# NO HARM, NO FOUL, NO RELIEF

**WISCONSIN STATE PUBLIC DEFENDER CONFERENCE**
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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, 700 N.W.2d 98 (quoting Court of Appeals' unpublished decision in that case).

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[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.

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

B. 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").

C. 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).

D. 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).

E. 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)

F. 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)

G. 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)

H. 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).

I. ***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.").

J. 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)).

K. "[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 and the courts often try 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").

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.