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SECOND CIRCUIT REVIEW

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Effective Assistance of Counsel

In this month's column, we report on a recent decision by the U.S. Court of Appeals for the Second Circuit concerning a criminal defendant's right to effective assistance of counsel.

In *Henry v. Poole*,[1] the Second Circuit clarified what constitutes ineffective assistance of counsel under *Strickland v. Washington*,[2] reinforced prior Second Circuit cases interpreting what is an "unreasonable application" of established federal law under the Antiterrorism and Effective Death Penalty Act (AEDPA)[3] and called into question whether New York courts, in assessing whether a defendant has been prejudiced by his counsel's errors, may properly consider counsel's performance in other respects.

The Case and Prior Decisions

At issue in the case was petitioner Dwayne Henry's trial counsel's decision to call Lakesha Person, Mr. Henry's girlfriend, as an alibi witness, where Ms. Person could only testify as to Mr. Henry's whereabouts on the wrong night. At trial, Mr. Henry's counsel, Patrick Watts, maintained that the complainant's identification of Mr. Henry—the only evidence linking him to the crime—was mistaken. In addition, Mr. Watts called Ms. Person in an apparent effort to establish an alibi. However, although the robbery had occurred at 12:10 a.m. on Thursday, Aug. 10, 1995, Mr. Watts only questioned Ms. Person as to the events on "the night of Aug. 10." On cross-examination, the assistant district attorney established that Ms. Person was speaking only about Thursday night into Friday and, thus, could not establish an alibi defense. Nevertheless, Mr. Watts not only continued to present Ms. Person's testimony as an alibi, but also stressed the now-discredited alibi in his closing statement. The assistant district attorney, in summation, highlighted that Mr. Henry's putative alibi had been disproved and further argued that Mr. Henry and Ms. Person had fabricated the alibi. Mr. Henry was convicted on both counts of robbery.

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On direct appeal, the New York Court of Appeals rejected Mr. Henry's ineffective-assistance claim and upheld the convictions.[4] The Court of Appeals held that Mr. Henry had "received meaningful representation" under New York's "flexible standard," The Court of Appeals held that Mr. Henry had not called into question the "'fairness of the process as a whole,'" observing that "[i]n view of…counsel's competency in all other respects, we conclude that counsel's failed attempt to establish an alibi was at most an unsuccessful tactic." After Mr. Henry's motion under §440.10 of the New York Criminal Procedure Law to vacate his convictions was denied, Mr. Henry filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of New York, which was also denied by District Judge Jack B. Weinstein.[5]

On appeal, the Second Circuit reversed, holding that Mr. Henry had been denied his Sixth Amendment right to effective assistance of counsel under the two-pronged test set forth in *Strickland v. Washington*, which requires a convicted defendant to show (1) "that counsel's representation fell below an objective standard of reasonableness…under prevailing professional norms," and (2) "that the deficient performance prejudiced the defense,"

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i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[6] The Second Circuit further held that the New York Court of Appeals, in deciding that Mr. Henry had not been denied effective assistance of counsel, misapplied clearly established federal law in violation of AEDPA.

First Prong: Objective Standard

• ***The First 'Strickland' Prong: Trial Counsel's Decision to Present a False Alibi Fell Below an Objective Standard of Reasonableness.*** The Second Circuit held that Mr. Watts' performance at trial was severely deficient. Mr. Watts' errors concerning the putative alibi defense were, according to the court, "hardly a matter of hindsight." The court held, "Mr. Watts could not have made a reasonable investigation because he indisputably possessed all of the pertinent information…prior to asking Ms. Person a single question." Mr. Watts' "failure to recognize the difference between the beginning and the end of the day plainly falls below any acceptable level of professional competence."

Mr. Watts compounded his initial errors by "unaccountably persist[ing] with the purported alibi defense" even after it had been discredited during the assistant district attorney's cross-examination. The court found "inexplicabl[e]" Mr. Watts's summation "telling the jury that its decision would boil down to whether it believed [Ms.] Person or [the complainant]." Mr. Watts' "failure to recognize that [Ms.] Person's alibi testimony in no way contradicted the testimony of [the complainant]—because they dealt with Mr. Henry's whereabouts on different nights—is not within the realm of professional competence," the court held.

The court rejected the State's argument that Mr. Watts's decision to present the false alibi was simply a tactic. Citing cases and practitioners' guides, the court noted that putting forward a false alibi "is commonly accepted as evidence of a defendant's consciousness of guilt," and the court held that Mr. Watts's "presentation, adherence to, and emphasis on [Ms. Person's false alibi] …was representation that fell far below an objectively acceptable level of professional competence."

Reasonable Probability

• ***The Second 'Strickland' Prong: Trial Counsel's Errors Resulted in a Reasonable Probability of Prejudice.*** The court held that Mr. Henry satisfied the prejudice prong of the *Strickland* standard. The court rejected the State's contention that "the false alibi evidence was simply inconsequential and had no more effect than if no alibi had been offered," noting that "the assistant district attorney was able to capitalize on counsel's reliance on the fallacious alibi defense by arguing that the alibi was fabricated," thereby bolstering the State's case against Mr. Henry. The *Henry* court took note of the Supreme Court's admonition in *Strickland* that "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," concluding,

> [W]e lack confidence that the result of [Mr.] Henry's trial was reliable, given the lack of any evidence to connect [Mr.] Henry to the crime other than his selection from an arguably suggestive lineup, and the subsequent identification at trial, by a victim whose initial description of the robber differed from [Mr.] Henry as to, inter alia, age, height, weight, and hair length. We cannot conclude, given the persuasive misidentification defense, that there is no reasonable probability that, but for counsel's professionally deficient representation…the result of the trial would have been different.[7]

Notably, in determining whether Mr. Henry had been prejudiced, the Second Circuit did not consider counsel's performance in other respects.

AEDPA

• ***AEDPA: The New York Court of Appeals' Decision Was an Unreasonable Application of 'Strickland.'*** Because, as the Second Circuit noted, the New York Court of Appeals had rejected Mr. Henry's ineffective assistance claim on the merits, the New York Court of Appeals' decision was entitled to deference under the AEDPA, under which a federal court considering a habeas petition must deny the writ unless the state court's decision "was contrary to" or "involved an unreasonable application of" clearly established federal law.[8]

Noting that the Second Circuit had previously held that the New York Court of Appeals' application of New York's ineffective-assistance standard was not "contrary to" *Strickland*, the *Henry* court considered whether the New York Court of Appeals unreasonably applied *Strickland* in rejecting the petitioner's ineffective-assistance claim. Relying on its prior decision in *Francis S. v. Stone*,[9] the *Henry* court held that, under the Supreme Court's interpretation of AEDPA in *Williams v. Taylor*,[10] a decision is "objectively unreasonable" even if it is not "unreasonable to all reasonable jurists."

Accordingly, though the New York Court of Appeals had held that Mr.

Watts' presentation of the alibi defense was a tactic, the Second Circuit nevertheless held that the New York court's decision that Mr. Watts' performance did not fall below the required level of professional competence was an "objectively unreasonable" application of *Strickland*. As to whether Mr. Henry was prejudiced, the Second Circuit held that the Court of Appeals did not "reasonably apply *Strickland* because it does not appear to consider the false alibi defense's likely effect on the jury." The Second Circuit held that while the presentation of the false alibi did not "diminish[] the 'legitimacy' of the misidentification defense, [it] may well have diminished its effectiveness." The Second Circuit further held that the New York Court of Appeals' "reliance on 'counsel's competency in all other respects' failed to apply the *Strickland* standard at all."

Conclusion

• ***Conclusion: Unresolved Tension Between New York Law and 'Strickland' Concerning the Relevance of Counsel's Performance in Other Respects.*** Though the Second Circuit clarified and reiterated existing law regarding what conduct is ineffective under *Strickland* and what is an "unreasonable application" of federal law under AEDPA, the court left open the broader, and potentially more important, question of whether and to what extent New York courts, in determining prejudice, may consider counsel's competent performance in other areas. As the New York Court of Appeals had acknowledged, *Strickland's* test zeroes in on the specific impact of counsel's unprofessional conduct, whereas prejudice is determined under New York law by "the 'fairness of the process as a whole rather than [any] particular impact on the outcome of the case.'"

Though the Second Circuit has previously *held—in Lindstadt v. Keane*,[11] *Loliscio v. Goord*,[12] and *Eze v. Senkowski*[13]—that the New York standard was not "contrary to" federal law for the purposes of AEDPA, the Second Circuit, in *Henry v. Poole*, went out of its way to question its prior decisions.[14] Acknowledging that the New York standard was not "contrary to" *Strickland* when assessed "at the level of generality that focuses on the State standard in broad terms," the Second Circuit in *Henry v. Poole* went on to say, "We are hardly sure, however, that comparison at that level of generality is appropriate."[15] The court then highlighted ambiguity within the Supreme Court's decision in *Williams v. Taylor* interpreting AEDPA's "contrary to" language. In *Williams*, the Supreme Court held that a decision is "contrary to" clearly established federal law if it is "diametrically different" from, "opposite in character or nature" to, or "mutually opposed" to the federal standard.[16] As the Second Circuit noted, however, the Supreme Court, by way of example, also suggested in *Williams* that

> [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, in the example given by *Williams*, 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.[17]

As a consequence, the Second Circuit observed, "[W]e 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*."[18] While expressing its concern, the Second Circuit in *Henry v. Poole* left for another day the question of whether and to what extent the New York standard is "contrary to" the federal standard for ineffective assistance established in *Strickland*.

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1. No. 03-2884, 2005 WL 1220468 (2d Cir. May 24, 2005).
2. 466 US 668 (1984).
3. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 USC).
4. *People v. Henry*, 744 NE2d 112 (N.Y. 2000) (reversing *People v. Henry*, 699 NYS2d 129 (2d Dept. 1999)).
5. *Henry v. Poole*, 2005 WL 1220468, at *8-*9.
6. See id. at *12 (quoting *Strickland*, 466 US at 687-88).
7. *Henry v. Poole*, 2005 WL 1220468, at *17.
8. Id. (quoting 28 USC §2254(d)(1) and citing *Williams v. Taylor*, 529 US 362, 412-13 (2000)).
9. 221 F3d 100 (2d Cir. 2000).
10. 529 US 362 (2000).
11. 239 F3d 191, 198 (2d Cir. 2001).
12. 263 F3d 178, 193 (2d Cir. 2001).
13. 321 F3d 110, 122-24 (2d Cir. 2003).
14. *Henry v. Poole*, 2005 WL 1220468, at *20 ("[W]e pause to question whether the New York standard is not contrary to *Strickland* within the framework set forth in *Williams*."); accord id. at *22 ("Because I concurred in *Lindstadt* [which held that the New York standard was not contrary to *Strickland*], I write separately to note that I nonetheless find considerable merit in Judge Kearse's criticism [in the majority opinion in *Henry v. Poole*] of the rule.") (Sack, J., concurring).
15. *Henry v. Poole*, 2005 WL 1220468, at * 20.
16. *Williams*, 529 US at 405, quoted in *Henry v. Poole*, 2005 WL 1220468, at *17.
17. *Henry v. Poole*, 2005 WL 1220468, at *20. In *Williams*, the Supreme Court had observed,

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be "diametrically different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that…the result of the proceeding would have been different."

529 US at 405-06, quoted in *Henry v. Poole*, 2005 WL 1220468, at *20.
18. *Henry v. Poole*, 2005 WL 1220468, at *20 (quoting *Benevento*, 697 NE2d at 589).