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**AN INTRODUCTION TO INEFFECTIVE ASSISTANCE OF COUNSEL IN NEW YORK**

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**Introduction**

This outline is intended as a guide to the law governing ineffective assistance of counsel in New York. Every effort has been made to cite cases in which the ineffective assistance claim was successful. Second Circuit cases are cited when New York courts appeared to be silent on the topic or to have levied an adverse decision.

Many of the state court decisions cited found ineffective assistance based on the application of the totality of the circumstances test. Thus, the particular failing cited -- e.g., failure to investigate a possible defense -- usually is but one of the reasons why ineffective assistance was found. The cases are cited in this manner to alert counsel to the broad outlines of ineffective assistance law in New York and also to assist those doing post-conviction work.

**I. STANDARDS FOR DETERMINING INEFFECTIVE ASSISTANCE OF COUNSEL**

- A. Federal Standard: *Strickland v. Washington*, 466 U.S. 668, 686 (1984); also U.S. Const. amend. VI.

- 1. Elements:

- a. Counsel's performance must be deficient and fall below the objective standard of reasonableness. *Strickland*, 466 U.S. at 689-91.
  - 1. Counsel's performance is examined "as of the time of counsel's conduct," *Id.*, at 690.
  - 2. Hindsight may not be used to second-guess counsel's strategic choices. *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994); see also *McKee v. United States*, 167 F.3d 103, 106 (2d Cir. 1999).

- b. The deficient performance must be prejudicial, thus depriving the accused of both a fair trial and a reliable result. *Strickland*, 466 U.S. at 694.
        - 1. Prejudice is established if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoted in *Bunkley v. Meachum*, 68 F.3d 1518, 1521 (2d Cir. 1995).
- B. New York Standard: *People v. Baldi*, 54 N.Y.2d 137, 147 (1981); N.Y. Const. art. I, §6.
  - 1. Elements:
    - a. The finding of ineffective assistance a review of the "totality" of the evidence, law and circumstances in a particular case. *Baldi*, 54 N.Y.2d at 147.
    - b. The review must show that representation was "meaningful." *Id.*
  - 2. Exception to "Totality" Requirement--Single Substantial Error. A single substantial error by counsel which seriously compromises a defendant's right to a fair trial can constitute ineffective representation. *People v. Hobot*, 84 N.Y.2d 1021, 1022 (1995).

## II. PER SE INEFFECTIVE ASSISTANCE

- A. "Attorney" Not Duly Licensed in Any Jurisdiction
  - 1. *People v. Felder*, 47 N.Y.2d 287, 293-97 (1979) (layman masqueraded as lawyer). *But see People v. Kieser*, 79 N.Y.2d 936, 937-38 (1992) (no ineffective assistance where counsel was out-of-state lawyer who had been suspended in home state for failing to pay bar dues and who had not sought admission in New York *pro hac vice*).
  - 2. *Solina v. United States*, 709 F.2d 160, 167 (2d Cir. 1983) (counsel never admitted to bar).
- B. Counsel Fraudulently Obtained Law License--*United States v. Novak*, 903 F.2d 867, 870 (2d Cir. 1984).
- C. Counsel Implicated in Client's Crimes--*United States v. Fulton*, 5 F.3d 605, 609-12 (2d Cir. 1993); *United States v. Cancilla*, 725 F.2d 867, 871 (2d Cir. 1984).
- D. Counsel Asleep During Trial--*Tippins v. Walker*, 77 F.3d 682, 687 (2d Cir. 1996) (accused suffered prejudice, by presumption or otherwise, if his counsel was repeatedly unconscious at trial for periods of time in which defendant's interests were at stake). *But see People v. Tippins*, 173 A.D.2d 512, 513 (2d Dept. 1991), *lv. denied* 78 N.Y.2d 1015 (1991) (New York standards for effective assistance not violated by sleeping lawyer).

## III. CONFLICTS OF INTEREST

- A. Defense Counsel's Prior Representation of Government Witness -- *Ciak v. United States*, 59 F.3d 296, 304-5 (2d Cir. 1995).

- B. Plea Induced by Counsel's Threats and Misinformation -- *Lopez v. Scully*, 58 F.3d 38, 41-43 (2d Cir. 1995).
- C. Criminal Activity by Counsel -- *United States v. Fulton*, 5 F.3d 605, 609-12 (2d Cir. 1994) (prosecution witness's allegation of criminal activity by counsel created a *per se* prejudicial conflict of interest).
- D. Representation of Co-Defendants with Conflicting Defenses--*People v. Jones*, 184 A.D.2d 405, 406 (1<sup>st</sup> Dept. 1992).
- E. Representation of Two Co-Defendants, One of Whom is Offered Plea in Exchange for Testimony Against the Other Co-Defendant--*People v. Dell*, 60 A.D.2d 18, 22-23 (4<sup>th</sup> Dept. 1977).
- F. Representation of Two Clients with Conflicting Interests--*People v. Carillo*, 218 A.D.2d 505, 506 (1<sup>st</sup> Dept. 1995); *People v. Ortiz*, 76 N.Y.2d 652, 656 (1990); *People v. Davis*, 72 A.D.2d 69, 71 (4<sup>th</sup> Dept. 1979).
- G. Representation by Co-Defendant's Attorney During Jury Deliberations Because Counsel Absent--*People v. Allah*, 80 N.Y.2d 396, 400 (1992).

#### IV. GUILTY PLEAS

- A. Counsel's Ignorance of Applicable Law--*People v. Butler*, 94 A.D.2d 726, 726 (2d Dept. 1983).
- B. Failure to Investigate Prior to Advising Client to Accept Plea -- *People v. Van Wie*, 238 A.D.2d 876, 876-77 (4th Dept. 1997) (counsel ineffective in advising defendant to plead guilty when investigation would have shown the prosecution had no case).
- C. Failure to Communicate Information Regarding Viable Defense Prior to Advising Client to Plead Guilty--*People v. Thomson*, 719 NYS2d 171 (3d Dept. 2001) (attorney failed to advise client that criminal intent was necessary element of attempted murder in the second degree and element could have been negated by fact client was intoxicated).
- D. Failure to Communicate Accurate Information About Plea Negotiations--*People v. Reed*, 152 A.D.2d 481, 481 (1<sup>st</sup> Dept. 1981).
- E. Failure to Place Understanding of Plea on the Record--*People v. Roy*, 122 A.D.2d 482, 483-84 (3d Dept. 1986).
- F. Failure to Advise Client that He Was Not Entitled to Specific Performance of the Plea Agreement, but Could Withdraw Plea--*People v. Roy*, 122 A.D.2d 482, 283-84 (3d Dept. 1986).
- G. False Representations and Promises as Inducements to Plead Guilty--*Mosher v. Lavallee*, 351 F.Supp. 1101, 1107 (SDNY 1972).
- H. Failure to Advise of Deportation Consequences--*Janvier v. United States*, 659 F.Supp. 827, 829 (EDNY 1987). *But see Campbell v. United States*, 1992 WL 1001 74 (EDNY 1992) and *People v. Ford*, 86 N.Y.2d 397, 403-4 (1995).
- I. Failure to Advise Client that Prosecution Did Not Intend to Enforce Promise of Reduced Sentence--*United States ex rel. Wissenfeld v. Wilkins*, 281 F.2d 707, 712 (2d Cir. 1960).
- J. Failure to Counsel Client to Accept Plea Resulting in Shorter Sentence -- *Boria v. Keene*, 99 F.3d 492, 496-99 (2d Cir. 1996); *see also United States v. Gordon*, 156 F.3d 376,

379-80 (2d Cir. 1998).

- K. Failure by Counsel to Familiarize Self with Charges Client Pleaded Guilty To -- *People v. Droz*, 39 N.Y.2d 457, 462-63 (1976).

## V. FAILURE TO MAKE VARIOUS MOTIONS

- A. Failure to File Any Pre-Trial Motions -- *People v. Trait*, 139 A.D.2d 937, 938-39 (4th Dept.), *appeal denied* 72 N.Y.2d 867 (1988); *People v. Ramos*, 53 A.D.2d 703, 703 (2d Dept. 1976).
- B. Speedy Trial
  - 1. Failure to Demand a Speedy Trial -- *People v. Pickens*, 216 A.D.2d 631, 632 (3d Dept. 1995); *People v. O'Connell*, 133 A.D.2d 970 (3d Dept. 1987).
  - 2. Failure to Pursue Defendant's *Pro Se* Speedy Trial Motion -- *People v. Sanford*, 148 A.D.2d 999 (4<sup>th</sup> Dept. 1989).
- C. Failure to Demand a Hearing (*Dunaway*) on Probable Cause to Arrest -- *People v. Detling*, 73 A.D.2d 937, 937-38 (2d Dept. 1980).
- D. Failure to Demand a Suppression Hearing (*Mapp*) on Physical Evidence Seized from Accused -- *People v. Donovan*, 184 A.D.2d 654, 655 (2d Dept. 1992); *People v. Gugino*, 132 A.D.2d 989, 989-90 (4th Dept. 1987); *People v. Sanin*, 84 A.D.2d 681, 682-83 (4th Dept. 1981).
- E. Failure to Demand a Suppression Hearing (*Huntley*) on Voluntariness of Statement -- *People v. Morgan*, 141 A.D.2d 928, 929-30 (3d Dept. 1988); *People v. Detling*, 73 A.D.2d 937, 937-38 (2d Dept. 1980); *People v. Gugino*, 132 A.D.2d 989, 989-90 (4th Dept. 1987); *People v. Sanin*, 84 A.D.2d 681, 682-83 (4th Dept. 1981).
- F. Failure to Demand a Hearing (*Sandoval*) on Accused's Prior Crime or Misconduct -- *People v. Wiggins*, 213 A.D.2d 965, 965 (4<sup>th</sup> Dept. 1995); *People v. Peterson*, 97 A.D.2d 967, 967-68 (4th Dept. 1983).
- G. Identification (*Wade*) Hearing
  - 1. Failure to Demand a Hearing (*Wade*) regarding Identification of the Accused -- *People v. Sullivan*, 209 A.D.2d 558, 558-59 (2d Dept. 1994); *People v. Donovan*, 184 A.D.2d 654, 655 (2d Dept. 1992); *People v. Peterson*, 97 A.D.2d 967, 967-68 (4th Dept. 1983); *People v. Sinatra*, 89 A.D.2d 913, 914-15 (2d Dept.), *leave denied*, 28 N.Y.2d 695 (1982).
  - 2. Failure to Properly Move for a *Wade* Hearing--*People v. Hale*, 142 A.D.2d 172, 174-75 (1<sup>st</sup> Dept. 1998) (accused denied *Wade* hearing because counsel erroneously asserted that accused was identified in line-ups not in show up).
- H. Failure to Move for Dismissal of the Indictment -- *People v. Kilstein*, 174 A.D.2d 756, 757 (2d Dept. 1991) (vague allegations); *People v. Sanford*, 148 A.D.2d 999, 1000 (4<sup>th</sup> Dept. 1989) (improper questioning of defendant by prosecutor before grand jury).
- I. Failing to Seek Competency Hearing -- *People v. Sinatra*, 89 A.D.2d 913, 915 (2d Dept.), *leave denied*, 28 N.Y.2d 695 (1982) (ineffective assistance found where accused appeared incompetent and court suggested that counsel seek hearing, but counsel did not). *But see People v. Tortorici*, 249 A.D.2d 588, 592-93 (3d Dept. 1998), *aff'd on other*

*grounds*, 92 N.Y.2d 757 (1999) (counsel not ineffective for failing to seek competency hearing after prosecution's psychiatrist opined mid-trial that accused was unfit to proceed).

## VI. INADEQUATE TRIAL PREPARATION

### A. The Client

1. Failure to Meet Client Until the Day of Trial -- *People v. Droz*, 39 N.Y.2d 457, 462-63 (1976).
2. Failure to Conduct More than a Single Interview With Client Before Trial -- *People v. Simmons*, 110 A.D.2d 666, 666-67 (2d Dept. 1985).

### B. Witnesses

1. Failure to Prepare Witnesses Adequately -- *People v. Donovan*, 184 A.D.2d 654, 655 (2d Dept. 1992).
2. Failure to Locate and Call Significant Witnesses -- *People v. Droz*, 39 N.Y.2d 457, 462-63 (1976); *People v. Sullivan*, 209 A.D.2d 558, 558-59 (2d Dept. 1994) (failure to subpoena alibi witnesses); *People v. Sullivan*, 209 A.D.2d 558, 558-59 (2d Dept. 1994) (failure to interview available witnesses).
3. Failure to Secure Independent Medical Testimony -- *People v. Ali-Baba*, 179 A.D.2d 725, 729 (2d Dept. 1992).

### C. Discovery

1. Failure to Follow Up on Demanded Discovery -- *People v. Ali-Baba*, 179 A.D.2d 725, 729 (2d Dept. 1992) (counsel failed to follow up on demand for medical records which resulted in his receipt of them on the day of trial).
2. Failure to Subpoena Documents -- *People v. Sullivan*, 209 A.D.2d 558, 558-59 (2d Dept. 1994).

### D. Investigation

1. Generally -- *People v. Droz*, 39 N.Y.2d 457, 462 (1976); *People v. La Bree*, 34 N.Y.2d 257, 259 (1974); *People v. Van Wie*, 238 A.D.2d 876, 877 (4th Dept. 1997); *People v. AliBaba*, 179 A.D.2d 725, 728-29 (2d Dept. 1992); see also *People v. Bennett*, 29 N.Y.2d 462, 466 (1972) (right to counsel includes right to have counsel conduct appropriate investigations). And *Deluca v. Lord*, 77 F.3d 578, 584 (2d Cir.), *cert. denied*, 117 S.Ct. 83 (1996) (counsel failed to conduct adequate investigation of possible defense of extreme emotional disturbance which could have reduced murder charge to first-degree manslaughter).
2. Failure to Read Hospital Records and Speak to Doctors -- *People v. Bennett*, 29 N.Y.2d 462, 466 (1972).
3. Delay in Investigating Possible Mental Defense -- *People v. Wilson*, 133 A.D.2d 179, 180-81 (2d Dept. 1987).

### E. Unfamiliarity With Earlier Proceedings -- *People v. Riley*, 101 A.D.2d 710, 711 (4th Dept. 1984).

### F. Specific Defense

1. Failure to Prepare Alibi Defense -- *People v. Sullivan*, 209 A.D.2d 558, 558-59 (2d Dept. 1994).
2. Failure to Prepare Insanity Defense -- *People v. Angellilo*, 91 A.D.2d 666, 666-67 (2d Dept. 1982).

G. The Law

1. Failure to Prepare on the Law Essential to the Defense -- *People v. Bennett*, 29 N.Y.2d 462, 464-66 (1972) (insanity case where counsel failed to read the law regarding the insanity defense); *People v. Van Wie*, 238 A.D.2d 876, 877 (4th Dept. 1997).
2. Failure to Conduct Any Legal Research -- *People v. Sullivan*, 209 A.D.2d 558, 558-59 (2d Dept. 1994).

**VII. FAILURE TO OBJECT AT TRIAL**

A. In General -- *People v. Hollins*, 221 A.D.2d 863, 864 (3d Dept. 1995) (counsel made only two objections at trial).

B. Direct and Cross Examination

1. To Improper Direct or Cross-Examination -- *People v. Wiggins*, 213 A.D.2d 965, 966 (4th Dept. 1995).
2. To Prosecution's Improper Implications Made on Cross-Examination -- *People v. Peterson*, 97 A.D.2d 967, 967-68 (4th Dept. 1983).

C. Evidence

1. To Inadmissible Tangible Evidence -- *People v. Hollins*, 221 A.D.2d 863, 864 (3d Dept. 1995); *People v. Donovan*, 184 A.D.2d 654, 654 (2d Dept. 1992); *People v. Ellsworth*, 131 A.D.2d 109, 112 (3d Dept. 1987); *People v. Ferguson*, 114 A.D.2d 226, 229-31 (1st Dept. 1986); see also *Quartararo v. Fogg*, 679 F.Supp. 212, 240 (EDNY 1988), *aff'd without op.*, 849 F.2d 1467 (2d Cir. 1988) (counsel failed to object to evidence that defendant's parents believed him to be guilty).
2. To Hearsay Evidence -- *Mason v. Scully*, 16 F.3d 38, 42 (2d Cir. 1994) (counsel ineffective in failing to object, on hearsay and Confrontation Clause grounds, to critical testimony by police detective about inculpatory statement by nontestifying codefendant).
3. To Inadmissible Confession -- *People v. Vauss*, 149 A.D.2d 924, 924 (4th Dept. 1989) (confession by accused); *People v. Morgan*, 141 A.D.2d 928, 929 (3d Dept. 1988) (confession by accused); *People v. Barbot*, 133 A.D.2d 274, 275-76 (2d Dept. 1987); *Henry v. Scully*, 918 F. Supp. 693, 713-15 (S.D.N.Y. 1995), *aff'd*, 78 F.3d 51 (2d Cir. 1996) (confession of co-defendant).
4. The Accused
  - a. To Evidence of Accused's Criminal Record -- *People v. Wiggins*, 213 A.D.2d 965, 966 (4th Dept. 1995); *People v. Morgan*, 141 A.D.2d 928, 929-30 (3d Dept. 1988).
  - b. To Prejudicial Collateral Matters Elicited from Accused by Prosecution--  
*People v. Gugino*, 132 A.D.2d 989, 990 (4<sup>th</sup> Dept. 1987).

- c. To Incriminating Information Extracted from Accused on Cross by Prosecution -- *People v. Sanin*, 84 A.D.2d 681, 682-83 (4th Dept. 1981).
- 5. To Improper Identification Evidence -- *People v. Wallace*, 187 A.D.2d 998, 998 (4th Dept. 1982); *People v. Winston*, 134 A.D.2d 546, 547 (2d Dept. 1987).
- D. To Prosecutorial Misconduct -- *People v. Sullivan*, 209 A.D.2d 558, 558-59 (2d Dept. 1994).
- E. To Jury Instructions -- *People v. Sullivan*, 209 A.D.2d 558, 558-59 (2d Dept. 1994).

#### VIII. OTHER INEPT TRIAL PERFORMANCE

- A. Jury Selection--*People v. Wagner*, 104 A.D.2d 457, 458-59 (2d Dept. 1984) (counsel failed to challenge jurors at all, resulting in nine jurors with friends or relatives on police forces).
- B. Opening Statement
  - 1. Failure to Make Any Opening Statement--*People v. Angellilo*, 91 A.D.2d 666, 667 (2d Dept. 1982).
  - 2. Poor Opening Statement -- *People v. Trait*, 139 A.D.2d 937, 938-39 (4th Dept.), *lv. denied* 72 N.Y.2d 867 (1988) (rambling and disconnected opening sustained 21 objections); *see also People v. Barbot*, 133 A.D.2d 274, 275 (2d Dept. 1987) (counsel suggested client attempted to commit charged crime even though attempt was A-1 felony, too).
- C. Counsel Sleeping At Trial -- *Tippins v. Walker*, 77 F.3d 682, 684 (2d Cir. 1996).
- D. Failure to Develop the Record -- *People v. Van Wie*, 238 A.D.2d 876, 877 (4th Dept. 1997).
- E. Failure to Pursue Identifiable Defense Strategy--*People v. Norfleet*, 267 A.D.2d 881, 882 (3d Dept. 1999), *lv. denied*, 95 N.Y.2d 801 (2000) (defense should have pursued intoxication defense).
- F. Failure to Raise Issue of Whether Chief Prosecution Witness was Accomplice and, Therefore, Whether His Testimony Required Corroboration--*People v. Gugino*, 132 A.D.2d 989, 990 (4<sup>th</sup> Dept. 1987).
- G. Waiver of *Ranghelle* Violation --*Flores v. Demskie*, 215 F.3d 293, 304-6 (2d. Cir.), *cert. denied sub nom Keane v. Flores*, 121 S.Ct. 606 (2000).
- H. Waiver of Cross-Examination of Certain Prosecution Witnesses through Unwise Concession -- *People v. Morales*, 118 A.D.2d 814, 814-15 (2d Dept. 1986).
- I. Inadequate Cross Examination
  - 1. Generally -- *People v. LaBree*, 34 N.Y.2d 257, 259 (1974); *People v. Tillman*, 179 A.D.2d 886, 887-88 (3d. Dept. 1992); *People v. Kilstein*, 174 A.D.2d 756 (2d Dept. 1991), *appeal denied*, 78 N.Y.2d 1012 (1991); *People v. Trait*, 139 A.D.2d 937, 938-39 (4th Dept. 1988), *appeal denied*, 72 N.Y.2d 867 (1988); *People v. Trait*, 139 A.D.2d 937, 938-39 (4th Dept.), *appeal denied* 72 N.Y.2d 867 (1988); *People v. Morales*, 118 A.D.2d 814 (2d Dept. 1986).
  - 2. Failure to Cross-Examine the Complainant -- *People v. Morales*, 118 A.D.2d

814, 814-15 (2d Dept. 1986).

3. Failure to Use Evidence of Prior Misidentifications By Sole Prosecution Witness - - *People v. Jenkins*, 68 N.Y.2d 896, 898 (1986).
4. "Opening The Door" -- *People v. Wiggins*, 213 A.D.2d 965, 966 (2d Dept. 1994) (counsel opened door to prejudicial information about accused).
5. Eliciting Uncharged Crimes on Cross-Examination -- *People v. Hollins*, 221 A.D.2d 863, 864 (3d Dept. 1995).
6. Eliciting Damaging Testimony about the Accused on Cross -- *People v. Barbot*, 133 A.D.2d 274, 275-76 (2d Dept. 1987); *People v. Riley*, 101 A.D.2d 710, 711 (4th Dept. 1984).

J. Failure to Call Witnesses

1. Failure to Call Accused as Witness -- *Deluca v. Lord*, 858 F.Supp. 1330, 1353-57 (S.D.N.Y. 1994), *aff'd*, 77 F.3d 578 (2d Cir.), *cert. denied*, 117 S.Ct. 83 (1996).
2. Failure to Call A Promised Witness -- *People v. Shawn Brown*, 8/21/98 NYLJ, at 21 (Sup. Ct., Queens Co.) (Eng, J.).
3. Failure to Call Alibi Witness -- *People v. Detling*, 73 A.D.2d 937, 937-38 (2d Dept. 1980).
4. Failure to Call Any Witnesses -- *People v. Angellilo*, 91 A.D.2d 666, 666-67 (2d Dept. 1982).
5. Failure to Call Expert Witnesses-- *People v. Saunders*, 54 A.D.2d 938, 939 (2d Dept. 1976).

K. Inadequate Direct Examination

1. Inadequate Direct Examination of Defense Expert -- *People v. Trait*, 139 A.D.2d 937, 938-39 (4th Dept.), *appeal denied* 72 N.Y.2d 867 (1988) (inadequate examination of psychiatric expert in insanity case).
2. Permitting Client to Offer Inculpatory Testimony at Prior Trial -- *People v. Wilson*, 133 A.D.2d 179, 180-81 (2d Dept. 1987).

L. Use of the Mental Defense

1. Failure to Raise Insanity Defense -- *People v. Angellilo*, 91 A.D.2d 666, 666-67 (2d Dept. 1982).
2. Inadequate Presentation of Insanity Defense -- *People v. Saunders*, 54 A.D.2d 938, 938-39 (2d Dept. 1976).

M. Closing Argument

1. Introduction of Damaging Evidence During Defense Summation -- *People v. Tillman*, 179 A.D.2d 886, 887-88 (3d Dept. 1992).
2. "Incompetent" Closing Argument by Defense -- *Quartararo v. Fogg*, 679 F.Supp. 212, 250-51 (EDNY 1988), *aff'd without op.*, 849 F.2d 1467 (2d Cir. 1988); *see also People v. Worthy*, 112 A.D.2d 445, 456 (2d Dept. 1985) (failure to review

evidence or focus jury on critical identification issue).

N. Jury Charge

1. Request for Lesser Included Offense that Doubled Number of A-1 Felonies -- *People v. Barbot*, 133 A.D.2d 274, 275-76 (2d Dept. 1987).
2. Failing to Seek Charge
  - a. On Voluntariness of Confession -- *People v. Barbot*, 133 A.D.2d 274, 275-76 (2d Dept. 1987).
  - b. Regarding Missing Witness--*Henry v. Scully*, 78 F.3d 51, 53 (2d Cir. 1996); *People v. Wiley*, 120 A.D.2d 66, 70 (4th Dept. 1986).
  - c. Regarding Alibi--*People v. Wiley*, 120 A.D.2d 66, 70 (4th Dept. 1986) (counsel also failed to preserve issue for appeal).
  - d. On Circumstantial Evidence--*People v. Butterfield*, 108 A.D.2d 958, 960 (3d Dept. 1985).

**IX. SENTENCING**

- A. Failure to Appear at Sentencing -- *People v. LaBree*, 34 N.Y.2d 257, 259 (1974).

**X. INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL**

- A. Failure to Advise Client of Right to Appeal--*United States ex rel. Thurmond v. Mancusi*, 275 F.Supp. 508, 523 (EDNY 1967).
- B. Failure to Perfect Appeal in Timely Manner--*Harris v. Kuhlman*, 601 F.Supp. 987, 993-95 (EDNY 1987).
- C. Filing of *Anders* Brief When Review of Record Showed Colorable Appellate Issues -- *People v. Stokes*, 2001 N.Y. LEXIS 102, \*10 (Ct. App. 2001).
- D. Advocacy on Appeal
  1. Failure to Present Significant and Obvious Issues -- *Mayo v. Henderson*, 13 F.3d 528, 532 (2d Cir. 1994) (ignored issues must be stronger than those presented).
  2. Failure to Present Particular Issues
    - a. *Rosario* Violation--*Mayo v. Henderson*, 13 F.3d 528, 535 (2d Cir. 1994).
    - b. Violation of State Constitutional Right to Counsel--*Claudio v. Scully*, 982 F.2d 798, 805 (2d Cir. 1992), *cert. denied* 508 U.S. 912 (1993).
    - c. *Batson* Violation --*People v. Reyes*, 151 A.D.2d 262, 263 (1<sup>st</sup> Dept. 1989).
    - d. Duplicitious Nature of Indictment--*Grady v. Artuz*, 931 F.Supp. 1048, 1053-54 (SDNY 1996).
  3. Choosing to Argue Particularly Weak Appellate Issues that Had Little Chance of Success--*Mayo v. Henderson*, 13 F.3d 528, 536 (2d Cir. 1994).

4. Disparaging Defendant's *Pro Se* Arguments--*People v. Wallace*, 137 A.D. 639, 639-40 (2d Dept. 1988).