

INEFFECTIVE ASSISTANCE OF COUNSEL

Thomas P. Franczyk, Director of CLE Training

Assigned Counsel Program of Erie County

Presentation: June 28th, 2019

Criminal defense work requires a thick hide inasmuch as many clients who are convicted of crimes, whether by verdict or plea, often attribute the unsatisfactory outcome of their cases to the alleged ineffectiveness of their counsel at one point or another in the course of the representation. In the first half of this year alone, the Fourth Department of the Appellate Division reported on over 20 appeals in which the defendant alleged, among other things, ineffectiveness of legal representation as a basis to overturn their convictions. Unfortunately for most of the defendants (and, perhaps as vindication for their former counsel), those claims did not prevail.

Claims of ineffective assistance run the full gamut of representation from the investigative stages through the appeal, if there is one. Counsel may be called out for things they did or didn't do including (but by no means limited to): failure to interview, prepare or call witnesses to testify, failure to review and properly utilize important documents (e.g. medical records, police reports, inconsistent statements), failure to demand or follow up on discovery materials or issue subpoenas for relevant documentary evidence, failure to make appropriate motions (usually suppression of statements, physical evidence or identification, or speedy trial) or demand a hearing (e.g. Huntley, Dunaway, Mapp, Frye with new and novel science), failure to properly counsel client before a guilty plea is entered (e.g. as to direct consequences, rights and defenses waived, sentence range), taking an adverse position on a client's motion to withdraw his plea, failure to adequately prepare for trial, failure to have a discernably coherent theory of defense, conducting a prejudicially inept voir dire, not making motions in limine (eg. Sandoval), not giving an opening statement where one is called for, giving an ineffectual if not harmful opening statement, not objecting to unduly prejudicial questions on the prosecutor's direct examination, not impeaching a witness effectively or at all, opening the door to unduly prejudicial testimony on cross examination, not moving to exclude the jury for arguments on objections that may be unduly prejudicial, failure to make a meaningful motion for trial order of dismissal that preserves relevant issues for appeal, not calling witnesses to testify who can support a defense, deficient cross examination of opposing experts, ineffectual direct examination of defense expert or not retaining an expert when the case calls for it, not objecting to inflammatory, prejudicial prosecution arguments on summation, not addressing important issues in summation, failing to challenge the verdict before the jury has been discharged, not advising the defendant of his right to appeal, failing to preserve issues for appeal, overlooking critical arguments on appeal, drafting a brief or making arguments that do not permit meaningful review of the issues on appeal. Ineffective assistance claims may also arise from counsel's representation under circumstances indicating a conflict of interest.

Fortunately for counsel, the burden upon defendants to establish ineffective assistance is not insubstantial, and beyond enjoying a presumption of competence (unless shown otherwise), lawyers are afforded substantial latitude in the exercise of professional judgment regarding matters of law, evidence and strategy (provided they have one). They will not be faulted for declining to chase windmills with motions, arguments and trial tactics that have little chance of success under the law. Moreover, claims of ineffective representation are viewed not through the lense of 20-20 hindsight, but rather as of the time of the alleged transgression(s). Courts will generally evaluate the questioned conduct in light of counsel's overall representation (including the outcome), unless a singular error was so obvious, egregious and dispositive as to deprive the defendant of meaningful representation.

Constitutional challenges to the effectiveness of legal representation typically proceed on two fronts; one federal and one state. Under *Strickland v Washington* 466 US 668 (1984), to be ineffective under the Sixth Amendment, the lawyer's performance must fall below an objective level of reasonableness and be so deficient as to deprive the defendant of a fair trial or a reliable outcome. Key to the federal standard is a showing of prejudice which exists if there is a reasonable probability that, absent counsel's errors, the result of the proceeding would have been different. A reasonable probability is defined as one that is enough to undermine confidence in the outcome. (*Bunkly v Meacham* 68 F3d 1518 [2d Cir 1995]).

The New York approach, as set forth in *People v Baldi*, 54 NY2d 137 (1981), requires review of counsel's conduct (at the time of the representation), in light of the totality of the evidence, law and circumstances of the particular case to determine whether the representation was meaningful. Unlike the federal standard, a showing of actual prejudice is not required so that even without a reasonable probability of a different outcome, reversal will occur if it shown that the defendant was deprived of fair process. (See *People v Hongrihun* 29 NY3d 284 [2017]). While the New York State Constitution provides greater protection to defendants than the federal standard, as a practical matter, a showing of prejudice is still an important factor, and aggrieved defendants stand a much better chance of succeeding on claims of ineffective assistance where actual prejudice can be shown. (See *People v Caban* 5 NY3d 143 [2005], *People v Stultz*, 2 NY3d 277 [2004]), *People v Ennis* 11 NY3d 403 [2008], *People v Alvarez*, 2019 NY Slip Op. 02383 [3/28/19]). To succeed, however, the defendant must establish that counsel's conduct was devoid of any strategic or other legitimate explanation. That fact that a particular defense strategy or tactic may not have succeeded will generally not be enough to carry the day. (See *People v Benevento*, 91 NY2d 708 [1998]).

While counsel's conduct is viewed in toto, singular, substantial errors may be considered to determine whether the defendant has been deprived of a fair trial. In *People v Hobot*, 84 NY2d 1021 (1995), the defendant who was convicted of raping and sexually abusing his girlfriend's nine-year-old daughter, alleged that he was denied a fair trial because his counsel failed to utilize a medical report of a general practice doctor who examined the victim and noted "intact hymen." (At a CPL 440 hearing, the doctor testified that he did not perform an internal pelvic exam [unlike the People's gynecological expert who found two vaginal tears], but did otherwise observe contusions on the victim's face and body).

In ruling that the defendant failed to meet his burden of demonstrating a deprivation of his right to a fair trial, the court noted that defense counsel got the People's expert to concede that the two small tears were not conclusive evidence of penetration, and their origin could not be pinpointed in time. Counsel also put forth alibi evidence, challenged the victim's motive (to curry favor with her mother),

and argued in summation that the physical evidence was inconsistent with rape. Under the circumstances, the Court held that counsel's failure to use the report (which also documented observations of other injuries supporting the victim's story) did not prejudice the defendant's right to a fair trial.

The following are recent Fourth Department cases in which ineffective assistance of counsel were among the issues raised:

People v Thomas, 169 AD3d 1451 (4th dep't 2019). Defendant challenged his Robbery 2nd degree verdict citing counsel's failure to object to the prosecutor's improper impeachment of himself (regarding his pre-trial silence) and of other witnesses, and to improper prosecution arguments in summation. The court, citing *Baldi supra*, said, "viewing the evidence, law and circumstances of the case in totality at the time of the representation, we conclude that counsel provided meaningful representation."

People v Stendaro, 2019 NY Slip Op. 00793 (2/1/19). Court rejected ineffective assistance claim of defendant, (convicted of possessing sexual performance of a child), based on alleged failure to advise him of mental disease or defect defense where the record showed no indication that the defendant suffered from any such condition under PL 40.15.

People v Freeman, 2019 NY Slip Op. 01037 92/8/19. Court finds that counsel's failure to make a suppression motion did not rise to ineffective assistance where defendant (who was re-sentenced to jail following a VOP), failed to demonstrate the absence of strategic or other legitimate explanation for counsel's conduct (citing *People v Bank*, 129 AD3d 1445 [4th dep't 2015]).

People v. Truitt 2019 NY Slip Op. 01983 (3/15/19). The Court said that to the extent that defendant's challenge to his guilty plea survived the plea and waiver of right to appeal, it lacked merit.

WITH RESPECT TO GUILTY PLEAS, in order to make out a case of ineffective assistance, a defendant must show that counsel's ineffectiveness infected the plea-bargaining process or that the plea was entered on account of counsel's poor performance. (*People v Rausch*, 126 AD3d 1535 [4th dep't 2015]).

People v Spencer, 2019 NY Slip Op. 01998 (3/15/19). The court noted that defendant's claims in connection with his plea (involuntarily made based on counsel's alleged failure to investigate, follow through on discovery and explore potential defenses), were outside the record (and, hence, more suitable to a CPL 440 motion), and as far as the record showed, without merit since he got an advantageous disposition of his controlled substance charges. The same conclusion was reached in *People v Graham*, 2019 Slip Op. 03241 (4/26/19).

People v Bellamy, 2019 NY Slip Op. 02233 (3/22/19). The defendant, convicted of Controlled Substance Possession and Coercion, failed to demonstrate that counsel's conduct infected the plea-bargaining process. (Citing *People v Lugg*, 108 Ad3D 10-74 [4TH dep't 2013]).

In *People v Linder*, 2019 NY Slip Op. 0195 (3/15/19), the defendant who was convicted of CPCS 3rd degree, argued that counsel was ineffective for failing to request a missing witness charge with respect to a CI who set up the alleged drug deal that the defendant and his co-defendant (who testified against him), were driving to when they got pulled over. (A detective testified that the defendant handed something over to the co-defendant/passenger who then stuffed it (drugs) in his rear-end).

The court rejected this argument reasoning that counsel's failure to request the instruction was not lacking in legitimate strategy inasmuch as the People could have, upon such request, moved to re-open their case by calling the CI to the stand. (Citing *People v Parilla* 158 AD2d 556 [2d dep't 1990]). Whether such a request would have been made, let alone granted, is another story. The court also noted that the defendant was acquitted on the only counts about which the CI could have testified.

The defendant also took issue with counsel's failure to cross examine the detective about an alleged discrepancy between his suppression hearing testimony ("I didn't see what the defendant handed to the passenger"), and his trial testimony ("I told the passenger that I saw the defendant hand drugs to him during the V and T stop"). The court found no indication of ineffective assistance for failing to exploit what it described as an illusory argument. (Citing *People v Lewis*, 139 AD3d 571 [1st dep't 2016]).

The court also found that counsel's failure to object to instances of alleged prosecutorial misconduct (references to multiple cell calls made during the traffic stop, and comments in summation about the police not expecting to find drugs in the car), was of no moment because the comments were not so egregious to warrant objection much less deprive the defendant of a fair trial. (Citing *People v Grant*, 160 AD3d 1406 [4th dep't 2008]).

People v Carrasquillo, 2019 NY Slip Op. 01984 (3/15/19). This defendant was convicted of Murder, Assault and Weapon's Possession at a trial in which several witnesses identified him as the person who fired shots from a red Honda at two people, both of whom were hit and one of whom died. There was also a video showing the gun pointed out the car window and a shell casing was found by the vehicle when it was pulled over with the defendant (and others) inside.

On appeal, the defendant argued that counsel was ineffective for failing to call a witness who could have bolstered the purported testimony of the surviving victim that there was a second shooter. The court, citing *People v Gonzalez*, 62 AD3d 1263 (4th dep't 2009), rejected this argument, finding that counsel's forbearance was a matter of sound strategy.

The court also found that the failure to introduce evidence of prior altercations between the back-seat, driver's- side passenger and the deceased victim was more appropriate to a CPL 440 motion.

A similar conclusion (regarding 440) was reached in *People v Withrow*, 2019 NY Slip Op.01975 (3/15/19), where the defendant, who was found guilty of Robbery 2d degree, complained that counsel relied too much on the defendant's judgment rather than her own professional judgment. (Citing *People v McLary*, 162 AD3d 1582 (4th dep't 2018)).

The defendant also argued that he received ineffective assistance based on counsel's inept impeachment of witnesses. The Court noted that while counsel demonstrated some confusion with

impeachment with a prior inconsistent statement, she nevertheless effectively cross examined the victim and a detective about the victim's prior statement to police.

People v Pendergraph, 2019 NY Slip Op. 02212 (3/22/19). Here, the Court held that County Court erred in summarily denying the Grand Larceny defendant's 440 motion (alleging that trial counsel improperly told jurors that he would testify at trial without first discussing the matter with him). While rejecting the defendant's other ineffective assistance claims on direct appeal, the Court remanded the case for a hearing on whether counsel did what defendant claimed (trial counsel admitted to appellate counsel that the defendant never said he would testify), and if so, whether there was some valid reason for doing so. (Citing *People v Washington*, 128 AD3d 1397 [4th dep't 2015]).

People v Harvey, 2019 NY Slip Op. 02250 (3/22/19). In this case, defendant, convicted by verdict of Criminal Possession of a Weapon 2d degree and Tampering with Evidence, alleged ineffective assistance based on counsel's failure to make a motion to suppress a handgun for want of reasonable suspicion. Noting that the officers who responded to a call of a trespasser at a vacant house observed the defendant running from the house holding his waistband in a manner suggesting concealment of a weapon, the Court concluded that counsel was not ineffective for not making a motion that had little or no chance of success. (Citing *People v Caban supra*). The Court observed, "...absent a showing (of no strategic or other legitimate reason for counsel's failure to request a hearing), it is presumed that counsel acted competently and exercised professional judgment in not pursuing (one). (Citing *People v Rivera*, 71 NY2d 705 [1988]).

In *People v Farrington*, 2019 NY Slip Op. 03237 (4/26/19), an inmate assault case in which the victim did not testify, the court held that that the defendant was not deprived of a fair trial by counsel's failure to object to the prosecutor's summation (asking the jury to consider why a prison inmate might not want to testify) because the remarks were deemed to be a fair response to the defense closing argument (which described prison as a "strange environment"). Also unavailing was the defendant's contention that counsel was ineffective for not objecting to the prosecutor's questions in voir dire which sought to assess the jurors' attitudes about certain weaknesses in the People's case. Describing such questioning as a "standard tactic," the Court saw no basis to make an objection that was unlikely to succeed. (Citing *People v Benevento supra*, *People v Stultz supra* and *People v Evans*, 242 AD2d 948 [4th dep't 1997]).

People v Paul, 2019 NY Slip Op. 03240 (4/26/19). The Court rejected Murder defendant's claim of ineffective assistance based on counsel's confusing presentation of an alibi defense which, the court noted, was cleared up on re-direct examination.

People v Hickey, 2019 NY Slip Op. 03165 (4/26/19). The Court rejected the defendant's claim that counsel was ineffective for failing to argue legal insufficiency of the evidence in his T.O.D. motion which, in the Court's view, had little or no chance of success. The Court was also unpersuaded by the

defendant's complaint that counsel did not consult with him as he was being removed from the courtroom.

In *People v Graham*, 2019 NY Slip Op. 03246 (4/26/19), a child sex abuse case, the Court did not find counsel ineffective for declining to press the 7-year-old victim on cross examination about her history of lying, where counsel otherwise elicited reputation testimony (helpful to the defense), from several witnesses. (*People v Pavao* 59 NY2d 282 [2005]). The court also surmised that counsel may have chosen not to risk alienating the jury by going after the child on cross exam, (an arguably sound strategy).

The court also rejected the defendant's claim of ineffective assistance based on counsel's not bringing up an exculpatory DNA report in his cross exam of the detective who didn't mention the report on his direct exam (but conceded that the victim's DNA was not found on any of the defendant's items of clothing that the police had seized from his trailer).

Also, the Court determined that defense counsel, contrary to defendant's claim, was not ineffective for failing to lay a proper foundation for the admissibility of certain sexually suggestive Face Book posts of the victim's mother (to suggest a possible alternative source of the child's knowledge of sexual matters), because the trial court properly disallowed the posts on relevance (rather than foundation) grounds.

In *People v Garrow*, 2019 NY Slip Op. 03238 (4/26/19), The Court, citing *People v Baldi supra* and *People v Lewis*, 140 AD3d 1593 (4th dep't 2016), was unpersuaded by defendant's ineffective assistance claims based on counsel's failure to object to improper arguments by the prosecutor in summation (improper appeal to emotion, improper suggestion of more than one incident of abuse), eliciting improper testimony suggesting another incident (which the court instructed the jury to disregard). The court also rejected defendant's claim based on failure to call an expert (to explain how the defendant's semen could have been transferred to the victim's clothing in the washing machine).

People v Simpson 2019 NY Slip Op. 04538 (6/7/19). The Court rebuffed all of the defendant's ineffective assistance claims in this Manslaughter case including: 1. Failing to seek public funds for a forensic pathologist. (Court said no chance of success. *People v Larkins*, 153 AD3d 1504 [4th dep't 2017]); 2. Failure to preserve legal sufficiency claim. (Not likely to succeed, *People v Graves*, 163 AD3d 16 [4th dept 2018])); 3. Failure to strike a prospective juror (who had a similar background to the defendant's and may well have been sympathetic), *People v Thompson*, 21 NY 3d 555 [2015])); 4. Failure to call an expert in Battered Spouse Syndrome where the doctor's report did not find the defendant to be a battered spouse (and also contained some harmful conclusions); 5. Giving ineffectual opening and closing statement. (No basis for second guessing counsel's strategy and defendant is entitled to a fair trial not a flawless one. *People v Burgos* 259 AD2d 266 [1st dep't 1999]). 6. Failure of counsel to speak on defendant's behalf at sentencing. (Record reflected that counsel spoke with court in chambers and this issue deemed better suited to a CPL 440 motion).

People v Reid, 2019 NY Slip Op. 04565 (6/7/19). The Court found no ineffectiveness in counsel's not moving to preclude audio tapes of a drug transaction (on audibility grounds) which were not so inaudible as to force the jury to speculate about their content. (People v Cleveland, 273 AD2d 787 [4th dep't 2000]). Also, counsel's failure to make "chain of custody" objection was not fatal since chain of custody is not an issue with audio recordings. (People v Ely, 68 NY2d 520 [1986]). As the court observed, "(t)here can be no denial of effective assistance of counsel based on...counsel's failure to make a motion or argument that has little chance of success. (Citing People v Stultz supra).

People v Gibson 2019 Slip Op. 04856 (6/14/19). The defendant, convicted at trial of DWAI, AUO and Unlawful Flight from an Officer, argued that he was denied a fair trial when counsel asked him on direct examination whether he had a valid driver's license on the day of his arrest. Ruling that the defendant failed to show the absence of any strategic or other legitimate explanation for counsel's questioning, (People vs Benevento supra), the Court noted that the trial judge had ruled in limine at the Sandoval hearing that the People would be allowed to cross examine the defendant about his prior AUO conviction. Therefore, asking him about his license status was not without any good explanation.

INEFFECTIVE ASSISTANCE CLAIMS IN APPELLATE ADVOCACY

In People v Alvarez, 2019 NY Slip Op. 02383 (3/28/19), In 1996, the defendant, an alleged enforcer in a drug operation, was convicted of Murder, Attempted Murder, Conspiracy, Assault and Weapons Possession in connection with a drive-by shooting that killed one teenager and severely injured another. The defendant was sentenced to 66 and 2/3 to life in prison. The Appellate Division (AD) affirmed the conviction in 2000 (27 AD3d 679 [1st dep't 2000]). Thereafter, in 2017, the defendant sought a vacatur of the AD's order of affirmance by writ of coram nobis alleging that appellate counsel was constitutionally ineffective for: 1. not communicating with him during the pendency of his appeal; 2. submitting a poorly structured brief; 3. failing to contest the sentence as unduly harsh and excessive and 4. Neglecting to file leave to appeal to the Court of Appeals. The AD denied the defendant's petition for writ of coram nobis. The Court of Appeals granted leave in 2018 [30 NY 3d 113]).

The Court observed that appellate advocacy is meaningful if it reflects a competent grasp of the facts, law and appellate procedure supported by appropriate authority and argument. (Citing People v Stultz supra, 2 NY3d at 285 and People v Feliciano, 17 NY3d 21 [2011]). The Court further noted counsel is not required to brief or argue every issue that may have merit, but rather, has broad leeway to decide which issues to advance and in what order. (Citing People v Ramchair, 8 NY3d 313 [2007]). Moreover, as with trial advocacy, appellate counsel's work should not be second-guessed with hindsight recognizing that the accused is entitled to a fair proceeding, not a perfect one. (Citing People v Turner, 5 NY3d 476 [2005]).

Addressing the defendant's arguments, the Court found that the defendant offered no evidence beyond his word of counsel's alleged failure to communicate with him. As for counsel's brief, the Court observed

that while it was “somewhat terse and not a model to be emulated,” it revealed counsel’s grasp of the facts and law. The Court did not find fatal ineffectiveness in counsel’s failure to challenge the sentence given the “heinous nature of the crimes,” the defendant’s “lamentable behavior,” and complete lack of remorse. (Citing *People v Caban supra* and *People v Stoltz supra*). As for counsel’s failure to file a criminal leave application to the Court of Appeals, the Court noted that such an omission in and of itself does not amount to ineffective assistance on state or federal grounds. (Citing *People v Grimes*, 32 NY 3d 302, [2018]). Nor did the defendant identify any issue that should have been raised by criminal leave application. Moreover, the unraised challenge to the severity of the sentence would not have been reviewable by the Court of Appeals. (*People v Thompson*, 60 NY2d 513 [1983]).

In contrast, see *People v Gonzalez*, 47 NY 2d 606 (1979), where counsel’s affirmation that “there are no points to be raised on appeal” then listing four headings requested by the defendant with no argument offered in support constituted ineffective assistance. And, in *People v Vasquez*, 70 NY2d 14 (1987), counsel’s disparagement of the defendant’s requested arguments constituted ineffective assistance by undermining the defendant’s ability to credibly assert these arguments in a pro se brief.

Counsel also risks being found ineffective by taking adverse positions to the client in the context of pre-trial and post-trial proceedings. In *People v Armistead*, 2015 NY Slip Op. 10956 (2d dep’t, 3/1/15), the defendant brought a pro se motion to vacate his plea that he claimed was involuntarily made. Counsel told the court that it was voluntarily. Under the circumstances, since counsel had now become his client’s adversary, the court should have appointed new counsel before resolving the motion. The court noted that while a lawyer need not support a client’s pro se motion to withdraw a plea, he cannot become a witness against him, affirmatively undermine his position or otherwise take a position that is adverse to his interests.

Similarly, in *People v Prater*, 2015 NY Slip Op. 02806 (3d dep’t 4/2/15), when asked his view of his client’s motion to withdraw his plea, defense counsel said, “in my opinion, (the court) thoroughly explained everything to him...the defendant had no questions about the plea and there is no way I can see that he pleaded without knowing what he was pleading to.” This created a conflict warranting new counsel.

OTHER INEFFECTIVE ASSISTANCE CASES WORTH MENTIONING

In *People v Wilson* 83 NYSupp3d 705 (3d dep’t 2018), a Burglary/Rape case, the Court agreed with the defendant that counsel was ineffective for not requesting a Frye hearing to determine the general scientific acceptance of the TrueAllele Casework System, a computer program used by a private company to test for DNA ordinarily disregarded by forensic analysts. (See *People v Wesley*, 83NY2d 417 [1994]). In this case, this system identified the defendant’s DNA inside a pair of gloves found near the apartment of one of the victims. The State Police methods of testing for DNA did not allow analysts

there to reach a conclusion, so they recommended that the evidence be sent to a private company, Cybergene, for more detailed analysis. The TrueAllele system analysis determined that a match between the DNA from the gloves and of the defendant was 31.3 million times more likely than a coincidental match to an unrelated black person.

The court noted that at the time of the pre-trial hearings in the case, there were no reported court decisions (or known Frye hearings conducted), attesting to the reliability of this system of DNA analysis and concluded that requesting a Frye hearing would not necessarily have been pointless or doomed to fail. (Citing *People v Carnevale* 101 AD3d 1380 [3d dep't 2012]). And, absent any strategic or other legitimate explanation for counsel's failure to pursue a Frye hearing, the court found this singular omission, (despite counsel's otherwise capable representation), to constitute ineffective assistance requiring remand to the trial court for a hearing. (Citing *People v Zeh*, 144 AD3d 1395 [3d dep't 2016]).

People v Williams, 2017 NY Slip Op. 02588 [4/4/17]. In this case, the court rejected defendant's claim that he was denied a fair trial by the prosecution's use of a Power Point presentation which contained misleading captions ("photo of victim's brother's vehicle" when it wasn't definitively identified as such; "victim's brother sees defendant," despite lack of positive ID). He also complained of counsel's failure to object to improper prosecution arguments in summation.

Noting the general acceptability of Power Points as a visual supplement to argument, the Court indicated that if something is proper to say, it's also permissible to show graphically as long as it's done fairly and accurately. In this case, while the captions were misleading, the court struck the offending annotations and instructed the jury to disregard them. (Citing *People v Galloway*, 54 NY2d 396 [1981]). The court also gave several forceful cautionary instructions and the defendant declined any further remedy. The court held that the prosecutor's remarks were not so egregious that counsel's failure to object rendered his overall representation constitutionally defective. (Citing *People v Wrag*, 26 NY3d 403 [2016]).

With respect to summations, the court in *Williams* observed that "(a)ttorneys are entitled to broad latitude in commenting on pertinent matters of fact...so long as they limit themselves to relevant matters within the four corners of evidence... The (prosecutor) may not refer to matters not in evidence or (ask) the jury to draw conclusions which are not fairly inferable from the evidence. Above all, (he/she) shall not seek to lead the jury away from the issues by drawing irrelevant and unfair conclusions which have a decided tendency to prejudice the jury against the defendant...In determining whether the defendant has been deprived of a fair trial by improper comments (in summation), it is of vital significance whether the court gave standing to (such statements)...as legitimate argument or whether it took proper corrective action such as a curative instruction." (Citing *People v Broady*, 5 NY2d 500 [1959]).

People v Gross, 2016 NY Slip Op. 01204 (2/18/16). In this CPL 440 case, the defendant, convicted of Course of Sexual Conduct Against a Child, alleged that his counsel was ineffective for not opposing witness testimony regarding the victim's reports of sex abuse (or requesting a limiting instruction), and failing to call a medical expert to testify with respect to the significance of no physical evidence vis-

à-vis claimed sexual abuse. He also complained that counsel should have objected to testimony of the People's expert that the absence of physical injury does not necessarily mean that the child was not raped.

In a 3-2 decision, the Court found that the defendant did not sustain his burden of showing ineffective assistance because he failed to submit an affidavit from an expert supporting his claim that the lack of physical evidence could indicate the lack of sexual assault. Also, the testimony regarding the child's complaints of abuse were admitted not to prove the fact of the alleged abuse but to explain the nature and background of the investigation and how it led to the defendant. (It should be noted that counsel did object to witnesses testifying to the details of the child's complaints and to her statements to a doctor which the court admitted as being pertinent to diagnosis and treatment). Ultimately, the court found that counsel's handling of the case was not so deficient as to deprive the defendant of a fair trial.

While the relatively low percentage of successful claims of ineffective assistance may rightfully be a source of comfort to criminal defense attorneys, it should not be taken as an invitation to anything less than counsel's best efforts in every aspect of client representation from arraignment (if not before), through final case disposition. Whether it's one serious faux pas or several small missteps taken together, counsel must be on his/her best game at all times so that clients are afforded meaningful representation under both the State and Federal Constitutional standards, and legitimate ineffective assistance complaints are kept to a minimum.