APL 2023-00055

Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

- against -

COREY DUNTON,

Defendant-Respondent.

Brief of Amici Curiae
The Center for Appellate Litigation
In Support of Defendant-Respondent

Jenay Nurse Guilford
Center for Appellate Litigation
120 Wall Street, 28th Floor
New York, NY 10005
(212) 577-2523

BRYAN S. FURST
ROBERT HUNTER
Of Counsel

FEBRUARY 2, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statement of Interest

The Center for Appellate Litigation ("CAL") is a non-profit, public-defense firm. CAL represents indigent defendants appealing their convictions to the First Department and this Court. This appeal involves important questions of ineffective-assistance-of-counsel ("IAC") law. CAL has a direct interest in this appeal, which implicates the rights of the clients we represent every day in appellate and post-conviction proceedings. CAL frequently litigates ineffective-assistance claims before this Court, including most recently in *People v. Debellis*, 40 N.Y.3d 431, 2023 WL 8039658 (Nov. 21, 2023). *See also*, *e.g.*, *People v. Nesbitt*, 20 N.Y.3d 1080 (2013). CAL also frequently litigates ineffective-assistance claims in the intermediate-appellate and trial courts. Further, as an appellate provider, CAL is familiar with the prevailing professional norms governing appellate practice, which are at issue here.

Statement of the Case

Following a jury trial, nineteen-year-old Corey Dunton was convicted of attempted murder and six related counts. Corey interrupted the jurors' announcement of the verdict as they were preparing to read the seventh count, reckless endangerment. After a brief exchange — in which Corey was never warned that he could be removed — the judge ordered Corey to leave the courtroom. Corey was not present for announcement of the verdict on the reckless endangerment count, or for the

subsequent polling of the jury. Appendix 308-311 ("A"). He was sentenced to an aggregate term of twenty-five years in prison. A328.

Corey's attorney raised four claims on appeal. However, appellate counsel did not argue that Corey's removal without warning violated his right to be present for all material stages of trial. The Appellate Division affirmed Corey's conviction on appeal. *People v. Dunton*, 184 A.D.3d 473 (1st Dep't 2020). Corey sought leave to appeal, which this Court denied on September 30, 2020. *See People v. Dunton*, 35 N.Y.3d 1093 (2020).

Corey subsequently filed a petition for a writ of error coram nobis, arguing that his appellate attorney was ineffective on three bases: (1) counsel failed to raise any argument regarding Corey's removal from the courtroom during the verdict; (2) counsel did not argue that the sentencing court erred in failing to consider youthful offender treatment; and (3) counsel did not argue that Corey's sentence was excessive. In support, Corey included an affirmation from a supervising attorney at the Legal Aid Society, who had supervised pro bono counsel on his direct appeal. The attorney stated that he had "reviewed the appellate record and made the ultimate decisions about the litigation strategy and about the claims to be pursued on appeal." However, he "did not consider raising a challenge to Mr. Dunton's removal from the courtroom during the verdict without sufficient warning." A143 ¶ 5.

Taking a rare step,[1] the Appellate Division granted Corey's petition and vacated its earlier order. *See People v. Dunton*, 2022 WL 2542106 (1st Dep't July 5, 2022). It held that the trial court violated Corey's Sixth Amendment and statutory rights by removing him without adequate warning, and ordered reversal and remand for a new trial. *Id.* The government sought leave to appeal from this order, which this Court granted.

Argument

I. Appellate counsel's performance is deficient where, due to an admitted oversight, counsel omits an argument that, at the time of the appeal, could not reasonably be deemed "so weak as to be not worth raising."

This case presents the opportunity for the Court to clarify the legal standards governing ineffective-assistance claims. The government's argument that appellate counsel was not ineffective would, if accepted, distort the test for establishing IAC under the state and federal constitutions in two ways.

First, the government incorrectly argues that when an attorney's "single error" is at issue, the governing standard is *not* the two-pronged test that governs IAC claims — that is, was the error unreasonable and did it prejudice the defense. *See Strickland v. Washington*, 466 U.S. 668, 693-94 (1984). Instead, under the government's quantity-based approach, where counsel omits "one" argument on appeal, the defendant cannot

[1] Based on a Westlaw review, the Appellate Division First Department has granted fewer than ten petitions alleging ineffective assistance of appellate counsel in the last three decades, while denying hundreds.

secure relief unless the omitted appellate claim is "clear cut" and "dispositive." Second, the government urges this Court to ignore appellate counsel's affidavit setting forth the *actual* basis for his decisions — mere oversight — and instead rely on speculative, theoretical bases for those decisions that are contrary to the record. *Compare People v. Turner*, 5 N.Y.3d 476, 484 (2005) (rejecting this hypothetical approach).

We respectfully request that the Court clarify the standards governing IAC claims to prevent the grave risk that lower courts will apply standards that violate both the state and federal constitutions.

a. Legal Background

Under the Sixth Amendment, trial or appellate counsel is ineffective when: (1) counsel's performance is deficient, that is, counsel commits an unreasonable error that is inconsistent with prevailing professional norms and not backed by an objectively reasonable strategy; and (2) that error works prejudice, that is, there is a "reasonable probability" that, absent that omission, the result of the proceeding would have been different. *Smith v. Murray*, 477 U.S. 527, 535-36 (1986); *Strickland v. Washington*, 466 U.S. 668, 686-94 (1984); *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (to show prejudice under *Strickland*, "a defendant must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' According to *Strickland,* '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.'") (quoting 466 U.S. at 693-94)).

The inquiry focuses on the "identified acts or omissions" of counsel. *Strickland*, 466 U.S. at 690-91. Conduct beyond those acts or omissions can help explain why the identified acts or omissions were or were not deficient performance: For example, the decision to raise one claim might shed light on the reasonableness of omitting another. *See Kimmelman v. Morrison*, 477 U.S. 365, 385-86 (1986). But good performance in other contexts cannot offset a prejudicial error on the theory that, on balance, counsel's otherwise competent performance rendered the trial "fair." *See id.*; *People v. Harris*, 26 N.Y.3d 321, 327-28 (2013); *Williams v. Taylor*, 529 U.S. 362 (2000) (a state court unreasonably applies *Strickland* by declining to assess the reasonable-probability question and instead focusing on the fairness of the trial).

This Court has held that New York's deficient-performance standard is the same as the federal standard. *Turner*, 5 N.Y.3d at 480-81. But this Court has rejected the federal outcome-oriented prejudice test under the state constitution. *People v. Stultz*, 2 N.Y.3d 277, 283-84 (2004). Thus, even if the defendant cannot satisfy the federal reasonable probability standard, he can still secure relief if he can show a breakdown in the trial's fairness and the absence of "meaningful representation." *Id.*; *Debellis*, 2023 WL 8039658, at *4.

New York's more lenient prejudice analysis is a natural outgrowth of its holistic analysis of counsel's performance. By focusing on the "totality" of the representation, New York's standard provides a safety valve for defendants where an attorney commits a serious error implicating the integrity of the proceedings, but the error does not satisfy

Strickland's "reasonable probability" standard. *See, e.g.*, *Debellis*, 2023 WL 8039658, at *4 ("Because counsel failed to provide meaningful assistance [under the "fair trial" standard], it does not matter whether Mr. Debellis can now show a reasonable probability of a different outcome."); *Stultz*, 2 N.Y.3d at 284 n.12 ("Of course, [this Court's state-constitutional jurisprudence] did not create a state standard of ineffectiveness more difficult to prove than required under the Federal Constitution.").

To be sure, there may be overlap between the factors bearing on the deficient-performance inquiry and the *state*-prejudice standard, which focuses on the fairness of the proceeding and meaningful representation. The egregiousness of the error and the reasons for the error — squarely relevant to the deficient-performance question — are also relevant to the state-prejudice assessment. Suppose, for instance, an appellate lawyer swore that the reason he did not raise three claims was because he "did not like his client nor believe his client was innocent." That's clearly deficient performance because no reasonable attorney omits appellate claims for such reasons. Yet that attorney's omissions may not satisfy *Strickland*'s prejudice standard if the omitted arguments would not have raised a reasonable probability of a different outcome. That defendant, however, *would* likely satisfy the state prejudice standard because the reason for counsel's omissions — hostility to his client and a belief in his guilt — raised grave doubts about the integrity of the process and whether the defendant was "deprived of a fair [appeal]." *People v. Caban*, 5 N.Y.3d 143, 156 (2005).

The state "totality" analysis, however, cannot be used against a defendant to excuse an attorney's unreasonable and prejudicial error just because the attorney seemed adequate in other respects. *See Stultz*, 2 N.Y.3d at 284 n.12; *Harris*, 26 N.Y.3d at 327 (noting that counsel's error, which was prejudicial under *Strickland*'s reasonable probability test, "should not be subsumed within the 'totality' of the representation for purposes of determining the availability of relief for ineffective assistance"). To hold otherwise, this Court and the Second Circuit have found, would create a perverse rule where an unreasonable and prejudicial error is "shielded from address under the ineffective assistance rubric by the competent balance of an attorney's representational effort." *Harris*, 26 N.Y.3d at 327; *accord Debellis*, 2023 WL 8039658, at *4 ("[W]e reject the suggestion that our standard of meaningful representation 'viewed in totality' allows us to justify ineffective performance on a core issue at trial via effective performance on ancillary pretrial issues[.]") (quoting *People v. Benevento*, 91 N.Y.2d 708, 712 (1998)); *Rosario v. Ercole*, 601 F.3d 118, 124-26 (2d Cir. 2010) (discussing the "danger that some courts might misunderstand the New York standard and look past a prejudicial error as long as counsel conducted himself in a way that bespoke of general competency throughout the trial. That would produce an absurd result inconsistent with New York constitutional jurisprudence and the mandates of *Strickland*.").

b. Appellate counsel's performance is deficient if counsel omits a meritorious argument that a reasonable lawyer could not have believed was "so weak as to be not worth raising" and there are no countervailing strategic concerns in play.

Although this Court intended the state standard to provide *more* protection to defendants, New York's "focus" on "the fairness of the proceedings as a whole," *Stultz*, 2 N.Y.3d at 284, has caused some analytical confusion in so-called "single error" cases. This confusion stems from language in *People v. Turner*, which held that an attorney's single error — his "failure to raise a defense as clear-cut and completely dispositive as a statute of limitations" — constituted deficient performance. 5 N.Y.3d at 481.

Seizing on *Turner*'s language, the government argues that, because this case also presents a claim of single error,[2] counsel's performance can only be deemed "deficient" under the first prong of the IAC analysis if the omitted claim was "clear-cut" (Appellant's Brief ["AB"] at 2) (quoting *People v. McGee*, 20 N.Y.3d 513, 518 (2013)). The government defines the "clear cut" standard as requiring the overlooked claim to be "patently obvious" and based on "squarely applicable precedent." Appellant's Reply Brief ["ARB"] at 2-3. Thus, under the government's position, even if appellate counsel's omission was objectively unreasonable and satisfied the "reasonable probability"

[2] As noted in Defendant-Respondent's brief, Corey's original coram nobis submission raised three grounds on which counsel was ineffective. It was only because the Appellate Division declined to reach the second two claims that Corey raises a single issue before this Court. (Defendant-Respondent's Brief ["DRB"] at 23 n.5).

prejudice test, *Strickland*, 466 U.S. at 686-94, the defendant would still lose on deficient-performance grounds unless he can show that the single error was "clear cut and dispositive." The Court should reject that unconstitutional approach.

* * *

As a starting point, the government appears to concede that a defendant need not show that an omitted appellate argument was "clear cut" to show *prejudice* under the state or federal constitutions — instead, in the government's view, the "clear cut" question only bears on the deficient-performance question. ARB 5. That concession is demanded by precedent, which does not require that an appellate argument for reversal be "clear cut" for its omission to be prejudicial. Instead, under the federal standard, the defendant need only show a "reasonable probability" of a different outcome — a standard that nullifies any suggestion that the argument must be a clear-cut winner. *Strickland*, 466 U.S. at 693-94. Similarly, this Court has repeatedly found prejudice under the state standard even where the unreasonably omitted argument or defense was not a clear cut winner. *See, e.g.*, *Debellis*, 2023 WL 8039658, at *4.

The government also incorrectly presses that omission of a "single" appellate claim is only deficient performance under state and federal standards if the argument is "clear cut." This quantity-based formalism is illogical and unworkable. The theory that the substantive ineffective-assistance standard somehow changes based on the number of errors — that is, a "single error" claim is subject to a heightened ineffective-assistance standard compared to a "multiple error" claim — is arbitrary and illogical.

The Supreme Court has never hinted at such a vague approach; instead, it has simply applied *Strickland*'s objective-reasonableness standard to single-error cases. *See Hinton v. Alabama*, 571 U.S. 263, 272, 274-75 (2014) (per curiam) (analyzing attorney's error, which was "the only inadequate assistance of counsel here," under the deficient performance standard); *Rompilla v. Beard*, 545 U.S. 374, 380, 383 (2005) (counsel was ineffective under *Strickland*'s deficient performance standard for the single error of failing to examine the court file from Petitioner's prior conviction). And while it may be more difficult to show that a single error (as opposed to many) undermined confidence in the proceeding's outcome, *Strickland*, 466 U.S. at 693-94, it does not follow that IAC standards substantively change based on an arbitrary "counting" of the number of errors at issue.

Second, in arguing that appellate counsel's performance is deficient in a single-error case only when such error is "clear cut," the government ignores prevailing professional norms. No reasonable appellate lawyer abandons a potentially meritorious claim for reversal simply because it was not a clear-cut "lock." Indeed, very few arguments can be comfortably deemed "clear cut," yet reasonable appellate lawyers raise them every day in our courts. To do otherwise would scrap a potential basis for relief and lead to procedural default on federal habeas review. Therefore, abandoning a potentially meritorious argument — unless there are specific countervailing strategic concerns — is a lose-lose proposition for the client. Neither the government's briefs nor this Court's cases justify the suggestion that an argument is not "worth raising"

under *Turner* because of the mere existence of legal counterarguments, or that reasonable appellate attorneys must only raise sure-fire winners. *See* 5 N.Y.3d at 483. (concluding that the omitted claim was not "so weak as to be not worth raising").

Turner itself undermines the government's understanding of the deficient-performance standard. There, appellate counsel failed to argue that trial counsel was ineffective in failing to object on statute-of-limitations grounds. *Id.* at 478-79. While this Court eventually found the omitted argument strong, it acknowledged that the People had a counterargument, albeit a weak one. *Id.* at 481-83. This Court concluded that although "[a] reasonable defense lawyer at the time of defendant's trial might have doubted that the statute of limitations argument was a *clear winner* . . . no reasonable defense lawyer could have found it *so weak as to be not worth raising*." *Id.* 483 (emphasis added). *Turner* thus confirms that, even if an argument is not "clear cut" or a "clear winner," counsel's omission of that argument is still deficient if (1) reasonable counsel would not have found the argument "so weak as to be not worth raising" and (2) no other reasonable appellate-briefing strategies justified the omission. *Id.* 483-85.

Later, in *People v. Heidgen [McPherson]*, 22 N.Y.3d 259, 278 (2013), this Court reiterated that "even if a reasonable defense lawyer might have questioned whether a motion to dismiss . . . was 'a clear winner,' he or she could not have reasonably determined that the argument was 'so weak as to be not worth raising.'" *Id.* (*quoting*

Turner, 5 N.Y.3d at 483).[3] Numerous other decisions from this Court are to the same effect, finding counsel's performance deficient even though the omitted argument or defense was not a sure-fire winner. *People v. Clermont*, 22 N.Y.3d 931, 934 (2013) (counsel ineffective in failing to raise an argument that was "close under our complex *De Bour* jurisprudence"); *People v. Nesbitt*, 20 N.Y.3d 1080, 1082 (2013) (counsel failed to request a lesser included offense charge whose success was an "open issue"); *Debellis*, 2023 WL 8039658, at *4 (counsel failed to request jury instruction based on defendant's testimony even when the jury may have found his testimony incredible).

Unfortunately, when cited out of context, the "clear cut" language distracts from the deficient-performance inquiry commanded by the state and federal constitutions, and we urge the Court to reaffirm the traditional inquiry. If taken literally, "clear cut" can be interpreted to require that an argument be a sure-fire winner — a position that this Court rejected in *Turner*, and which unquestionably violates *Strickland*. *See, e.g., People v. McKinnon*, 186 A.D.3d 1533, 1533 (1st Dept. 2020) (to constitute IAC, the omitted "speedy trial violation must have been 'clear-cut and dispositive'") (citations omitted); *People v. Dixon*, 61 Misc.3d 128(A) (N.Y. App. Term. 1st Dept. 2018) (failure to raise dismissal claim was not ineffective assistance because the claim was "by no means so clear-cut that it should have been apparent"); *see also People v. Spencer*, 183 A.D.3d 1258, 1260 (4th Dept. 2020) ("the failure to request a particular lesser included offense is not

[3] While the Court in *Heidgen* ultimately declined to find ineffective assistance, the claim failed on the prejudice prong, not the attorney performance prong. *See* 22 N.Y.3d at 279.

the type of clear cut and completely dispositive error that rises to the level of ineffective assistance of counsel") (citation and quotation marks omitted).

Dictum from *People v. McGee*, 20 N.Y.3d 513, 518 (2013), also subtly misinterpreted *Turner* and has caused confusion. There, this Court read *Turner* to hold that the failure to raise a "significant argument" can be ineffective, but that the omission "must typically involve an issue that is so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it." *Id.* at 518. But that is not what *Turner* (or *McPherson*)[4] held. *Turner* held that counsel provides deficient performance if the omitted appellate argument was, although not a "clear winner," not "so weak as to be not worth raising." 5 N.Y.3d at 483. But *Turner* did not *require* that the argument be so "clear cut and dispositive that no reasonable defense counsel would have [omitted it]" — a considerably more demanding standard. 5 N.Y.3d at 483.

Ultimately, *McGee* did not turn on this "clear cut" issue because it found the omitted arguments of "dubious efficacy," 20 N.Y.3d at 514, a finding that defeats the claim even under the correct and traditional standards. *See, e.g.*, *Strickland*, 466 U.S. at 686-94. Still, the *McGee* dictum is problematic because it suggests that *Turner* did not mean what it actually held.

In the end, no case from this Court has ever squarely *held* that, even where appellate counsel unreasonably omitted a claim for no strategic reason *and* that claim

[4] *McPherson* was decided after *McGee* and should be read as correcting *McGee*'s misstatement of *Turner*'s holding.

was likely to prevail on appeal, *see Strickland*, 466 U.S. at 686-94, the IAC claim failed because the omitted argument was not a "clear cut" winner. Thus, instead of addressing how "clear cut" an argument seems — an unconstitutional and unworkable approach — this Court should confirm the *Turner/McPherson* standard, which correctly assesses whether, "clear winner" or not, the argument was "so weak as to" justify wholesale omission from a brief.

To be clear, an argument may, in a vacuum, be "worth raising," yet there may be reasonable, context-specific justifications for omitting such claims. A lawyer may reasonably conclude that an identified argument, although not particularly "weak," will detract from other arguments. If a crime is especially heinous, for example, counsel might reasonably conclude that the client would be better off omitting a valid (but ultimately unlikely to prevail) excessive-sentence argument, as that argument could give the government the chance to highlight the heinous nature of the crime and detract from other, stronger points for a new trial. Similarly, if a lengthy argument is "not so weak as to be not worth raising," but is inconsistent with a much stronger argument, counsel may choose to reasonably omit it. *Accord Turner*, 5 N.Y.3d at 485.

But none of these reasonable strategic calls were at issue here. Instead, counsel simply missed this argument — he failed to "issue spot" it. Omitting a meaningfully strong argument for reversal, when the result of sheer oversight, is clearly inconsistent with prevailing professional norms. The omission here was objectively unreasonable under *Turner* and *Strickland*.

We emphasize, too, that merely showing deficient performance does not justify relief. A defendant must also show prejudice under either the state or federal standards. For that analysis too, an argument's status as "clear cut" or a "clear winner" does not control. Instead, under *Strickland*, the defendant need only show a reasonable probability that the omitted argument would have prevailed, defined as a probability that undermines confidence in the appeal's outcome. *Strickland*, 466 U.S. at 693-94.

c. A "dispositive" argument need not lead to dismissal of a claim.

This Court's reference to the "dispositive" claim in *Turner* has also caused some confusion about the extent to which an omitted claim in a single-issue case, if successful, must be prejudicial to the defendant. Taken literally, the word "dispositive" could be read to suggest that such a claim must lead to complete dismissal of a charge to constitute ineffectiveness.[5] But this Court has never interpreted "dispositive" so stringently, and such an interpretation would lead to the absurd result that — even where counsel's error satisfies *Strickland* — no relief is available if the omitted argument would lead only to a new trial, as opposed to outright dismissal. Such an interpretation would also be inconsistent with state and Federal constitutional doctrine regarding the "prejudice" prong for IAC, and we urge the Court to definitively reject it here.

[5] *See People v. Harris*, 97 A.D.3d 1111, 1111 (4th Dep't 2012) ("Unlike the failure to raise a statute of limitations defense, defense counsel's failure to object to, or to request, the court's consideration of lesser included offenses is not the type of 'clear-cut and completely dispositive' error that rises to the level of ineffective assistance of counsel.")

Under *Strickland*, a defendant must only show a reasonable probability of a different *outcome*, not dismissal with prejudice. 466 U.S. at 694. Indeed, the Supreme Court has repeatedly granted IAC claims for errors that would not, if established, lead to outright dismissal. *See, e.g.*, *Hinton*, 571 U.S. at 275 (finding attorney deficient for failing to hire a ballistics expert due to a mistake of law, and noting that "if . . . Hinton was prejudiced by his lawyer's deficient performance [he] is entitled to a new trial."); *Rompilla*, 545 U.S. at 390-93 (counsel's failure to investigate prior conviction was prejudicial because it would have turned up mitigation evidence that may have changed defendant's sentence); *Glover v. United States*, 531 U.S. 198, 203 (2001) (counsel can be ineffective at sentencing where the deficient performance leads to "any amount of [additional] jail time"). In neither *Hinton* nor *Rompilla* — both "single-error" cases — did the Supreme Court find that such an error had to be "dispositive," or lead to dismissal.

Moreover, as discussed above, New York's meaningful representation standard is even more generous to defendants than the federal standard. Under the New York Constitution, it may be unnecessary to show a reasonable likelihood of a different outcome. Accordingly, this Court has granted ineffective assistance claims when counsel's error was an instructional one, for which the remedy was a new trial — not just dismissal. *See Debellis*, 2023 WL 8039658, at *4 (instructional error that warranted a new trial); *Nesbitt*, 20 N.Y.3d at 1082 (same). Such an approach is hard to square with a literal reading of "dispositive."

It is thus no surprise that, in this case, the government concedes that *Strickland*'s prejudice prong requires only a "reasonable probability" of a different result: a new-trial order from the Appellate Division. ARB 5. And given the authority discussed above, this concession forecloses any argument that "dispositive" should be read to mean "complete dismissal." Nevertheless, we urge the Court to clarify, for the benefit of lower courts and future litigants, that counsel can be ineffective for omitting an argument even if the argument does not justify dismissal of the charges.

II. Appellate counsel's performance must be assessed based on the actual reason for the challenged omission, not hypothetical reasons that contradict the record.

The Appellate Division found that Corey's appellate counsel "did not exercise any professional judgment or make a strategic decision" regarding his right to be present at a material stage of trial. *Dunton*, *above*. Indeed, appellate counsel admitted that he simply "did not consider" raising the issue. *Id.* Nevertheless, the government now contends that the attorney performance prong of Corey's ineffective assistance claim should be analyzed based on imagined reasons that supposedly could have motivated a hypothetical attorney to forgo the claim, as opposed to counsel's *actual* reason for the omission. *See* AB 5, 6, 25–27, 37 (proffering purportedly reasonable bases for why counsel "could have" omitted this claim without claiming that any of these reasons, in fact, operated on counsel). This "hypothetical approach" violates *Strickland*, is

incompatible with New York law, and has been repeatedly rejected by federal circuit courts. We urge this Court to unequivocally reject it here.

Prosecutors across New York State continue to make this extreme argument despite this Court's rejection of it in *Turner* nearly twenty years ago. *See* 5 N.Y.3d at 484 (rejecting the argument "that any blunder by counsel may be ignored if the result of the blunder … is one that a reasonably competent attorney might have sought"). This Court has never held that, when assessing attorney performance, a reviewing court can disregard actual reasons in the record for counsel's challenged acts or omissions and instead ask whether a hypothetical competent attorney could have chosen the same course of action for strategic reasons. Certainly, no such holdings appear in the cases cited in Appellant's Brief in support of the hypothetical approach. *See* AB 24 (citing *inter alia*, *Turner*, 5 N.Y.3d 476; *McGee*, 20 N.Y.3d at 518; *People v. Keschner*, 25 N.Y.3d 704, 723 (2015)).

To be sure, where the record is *silent* as to counsel's reasons for challenged conduct, considering hypothetical reasonable strategies is consistent with *Strickland*'s presumption of effectiveness. 466 U.S. at 689 (holding that the defendant must overcome the "strong presumption that counsel's conduct" was strategic); *see also People v. Maffei*, 35 N.Y.3d 264, 269 (2020). But once counsel's actual reasons for an act or omission are in the record, they must be directly analyzed for reasonableness. *See e.g., People v. Evans*, 16 N.Y.3d 571, 574 (2011) ("Although the attorney's affirmations are not dispositive of the ineffective assistance claim, they plainly are relevant."); *Strickland*,

466 U.S. at 689; *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003); *Massaro v. United States*, 538 U.S. 500, 505 (2003).

Here, appellate counsel candidly admitted that he never considered raising the issue of Corey's right to be present at a material stage of the trial, and the government has offered no meaningful basis to doubt his admission. Thus, it is irrelevant whether a hypothetical attorney may have considered the issue and chose not to raise it because they believed (1) Corey was "effectively" warned; (2) further warnings were not practicable; or (3) there was not sufficient case law to raise the argument. AB 26–27. On this record, the question for this Court is whether it was reasonable for counsel to fail to raise this issue specifically because it never occurred to him to do so.

a. The hypothetical approach is contrary to this court's precedents and New York post-conviction practice more generally.

For decades, prosecutors in New York have argued that counsel's performance is not deficient, so long as they can identify *some* hypothetical reasonable strategy for counsel's acts or omissions — even when counsel's actual reasoning is in the record. *See* AB 26–27; *Lopez v. Greiner*, 323 F.Supp.2d 456, n.14 (S.D.N.Y. 2004) (reiterating and rejecting this argument made by the district attorney).[6] This argument persists despite

[6] For additional examples, *see* Brief for Respondent at 21, 37, *People v. Robinson*, 209 A.D.3d 505 (1st Dep't 2022) (N.Y. Cty. D.A.); Brief for Respondent, *People v. Negron*, 26 N.Y.3d 262 (2015), 2014 WL 10894580, at 39–40 (2014) (Queens Cty. DA); Brief of Respondent, *People v. Smith*, 90 A.D.3d 561 (1st Dep't 2011), 2011 WL 13260903, at 53 (N.Y. Cty. D.A.); Brief of Respondent, *People v. Clark*, 28 N.Y.3d 556 (2016), 2016 WL 7434728, at 57 (Kings Cty. D.A.); Brief of Respondent, *People v. Pacheco*, 50 A.D.3d 1063 (2d Dep't 2008), 2007 WL 5232168, at 28–29.

this Court's rejection of it in *Turner*. *See* 5 N.Y.3d at 484; *see also Evans*, 16 N.Y.3d at 574; *Maffei*, 35 N.Y.3d at 269 ("Generally, [ ] ineffectiveness [ ] is not demonstrable on the main record but rather requires consideration of [extra-record] factual issues") (citations and quotations omitted); *People v. Brown*, 45 N.Y.2d 852, 853–54 (1978) (expressing a preference for analyzing ineffective assistance claims after "an evidentiary exploration"). The "hypothetical approach" cannot be squared with New York law.

Prosecutors frequently cite *People v. Satterfield*, 66 N.Y.2d 796, 798 (1985) in support of the hypothetical approach, despite this Court's explicit rejection of that reading in *Turner*, 5 N.Y.3d 476, 484. *See* n.6, *above*. In *Satterfield*, this Court found that a 440 hearing was not required because "counsel's subjective reasons for his choice of this strategy *in this case* were immaterial." 66 N.Y.2d at 799 (emphasis added). Probing counsel's subjective reasoning *in that case* was not necessary because "viewed objectively, the transcript and the submissions reveal[ed] the existence of a trial strategy that might well have been pursued by a reasonably competent attorney." *Id.* While prosecutors have seized on this language to argue for the hypothetical approach, this Court was merely acknowledging that the existing record was adequate to demonstrate counsel's *actual strategy*. *Id.* ("That this was indeed the defense strategy is plain from counsel's summation"). In other words, *Satterfield* simply holds that where counsel's actual strategic reasons for the challenged act or omission are obvious from the record, it is unnecessary to hold a hearing to further probe counsel's reasoning. *Id.*

While the government does not rely on *Satterfield* here, it makes the same *Satterfield*-based argument that *Turner* rejected: Appellate counsel's admitted blunder should be ignored because the "result of the blunder is one that a reasonably competent attorney might have sought." 5 N.Y.3d at 484. Perhaps recognizing that reliance on *Satterfield* is foreclosed by *Turner*, the government cites no direct legal authority for applying the hypothetical approach. AB 24–26.

In doing so, the government seeks to treat this case as if the record were silent as to the reasons for counsel's challenged conduct. When there is no evidence of counsel's actual strategic thinking in the record, a court may consider hypothetical reasonable strategies that may have motivated counsel. *See McGee*, 20 N.Y.3d at 519 (finding counsel effective "to the extent that the record permits review" where counsel's actual strategic reasoning was not part of the record); *Maffei,* 35 N.Y.3d at 269. Such an approach is consistent with *Strickland* because "the defendant must overcome the presumption that … the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quotation marks and internal citation removed). In contrast, where an appellant offers unrefuted evidence of counsel's actual reasoning — as happened here — the presumption has been overcome and consideration of hypothetical strategies is no longer appropriate. *See Wiggins*, 539 U.S. at 526–527.

Applying the hypothetical approach where counsel's actual reasons for a challenged act or omission are in the record also conflicts with standard post-conviction practice in New York. It would render superfluous *every* Article 440 factual hearing in

which defense counsel's strategy was at issue: Why investigate counsel's strategic thinking at all if a reviewing court could simply ask whether a hypothetical attorney could have done the same thing for any strategic reason? Yet this Court has long found it "better, and in some cases essential," that ineffective assistance claims be "bottomed on an evidentiary exploration … by collateral or post-conviction proceeding." *Maffei*, 35 N.Y.3d at 270 (citing *Brown*, 45 N.Y.2d at 853–54); *Evans*, 16 N.Y.3d 571, 574–75 (explaining that, in that case, the court was unable to consider counsel's actual reasons for the challenged conduct, a "problem" that could have been avoided had the Appellate Division granted leave on the defendant's C.P.L. § 440.10 motion and consolidated it with the direct appeal). In the last forty years, appellate prosecutors have surely made that precise argument — that a 440 hearing is necessary to resolve the claim — thousands of times. This is because prosecutors recognize that the attorney's *actual* reasons, not hypothetical ones, control. *See e.g.*, Brief of Respondent at fn. 22, *People v. McBayne*, 204 A.D.3d 549 (1st Dep't 2022) (prosecution arguing that "if defendant believed that his counsel's efforts were constitutionally defective, he should have brought this claim by way of a C.P.L. 440.10 motion and provided his attorney the opportunity to explain his conduct").

b. The hypothetical approach violates *Strickland*.

The Supreme Court has never held that the actual reasons underlying counsel's challenged act or omission can be disregarded in favor of imagined strategies that could

have reasonably motivated a hypothetical attorney. Rather, when counsel's reasoning is part of the record, the Court has repeatedly and explicitly analyzed that reasoning under *Strickland*. *See e.g., Wiggins*, 539 U.S. at 526–27; *Hinton*, 571 U.S. at 274; *Massaro*, 538 U.S. at 505. The record here contains appellate counsel's actual reasons for failing to raise the issue of Corey's right to be present at a material stage of the trial: He simply missed the argument. Thus, evaluating his performance based on the People's hypothetical strategies would violate *Strickland*. 466 U.S. at 689.

Under *Strickland*, reviewing courts must analyze counsel's actual reasoning for the challenged act or omission. Courts are to make "every effort … to reconstruct the circumstances of counsel's challenged conduct," and to "evaluate the conduct *from counsel's perspective at the time*." *Strickland*, 466 U.S. at 689 (emphasis added). The person making the claim is required to "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable *professional judgments*." *Id.* at 690 (emphasis added). When challenged, "strategic *choices*" to not investigate must be "directly assessed for reasonableness." *Id.* at 690–91 (emphasis added). It is counsel's "perspective," "judgments," and "choices" at the time of the challenged conduct that underlay the attorney performance analysis, not those of a hypothetical attorney.

The Court affirmed this point in *Wiggins*, 539 U.S. at 510. There, the Court held that the "strategic decision" relied upon by the lower courts to affirm Mr. Wiggins' death sentence was "more *post-hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing." *Id.* at 526–27. Counsel's failure

"was the result of inattention, not reasoned strategic judgment." *Id.* at 534. Whether a hypothetical attorney could have pursued the same course of action by way of "reasoned strategic judgment" was irrelevant. The attorney performance analysis required "a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Id.* at 523 (quoting *Strickland* 466 U.S. at 689); *see also Massaro*, 538 U.S. at 500 (finding that IAC claims should generally not be raised for the first time on direct appeal because "[t]he trial record may contain no evidence of alleged errors of omission, much less *the reasons underlying them*.") (emphasis added).

Other examples abound. In *Hinton*, the court found counsel ineffective because his failure to request additional expert funds was based on his subjective, incorrect belief that he was not entitled to them under Alabama law. 571 U.S. at 274. In *Williams v. Taylor*, 529 U.S. 362, 395 (2000), counsel's failure to conduct an in-depth mitigation investigation was "not because of any strategic calculation but because they incorrectly thought state law barred access to such records." In *Kimmelman v. Morrison*, 477 U.S. 365, 385-86 (1986), counsel's performance was deficient where, despite the "relative [un]importance" of the evidence in question, his decision to not file a suppression motion was based on his subjective "mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense." In all these cases, the Court's deficient performance analysis focused on the reasonableness of counsel's *actual* decisions — the existence of any hypothetical reasonable strategy was irrelevant. The focus should be the same here.

c. Federal circuits have repeatedly rejected the hypothetical approach.

Federal circuits have also repeatedly rejected the hypothetical approach where counsel's actual reasoning is in the record.[7] For example, in *Wright v. Clarke*, 860 Fed. App'x 271 (4th Cir. 2021), the Fourth Circuit held that the Virginia Supreme Court's application of the hypothetical approach violated *Strickland*. In analyzing trial counsel's performance, the Virginia Supreme Court disregarded counsel's actual reasons for the challenged conduct — his ignorance of the law in that case — and instead asked "whether some other hypothetical counsel, fully informed of the law, reasonably could have" done the same thing. *Id.* at 279. The court found that this application of *Strickland* violated clearly established federal law. *Id.* at 280 (citing *Wiggins*, 539 U.S. at 521; 28 U.S.C. § 2254(d)(1)). The court noted that the question of whether a hypothetical competent attorney could have strategically pursued the challenged course of conduct

[7] *See Greiner v. Wells*, 417 F.3d 305, 320 (2d Cir. 2005); *Thomas v. Varner*, 428 F.3d 491, 499 n.7 (3d Cir. 2005); *Wright v. Clarke* 860 Fed. Appx. 271 (4th Cir. 2021); *Hernandez v. Chappell*, 923 F.3d 544, 550–51 (9th Cir. 2019); *United States v. Miller*, 799 F.3d 1097 (D.C. Cir. 2015); *Hughes v. Vannoy*, 7 F.4th 380, 388 (5th Cir. 2021) (rejecting the State's argument that counsel's failure to interview a witness could have been strategic because counsel "admitted that there was no strategy behind his decision not to"); *Dunn v. Neal*, 44 F.4th 696, 707 (7th Cir. 2022) (finding that for *Strickland*'s presumption that a trial tactic was strategic to apply, the "decision must be – in fact – strategic, and consequences of inattention rather than reasoned strategic decisions are not entitled to the presumption of reasonableness") (quotations and citations removed); *Hooper v. Mullin*, 314 F.3d 1162, 1170 n.3, 1171 (10th Cir. 2002) (rejecting the rule that counsel could only be deficient if "no competent counsel would have proceeded the way" counsel did, and instead analyzing counsel's actual strategy for reasonableness).

was only relevant to the prejudice prong of *Strickland*, and could not "retroactively redeem" counsel's performance. *Id.* at 279–280.

Similarly, in *Hernandez*, the Ninth Circuit unequivocally rejected the "state's argument that [it] should reject counsel's stated explanations in favor of hypothetical strategic choices that could have supported counsel's conduct." 923 F.3d at 550–51. The court explained that, where "it would contradict counsel's testimony to presume that counsel's conduct was strategic when counsel clearly stated otherwise," counsel's statements control. *Id.* at 550. This is consistent with the Third Circuit's warning that, under the hypothetical approach, "incompetency of defense counsel could be rewarded by ingenuity on the part of a State's attorneys in supplying hypothetical strategies to explain defense counsel's uninformed prejudicial oversights." *Varner*, 428 F. 3d at 499 n.7; *see also Marshall v. Hendricks*, 307 F.3d 36, 115 (3d Cir. 2002) (the deficient performance analysis "needs to be made with an understanding of counsel's thought process, … so that a conclusion whether counsel was ineffective can be made based on facts of record, rather than on assumptions.").

The Second Circuit's analysis is in accord. In *Wells*, the Circuit acknowledged its duty under *Strickland* to "look for legitimate justifications for counsel's conduct" in the record, but held that it must "reconsider any assumption that a 'choice' was strategic" if an "examin[ation] of counsel's decision-making process" reveals the challenged conduct was the result of "incompetence, negligence, or pure serendipity." 417 F.3d at 320. The court then cited several cases in which counsel's actual reasoning was the basis

of finding deficient performance. *Id.* at n. 17. In *DeLuca v. Lord*, 77 F.3d 578 (2d Cir. 1996), for example, the court found that "even though the decision not to pursue the defense *could have been justified*, because defense counsel's actual decision 'was so hasty and based on so little . . . his decision cannot be considered either a reasonable professional judgment or a reasoned strategic choice.'" *Wells*, 417 F.3d at 320 n. 7 (quoting *DeLuca*, 77 F.3d. at 588) (emphasis added).

* * *

As New York prosecutors frequently do, the People ask this Court to disregard appellate counsel's actual reason for the challenged omission and instead assess his performance based on what may have motivated a hypothetical competent attorney. This Court rejected the hypothetical approach almost twenty years ago in *Turner*, and has never since endorsed it. 5 N.Y.3d at 484. It is entirely incompatible with post-conviction practice in New York State. *E.g.*, *Maffei*, 35 N.Y.3d at 269. It violates *Strickland* and its progeny. *E.g.*, *Hinton*, 571 U.S. at 274. And federal circuit courts have repeatedly rejected it. *See* n.7 *above*. Yet the People continue to make this extreme argument with regularity. We urge this Court to, once again, reject the hypothetical approach where counsel's actual reasons for the challenged conduct appear in the record.

III. Conclusion

The Court should affirm the Appellate Division's grant of Corey's coram nobis petition.

Respectfully submitted,

BRYAN S. FURST
ROBERT HUNTER
Attorneys for Amici Curiae

By 
Robert Hunter
February 2, 2024

Jenay Nurse Guilford
Center for Appellate Litigation
120 Wall Street, 28th Floor
New York, NY 10005

PRINTING SPECIFICATIONS STATEMENT

1. The following statement is made in accordance with Court of Appeals Rule 500.13(c).
2. *Amici*'s brief was prepared in the processing system Microsoft Word, with Garamond typeface, 14-point font, except for footnotes, which are 12-point font.
3. The text of the body of the brief, omitting the cover page and tables, has a word count of 6,990 and is 28 pages in length.

DATED: February 2, 2024
New York, NY

Robert Hunter, *Attorney for Amici*