AN INTRODUCTION TO INEFFECTIVE ASSISTANCE OF COUNSEL IN NEW YORK

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Introduction

This outline is intended as a guide to the law governing ineffective assistance of counsel in New York. Every effort has been made to cite cases in which the ineffective assistance claim was successful. Second Circuit cases are cited when New York courts appeared to be silent on the topic or to have levied an adverse decision.

Many of the state court decisions cited found ineffective assistance based on the application of the Totality of the circumstances test. Thus, the particular failing cited -- e.g., failure to investigate a possible defense -- usually is but one of the reasons why ineffective assistance was found. The cases are cited in this manner to alert counsel to the broad outlines of ineffective assistance law in New York and also to assist those doing post-conviction work.

I. STANDARDS FOR DETERMINING INEFFECTIVE ASSISTANCE OF COUNSEL


1. Elements:

   a. Counsel’s performance must be deficient and fall below the objective standard of reasonableness. Strickland, 466 U.S. at 689-91.

      1. Counsel's performance is examined “as of the time of counsel's conduct,” Id., at 690.

      2. Hindsight may not be used to second-guess counsel’s strategic choices. Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994); see also McKee v. United States, 167 F.3d 103, 106 (2d Cir. 1999).
b. The deficient performance must be prejudicial, thus depriving the accused of both a fair trial and a reliable result. *Strickland*, 466 U.S. at 694.

1. Prejudice is established if "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." *Id.*, quoted in *Bunkley v. Meachum*, 68 F.3d 1518, 1521 (2d Cir. 1995).


1. Elements:
   a. The finding of ineffective assistance a review of the "totality" of the evidence, law and circumstances in a particular case. *Baldi*, 54 N.Y.2d at 147.
   
b. The review must show that representation was "meaningful." *Id.*


II. *PER SE INEFFECTIVE ASSISTANCE*

A. "Attorney" Not Duly Licensed in Any Jurisdiction

1. *People v. Felder*, 47 N.Y.2d 287, 293-97 (1979) (layman masqueraded as lawyer). *But see People v. Kieser*, 79 N.Y.2d 936, 937-38 (1992) (no ineffective assistance where counsel was out-of-state lawyer who had been suspended in home state for failing to pay bar dues and who had not sought admission in New York *pro hac vice*).


C. Counsel Implicated in Client's Crimes--*United States v. Fulton*, 5 F.3d 605, 609-12 (2d Cir. 1993); *United States v. Cancilla*, 725 F.2d 867, 871 (2d Cir. 1984).

D. Counsel Asleep During Trial--*Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996) (accused as suffered prejudice, by presumption or otherwise, if his counsel was repeatedly unconscious at trial for periods of time in which defendant's interests were at stake@). *But see People v. Tippins*, 173 A.D.2d 512, 513 (2d Dept. 1991), *lv. denied* 78 N.Y.2d 1015 (1991) (New York standards for effective assistance not violated by sleeping lawyer).

III. CONFLICTS OF INTEREST

B. Plea Induced by Counsel's Threats and Misinformation -- *Lopez v. Scully*, 58 F.3d 38, 41-43 (2d Cir. 1995).

C. Criminal Activity by Counsel -- *United States v. Fulton*, 5 F.3d 605, 609-12 (2d Cir. 1994) (prosecution witness's allegation of criminal activity by counsel created a *per se* prejudicial conflict of interest).


E. Representation of Two Co-Defendants, One of Whom is Offered Plea in Exchange for Testimony Against the Other Co-Defendant--*People v. Dell*, 60 A.D.2d 18, 22-23 (4th Dept. 1977).

F. Representation of Two Clients with Conflicting Interests--*People v. Carillo*, 218 A.D.2d 505, 506 (1st Dept. 1995); *People v. Ortiz*, 76 N.Y.2d 652, 656 (1990); *People v. Davis*, 72 A.D.2d 69, 71 (4th Dept. 1979).


IV. GUILTY PLEAS


B. Failure to Investigate Prior to Advising Client to Accept Plea -- *People v. Van Wie*, 238 A.D.2d 876, 876-77 (4th Dept. 1997) (counsel ineffective in advising defendant to plead guilty when investigation would have shown the prosecution had no case).

C. Failure to Communicate Information Regarding Viable Defense Prior to Advising Client to Plead Guilty--*People v. Thomson*, 719 NYS2d 171 (3d Dept. 2001) (attorney failed to advise client that criminal intent was necessary element of attempted murder in the second degree and element could have been negated by fact client was intoxicated).


E. Failure to Place Understanding of Plea on the Record--*People v. Roy*, 122 A.D.2d 482, 483-84 (3d Dept. 1986).

F. Failure to Advise Client that He Was Not Entitled to Specific Performance of the Plea Agreement, but Could Withdraw Plea--*People v. Roy*, 122 A.D.2d 482, 283-84 (3d Dept. 1986).


I. Failure to Advise Client that Prosecution Did Not Intend to Enforce Promise of Reduced Sentence--*United States ex rel. Wissenfeld v. Wilkins*, 281 F.2d 707, 712 (2d Cir. 1960).

J. Failure to Counsel Client to Accept Plea Resulting in Shorter Sentence -- *Boria v. Keene*, 99 F.3d 492, 496-99 (2d Cir. 1996); *see also United States v. Gordon*, 156 F.3d 376,

V. FAILURE TO MAKE VARIOUS MOTIONS


B. Speedy Trial


G. Identification (\textit{Wade}) Hearing


2. Failure to Properly Move for a \textit{Wade} Hearing--\textit{People v. Hale}, 142 A.D.2d 172, 174-75 (1st Dept. 1998) (accused denied Wade hearing because counsel erroneously asserted that accused was identified in line-ups not in show up).


grounds, 92 N.Y.2d 757 (1999) (counsel not ineffective for failing to seek competency hearing after prosecution’s psychiatrist opined mid-trial that accused was unfit to proceed).

VI. INADEQUATE TRIAL PREPARATION

A. The Client


B. Witnesses


C. Discovery

1. Failure to Follow Up on Demanded Discovery -- People v. Ali-Baba, 179 A.D.2d 725, 729 (2d Dept. 1992) (counsel failed to follow up on demand for medical records which resulted in his receipt of them on the day of trial).


D. Investigation

1. Generally -- People v. Droz, 39 N.Y.2d 457, 462 (1976); People v. La Bree, 34 N.Y.2d 257, 259 (1974); People v. Van Wie, 238 A.D.2d 876, 877 (4th Dept. 1997); People v. AliBaba, 179 A.D.2d 725, 728-29 (2d Dept. 1992); see also People v. Bennett, 29 N.Y.2d 462, 466 (1972) (right to counsel includes right to have counsel conduct appropriate investigations). And Deluca v. Lord, 77 F.3d 578, 584 (2d Cir.), cert. denied, 117 S.Ct. 83 (1996) (counsel failed to conduct adequate investigation of possible defense of extreme emotional disturbance which could have reduced murder charge to first-degree manslaughter).

2. Failure to Read Hospital Records and Speak to Doctors -- People v. Bennett, 29 N.Y.2d 462, 466 (1972).


F. Specific Defense


**G. The Law**


**VII. FAILURE TO OBJECT AT TRIAL**


**B. Direct and Cross Examination**


**C. Evidence**


2. To Hearsay Evidence -- *Mason v. Scully*, 16 F.3d 38, 42 (2d Cir. 1994) (counsel ineffective in failing to object, on hearsay and Confrontation Clause grounds, to critical testimony by police detective about inculpatory statement by nontestifying codefendant).


4. The Accused


c. To Incriminating Information Extracted from Accused on Cross by Prosecution -- People v. Sanin, 84 A.D.2d 681, 682-83 (4th Dept. 1981).


VIII. OTHER INEPT TRIAL PERFORMANCE

A. Jury Selection--People v. Wagner, 104 A.D.2d 457, 458-59 (2d Dept. 1984) (counsel failed to challenge jurors at all, resulting in nine jurors with friends or relatives on police forces).

B. Opening Statement


C. Counsel Sleeping At Trial -- Tippins v. Walker, 77 F.3d 682, 684 (2d Cir. 1996).

D. Failure to Develop the Record -- People v. Van Wie, 238 A.D.2d 876, 877 (4th Dept. 1997).


F. Failure to Raise Issue of Whether Chief Prosecution Witness was Accomplice and, Therefore, Whether His Testimony Required Corroboration--People v. Gugino, 132 A.D.2d 989, 990 (4th Dept. 1987).


I. Inadequate Cross Examination


2. Failure to Cross-Examine the Complaintant -- People v. Morales, 118 A.D.2d


J. Failure to Call Witnesses


2. Failure to Call A Promised Witness -- People v. Shawn Brown, 8/21/98 NYLJ, at 21 (Sup. Ct., Queens Co.) (Eng, J.).


K. Inadequate Direct Examination


2. Permitting Client to Offer Inculpatory Testimony at Prior Trial -- People v. Wilson, 133 A.D.2d 179, 180-81 (2d Dept. 1987).

L. Use of the Mental Defense


M. Closing Argument


evidence or focus jury on critical identification issue).

N. Jury Charge


2. Failing to Seek Charge

IX. SENTENCING

A. Failure to Appear at Sentencing -- *People v. LaBree*, 34 N.Y.2d 257, 259 (1974).

X. INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL


D. Advocacy on Appeal

1. Failure to Present Significant and Obvious Issues -- *Mayo v. Henderson*, 13 F.3d 528, 532 (2d Cir. 1994) (ignored issues must be stronger than those presented).

2. Failure to Present Particular Issues