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**CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL: THE  
CLASH OF THE FEDERAL AND NEW YORK STATE  
CONSTITUTIONS**

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**I. INTRODUCTION**

The Sixth Amendment to the United States Constitution ensures those accused of a crime the right to the assistance of defense counsel in all criminal prosecutions.<sup>1</sup> State constitutions commonly express similar guarantees, and New York is no exception.<sup>2</sup> Inevitably, the ambiguities and nuances of constitutional provisions are interpreted by the judiciary,<sup>3</sup> thus, governing case law is created. However, different courts do not always agree. The United States Supreme Court and the highest court in New York State, the Court of Appeals, have advanced different rules that determine when ineffective assistance of counsel exists and when justice requires that a conviction be reversed.<sup>4</sup>

This Comment is an effort to concisely analyze the distinctions between claims of ineffective assistance of counsel under the Federal and New York standards. To facilitate this, Section II will

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<sup>1</sup> U.S. CONST. amend. VI.

<sup>2</sup> N.Y. CONST. art. I, § 6.

<sup>3</sup> See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (“Interpretation of the law and the Constitution is the primary mission of the judiciary . . . .” (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803))).

<sup>4</sup> Compare *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (establishing a “reasonably effective” standard for judging the assistance of counsel), with *People v. Baldi*, 429 N.E.2d 400, 405 (N.Y. 1981) (establishing the “meaningful representation” standard for judging effective assistance of counsel in New York).

detail the evolution of the standards. Section III of the Comment will endeavor to interpret the relative positive and negative aspects of the differences between the Federal and New York standards. To accomplish this, there will be a critical exploration of the history of ineffective assistance of counsel rulings, as well as an evaluation of the reasoning, methodology, and overall integrity of the different approaches. Upon examination, it will become apparent that the federal and state standards should not be permitted to coexist and that the New York standard is far superior. Section IV will briefly summarize these findings and set forth a conclusion regarding the disharmony of the two standards. This section will also propose reasoned suggestions for how ineffective assistance of counsel standards should be most appropriately interpreted.

## II. HISTORY

### A. A Brief Historical Perspective on the Right to Counsel

The Sixth Amendment provides defendants with the right to the assistance of counsel in criminal prosecutions, which is a guarantee that has been enforced by federal courts since the amendment's inception.<sup>5</sup> In terms of how effective such representation must be, the amendment specifies nothing. It was not until *Powell v. Alabama*<sup>6</sup> that the adequacy of counsel in criminal prosecutions was interpreted by the Supreme Court.<sup>7</sup> The uniquely dramatic facts of the case persuaded the Court to conclude that anything less than sufficiently effective representation would be a violation of due process.<sup>8</sup>

Decades later, in *Gideon v. Wainwright*, the right to have the

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<sup>5</sup> U.S. CONST. amend. VI. See also Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1638-39 (2003) (indicating that the right to counsel existed as far back as the seventeenth century when American colonists decided to abandon the English prohibition of counsel "to afford defendants a fighting chance against the prosecution").

<sup>6</sup> 287 U.S. 45 (1932).

<sup>7</sup> *Id.* at 71 (indicating that lack of effective counsel is "a denial of due process within the meaning of the Fourteenth Amendment").

<sup>8</sup> *Id.* at 49, 71 (describing that the defendants were illiterate black youths accused of raping two white girls in pre-civil rights era Alabama, cut off from communication with their family and friends, and faced with severe and life-threatening hostility from the general public).

assistance of counsel when defending felony charges was affirmed under both the Sixth and Fourteenth Amendments and held to apply to the states.<sup>9</sup> As a result of *Gideon* in 1963, it became law that indigent criminal defendants were universally required to have counsel appointed by the court, unless the right was “completely and intelligently waived.”<sup>10</sup> In the wake of *Gideon*, the right to counsel saw a steady expansion. Eventually, it would be required that, barring a knowing and informed waiver, no defendant could be incarcerated for any criminal offense without representation by counsel at trial.<sup>11</sup> The right was broadened to apply to the entire spectrum of criminal charges, from petty offenses to felonies.<sup>12</sup>

The specifics of what the right to counsel entails has been further elaborated upon by the Court since *Gideon*.<sup>13</sup> In *McMann v. Richardson*,<sup>14</sup> the Supreme Court determined that “the right to counsel is the right to the effective assistance of counsel.”<sup>15</sup> What exactly constituted effective assistance was left nebulous.<sup>16</sup> To measure the effectiveness of counsel without the benefit of clear Supreme Court rationale, courts on the federal level historically utilized assorted versions of the “mockery of justice” formula.<sup>17</sup> The basis for this formula seemingly originated from the decision rendered in *Diggs v. Welch*,<sup>18</sup> which held that findings of actual ineffective assistance of counsel were limited strictly to “cases where the circumstances surrounding the trial shocked the conscience . . . and made the proceedings a farce and a mockery of justice.”<sup>19</sup> In regards to what was effective, the farce and mockery standard demanded an extremely low level of minimum performance.<sup>20</sup> This standard doggedly persisted until 1984 when the Supreme Court redefined the standard for effec-

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<sup>9</sup> 372 U.S. 335, 342-43 (1963).

<sup>10</sup> *Id.* at 340.

<sup>11</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

<sup>12</sup> *Id.*

<sup>13</sup> *See, e.g., McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (indicating that “the right to counsel is the right to the effective assistance of counsel”).

<sup>14</sup> 397 U.S. 759.

<sup>15</sup> *Id.* at 771 n.14.

<sup>16</sup> *Id.* at 771.

<sup>17</sup> *McQueen v. Swenson*, 498 F.2d 207, 214 (8th Cir. 1974).

<sup>18</sup> 148 F.2d 667 (D.C. Cir. 1945).

<sup>19</sup> *Id.* at 670.

<sup>20</sup> *See id.* at 669 (reserving actual findings of ineffective assistance of counsel under the farce and mockery test for only the most extreme cases).

tive assistance of counsel.<sup>21</sup>

### B. The Influence of *Strickland v. Washington*

A method for determining what constituted actual effectiveness was not fully characterized by the Supreme Court until *Strickland v. Washington*.<sup>22</sup> In *Strickland*, the Court established that “[t]he 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.”<sup>23</sup>

*Strickland* also established the “reasonably effective” standard for judging the assistance of counsel.<sup>24</sup> This standard indicates that specific duties exist that are associated with the norms of professional practice.<sup>25</sup> Counsel must meet these standards when representing a defendant in a criminal trial in order to satisfy reasonable effectiveness.<sup>26</sup> The standards include “a duty of loyalty, a duty to avoid conflicts of interest,” a duty to argue for the defendant’s position, a duty “to keep the defendant informed,” and also a duty “to consult with the defendant” on matters of crucial importance.<sup>27</sup> However, this does not wholly define what it means to be “reasonably effective.” The standard is nebulous by design, as the Court explains:

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of

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<sup>21</sup> See *Strickland*, 466 U.S. at 687 (establishing the “reasonably effective” standard for judging the assistance of counsel).

<sup>22</sup> See *id.*

<sup>23</sup> *Id.* at 686.

<sup>24</sup> *Id.* at 687. See also *McMann*, 397 U.S. at 770-71 (advocating that, in order to be effective, counsel must be a reasonably competent attorney).

<sup>25</sup> *Strickland*, 466 U.S. at 688.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

legitimate decisions regarding how best to represent a criminal defendant.<sup>28</sup>

To evaluate counsel's performance with the "20/20 vision" that is intrinsically attributed to hindsight would undermine the entire judicial process, and the Court wanted to avoid such interpretations.<sup>29</sup> To this end, *Strickland* imposed a strong presumption that the counsel's performance was reasonably effective,<sup>30</sup> and "[j]udicial scrutiny . . . must be highly deferential" to the decisions of defense attorneys.<sup>31</sup>

In *Strickland*, the Court created a two prong test that must be affirmatively proven if a defendant is convicted and subsequently advances a claim that the assistance of his or her counsel was so woefully unsound that fairness necessitates a reversal of the decision.<sup>32</sup> First, there must be a showing of deficiency wherein "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment."<sup>33</sup> The second prong requires that counsel's errors be prejudicial, and of such a substantial caliber as to render the trial unfair.<sup>34</sup> Errors by counsel that do not affect the outcome of the trial, even if they are substantially unreasonable, are not considered prejudicial.<sup>35</sup> "The defendant must show that there is 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."<sup>36</sup>

### C. *People v. Baldi* and New York

Similar to the Constitution of the United States, the New York State Constitution also contains a provision which guarantees the

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<sup>28</sup> *Id.* at 688-89.

<sup>29</sup> *Id.* at 689-90.

<sup>30</sup> *Strickland*, 466 U.S. at 689.

<sup>31</sup> *Id.* at 689. *See also* *Lindh v. Murphy*, 521 U.S. 320, 334 n.7 (1997) (noting the new standard is highly deferential).

<sup>32</sup> *Strickland*, 466 U.S. at 687.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 691.

<sup>36</sup> *Id.* at 694.

right to the effective assistance of counsel.<sup>37</sup> The New York Court of Appeals first put forth a constitutional argument for the effective assistance of counsel in *People v. Tomaselli*.<sup>38</sup> Mirroring the evolution of the federal standard, in *Tomaselli* New York initially adopted a “mockery of justice” standard.<sup>39</sup> The standard remained in place for years. It wasn’t until the late 1970s that New York began to deviate from this traditional formula.<sup>40</sup> In 1976 and 1979, the New York Court of Appeals found two instances of ineffective assistance of counsel to be unconstitutional without resorting to the mockery of justice test.<sup>41</sup> The mockery of justice test would soon be abandoned as a whole. It was evident to the court that “a criminal trial should be more efficient, and fairer, than one that rises just above the level of farce.”<sup>42</sup>

In *People v. Baldi*,<sup>43</sup> the New York Court of Appeals redefined what effective assistance of counsel in New York meant when it stated, “[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met.”<sup>44</sup> This flexible standard “necessarily hinges upon the facts and circumstances of each particular case.”<sup>45</sup>

This “meaningful representation” standard, which evaluates the totality of the circumstances, was established in New York three years prior to the Supreme Court’s decision in *Strickland*.<sup>46</sup> At the time, the decision applied only at the trial level.<sup>47</sup> Subsequently, the New York Court of Appeals had occasion to adopt the federal *Strick-*

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<sup>37</sup> N.Y. CONST. art. I, § 6.

<sup>38</sup> 165 N.E.2d 551 (N.Y. 1960).

<sup>39</sup> *Id.* at 553.

<sup>40</sup> See *People v. Aiken*, 380 N.E.2d 272, 274 (N.Y. 1978); *People v. Droz*, 348 N.E.2d 880, 882 (N.Y. 1976); see also *People v. Medina*, 375 N.E.2d 768, 772 (N.Y. 1978).

<sup>41</sup> See *People v. Bell*, 401 N.E.2d 180, 181 (N.Y. 1979) (holding that a litany of errors amounted to ineffective assistance of counsel); *Droz*, 348 N.E.2d at 882 (evaluating effective assistance as a question of degree of adequate performance and cumulative error).

<sup>42</sup> *People v. Stultz*, 810 N.E.2d 883, 887 (N.Y. 2004).

<sup>43</sup> 429 N.E.2d 400 (N.Y. 1981).

<sup>44</sup> *Id.* at 405.

<sup>45</sup> *People v. De Marco*, 822 N.Y.S.2d 325, 326 (N.Y. App. Div. 2006).

<sup>46</sup> *Baldi*, 429 N.E.2d at 405.

<sup>47</sup> *Id.* See also *People v. Flores*, 639 N.E.2d 19, 21 (N.Y. 1994); *People v. Saunders*, 753 N.Y.S.2d 620, 624 (N.Y. App. Div. 2003).

*land* standard regarding ineffective assistance of counsel, but instead elected to retain the *Baldi* standard.<sup>48</sup> Almost a quarter-century after *Baldi*, the New York Court of Appeals decided *People v. Stultz*<sup>49</sup> in favor of extending the *Baldi* standard to the appellate level in regard to the ineffectiveness of appellate counsel.<sup>50</sup> The highest court of the state went on to note that the *Baldi* standard, which ensures representation that is meaningful, “comports with both the Sixth Amendment and our own state constitutional sensibilities.”<sup>51</sup>

### III. ANALYSIS

What clearly differentiates the federal approach from the standard articulated by the New York Court of Appeals in *Baldi* is the prejudice prong of the *Strickland* test.<sup>52</sup> The *Strickland* test requires a reasonably probable showing of “but-for” causation between counsel’s prejudicial ineffectiveness and the defendant’s loss at trial.<sup>53</sup> Prejudice under *Baldi* is evaluated in terms of “fairness of the process as a whole rather than its particular impact on the outcome of the case.”<sup>54</sup>

#### A. Can and Should the Two Standards Coexist Under the Law?

A point of inquiry is whether New York’s standard should even be permitted under the reigning federal law of the United States. In accordance with the Supremacy Clause, states are barred from implementing their own standards of ineffectiveness if they are more burdensome or demanding than what federal law dictates.<sup>55</sup> Howev-

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<sup>48</sup> *People v. Benevento*, 697 N.E.2d 584, 589 (N.Y. 1998).

<sup>49</sup> 810 N.E.2d 883.

<sup>50</sup> *Id.* at 887-88.

<sup>51</sup> *Id.* at 886.

<sup>52</sup> Compare *Strickland*, 466 U.S. at 694 (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”), with *Baldi*, 429 N.E.2d at 405 (indicating that “trial tactics which terminate unsuccessfully do not automatically indicate ineffectiveness”).

<sup>53</sup> *Strickland*, 466 U.S. at 694 (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”).

<sup>54</sup> See *Benevento*, 697 N.E.2d at 588.

<sup>55</sup> *Stultz*, 810 N.E.2d at 888 n.12.

er, states are entitled to take the opposite approach.<sup>56</sup> “In interpreting their own constitutions, states are free to provide greater protection than the Federal Constitution requires.”<sup>57</sup> In this sense, the Federal Constitution sets forth a minimum level of rights—a floor—to which states must adhere, but may surpass.”<sup>58</sup>

The Federal *Strickland* standard for ineffective assistance of counsel has not been universally adhered to by the states.<sup>59</sup> Some states, such as New York, have chosen to retain their own preferential standards of evaluation.<sup>60</sup> This does not mean, however, that they are wholly separate. The standards clash when federal writs of habeas corpus come into play.

[A] state prisoner seeking a federal writ of habeas corpus on the ground that he was denied effective assistance of counsel must show more than simply that he meets the *Strickland* standard. Under 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), the state court’s decision rejecting his claim is to be reviewed under a more deferential standard than simply whether that decision was correct. . . . [The federal court] must defer to the state court’s rejection of the claim, and must deny the writ unless (to the extent pertinent here) the state-court adjudication (1) “was contrary to,” or (2) “involved an unreasonable application of,” clearly established federal law “as determined by the Supreme Court of the United States.”<sup>61</sup>

What the AEDPA essentially demands is that a habeas petitioner must show that the state court applied *Strickland* unreasonably or

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<sup>56</sup> *Id.*; see also *California v. Ramos*, 463 U.S. 992, 1014 (1983) (holding that states have the freedom to permit and enforce greater protections than those demanded by the U.S. Constitution).

<sup>57</sup> *Stultz*, 810 N.E.2d at 888 n.12.

<sup>58</sup> *Id.* (citation omitted).

<sup>59</sup> See, e.g., *People v. Henry*, 744 N.E.2d 112, 114 (N.Y. 2000); *Briones v. State*, 848 P.2d 966, 976 (Haw. 1993).

<sup>60</sup> *Benevento*, 697 N.E.2d at 589.

<sup>61</sup> *Henry v. Poole*, 409 F.3d 48, 67 (2d Cir. 2005) (quoting 28 U.S.C.A. § 2254(d)(1) (West 2010)). See also *Wiggins v. Smith*, 539 U.S. 510, 511 (2003) (stating that unreasonable application of a rule can result in granting writ).



used its own standard that is contrary to *Strickland*.<sup>62</sup> The Second Circuit has ruled on multiple occasions that New York's standard is not contrary to *Strickland* and therefore the rule is in accordance with 28 U.S.C. § 2254 as amended by the AEDPA.<sup>63</sup>

From an over-arching perspective, the standards appear to be in harmony. Whether state or federal, the goal is to ensure reasonable assistance in the interest of fairness.<sup>64</sup> However, upon closer examination, the different standards appear to have a very basic contradiction. The Second Circuit, in *Henry v. Poole*,<sup>65</sup> although bound by precedent to recognize the standards as non-contrary, opined on this incongruity as follows:

[I]n order to be “contrary to” the federal standard, a state-law principle need not be diametrically different from, or opposite in character to, or mutually opposed to, the federal standard *in toto*. Rather . . . if the state court’s rejection of a claim is grounded on part of a state-law principle that is inconsistent with part of the *Strickland* standard, it meets the AEDPA “contrary to” test. . . . [I]n light of the *Strickland* principle that an ineffective assistance claim is established if the court concludes that there is a reasonable probability that but for counsel’s professionally deficient performance the outcome of the proceeding would have been different, we find it difficult to view so much of the New York rule as holds that “*whether defendant would have been acquitted of the charges but for counsel’s errors is . . . not dispositive*,” as not “contrary to” the prejudice standard established by *Strickland*.<sup>66</sup>

In *Henry*, Judge Sack’s concurring opinion was heavily influenced by the criticism levied against New York’s continued use of a standard

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<sup>62</sup> *Henry*, 409 F.3d at 70-71.

<sup>63</sup> *Id.* at 69-70. See also *Eze v. Senkowski*, 321 F.3d 110, 122 (2d Cir. 2003); *Lindstadt v. Keane*, 239 F.3d 191, 198 (2d Cir. 2001) (holding that the *Baldi* standard “is not ‘diametrically different, opposite in character or nature, or mutually opposed’ to the standard articulated in *Strickland*” (quoting *Williams v. Taylor*, 529 U.S. 362, 364 (2000))); *Loliscio v. Goord*, 263 F.3d 178, 189 n.6 (2d Cir. 2001).

<sup>64</sup> *Henry*, 409 F.3d at 70.

<sup>65</sup> 409 F.3d 48.

<sup>66</sup> *Id.* at 70-71 (quoting *Benevento*, 697 N.E.2d at 588) (citation omitted).

that could be interpreted as contrary to *Strickland*.<sup>67</sup> Belying a belief that the two standards are, in fact, contrary, Judge Sack went so far as to state, “we might be well advised to consider the appeal for en banc review as a means to reconsider the issue.”<sup>68</sup>

Regardless of which standard is more rational and prudent, “a state court’s incorrect legal determination has [n]ever been allowed to stand because it was reasonable.”<sup>69</sup> It has been a long-standing and well-respected rule that the federal court system has “an independent obligation to say what the law is.”<sup>70</sup> The inherent difference in the standards, as noted by the *Henry* decision, should trigger a “contrary to” analysis that reevaluates the *Baldi* standard and finds it in violation of “clearly established [f]ederal law, as determined by the Supreme Court of the United States.”<sup>71</sup>

New York would not be unique if, as a state, the interpretation of its highest court regarding ineffective assistance of counsel was defeated for not complying with the federal standard. The Supreme Court of Virginia advanced a standard based upon what they viewed as a modification of *Strickland* that resulted from the Supreme Court’s decision in *Lockhart v. Fretwell*.<sup>72</sup> The Virginia standard held that “focus on outcome determination was insufficient standing alone.”<sup>73</sup> The Supreme Court ruled that Virginia’s interpretation was not supported by the decision in *Lockhart*, which applied to very specific circumstances when prejudice ought not to be part of the equation, and as a result was contrary to *Strickland*.<sup>74</sup>

Virginia’s approach was not unlike New York’s *Baldi* standard, holding that “but for” causation was “not dispositive.”<sup>75</sup> Each standard endeavored to distance itself from requiring a causal relationship between ineffective assistance of counsel and an unfavorable result for the defendant, which is essentially the heart of *Strickland*’s

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<sup>67</sup> *Id.* at 72-73 (Sack, J., concurring).

<sup>68</sup> *Id.* (emphasis omitted).

<sup>69</sup> *Williams*, 529 U.S. at 384 (quoting *Wright v. West*, 505 U.S. 277, 305 (1992)) (internal quotation marks omitted).

<sup>70</sup> *Id.*

<sup>71</sup> 28 U.S.C.A. § 2254(d)(1) (West 2010).

<sup>72</sup> 506 U.S. 364, 372-73 (1993); *Williams v. Warden of the Mecklenburg Corr. Ctr.* (*Williams I*), 487 S.E.2d 194, 199 (Va. 1997).

<sup>73</sup> *Williams*, 529 U.S. at 414; *Williams I*, 487 S.E.2d at 199.

<sup>74</sup> *Williams*, 529 U.S. at 414.

<sup>75</sup> *Benevento*, 697 N.E.2d at 588.

prejudice prong.<sup>76</sup> Virginia's standard did not survive, and New York's standard, due to its contrary nature and despite its superior protection, warrants a similar fate under prevailing law.<sup>77</sup>

**B.      The Numerous Fundamental Shortcomings of  
*Strickland* and Why *Baldi* Is Preferable**

Having illustrated how *Strickland* and *Baldi* are contrary to one another, the next question to confront is whether it is appropriate to hold a superior standard unconstitutional. It is well settled that contradictory state and federal laws cannot coexist.<sup>78</sup> However, while the current law may suggest that *Baldi* will be defeated by *Strickland*, this is not necessarily the optimum solution in the interest of justice. In true Darwinian style, the standard that is the most fit should be the one to survive. If only one of the two standards can exist, the Supreme Court should consider abandoning *Strickland* and adopting the *Baldi* standard on the federal level.

When the Supreme Court is faced with issues that arise from the application of different standards, it is the standards themselves that should be evaluated. The *Strickland* test is the more rigid of the two and will often be very difficult for the defendant to actually meet.<sup>79</sup> On the other hand, the pro-defendant *Baldi* standard is plainly more achievable.<sup>80</sup> The cause for this divergence, and the point of contention, is the prejudice prong of the *Strickland* test. There are fundamental difficulties inherent in proving that a convicted defendant would have garnered a different outcome had his counsel's assistance been effective.

**1.      Counsel's Role in Obscuring Findings of  
*Ineffectiveness and Prejudice***

Cases that may seem to be insurmountable at first glance can

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<sup>76</sup> See *id.* at 587-88; *Williams*, 529 U.S. at 371.

<sup>77</sup> *Stultz*, 810 N.E.2d at 887.

<sup>78</sup> *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

<sup>79</sup> See *Peguero v. United States*, 526 U.S. 23, 30 (1999) (O'Connor, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden . . .").

<sup>80</sup> See *Benevento*, 697 N.E.2d at 587, 589 (referencing the *Baldi* standard as one that is both "flexible" and "discrete").

be overcome by effective counsel.<sup>81</sup> Likewise, effective counsel may possess the ability to rebut the arguments and cross-examine the evidence advanced by the government in ways that simply cannot be discovered in any other manner.<sup>82</sup> Situations where competent lawyering has overcome supposedly impossible odds are prevalent, and it is accepted that such happenings are entirely possible.<sup>83</sup> However, when counsel does a terrible job, the natural result is that the opposition looks invincible. In this inverse relationship, the worse defense counsel performs, the more unbeatable the prosecution's case seems when it appears before the reviewing court. If the prosecution's case seems overpowering, the reviewing court will be unable to find prejudice, even though the weakness of the case might be directly attributable to the weakness of the originally defective counsel. The *Strickland* standard thus becomes a metaphorical Ouroboros, the mythical serpent that perpetually swallows its own tail. The difference that competent, "meaningful" representation has the potential to make in breaking such a vicious cycle cannot be feasibly quantified by any accurate measure. It is this "meaningful" representation that the New York State Constitution requires.<sup>84</sup>

Additionally, finding evidence that proves prejudice may be rendered difficult or impossible to accomplish precisely because of counsel's ineffectiveness and original evidentiary failures.<sup>85</sup> Practical problems that manifest through ineptitude create holes in the record that make proving prejudice exceedingly difficult.<sup>86</sup> Evidence, once readily accessible, runs the risk of being forever lost to time if it is not obtained with reasonable diligence.<sup>87</sup> Memories fade, and when

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<sup>81</sup> See *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

<sup>82</sup> See *id.*

<sup>83</sup> See Michael Mello, *Nine Scorpions in a Bottle*, 44 CRIM. L. BULL. ART. 1 (describing the sincere belief that competent lawyering could even have prevented the execution of infamous serial killer Ted Bundy, who desired acclaimed attorney, Millard Farmer, as counsel, and apparently was going to receive his services pro bono until the state trial judge denied the request because Farmer had an outstanding contempt citation).

<sup>84</sup> *Benevento*, 697 N.E.2d at 587 (quoting *Baldi*, 429 N.E.2d at 405).

<sup>85</sup> See *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting).

<sup>86</sup> See *id.* at 710 n.4 ("When defense counsel fails to take certain actions, not because he is 'compelled' to do so, but because he is incompetent, it is often . . . difficult to ascertain the prejudice consequent upon his omissions.").

<sup>87</sup> See *Peyton v. Rowe*, 391 U.S. 54, 62 (1968) ("[D]immed memories or the death of witnesses is bound to render it difficult or impossible to secure crucial testimony on disputed issues of fact.").

tasked with supplementing prior information, the defendant must confront “a real possibility that the parties present . . . may no longer be able to recall the proceeding in detail.”<sup>88</sup>

Counsel may also actively attempt to conceal incompetence out of self-interest.<sup>89</sup> The cooperation of the allegedly defective counsel can be essential to proving ineffective assistance.<sup>90</sup> However, their non-cooperation can make proving the claim practically impossible.<sup>91</sup> “[A]n ineffective assistance of counsel claim is unlikely to succeed if the criminal defense lawyer vigorously contests the allegations of ineffectiveness.”<sup>92</sup> *Strickland* itself acknowledged the necessity of inquiring into verbal exchanges between counsel and counseled when determining ineffectiveness.<sup>93</sup> There may be no other realistic way to discover exactly what information passed from the client to his or her counsel. The actions of counsel are often based upon information garnered from conversations with clients, making inquiry into those conversations critical to fair assessments of strategy and performance. However, it is evident that garnering such information will meet resistance from an involved party.

A hostile disposition from the attorney of the accused towards an ineffective assistance claim is easy to understand when considering the myriad of incentives at play. It does not take a legal scholar to see that “[a] client’s former attorney will be less than enthusiastic about helping a former client publicly criticize his [or her] representation.”<sup>94</sup> A proven claim of ineffective assistance can inherently dis-

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<sup>88</sup> Raisa Litmanovich, *In the Name of Efficiency: How the Massachusetts District Courts are Lobbying Away the Constitutional Rights of Indigent Defendants*, 29 B.C. THIRD WORLD L.J. 293, 311 (2009) (illustrating that this problem is especially prevalent regarding anything that occurs off the record, especially during unrecorded “lobby conferences” between attorneys and judges that are standard practice in certain jurisdictions).

<sup>89</sup> See *United States v. Livingston*, 425 F. Supp. 2d 554, 560 (D. Del. 2006) (demonstrating that the attorney actively concealed his own incompetence resulting in ineffective assistance).

<sup>90</sup> See Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 7 (1995).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Strickland*, 466 U.S. at 691 (“[I]nquiry into counsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions, just as it may be critical to a proper assessment of counsel’s other litigation decisions.”).

<sup>94</sup> Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 27 (2002).

credit a lawyer's ability, pride, and professional reputation.<sup>95</sup> Additionally, these claims may draw the attention of disciplinary bodies to misconduct that might otherwise have flown under the proverbial radar.<sup>96</sup> Original counsel might potentially be faced with separate actions for professional negligence, or even worse, the tortious act of attorney malpractice.<sup>97</sup> The predictable desire to avoid any potential liability for malpractice is "a powerful incentive not to cooperate or otherwise be helpful to a former client seeking to prove an ineffectiveness claim."<sup>98</sup> A claim for ineffective assistance of counsel, if defeated, eliminates the ability to sue for criminal malpractice in the majority of jurisdictions,<sup>99</sup> including New York.<sup>100</sup> The defense attorney therefore has an interest in seeing such claims fail for his or her own security. Relying on the altruism of the original defective counsel to act against his or her own interest is dubious at best. A standard that essentially requires counsel to admit to being so woefully deficient as to have been the cause of his or her client's conviction cannot realistically be considered to serve the interests of justice.

This is not to say that an attorney will never willingly take a metaphorical bullet for his or her client. Sometimes it will occur even when counsel has done nothing wrong. In *Barclay v. Spitzer*,<sup>101</sup> counsel willingly testified that he did not call a witness who might have helped absolve his client<sup>102</sup> because he did not adequately prepare for his role at the trial.<sup>103</sup> This admission, if accepted, would have indicated that failure to call the witness was not part of any

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<sup>95</sup> *Id.*

<sup>96</sup> *See id.* at 28 (noting that although "bringing or prevailing in an ineffective assistance of counsel claim does not automatically trigger disciplinary proceedings in any jurisdiction," they still generate publicity that the allegedly defective counsel would certainly rather avoid).

<sup>97</sup> *See Mylar v. Wilkinson*, 435 So. 2d 1237, 1238-39 (Ala. 1983) (illustrating that victory on a claim of ineffectiveness does not guarantee victory on a claim of malpractice).

<sup>98</sup> Duncan, *supra* note 94, at 28.

<sup>99</sup> *Id.* at 27-28.

<sup>100</sup> Gill v. Blau, 507 N.Y.S.2d 182, 183 (N.Y. App. Div. 1996) (ruling that failure to succeed on a claim of ineffective assistance of counsel acts as collateral estoppel for legal malpractice claims).

<sup>101</sup> 371 F. Supp. 2d 273 (E.D.N.Y. 2005).

<sup>102</sup> *Id.* at 275 (claiming that the witness, who was the long-time doctor of the accused, would have testified that Barclay was physically incapable of having performed the alleged rape).

<sup>103</sup> *Id.*

strategy, but the result of self-acknowledged neglect.<sup>104</sup> The federal district court was not swayed, and held that counsel's "rhetoric did not represent his real evaluation, but was essentially a ploy to obtain a new trial by a lawyer more devoted to his client than to his own reputation."<sup>105</sup> Evaluation of the record led the court to believe that counsel was actually talented and skilled during the proceedings.<sup>106</sup> Counsel had met the minimum constitutional requirements despite his insistence to the contrary, and the issue regarding the non-calling of the witness was not significant enough to amount to prejudice.<sup>107</sup>

In evaluating this case, the judge opined that, "[s]kepticism is particularly called for when an excellent attorney doing a highly credible job for the defense suddenly pleads ineptitude. In this respect, the New York State's standard for determining competent representation seems more useful than the federal standard."<sup>108</sup> *Barclay* gave the federal court some consternation when attempting to apply the two prongs of *Strickland*, leaving the court wishing it could use New York's superior standard instead.<sup>109</sup> Use of the meaningful representation test set forth by *Baldi* would have led to a more straightforward determination regarding the satisfaction of constitutional rights in cases like *Barclay* where ineffectiveness is suspiciously admitted.

## 2. *The Iniquity of a Standard Where the Superficially Guilty Are Essentially Found Not Deserving of Effective Counsel*

A crucial concern regarding an outcome-determinative test like *Strickland* is the fact that if the amount of evidence against a defendant is sufficiently large, the ineffective assistance of counsel claim will never be considered under the *Strickland* test because the

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 277.

<sup>106</sup> *Barclay*, 371 F. Supp. 2d at 277.

<sup>107</sup> *Id.* at 281.

<sup>108</sup> *Id.* at 283.

<sup>109</sup> *See id.* at 284 ("The New York State test should be deemed to satisfy federal constitutional standards in cases such as the instant one. . . . The distinguished New York courts and New York's excellent criminal justice system deserves more in the way of comity than is afforded in some federal proceedings.").

result is presumed to be unchangeable.<sup>110</sup> This arguably promotes judicial economy and prevents criminals from walking away from convictions with impunity because of “technicalities.” Furthermore, it reduces delays, averts retrials, and gives respectful deference to convictions.<sup>111</sup> From a perspective of unfeeling mechanical efficiency, it is not difficult to see the appeal. It is an unfortunate reality that “[t]he rapid processing of cases, the emphasis on pleas, and the evaluation of judges based on their rate of disposition have long been the modus operandi in the state criminal courts.”<sup>112</sup> The Supreme Court in *Strickland* appears to have been operating under a fear of opening the proverbial floodgates of ineffective assistance of counsel claims. The Court has no doubt satisfied its agenda in that regard, because the *Strickland* standard is plainly more burdensome and will defeat a larger amount of claims.

Some years after issuing his dissent in *Strickland*, Justice Marshall remarked on the utter absence of winning ineffective assistance of counsel claims since the majority’s decision and assured the country that “the explanation for this lassitude is not that *Strickland* ushered in a golden new age of uniformly competent assistance.”<sup>113</sup> The reason was, of course, that the new standard made defeating ineffective assistance claims practically effortless.<sup>114</sup> An evaluation of counsel’s performance does not even necessarily have to occur;<sup>115</sup> if it is easier to disqualify a claim on the grounds of insufficient prejudice, then that is the course that is followed.<sup>116</sup> However, under such circumstances, claims of ineffective assistance of counsel are unceremoniously relegated to failure because prejudice simply cannot be proven.

Those who are overtly guilty are subject to a proverbial coin-toss, where they may or may not benefit from their constitutional

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<sup>110</sup> See *People v. Henriquez*, 818 N.E.2d 1125, 1140 (N.Y. 2004) (holding that overwhelming evidence against the defendant does not excuse the obligation of defense counsel to challenge the prosecution in an adversarial manner).

<sup>111</sup> *Williams*, 529 U.S. at 386.

<sup>112</sup> Richard Klein, *The Constitutionalization of In Effective Assistance of Counsel*, 58 MD. L. REV. 1433, 1478-79 (1999).

<sup>113</sup> Hon. Thurgood Marshall, Assoc. Justice, Supreme Court of the United States and Circuit Justice for the Second Circuit, Annual Judicial Conference Second Judicial Circuit of the United States (Sept. 9, 1988), in 125 F.R.D. 197, Sept. 1988, at 202.

<sup>114</sup> *Id.* at 202-03.

<sup>115</sup> *Smith v. Robbins*, 528 U.S. 259, 286 n.14 (2000).

<sup>116</sup> *Strickland*, 466 U.S. at 697.



right to the effective aid of counsel.<sup>117</sup> Should they be lucky and receive effective assistance of counsel, then justice is served and they have received everything the Constitution entitles them to. Should they be unlucky and receive ineffective assistance from their counsel, they are left with no recourse and have not received an intrinsic constitutional right that is “necessary to insure fundamental human rights of life and liberty.”<sup>118</sup> As Justice Marshall noted in his original dissent to *Strickland*, “[e]very defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not . . . constitute due process.”<sup>119</sup> Indeed, it is a logical legal conclusion that “[i]neffective, incompetent, or inadequate representation is the same as no counsel at all.”<sup>120</sup>

What stringent requirements might save in terms of judicial economy, they cost dearly in other areas. As one concerned judge recently noted:

There is an illogical correlation between our present ineffective assistance standard as applied and our goal of fair process and not convicting innocent people and insuring the right to counsel as constitutionally guaranteed. What is the hidden cost of convicting innocent people to the taxpayer, to the defendant, to the state that inevitably pays for the new trial, to the citizenry’s confidence in the judiciary and the criminal justice system?<sup>121</sup>

The Supreme Court has conceded that its current standard, which requires a showing of but-for causation between the attorney’s defective performance and the unfavorable outcome, demands a “needed prophylaxis in situations where [the ordinary requirements of] *Strickland* [are] evidently inadequate to assure vindication of the defend-

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<sup>117</sup> See *Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986) (stating that the effective assistance of counsel is not solely a right reserved for the innocent).

<sup>118</sup> *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

<sup>119</sup> *Strickland*, 466 U.S. at 711 (Marshall, J., dissenting).

<sup>120</sup> *State v. McKay*, 234 N.W.2d 853, 857 (N.D. 1975) (citing *State v. Keller*, 223 N.W. 698, 699 (N.D. 1929)).

<sup>121</sup> *State v. Henry*, No. 2007-L-142, 2009 WL 653051, at \*8 (Ohio Ct. App. March 13, 2009).

ant's Sixth Amendment right to counsel."<sup>122</sup> The use of the term "prophylaxis" by the Court is rather apropos, as it relates the *Strickland* standard itself to a disease requiring treatment.<sup>123</sup>

In New York, overt guilt is not a basis for deprivation of the constitutional right to counsel.<sup>124</sup> The State insists that "the Constitution must be applied in all cases to be effective and, for that reason, 'our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence.'"<sup>125</sup> This balancing of interests ensures universal application of the Constitution and thus helps protect the innocent as well as the guilty.<sup>126</sup> The New York courts, unlike those that embrace the *Strickland* standard, will not deny constitutional rights based on a determination that, essentially, the defendant does not deserve them.<sup>127</sup>

There exists a presumption of innocence at the heart of America's criminal justice system.<sup>128</sup> Counsel has a responsibility to challenge the prosecution in an adversarial manner and force it to prove the heavy burden necessary to establish guilt beyond a reasonable doubt.<sup>129</sup> A trial lacking effective assistance of counsel is fundamentally unfair, and the "meaningful representation" standard of analysis is more likely to defeat that unfairness. How not utilizing such a standard can be deemed permissible, aside from a mere theory of judicial economy, might have something to do with "the unacknowledged but pervasive belief that anyone who has been arrested is guilty[,]" also known as the "guilty anyway syndrome."<sup>130</sup> This belief, so innately antithetical to the core tenants of fundamental fair-

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<sup>122</sup> *Mickens v. Taylor*, 535 U.S. 162, 176 (2002).

<sup>123</sup> *Id.*

<sup>124</sup> *Benevento*, 697 N.E.2d at 588.

<sup>125</sup> *Id.* (quoting *People v. Donovan*, 193 N.E.2d 628, 631 (N.Y. 1963)).

<sup>126</sup> *See Donovan*, 193 N.E.2d at 631.

The worst criminal, the most culpable individual, is as much entitled to the benefit of a rule of law as the most blameless member of society. To disregard violation of the rule because there is proof in the record to persuade us of a defendant's guilt would . . . endanger the rights of even those who are innocent.

*Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Coffin v. United States*, 156 U.S. 432, 453 (1895).

<sup>129</sup> *United States v. Cronin*, 466 U.S. 648, 657 (1984).

<sup>130</sup> Adele Bernhard, *Take Courage: What the Courts Can Do To Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 311 (2002).

ness, is speculated to be widespread throughout the criminal justice system, if not society as a whole.<sup>131</sup> Therefore, fewer tears are shed when the superficially guilty are denied effective assistance and the outrage at the denial of constitutionally protected rights simply is not there. There is not much sympathy to go around for those who are “guilty anyway.”

A concern about standards that do not strictly require a showing of prejudice on the outcome, like New York’s *Baldi* standard, is that defendants who are actually guilty will be set free upon the world, whereas *Strickland*’s prejudice prong would keep them off the streets.<sup>132</sup> This is not the case. It is only in situations where a superficially guilty defendant can demonstrate that he or she received ineffective assistance of counsel that this concern would arise.<sup>133</sup> Even under the New York standard, proving that counsel was ineffective is no simple venture.<sup>134</sup> Furthermore, meritorious ineffective assistance of counsel claims are remedied via new trials.<sup>135</sup> If the deficiency of the original defense counsel truly was “harmless,” the result will simply be another conviction.<sup>136</sup> True guilt should and will be found in a trial where the defendant has been afforded all the fundamentally fair protections demanded by the Constitution.<sup>137</sup> Anything less would impugn the integrity of the courts, and a slightly greater expenditure of judicial resources is justified to avoid such harm. Courts at the trial level may also be further incentivized to correct errors of counsel when they see them to avoid reversal on appeal.

Even if effective assistance of counsel would not be enough to secure an acquittal or other form of victory, it can certainly mitigate

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<sup>131</sup> *Id.* (going so far as to suggest that this belief is nearly universal and is “a major hindrance to improving criminal defense services”).

<sup>132</sup> *Id.* at 312.

<sup>133</sup> *Id.*

<sup>134</sup> *People v. Hobot*, 646 N.E.2d 1102, 1103 (N.Y. 1995) (“To prevail on his claim that he was denied effective assistance of trial counsel, defendant bears the well-settled, *high burden* of demonstrating that he was deprived of a fair trial by less than meaningful representation.” (emphasis added)).

<sup>135</sup> N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2009) (stating that in New York, a judgment made in violation of the state or federal constitutional rights of the defendant may be vacated upon motion and a new trial commenced as a remedy); FED. R. CRIM. P. 33 (stating a similar federal rule).

<sup>136</sup> *United States v. Decoster*, 624 F.2d 196, 216 (D.C. Cir. 1976).

<sup>137</sup> *Cf. Williams*, 529 U.S. at 391 (noting that in some instances, the over-arching focus on fundamental fairness must affect the *Strickland* analysis).

penalties. Effective counsel can quite literally be the difference between life and death in cases that involve capital punishment.<sup>138</sup> Take the chilling example of Gary Graham, described as a “textbook example of how bad lawyering sends poor people to death row.”<sup>139</sup> Graham was an inmate convicted of murder in the state of Texas who filed for a writ of habeas corpus claiming ineffective assistance of counsel.<sup>140</sup> Graham was represented by the appropriately named attorney, Ronald Mock.<sup>141</sup> Mock boasts the dubious distinction of having “had more clients sentenced to death than any lawyer in the country.”<sup>142</sup> Mock had been reprimanded by the Texas Bar Association on several occasions, had multiple accusations of ineffective assistance of counsel lobbied against him, and in regards to the substantial number of complaints, went so far as to sardonically remark, “I have a permanent parking spot at the grievance committee.”<sup>143</sup>

Graham asserted that in his role as counsel, Mock failed to “ask ‘the obvious questions,’ ” specifically claiming

that counsel failed to conduct an adequate investigation, failed to interview eyewitnesses to the offense, . . . failed to present an alibi defense, and failed to introduce ballistics evidence to show that the gun taken from Graham when he was arrested was not the murder weapon.<sup>144</sup>

The court acknowledged that even if Mock’s performance was held to be deficient, Graham could not satisfy the prejudice prong of the *Strickland* test and thus could not adequately claim ineffective assistance of counsel.<sup>145</sup> Gary Graham was subsequently executed by lethal injection with questions about his counsel still linger-

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<sup>138</sup> See Sara Rimer & Raymond Bonner, *Texas Lawyer's Death Row Record a Concern*, N.Y. TIMES, June 11, 2000, at A1 (portraying an attorney, unqualified for handling capital cases, alleging that more of his clients have been sentenced to death than those of any other attorney).

<sup>139</sup> *Id.*

<sup>140</sup> *Graham v. Collins*, 829 F. Supp. 204, 206 (S.D. Tex. 1993).

<sup>141</sup> *Id.* at 209.

<sup>142</sup> Rimer & Bonner, *supra* note 138 (indicating that this distinction is self-admitted and merely what he believes is the case).

<sup>143</sup> *Id.* (internal quotation marks omitted).

<sup>144</sup> *Graham*, 829 F. Supp. at 209.

<sup>145</sup> *Id.*

ing in the minds of many.<sup>146</sup>

Mock's performance may justly be considered to have been less than meaningful. New York has recognized that, despite strong evidence of guilt, pervasive and thoughtless errors of counsel without any strategic or legitimate basis constitute ineffectiveness.<sup>147</sup> The deleterious impact of unreasonable strategy can be compounded by other shortcomings, such as incomplete cross-examination, evidentiary missteps, and the failure to object when warranted.<sup>148</sup> The *Baldi* standard, if it had been applied in the jurisdiction, may very well have saved Mr. Graham's life.

The outcome-determinative element of the *Strickland* test, when treated as an absolute, is fundamentally flawed. The Supreme Court in *Lockhart* noted that "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him."<sup>149</sup> In a case such as *Graham*, the defense attorney's failure to take certain steps was deemed to not have been prejudicial on the outcome.<sup>150</sup> Conversely, it is simple to envision how certain intentionally disreputable or dishonorable acts could have outcome-changing results. Consider a case where an argument for ineffective assistance of counsel arises as a result of counsel's refusal to facilitate the defendant's suggestion to take actions that are potentially beneficial to his or her case, but are ethically unallowable.<sup>151</sup> Lies or misrepresentations are straightforward examples of such actions, and there can be no doubt that it is reasonably probable that if a lawyer employs such tactics at trial, their use could yield a different result.<sup>152</sup>

In this hypothetical example, a broader overview of the circumstances is demanded in order to properly determine that no unfair

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<sup>146</sup> See Rimer & Bonner, *supra* note 138 (noting that then Governor George W. Bush was not one of the individuals with doubts, as the future president was vehemently convinced that everyone executed in Texas during his administration was guilty).

<sup>147</sup> *People v. Miller*, 880 N.Y.S.2d 386, 386 (N.Y. App. Div. 2009) (stating that multiple significant errors of counsel cannot be overlooked).

<sup>148</sup> *Id.* at 385-86.

<sup>149</sup> *Lockhart*, 506 U.S. at 369-70.

<sup>150</sup> *Graham*, 829 F. Supp. at 209.

<sup>151</sup> See *Lockhart*, 506 U.S. at 370; *Nix v. Whiteside*, 475 U.S. 157, 171 (1986) (illustrating a scenario where defendant unsuccessfully argued that he received ineffective assistance of counsel based upon counsel's refusal to comply with his desires to present testimony tainted by perjury).

<sup>152</sup> *Lockhart*, 506 U.S. at 370.

prejudice exists.<sup>153</sup> Merely looking at the outcome without considering ethical obligations of counsel is insufficient. Finding that counsel was not ineffective in such a situation would be considered a rare exception under *Strickland*.<sup>154</sup> New York's "meaningful representation" standard, on the other hand, would defeat the claim soundly and straightforwardly without the need to even evaluate causation or invoke exceptions.<sup>155</sup> Meaningful representation is inherently ethical representation.

From a broader view, the actual feasibility of fairly performing what the *Strickland* test demands is questionable. *Strickland* takes pains to eliminate the use of hindsight,<sup>156</sup> but in the process creates an inherent paradox when endeavoring to objectively evaluate past prejudice.

It is impossible to pretend that you have no knowledge of presented evidence after you have heard that evidence, you know it exists, and it has been admitted. In fact, the second prong of *Strickland* requires the "but for" showing of prejudice, retrospectively. It is like reading the ending to a novel before you read the book. . . . The present *Strickland* analysis creates a conflict between the objective reasonable requirements of the first prong of the analysis, and the subjective remedy of the second prong, which results in establishing a broad standard for competency which at some point interferes with the defendant's right to a fair trial and right to counsel.<sup>157</sup>

When determining what was or was not prejudicial, the absence of hindsight is little more than a judicially created fiction. Coupling that fiction with a mandate to afford a wide breadth to what is competent representation cannot, and does not, produce just results.

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<sup>153</sup> *Id.* at 370 n.3.

<sup>154</sup> See *Strickland*, 466 U.S. at 695, 697 ("A defendant has no entitlement to the luck of a lawless decisionmaker . . .").

<sup>155</sup> *Henry*, 744 N.E.2d at 113.

<sup>156</sup> *Strickland*, 466 U.S. at 689.

<sup>157</sup> *Henry*, 2009 WL 653051, at \*8.

### 3. *The Burden Inversion of Strickland and the Unreasonably Low Level of Performance from Counsel it Permits*

With a presumption of the competence and adequacy of defense counsel in place, under *Strickland* it is the aggrieved defendant who is charged with the lofty task of proving that counsel was ineffective and prejudicial.<sup>158</sup> This does not comport with traditional notions of justice.<sup>159</sup> “For the defendant to shoulder the burden of having to demonstrate a reasonable probability that he would have been acquitted but for counsel’s ineffectiveness, is just another way of saying that the defendant must show that he was innocent.”<sup>160</sup> *Strickland*’s “but-for” prong creates a situation where, even after an error has been identified, the defendant still must prove that such error was prejudicial and the cause of the unfavorable outcome.<sup>161</sup> The burden falls on the wrong shoulders.

In traditional harmless error analysis, once the error has been shown by the defendant to have occurred, then the state has the burden of proving the absence of prejudice beyond a reasonable doubt. . . . [T]his is consistent with the basic concept of American justice that the state has the burden of proving the defendant’s guilt, as opposed to the totalitarian regimes . . . [that] assume guilt and require the defendant to prove innocence.<sup>162</sup>

This burden inversion stands as one of the most prominent failings of *Strickland*. It is a failing that can be avoided by utilizing New York’s *Baldi* standard, which does not demand satisfaction of the prejudice prong in *Strickland*.<sup>163</sup> *Baldi* merely requires a showing that representation was not “meaningful,” not that the defendant was actually innocent.<sup>164</sup>

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<sup>158</sup> *Hernandez v. United States*, 839 F. Supp. 140, 145 (E.D.N.Y. 1993).

<sup>159</sup> See Klein, *supra* note 112, at 1467-69.

<sup>160</sup> Klein, *supra* note 112, at 1468.

<sup>161</sup> *Strickland*, 466 U.S. at 703 (Brennan, J., dissenting).

<sup>162</sup> Klein, *supra* note 112, at 1468-69.

<sup>163</sup> *Baldi*, 429 N.E.2d at 405.

<sup>164</sup> *Id.*

*Strickland* further hinders a defendant's ability to actually prove his or her counsel was ineffective by mandating that review be "highly deferential" to the defense attorney's original decisions.<sup>165</sup> Establishing ineffectiveness can be accomplished by proving that counsel's chosen course of action was based upon unsound strategy and was unreasonable under the prevailing norms of the profession.<sup>166</sup> As the Court feared in *Strickland*, second-guessing counsel's assistance after an unfavorable result may make it "all too tempting" for the Court to reach the conclusion that counsel's performance was unreasonable.<sup>167</sup> Yet attorneys inexplicably seem to be islands unto themselves in this regard, as courts do not shy away from second-guessing the decisions of other professionals. "The standard is 'reasonable professional competence' for malpractice suits against physicians and surgeons, accountants, and architects. Certainly the harm and loss of liberty resulting to a defendant because of an incompetent attorney may be far greater than the damage done to a client of a negligent accountant or architect."<sup>168</sup> The idea that the work of allegedly ineffective accountants should be presumed sufficient or given high deference is laughable. Yet, equally professional attorneys are afforded such respect despite not truly warranting it.

Under the pall of the high deference requirement in *Strickland*, it would be an understatement to say that persuading the courts to reach a conclusion that counsel was unreasonably operating outside professional norms is difficult. Consider that counsel has been found to be effective when an attorney failed to offer forensic evidence that defendant was not even driving the vehicle in a negligent homicide case involving a fatal automobile wreck.<sup>169</sup> Unbelievably, this is not even the most outrageous example. An attorney might suffer the debilitating effects of mental illness, but nonetheless be considered effective.<sup>170</sup> Counsel can be found to be effective even if he

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<sup>165</sup> *Strickland*, 466 U.S. at 689. See also *Lindh*, 521 U.S. at 333-34 n.7 (noting the standard is highly deferential).

<sup>166</sup> *Strickland*, 466 U.S. at 688-89.

<sup>167</sup> *Id.* at 689.

<sup>168</sup> Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 640-41 (1986).

<sup>169</sup> *Peterson v. Kennedy*, 532 F. Supp. 113, 115 (N.D.N.Y. 1982) (presenting that such forensic evidence would have corroborated testimony that defendant was actually the passenger of the vehicle, not the driver).

<sup>170</sup> *Pugach v. Mancusi*, 310 F. Supp. 691, 715-18 (S.D.N.Y. 1970) (indicating that the pe-



or she is literally falling asleep on the job, slumbering through portions of the trial.<sup>171</sup> There is an old expression used to describe situations where minimal effort is given in an uncommitted fashion; counsel might be said to “phone it in.”<sup>172</sup> Counsel can literally appear at a plea hearing via speaker-phone only and be found effective.<sup>173</sup> Likewise, counsel can be intoxicated throughout the proceedings and still skirt around findings of ineffectiveness.<sup>174</sup> Counsel can even outright personally insult the jury and jury members’ families and still not be sufficiently ineffective.<sup>175</sup>

Those outrageous examples of defense attorney behavior might pass muster under *Strickland*, but are much less likely to do so

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itioner’s attorney who, amidst other alleged failings, was repeatedly stricken with bouts of disorientation and irrationality; the court performed informal inquiries into his sanity after each incident and discovered that he was essentially cracking under the substantial pressure he found himself under; this “mental fatigue” was found to not have prejudiced his client). *But see* *Andrews v. Robertson*, 145 F.2d 101, 102 (5th Cir. 1944) (holding that with sufficient proof, mental incapacity and the unsound mind of counsel should be held to be a violation of due process).

<sup>171</sup> *Moore v. State*, 227 S.W.3d 421, 426, 427 (Tex. Crim. App. 2007) (holding that a “‘nap’ . . . of . . . temporary duration” was not enough to warrant a presumption of prejudice under *Strickland* and that counsel is not ineffective if counsel’s behavior is “like a schoolboy lost in a daydream”).

<sup>172</sup> *See United States v. Hernandez*, No. CRIM.05-047, 2005 WL 1244918, at \*2 (E.D. Pa. May 24, 2005) (holding that the witness may not testify by telephone because “[t]he appearance of casualness . . . runs starkly counter to the seriousness of purpose that must attend a criminal trial”).

<sup>173</sup> *Wright v. Van Patten*, 552 U.S. 120, 125 (2008) (holding that the appearance of counsel via speaker phone was not the same as no counsel at all and therefore did not prevent effective assistance from being rendered, despite conceding that a long-distance lawyer would logically not perform as well as one who actually appeared).

<sup>174</sup> *People v. Garrison*, 765 P.2d 419, 440-41 (Cal. 1989) (indicating that counsel suffered from an eventually fatal alcoholism affliction which caused him to consume large quantities of alcohol every day of the trial; he was even arrested for drunk driving on his way to court, however, the claim was rejected because it “would invite defendants to challenge their convictions on the basis of speculation about the drinking habits of their attorneys”). *Contra Franklin v. State*, 471 S.W.2d 760, 762-63 (Ark. 1971) (illustrating that a drunken lawyer can be found to have provided ineffective assistance of counsel when said lawyer’s inebriated courtroom shenanigans are of such a substantial character that jurors “actually consider[] getting up and leaving the courtroom, because . . . a jury should [not] be required to sit on a case where the defendants’ attorney appear[s], because of intoxication, to be in no state of mind to be handling a case in court”).

<sup>175</sup> *People v. Frye*, 959 P.2d 183, 232 (Cal. 1998), *overruled on other grounds by People v. Doolin*, 198 P.3d 11, 36 n.22 (Cal. 2009) (finding counsel ineffective when, in the closing arguments of a capital murder trial, he referred to the juror’s community as “a little Podunk area;” it was deemed an “appropriate argument” designed to cast doubt upon the abilities of the local criminal investigators and their evidence, regardless of the fact that they were from the same community as the jurors).

under New York's standard. Recently, in *People v. Irizarry*,<sup>176</sup> the defendant's attorney fell asleep, perused health and fitness magazines during the testimony of witnesses, and gave a "bizarre" opening statement.<sup>177</sup> Despite these shortcomings, the New York Supreme Court conceded that there was no showing that any actual prejudice on the outcome resulted from the attorney's behavior.<sup>178</sup> *Irizarry* would not have satisfied the *Strickland* standard on that basis. In applying *Baldi*, however, the court recognized a troubling lack of "meaningful representation."<sup>179</sup> Essentially, there was none. Counsel's behavior was unpredictable and discomfiting, unsettling the judge on several occasions.<sup>180</sup> The court found that the defendant did not receive the minimum representation that he was entitled to under the law,<sup>181</sup> illustrating how the application of *Baldi* can defeat the fallacy that a sleeping, inept, and completely disinterested lawyer can effectively represent a defendant in a criminal trial. Likewise, New York has recognized that a defense attorney who consistently lobs insults at the trial judge resulting in heated, personal exchanges also falls short of effective assistance when considering the totality of circumstances.<sup>182</sup> Other indiscretions of defense counsel that would lower the quality of representation below a level that could be described as "meaningful" would justly meet similar fates under *Baldi*.

The aforementioned examples are evidence of how far courts applying *Strickland* or *Strickland*-like standards are willing to extend "reasonableness under prevailing . . . norms" when forcing a defendant to prove that counsel was ineffective.<sup>183</sup> The same kinds of problems arise when a defendant is tasked with proving that counsel's strategy was unsound. When contemplating the vast universe of dif-

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<sup>176</sup> No. 6676-2006, 2009 WL 1758769 (N.Y. Sup. Ct. June 15, 2009).

<sup>177</sup> *Id.* at \*7.

<sup>178</sup> *Id.* at \*8.

<sup>179</sup> *Id.* (citing *Baldi*, 429 N.E.2d 400).

<sup>180</sup> *Id.* at \*9.

<sup>181</sup> *Irizarry*, 2009 WL 1758769, at \*9. *But see* *People v. Tippins*, 570 N.Y.S.2d 581, 582 (N.Y. App. Div. 1991) (holding that counsel actually sleeping through the trial is not ineffective per se because it would provide the opposition a trump card that they could play at any later portion of the trial in the eventuality that things go negatively for them).

<sup>182</sup> *People v. Torres*, 581 N.Y.S.2d 788, 789 (N.Y. App. Div. 1992) (noting that counsel's deliberate belligerence towards the judge and the judge's retaliation resulted in an emotionally-charged, confrontational environment that distracted the jury from the real issues of the trial).

<sup>183</sup> *Strickland*, 466 U.S. at 688.

fering styles, theoretical approaches, philosophies, and methodologies that could be construed as strategic in some way, it becomes difficult to imagine what could not be justified as part of a strategy. “If a lawyer fails to interview and call witnesses for the defense, how can it be shown that this lack of preparation was not strategic, e.g., because counsel may have believed that the witnesses would not be found credible?”<sup>184</sup>

New York is also afflicted by use of a similarly problematic burden. In New York, “the defendant must overcome the strong presumption that the defense counsel rendered effective assistance.”<sup>185</sup> The burden still lies on the ineffectively represented defendant to establish the lack of a strategic basis for counsel’s deficiencies.<sup>186</sup> The State requires that the defense attorney’s strategy be “meaningful” when evaluated in light of “the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation.”<sup>187</sup> This appears at least marginally superior to the requirement in *Strickland* that strategy be “reasonable,”<sup>188</sup> but the distinction is practically indistinguishable.<sup>189</sup> Both standards make it incredibly difficult to attack any action or inaction by a defense attorney that could be broadly construed as strategic.

#### IV. CONCLUSION

In summation, there is an inherent incongruity between the standard for evaluating the effective assistance of counsel currently utilized on the federal level and the standard as adopted by the State of New York.<sup>190</sup> The *Strickland* standard clearly delineates that a defendant must positively prove that, but for the unreasonable ineffectiveness of his or her counsel, the trial would have resulted different-

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<sup>184</sup> Klein, *supra* note 112, at 1459.

<sup>185</sup> See *People v. Chen*, 782 N.Y.S.2d 376, 377 (N.Y. App. Div. 2004); see also *People v. Fernandez*, 776 N.Y.S.2d 512, 512 (N.Y. App. Div. 2004).

<sup>186</sup> *People v. Caban*, 833 N.E.2d 213, 220 (N.Y. 2005) (quoting *People v. Rivera*, 525 N.E.2d 698, 700 (N.Y. 1988) (per curiam)).

<sup>187</sup> *Baldi*, 429 N.E.2d at 405.

<sup>188</sup> *Strickland*, 466 U.S. at 681.

<sup>189</sup> *Benevento*, 697 N.E.2d at 587 (distinguishing the standard for evaluating strategy in New York as one that requires strategy be both “reasonable and legitimate . . . under the circumstances and evidence”) (emphasis added).

<sup>190</sup> Compare *Strickland*, 466 U.S. at 686-87, with *Baldi*, 429 N.E.2d at 405.

ly.<sup>191</sup> The *Baldi* standard finds such “but for” causation to be relevant, but not dispositive.<sup>192</sup> This is a direct contradiction.<sup>193</sup> The permissive existence of such disharmony should be re-evaluated.

New York State’s *Baldi* approach, however, is preferable to the federal *Strickland* standard. It evaluates the totality of the circumstances, independently assesses whether the representation was meaningful, and does not necessarily require affirmative proof that but for the grievous errors of counsel, a different result would have been reached.<sup>194</sup> The federal *Strickland* test, specifically its outcome-determinative prejudice prong, is simply too burdensome on defendants to effectively be a proper method of ensuring fundamental fairness.<sup>195</sup> Furthermore, it endangers the due process of defendants who actually are afflicted with ineffective counsel but are overtly guilty.<sup>196</sup> Despite its contradiction with the current trend of federal adjudication, the *Baldi* standard is the more constitutionally sound approach to gauging whether the assistance of counsel is sufficiently effective, and should be adopted by the Supreme Court to apply on a federal level.

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<sup>191</sup> *Strickland*, 466 U.S. at 694.

<sup>192</sup> *Benevento*, 697 N.E.2d. at 588.

<sup>193</sup> *See Henry*, 409 F.3d at 67 (establishing that a claim of ineffective assistance of counsel must show that the state’s determination was contrary to *Strickland*).

<sup>194</sup> *Baldi*, 429 N.E.2d at 405.

<sup>195</sup> *See Henry*, 2009 WL 653051, at \*8 (“There is an illogical correlation between our present ineffective assistance standard [as stated in *Strickland*] . . . and our goal of fair process and not convicting innocent people and insuring the right to counsel as constitutionally guaranteed.”).

<sup>196</sup> *See Strickland*, 466 U.S. at 711 (Marshall, J., dissenting) (arguing that every defendant is entitled to a vigorous defense, without which there is a violation of due process).