Strategies to Effectively Argue Prejudice in Ineffective Assistance of Counsel Claims

Supplemental Materials

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Panelists: Rob Henak, Suzanne Hagopian, and Matthew Pinix
Moderator: Hannah Schieber Jurss

I. Reliability/Outcome Determinative Standard:

The prejudice analysis in an ineffectiveness claim is not outcome determinative in the sense that the defendant need not show that a different result "would" happen - i.e., is more likely than not. However, that is not based on a reliability standard but on the "reasonable probability" standard. The analysis most certainly is outcome determinative in the sense that, in the vast majority of cases, what matters is the effect of the error on the outcome, not the perceived "reliability" of that outcome. If the reasonable probability standard is satisfied, then the conviction is, by definition, unreliable. However, a judge's determination that the outcome is "reliable" does not necessarily overcome the reasonable probability of a different result standard.

The Wisconsin Appellate Courts often claim that, to show prejudice on his ineffectiveness claims, the defendant must demonstrate that trial counsel's errors were so serious that the result of the proceeding was unreliable. *See*, *e.g.*, ***State v. Mayo***, 2007 WI 78, ¶64, 301 Wis.2d 642, 734 N.W.2d 115; ***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.

However, these cases overlooked the United States Supreme Court's express rejection of this "reliability" analysis 17 years ago in ***Williams v. Taylor***, 529 U.S. 362, 391-93 (2000); *see* ***Glover v. United States***, 531 U.S. 198, 202-03 (2001). Rather, resulting prejudice in the ineffectiveness context turns on whether there is "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Williams***, 529 U.S. at 391 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694 (1984)); *see* ***State v. Gordon***, 2003 WI 69, ¶¶22-23, 262 Wis.2d 380, 663 N.W.2d 765 (One of the few published Wisconsin cases citing ***Williams'*** recognition of the proper standard). 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.

Many of the state cases trace back to language in ***State v. Smith***, 207 Wis.2d 258, 276, 558 N.W.2d 379, 386 (1997), that "the touchstone of the prejudice component is 'whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" The ***Smith*** Court cited ***Lockhart v. Fretwell***, 506 U.S. 364 (1993), and ***Nix v. Whiteside***, 475 U.S. 157 (1986), for this proposition. However, the ***Williams*** Court expressly rejected that analysis, holding that ***Nix*** and ***Fretwell*** "do not justify a departure from a straightforward application of ***Strickland*** when the ineffectiveness of counsel does deprive the defendant of a substantive or procedural right to which the law entitles him." 529 U.S. at 393 (emphasis removed).

The "reliability" standard is not merely wrong as a matter of law. Its continued application both increases the cost of litigation and results in the denial or delay of relief to those unconstitutionally convicted or sentenced. The insistence on that standard has resulted in federal habeas relief in at least three of undersigned counsel's cases, but not until the defendants had served as much 13 years in prison. ***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). In each case, the Seventh Circuit recognized that the "reliability" standard applied by the state court was contrary to controlling Supreme Court precedent in ***Williams***.

II. Prejudice in the Plea Context

The "plea withdrawal" section on page 2 of the original outline omits some critically important language. Specifically, we are not required to prove that the defendant "would" have insisted on a trial but for counsel's deficient performance. Rather, we need only prove that there is a reasonable probability of that result. ***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"); ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (same).

III. Helpful Law

A. 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).

B. 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)

C. Jury - not judge - to make credibility determination regarding defense case. Jury entitled to believe evidence unless incredible as matter of law. 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); *e.g.*, ***State v. Jenkins***, 2014 WI 59, ¶¶50-65, 355 Wis.2d 180, 848 N.W.2d 786; ***id.***, ¶¶69-98 (Crooks, J. Concurring).

D. 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)

E. ***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.").

F. 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)).

G. "[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).

H. "A defendant who alleges that counsel was ineffective by failing to take certain steps must show with specificity what the actions, if taken, would have revealed and how they would have altered the outcome of the proceeding." ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999).

IV. 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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> 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").