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Court Decisions After Strickland v. Washington: The Evolution of Ineffective Assistance of Counsel Requirements in Federal and State Courts

Mackenzie Morrison

University of Wyoming, mmorri29@uwyo.edu

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**Court Decisions After *Strickland v. Washington*: The Evolution of Ineffective Assistance of
Counsel Requirements in Federal and State Courts**

Mackenzie Morrison
With Dr. Adrienne Freng
Department of Criminal Justice
Honors Capstone Paper
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Court Decisions After *Strickland v. Washington*: The Evolution of Ineffective Assistance of Counsel Requirements in Federal and State Courts

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I. INTRODUCTION

The Sixth Amendment says that any person facing criminal charges has the right to assistance of counsel at their defense.¹ Despite this, it was not until *Powell v. Alabama* in 1932, that the United States Supreme Court stated the right to counsel applied in capital cases. In the Court’s ruling, they also acknowledged the importance of a fair trial and the need for competent counsel in order to have a fair trial.² In the landmark case of *Gideon v. Wainwright*, the Supreme Court established that the Sixth Amendment right to counsel extended to indigent defendants in felony cases.³ *Gideon* was the first major step toward the fulfillment of the Sixth Amendment right to counsel, as the Sixth Amendment now applied to all defendants charged with a felony, rather than only capital cases.

¹ See Stephen G. Gilles, “Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guaranteed,” *University of Chicago Law Review* 50 (1984): 1385.

² See *Id.* at 1410.

³ See *Gideon v. Wainwright*, 372 US 335, 342 (1963).

In the years following *Gideon*, the Supreme Court continued to expand the Sixth Amendment right to counsel through various court decisions. Many people do not realize that the right to counsel and the right to *effective* assistance of counsel are two separate legal questions. The Sixth Amendment does not state a right to competent or effective counsel, it only says right to counsel. The Court realized that in order to ensure a fair trial, the right to counsel must be the right to effective assistance of counsel.⁴ Even then, it wasn't until *Strickland v. Washington* that the Court examined and set out what constituted effective assistance of counsel.⁵ *Strickland* established a two-part test, which is used in any ineffective assistance of counsel claims. Since *Strickland*, the Court has fine-tuned this test and what is needed to fulfill it.

After *Strickland* was established, most states used the two-part test for ineffective assistance of counsel claims. Wyoming was one of the many who did use it shortly after the ruling and still uses this test today. In New York, they handle effective assistance of counsel cases a little differently though. "Meaningful representation" as established in *People v. Baldi* has been the standard in New York since 1981 and is still the standard today.⁶ By assessing the evolution of Wyoming and New York's decisions on effective assistance of counsel cases, as well as a comparison between Wyoming's use of the *Strickland* standard and New York's use of their *Baldi* standard, it is clear that many problems arise with the *Strickland* standard. New York's lower standard of meaningful representation, in turn, fills many holes *Strickland* has. New York's standard is not only more achievable, but truly fulfills the intended purposes of the Sixth Amendment right to counsel, and therefore is the better standard.

⁴See *McMann v Richardson*, 397 US 759, 760 (1970).

⁵ See *Strickland v. Washington*, 466 US 668, 686 (1984).

⁶ *People v. Baldi*, 54 N.Y.2d 137, 147 (1981).

II. U.S. SUPREME COURT RULINGS ON INEFFECTIVE ASSISTANCE OF COUNSEL

In *Strickland v. Washington* the court acknowledged that counsel must not simply be present alongside the defendant. They must have a crucial and active role in order to have a fair trial.⁷ In terms of establishing ineffective assistance of counsel, the Court said that the ineffectiveness needed to be so substantial as to diminish the adversarial process, therefore resulting in an unjust outcome.⁸ The nature of the adversarial system requires *effective* assistance, which is why a lack there of could skew the fairness of the outcome. As a result, a two-part standard was established. The first part of the test is deficiency, where the defendant must show that counsel's performance was deficient.⁹ The second part requires the defendant to show that counsel's deficient performance prejudiced the defense.¹⁰ Prejudice requires for the defendant to show, "that counsel's errors were so serious as to deprive the defendant of a fair trial, whose result is reliable."¹¹

Two years after *Strickland*, in the case of *Nix v. Whiteside*, the Court stated that when assessing ineffective assistance of counsel claims the assessment must be on if the attorney's conduct was reasonably effective.¹² Counsel has a large amount of discretion in their decisions that still falls under reasonably professional assistance.¹³ The Court stated that the decisions counsel makes at the time must be reasonable and that counsel's actions must not be looked at in hindsight, but assessed from the attorney's situation at the time.¹⁴ In *Lockhart v. Fretwell* the Court reiterated reasons for establishing the two-part test, saying that deficient assistance of

⁷ See *Strickland v. Washington*, 466 US 668, 685-686 (1984).

⁸ See *Id.* at 686.

⁹ See *Id.* at 688.

¹⁰ See *Id.* at 695.

¹¹ *Id.* at 687.

¹² See *Nix v. Whiteside*, 475 US 157, 165 (1986).

¹³ See *Id.*

¹⁴ See *Id.*

counsel results in unfairness, which violates the Sixth Amendment right to counsel.¹⁵ The Court stated that under *Strickland*, the defendant is required to show that the error(s) made by counsel must be so serious that it deprived the defendant to their right to a fair trial.¹⁶ Here, the Court is stated that the burden to show ineffective assistance falls directly on the defendant or appellant.

In *Glover v. United States*, the Court's past focus on the outcome shifted slightly. The Court said that a defendant's sentence may increase due to counsel's failed performance, but because of the determinate sentencing guidelines, such a change in outcome cannot, "serve as a bar to a showing of prejudice."¹⁷ The Court emphasized that any amount of actual jail time has Sixth Amendment significance, referring to the decision in *Argersinger v. Hamlin*.¹⁸ A certain standard or length of a sentence is irrelevant. The fact that the increase may have been anywhere between 6 and 21 months in this case, should not be the focus. Therefore, an increased sentence cannot serve as the line to showing prejudice, so it is important to note when, or if, a certain sentencing length increase came from deficient performance by counsel or error by counsel, the prejudice prong to the *Strickland* test is fulfilled.¹⁹

In *Yarborough v. Gentry* the Court acknowledged the wide array of decisions an attorney could make, saying it is up to counsel's discretion on how to best represent their client.²⁰ Tactical decisions are crucial and made often in closing arguments and because of this reviewing an attorney's decisions in their closing remarks must be "highly deferential."²¹ If counsel's actions were tactical at the time, but later seen to have failed, a defendant cannot argue this as ineffective assistance of counsel. With that, the Court said that reasonable competence is the standard

¹⁵ *Lockhart v. Fretwell*, 506 US 364, 372 (1993).

¹⁶ *See Id.* at 369.

¹⁷ *Glover v. United States*, 531 US 198, 204 (2001).

¹⁸ *See Argersinger v. Hamlin* 407 US 25 (1972).

¹⁹ *See Glover v. United State* 531 U.S. 198, 203 (2001).

²⁰ *See Yarborough v. Gentry* 540 U.S. 1 (2003).

²¹ *Id.* at 6.

guaranteed by the Sixth Amendment. Advocacy without any mistakes is not the standard guaranteed, especially when these actions are judged in hindsight.²²

In *Missouri v Frye*, the Court's ruled that the Sixth Amendment right to counsel extends to plea offers in consideration, plea offers that lapse, or pleas offers that are rejected.²³ The Court further explained stating that in today's criminal justice system, plea bargains are critical stages in the criminal justice process. In turn, effective assistance of counsel is needed during all plea bargain negotiations.²⁴ The Court held that defense counsel, "has the duty to communicate formal offers from the prosecution to accept plea on terms and conditions that may be favorable to the accused."²⁵ In cases such as these, rather than examining the outcome of proceeding to trial, examination into whether the defendant would have accepted the plea offer if they had received effective assistance to counsel is required.²⁶ *Missouri* stands as the most recent case where the Supreme Court further defined the right to effective assistance of counsel.

III. MOVING AWAY FROM *STRICKLAND*: NEW YORK'S INEFFECTIVE ASSISTANCE OF COUNSEL REQUIREMENTS

The State of New York is one of three states to create their own standard for ineffective assistance of counsel claims.²⁷ Prior to the US Supreme Court decision in *Strickland*, New York was advanced in their attempts to protect an individual's Sixth Amendment right, as they had established effective assistance of counsel requirements before the *Strickland* standard was

²² *Id.* at 8.

²³ *See Missouri v. Frye*, 566 US 134, 138 (2012).

²⁴ *See Id.* 143-144.

²⁵ *Id.* at 145.

²⁶ *See Id.* at 146-147.

²⁷ *See* Kellsie J. Nienhuser, "Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel in Wyoming after *Osborne v. State*, 2012 WY 123, 285 P.3d 248," *Wyoming Law Review* 14, no. 1 (2014): 170-172.

assessed by the Supreme Court.²⁸ After *Strickland* was decided in 1984, New York had already fine-tuned their standard of meaningful representation and even after 1984 they chose to continue to use the *Baldi* standard.²⁹ Since *Baldi*, the courts in New York have adjusted and improved the standard through various court decisions throughout the years.

A. New York Case History

The state of New York first established requirements for ineffective assistance of counsel in the 1960 case of *People v. Tomaselli*.³⁰ This was 24 years before the Supreme Court established the *Strickland* two-part test. Because there was no precedent on effective assistance of counsel, New York established a rule they believed fulfilled the Sixth Amendment right to counsel. In *Tomaselli*, the Court of Appeals of New York established that a defendant received ineffective assistance when counsel's performance resulted in a "mockery of justice" or made the "trial a farce."³¹ In this case, the court in New York essentially decided that a defendant has been given ineffective assistance of counsel when such aid resulted in the disruption of the adversarial process within the US criminal justice system. Such injustice requires the court to correct it in order to fully fulfill the Sixth Amendment.³²

Tomaselli was the first case the state of New York assessed in terms of ineffective assistance of counsel. The "mockery of justice" requirement continued to act as the standard until *People v. Baldi*, three years prior to the *Strickland* decision. In *Baldi*, the court did away with the *Tomaselli* standard, and established a new standard. This standard continues to act as the requirement for ineffective assistance of counsel in New York today.³³ The Court of Appeals of

²⁸ See *People v. Tomaselli*, 7 N.Y.2d 350 (1960).

²⁹ See *People v. Baldi*, 54 N.Y.2d 137 (1981).

³⁰ See *People v. Tomaselli*, 7 N.Y.2d 350 (1960).

³¹ See *Id.* at 353.

³² See *Id.* at 355.

³³ See *People v. Baldi*, 54 N.Y.2d 137 (1981).

New York emphasized the importance of a fair trial, letting this act as their benchmark for their reasoning. The court also noted that assessing ineffective assistance of counsel claims requires the assessment of, “unique circumstances of each representation.”³⁴

In the concluding remarks of *Baldi*, the Court of Appeals held that counsel has fulfilled their duty of effective assistance if they provided “meaningful representation.”³⁵ The court stated that this would act as the new standard for ineffective assistance of counsel. They further explained meaningful representation, saying that meaningful representation will be assessed only after viewing the case, the law, the evidence, and particular circumstances, specifically at the time of representation.³⁶ Any explanation of what meaningful representation constituted specifically was not discussed. The only emphasis the court stated was in discussion of tactical decisions, in which these decisions could not be held as ineffective assistance of counsel.³⁷ Though perhaps this was intentional, it is clear that this standard sat relatively low on the defendant requirements to show ineffective assistance of counsel.

The New Court of Appeals defined meaningful representation a bit more in *People v. Flores*.³⁸ In this case, the defendant was arguing he received ineffective assistance of counsel, and though *Strickland* had been long decided at the federal level, the court in New York chose to cite *Baldi* as their reasoning in their decision.³⁹ No mention of *Strickland* was given. In turn, the court pointed out (in more detail) the relationship between meaningful representation and tactical decisions by defense counsel.⁴⁰ The court said that tactics resulting in a loss at trial should not be confused with true ineffective assistance of counsel. Tactics made by counsel are a right that

³⁴ *Id.* at 146.

³⁵ *Id.* at 147.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See People v. Flores*, 84 N.Y.2d 184 (1994).

³⁹ *See Id.* at 186.

⁴⁰ *See Id.* at 187.

attorneys have; it would be unfair to judge such tactics in hindsight.⁴¹ Though no true definition of what constitutes meaningful representation was given, further explanation of tactical decisions and effectiveness was a step forward for the New York ineffective assistance standard, as established in *Baldi*.

In the case of *People v. Benevento*, the court acknowledged the *Strickland* standard, but also justified why the state of New York chose to continue to use the *Baldi* ruling.⁴² Further definition of meaningful representation was given as well. The court stated that it does not equate meaningful representation to perfect representation.⁴³ The court discussed the importance of a fair trial, stating that this is the reason they kept the “flexible” *Baldi* standard.⁴⁴ Reference to *Strickland* was given, but followed by more discussion of, “fairness of the process as a whole, rather than its particular impact on the outcome of the case.”⁴⁵ In fact, the court stated why they did not adopt the *Strickland* standard, saying that the question if the result of the trial would have been different but for counsel’s errors, “is relevant, but not dispositive under the state constitution.”⁴⁶ Here, the court seemed to justify their stance, turning away from the prejudice prong, where the “but for counsel’s errors” test consists of the core to the second part of the two-part test as ruled in *Strickland*.⁴⁷

The state of New York continued to uphold the *Baldi* standard into the 2000s. In *People v. Stutz*, the court reiterated their focus on the fairness of criminal proceedings as a whole.⁴⁸ The court acknowledged *Strickland* from time-to-time. In addition they emphasized why they chose

⁴¹ *See Id.* at 188.

⁴² *See People v. Benevento*, 91 N.Y.2d 708 (1998).

⁴³ *See Id.* at 712.

⁴⁴ *See Id.* at 711-712.

⁴⁵ *Id.* at 714.

⁴⁶ *Id.*

⁴⁷ *See Strickland v. Washington*, 466 US 668, 687 (1984).

⁴⁸ *See People v. Stutz*, 2 N.Y.3d 277, 278 (2004).

to follow the *Baldi* standard. In reference to the *Strickland* standard the court said, “they have never applied it with such stringency as to require a defendant to show that, but for counsel’s ineffectiveness, the outcome would probably have been different.”⁴⁹ Essentially, meaningful representation and showing prejudice are connected, but showing prejudice is not an element that is needed in order to show lack of meaningful representation.⁵⁰ It is evident that the court further differentiated their ineffective assistance requirements versus the federal requirements, implying that the bar in the *Strickland* standard was set too high for them.

In *Henry v. Poole*, the Second Circuit of the States Court of Appeals assessed the relationship between the federal *Strickland* standard and the New York standard for ineffective assistance of counsel. They court said that states are allowed to have separate ineffective assistance of counsel standards so long as they are not contrary to the federal standard.⁵¹ The court assessed the New York application of the *Baldi* standard, which again, focuses on the fairness of the process altogether, rather than if the outcome of the case was due to the ineffective assistance of counsel.⁵² This standard, as told by the court, is not diametrically different from, opposed to, or inconsistent with the *Strickland* standard.⁵³ In other words, if the standard were to be higher than the federal standard or if it were completely apart from it, the New York standard would not be ok. Therefore, the court found that the New York ineffective assistance of counsel standard was not at all “contrary to” the *Strickland* standard and the standard could be used.

⁴⁹ *Id.* at 283.

⁵⁰ *See Id.* at 283.

⁵¹ *See Henry v. Poole*, 409 F.3d 48, 69 (2005).

⁵² *See Id.* at 69.

⁵³ *See Id.* at 70.

The Court of Appeals of New York acknowledged *Strickland* once again in *People v. Caban*.⁵⁴ The court applied the *Baldi* requirement, but acknowledged the prejudice prong of the *Strickland* test. The *Strickland* standard is much higher, and in turn the court stated that the New York standard, "...offers greater protection than under the federal test."⁵⁵ By saying this, the court implied that the defendant has a much higher standard of proof, in terms of ineffective assistance at the federal level, and because of this the defendant has less protection. The court went on to distinguish themselves from the federal standard by establishing that a single error may qualify as ineffective assistance, a standard much lower than that of the federal level.⁵⁶ The court still did not ignore the importance of showing prejudice; yet they refused to regard this as being crucial in weighing meaningful representation.

In 2015, the New York Supreme Court fully explained the ineffective assistance requirements in the case of *People v. Irizarry*.⁵⁷ Under the New York standard, the defendant only has to establish that meaningful representation was lacking, as the concern is with overall fairness of the proceedings and viewed in totality. In addition, the court did state once again that meaningful representation is not to be confused with perfect representation or tactical decisions.⁵⁸ Whether or not the outcome of the case would have been different as a result of the counsel's deficient performance is irrelevant.⁵⁹ Because of this, the court believed the New York standard is more favorable to defendants, as the *Strickland* standard is "highly demanding and hard to fulfill."⁶⁰ They explained that in many instances defendants lack the ability to prove the

⁵⁴ See *People v. Caban*, 5 N.Y.3d 143 (2005).

⁵⁵ *Id.* at 156.

⁵⁶ See *Id.* at 151.

⁵⁷ See *People v. Irizarry*, 49 Misc.3d 1213(A) (2015).

⁵⁸ See *Id.* at 11.

⁵⁹ *Id.*

⁶⁰ *Id.* at 10,12.

prejudice prong of *Strickland*, yet still received deficient assistance of counsel.⁶¹ Consequently, this is the reasoning used when the court justified they continued use of the *Baldi* standard.

IV. ADOPTING *STRICKLAND*: WYOMING'S INEFFECTIVE ASSISTANCE OF COUNSEL REQUIREMENTS

Wyoming is one of the many states to adopt the federal standard for ineffective assistance of counsel, as decided in *Strickland*.⁶² A case history gives a good understanding of when, how, and why the state of Wyoming chose to adopt the federal standard, in contrast to the state of New York's decisions to adopt their own standard at the state level. Throughout the years, Wyoming has evolved their standard for ineffective assistance of counsel claims. However, instead of moving away from *Strickland* like New York did, Wyoming continues to uphold *Strickland* in a strict manner, using exact Supreme Court rhetoric when ruling on ineffective assistance claims.

A. Wyoming Case History

In *Munden v. State*, one year after *Strickland*, the court in Wyoming did not directly adopt the federal standard for ineffective assistance of counsel, but they did use reasoning from *Strickland* in their ruling.⁶³ The court said that the standard they used to determine ineffective assistance of counsel is, "one of reasonableness."⁶⁴ The court used the standard of reasonableness to determine if assistance was considered competent in that particular situation.⁶⁵ Additionally, they also used the federal benchmark, citing both the first prong of deficient

⁶¹ *See Id.* at 16.

⁶² *See Strickland v. Washington*, 466 US 668, 686 (1984).

⁶³ *See Munden v. State*, 698 P.2d 621 (1985).

⁶⁴ *Id.* at 623.

⁶⁵ *Id.*

performance and the second of prejudice to the outcome as stated in *Strickland*. However, it was not the main reasoning used in their decision.⁶⁶

The state of Wyoming officially adopted the *Strickland* standard in *Frias v. State*.⁶⁷ The court explicitly stated that when deciding on any ineffective assistance of counsel claims, the state would use the federal *Strickland* requirements.⁶⁸ First, the appellant must show that counsel's performance was deficient and then the appellant must show that the deficient behavior prejudiced the outcome of the trial.⁶⁹ The court went so far as to quote *Strickland* for almost all of their reasoning in assessing if the appellant received ineffective assistance of counsel. The only area where the court stated their own words was when speaking of the focus on fairness of the proceedings, but this was quickly followed up by another quote from *Strickland*.⁷⁰

In *Calene v. State*, the court emphasized the importance of the right to counsel extending to effective assistance of counsel and the need for a proper record in order to assess counsel effectiveness.⁷¹ In order to fully assess and rule on ineffective assistance of counsel, the court record is crucial, as this may contain evidence of ineffectiveness. The court continued with their adoption of *Strickland*, saying it is crucial to have a fair trial because of the adversarial process, implying that this standard accomplishes the goal of fulfilling the Sixth Amendment right to counsel.⁷² Throughout the opinion, the court applied *Strickland* very directly, by inserting exact quotations.⁷³ It is clear that not only is the state of Wyoming adopting the *Strickland* standard, but they were also dedicated to using it's components in a very strict manner in this case.

⁶⁶ *Id.*

⁶⁷ *See* *Frias v. State*, 722 P.2d 135 (1986).

⁶⁸ *See Id.* at 146.

⁶⁹ *See Id.* at 145.

⁷⁰ *See Id.* at 147.

⁷¹ *See* *Calene v. State*, 846 P.2d 679, 689 (1993).

⁷² *See Id.* at 690.

⁷³ *See Id.* at 691.

The Wyoming Supreme Court continued to cite *Strickland* in ineffective assistant claims in the case of *Jackson v. State*.⁷⁴ The only non-*Strickland* rhetoric used by the court was in their emphasis of determination of ineffectiveness, where it should be assessed if counsel's acts in that particular case were, "...outside of the wide range of professionally competent assistance."⁷⁵ The court stated this again in *Duke v. Wyoming*.⁷⁶ In the nine years that lapsed between these two cases, the court's reasoning for their ruling were almost identical, where the court took direct block quotations from the Supreme Court's opinion in *Strickland*, showing no movement away from the *Strickland* standard.

In *Dettloff v. State*, the state again used the same *Strickland* rhetoric.⁷⁷ The court added that it is entirely the appellant's responsibility to show that if it were not for deficient counsel performance, the outcome of the proceedings would have been different.⁷⁸ The court reiterated this ruling in *Pendleton v. State*.⁷⁹ In *Sanchez v. State* the court acknowledged that ineffectiveness may be present in trial record, as well as off the court record, where ineffectiveness occurred outside of the courtroom.⁸⁰ In order to show the latter, the court stated that the appellant must fulfill the deficiency prong and then gather evidence that shows how actions or lack of actions outside the courtroom prejudiced him or her.⁸¹ Wyoming appeared to be fine-tuning their requirements for ineffectiveness assistance claims at this point. It seemed it was only moving closer to the *Strickland* standard, rather than moving away.

⁷⁴ See *Jackson v. State*, 902 P.2d 1292 (1995).

⁷⁵ *Id.* at 1295.

⁷⁶ See *Duke v. State*, 99 P.3d 928 (2004).

⁷⁷ See *Dettloff v. State*, 152 P.3d 376, 382 (2007).

⁷⁸ See *Id.* at 382.

⁷⁹ See *Pendleton v. State*, 180 P.3d 212 (2008).

⁸⁰ See *Sanchez v. State*, 253 P.3d 136 (2011).

⁸¹ See *Id.* at 148, 149.

Following *Sanchez*, Wyoming summed up the appellant's responsibility for showing ineffective assistance more clearly in *Ortega-Araiza v. State*. Here, the court said that the defendant or appellant must show that there is a "reasonable probability that, but for counsel's errors" the result of a plea, plea agreement, or trial outcome would have been different.⁸² The court continued to concentrate on the *Strickland* standard and the duty of the defendant or appellant to prove the two prongs listed in *Strickland*. In *Galbreath v. Wyoming*, the Supreme Court of Wyoming brought all of the past court rulings together. The court reiterated the standard being reasonable competence on the part of counsel, the responsibility of showing ineffectiveness lying with the appellant, and the fulfillment of the deficiency prong, as well as the prejudice prong.⁸³

V. ANALYSIS OF VARYING REQUIREMENTS FOR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

The state of Wyoming is similar to almost all other states in the US, as it adopted *Strickland* as the requirement for ineffective assistance of counsel claims. *Strickland* was a major case, as it was the first case where the US Supreme Court explicitly stated that the Sixth Amendment not only means a right to counsel, but a right to *effective* assistance of counsel.⁸⁴ After the establishment of the right to counsel in *Gideon*, it became apparent that there was a need for a standard of competency for counsel, and *Strickland* did just that.⁸⁵ The only problem was that the Supreme Court made the requirements for ineffective assistance difficult for defendants to fulfill. Because of this, the Supreme Court's attempt at fulfilling the right to

⁸² *Ortega-Araiza v. State*, 331 P.3d 1189, 1194 (2014).

⁸³ *See Galbreath v. State*, 346 P.3d 16 (2015).

⁸⁴ *See Strickland v. Washington* 466 U.S. 668 (1984).

⁸⁵ *See* Laura J. Calese, "Criminal Law: Defendant's Rights," *Denver University Law Review* 75 (1998): 782.

effective assistance of counsel fell short as seen with the many problems associated with their two-part test as outlined in *Strickland*.

The New York Standard of meaningful representation diverts from the federal *Strickland* standard, specifically when reaching the prejudice prong. *Baldi v. State* established meaningful representation.⁸⁶ New York chose to keep their meaningful representation standard despite the decision in *Strickland*, which came three years after the *Baldi* decision.⁸⁷ New York was not barred from creating an alternative ineffective assistance of counsel requirement, as the meaningful representation standard was less demanding and therefore allowable.⁸⁸ The reason New York sought to keep their standard was due to the view that the *Strickland* standard was set too high, making it almost impossible to fulfill.⁸⁹ Thus, they chose to lower the bar a defendant must reach.

A. *The New York Standard, The Better Choice*

The New York standard (as established in *Baldi*) focuses on the process as a whole. As a result, the focus is on the fairness in its entirety instead of a focus on a change in the outcome, as done in *Strickland*. The New York standard puts the quality of counsel at the forefront of court assessment in any ineffective assistance of counsel claims.⁹⁰ Instead of focusing only on the outcome (as done in the federal system), in New York the court assesses claims by looking at a larger, less stringent picture. The purpose of meaningful representation is to ensure “fairness of

⁸⁶ See *People v. Baldi*, 54 N.Y.2d 137 (1981).

⁸⁷ See Timothy M. Riselvato, “Claims of Ineffective Assistance of Counsel: The Clash of the Federal and New York State Constitutions,” *Touro College Law Review* 26 (2011): 1201.

⁸⁸ See *Id.* at 1204.

⁸⁹ See Kellsie J. Nienhuser, “Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel in Wyoming after *Osborne v. State*, 2012 WY 123, 285 P.3d 248,” *Wyoming Law Review* 14, no. 1 (2014): 163.

⁹⁰ See *Id.* at 171.

the process as a whole.”⁹¹ Subsequently, if a defendant is overtly guilty and there is no arguing that the outcome would not have changed, he or she may still have a claim. Since the focus is on fairness of the process under the New York standard, they can still establish ineffective assistance of counsel if counsel lacked meaningful representation.⁹²

In comparison to the *Strickland* standard, the New York standard offers a larger amount of flexibility.⁹³ New York explicitly stated in *Baldi* that flexibility is important because exactly what constitutes effective assistance of counsel should not be a fixed standard.⁹⁴ The outcome-determinative *Strickland* standard is a fixed standard. If the outcome would have been different because of counsel’s actions, then you have a claim because you have fulfilled both prongs in *Strickland*. There is no such requirement under the New York standard. In New York, the court takes into account the “totality of circumstances,” which looks at the entirety of the criminal proceedings.⁹⁵ Because of this, the standard is much less fixed and therefore flexible.

Since the New York standard focuses on the fairness of the trial as a whole, it is arguably more objective as well.⁹⁶ In *Strickland*, when focusing only on the outcome, the potential for subjectivity when assessing ineffective assistance claims is much higher. This occurs because the court’s focus in these cases is narrower than in New York courts, as the focus is only on the outcome, whereas in New York the focus is on the fairness of the *entire* process. Under the

⁹¹ See Timothy M. Riselvato, “Claims of Ineffective Assistance of Counsel: The Clash of the Federal and New York State Constitutions,” *Touro College Law Review* 26 (2011): 1201.

⁹² See Timothy M. Riselvato, “Claims of Ineffective Assistance of Counsel: The Clash of the Federal and New York State Constitutions,” *Touro College Law Review* 26 (2011): 1212.

⁹³ See Kellsie J. Nienhuser, “Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel in Wyoming after *Osborne v. State*, 2012 WY 123, 285 P.3d 248,” *Wyoming Law Review* 14, no. 1 (2014): 172.

⁹⁴ See *Id.* at 177.

⁹⁵ See Timothy M. Riselvato, “Claims of Ineffective Assistance of Counsel: The Clash of the Federal and New York State Constitutions,” *Touro College Law Review* 26 (2011): 1200.

⁹⁶ See Kellsie J. Nienhuser, “Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel in Wyoming after *Osborne v. State*, 2012 WY 123, 285 P.3d 248,” *Wyoming Law Review* 14, no. 1 (2014): 172.

Strickland standard, the judge decides if the defendant has shown deficiency and prejudice to the outcome. If the court finds prejudice, this implies the judge believes the outcome would have been different based on counsel's actions, therefore, reversing the conviction of the appellant.⁹⁷ The totality of circumstances aspect of the New York standard reduces the judge's potential for subjectivity when deciding ineffective assistance of counsel. Judges are still looking at in hindsight under the New York standard, but rather than hindsight in assessing the change of outcome in a trial. They are looking at the fairness of the proceedings.⁹⁸ As a result, though some subjectivity is arguably inevitable, it is much less present under the New York standard.

The New York ineffective assistance of counsel requirements are much more achievable than the federal *Strickland* standard. For this reason, the New York approach, "...does not allow a court to dismiss error simply because of overwhelming evidence against the defendant," as seen in past Wyoming cases.⁹⁹ It is possible for an appellant to show they did not receive meaningful representation, as well as show that meaningful representation did not necessarily result in a changed outcome of their case. Under *Strickland*, deficiency may occur, but unless the prejudice prong is fulfilled (but for counsel's actions, the outcome would have been different), no relief will be given, despite deficient performance on the part of counsel. In New York, a defendant may still have a claim of ineffective assistance of counsel because prejudice is not at the forefront of ineffective assistance claims, rather it "is relevant, but not dispositive under the state constitution."¹⁰⁰ Therefore, the lack of the "but for counsel's errors" the outcome would have been different, is not the deciding factor in ineffective assistance claims.

⁹⁷ *See Id.* at 171.

⁹⁸ *See Id.* at 171.

⁹⁹ *See Id.* at 177.

¹⁰⁰ *People v. Benevento*, 91 N.Y.2d 708, 714 (1998).

The standard of evidence is also lower under the New York standard. Under the federal *Strickland* standard, the defendant must have evidence to show deficiency and prejudice. Finding evidence in order prove deficient counsel performance may be difficult, but finding evidence to prove prejudice to the outcome because of the deficient performance is even harder.¹⁰¹ Under the New York standard, any lack of meaningful representation may result in a successful claim of ineffective assistance of counsel. Meaningful representation is much easier to show than prejudice to the outcome of one's trial. The outcome-focused *Strickland* standard results in unfulfillment of ethical obligations by counsel, since counsel could act deficiently and/or unethically, yet not prejudice the outcome.¹⁰² Under the New York standard, "meaningful representation is inherently ethical representation."¹⁰³ Because of this, the evidence needed in New York is easier to obtain.

Because meaningful representation is a lower standard and easier for a defendant to prove, the burden on the defendant is also reduced under the New York standard. Under the federal *Strickland* standard, the burden to show deficient performance and prejudice lays solely on the defendant.¹⁰⁴ The only responsibility the defendant has under the New York standard is to show that counsel acted without meaningful representation. The defendant does not have to show that they would have received an innocent verdict if not for counsel's ineffectiveness. Neither do they need to show that their sentence would have been different if it was not for the deficient performance, as is required under *Strickland*.¹⁰⁵ Not only is the burden shifted because the

¹⁰¹ See Kellsie J. Nienhuser, "Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel in Wyoming after *Osborne v. State*, 2012 WY 123, 285 P.3d 248," *Wyoming Law Review* 14, no. 1 (2014): 162.

¹⁰² *See Id.* at 1206.

¹⁰³ *See Id.* at 1216.

¹⁰⁴ See Stephen G. Gilles, "Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guaranteed," *University of Chicago Law Review* 50 (1984): 1398.

¹⁰⁵ *See Id.* at 1217.

standard is lower, but because the focus is on the process as whole, the defendant doesn't need the same level of evidence as needed if trying to prove a different outcome but for counsel's errors.

VI. CONCLUSION

The *Strickland* test implemented a safeguard in order to fulfill the Sixth Amendment right to counsel, specifically a right to *effective* counsel. One could argue that this right is not fulfilled under the *Strickland* test because of the many problems that arise with it. The standard is set so high as to have diminished its initial purpose of fulfilling the Sixth Amendment.¹⁰⁶ The need for competent and effective counsel is paramount due to our adversarial system.¹⁰⁷ Consequently, only a few states, like New York, have decided to create their own ineffective assistance of counsel requirements. Overall, the New York standard as established in *Baldi*, makes an ineffective assistance claim more achievable for defendants who did in fact receive ineffective assistance. Deficient performance is deficient performance, no matter if it resulted in a change of the outcome of the trial or not. If the Supreme Court does agree that a right to counsel (as stated in the Sixth Amendment) means the right to effective counsel, then the New York standard truly fulfills this, making it the better standard for ineffective assistance of counsel claims.

¹⁰⁶ See Stephen G. Gilles, "Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guaranteed," *University of Chicago Law Review* 50 (1984): 1384.

¹⁰⁷ See Laura J. Calese, "Criminal Law: Defendant's Rights," *Denver University Law Review* 75 (1998): 780.