

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of August, two thousand ten.

- - - - -X
RICHARD ROSARIO,

Petitioner-Appellant,

- v.-

08-5521-pr

SUPT. ROBERT ERCOLE, Green Haven
Correctional Facility, ATTORNEY
GENERAL ELLIOT SPITZER,

Respondents-Appellees.

- - - - -X

ORDER

Following disposition of this appeal on April 12, 2010, petitioner-appellant Richard Rosario filed a petition for rehearing and rehearing in banc. Upon consideration by the panel that decided the appeal, the petition for rehearing is **DENIED**. An active judge requested a poll on whether to rehear the case in banc. A poll having been conducted and there being no majority favoring in banc review, rehearing

1 in banc is hereby **DENIED**.

2 Judge Wesley concurs in an opinion joined by Judges
3 Cabranes, Raggi, Hall, and Livingston; Judge Katzmann
4 concurs in a separate opinion; Chief Judge Jacobs dissents
5 in an opinion joined by Judges Pooler, Lynch, and Chin; and
6 Judge Pooler dissents in a separate opinion.

7 FOR THE COURT:
8 CATHERINE O'HAGAN WOLFE, CLERK
9
10
11

1 RICHARD C. WESLEY, Circuit Judge, with whom Judge JOSÉ A.
2 CABRANES, Judge REENA RAGGI, Judge PETER W. HALL, and Judge
3 DEBRA ANN LIVINGSTON join, concurring in the denial of
4 rehearing *en banc*.

5
6 We stand by the panel's decision in this case and
7 support the Court's decision not to rehear this case *en*
8 *banc*.

9 As the lead dissent from the denial of rehearing *en*
10 *banc* concedes, the New York state standard is more
11 protective of defendants than the federal standard. The New
12 York Court of Appeals has expressed this sentiment in
13 decision after decision. *See, e.g., People v. Ozuna*, 7
14 N.Y.3d 913, 915 (2006); *People v. Turner*, 5 N.Y.3d 476, 480
15 (2005) (collecting cases). Yet because the state standard
16 could be misapplied to diminish the prejudicial effect of a
17 single error, members of this Court wish to encroach on the
18 province of the state to demand that it reframe its standard
19 for identifying ineffective assistance of counsel to mimic
20 the less protective federal model. I believe such a drastic
21 measure is unnecessary as a matter of law and unwarranted as
22 a matter of comity. As the court's opinion in this case
23 holds, an attorney error that prejudiced a defendant under
24 the federal standard would necessarily affect the fairness
25 of the process as a whole under the state standard. Thus,

1 to the extent that any state court failed to afford relief
2 for prejudicial error, that oversight would be contrary to
3 both the federal and state standard, and could be dealt with
4 on case by case review.

5 Certainly the failure that the dissent fears did not
6 occur in this case. As detailed in the court's opinion, in
7 his assessment of the alibi witnesses at the hearing
8 pursuant to New York Criminal Procedure Law 440.10(1),
9 Justice Davidowitz looked specifically at the possible
10 prejudicial effects of the very error at issue here. He did
11 not minimize the mistake, but instead concluded that the
12 omission of the additional alibi witnesses could not support
13 an inference that, but for that omission, the outcome would
14 have been different. The dissent focuses on but one passage
15 from the state court opinion, arguing that Justice
16 Davidowitz "shifted the focus" away from the error to the
17 performance of counsel overall. The dissent fails to
18 recount the full extent of the state court inquiry. As
19 stated in the court's opinion:

20 The [state] court noted that the two alibi
21 witnesses that were presented at trial "had the
22 best reason for remembering why defendant was
23 present in Florida on June 19[,] 1996 - the birth
24 of their son - an event that was more relevant for
25 them than the events relied upon by the other

1 witnesses." He expressed skepticism as to the
2 probative value of the witnesses presented at the
3 hearing, calling the evidence "in some cases
4 questionable and in others [raising] issues which
5 could have created questions for a deliberating
6 jury. For example, two of the witnesses – Lisette
7 Rivero[] and Denise Hernandez – could not say
8 where the defendant was on June 19 and 20." The
9 judge "studied closely" the alibi witnesses
10 presented at the hearing, and concluded they were
11 "for the most part, questionable and certainly not
12 as persuasive as the two witnesses who did
13 testify, and were rejected by the jury" and the
14 testimony they would have provided was "largely"
15 cumulative. In spite of the failure to call the
16 alibi witnesses, Justice Davidowitz determined
17 "this jury verdict was *unimpeached* and amply
18 supported by the evidence." (internal quotation
19 marks omitted and emphasis added).

20
21 *Rosario v. Ercole*, 601 F.3d 118, 127 (2d Cir. 2010).

22 That said, I agree with the dissent that New York state
23 courts would be wise to engage in separate assessments of
24 counsel's performance under both the federal and the state
25 standards. See, e.g., *People v. McNeill*, 899 N.Y.S.2d 840,
26 841 (1st Dep't 2010). Such an exercise would ensure that
27 the prejudicial effect of each error is evaluated with
28 regard to outcome, and would guarantee that defendants get
29 the quality of overall representation guaranteed under New
30 York state law. This vigilance will also alleviate the risk
31 that the federal courts will force state courts to abandon
32 New York's generous standard for one akin to the more
33 restrictive federal model.

1 KATZMANN, *Circuit Judge*, concurring in the denial of rehearing *in banc*.

2 The dissenters have identified possible challenges posed by New York’s constitutional
3 standard for ineffective assistance of counsel claims. As they note, the New York standard could
4 leave room for New York courts to find a lawyer effective by focusing on the “fairness of the
5 process as a whole,” *People v. Benevento*, 91 N.Y.2d 708, 714 (1998), rather than on whether
6 “there is a reasonable probability that . . . the result of the proceeding would have been different”
7 absent defense counsel’s mistakes, *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See*
8 *Henry v. Poole*, 409 F.3d 48, 70-72 (2d Cir. 2005) (“paus[ing] to question whether the New York
9 standard is not contrary to *Strickland*”).

10 As both Chief Judge Jacobs’ dissent and Judge Wesley’s concurrence observe, however,
11 such difficulties can be avoided by separate consideration of counsel’s performance under the
12 federal standard when a federal challenge is presented in the New York courts. For the reasons
13 set forth in the panel’s decision, *see Rosario v. Ercole*, 601 F.3d 118, 127 (2d Cir. 2010), I am
14 satisfied that the trial court here engaged in such an inquiry, albeit “not delivered in *Strickland*
15 terminology,” *id.* (quoting *Rosario v. Ercole*, 582 F. Supp. 2d 541, 553 (S.D.N.Y. 2008)).
16 Accordingly, this case does not require us to review New York’s standard. Thus, I concur in the
17 decision of the Court to deny rehearing *in banc*.

1 DENNIS JACOBS, Chief Judge, joined by ROSEMARY S. POOLER,
2 GERARD E. LYNCH, and DENNY CHIN, Circuit Judges, dissenting
3 from the denial of rehearing in banc.
4

5 I agree with the panel majority that the New York
6 standard for ineffective assistance of counsel is more
7 lenient to defendants generally, lacking as it does a “but
8 for” prejudice requirement. See People v. Turner, 5 N.Y.3d
9 476, 480 (2005). But it is nevertheless contrary to the
10 standard set forth in Strickland v. Washington, 466 U.S. 668
11 (1984). I respectfully dissent from the order denying in
12 banc review because this defect likely will give rise to
13 more cases that will bedevil the district courts, which are
14 left to sort out case-by-case a problem that is systemic.¹
15

16 **I**

17 Under federal law, a lawyer is ineffective when conduct
18 that falls “below an objective standard of reasonableness,”
19 Strickland, 466 U.S. at 688, creates “a reasonable
20 probability that . . . the result of the proceeding would
21 have been different,” id. at 694. “[U]nder New York law the

¹ Senior Circuit Judge Chester J. Straub, the author of the panel’s minority opinion concurring in part and dissenting in part, was not authorized to participate in the in banc poll, but has endorsed the views expressed in this opinion.

1 focus of the inquiry is ultimately whether the error
2 affected the 'fairness of the process as a whole.'" Rosario
3 v. Ercole, 601 F.3d 118, 124 (2d Cir. 2010) (quoting People
4 v. Benevento, 91 N.Y.2d 708, 714 (1998)). The test
5 articulated by the New York Court of Appeals thus allows a
6 lawyer whose overall performance is adequate to be deemed
7 constitutionally effective notwithstanding an isolated lapse
8 that calls the result into question--the very scenario that
9 triggers relief under Strickland. The New York standard is
10 fairly unambiguous:

11 Two of our decisions have rejected ineffective
12 assistance claims despite *significant mistakes* by
13 defense counsel (People v. Hobot, 84 N.Y.2d 1021
14 (1995); People v. Flores, 84 N.Y.2d 184 (1994)).
15 Those cases hold, and we reaffirm today, that such
16 errors as overlooking a useful piece of evidence
17 (Hobot), or failing to take maximum advantage of a
18 Rosario violation (Flores), do not in themselves
19 render counsel constitutionally ineffective where
20 his or her *overall performance is adequate*. But
21 neither Hobot nor Flores involved the failure to
22 raise a defense as *clear-cut and completely*
23 *dispositive* as a statute of limitations. Such a
24 failure, in the absence of a reasonable
25 explanation for it, is hard to reconcile with a
26 defendant's constitutional right to the effective
27 assistance of counsel.

28
29 Turner, 5 N.Y.3d at 480-81 (emphases added). Thus the New
30 York test averages out the lawyer's performance while
31 Strickland focuses on any serious error and its
32 consequences.

1 In the passage quoted above, the Turner court relies on
2 Flores. That is dubious precedent. In Flores, a case
3 involving a single serious error, the New York Court of
4 Appeals relied on the "totality of representation" to decide
5 that defense counsel's waiver of a Rosario claim did not
6 constitute ineffectiveness. People v. Flores, 84 N.Y.2d
7 184, 187 (1994). Years later, this Court granted habeas
8 relief, finding "at least a reasonable probability . . .
9 that had that Rosario claim been pressed, Flores would have
10 been granted a new trial by the trial court or on appeal."
11 Flores v. Demskie, 215 F.3d 293, 305 (2d Cir. 2000).

12 Because the New York standard allows the gravity of
13 individual errors to be discounted indulgently by a broader
14 view of counsel's overall performance, it is contrary to
15 Strickland.

16

17

II

18 The present case illustrates the constitutional defect
19 in the New York standard. Rosario's pre-trial and trial
20 counsel admitted an uncommonly bad mistake in believing that
21 the state court had denied an application for funds to send
22 an investigator to find and interview about a dozen alibi
23 witnesses who would swear that the defendant was in Florida

1 when the charged crime was committed in New York. This
2 failure was not a misfire of strategy or tactics; it was
3 conceded error. In denying Rosario's collateral challenge,
4 the Supreme Court of the State of New York acknowledged as
5 much, but then shifted the focus:

6 The best and most reasonable explanation, then, is
7 that there was a misunderstanding or mistake which
8 persisted through the case and which the parties
9 simply cannot explain. But it was not deliberate.
10 And that does not alter the fact that both
11 attorneys represented defendant skillfully, and
12 with integrity and in accordance with the
13 standards of "meaningful representation" defined
14 by our appellate courts.

15
16 It is this shift--from the specific mistake to the broader
17 performance--that concerns me and should concern the entire
18 Court.

19

20 **III**

21

22 I recognize that some colleagues may not consider this
23 case an ideal vehicle for deciding the issue, in view of the
24 state court's alternative ruling that "an alibi defense was
25 presented through the two witnesses who had the best reason
26 for remembering why" Rosario was elsewhere when the crime
27 was committed, and that the prospective additional alibi
28 witnesses "were, for the most part, questionable and
29 certainly not as persuasive as the two witnesses who did
30 testify."

1 The panel majority seizes on this alternative ground to
2 assert that the state court “considered the prejudicial
3 effect of the errors, and concluded that the outcome of the
4 trial would not have been different but for those errors.”
5 Rosario, 601 F.3d at 128.

6 The state court’s findings of fact may bear on whether
7 the state court unreasonably applied the correct federal
8 standard, but they do not obviate the need to start with the
9 correct standard; a finding on a mixed question of law and
10 fact (such as prejudice) is suspect (at least) if it is
11 guided by a defective understanding of the law. Moreover,
12 although the state court conducted a hearing that included
13 testimony from seven prospective alibi witnesses, I am
14 unimpressed by the finding that they were “for the most
15 part, questionable,” and that the two who testified at trial
16 were the best of the lot. First, if a witness is without
17 flaw, I tend to suspect perjury; second, corroboration
18 matters. As the panel dissent forcefully explains, Rosario
19 was seriously prejudiced by the absence of more alibi
20 witnesses. Rosario, 601 F.3d at 131-37, 140-42 (Straub, J.,
21 dissenting).

1 IV

2 The full Court took an in banc poll in this case and
3 decided not to revisit the panel's ruling. But this should
4 not be construed as an imprimatur.²

5 I acknowledge that in most instances the state standard
6 is more solicitous of the Sixth Amendment right to counsel
7 than ours, and I respect the measures taken by the New York
8 courts to administer cases in a way that seeks to
9 accommodate a federal standard that is not congruent. That
10 said, members of this Court entertain serious disquiet that
11 in the courts of New York the gravity of individual mistakes
12 may be submerged in an overall assessment of effectiveness,
13 in a way that violates the federal Constitution.

14 Unneeded conflict can be avoided by separate
15 consideration of counsel's performance under the Strickland

² At different times, this Court has been of different minds on the question. Some opinions have said (albeit in dicta or in following binding precedent) that the New York test is not contrary to Strickland. See Eze v. Senkowski, 321 F.3d 110, 124 (2d Cir. 2003); Loliscio v. Goord, 263 F.3d 178, 192-93 (2d Cir. 2001); Lindstadt v. Keane, 239 F.3d 191, 198 (2d Cir. 2001). A later panel voiced doubt. See Henry v. Poole, 409 F.3d 48, 70-71 (2d Cir. 2005) (pausing "to question whether the New York standard is not contrary to Strickland," but granting habeas relief on the unreasonable application ground).

1 standard in the New York courts when a federal challenge is
2 presented. No doubt, there are other ways to the same end.
3 But without some further vigilance in the state courts, the
4 issue will be presented to us one day in a case in which
5 fact-findings do not blur focus on the constitutional
6 question, and an in banc panel of this Court may be convened
7 to deal with it.

POOLER, *J.*, dissenting in the denial of rehearing *en banc*:

I fully join Chief Judge Jacobs' dissent from the denial of rehearing *en banc*. I write separately only to further highlight the injustice this court's denial permits. It is probably correct that *generally* the New York state ineffective assistance standard is more lenient towards defendants than the federal standard. Rosario, however, I am sure would disagree. The state standard can act to deny relief despite an egregious error from counsel so long as counsel provides an overall meaningful representation. This is contrary to *Strickland*. See *Strickland v. Washington*, 466 U.S. 668 (1984). Far from being a theoretical problem as the concurrence suggests, this seems to be exactly what happened in Rosario's case. All three members of the *Rosario* panel agreed that defense counsels' performance was probably ineffective under *Strickland* even though it was not ineffective under the state standard. *Rosario v. Ercole*, 601 F.3d 118, 126 (2d Cir. 2010); *id.* at 129 (Straub, *J.*, dissenting).

At least we all can agree that the New York state courts would be wise to evaluate counsels' performances separately under the federal and the state standards. Doing so will likely prevent future defendants from being penalized by a lacuna in a state standard that we have upheld because it supposedly works to their benefit.