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APPELLATE IMPACT LIT SERIES #3 (MAY 2023)[1]

The Court of Appeals Will Consider Whether to Adopt the First Department's Rule That a Waiver of the Right to Counsel Is *Per Se* Invalid If the Defendant Was Unaware of the Sentencing Exposure.

This Appellate Impact Lit Series discusses the constitutional requirement that the defendant know his/her sentencing exposure before waiving the right to counsel. The First Department has adopted that requirement (as of 2018) and the Court of Appeals will now consider it in *People v. Blue*. In the meantime, if the record does not indicate that the self-representing defendant knew the sentencing exposure, brief it in the Appellate Division.

A. The First Department's Rule

Before the State destroys a life with a criminal conviction, it should safeguard the right to counsel. But often, that does not happen. Our clients "waive" the right to counsel after a curt and useless colloquy regarding the "pitfalls" of self-representation. They then fend for themselves at the plea or trial stages.

Although New York courts are not well known for adopting clear and categorical rules, the First Department has rejected that trend in a steady line of right-to-counsel cases, starting with *People v. Rodriguez*, 158 A.D.3d 143, 152-53 (2018) (Webber, J., for a unanimous panel). *See also People v. Jackson*, 194 A.D.3d 622, 622 (2021); *People v. Perry*, 198 A.D.3d 576, 576 (2021). These cases hold that where the record (either the waiver-colloquy transcript or a prior transcript) does not establish that a pro se defendant knew "his actual sentencing exposure," the waiver is invalid. *Rodriguez*, 158

[1] The prior series are also attached and can also be accessed at our website: https://appellate-litigation.org/Impact-Litigation-Project.

A.D.3d at 151-53. The Southern District of New York has ratified this rule too on habeas review. *Rodriguez v. Superintendent of Clinton Corr. Facility*, 2021 WL 51445, *3-4 (S.D.N.Y. Jan. 6, 2021); ***but see*** *People v. Rogers*, 186 A.D.3d 1046, 1048 (4th Dept. 2020) ("[R]espectfully declin[ing] to follow the First Department's contrary holding in [*Rodriguez*.]").[2]

This rule is consistent with Supreme Court precedent and a steady line of federal/state appellate authority. *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) (holding, in a plea case, that the "constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him . . . and of the range of allowable punishments attendant upon the entry of a guilty plea."); *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) ("The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and *consequences* of a particular decision and whether the decision is uncoerced.") (some emphasis added); *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (plurality) ("To be valid [a] waiver [of the right to counsel] must be made with an apprehension of the

[2] In rejecting a sentencing-exposure rule, *Rogers*, citing to *People v. Providence*, 2 N.Y.3d 579, 582 (2004), conflated the *substantive* question of what facts control the waiver's validity with the *procedural question* of how the record must demonstrate such facts. *Rogers*, 186 A.D.3d at 1047-48 ("*Providence* explicitly held that the trial judge's failure to mention any specific piece of information was not dispositive of the sufficiency of the requisite searching inquiry, and that a trial court's failure to perfectly align its colloquy with best practices would not invalidate the subsequent waiver so long as the court adequately discharged its core obligation to warn and apprise the defendant of the dangers and pitfalls of self-representation.") (citing *Providence*, 2 N.Y.3d at 582-83). Contrary to the Fourth Department's curt reasoning, *Providence* merely holds that the court need not specifically *ask* questions regarding "piece[s] of information" relevant to the waiver, e.g., age and education. Instead, it is sufficient if the record contains evidence bearing on those issues. 2 N.Y.3d at 582-83. *Providence* thus addresses the procedures required for developing the record, not the ultimate "information," such as sentencing exposure, the record must address.

Similarly, while there is no "rigid formula" or script that a court must employ when creating a waiver record, *id.*, that rule just begs the question that *Rogers* did not even try to answer: script or not, must there nevertheless be a record confirming knowledge of sentencing exposure.

nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter."); *see also*, *e.g.*, *Arrendondo v. Neven*, 763 F.3d 1122, 1131-32 (9th Cir. 2014) ("*Tovar*'s statement concerning the defendant's knowledge of possible punishments is clearly established Supreme Court law."); *State v. Diaz*, 878 A.2d 1078, 1086 (Conn. 2005) (where offense carried a potential sentence of "nearly fifty years," it was insufficient that defendant knew he faced "substantial prison time" and had been offered a 15 year sentence as part of a plea bargain).

The First Department's decisions recognize the basic fact that sentencing exposure is perhaps the *most* important information to a defendant who is considering self-representation. Just as a defendant cannot waive the fundamental right to a jury trial without knowledge of sentencing exposure, *People v. Catu*, 4 N.Y.3d 242 (2005), a defendant cannot waive the fundamental right to counsel without the same critical information. *See Arrendondo*, 763 F.3d at 1133.

B. Pending Litigation in The Court of Appeals (*Blue*)

The Court of Appeals will consider a sentencing-exposure-warning requirement in *People v. Blue* (APL-2022-00189). There, the record does not confirm that the defendant, who represented himself at trial, was aware of his maximum sentencing exposure. The Appellant's Brief was recently filed (available on Court-Pass) and the case will likely be decided in early 2024 (if not earlier).

In the meantime, this issue should be briefed in the Appellate Division in the event that the Court of Appeals decides the issue in our favor or does not reach it. To brief it, you will likely have to order

calendar-call transcripts to confirm that sentencing exposure was not discussed prior to the waiver proceeding.

C. Other Permutations

There are other potential permutations of this rule that can be briefed in the Appellate Division.

1. Consecutive Sentences. The First Department has confirmed that the record must indicate the defendant's awareness of the "potential for his sentences in [ ] pending cases . . . to run *consecutively*." *Perry*, 198 A.D.3d at 576 (emphasis added); *Jackson*, 194 A.D.3d at 622 (same).

2. The minimum sentence. Whether the court must also advise the defendant of the minimum sentence is unsettled. *Tovar*'s requirement that the defendant be aware of the "*range* of allowable punishments" supports such a requirement. 541 U.S. at 81 (emphasis added). We can argue that the mandatory minimum sentence is a critical issue for any defendant weighing the self-representation option and therefore a minimum-sentence warning is required. *Alleyne v. United States*, 570 U.S. 99, 112-13 (holding, in the Sixth Amendment jury-right context, that it "is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime. Indeed, criminal statutes have long specified both the floor and ceiling of sentence ranges, which is evidence that both define the legally prescribed penalty. This historical practice allowed those who violated the law to know, ex ante, the contours of the penalty that the legislature affixed to the crime—and comports with the obvious truth that the floor of a mandatory range is as relevant to wrongdoers as the ceiling. A fact that increases a sentencing floor, thus, forms an essential ingredient of the offense.") (cleaned up).

3. PRS. The First Department has recently rejected the argument that the court must ensure that the defendant is aware of PRS before waiving the right to counsel. *People v. Coleman*, 213 A.D.3d 464, 464 (1st Dept. 2023).

Nevertheless, this issue should still be raised in the Appellate Division with an eye towards Court of Appeals litigation. *See People v. Catu*, 4 N.Y.3d 242, 245 (2005) ("[PRS] is significant.").

4. Immigration Warnings. It is unsettled whether a court must warn a non-citizen defendant who is considering self-representation that a conviction will have immigration consequences. Brief it! *See People v. Peque,* 22 N.Y.3d 168 (2013); *Padilla v. Kentucky*, 559 U.S. 356 (2010).

C. Collateral Relief Under C.P.L. § 440.10

If this sentencing-exposure claim was not raised on direct appeal, but you are considering a collateral challenge, you could try to overcome a procedural bar under *People v. Grubstein*, 24 N.Y.3d 500 (2014) and the text of C.P.L. § 440.10(2)(c) (motion must be denied where an issue that could have been, but was not, raised on direct appeal due "to the defendant's unjustifiable failure" to take an appeal or raise the issue on the perfected appeal).

If the State raises a procedural defense under C.P.L. § 440.10(2)(c), argue, under *Grubstein*, that right-to-counsel violations are not waivable on such grounds. 24 N.Y.3d at 502-03 (finding that a record-based right-to-counsel claim could be raised collaterally even if not raised on direct appeal and explaining that, "[b]efore the enactment of CPL article 440 New York courts recognized, in cases discussing the writ of error coram nobis, article 440's common-law predecessor, that the usual procedural barriers to post-conviction relief must sometimes be relaxed when a violation of the right to counsel is claimed. 'Judicial interference with the right to counsel guaranteed to defendant by law may warrant the extraordinary remedy of coram nobis, even though the error appears on the face of the record.' The limitation of CPL 440.10(2)(c)'s procedural bar to cases of 'unjustifiable' failure may be seen as a codification of the rule stated in those cases.") (quoting *People v.*

Hannigan, 7 N.Y.2d 317, 318 (1960) (per curiam), some internal citations omitted).

Also, we can, where the facts permit it, argue that the omission of this sentencing-exposure argument on direct appeal was not "unjustifiable" because the State did not supply a complete direct-appellate record. C.P.L. § 440.10(2)(c) (the failure to raise the claim on appeal must have been "unjustifiable").[3] After all, to prevail on this claim you need almost every calendar-call transcript in order to confirm that there is no record evidence that the defendant knew of the actual sentencing exposure.

Finally, if the State raises retroactivity, we can argue that, under *Teague v. Lane*, 489 U.S. 288 (1989), a sentencing-exposure rule is not a "new rule" as it stretches back to *Von Moltke*, 332 U.S. at 724 (plurality). *See also Tovar*, 541 U.S. at 81. In any event, we have a solid argument that a sentencing-exposure rule should apply retroactively under state-retroactivity rules because, among other reasons, the right to counsel goes straight to the "heart of a reliable determination of guilt or innocence." *People v. Pepper*, 53 N.Y.2d 213, 221 (1981).

[3] Recent amendments to C.P.L. § 440.10(2)(c) exempt *ineffective-assistance* claims but not right-to-counsel claims from this procedural bar. It's possible that this distinction is so irrational as to violate equal protection and/or substantive due process.

Appellate Impact Lit Series #2 (January 2023)*
BY: Matthew Bova

CENTER FOR APPELLATE LITIGATION

***People v. Garrett*'s No-Imputation Rule Is Unconstitutional**

This Impact Lit Series seeks to provide a framework for litigating a common *Brady* claim under C.P.L. § 440.10: the State violated due process by suppressing the prior bad acts of a testifying police officer.

In *People v. Garrett*, 23 N.Y.3d 878, 887-90 (2014), the Court of Appeals stated, in dictum, that a testifying officer's prior bad acts—which could be used to impeach the officer's credibility—are not imputed to the prosecution for *Brady* purposes. *See also*, *e.g.*, *People v. Rispers*, 146 A.D.3d 988, 989 (2d Dept. 2017) (adopting this dictum). This Series argues that the *Garrett* dictum gets *Brady* doctrine terribly wrong and provides a template for attacking the flawed *Garrett* decision.

THE PROBLEM

In *Garrett*, the Court of Appeals adopted, albeit in dictum, an exception to the well-established *Kyles* rule that exculpatory information "known only to police investigators and not to the prosecutor" is imputed to the prosecution for *Brady* purposes. *Kyles v. Whitley*, 514 U.S. 419, 438-40 (1995).[1] The *Garrett* exception applies when: (1) the

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exculpatory evidence at issue involves prior bad acts of a police officer that bear only on the officer's credibility; and (2) *only* the police officer knows about the prior bad act. 23 N.Y.3d at 889 (a federal lawsuit alleging misconduct on the part of a testifying officer was not imputed to the prosecution because it "concerned [the officer's] alleged misconduct in an unrelated criminal case, and the allegations were, at most, collateral to defendant's prosecution to the extent they may have provided impeachment material.").[2]

The *Garrett*-imputation exception can shield the State from *Brady* liability where the prosecution fails to disclose an officer's prior CCRB misconduct or lawsuits that the prosecution did not know about. That exception is critical as CCRB records are now publicly available and can provide evidence of undisclosed prior bad acts, which can in turn justify *Brady* 440 motions. But, under the *Garrett* exception, we lose the *Brady* motion if the prosecution did not know about the CCRB record, as may be the case in trials that preceded 2015 or so.

[1] *Garrett*'s exception to the prosecutor's duty to disclose is dictum because the majority also found the impeachment material immaterial.

[2] *Garrett* explicitly held that its no-imputation rule does not apply to evidence bearing on the officer's motive to fabricate or bias. 23 N.Y.3d at 889 n.3 (discussing *People v. Wright*, 86 N.Y.2d 591 (1995)). Further, *Garrett*'s no-imputation rule is likely inapplicable to prior bad acts that establish a propensity to engage in certain conduct as opposed to merely undermining the officer's credibility (e.g., the officer previously coerced a confession and did so in your case too). *Garrett* appears to explicitly limit its no-imputation rule to "collateral" prior bad acts that merely undermine credibility. 23 N.Y.3d at 889; *but see Garrett*, 23 N.Y.3d at 886 (suggesting that Mr. Garrett had argued that the evidence at issue proved a propensity to engage in coercive conduct during interrogations). *Garrett*'s no-imputation rule therefore does not encompass propensity evidence as such evidence is not used to impeach credibility but to prove that a particular act occurred. *E.g.*, *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984).

A POTENTIAL SOLUTION

This Series contends that the *Garrett* exception violates *Kyles*' command that "evidence known only to police investigators and not to the prosecutor" *is* subject to *Brady*. 514 U.S. at 438. The exception is "arbitrary and illogical," conflating materiality with the duty to disclose. 23 N.Y.3d at 893-94 (Lippman, J., concurring in result). Perhaps, as Chief Judge Lippman's *Garrett* concurrence observed, an officer's prior bad acts won't be sufficiently material to raise doubt as to guilt. *Id.* But it does not follow that those acts are not imputed to the prosecution in the first place. *Id.*

We can argue that *Garrett*'s dictum violates *Kyles*. The goal here is to get this issue to the Court of Appeals and ultimately the United States Supreme Court or a federal habeas court.

Below is a template for arguing that *Garrett* violates *Kyles*.

TEMPLATE

The State violates due process when it suppresses favorable evidence that is material. *Kyles v. Whitley*, 514 U.S. 419 (1995); *People v. Vilardi*, 76 N.Y.2d 67 (1990); U.S. Const. amend. 14; N.Y. Const. art. I § 6. The State "suppresses" exculpatory evidence when it fails to disclose evidence that is known to the prosecution or those "acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437-38.

[**Argue, to the extent you can, that the prosecutor knew of the misconduct evidence. Then argue, in the alternative**:]

Even if the prosecutor did not know of Detective X's CCRB record, that is irrelevant under *Kyles*, 514 U.S. at 438. Under *Kyles,* material evidence unknown to the prosecution

is imputed to the prosecution where, as here, it is known to those "acting on the government's behalf in the case, including the police." *Id.* at 438.

Kyles expressly rejected the attempt to "accommodate" the State by holding that *Brady* does not apply to "evidence known only to police investigators and not to the prosecutor." *Id.* As *Kyles* held, that accommodation would constitute "a serious change of course from the *Brady* line of cases." *Id.* And while "police investigators sometimes fail to inform a prosecutor of all they know," "procedures and regulations can be established to . . . insure communication of all relevant information on each case to every lawyer who deals with it." 514 U.S. at 437-38 (quotation marks omitted); *accord Strickler v Greene*, 527 U.S. 263, 280-81 (1999); *People v. Santorelli*, 95 N.Y.2d 412, 421 (2000). That is particularly true here with CCRB records, which can be systematically tracked by the District Attorney's Office—indeed, New York City prosecutors *already* do that. **[***CITE publicly available evidence or a previously filed affirmation from an ADA if available].**

Dictum from *People v. Garrett*, 23 N.Y.3d 878, 887-90 (2014), which purports to carve out an exception to the *Kyles* rule, does not bar relief. Under the *Garrett* dictum, material evidence known only to the police is *not* imputed to the prosecution if that evidence involves prior bad acts "in an unrelated case." *Id.*[3]

This imputation exception violates *Kyles*' core holding that favorable evidence known only to the police *is* imputed to the prosecution. 514 U.S. at 438-39. *Kyles* did not suggest

[3] This exception is dictum because *Garrett* also rejected the *Brady* claim on materiality grounds, thus rendering the imputation question academic. 23 N.Y.3d at 891-92.

any artificial distinction in this context between prior-bad-act impeachment evidence and all other forms of evidence favorable to the accused. *See also Kyles*, 514 U.S. at 432 (the prosecution has an "affirmative duty to disclose evidence favorable to a defendant"). Unsurprisingly, the *Garrett* majority did not even attempt reconcile its exception with *Kyles*. *Garrett* instead relied on dictum from First and Third Department decisions that were either pre-*Kyles* or did not even cite *Kyles*.[4]

As Chief Judge Lippmann's concurrence explained, *Garrett*'s formalistic distinction "conflat[es] imputation and materiality." *Garrett*, 23 N.Y.3d at 893-84 (Lippman, C.J., dissenting). "The tangential nature of impeachment evidence has no bearing on whether a police officer's knowledge thereof is attributable to the People. By contrast, the degree to which an officer's bad acts may be characterized as collateral to a particular case is certainly relevant to determining [materiality]." *Id.*

The *Garrett* dictum also clashes with the Supreme Court's "repeated reject[ion]" of a *Brady* "distinction between impeachment evidence and exculpatory evidence." *United States v. Bagley*, 473 U.S. 667, 676-77 (1985); *Giglio v. United States*, 405 U.S. 150, 154 (1972). *Garrett*'s line drawing violates *Bagley* and *Giglio*'s basic rule that the *Brady* inquiry

[4] *Garrett*, 23 N.Y.3d at 897-98 ("Particularly relevant to this case, the First and Third Appellate Division departments have held that 'a police officer's secret knowledge of his own prior illegal conduct in an unrelated case will not be imputed to the prosecution for *Brady* purposes where the People had no knowledge of the corrupt officer's 'bad acts' until after trial.") (brackets omitted) (citing four cases: *People v. Johnson,* 226 A.D.2d 828, 829 (3d Dept. 1996) (stating, in dictum and without mentioning *Kyles*, that impeachment evidence exclusively in police control is not imputed to prosecution for *Brady* purposes), *People v. Vasquez,* 214 A.D.2d 93, 95 (1st Dept. 1995) (same), *People v. Kinney,* 107 A.D.3d 563, 564 (1st Dept. 2013) (same), and *People v. Longtin,* 245 A.D.2d 807, 810 (3d Dept 1997) (same), *affd on other grounds* 92 N.Y.2d 640 (1998)).

turns on whether the material evidence is *favorable*, not whether it can be classified as "impeachment" or "exculpatory."

The *Garrett* dictum produces unreasonable results. Under the *Garrett* dictum, police officers can avoid disclosure of exculpatory evidence by keeping quiet. Incentivizing police officers to hide the truth from prosecutors offends simple justice. In the end, by conditioning the prosecution's *Brady* obligation on whether an officer chooses to be open about his prior record, the *Garrett* dictum "'substitut[es] [ ] the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.'" *Garrett*, 23 N.Y.3d at 895 (quoting *Kyles*, 514 U.S at 438).

Further, under the *Garrett* dictum, the prosecutor can completely ignore a *specific* discovery demand for a testifying officer's prior bad acts. After all, if *Brady* is inapplicable to evidence known only to the police, the prosecutor has no due-process obligation to ask the police for it. That result plainly violates *Kyles* warning that "the adversary system of prosecution [should not be permitted to] descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth." 514 U.S. at 439.

Practical concerns do not justify exempting CCRB records from *Brady* either. Prosecutors need not scour the earth to find CCRB records—they need only ask for them. *Kyles*, 514 U.S. at 438 (while "police investigators sometimes fail to inform a prosecutor of all they know," "procedures and regulations can be established to . . . insure communication of all relevant information on each case to every lawyer who deals with it"). To the extent such inquiries are burdensome (they are not), that difficulty pales in comparison to the harm caused by an unfair trial. The "Constitution recognizes higher

values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

It is no wonder that Chief Judge McMahon recently found the *Garrett* "distinction" baseless. *Fraser v. City of New York*, 2021 WL 1338795, *8 (S.D.N.Y. Apr. 9, 2021). Instead, "as long as the evidence could be used to impeach a key witness, a police officer [must] share that information with the prosecutor because the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." *Id.* (citations and quotation marks omitted).

Appellate Impact Litigation Series #1
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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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[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.

SCOTUS DOCKET UPDATE
Impact Lit Project
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Below you will find the first of the Impact Lit Project's SCOTUS Docket Update. The Update will provide a bi-annual summary of the Supreme Court's docket. My source here is SCOTUSBlog. I included a list of currently docketed cases and cert petitions that are relevant to our criminal-appellate practice. Particularly relevant cases are highlighted.

Although it is obvious that pending SCOTUS cases/petitions matter because they could directly implicate one of our cases, cert petitions can be very helpful for a less-obvious reason: **they can provide valuable research assistance**. If a cert petition touches on an issue that you are currently briefing, it can be a research goldmine.

If you realize that I missed something, please let me know.

CURRENT SCOTUS DOCKET

1. Cruz v. Arizona, No. 21-846 [Arg: 11.1.2022]

   Issue(s): Whether the Arizona Supreme Court's holding that Arizona Rule of Criminal Procedure 32.1 (g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment.

2. Jones v. Hendrix, No. 21-857 [Arg: 11.1.2022]

   Issue(s): Whether federal inmates who did not — because established circuit precedent stood firmly against them — challenge their convictions on the ground that the statute of conviction did not criminalize their activity may apply for habeas relief under 28 U.S.C § 2241 after the Supreme Court later makes clear in a retroactively applicable decision that the circuit precedent was wrong and that they are legally innocent of the crime of conviction.

3. In re Grand Jury, No. 21-1397 [Arg: 1.9.2023]

   Issue(s): Whether a communication involving both legal and non-legal advice is protected by attorney-client privilege when obtaining or providing legal advice was one of the significant purposes behind the communication.

4. Santos-Zacaria v. Garland, No. 21-1436 [Arg: 1.17.2023]

   Issue(s): Whether the court of appeals correctly determined that 8 U.S.C. 1252(d)(1) prevented the court from reviewing petitioner's claim that the Board

of Immigration Appeals engaged in impermissible factfinding because petitioner had not exhausted that claim through a motion to reconsider.

5. Smith v. U.S., No. 21-1576

Issue(s): Whether the proper remedy for the government's failure to prove venue is an acquittal barring re-prosecution of the offense, as the U.S. Courts of Appeals for the 5th and 8th Circuits have held, or whether instead the government may re-try the defendant for the same offense in a different venue, as the U.S. Courts of Appeals for the 6th, 9th, 10th and 11th Circuits have held.

6. U.S. v. Hansen, No. 22-179

Issue(s): Whether the federal criminal prohibition against encouraging or inducing unlawful immigration for commercial advantage or private financial gain, in violation of 8 U.S.C. § 1324(a)(1)(A)(iv) and (B)(i), is facially unconstitutional on First Amendment overbreadth grounds.

7. Samia v. U.S., No. 22-196

Issue(s): Whether admitting a codefendant's redacted out-of-court confession that immediately inculpates a defendant based on the surrounding context violates the defendant's rights under the confrontation clause of the Sixth Amendment.

CERT PETITIONS

NEW YORK CASES

Hemphill v. New York	**Whether the improper admission of the out-of-court statement by the alternative suspect in *Hemphill v. New York* was "so unimportant and insignificant" as to be harmless under *Chapman v. California*.**

EXECUTION AND COMPASSION

Fratta v. Texas	Whether to stay the execution of Robert Fratta (pro se filing)

APPELLATE PROCEDURE AND HARMLESS ERROR

Deveraux v. Montana	**Whether a trial court commits structural error, requiring automatic reversal under the Sixth Amendment, when it seats a biased juror after erroneously denying a for-cause challenge to that juror.**
Dupree v. Younger	Whether to preserve the issue for appellate review a party must reassert in a post-trial motion a purely legal issue rejected at summary judgment.
Kimberlin v. U.S.	Whether a petitioner must show he suffers from a "civil disability"—that is, a collateral consequence that causes a substantial and present harm, is specific to the criminal context, and arises solely from the erroneous conviction—before a court can grant a writ of error coram nobis, or whether a court may instead presume that every conviction has collateral consequences that provide adequate standing to seek relief.
U.S. v. Hakim	**Whether a defendant's erroneous pretrial self-representation categorically constitutes structural error, thereby requiring automatic vacatur of the convictions, where the defendant had counsel at trial and did not irretrievably lose any rights or defenses in the interim.**
Irons v. U.S.	Whether errors in calculating the Sentencing Guidelines are rendered categorically harmless by the district court's assertion that the guidelines would make no difference to the choice of sentence.

THE FIRST

Counterman v. Colorado	**Whether, to establish that a statement is a "true threat" unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement, or whether it is enough to show that an objective "reasonable person" would regard the statement as a threat of violence.** ****This case implicates the constitutionality of the New York aggravated harassment statute, which does not require a subjective intent to intimidate. Penal Law § 240.30(1)(a).**
Chen v. Texas	(1) Whether a law that criminalizes expressive speech is immunized from any First Amendment scrutiny if it also criminalizes non-expressive conduct; and (2) whether a law that punishes the repeated sending of electronic communications with intent and likely result to "harass, annoy, alarm, abuse, torment, embarrass, or offend" another is unconstitutionally overbroad.
Moore v. Texas	(1) Whether a law that criminalizes expressive speech is immunized from any First Amendment scrutiny if it also criminalizes non-expressive conduct; and (2) whether a law that punishes the repeated sending of electronic communications with intent and likely result to "harass, annoy, alarm, abuse, torment, embarrass, or offend" another is unconstitutionally overbroad.
Barton v. Texas	(1) Whether the criminalization of expressive electronic communications in Texas Penal Code § 42.07(a)(7) implicates the First Amendment; and (2) whether Texas Penal Code § 42.07(a)(7) is unconstitutionally overbroad.

THE FOURTH

Moore v. U.S.	Whether long-term police use of a surveillance camera targeted at a person's home and curtilage is a Fourth Amendment search.

THE SIXTH WITH A LITTLE BIT OF FIFTH/FOURTEENTH

Shaw v. U.S.	**(1) Whether the jury [right] or [ ] due process clause . . . bar a court from imposing a more severe criminal sentence on the basis of conduct that a jury necessarily rejected, given its verdicts of acquittal on other counts at the same trial; (2) whether . . . *United States v. Watts* should be overruled; and (3) whether, in avoidance of the constitutional question, the rules of issue preclusion, as applied in federal criminal cases, bar imposition of an aggravated sentence on a factual predicate necessarily rejected by the jury at trial in the same case.**
Shields v. Kentucky	When, if ever, a preliminary hearing provides an "adequate opportunity" for cross-examination under the Sixth Amendment's confrontation clause.
Reed v. U.S.	Whether the Constitution requires an indictment, jury trial and proof beyond a reasonable doubt to find that a defendant's prior convictions were "committed on occasions different from one another," as is necessary to impose an enhanced sentence under the Armed Career Criminal Act.
Randel v. Rabun County School District	Whether the existence of a state post-deprivation process precludes a procedural due process claim only where a pre-deprivation process that satisfied constitutional standards would be impracticable, such as because the deprivation was a random or unauthorized act of an errant state official, or in any case in which, even though compliance with constitutional standards in a pre-deprivation process was practicable, the state post-deprivation process provides some form of remedy for the constitutional deficiency of the pre-deprivation process.
Ruiz v. Massachusetts	Whether the Fifth and 14th Amendments forbid judges (or prosecutors) from instructing (or inviting) the jury to take into account a non-testifying criminal defendant's courtroom demeanor as a basis for finding guilt.
Harness v. Watson	Whether any amendment to a law originally adopted for an impermissible racially discriminatory purpose, no matter how minor the amendment and no matter the historical context, cleanses the law of its racist origins for 14th Amendment purposes unless the party challenging the law can prove that the amendment itself was motivated by racial discrimination.

DNA

Escobar v. Texas	Whether the Texas Court of Criminal Appeals erred in holding that the prosecution's reliance on admittedly false DNA evidence to secure petitioner's conviction and death sentence is consistent with the due process clause of the 5th Amendment because there is no reasonable likelihood that the false DNA evidence could have affected the judgment of the jury.

THE GREAT WRIT

Jordan v. Lamanna	Whether a federal habeas petitioner seeking relief on the basis of a violation of the public trial clause of the Sixth Amendment can demonstrate an "unreasonable application of clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1) in the absence of a Supreme Court precedent involving analytically indistinguishable facts.
Fratta v. Texas	(1) Under the ruling in Shinn v. Ramirez, whether state courts are required to accept and rule on the merits of claims presented in writs of habeas corpus by prisoners who lawfully dismiss their attorneys to be incompliance with state procedures and file the claims pro se because the attorneys neglected or refused to do so; (2) whether unindicted actors can be added into an accused's jury charge when his indictment charges him as the only actor to commit the offense; and (3) whether it is constitutional for a grand jury to sign off on an indictment when the elements of the offense sought are not satisfied or could not have been satisfied by the government to begin with.
Chestnut v. Allen	Whether the U.S. Court of Appeals for the 4th Circuit violated 28 U.S.C. § 2254(d) limitations and needlessly overturned a state death sentence on an insubstantial premise that respondent's mental health evidence was not afforded "meaningful consideration and effect" when the judge stated at sentencing that he had considered all the mental health evidence but did not explicitly reference respondent's eating disorder.

Marshal v. Texas	(1) Whether the Texas Court of Criminal Appeals' application of the equitable doctrine of laches constitutes an independent and adequate state-law ground that bars review of petitioner's constitutional claims; (2) whether the court's application of laches violated petitioner's right to due process of law; and (3) whether the prosecution is estopped from relying on the doctrine of laches when its misconduct caused the delay in filing the habeas corpus application.

PRISON CONDITIONS

Huffman v. Harris	(1) Whether [CA5] erred in finding that [due process] imposes an obligation on county sheriffs to release a dangerous schizophrenic inmate whose criminal charges remained pending and whose court proceedings were stalled, and then denying qualified immunity in the absence of clearly established law; and (2) whether [CA5] erred in imposing an obligation on jailers to inquire as to the status of an inmate's court proceedings without providing any guidance or parameters for compliance.

IMMIGRATION

Daye v. Garland	Whether the court should overturn *Jordan v. De George* and hold that the phrase "crime involving moral turpitude" is unconstitutionally vague as it is used in 8 U.S.C. § 1227(a)(2)(A).
He v. Garland	(1) Whether courts of appeals review de novo - as a question of law - or for substantial evidence - as a question of fact - a Board of Immigration Appeals' determination that established facts do not rise to the level of persecution; and (2) whether being prohibited by government officials from freely and openly practicing one's religion constitutes persecution as a matter of law.