Proving Prejudice and Disproving Harmlessness

WISCONSIN STATE PUBLIC DEFENDER CONFERENCE
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Hon. Richard J. Sankovitz
Milwaukee County Circuit Court
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> No indictment, information, complaint or warrant shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant.

Wis. Stat. §971.26.

> No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

Wis. Stat. §805.18(2).

I. Why resulting prejudice generally is required for relief

A. Nineteenth Century – near automatic reversal deemed necessary to "insure that the appellate court did not encroach upon the jury's fact finding function by discounting the improperly admitted evidence and sustaining the verdict on its belief that the remaining evidence established guilt." Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 26.6(a) (1984).

B. Subject to abuse by defense bar. *See* ***Kotteakos v. United States***, 328 U.S. 750, 759 (1946) ("So great was the threat of reversal, in many jurisdictions, that criminal trial became a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had been thus obtained").

C. In 1919, Congress adopted the federal harmless error rule intended "to prevent

matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." ***Bruno v. United States***, 308 U.S. 287, 293 (1939); *see* 28 U.S.C. § 391 (1911).

D. That deemed "harmless" has now swung far from the trivialities that originally justified "harmless error" analysis to the opposite extreme, rationalizing affirmance of convictions where errors clearly are not harmless. *See, e.g.*, Ana M. Otero, *In Harm's Way--a Dismal State of Justice: the Legal Odyssey of Cesar Fierro*, 16 Berkeley La Raza L.J. 119 (2005).

E. *See also* Harry T. Edwards, *Madison Lecture: To Err is Human, But not Always Harmless: When Should Legal Error be Tolerated?* 70 N.Y.U. L. Rev. 1167 (1995) (Judge Edwards distinguishes the "guilt based approach" to harmless error from the "effect-on-the-verdict approach," arguing that given limitations inherent in the system and the nature of the rights at stake, the effect-on-the-verdict approach is preferred); Charles S. Chapel, *The Irony of Harmless Error*, 51 Okla L. Rev. 501 (1998) (Judge Chapel argues that the modern harmless error rule derives from two faulty premises, the combination of which results in an illogical rule that distorts the functions of both criminal trials and appellate review).

II. Why and when a showing of prejudice is NOT required for relief

A. As a general rule, a constitutional error does not automatically require reversal of a conviction. However, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." ***Chapman v. California***, 386 U.S. 18, 23 & n.8 (1967) (citations omitted).

B. "'Structural errors' are 'a very limited class' of errors that affect the '"framework within which the trial proceeds,"' such that it is often 'difficul[t]' to 'asses[s] the effect of the error.'" ***United States v. Marcus***, 130 S.Ct. 2159, 2164-65 (2010).

C. Structural errors "are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." ***Arizona v. Fulminante***, 499 U.S. 279, 309 (1991) (opinion of Rehnquist, Ch. J.).

D. Examples of structural errors:

1. Complete denial of right to counsel. ***Gideon v. Wainwright***, 372 U.S. 335 (1963)

2. Denial of right to impartial judge. ***Tumey v. Ohio***, 273 U.S. 510 (1927)

3. Unlawful exclusion of members of the defendant's race from a grand jury, ***Vasquez v. Hillery***, 474 U.S. 254 (1986)

4. Denial of the right to self-representation at trial, ***McKaskle v. Wiggins***, 465 U.S. 168, 177–78, n.8 (1984)

5. Denial of the right to public trial, ***Waller v. Georgia***, 467 U.S. 39, 49 n.9 (1984)

   a. *But see* ***id.*** at 50 (denial of right at pretrial hearing requires only a new hearing, not necessarily a new trial)

   b. Partial closure of trial can be so trivial as to not implicate Sixth Amendment. *E.g.*, ***State v. Ndina***, 2009 WI 21, ¶¶48-49, 315 Wis.2d 653, 761 N.W.2d 612; ***Braun v. Powell***, 227 F.3d 908, 919 (7th Cir. 2000).

III. The harmless error / resulting prejudice standards in various contexts

A. Basic trial errors - default standard

1. Federal - different standards for constitutional and non-constitutional errors

   a. Constitutional error - the prosecution must carry the burden of showing that a constitutional trial error is harmless beyond a reasonable doubt. *E.g.*, ***Chapman v. California***, 386 U.S. 18, 24 (1967).

   b. Non-constitutional error - A nonconstitutional error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict." ***Kotteakos v. United States***, 328 U.S. 750, 776 (1946); *see, e.g.*, ***Fry v. Pliler***, 551 U.S. 112, 116 (2007).

   c. Habeas corpus from state court conviction - ***Brecht v. Abrahamson***, 507 U.S. 619, 637 (1993) (error is harmless if it had no "substantial and injurious effect or influence in determining the jury's verdict" (citations omitted)); ***O'Neal v. McAninch***, 513 U.S. 432, 438-39 (1995) (burden remains on the state to disprove prejudice).

2. Wisconsin

   a. An "error is harmless if the beneficiary proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" ***State v. Mayo***, 2007 WI 78, ¶47, 301 Wis.2d 642, 734 N.W.2d 115 (citation omitted).

   b. Same standard for constitutional and non-constitutional errors. ***State v. Harvey***, 2002 WI 93, ¶40, 254 Wis.2d 442, 647 N.W.2d 189; ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222 (1985).

      i. ***Dyess*** rejected prior statements of the standard, including

that in ***State v. Wold***, 57 Wis.2d 344, 356-57, 204 N.W.2d 482 (1973) (nonconstitutional error harmless if untainted evidence sufficient for conviction).

c. Factors to consider - The Wisconsin Supreme Court has identified a number of factors to aid harmless error analysis:

> These factors include the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case.

Mayo, 2007 WI 78, ¶48 (citation omitted).

B. Instructional errors

1. ***Neder v. United States***, 527 U.S. 1, 17 (1999) (jury instruction that improperly omits an essential element from the charge constitutes harmless error if "a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error"); ***State v. Harvey***, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189 (same).

2. Potentially confusing instruction - defendant must show that "there is a reasonable likelihood that the jury was misled and therefore applied potentially confusing instructions in an unconstitutional manner." ***State v. Lohmeier***, 205 Wis.2d 183, 194, 556 N.W.2d 90 (1996).

3. ***Miller v. State***, 139 Wis. 57, 78, 119 N.W. 850, 858 (1909) ("Even a correct instruction following an incorrect one, as if the two might stand together, does not cure the error, as one cannot tell upon which the jury relied"); ***Francis v. Franklin***, 471 U.S. 307, 322 (1985) (same)

C. Prosecutorial misconduct - Knew or should have known evidence false/misleading, *e.g.*, ***Giglio v. United States***, 405 U.S. 150 (1972).

1. The test for determining whether the resulting conviction is fundamentally unfair, and thus violative of due process, is whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." ***United States v. Agurs***, 427 U.S. 97, 103 (1976).

D. Same - non-constitutional misconduct - When a defendant alleges that a

prosecutor's statements and arguments constituted misconduct, the test applied is whether the statements "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " ***State v. Davidson***, 2000 WI 91, ¶88, 236 Wis.2d 537, 613 N.W.2d 606 (citation omitted). *See* ***Mayo***, 2007 WI 78, ¶¶43-45.

1. Query - Why must errors by prosecutor reach constitutional level to justify reversal?

E. Violation of ***Brady v. Maryland***, 373 U.S. 83 (1963), - materiality and resulting prejudice merge - Evidence is material if there is a reasonable probability that, if the evidence had been disclosed, the result of the proceedings would have been different. ***Brady***, 373 U.S. at 87-88.

F. Harm in plea context

1. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985) (where defendant alleges ineffective assistance of counsel in the plea process, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial")

2. ***State v. Semrau***, 2000 WI App 54, ¶¶22, 26, 233 Wis. 2d 508, 608 N.W.2d 376 ("In a guilty plea situation following the denial of a motion to suppress, the test for harmless error on appeal is whether there is a reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction. … We hold there is no reasonable probability that, but for the trial court's failure to suppress the disputed evidence, Semrau would have refused to plead and would have insisted on going to trial.").

G. Reliance upon inaccurate information at sentencing (due process violation)

1. State standard - Sentencing court's reliance upon inaccurate information mandates resentencing unless state can prove the error harmless beyond a reasonable doubt. ***State v. Tiepelman***, 2006 WI 66, ¶¶26-31, 291 Wis.2d 179, 717 N.W.2d 1.

2. Federal standard - Sentencing court's actual reliance upon inaccurate information itself establishes that the error is not harmless. ***United States ex rel. Welch v. Lane***, 738 F.2d 863, 867-68 (7th Cir. 1984).

H. Sentencing errors - other constitutional violations

1. ***State v. Harris***, 2010 WI 79, ¶33, 326 Wis.2d 685, 786 N.W.2d 409 (leaving open question of whether sentencing court's reliance upon constitutionally improper factors such as race or gender is structural error or subject to harmless error analysis).

I. Sentencing errors - erroneous exercise of discretion

1. Erroneous exercise of discretion at sentencing does not alone mandate reversal "if from the facts of record it is sustainable as a proper discretionary act." ***McCleary v. State***, 49 Wis.2d 263, 282, 182 N.W.2d 512, 552 (1971).

2. Wisconsin courts interpret this as requiring the appellate court to uphold a decision if a court reasonably *could* have made such a decision in the exercise of its discretion, even absent suggestion in the record that the court in fact relied upon such grounds. *E.g.*, ***State v. Kirschbaum***, 195 Wis.2d 11, 20-21, 535 N.W.2d 462, 465 (Ct. App. 1995).

3. Query: Why this deference to sentencing court decision-making even absent valid exercise of discretion? Why not traditional harmless-error analysis?

J. Ineffective Assistance of Counsel - resulting prejudice

1. "The defendant is not required [under ***Strickland v. Washington***, 466 U.S. 668 (1984),] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" ***State v. Moffett***, 147 Wis.2d 343, 354, 433 N.W.2d 572 (1989) (quoting ***Strickland***, 466 U.S. at 693). Rather, "[t]he question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." ***Id.*** at 357. No supplemental, abstract inquiry into the "reliability" or "fairness" of the proceedings is permissible. ***Williams v. Taylor***, 529 U.S. 362 (2000).

   a. Only in rare cases where prejudice is presumed or where "it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice'" is the reasonable probability standard displaced by abstract questions of reliability or fairness. ***Williams***, 529 U.S. at 391-93.

   b. For the latter, *see* ***Lockhart v. Fretwell***, 506 U.S. 364 (1993) (failure to object where decision on which objection would have been based later reversed), and ***Nix v. Whiteside***, 475 U.S. 157 (1986) (failure to proffer perjured testimony).

2. Note that Wisconsin Courts regularly apply the wrong standard, focusing on the perceived reliability of the result in violation of ***Williams*** rather than whether there exists a reasonable probability of a different result. *See, e.g.*, ***Mayo***, 2007 WI 78, ¶64; ***State v. Love***, 2005 WI 116, ¶30, 284 Wis.2d 111, 700 N.W.2d 62; ***State v. Boyd***, 2011 WI

App 25, ¶18, 331 Wis.2d 697, 797 N.W.2d 546; ***State v. Jones***, 2010 WI App 133, ¶16, 329 Wis.2d 498, 791 N.W.2d 390; ***State v. Prineas***, 2009 WI App 28, ¶¶35-36, 316 Wis.2d 414, 766 N.W.2d 206; ***State v. Taylor***, 2004 WI App 81, ¶13, 272 Wis.2d 642, 679 N.W.2d 893. *But see* ***State v. Gordon***, 2003 WI 69, ¶¶22-23, 262 Wis.2d 380, 663 N.W.2d 765 (the only published Wisconsin case citing ***Williams'*** recognition of the proper standard).

a. Wisconsin's erroneous "reliability" standard has resulted in federal habeas relief in several cases. *E.g.*, ***Goodman v. Bertrand***, 467 F.3d 1022 (7th Cir. 2006); ***Martin v. Grosshans***, 424 F.3d 588 (7th Cir. 2005); ***Washington v. Smith***, 219 F.3d 620 (7th Cir. 2000).

3. Actual denial of the assistance of counsel altogether is legally presumed to result in prejudice and can never be treated as harmless error. ***Penson v. Ohio***, 488 U.S. 75, 88 (1988); ***State ex rel. Seibert v. Macht***, 2001 WI 67, ¶19, 244 Wis.2d 378, 627 N.W.2d 881(citation omitted), *modified on denial of reconsideration*, 2002 WI 12, 249 Wis.2d 702, 639 N.W.2d 707.

K. Newly discovered evidence

1. Motion for new trial - whether the new evidence created "a reasonable probability of a different result." ***State v. Love***, 2005 WI 116, ¶44, 284 Wis.2d 111, 700 N.W.2d 62. "A reasonable probability of a different outcome exists if 'there is a reasonable probability that a jury, looking at both the [old evidence] and the [new evidence], would have a reasonable doubt as to the defendant's guilt.'" ***Id.***, (citation omitted).

a. BUT, unclear what "reasonable probability" means in this circumstance. *Compare* ***State v. Truman***, 187 Wis.2d 622, 625-26, 523 N.W.2d 177 (Ct. App. 1994) ("reasonable probability" has same meaning as in ineffectiveness situation), *with* ***State v. Avery***, 213 Wis.2d 228, 237-41, 570 N.W.2d 573 (Ct. App. 1997) (holding that the standard is "outcome determinative").[1]

b. More lenient standard may apply where inculpatory evidence previously used against the defendant is demonstrated to be false, as opposed to situations in which the new evidence is merely additional evidence that might have helped the defense. *See* ***State v. Armstrong***, 2005 WI 119, ¶104, 283 Wis.2d 639,

[1] The Supreme Court rejected a related aspect of ***Avery*** (requiring the defendant to prove a "reasonable probability of a different result by clear and convincing evidence) by ***State v. Armstrong***, 2005 WI 119, ¶162, 283 Wis.2d 639, 700 N.W.2d 98.

700 N.W.2d 98 (quoting Court of Appeals' unpublished decision in that case).

2. Motion to withdraw plea - Oddly, Wisconsin Supreme Court applies same, reasonable probability of a different result *at trial* standard to newly discovered evidence challenges to pleas. ***State v. McCallum***, 208 Wis.2d 463, 561 N.W.2d 707, 710-11 (1997).

   a. More rational standard is whether there is a reasonable probability that, had the defendant known of the newly discovered evidence, he would not have pleaded guilty and would have insisted on going to trial. *Cf*. ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985) (applying this standard to ineffectiveness claim affecting decision to plead); ***State v. Bentley***, 201 Wis.2d 303, 548 N.W.2d 50, 54 (1996) (same).

   b. *But see* ***State v. Harris***, 2003 WI App 144, ¶14, 266 Wis.2d 200, 667 N.W.2d 813 (applying ***Hill*** prejudice standard where the newly discovered evidence is exculpatory evidence that was not disclosed by the state in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963)); ***State v. Sturgeon***, 231 Wis.2d 487, 502-04, 605 N.W.2d 589 (Ct. App. 1999) (same; discussing why different contexts between trial cases and plea cases require different standard for resulting prejudice).

L. Interests of Justice. ***State v. Henley***, 2010 Wl 97, ¶¶73-76, 328 Wis. 2d 544,787 N.W.2d 350 (inherent authority of circuit court to reverse conviction in interests of justice on direct appeal); ***State v. Armstrong***, 2005 WI 119, ¶104, 283 Wis.2d 639, 700 N.W.2d 98 (inherent authority of Supreme Court and Court of Appeals); Wis. Stat. §751.09 (statutory authority of Supreme Court); Wis. Stat. §752.35 (statutory authority of Court of Appeals).

1. Real controversy not fully tried - unnecessary for appellate court to first conclude that the outcome would be different on retrial. ***Vollmer v. Luety***, 156 Wis.2d 1, 19, 456 N.W.2d 797 (1990).

   a. Court must conclude that the real controversy was not fully tried where "[w]e cannot say with any degree of certainty that the [now challenged] evidence used by the State during trial played little or no part in the jury's verdict." ***State v. Hicks***, 202 Wis. 2d 150, 153, 549 N.W.2d 435 (1996).

2. Miscarriage of justice - court must find "substantial probability of a different result on retrial." ***Vollmer***, 156 Wis.2d at 19.

M. Plain Error - "The burden is on the State to prove that the plain error is harmless beyond a reasonable doubt." ***Mayo***, 2007 WI 78, ¶29; *see* ***State v.***

King, 205 Wis.2d 81, 93, 555 N.W.2d 189 (1996).

IV. Harmless error / prejudice determinations deemed issues of law. Therefore, they are reviewed *de novo* on appeal

A. Harmless Error reviewed *de novo*. *E.g.*, ***State v. Carnemolla***, 229 Wis.2d 648, 653, 600 N.W.2d 236 (Ct. App.1999).

B. Resulting prejudice / "reasonable probability of a different result" reviewed *de novo.*

1. Newly discovered evidence. Reasonable probability of a different result determination is issue of law. ***Armstrong***, 2005 WI 119, ¶¶158-62.

a. However, law unsettled whether reviewed *de novo* or for erroneous exercise of discretion. *Compare*, *e.g.*, ***State v. Plude***, 2008 WI 58, ¶31, 310 Wis.2d 28, 750 N.W.2d 42, *with* ***McCallum***, 208 Wis.2d at 484-87 (Abrahamson, Ch.J., concurring) (erroneous exercise of discretion standard often repeated but not consistently applied in newly discovered evidence cases); *see* ***State v. Edmunds***, 2008 WI App 33, ¶ 8 & n. 3, 308 Wis.2d 374, 746 N.W.2d 590 (noting inconsistency and Court of Appeals' inability to correct it).

2. Ineffective assistance of counsel. Once the facts are established, each prong of the analysis is reviewed *de novo*. ***State v. Cummings***, 199 Wis.2d 721, 747-48, 546 N.W.2d 406 (1996).

V. General considerations - Helpful citations

A. Central issue for proving prejudice or absence of harmlessness is showing why it matters. For a helpful discussion, see Alper, Ty , *'So What?': Using Reverse Investigation To Articulate Prejudice and Win Post-Conviction Claims*, The Champion, December 2011, at 44 (copy attached).

B. Important to explain exactly how specific errors undermine critical components of state's case. Conclusory assertions of harm insufficient.

C. Harmless error analysis does not permit the Court to interpose itself as some sort of "super-jury." ***Neder v. United States***, 527 U.S. 1, 19 (1999). Where the defendant contested the issue affected by the error, and the evidence viewed most favorably to the defendant supports his theory, it is for the jury to determine whether to believe it. ***Id***. ("where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding [the court] should not find the error harmless").

D. Courts should be wary about invoking doctrine of harmless error with regard

to evidentiary rulings in jury cases. ***United States v. Cerro***, 775 F.2d 908, 915-16 (7th Cir. 1985); ***United States v. Doerr***, 886 F.2d 944, 952-53 (7th Cir. 1989).

E. Court must consider cumulative effect of all errors.

1. ***State v. Thiel***, 2003 WI 111, ¶¶59-60, 264 Wis.2d 571, 665 N.W.2d 305 (ineffective assistance of counsel)

2. ***State v. Mayo***, 2007 WI 78, ¶64 & n.8, ¶66 (applies to all errors).

F. Where the state's case already is of marginal sufficiency, even otherwise minor errors can have a great impact on the jury. ***United States v. Agurs***, 427 U.S. 97, 113 (1976)

G. Jury to make credibility determination regarding defense case. Evidence incredible as matter of law only if evidence is "in conflict with ... nature or with fully established or conceded facts." ***Rohl v. State***, 65 wis.2d 683, 695, 223 N.W.2d 567, 572 (1974)

H. The jury cannot search for the truth if the trial court erroneously prevents the jury from considering relevant admissible evidence on a critical issue in the case. ***State v. Cuyler***, 110 Wis.2d 133, 327 N.W.2d 662, 667 (1983)

I. Failure to sustain proper objection enhances resulting prejudice.

1. ***Graves v. United States***, 150 U.S. 118 (1893) (court's failure to sustain proper objections to improper prosecutorial remarks concerning absence of defendant's wife essentially told jury that it could use that absence against defendant when legally it could not; conviction reversed)

2. ***Williams v. United States***, 168 U.S. 382 (1897) (court's failure to sustain objection to prosecutor's improper remarks within hearing of jury contributed to reversal because it tended to prejudice the defendant's right to a fair and impartial trial).

J. ***Parker v. Gladden***, 385 U.S. 363, 365 (1966) *(per curiam)*, (26 hours of juror deliberations in a murder trial "indicat[ed] a difference among them as to the guilt of petitioner.").

K. If prosecutor emphasized the importance of particular, improperly admitted evidence at trial, or relied upon the absence of particular, improperly excluded evidence, argue that the state has conceded the error is not harmless. *Cf.* ***Kyles v. Whitley***, 514 U.S. 419, 448 (1995) ("If a police officer thought so, a juror would have, too" (footnote omitted)).

L. "[T]he fact that the jury was unable to reach a verdict at the conclusion of the first trial provides strong reason to believe the significant errors that occurred

at the second trial were prejudicial." ***Kyles v. Whitley***, 514 U.S. 419, 455 (1995) (Stevens, J., concurring).

VI. Common state / court arguments and potential responses

A. Although the state often tries to minimize the effect of defense evidence improperly excluded at trial by labeling it as "cumulative," corroborative evidence is not the same as cumulative evidence.

1. Evidence is not "cumulative" unless it "supports a fact established by existing evidence." ***Washington v. Smith***, 219 F.3d 620, 634 (7th Cir. 2000), citing Black's Law Dictionary 577 (7th ed. 1999).

2. "[T]estimony is not merely cumulative when it tends to prove a distinct fact not testified to at the trial, although other evidence may have been introduced by the moving party tending to support the same ground of claim or defense to which such fact is pertinent." ***Wilson v. Plank***, 41 Wis. 94.

3. ***Skipper v. South Carolina***, 476 U.S. 1, 8 (1986) ("The testimony of more disinterested witnesses ... would quite naturally be given much greater weight by the jury").

B. Effect of "curative instructions"

1. While courts generally follow the legal fiction that the jury will follow a properly given cautionary instruction, *see* ***State v. Lukensmeyer***, 140 Wis.2d 92, 409 N.W.2d 395, 403 (Ct. App. 1987), that assumption does not hold where the evidence is highly prejudicial to the core issue at trial. ***State v. Pitsch***, 124 Wis.2d 628, 644 n.8, 369 N.W.2d 711, 720 n.8 (1985); *see* ***Francis v. Franklin***, 471 U.S. 307, 323 n.9 (1985).

2. ***Dunn v. United States***, 307 F.2d 883, 886 (5th Cir. 1962) ("if you throw a skunk into the jury box, you can't instruct the jury not to smell it").

3. Prejudice cannot be deemed cured by the trial court's general instruction to disregard the remarks of counsel that did not pertain to matters in evidence because the instruction was not given until after completion of closing arguments and did not tell the jury what comment to disregard. *Cf.* ***State v. Penigar***, 139 Wis.2d 569, 581-82, 408 N.W.2d 28, 34 (1987).

C. State often claims reliance upon circumstantial evidence and reasonable inferences which in fact is pure speculation.

a. "[B]uilding an inference upon an inference" is speculation. ***Home Savings Bank v. Gertenbach***, 270 Wis. 386, 404, 71 N.W.2d 347 (1955).

b. Conviction of a criminal offense cannot be based upon such speculation. *E.g.*, ***State ex rel. Kanieski v. Gagnon***, 54 Wis.2d 108, 194 N.W.2d 808, 813 (1972).

c. Circumstantial evidence may establish the material facts, ***Reichert v. Rex Accessories Co.***, 228 Wis. 425, 439, 279 N.W. 645 (1938), but must dispel speculation and doubt. ***Rumary v. Livestock Mortgage Credit Corp.***, 234 Wis. 145, 147, 290 N.W. 611 (1940).

D. The state often will rely on particular evidence as making the state's case "overwhelming." Explain why it is not.

1. ***Holmes v. South Carolina***, 547 U.S. 319, 126 S.Ct. 1727, 1734-35 (2006):

> Just because the prosecution's evidence, *if credited*, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case. And where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.
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> * * *
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> The point is that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.

2. ***United States v. Wolf***, 787 F.2d 1094, 1098-99 (7th Cir. 1986) (although evidence overwhelming if prosecution witness believed, improprieties which negatively affected defendant's credibility were prejudicial where jury had reason to doubt prosecution witness).

3. "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." ***United States v. Wade***, 388 U.S. 218, 228 (1967).

4. Research has also noted the problem of demonstrably false confessions. See, e.g., Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1051 (2010) ("Postconviction DNA testing has now exonerated over 250 convicts, more than forty of whom falsely confessed to rapes and murders. As a result, there is a new awareness that innocent people falsely confess, often due to psychological pressure placed upon them during police interrogations.")(emphasis

omitted).

5. The Supreme Court has recognized that changes in a witness' story can be fatal to her credibility. *See, e.g.*, ***Kyles v. Whitley***, 514 U.S. 419, 444 (1995) ("[T]he evolution over time of a given eyewitness' description can be fatal to its reliability").

6. Accomplice or "jailhouse snitch" evidence

   a. ***On Lee v. United States***, 343 U.S. 747, 757 (1952) (use of such informers "may raise serious questions of credibility"); ***Dudley v. Duckworth***, 854 F.2d 967, 972 (7th Cir. 1988) ("admitted accomplices testifying in exchange for immunity or dismissal of charges, are inherently dubious witnesses").

   b. ***United States v. Bernal-Obeso***, 989 F.2d 331, 334 (9th Cir. 1993). ("Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison"); ***Commonwealth of the N. Mariana Islands v. Bowie***, 243 F.3d 1109, 1124 (9th Cir. 2001) ("[A]lthough the truthful testimony of accomplice witnesses will continue to be of great value to the law, rewarded criminals also represent a great threat to the mission of the criminal justice system").

   c, Michael Radelet et al., *In Spite of Innocence* 18 (1992) (finding that, among errors leading to the conviction of innocent people, the "most frequent [is] perjury by prosecution witnesses").

7. Consciousness of guilt - Flight, etc.

   a. "We have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime." ***Wong Sun v. United States***, 371 U.S. 471, 483-84 n.10 (1963); *see* ***Alberty v. United States***, 162 U.S. 499, 511 (1896).

   b. ***United States v. Myers***, 550 F.2d 1036, 1049 (5th 1977) ("evidence of flight or related conduct is 'only marginally probative as to the ultimate issue of guilt or innocence'").

   c. Guilt as to what?

VII. Conclusion

Harmless error/resulting prejudice is the principle of criminal justice most overlooked by the defense and most distorted by the state and the courts. Explaining exactly why the particular error or errors in your case meet the applicable standard (or prevent the state from meeting its burden on the point) is critical to success in post-conviction

motions or on appeal. A persuasive showing of doubt regarding your client's guilt not only meets a necessary requirement for reversal, but also helps the Court overcome institutional biases against doing the right thing in criminal appeals.

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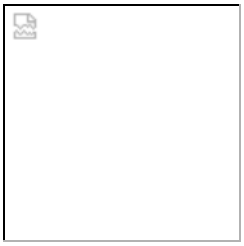

'So What?': Using Reverse Investigation To Articulate Prejudice and Win Post-Conviction Claims

By Ty Alper

It can be daunting for an attorney handling her first post-conviction capital case to know where to start. When I began working as a staff attorney at the Southern Center for Human Rights, I was given a desk, a file cabinet, and a caseload of post-conviction capital cases. Affixed by yellowing Scotch tape to the file cabinet was a small piece of paper on which someone had typed (with a typewriter) the following:

> *The Four Post-Conviction Questions*
>
> 1. *What was the most damaging evidence?*
> 2. *Who were the most damaging witnesses?*
> 3. *Why was my client convicted?*
> 4. *Why was my client sentenced to death?*

Because it was some of the best advice I've ever received as a post-conviction attorney, I tried over the years, to no avail, to find out who had taped those questions to the file cabinet. This article is an attempt to pass along, and flesh out, the wisdom contained in those four questions.

At first blush, it seems obvious that, upon agreeing to represent a client in post-conviction, one would seek answers to these basic questions. But in fact, attorneys often start somewhere else. With the doctrines of ineffective assistance of counsel and *Brady v. Maryland* at the forefront of their minds, attorneys often start with these two questions: What did trial counsel do wrong? What did the trial prosecutor do wrong? It is reasonable to ask these questions; indeed, any competent post-conviction investigation would seek to answer them comprehensively. But these questions are focused on error, not prejudice.

The post-conviction case will inevitably turn on *what made a difference at trial.* The problem with framing the investigation around "what went wrong" as opposed to "what made a difference" is that the former approach relegates to the sidelines the virtually immovable obstacle of prejudice that post-conviction counsel will need to overcome in order to prevail in court. No matter what went wrong at trial, all courts will ask, "So what?" If the post-conviction attorney cannot answer that question, even the strongest case of deficient trial counsel performance or prosecutorial misconduct will fail.[1] The four post-conviction questions that were taped to the file cabinet provide a guide to determining what mattered at trial, so that — when the post-conviction attorney finds trial counsel errors and prosecutorial misconduct — she will be able to answer the "so what?" question.[2]

In the ineffectiveness context, a successful petitioner must convince the reviewing court that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[3] In the *Brady* context, she must establish that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[4] But "establishing prejudice" means more than just remembering to plead it in each post-conviction petition. Attorneys need to think about prejudice from the very beginning of the post-conviction case, so that they can find, develop, and ultimately present a vision for how the unexamined or withheld evidence harmed their clients.[5]

In an ineffectiveness case, the California Supreme Court articulated well the burden of post-conviction counsel: "[T]he petitioner must show us what the trial would have been like, had he been competently represented, so we can compare that with the trial that actually occurred and determine whether it is reasonably probable that the result would have been different."[6] The goal in post-conviction is not only to paint a portrait of the trial that would have occurred but for the deficient performance of trial counsel and/or the prosecutor's improper withholding of evidence. *The goal is for the trial that would have occurred to look substantially different than the trial that actually occurred.*

If the trial that would have occurred looks too similar to the actual trial, the post-conviction attorney will be hard pressed to convince a court that there is a reasonable probability that the result would have been different. Conversely, if the two trials look very different, a court is unlikely to conclude that the outcome of each would probably have been the same. This is the reason attorneys have long understood that their task in post-conviction is to "change the picture" that was presented at trial.[7]

Because courts require that post-conviction petitioners describe the trial that would have occurred, the petitioner's burden in post-conviction is to actually present

the evidence that establishes prejudice. This is not easy to accomplish, especially when a great deal of time has passed since the original trial. When witnesses have died or cannot be found, it is not enough for counsel to speculate about what effective counsel could have done differently with respect to those witnesses, or what investigative leads a withheld piece of evidence might have uncovered about those witnesses. The California Supreme Court put it this way: "[A] petitioner generally cannot expect to establish a case for relief solely by relying on testimony, expert or otherwise, describing what evidence *might have been* discovered and produced by competent counsel. Instead, he must generally produce that evidence so the credibility of the witnesses can be tested by cross-examination."[8]

When the post-conviction proceedings long postdate the trial, producing this evidentiary proof of prejudice can be quite a burden. Consider a case in which a threatening note, delivered to the victim days before his murder, was in the possession of the police but never disclosed to trial counsel. When the note is finally revealed in post-conviction proceedings, almost two decades after the trial, it is virtually impossible to discern its author, let alone investigate the circumstances under which it was written. The note itself points to the possibility of another suspect in the case, one whose role at trial may have been used by effective counsel to raise a reasonable doubt and thus produce a different outcome. But the note alone does not establish prejudice. As one court explained: "The court recognizes that it may be exceedingly difficult, decades later, to locate witnesses and to establish with any degree of certainty that they would have given testimony favorable to petitioner had they been identified and called at trial. But, that is petitioner's burden nonetheless."[9] Actual production of evidence — as opposed to mere speculation — is key.

There are practical hurdles involved in presenting evidence that will transform the trial that would have been into a proceeding unrecognizable to the participants in the trial that actually occurred. (And, sometimes, as in the "threatening note" example above, those hurdles may prove impossible to overcome.) But beyond the practical realities inherent in reinvestigating an old case,[10] there remains the question of how to frame the post-conviction investigation so that the court has little doubt about prejudice. A focus on error to the exclusion of prejudice will yield merely pyrrhic victories. Consider *Turner v. Runnels*, a post-conviction ineffectiveness case in which the Ninth Circuit found that trial counsel's failure to investigate key facts constituted deficient performance.[11] The court judged trial counsel harshly, noting that they had failed to take "even the minimal step of reviewing information that had been collected by ... former counsel."[12] And the court went out of its way, in a footnote, to praise *pro bono* post-conviction counsel for their "excellent work" in the case.[13] So far, so good. Unfortunately, the court concluded, in this arson case, that "none of the evidence [post-conviction counsel] adduced during the habeas proceedings refutes any of the evidence connecting him to the arson," and, therefore, "trial counsel's deficient performance did not prejudice" the petitioner.[14]

Similar examples abound in the *Brady* context as well. In *Smith v. Holtz*, the Third Circuit agreed that prosecutors had engaged in "reprehensible and unethical conduct" by failing to disclose certain evidence to the defendant at trial.[15] But "*Brady* material" should not be confused with "the *Brady* materiality standard," which requires prejudice. Under the latter standard, the court held, post-conviction presentation of the withheld evidence fell "woefully short of undermining confidence in [the] murder convictions."[16]

To be sure, the fact that a court does not find prejudice does not mean that post-conviction counsel failed in her efforts to present the post-conviction claims. Sometimes error is all an attorney has, and she has to make the most of it. Evidence of prejudice does not always exist. But there are ways for post-conviction attorneys to avoid the trap of framing an investigation around error as opposed to prejudice — and thus to increase the likelihood that they will find prejudice if it exists.

One way to do this is to start with the four post-conviction questions, and then conduct what this article will call "reverse investigation." Answering the four post-conviction questions reveals what made a difference at trial. Reverse investigation is the task of using that revelation as a framework for the investigation. Instead of beginning the investigation by asking, "What did trial counsel and the prosecutor do wrong?," the post-conviction attorney should ask, "What made a difference at trial?" and let the answer to that question guide the investigation. Many post-conviction attorneys already take this approach, both consciously and unconsciously. The goal here is to articulate this intuitive practice and provide a strategic framework for employing it.

Answering the Four Post-Conviction Questions

Law students new to the concept of establishing prejudice often ask: How is it possible to know whether there is a "reasonable likelihood" that the result of a trial would have been different but for the deficient performance of trial counsel or the misconduct of the prosecutor? The answer most obvious to a layperson (just ask the jurors who tried the case!) is typically not available as a matter of evidence law.[17] As a result, courts must engage in speculation — informed speculation, but speculation nonetheless — as to the effect that evidence presented in post-conviction would have had on the jury that convicted the defendant and sentenced him to death.

If the evidence presented at trial negated, or changed significantly, some critical aspect of the trial, it is easier to speculate that the evidence would have made a difference at trial and resulted in a different outcome. That is where the four post-conviction questions become applicable. They reveal what mattered at trial. And once an attorney knows what mattered at trial, she can begin to think about how a court will engage in speculation about whether *her* post-conviction evidence would have affected what mattered. *An attorney can only "change the picture" in post-conviction if she knows what the picture was at trial.*

Answering the four post-conviction questions cannot be done simply by reading the witness testimony. A lot of trial testimony is not critical to securing a conviction or death sentence, and it can be difficult for someone who was not present at trial to evaluate which pieces of evidence really mattered. To find out what actually made a difference at trial — to accurately answer the four post-conviction questions — there are a number of places that post-conviction counsel must look.

What the Lawyers Said

To find out what the most damaging evidence was, and who the most damaging witnesses were, look to what the lawyers emphasized — orally and in writing. Did defense counsel unsuccessfully seek *in limine* to exclude certain testimony? Did the prosecutor fight tooth and nail to keep it in? If so, it was probably important testimony that was damaging to the client's case.[18] And, more to the point, if there is evidence in post-conviction that contradicts that testimony, the attorney will be able to construct a compelling argument that, had the evidence discovered in post-conviction been offered to contradict the challenged testimony at trial, there is a reasonable probability that the result of the trial that would have occurred would have been different than the result of the actual trial.

Do not stop at pretrial litigation. What did the lawyers ask about on voir dire? What did they seek permission to ask about? Perhaps most importantly, what did the lawyers say to the jury during opening statements and closing arguments? What evidence did they explicitly tell the jury to pay attention to? In the absence of direct, admissible statements from the jurors about what they considered important, opening and closing statements are typically the best source of answers to the four post-conviction questions. Consider a *Brady* case, for example, in which the Ninth Circuit cited (and quoted at length) the trial prosecutor's closing argument in rejecting the state's contention that withheld evidence — impeaching a key prosecution witness — was not prejudicial: "[T]he state's claim that the undisclosed information made no difference is severely undercut by the prosecutor's strenuous vouching for [the witness's] truthfulness in closing argument."[19]

What the Judge Said

What did the judge think was important in the case? One place to look is the jury instructions. The fact that courts tend to presume jurors follow the law as charged heightens the importance of jury instructions when trying to prove prejudice. Did the judge instruct the jury not to consider an inadmissible fact that was blurted out by a defense witness? Evidence discovered in post-conviction that would have rendered the fact admissible would likely have made a difference because the judge would not have given the limiting instruction that the prosecutor fought so hard to get.

Jury instructions are just the beginning. Look for comments the judge may have made during sidebars, indicating her views on the relative importance of certain evidence, or other comments made during any point in the trial. The judge's remarks are particularly key when judicial sentencing is at issue. In an Alabama case, for example, the Eleventh Circuit found prejudice where trial counsel had failed to present evidence of the severe abuse and neglect suffered by the client as a child.[20] At trial, the sentencing judge had explicitly noted that the defendant's childhood was *not* one of "total deprivation."[21] In post-conviction, the court explained that, "given the importance the trial judge placed on [defendant's] ... purported lack of deprivation, [evidence of deprivation] clearly would have been beneficial ... had it been presented."[22]

What Jurors Said

Jurors will likely not be able to come forward in post-conviction proceedings and testify that, had they known about a certain piece of evidence, they would not have convicted or voted for death. But that does not mean jurors have no say in what made a difference at trial. Jurors speak directly on voir dire, often indicating (in the abstract) what they consider to be important. Juror notes during deliberations are an even more direct source of evidence regarding what mattered to the jury. Consider an example outside of the ineffectiveness or *Brady* context: a juror misconduct case in which the jury asked on five separate occasions to have the eyewitness's 911 call played back. Post-conviction counsel discovered that one of the jurors knew the eyewitness, but failed to disclose that fact during voir dire. In order to prove that the misconduct "might have unlawfully influenced [the] verdict,"[23] post-conviction counsel can point to the obvious centrality of the 911 call in the jurors' deliberations.

What Others Said

Sometimes the answers to the four post-conviction questions can be found in the testimony of people not directly involved in the trial, such as journalists, spectators, and court staff. Local media, in particular, can often help answer, "Why was my client convicted?" and "Why was he sentenced to death?" Gather, and carefully review, all of the media generated at the time of trial. Consider interviewing journalists who covered the trial and spent as much time in the courtroom as the lawyers and jurors.

It should be evident that many (but not all) of the answers to the four post-conviction questions can be found in the trial record itself. It is standard practice for a post-conviction attorney to read the trial record at the inception of her representation of the client. Attorneys often read the trial record for trial court errors, for missed objections, and for prosecutorial misconduct. All of these instances should be noted, catalogued, and considered. Nonetheless, the first review of the record should also yield a list of answers to the four post-conviction questions — a list that should then frame counsel's approach to the post-conviction investigation.

Reverse Investigation

Once the post-conviction attorney knows what mattered at trial, her prejudice arguments begin to take shape — even before she begins the post-conviction investigation.

Consider a case in which the prosecutor emphasized in the penalty phase closing argument that there was no evidence the defendant had been abused, stating, "You heard that his mother was married to a violent man and that he abused her. What has that got to do with the defendant?"[24] Before the post-conviction attorney interviews a single witness, she can read this closing argument transcript and envision a prejudice argument on an ineffectiveness claim. If the investigation reveals abuse of the client, the attorney will be able to argue that the trial that would have occurred with effective counsel would look very different from the actual trial. The central theme of the prosecutor's closing argument — that defense counsel failed to establish the defendant had been abused — would have been foreclosed. Of course, counsel needs to establish deficient performance (i.e., that the client was abused and counsel was deficient for not discovering and presenting that evidence), but now counsel has a roadmap for what to look for. Indeed, in *Cooper v. Secretary, Department of Corrections*, post-conviction counsel was able to present evidence of childhood abuse that the Eleventh Circuit deemed "horrific."[25] The court quoted the prosecutor's closing argument at trial to emphasize this point: "During the penalty phase, the jury heard very little that would humanize Cooper ... and the mitigation evidence presented in post-conviction proceedings 'paints a vastly different picture of his background' than the picture painted at trial."[26]

So what does it mean to reverse-investigate? After post-conviction counsel answers the four post-conviction questions and has a concrete idea of what mattered at trial, "reverse investigation" prompts two more questions: (1) Was any evidence withheld that would have discredited or eliminated or changed anything that made a difference at trial?, and (2) Would effective counsel have been able to discredit or eliminate or change anything that made a difference at trial? Those are the two questions that should guide the post-conviction investigation initially, and ultimately the development and presentation of the post-conviction claims.

Imagine a case in which counsel has asked one of the four post-conviction questions, "Why was my client convicted?" The record reveals that the most damaging

evidence against the client was the testimony of an eyewitness, Ms. Wilson, who came forward to implicate the client after learning of a $1,000 reward in the case. She was cross-examined at length about her knowledge of the reward. Especially given the prosecutor's comment in closing argument that "Ms. Wilson tells you everything you need to know to convict Mr. Davis," the post-conviction attorney might conclude that the jury convicted the client because Ms. Wilson identified him as the perpetrator, the reward notwithstanding. Basic "reverse investigation" here simply means the post-conviction attorney focuses the investigation on Ms. Wilson's identification. For example, counsel may direct her investigator to look into the circumstances of Ms. Wilson's identification and seek to discredit her testimony if at all possible. If the investigator finds evidence that contradicts the identification (for example, that the lighting was poor at the crime scene and trial counsel should have presented that fact), the attorney may be able to establish prejudice.

But counsel should take this approach a step further by scrutinizing all the factors that led to the client's conviction. A closer review of the record reveals that, although Ms. Wilson's identification of the client was a critical piece of evidence, the prosecutor's entire re-direct examination attempted to rehabilitate her by eliciting the fact that she was quite wealthy and would not have risked a perjury conviction for a paltry $1,000. Indeed, in closing, the prosecutor emphasized the witness's wealth, arguing, "Why would Ms. Wilson risk everything to come in here and lie for $1,000, which may be a big deal to me and you, but was pocket change to her?" Now, counsel may answer the post-conviction questions differently. Counsel may conclude that, more than Ms. Wilson's identification, the fact that she was apparently wealthy was quite damaging, because it effectively neutralized trial counsel's questions about her motivation to come forward. With that in mind, the reverse investigation can be further refined. The attorney still wants to investigate Ms. Wilson and look for anything that may discredit her identification. Without more guidance, the investigator would, for example, presumably run a criminal and civil court record search on Ms. Wilson. But now counsel focuses in on the financial angle that played such a key role at trial. Counsel tells the investigator to look into tax liens and bankruptcy filings for Ms. Wilson. Counsel wants to discredit not only her identification, but her assertion of relative wealth (for which the prosecutor vouched). Maybe nothing will come of it, but if counsel finds evidence that she was in fact going through a financial crisis at the time she came forward, the prejudice argument writes itself: "There is a reasonable likelihood that the outcome of the trial would have been different had the prosecutor's primary argument vouching for Ms. Wilson been destroyed."

Indeed, one of the most practical benefits of reverse investigation is that it takes advantage of the maxim that if you know what you are looking for, you are more likely to find it. That does not mean it will always be there. But if you do not know what you are looking for, you will likely miss it.

Focusing the investigation on what mattered at trial is not inconsistent with keeping an open mind and conducting as broad an investigation as time and resources permit. In fact, there is a danger when post-conviction counsel narrows an investigation too quickly and assumes she knows the universe of helpful facts that could be discovered. Conducting a reverse investigation does not mean limiting the investigation only to those issues that can be directly linked to an aspect of the trial that mattered. But it does mean remaining conscious, from the beginning, of the factual claims that are most likely to relate to the four post-conviction questions identified at the outset of this article.

Conclusion

If the post-conviction attorney keeps the obligation to prove prejudice at the forefront of her mind as she frames her investigation, she will both conserve resources and discover winning evidence that might actually be missed in a more scattershot approach. The basic approach can be summed up in the chart at right.

A recent case from the Eleventh Circuit, *Ferrell v. Hall*, provides a concrete example of what this approach looks like and how it works. Consider the following excerpt from defense counsel's closing argument during the penalty phase of this Georgia capital case: "Why would he do this thing? … Why would someone like this, why would [the defendant] here, who, to all accounts, loved these folks he murdered … who is not a mad-dog killer, had never done this sort of thing before — why would he do this? Well, we don't know. We may never know."[27]

One of the four post-conviction questions is: "Why was this defendant sentenced to death?" From reading this defense closing argument, one could reasonably conclude that the lack of an explanation offered by defense counsel contributed to the death sentence. Think about it in terms of the trial that was and the trial that would have been. At the actual trial, defense counsel told the jury that there was no explanation — and perhaps never would be — for the defendant's actions. Employing reverse investigation, the attorney would focus her post-conviction investigation on providing an explanation for the crime. Assume she uncovers evidence of severe mental illness that provides an explanation. Instead of offering jurors no explanation whatsoever, defense counsel would have offered a plausible explanation for the crime committed. Instead of saying, "We don't know why this happened," defense counsel would have told the jury, "We *do* know why this happened, and this is why." This trial looks nothing like the trial that actually occurred.

On post-conviction review, the attorney must convince the court that trial counsel was deficient for not doing the investigation that would have uncovered the evidence of mental illness. If the attorney can do that, the court then asks whether there is a reasonable likelihood that the outcome of the trial would have been different but for the deficient performance. In short, "So what?" Here, the mental health evidence uncovered in post-conviction would have changed the picture at trial. And that is exactly what the Eleventh Circuit concluded in *Ferrell*. In the course of reversing the death sentence and granting a new trial, the court explained, "[Defense] counsel's repeated questions to the jury about why Ferrell had committed the crime could have been answered by providing mitigating evidence about his mental health."[28]

Even in the most aggravated of cases, it is possible to change the picture, to portray a trial that would have occurred had the client's constitutional rights been protected. And as long as that trial looks sufficiently different than the trial that actually took place, post-conviction counsel has a shot at proving the prejudice needed to win relief.

Identify What Made A Difference At Trial

[By asking the Four Post-Conviction Questions]

then...

Conduct Reverse Investigation

[By asking whether any evidence that was withheld from defense counsel would have discredited or eliminated or changed anything that made a difference at trial, or whether effective counsel could have discredited, eliminated, or changed anything that made a difference at trial]

then...

Articulate Prejudice

[By contrasting the actual trial that was with the trial that would have been]

Notes

1. Even bad faith prosecutorial misconduct claims require prejudice. Though the bar may be somewhat lower, *see, e.g., Benn v. Lambert*, 382 F.3d 1040, 1058 n.11 (9th Cir. 2002), the law is unclear and the best practice is to assume that such claims require the same showing of prejudice that typical *Brady* claims require.
2. Ineffectiveness and *Brady* claims are not the only viable post-conviction claims, but they are the most common. The principles discussed here relate to most other post-conviction claims, including juror misconduct claims.
3. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
4. *United States v. Bagley*, 473 U.S. 667, 682 (1985). Juror misconduct claims require similar showings of prejudice. *See, e.g., Meyer v. State*, 80 P.3d 447, 455 (Nev. 2003) ("Prejudice is shown whenever there is a reasonable probability or likelihood that the juror misconduct affected the verdict."); *United Statesv. Keating*, 147 F.3d 895, 900 (9th Cir. 1998) ("A defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is 'a reasonable possibility that the extrinsic material could have affected the verdict.'" (quoting *Dickson v. Sullivan,* 849 F.2d 403, 405 (9th Cir.1988)).
5. Note that this general approach applies to both capital and non-capital post-conviction cases, even though the emphasis in this article is on capital cases.
6. *In re Fields*, 800 P.2d 862, 866 (Cal. 1990).
7. *See, e.g.,* Mark E. Olive & Russell Stetler, *Using the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases to Change the Picture in Post-Conviction*, 36 Hofstra L. Rev. 1067 (2008).
8. *Fields*, 800 P.2d at 866 (Cal. 1990) (emphasis added).
9. *Prevatte v. French*, 499 F. Supp. 2d 1324, 1331 n.1 (N.D. Ga. 2007). I was counsel of record for Petitioner in *Prevatte*.
10. It is worth noting that the passage of time does not always work to the habeas petitioner's disadvantage. For example, paid state witnesses may be more likely to speak with a defense investigator years after the trial, when they are no longer under the control of law enforcement. Passions in the community may also have died down, resulting in some witnesses feeling more comfortable talking about the case or the client.
11. *Turner v. Runnels*, 322 Fed.Appx. 525, 526 (9th Cir. 2009).
12. *Id.*
13. *Id.* at n.1.
14. *Id.*
15. *Smith v. Holtz*, 210 F.3d 186, 197 (3d Cir. 2000). *Smith* was a civil case brought pursuant to 18 U.S.C. § 1983, but the analysis in which the court engaged was whether the plaintiff had established a due process violation under *Brady.*
16. *Id.* at 198.
17. Courts generally do not permit inquiry into the mental processes of jurors in reaching a verdict, unless for the purpose of establishing an act of misconduct. *See, e.g.*, *Saucedo v. Winger*, 252 P.2d 908, 917 (Kan. 1993).
18. Likewise, if the prosecutor deliberately withheld exculpatory evidence, the intent to evade the requirements of *Brady* can reveal how important the prosecutor believed that evidence to be. Thus, while a habeas petitioner does not bear the burden of establishing purposeful action or bad faith on the part of the prosecutor withholding exculpatory information, *see Kyles v. Whitley*, 514 U.S. 419, 437-438 (1995), evidence of bad faith can be helpful in proving prejudice.
19. *Carriger v. Stewart*, 132 F.3d 463, 482 (9th Cir. 1997). Another good example of a post-conviction court examining the trial prosecutor's closing argument to determine prejudice is *Lambert v. Beard*, 633 F.3d 126, 135 (3d. Cir. 2011).
20. *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008).
21. *Id.* at 1343.
22. *Id.*
23. This example is hypothetical; for illustrative purposes, I note the Alabama standard for establishing prejudice in a juror misconduct case. *See Roan v. State*, 143 So. 454, 460 (Ala. 1932).
24. *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1339 (11th Cir. 2011).
25. *Id.* at 1355.
26. *Id.* (citing *Williams,* 542 F.3d at 1342).
27. *Ferrell v. Hall*, 640 F.3d 1199, 1207 n.8 (11th Cir. 2011).
28. *Id.* at 1235.

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