Must Show a "Clear Cut and Dispositive" Error.

POSSIBLE RESPONSE: [CLIENT] need not satisfy a vague "clear cut and dispositive" standard. Instead, the controlling inquiry is whether (1) the identified error was unreasonable and (2) the error undermines confidence in the trial's outcome. *People v. McPherson*, 22 N.Y.3d 259, 278 (2013) (counsel ineffective in unreasonably omitting an argument even where the argument was not a "clear winner"); *People v. Turner*, 5 N.Y.3d 476, 483 (2005) (same); *Hinton v. Alabama*, 571 U.S. 263 (2014) (defendant alleged a single error (the failure to hire a ballistics expert); traditional *Strickland* analysis applied); *Rompilla v. Beard*, 545 U.S. 374 (2005) (single error in failing to investigate a file was subject to traditional *Strickland* analysis).

***** SOME IAC RESEARCH TIPS:**

Several solid treatises are available on Westlaw, including LaFave's *Criminal Procedure* (an excellent starting point for any criminal-procedure research) and *Ineffective Assistance of Counsel* (2022 ed.) But perhaps the best resource out there is "Summaries of Published Successful Ineffective Assistance of Counsel Claims Post-Wiggins v. Smith," available online and linked here. These summaries provide detailed explanations of favorable IAC cases and are text searchable and sorted by topic.