STATE COLLATERAL REVIEW

Post-Conviction Relief

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STATE COLLATERAL REVIEW

(Post-Conviction Relief)

Almost every state has a process in place for collateral review of criminal convictions. While the rules for processing these cases are different in each state, there is substantial overlap in the substance of these types of proceedings. These proceedings are typically the home of two types of constitutional claims – ***Brady/Giglio*** **Violations and Ineffective Assistance of Counsel claims.**

What follows is a summary of the most common claims that are raised in these two categories with some pointers on the major U.S. Supreme Court cases regarding these claims and what can be done before and during the original trial to provide some protection from these claims.

BRADY/GIGLIO

Brady and *Giglio* are broad labels for two types of materials which must be disclosed. *Brady v. Maryland* 373 U.S. 83 (1963), requires prosecutors to disclose "exculpatory" evidence – evidence which potentially negates an element of the offense or mitigates punishment. *Giglio v. U.S.,* 405 U.S. 150 (1972), expanded that requirement to impeachment evidence – evidence that does not directly negate any element of the offense but only calls into doubt the credibility of the State's evidence/witnesses. The line between the two types of evidence can, on occasion, be blurry, but the test is the same for both types of evidence.

Test Requirements for Brady and Giglio

- Apply to all information known to any individual working on behalf of the government in connection with a case which will include any law enforcement agencies involved in the investigation of the case. (Some states also require disclosure of information possessed by other government agencies not directly involved in the case.)
- Make every effort to obtain all material related to the case from the law enforcement agency. The prosecutor should be making the decision on what should be disclosed, not the police department(s).

Brady and *Giglio* material subject to three-part test *Strickler v. Greene*, 427 U.S. 263, 281-82 (1999).

- **Exculpatory/Impeachment:**
  The first part is whether the material is exculpatory/impeachment. If it is, it should be disclosed. In practice, this prong merges into the third prong. While the prosecutor reviewing the material effectively gets to decide if it is discoverable, the model practice is to disclose everything. Before declining to disclose, a prosecutor must be certain that it is not discoverable and preferably should have a good reason (not related to the specific case) for the decision to not disclose. If the thought is that disclosing this evidence will harm this case, then the evidence must be disclosed.

- **Disclosure:**
  The second part is whether the material was disclosed. Here is where documentation is key. If you make a detailed record of what was disclosed, that record will prove what was disclosed. For documents, bates stamping[1] is a good method of tracking what pages were disclosed. For discs, either a detailed listing of the files saved to the disc or numbering each disc with labels with the case number on the discs is a good way to track the discs. In both cases, either a discovery receipt signed by defense counsel (or defense counsel's legal assistant/ investigator) or a computer system which tracks when discovery is downloaded will help demonstrate that the discovery got to defense counsel. To the extent that the court rules permit it, model practice is to file a notice showing what was disclosed with the court.

1 A unique numeric or alphanumeric identifier attached to individual documents and pages to make each document and page easily identifiable and retrievable.

- **Prejudice:**
  The third and final step is prejudice which requires showing that the undisclosed information was "material." The definition of material is similar to the *Strickland* standard (as *Strickland* used the standard which applied to *Brady* violations). In determining whether nondisclosed evidence is material, the collateral review court is to consider the cumulative impact of all of the nondisclosed evidence rather than each piece individually. *Kyles v. Whitley*, 514 U.S. 49 (1995).

Note: Sometimes attorneys will argue for applying a harmless error standard on top of the three-prong test. In reality, harmless error is a more favorable standard for offenders than the materiality test. If the evidence is material, the failure to disclose will not be harmless. It is only if the evidence is not material that the failure to disclose might be harmless (or it might not be harmless).

SUMMARY:

Brady and *Giglio* are trial-related rights which, at least at the federal level, are waived by a guilty plea. *United States v. Ruiz*, 556 U.S. 622 (2002). On the other hand, unless the guilty plea occurs very early in the case, model practice is to promptly disclose all *Brady/Giglio* material as late disclosure might lead to a continuance of the trial. The simple strategy for dealing with *Brady/Giglio* is to get everything from your law enforcement agencies, disclose everything, and document everything. However, that is easier said than done. Police agencies may not recognize that a separate investigation is connected to your case or may not document everything that they know. There will sometimes be something that you decide is not covered by the disclosure requirements for which you have a good reason for not disclosing. Documentation ultimately depends on the legal assistants and paralegals who handle making the copies and providing the material to defense counsel who may not fully describe the materials being provided.

INEFFECTIVE ASSISTANCE OF COUNSEL

Cases that establish the core rules for ineffective assistance of counsel claims and share some of the enumerated uniform features:

- *Strickland v. Washington,* 466 U.S. 668 (1984) (trial & sentencing)
- *Hill v. Lockhart,* 474 U.S. 52 (1985) (plea counsel)
- *Smith v. Robbins,* 528 U.S. 259 (2000) (appellate counsel)

All ineffective assistance claims have two components: **competence** and **prejudice**. A person challenging a conviction must prevail on both.

- Competence requires more than showing the existence of an alternative course of conduct There is always something else that can be done in any case.

- Counsel is presumed to be competent. A petitioner/movant must allege specific acts that constitute incompetence. While the petitioner is not required to call his former counsel, it can be difficult to overcome the presumption of competence without counsel's testimony. *Dunn v. Reeves*, 141 S. Ct. 2405 (2021).

- Incompetence requires showing that counsel acted outside the scope of what a reasonable attorney would do. State ethical rules and ABA standards are guidance but are not conclusive. *Bobby v. Van Hook*, 558 U.S. 4 (2009).

- Reasonableness of counsel's actions are based on what counsel knows or should know.

- Reasonable trial strategy is a defense to claim of incompetence. Trial strategy can include considerations of the idiosyncrasies of the fact-finder.

- Avoid the tendency to use hindsight in judging reasonableness. This rule works both ways – neither post hoc rationalizations for conduct nor conclusion that should have done something different resolve the issue of competency.

- "Nothing to lose" is not a measure of competency. *Knowles v. Mirzayance*, 556 U.S. 111 (2009). Defense counsel can opt for the best strategy and does not have to pursue every nonfrivolous defense.

- For all types of claims, prejudice is the reasonable probability of a different result. In the case of a plea, that different result is going to trial.
    - For **trial/sentencing**, the different result is an acquittal, a lower sentence,[2] or conviction of a lesser offense.
    - For **appeal**, the different result is reversal.

- When relevant, prejudice is based on the current law. *Lockhart v. Fretwell,* 506 U.S. 364 (1993). While counsel might be incompetent for not pursuing a colorable claim based on the law at the time of the trial, there is no prejudice if later decisions clarify that the claim is meritless.

- For the most part, prejudice is not presumed. Instead, petitioner/movant must demonstrate prejudice.

- Prejudice is an objective, not subjective standard, under *Strickland*, *Hill*, and *Robbins*. It is based on what a reasonable person/judge/jury would do. However, in the case of a plea, there is a subjective component of what the defendant's priorities are *Lee v. United States*, 137 S. Ct. 1958 (2017) (desire to avoid deportation had to be considered in determining whether reasonable possibility that defendant would have rejected plea offer to lesser charge which still required deportation and gone to trial on more serious charge notwithstanding strong evidence of guilt).

COMMON CLAIMS

Most Ineffective Assistance of Counsel Claims fall into nine categories:

I. FAILURE TO CALL WITNESSES/INVESTIGATE WITNESS

Strickland establishes the basic rule – counsel has a duty to engage in a reasonable investigation:

- In capital cases, many of the potential sources for mitigating evidence are also sources for evidence in aggravation. Obtaining court records (including probation reports and sentencing reports), corrections records, state mental health records, educational records, and children's division records and disclosing those records to defense counsel may make it harder for the offender to claim that counsel did not investigate those areas. For the type of records that should be reviewed in a capital case *see Rompilla v. Beard,* 545 U.S. 374 (2005) (prison records and prior case files)*; Wiggins v. Smith,* 539 U.S. 510 (2003) (general social history); *Williams v. Taylor,* 529 U.S. 362 (2000) (juvenile records, prison records).

- *Strickland* makes clear that the scope of a proper investigation is based on what counsel knows/should know. At each step of the analysis on this type of claim, the first question should be what information counsel had (from offender, his family, other witnesses, discovery) that would have led counsel to the next step of the investigation.

- *Strickland* also allows counsel to make a reasonable decision that further investigation is not productive. If counsel's information indicates that one defense theory looks potentially viable and another theory does not look viable, counsel can opt to focus resources on the viable theory.

2 Most, if not all, of the U.S. Supreme Court cases involve ineffective assistance at sentencing where the sentencing options are binary. It is less than crystal clear how Strickland applies to non-capital sentencing decisions where the trial court has a range of options and only broad guidance as to what makes a sentence appropriate.

- Even if an offender can show that further investigation would have led counsel to call a witness or introduce certain evidence, an inmate must still show prejudice – a reasonable probability of a different outcome. The strength of the case matters. The more open and shut the State's case is (*e.g.*, physical evidence connecting the defendant to the offense or extremely aggravating circumstances in penalty phase), the less likely that a court will find prejudice from the lack of certain evidence (*e.g.*, alibi in guilt phase or weak mitigation evidence).

Note: Expert witnesses are a subcategory of this type of claim. Defense counsel still has the ability to make reasonable decisions about whether they need to consult with or call an expert on particular issues and are not required to get a counter-expert for every state expert. *Harrington v. Richter,* 562 U.S. 86 (2011). A reasonable decision not to hire an expert (either in general or a specific expert) is not ineffective assistance of counsel. *Dunn v. Reeves,* 141 S. Ct. 2405 (2021).

II. FAILURE TO OBJECT/SUPPRESS EVIDENCE (OR OPENING STATEMENT/CLOSING ARGUMENT)

- Strategic considerations still apply. Defense counsel can decline to object if they think the evidence might help the defense. Can also decline to object if they think an objection is not worth it – the risk of losing credibility with the jury/judge if they object too much and the evidence/argument is not that harmful.

- If a claim gets past competence prong, the prejudice prong has two stages. *Kimmelman v. Morrison,* 477 U.S. 365 (1986). At the first stage, the issue is whether there is a reasonable probability that the objection/motion to suppress would have been sustained. If the objection/motion to suppress is meritless, then there is no prejudice from the failure to file it. Under *Strickland*, the presumption is that the trial court will follow the law, and, as such, the test for prejudice assumes that a meritless claim will be denied and, therefore, will not impact the result of the trial. If the defendant can show that the objection/motion has merit, prejudice requires a showing that the result of the trial would have been different. This is basically the flip side of the failure to call a witness claim – instead of adding more evidence to what was presented at trial, this type of claim takes that evidence away. Again, the prejudice analysis looks at the change to the evidentiary picture and decides if the change is significant enough to create a reasonable probability that a reasonable jury would reach a different verdict.

- Sometimes, these claims get characterized as a "failure to preserve" a claim for appeal. While the U.S. Supreme Court has not directly addressed the issue, the reasoning in *Kimmelman* and *Strickland* shows why that framing is wrong. Under *Strickland*, the presumption is that the trial court will follow the law on any objection. Thus, if it would be error for the trial court to overrule an objection, *Strickland* requires that the collateral review court assume that the objection would have been sustained, and *Kimmelman* dictates that you then consider the impact of a successful objection. And, if it is not error for the trial court to overrule the objection, *Strickland* requires presuming that the appellate court will affirm.

III. INSTRUCTIONAL ERROR/FAILURE TO REQUEST INSTRUCTIONS

- A significant aspect of this claim is jurisdiction-specific, and it may matter whether your jurisdiction has mandatory instructions or merely model instructions and what the rules are for particular instructions.

- Especially on the failure to request a lesser-included instruction, trial strategy plays a part, and the defense can decide on an "all or nothing" approach. Model practice is to make a record about the decision to forego lesser-included offenses if your trial court will let you. If there is a record that the defense does not want to submit lesser-included offenses, that should defeat any claim that trial counsel did not consider submitting them.

- Ultimately, prejudice will come down to whether the instructions misled the jury. Even on defense-requested instructions, the prosecution has the duty to make sure that the instructions correctly state the law. While, in many jurisdictions, an error created by the defense will not be considered on direct appeals, such errors are the bread and butter of collateral review claims of ineffective assistance. Unless the error favors the defense, it is going to be hard to argue that the defense error was not an incompetent act by defense counsel.

IV. FAILURE TO ADVISE DEFENDANT ABOUT A PLEA OFFER

- Defense Counsel has a duty to communicate with a client about significant developments in a case. That includes informing the client about the plea offer and giving accurate advice about the options that the defendant has (accept the plea offer, make a counteroffer, plea up to the court, go to trial). If defense counsel fails to do so, that is incompetent representation. *Lafler v. Cooper,* 566 U.S. 156 (2012); Missouri v. Frye, 566 U.S. 134 (2012)

- Under *Frye*, the Prejudice prong has three parts – reasonable probability that defendant would have accepted the plea, reasonable probability that the prosecution would not have withdrawn the plea, and reasonable probability that court would have accepted. Whether the court would have accepted the plea is an objective question and should not require calling the trial judge as a witness.

- If you are going to contest whether the prosecution might have withdrawn the plea, you should have an objective basis for that argument (i.e., something that was learned within days of the plea offer). Additionally, this type of case is one of the handful of cases in which model practice requires having a new attorney handle the hearing so that the trial attorney is available to testify.

- If the case is going to trial, *Frye* suggests making a record, in the defendant's presence, prior to trial, of the offers in the case and that they were rejected. While this will not always be enough – given potential for a claim of erroneous advice connected with the plea offer – it does eliminate any claim that the defendant was ignorant of the plea offers. Model practice is to have a similar hearing before withdrawing any plea offer.

- For most "collateral" consequences, state law determines if counsel must advise the client about those consequences. An exception is potential immigration consequences, and counsel must advise a defendant about the impact of a conviction on possible deportation. *Padilla v. Kentucky,* 559 U.S. 356 (2010).

V. DEFENDANT AS WITNESS

- This type of claim is different from other claims related to witnesses. For other witnesses, the final word on whether to call a particular witness belongs to defense counsel. However, the defendant gets to choose if she testifies, and counsel's role is limited to giving her proper advice on the pros and cons of testifying.

- Often the claim is that counsel failed to inform the defendant of his right to testify. If your court allows it, model practice is for the court to ask the defendant if he wants to testify prior to the defendant testifying or the defense resting. Such a hearing should make a record that defendant knows: a) that it is his choice to testify; b) that if he does not testify, the jury is not allowed to infer guilt from the failure to testify; and c) if does testify, the State will get to cross-examine him including being able to ask questions about any prior convictions.

VI. JURY SELECTION/STRUCTURAL ERRORS

The Supreme Court has not directly addressed ineffective assistance in the context of jury selection.

- Some states and federal circuits have held that for issues related to peremptory strikes, the defendant must meet *Strickland* prejudice – which, given the presumption that the jury acted reasonably and the requirement to show a reasonable probability of a different result, is almost impossible to prove.

- Issues related to challenges for cause are different.

- Both *Batson* claims and unqualified jurors serving invoke structural error on direct appeal.

- In the ineffective assistance of counsel arena, whether structural error is enough to show prejudice depends on the type of structural error. *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017). Under Weaver, the issue is whether error calls into question the fundamental fairness and accuracy of the proceeding. A biased juror (i.e., one who should have been disqualified for cause) probably implicates the fundamental fairness and accuracy of the proceeding and, thus, does not require a further showing of prejudice. Cases like *Batson* which protect other interests of the legal system (equal participation) probably require a showing of an impact on the result.

VII. CONFLICTS OF INTEREST

- Generally analyzed outside of the *Strickland* framework. If not an actual conflict of interest, claim is one of ineffective assistance based on an alleged failure to act.

- If actual conflict, *Strickland* provides that there is no requirement to show prejudice. (Other exceptions which are more rarely invoked are the complete failure to provide any defense or representing a client under circumstances in which it is nearly impossible to effectively represent. The first essentially requires that defense counsel do nothing. The second has limited application outside of an entry on the eve of trial with insufficient time to prepare).

- Test for unwaivable actual conflict (as opposed to waivable potential conflict) is whether the conflict impairs the representation. *Mickens v. Taylor*, 535 U.S. 162 (2001).

VIII. APPELLATE COUNSEL

- While, in theory, these claims are handled under the *Strickland* framework, the application of the two prongs tends to collapse together and the ultimate issue is the merit of the claim that was not raised on direct appeal.

- On the competence prong, the issue is the relative strength of the unraised claim in comparison to the claims presented. Under *Robbins*, and other cases, there is no requirement to raise every viable claim on appeal, and, particularly in light of word/page limits on briefs, appellate counsel can choose to limit the brief to the strongest claims. Thus, the test requires showing that the omitted claim was clearly better than the claims raised.

- As with trial counsel, strategy matters, and a reasonable assessment by appellate counsel of the strength of a claim will justify counsel's acts. In such an assessment, key considerations are the standard of review and the substantive law that governs the claim.

- There may be rare cases in which an offender can prove incompetence but not prejudice. However, aside from the situation in which appellate counsel raised frivolous claims, it will be very rare that a claim has sufficient merit to clearly be stronger than the claims raised on direct appeal but also be *sufficiently weak that there is no reasonable probability that it would be granted.*

IX. VOLUNTARINESS OF PLEA

- A guilty plea is a knowing and voluntary waiver of several constitutional rights – the right to a jury trial, the right to confront witnesses, the right to present a defense, the right not to incriminate oneself – and an admission of guilt. Thus, there must be an adequate record to demonstrate a knowing and voluntary waiver of rights and to demonstrate that the defendant knowingly and voluntarily admitted guilt (which requires that the defendant know and understand the elements of the offense).

- The exact rules for guilty pleas tend to be covered in each state's rules of court. As such, some states (and federal courts) might require more – like a sufficient factual basis for the plea.

- Model practice is to know your local rules and make sure that the plea covers all of the requirements for a valid plea. On a factual basis, more details are better than too few details.

SUMMARY:

Pursuant to *Strickland*, successful Ineffective Assistance of Counsel Claims must satisfy two prongs; that defense counsel's performance was deficient and had it not been for counsel's deficient performance, the result would have been different. The list of claims supra is illustrative of the more common claims challenging successful verdicts and many are often plead simultaneously by defendants. Prosecutors should be mindful of these claims as well as the case law in their respective jurisdictions both before and during the trial process.