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**SUPREME COURT OF NEW YORK**  
**APPELLATE DIVISION, FIRST DEPARTMENT**

People v. Dillard<sup>1</sup>  
(decided February 21, 2006)

Troy Dillard was convicted of manslaughter on May 17, 2001, and sentenced as a second felony offender to seven and one-half to fifteen years in prison.<sup>2</sup> Dillard came before the appellate division after the trial court denied his motion to vacate the conviction on grounds that included a charge of ineffective counsel.<sup>3</sup> The basis of the appeal was a challenge to his attorney's lack of objection to the trial court's jury charge regarding the defense of justification.<sup>4</sup> Under both the United States Constitution<sup>5</sup> and the New York State Constitution,<sup>6</sup> a criminal defendant is entitled to relief if he received ineffective assistance of counsel.

The appellate division did not technically consider the substance of Dillard's appeal, or his assertion that a jury instruction regarding deadly force should have been given, as the claims were "unpreserved" and the court "decline[d] to review them in the interest

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<sup>1</sup> 811 N.Y.S.2d 356 (App. Div. 1st Dep't 2006).

<sup>2</sup> *Id.* at 357.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> U.S. CONST. amend. VI states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

<sup>6</sup> N.Y. CONST. art. I, § 6 states in pertinent part: "In any trial . . . the party accused shall be allowed to . . . defend in person and with counsel . . ."

of justice.”<sup>7</sup> Nevertheless, the court went on to state that if it reviewed the contention of ineffective assistance of counsel, it would have found Dillard was not deprived of effective assistance under either federal or state standards.<sup>8</sup>

The United States Supreme Court announced and explained the standards by which a defendant is deemed to have received ineffective assistance of counsel in violation of the Sixth Amendment in *Strickland v. Washington*.<sup>9</sup> In *Strickland*, the defendant pleaded guilty to three capital murder charges.<sup>10</sup> After receiving a death sentence, he sought relief by claiming his attorney “had rendered ineffective assistance at the sentencing proceeding.”<sup>11</sup> Lower courts previously used a standard of “reasonably effective assistance” and the Supreme Court took *Strickland* as an opportunity to examine that standard for the first time.<sup>12</sup> The Court began its analysis by stating that a Sixth Amendment right to counsel applies to criminal cases to help assure a fair trial—a trial “in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.”<sup>13</sup> The aid of counsel is essential, the Court concluded, “since access to counsel’s skill and

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<sup>7</sup> *Dillard*, 811 N.Y.S.2d at 357. The appellate division seemingly did not believe a recitation of the facts leading to Dillard’s conviction was required, likely because it held it would not review the substance of the appeal.

<sup>8</sup> *Id.* at 357-58. The court explained that Dillard did not receive ineffective assistance of counsel because the lack of objection by Dillard’s counsel to the justification charge, even if it “should have been made . . . did not cause the defendant any prejudice or deprive him of a fair trial.” *Id.*

<sup>9</sup> 466 U.S. 668, 672 (1984).

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

<sup>11</sup> *Id.* at 675.

<sup>12</sup> *Id.* at 683-84.

<sup>13</sup> *Id.* at 684-85.

knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”<sup>14</sup>

The Court held that the mere presence of a defense attorney is insufficient to satisfy the constitutional requirement.<sup>15</sup> “The Sixth Amendment . . . envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. . . . [and] to ensure that the trial is fair.”<sup>16</sup> Thus, the Court premised that inadequate counsel is the equivalent of no counsel at all.<sup>17</sup> This led the Court to determine how the effectiveness of counsel is to be analyzed.

This analysis began with a benchmark: if the conduct of a defendant’s attorney “so undermined the proper functioning of the adversarial process that the trial [or sentencing proceeding] cannot be relied on as having produced a just result,” the assistance was ineffective and the defendant is entitled to relief.<sup>18</sup> The Court stated that a two-part inquiry is utilized to determine whether the assistance was defective.<sup>19</sup> “First, the defendant must show that counsel’s performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense.”<sup>20</sup> The first part is satisfied with a showing of legal mistakes so serious by the defendant’s counsel that the representation the defendant received

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<sup>14</sup> *Strickland*, 466 U.S. at 685 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276 (1942)).

<sup>15</sup> *Id.*

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

<sup>17</sup> *Id.* at 686.

<sup>18</sup> *Id.*

<sup>19</sup> *Strickland*, 466 U.S. at 687.

<sup>20</sup> *Id.*

was *sub par* to that contemplated by the Sixth Amendment.<sup>21</sup> The second is satisfied with a showing that the mistakes contemplated in the first part deprived the defendant of a “fair” and “reliable” trial.<sup>22</sup>

In examining further what constitutes deficient performance by defense counsel, the Court reiterated that reasonableness is the proper standard by which to judge the effectiveness of a defendant’s counsel.<sup>23</sup> “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate.”<sup>24</sup> However, the Court added that determining reasonableness requires an account of the circumstances under which the defendant’s counsel was working, and not viewing counsel’s performance through “the distorting effects of hindsight, [but rather] to reconstruct the circumstances of counsel’s challenged action[s]” and decisions.<sup>25</sup> In this sense, the Court calls for a hybrid of objective and subjective perspectives of reasonableness. In sum, “[j]udicial scrutiny of counsel’s performance must be highly deferential . . . . [A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance . . . [or] sound trial strategy.”<sup>26</sup> Some actions of counsel, when viewed against this

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

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

<sup>24</sup> *Strickland*, 466 U.S. at 687-88.

<sup>25</sup> *Id.* at 689.

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

setting, are practically closed to challenge.<sup>27</sup>

Yet, *Strickland* also stands for the principal that, regardless of the unreasonableness of counsel's actions or inactions, a defendant is not entitled to relief unless the errors had an impact on the conclusions of the proceeding.<sup>28</sup> "[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."<sup>29</sup> The Court noted that errors by defense attorneys are equally as likely to be harmless as prejudicial.<sup>30</sup> Therefore, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding."<sup>31</sup> On the other hand, the Court explained that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case."<sup>32</sup> Instead, the Court settled on a requirement that a defendant show a "reasonable probability" that the adverse judgment would have been different "but for" the complained-of deficiencies.<sup>33</sup> The Court defined the "reasonable probability" requirement as "a probability sufficient to undermine confidence in the outcome."<sup>34</sup> *Strickland* attempted to guide the inquiry of lower courts toward a determination of whether or not a

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<sup>27</sup> *Id.* at 690. An example would be strategic trial choices that followed a detailed consideration of laws and facts. *Id.* at 690-91.

<sup>28</sup> *Id.* at 691.

<sup>29</sup> *Strickland*, 466 U.S. at 692. In cases where the defendant is wrongfully denied counsel or the state wrongfully interferes with counsel's representation, prejudice is presumed. *Id.* Absent such denial or interference, or to a lesser extent, a demonstration of an actual conflict of interest by counsel, a defendant must affirmatively prove prejudice. *Id.* at 692-93.

<sup>30</sup> *Id.* at 693.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 694.

<sup>34</sup> *Strickland*, 466 U.S. at 694.

reasonable probability existed that, absent the unreasonable errors of defense counsel, the judge or jury would have a reasonable doubt of the defendant's guilt.<sup>35</sup> "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury . . . . [Thus,] 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."<sup>36</sup>

New York utilizes a comparable analysis for determining whether a defendant received effective assistance of counsel, as demonstrated in *People v. Benevento*.<sup>37</sup> In that case, the defendant allegedly attacked a woman, with whom he had no previous contact, and assaulted her with punches and slaps.<sup>38</sup> When the defendant was confronted by passersby, he allegedly stole fifteen dollars from her pocket and fled.<sup>39</sup> After surrendering himself, Benevento confessed to officers at the scene and later to an Assistant District Attorney.<sup>40</sup> At his trial, defense counsel attempted to show that Benevento was too intoxicated to form the requisite intent to commit robbery.<sup>41</sup> Defendant's attorney noted the defendant had two hundred dollars of his own money on his person when arrested, was intoxicated, and argued successfully for a jury charge regarding the effect of that

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<sup>35</sup> *Id.* at 695.

<sup>36</sup> *Id.* at 695-96.

<sup>37</sup> 697 N.E.2d 584 (N.Y. 1998).

<sup>38</sup> *Id.* at 585.

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

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 586.

intoxication.<sup>42</sup>

After his conviction, Benevento claimed ineffective assistance of counsel, based on several allegations, including a claim that his attorney failed to put him on the stand, contrary to a promise made in counsel's opening statement.<sup>43</sup> The appellate division found Benevento had not received effective counsel, based on a finding that defense counsel had "no discernable defense strategy."<sup>44</sup> The New York Court of Appeals reversed and remitted the case to the appellate division.<sup>45</sup>

The *Benevento* court stated that the right to effective assistance of counsel is an integral part of the criminal justice process, and is guaranteed under the New York Constitution and the United States constitutions.<sup>46</sup> Further, that "[t]he phrase 'effective assistance' is not, however, amenable to precise demarcation applicable in all cases."<sup>47</sup> Rather, it must be analyzed on a case-by-case basis to account for the individualized representation to which criminal defendants are entitled.<sup>48</sup> The court of appeals "has long applied a flexible standard to analyze claims . . . [of] counsel's alleged ineffectiveness."<sup>49</sup> The current rule in the state was laid out in *People v. Baldi*:<sup>50</sup> "So long as the evidence, the law, and the

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<sup>42</sup> *Benevento*, 697 N.E.2d at 586.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (quoting *People v. Benevento*, 657 N.Y.S.2d 606, 607 (App. Div. 1st Dep't 1997)).

<sup>45</sup> *Id.* at 586.

<sup>46</sup> *Id.*

<sup>47</sup> *Benevento*, 697 N.E.2d at 587 (citing *People v. Baldi*, 429 N.E.2d 400, 404 (N.Y. 1981)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> 429 N.E.2d 400, 404 (1981).

circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the [state] constitutional requirement will have been met.”<sup>51</sup> The *Benevento* court emphasized that the focus of the analysis must remain on whether or not the representation was meaningful.<sup>52</sup> “[T]he 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. . . . [W]hether the defendant would have been acquitted of the charges but for counsel’s errors is relevant, but not dispositive . . . .”<sup>53</sup> The court noted that a certain cynicism is appropriate for the reviewing court, since challenged judgment “may have little to do with counsel’s performance, and courts are properly skeptical when ‘disappointed prisoners try their former lawyers on charges of incompetent representation.’ ”<sup>54</sup>

When conducting an analysis under *Baldi*, the New York Court of Appeals expressly stated that courts are to consider counsel’s actions in context, and, as in the federal analysis, without the benefit of hindsight to find mistakes.<sup>55</sup> A defense attorney’s performance, the court held, must be considered only to the extent necessary to determine “whether it was consistent with strategic decisions of a ‘reasonably competent attorney.’ ”<sup>56</sup> In New York,

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<sup>51</sup> *Benevento*, 697 N.E.2d at 587 (quoting *Baldi*, 429 N.E.2d at 405).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 588.

<sup>54</sup> *Id.* at 587 (quoting *People v. Brown*, 165 N.E.2d 557, 558 (N.Y. 1960)).

<sup>55</sup> *Id.*

<sup>56</sup> *Benevento*, 697 N.E.2d at 587 (quoting *People v. Satterfield*, 488 N.E.2d 834, 836 (N.Y. 1985)).



defendants are entitled to “a fair trial, not necessarily a perfect one.”<sup>57</sup> The *Benevento* court distinguishes between losing trial tactics and ineffectiveness.<sup>58</sup> To prevail on a claim of ineffective assistance, a defendant must show that counsel’s shortcomings deprived the defendant of a fair trial and lacked any legitimate explanation.<sup>59</sup> “As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance.”<sup>60</sup>

As with the federal analysis, an examination of ineffective counsel in New York has a second part involving prejudice to the defendant. However, the court of appeals delineated this type of prejudice as distinct from that used under *Strickland*.<sup>61</sup> Under the state analysis, it is not the “reasonable probability” of a different outcome<sup>62</sup> that controls, but rather the meaningfulness of the defendant’s counsel’s representation.<sup>63</sup> The defendant’s claim of ineffective assistance will only be upheld when his counsel engaged in a course of conduct that, by its “egregious and prejudicial” nature, had an “inexplicably prejudicial” effect on the proceeding.<sup>64</sup> “Stated another way, a court must examine whether counsel’s acts or omissions ‘prejudice[d] the defense or defendant’s rights to a fair

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<sup>57</sup> *Id.* (citations omitted).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Benevento*, 697 N.E.2d at 588.

<sup>62</sup> *Strickland*, 466 U.S. at 694.

<sup>63</sup> *Benevento*, 697 N.E.2d at 588.

<sup>64</sup> *Id.*

trial.’”<sup>65</sup>

The key distinction between the ineffective assistance analysis conducted under the New York Constitution is the manner in which prejudice is measured. *Strickland* calls for an outcome-determinative test.<sup>66</sup> Without a “reasonable probability” that counsel’s actions or inactions had measurable effect on the final judgment of the proceeding, the defendant is entitled to no relief under the United States Constitution.<sup>67</sup> A defendant making the same claim in New York, however, is not bound by *Strickland*’s limitation and thus, the New York Constitution affords defendants greater protection than the United States Constitution.<sup>68</sup> Unlike federal courts, a New York appellate court may find that although a verdict of “guilty” would have resulted despite the best theoretical defense strategy, relief in the form of a new trial is justified because the strategy actually presented was meaningless.<sup>69</sup> The same defendant would not necessarily be granted a new trial under the *Strickland* end-game analysis, because a defendant in a federal court must prove his counsel’s blunders had an impact on the hearing’s outcome.<sup>70</sup>

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<sup>65</sup> *Id.* (quoting *People v. Hobot*, 646 N.E.2d 1102, 1104 (N.Y. 1995)) (alteration in original).

<sup>66</sup> *Strickland*, 466 U.S. at 694.

<sup>67</sup> *Id.*

<sup>68</sup> Compare *Strickland*, 466 U.S. at 694 (calling for a “reasonable probability” of a positive judgment for defendant “but for” the errors of counsel), with *Benevento*, 697 N.E.2d at 588 (allowing defendant relief based only on an “inexplicably prejudicial” effect to the proceeding’s outcome).

<sup>69</sup> See *Benevento*, 697 N.E.2d at 588.

<sup>70</sup> See *Strickland*, 466 U.S. at 691, 694. It is on this point that Justice Marshall partly bases his dissent. He arrives at a conclusion more in line with New York’s rule:

The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted . . . [after representation] by a manifestly ineffective attorney. . . . I would . . . hold that a showing that

Thus, a defendant who would have been found guilty regardless of the strategy his counsel presents has little or no chance of receiving a new trial by the *Strickland* “but for” analysis, but can successfully argue for a new trial under *Benevento*.

Interestingly, however, after determining and elaborating the methods by which a claim of ineffective counsel is to be judged, the *Strickland* Court declared these methods as “principles” and not “mechanical rules.”<sup>71</sup> The Court stated, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.”<sup>72</sup> Hence, federal courts, unlike New York courts, consider underlying fairness.<sup>73</sup> However, the concept of fairness, in any proceeding, is significantly more subjective and open to interpretation than the narrower guidelines laid down in the rest of the holding. It seems that instead of coming full circle, the Court has in some ways instructed lower courts to use an even more amorphous standard than “reasonably effective counsel.”

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the performance of a defendant’s lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby.

*Id.* at 711-12 (Marshall, J., dissenting).

<sup>71</sup> *Id.* at 696.

<sup>72</sup> *Id.*

<sup>73</sup> *See id.* at 687 (explaining a fair trial to be “one whose result is reliable”).