

## Court Applies *Baldi* to Appellate Counsel

BY LAZAR EMANUEL

In *People v. Stultz*, NYLJ May 5, 2004, page 19, the Court of Appeals applied to appellate counsel for the first time the same standards of lawyer effectiveness as have applied to trial counsel since the Court's decision in *People v. Baldi*, 54 NY2d 137 (1981). The Court held that the constitutional requirements of effective assistance of counsel are met when appellate counsel provides "meaningful representation."

At the same time, the Court restated its rejection of the federal standard for measuring counsel's effectiveness announced by the Supreme Court in *Strickland v. Washington*, 466 US 668 (1984). The federal standard requires the defendant to show not only that counsel did not render reasonable competence assistance, but also "that there is a reasonable probability that, but for the counsel's inadequacy, the outcome of the trial would have been different."

Writing for the Court of Appeals, Judge Rosenblatt said:

"...under our Baldi jurisprudence, a defendant need not fully satisfy the prejudice test of Strickland. We continue to regard a defendant's showing of prejudice as a significant but not dispositive element in assessing meaningful representation. Our focus is on the fairness of the proceedings as a whole.

Until *Stultz*, the Court of Appeals had been unable procedurally to consider an appeal dealing with the issue of effective assistance by appellate counsel. This procedural inhibition was cured by the state legislature in 2002. In applying the Baldi "meaningful representation" rule, the Court said:

...it is inapt to have one standard for trial and another for appeals. We are confident that the appellate courts will be able to apply the Baldi standard appropriately when dealing with allegations of appellate counsel's ineffectiveness. Appellate courts are uniquely suited to evaluate what is meaningful in their own arena.

*Stultz* turned on the refusal of a defense witness to testify in reliance on the privilege against self-incrimination. The witness had previously submitted a sworn statement identifying another person as the murderer. When the trial court concluded that the witness could not be compelled to testify, trial counsel did not try to get the witness' sworn statement admitted into evidence. The defendant was convicted.

On appeal, appellate counsel failed to argue that trial counsel was ineffective in not having tried to get the witness' statement into evidence. The defendant argued that this failure by appellate counsel constituted ineffective representation in the appeal. The Court rejected this argument, essentially because the witness' statements were unreliable.

The court said, "A defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success."

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