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DECISION-MAKING IN THE DARK: HOW PRE-TRIAL ERRORS CHANGE THE NARRATIVE IN CRIMINAL JURY TRIALS

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Over the past decade and a half, a great deal of attention has rightfully been given to the issue of wrongful convictions. In 2003, Jim Dwyer, Peter Neufeld and Barry Scheck published Actual Innocence*, an eye-opening treatise on the reality of wrongful convictions in the United States.*[1] *In the years since, more than 1400 innocent persons have been exonerated, and a very diverse research community of attorneys, academics, social scientists, and activists has developed in response to the realization of flaws in our criminal justice system. In 2012, Brandon Garrett's* Convicting the Innocent *quantitatively evaluated the first 250 DNA exonerations and exposed clear patterns of error within those cases.*[2] *Dan Simon's* In Doubt: The Psychology of the Criminal Justice Process *followed with a union of these patterns and their relationship with established psychological principles.*[3] *This strong foundation has led to an explosion of interest in identifying, analyzing and resolving the issues raised in wrongful conviction cases.*[4]

The Innocence Project, founded in 1992 by Scheck and Neufeld in cooperation with the Benjamin N. Cardozo School of Law, has expanded to many dozens of Innocence Network organizations throughout the world. The Duke Wrongful Convictions Clinic, in operation for just over five years, recently marked its fifth exoneration in the state of North Carolina. In addition, the Clinic is currently working seven innocence peti-

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1. JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

2. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011).

3. DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS (2012).

4. Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201, 201–23 (2005).

tions filed and in litigation, and additional cases are in various stages of investigation.

In an effort to better understand and remedy the errors occurring in these wrongful conviction cases, the Duke Clinic's research team is working to develop a root cause analysis methodology intended to identify the policies, procedures, and legal doctrines that contribute to these errors and to develop strategies for improving the criminal justice process. Because the justice system relies on individuals and the decisions they make as the core of its function, it is necessary to consider the various roles of responsibility and evaluate their decision-making processes in order to identify the root causes of wrongful outcomes. Here, we illustrate this process with a consideration of the jury's role in reaching wrongful verdicts.

INTRODUCTION

The jury trial plays a critical constitutional and institutional role in American jurisprudence. Jury service is, technically, the only constitutional requirement demanded of our citizens and, as such, places an important responsibility on those chosen to serve on any jury, especially within the criminal justice system. Jury research has established that, generally, jurors take their responsibilities seriously; they work with the evidence presented at trial and they reach verdicts that correlate to the narratives they develop throughout the trial.[5] But with estimates of wrongful conviction rates as high as 5% in serious felony cases,[6] how are juries getting it wrong? Synthesizing what we know about how juries operate with what is seen again and again in wrongful conviction cases, the answer seems clear—the established evidentiary doctrines are sometimes compelling incorrect verdicts by presenting the juries with incomplete and inaccurate evidence while expecting them to develop complete and accurate narratives. Inevitably, this dichotomy leads to verdicts that are sometimes based on misleading narratives. . . surely not the ideal intended for our system's lay participants.

In this article, we consider the interaction of evidentiary issues and jury performance in light of the problem of wrongful convictions.

5. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 542 (1991).

6. Samuel R. Gross, *How Many False Convictions Are There? How Many Exonerations Are There?* (Univ. of Mich. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 316, 2013), *available at* http://ssrn.com/abstract=2225420.

We start with a quick review of the jury's role in the American justice system and the widely accepted story model approach to jury decision-making. We next discuss the legal standards of evidence and admissibility issues at trial and how problems with withheld, misleading, or erroneously excluded or included evidence can affect the narrative a jury creates, and thus the verdict that jury renders, and consider how these issues are handled on appeal and in post-conviction litigation.

To demonstrate the impact of these problems, we examine two completely different case scenarios that illustrate how these evidence issues impact jurors' options for narrative development. The case of LaMonte Armstrong, an exoneration facilitated by the Duke Wrongful Convictions Clinic, exemplifies injustices that can result from prosecutorial errors and misconduct. The second case, drawn from the published perspective of an actual juror, displays how arguably faulty narratives can result from improper application of evidentiary and exclusionary rules. Finally, we contemplate how to address these issues in terms of policy and practice, and the avenues for further examination of these evidentiary issues.

I. DYNAMICS OF JURY DECISION-MAKING

The role of the jury as trier of fact is perhaps one of the most critical notions in the American justice system. The Sixth Amendment guarantees the right to a public trial by an impartial jury of one's peers,[7] and while each side has some opportunity to shape the jury makeup through challenges for cause and peremptory challenges, there are clear limitations on obviously discriminatory challenges, at least in the areas of race and gender.[8] The resulting jury is intended to be representative of the community and a group capable of evaluating the evidence presented, joined with the parameters of the law offered by the judge, to determine the facts of the case.

On its face, the concept is sound: with a legal expert at hand, a group of six to twelve citizens should be able to weigh and evaluate the information presented during trial into a coherent and logical result.

7. U.S. CONST. amend. VI.

8. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (prohibiting gender-based challenges); Batson v. Kentucky, 476 U.S. 79 (1986) (prohibiting race-based challenges). However, despite *Batson*, research bearing on North Carolina's Racial Justice Act has demonstrated consistent patterns of excluding minority members in death penalty cases. *See* Neil Vidmar, *The North Carolina Racial Justice Act: An Essay on Substantive and Procedural Fairness in Death Penalty Litigation*, 97 IOWA L. REV. 1969 (2012).

With the added benefit of deliberations providing an opportunity for the jurors to discuss the ins and outs of the evidence and the law, it is rationally plausible to assume that the jury is a legitimate arbiter of justice within its defined role as the trier of fact. Although there is frequent criticism of the institution, significant research has established that juries are generally fair, efficient, and effective.[9]

Rita Simon's early research concluded that jurors' decision-making processes are similar to those of a court judge: they take their responsibilities seriously, work to keep the law (as they understand it) in mind, and seek consistency within the evidence they have to work with.[10] Jurors actively process the presented evidence; make inferences; and use common sense, societal norms and personal experiences to inform their opinions.[11] Jury decisions appear to track the position of the median juror in the group rather than leaning to extremism, even if it is present within the jury.[12] Essentially, research has established the average juror as an effective decision-maker who works hard to understand and fulfill his duties as expected.[13]

Subsequent empirical research has established that jurors tend to follow a clear process in reaching a final verdict. Reid Hastie, Steven D. Penrod, and Nancy Pennington identified an approach to juror decision-making called the story model, in which jurors construct a story that embraces the facts presented, as well as their own knowledge and experience, into a coherent whole.[14] This widely accepted theory presumes that the jurors construct explanations for the evidence as it is presented by incorporating their own knowledge about the offense, their new knowledge gained through trial evidence, and their own expectations of what constitutes a complete story.[15] In this model, the story construction is a dynamic process, culminating in each individu-

9. NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT (2007).

10. RITA J. SIMON, THE JURY: ITS ROLE IN AMERICAN SOCIETY (1980).

11. *Id.*

12. *Id.*; *see also* Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Trials* 24–25 (Econ. Research Initiatives at Duke (ERID) Working Papers Series, Paper No. 55, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1673994.

13. SIMON, *supra* note 10.

14. REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY (1983); Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision Making*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 192–221 (Reid Hastie ed., 1993); Steven Penrod & Reid Hastie, *Models of Jury Decision Making: A Critical Review*, 86 PSYCHOL. BULL. 462, 462–492 (1979).

15. Pennington & Hastie, *supra* note 14.

al's verdict position. Because individual knowledge, experience, and expectations vary, the story construction for each juror can also vary.[16]

In one of their early studies, Pennington and Hastie asked jurors to discuss aloud their story construction and discovered that the jurors often included evidence they inferred (rather than was actually presented) to complete their narratives.[17] The stories constructed by those leaning toward not guilty verdicts differed significantly from those leaning toward guilty verdicts, even though all heard the same evidence.[18] In a 1988 follow-up study, these same researchers found that jurors tended to recognize more pieces of evidence that fit their ultimate decision and fewer that contradicted that decision.[19] In a third study, Pennington and Hastie found that when the prosecution presented its case in a story-telling format and the defense did not, the jurors convicted 78% of the time.[20] When the approaches were reversed, the conviction rate dropped to just 31%.[21]

Jurors can and do create many competing explanations of the events presented at trial. Within the story model, jurors typically use three criteria in developing the most acceptable narrative: coverage, coherence, and uniqueness.[22] Coverage refers to how much of the presented evidence a developed narrative can accommodate.[23] Coherence refers to the narrative's degree of plausibility, internal consistency, and completeness.[24] If a juror's developed narrative is coherent, offers a sense of completeness, and accounts for all the evidence presented at trial, the juror can feel confident in his or her narrative. If more than one version of the story is coherent and covers all the facts provided, jurors will have less confidence in their decision-making. That is, when more than one interpretation can fit the provided fact pattern, some tension can develop over which explanation to accept.

16. *Id.*

17. Nancy Pennington & Reid Hastie, *Juror Decision-Making Models: The Generalization Gap*, 89 PSYCHOL. BULL. 246, 279 (1981).

18. *Id.*

19. Nancy Pennington & Reid Hastie, *Explanation-Based Decision-Making: Effects of Memory Structure on Judgment*, 14 J. OF EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION, 521, 524 (1988).

20. *Id.* at 529.

21. *Id.*

22. HASTIE, PENROD & PENNINGTON, *supra* note 14. Hastie, Penrod and Pennington developed this concept in the early 1980s, but this reference provides the best explanation, from which this paragraph description is drawn.

23. *Id.*

24. *Id*.

Once all the evidence is in and jurors have created their narratives, they are provided instructions and legal definitions on which to base their verdict. From there, jurors will choose the verdict that best matches their individually constructed story. Pennington and Hastie demonstrated that when the evidence was presented in a way that made it easier for participants to create a story, the participants were more likely to vote in accordance with the preponderance of the evidence.[25] The story model has been effective in describing jury decision-making in a wide range of cases, including murder, rape, and sexual harassment cases.[26]

Further studies bearing on the story model have confirmed that jurors who have an easy time constructing a coherent narrative are very likely to deliver a verdict consistent with that story.[27] Also, it appears that jurors' individual knowledge, experiences, and expectations have a significant impact on their decisions, clarifying how and why jurors reach different conclusions given the same presented evidence.[28]

Given all that is known about how jurors operate in terms of synthesizing evidence into a coherent narrative, and given that individual jurors can create different narratives even when provided identical data, it seems even more critical that the details introduced at trial be complete and accurate. Unfortunately, it seems that, at least in situations of wrongful conviction, this is rarely the case.

II. EVIDENCE ISSUES IN WRONGFUL CONVICTIONS

Given the jury's duty to be trier of fact, it would seem logically beneficial for those jurors to be provided with a complete set of facts with which to develop an accurate narrative of the particular situation. In reality, that all too often is not the case. A number of exonerations have shown astonishingly consistent problems with withheld, suppressed, and misleading evidence, the vast majority of which were not

25. Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189, 189–206 (1992).

26. *Id.*; Jill E. Huntley & Mark Costanzo, *Sexual Harassment Stories: Testing a Story-Mediated Model of Juror Decision-Making in Civil Litigation*, 27 LAW & HUM. BEHAV. 29, 29–51 (2003); Lynda Olsen-Fulero & Solomon M. Fulero, *Commonsense Rape Judgments: An Empathy-Complexity Theory of Rape Juror Story Making*, 3 PSYCHOL. PUB. POL'Y & L. 402, 402–27 (1997).

27. Ryan J. Winter & Edith Greene, *Cognition and Juror Decision Making*, *in* HANDBOOK OF APPLIED COGNITION 743 (Francis Durso ed., 2d ed. 2007).

28. Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW & HUM. BEHAV. 507 (1993).

seriously considered on direct appeal.[29] In addition, historically there have been admissibility issues (e.g., prejudicial and irrelevant evidence allowed into the trial or important and relevant evidence excluded) that were also rubber stamped on appeal. In either situation, the jury is left with an incomplete or misleading set of facts that require them to apply their own experiences and beliefs to complete the narrative and render a verdict.

A. Brady *and* Napue *Issues*

The evidentiary issues identified in most wrongful conviction cases fall into one of two categories—evidence withheld from the defense and jury or the presentation of false evidence. Withheld evidence issues are typically considered *Brady* claims or some derivation thereof. In *Brady v. Maryland*, the Supreme Court ruled that prosecutors withholding evidence favorable to the defendant violates due process.[30] The motivating force behind the Court's decision in *Brady* was the belief that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[31]

Thus, while many actors within the criminal justice system behave as though *Brady* issues are merely a technicality, in fact they are a fundamental "rule of fairness."[32] The totality of *Brady* and its progeny is reasonably clear: the prosecution has a "duty to learn of"[33] and disclose to the defense all favorable material information known to the prosecution team, including the police.[34] In *United States v. Bagley*,[35] the Court pointed out that the *Brady* rule signaled a slight departure from a purely adversarial system in that the prosecution team is essentially

29. NAT'L REGISTRY OF EXONERATIONS, A PROJECT OF THE U. OF MICH. L. SCH., http://www.law.umich.edu/special/exoneration/Pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=Contributing_x0020_Factors_x0020&FilterValue1=False%20or%20Misleading%20Forensic%20Evidence (last visited May 7, 2015). Typically, exonerations are successful with the cooperation of the current district attorney, or are based on irrefutable evidence of innocence. Thus, the plethora of issues that actually caused the wrongful conviction are not dealt with in the sense of legal precedent.

30. Brady v. Maryland, 373 U.S. 83, 90–91 (1963).

31. *Id.* at 87.

32. Curry v. United States, 658 A.2d 193, 197 (D.C. 1995).

33. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

34. *Id.* at 432; *Brady*, 373 U.S. at 87.

35. United States v. Bagley, 473 U.S. 667 (1985).

obligated to help the defense make its case.[36] However, given the plethora of resources at the state's disposal, including the police force and forensics labs, *Brady* is intended to level the playing field.

While most *Brady* violations involve the failure to turn over favorable evidence at all, the failure to disclose evidence in a timely manner can be a substantial problem as well, also leading to distorted evidence at trial. The two types of evidence included under *Brady* and its progeny are exculpatory and impeachment,[37] and a delay in receiving either type can put a significant damper on the defense's ability to develop a legitimate case. In addition, while most discussions of *Brady* use the term evidence, which implies evidence admissible at trial, the reality is that the prosecution is required to turn over all information that might "allow defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense."[38] During the time of investigation and strategy development, admissibility at trial is a non-issue. That is, the admissibility of evidence is an issue to be considered at trial, not an evaluation for the prosecution to make during the investigative and pre-trial stages. Therefore, any and all information relating to the case should be turned over to the defense, even if it might be excluded at trial.

Some critics argue that there appears to be an attitude among some prosecution teams that impeachment evidence is somehow less constitutionally important than exculpatory evidence[39] but in fact, impeachment evidence might be the bigger issue. For instance, over 50% of known exonerations include perjury or false testimony, most of which likely included witness incentives, delayed prosecution of crimes, or other questionable motivations and the details of which the prosecution had a duty to be aware of and share with the defense.[40]

Technically, the *Brady* doctrine dictates action at the appellate level, rather than directly at trial. That is, *Brady* and its progeny provide an opportunity for errors to be corrected on direct appeal rather than establishing clear requirements for pre-trial disclosure. This distinction is important because relief based on these errors depends upon a hindsight perspective on the case. The three-step standard for a

36. *Id.* at 675 n.6.

37. *See id.* at 676; *Kyles*, 514 U.S. at 439; *see generally Brady*, 373 U.S. 83; Napue v. Illinois, 360 U.S. 264, 269 (1959).

38. Miller v. United States, 14 A.3d 1094, 1108 (D.C. 2011).

39. Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

40. NAT'L REGISTRY OF EXONERATIONS, A PROJECT OF THE U. OF MICH. L. SCH., *supra* note 29.

legitimate *Brady* violation is that the undisclosed evidence be favorable to the defense (either for exculpatory or impeachment purposes); the evidence was suppressed by the state (intentionally or not); *and* that "prejudice ensued."[41] That is, that there exists a reasonable probability that a different verdict would have been reached.

Most often *Brady* claims are denied because, although an error is identified, the court rules that it is harmless error; in other words, that its disclosure would not have impacted the outcome of the trial. In *Strickler v. Greene*, Justice Stevens noted that "strictly speaking, there is never a real '*Brady* violation'" unless the issue of materiality is established.[42] Interestingly, the materiality test that Justice Stevens referred to—"a reasonable probability that the verdict would have been different"—is precisely the test for establishing prejudice under the federal habeas "cause and prejudice" standard,[43] a nearly impossible prospect. Thus, with the added benefit of both hindsight and confirmation biases firmly in hand, it is rare that *Brady* claims are accepted within the appeals or habeas routes.

In *United States v. Agurs*, the Court defined three different standards of review in *Brady* issues.[44] The highest level of scrutiny is to be reserved for cases involving known perjury or false evidence, such that reversal is warranted "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[45] Second, in cases where a specific *Brady* request is made, an intermediate level of scrutiny is applied, such that failing to disclose specifically requested evidence is "seldom, if ever, excusable."[46] In all other cases, although the prosecutor still maintains an independent disclosure obligation, the Court will apply a less stringent standard: whether there is any reasonable doubt about the conviction due to the suppressed evidence.[47]

The reason for these varying standards of review is based on the struggle to balance fairness in the form of full disclosure by the prosecution team and the impracticality of re-trying every case that includes a *Brady*-type violation. In *Agurs*, the Court did recognize that the re-

41. *Strickler*, 527 U.S. at 281–82.
42. *Id*.
43. Coleman v. Thompson, 501 U.S. 722, 730, 750 (1991).
44. United States v. Agurs, 427 U.S. 97, 98 (1976).
45. *Id*. at 103.
46. *Id.* at 106.
47. *Id.* at 106–07.

viewing judge must set aside the verdict and judgment unless his "conviction is sure that the error did not influence the jury, or had but very slight effect."[48] In practice, however, appeals courts have tended to err on the side of the prosecution, possibly based on a desire to support the system itself or perhaps due to the confirmation bias effect of reviewing a case with a guilty verdict. Regardless, the result is a low probability of overturning a case based on *Brady* and similar violations.

The second most common evidentiary error in wrongful convictions involves the presentation of false, misleading, or inaccurate testimony.[49] In *Napue v. Illinois*, the Court established that the presentation of false evidence by the state is a clear violation of due process.[50] When that false evidence is testimonial in nature, it is not necessary for that testimony to be perjury.[51] Rather, due process is violated when the testimony is misleading or creates a false impression.[52]

Napue claims essentially mirror *Brady* claims, in that the standard for success is based on three factors: the testimony was actually false, the prosecution knew or should have known that the testimony or evidence was false, and, like *Brady*, the testimony or evidence was material.[53] *Napue* also included the point that the same result occurs when the state allows such testimony or evidence to go uncorrected.[54] In much the same manner as *Brady* issues, *Napue* issues change the input for jurors, and thus inexorably alter the narratives developed during trial and deliberations. Also like *Brady* issues, *Napue* claims are typically dismissed under the "harmless error" doctrine.

Although one might expect evidentiary violations to be the suppression or false presentation of some Perry Mason-type of heart-stopping evidence, the reality is that most violations are viewed as seemingly minor, or harmless, especially in the context of an already tried and convicted defendant in an environment where the "finality" of the justice system is held in high esteem. As it turns out, often those "harmless" details, once fleshed out, turn out to be Perry Mason-esque

48. *Id.* at 112.
49. NAT'L REGISTRY OF EXONERATIONS, A PROJECT OF THE U. OF MICH. L. SCH., *supra* note 29.
50. *Napue*, 360 U.S. at 269.
51. *Id.*
52. Alcorta v. Texas, 355 U.S. 28, 32 (1957).
53. Sivak v. Hardison, 658 F.3d 898, 908–09 (9th Cir. 2011).
54. *Napue*, 360 U.S. at 269.

and have proven to be shocking revelations of innocence in case after case, often in those cases where relief was denied on direct appeal due to "harmless error."

B. Admissibility Issues

While *Brady* and its progeny cover evidentiary errors that develop directly from the state's actions, absent or misleading evidence can also invade a trial through judicial decisions on admissibility, further impacting the information available to the jury. The admissibility of evidence is governed by the *Federal Rules of Evidence* (FRE) passed as statutory laws in 1975,[55] as well as court-created doctrines such as the Exclusionary Rule.[56] The rules of evidence developed prior to the FRE tended to reflect a marked distrust of jurors, and the FRE were thus designed to encourage the admission of evidence in borderline situations, entrusting the jury to correctly and justly evaluate information for itself.[57]

The general rule in evidence, as laid out in the FRE, is that all relevant evidence is admissible and all irrelevant evidence is inadmissible. FRE 401 specifically states that "evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action."[58] Rule 403 allows relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice," or if it is misleading, leads to confusion, or is a waste of time.[59]

Of course, like everything in law, it is never quite that simple. There are three basic factors courts consider in evaluating whether evidence is admissible—relevance, materiality, and competency.[60] Relevancy requires that the evidence have a tendency to prove or disprove some important fact in the case. It is not necessary for the information to absolutely prove the fact, just that it increases or de-

55. Act of Jan. 2, 1975, Pub. L. No. 93–595, 88 Stat. 1929. For further legislative history of the Federal Rules of Evidence, see *1975 FRE Original Enactment Legislative History Page*, FED. EVIDENCE REV., http://federalevidence.com/node/574 (last visited May 7, 2015).

56. Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 665–757 (1970).

57. *See generally* FED. R. EVID.

58. FED. R. EVID. 401.

59. FED. R. EVID. 403.

60. FED. R. EVID. 402.

creases the likelihood that the fact is true.[61] Materiality requires that the evidence relate to a particular fact in the case.[62] Competent evidence must be reliable in its form and presentation.[63] Typically, this issue is raised relative to witness statements, though it can pertain to other types of evidence as well.[64] Admissibility is, on its face, a reasonably straightforward issue.

Evidence inadmissibility, on the other hand, is a more complicated, nuanced area of law. The rules are driven by public policy interests, case law, and the rules reflected in the FRE, but every rule has exceptions, and often those exceptions have exceptions in turn. Most of the standards appear to be straightforward, but in practice are very subjective and prone to bias influences in the final decisions.

Rule 403 establishes that relevant evidence can be excluded if its probative value is outweighed by its prejudicial effect. This balancing test is strongly weighted toward admission of evidence, and it is often difficult to establish "unfair prejudice"—technically, all relevant evidence is prejudiced toward one side or the other, and defining the line of "unfair" can be an impossible task. Generally, counsel tends to avoid using Rule 403 as a basis for objecting to evidence, in part because doing so indicates a stipulation that the evidence is, in fact, relevant.

Section IV of the FRE also allows exclusion for evidence that wastes time, is misleading, is hearsay, is character-based, and is privileged.[65] Of course, each of these areas have exceptions upon exceptions, and none can be as clearly defined as would be ideal. But again, the overall objective is to allow the jury to hear as much of the evidence as possible, so each of these options can be difficult to establish.

The Exclusionary Rule, a court-created, constitutionally based remedy and deterrent to unreasonable or unfair conduct by the police, covers three areas: evidence gained from unreasonable search and seizure,[66] improperly solicited self-incriminating statements[67], and evidenced obtained through a violation of the defendant's right to counsel.[68] Any evidence discovered through these methods, or as a

61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *See generally* FED. R. EVID. 401–415.
66. U.S. CONST. amend. IV; Mapp v. Ohio 367 U.S. 643 (1961).
67. U.S. CONST. amend. V; Miranda v Arizona, 384 U.S. 436, 444 (1966).
68. *Id.*

result of these methods (fruit of the poisonous tree), can and should be excluded at trial.[69] Courts will refuse to apply the rule, however, if the cost of exclusion outweighs the deterrent or remedial benefits.[70]

The objectives of the FRE and the Exclusionary Rule are sound—to only allow evidence at trial that is relevant and fair. Still, as will be illustrated below, these rules can be misconstrued and misused, even abused, to the point of corrupting the narrative possibilities available to the jury. Further, the appeals courts have historically rubber-stamped the decisions of trial courts in these areas, also utilizing the harmless error doctrine described above, so many of the years-old exoneration cases reflect questionable evidentiary rulings that clearly modified the narrative options for juries to consider.

More recently, and likely because of the media exposure surrounding exonerations over the past decade, appeals courts seem to be looking more closely at these types of issues, thus compelling trial court judges to be more conscientious in making admissibility decisions. Unfortunately, for those cases already past the direct appeal stage, admissibility issues are procedurally barred from consideration unless the petitioner can make a solid case, usually through an accumulation of bad evidentiary decisions, for due process violations.[71]

III. EFFECT OF EVIDENTIARY ERRORS ON JURY DECISION-MAKING

The sheer volume of laws, rules, and exceptions surrounding evidentiary issues indicates recognition of the importance of presenting a fair and complete set of facts for the jury to consider. However, as the following examples demonstrate, there is sometimes a clear disconnect between the spirit of the law and the realities of wrongful verdicts. The first example involves a surprisingly common situation—a wrongful conviction based almost entirely on *Brady*-related issues. The second example is based on the experience of a frustrated juror in a South Carolina murder case, demonstrating both the impact of missing evidence on the narrative a jury developed and the impact that a later realization of error can have on a juror who was just trying to do the right thing.

69. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (developed the "fruit of the poisonous tree" doctrine, though the term was first coined by Justice Frankfurter in *Nardone v United States*, 308 US 338, 341 (1939)).

70. Pennsylvania Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998).

71. Ward v. Jenkins, 613 F.3d 692 (7th Cir. 2010).

A. Armstrong's "Harmless Error" Brady *Issues*

How do *Brady* and other evidentiary issues impact juror decision-making? Unfortunately, probably more than judges and prosecutors want to acknowledge. The obvious problem is that in some wrongful conviction cases the jury was served an incomplete or misleading set of facts and expected to essentially play "choose your own adventure"—filling in the holes in the narrative with their own knowledge, experiences, and biases.

A recent exoneration litigated by the Duke Wrongful Convictions Clinic (Duke Clinic) presents an interesting story of a case predicated on just these types of issues. LaMonte Armstrong was convicted of first-degree murder and sentenced to life in prison in August 1995.[72] The crime charged was the July 1988 murder of Ms. Ernestine Compton, a faculty member at North Carolina A&T University and a neighbor of Mr. Armstrong's family. Mr. Armstrong emerged as a suspect as a result of a CrimeStoppers call made by a distant acquaintance of Armstrong, Mr. Charles Blackwell. The police soon interviewed Armstrong by phone, then three months later in person, during which he mentioned that he had received a few phone calls from Mr. Blackwell asking Mr. Armstrong for information about the case. Mr. Armstrong denied any knowledge of the murder, both to the police in the interviews and to Mr. Blackwell during these odd phone calls. Post-conviction investigation would later reveal that the investigating officers, in fact, orchestrated the phone calls, as well as a recorded drop-in visit from Mr. Blackwell.

For the next six years, no further interaction occurred between the police and Mr. Armstrong regarding the Compton murder. However, in 1994, the police took an inexplicably renewed interest in the case, and the lead detective and the then-assistant district attorney decided to file charges against Mr. Blackwell as "a participant" in Ms. Compton's murder based on information he fabricated or otherwise gleaned through his repeated contacts with the investigating officers. With no apparent physical evidence at hand, Mr. Blackwell was plucked from prison in Person County, returned to Greensboro, and charged with the murder of Ms. Compton in March of 1994. In April,

72. The details of the Lamonte Armstrong case that follow are accumulated from the case files, Motion for Appropriate Relief, or MAR petitions, and other documentation related to the Duke Wrongful Convictions Clinic's work in litigating Mr. Armstrong's exoneration. Thus, we included no additional citations through the case synopsis.

Mr. Armstrong was arrested and charged as well, presumably because of Mr. Blackwell's statements. Mr. Blackwell eventually pled guilty to accessory to murder and agreed to a five-year sentence. Mr. Armstrong consistently denied involvement in the crime, refused two plea offers from the State (for sentences of twenty and fifteen years), and was subsequently tried, convicted, and sentenced to life in 1996.

With the absence of any physical evidence connecting either defendant to this crime, the State's case rested on creating a narrative through witness testimony. The prosecution's theory was that Mr. Armstrong, who had known the victim for many years, was in the habit of borrowing money from her and when she refused to give him money on this occasion, Mr. Armstrong became enraged and murdered her. The key witnesses included Mr. Blackwell and three other incentivized witnesses, including two jail inmates, all of whom received some favorable treatment in exchange for their testimony. Of course, the jury heard Mr. Blackwell testify that he had pled guilty to playing a role in the murder and was present at the scene with Mr. Armstrong right up until the murder occurred. One witness testified to seeing Mr. Armstrong and Mr. Blackwell leaving the scene. The other two witnesses testified that Mr. Armstrong confessed to each of them, on separate occasions while jailed together, that he had committed the murder. Although there essentially was no other evidence, it was reasonable, given the available data and a fairly simple storyline, that the jury could easily develop a rational narrative leading to a guilty verdict.

Unfortunately for those jurors, they were denied access to significant evidence ranging from the basic facts of the case to the troublesome realities surrounding each of the key witnesses. *Brady* violations included nondisclosure of witness statements that established a different time frame for the murder—one that inconveniently coincided with a solid alibi for Mr. Armstrong. Additionally, the state withheld evidence that directly contradicted the prosecution's theory of the case. The victim actually did lend money to the young men in her neighborhood on occasion, and she kept records of those loans on her refrigerator. However, Mr. Armstrong's name was not on any of these lists, and there was no evidence he had ever borrowed money from her.

Also, the state failed to disclose the entirety of the detectives' relationship with Mr. Blackwell, including evidence that his story changed significantly over a number of interviews and included innumerable inaccuracies; that he was paid cash on multiple occasions to obtain

incriminating statements from Mr. Armstrong; that recordings of Mr. Armstrong's repeated and consistent denials existed; and that Mr. Blackwell, as well as the other three informants, were provided other incentives for their testimony. Furthermore, each of the three jailhouse informants, including the one who claimed to witness Mr. Armstrong and Mr. Blackwell at the scene, were first in contact with the police regarding this case more than five years after the crime, and only after the police had set their sights on Mr. Armstrong. Additionally, the police denied the existence of alternative suspects at trial, though the Duke Clinic's review of their files indicated otherwise.

Perhaps it is fair to say that any of these issues, individually, could be considered "harmless" in terms of deciding Mr. Armstrong's guilt and each was, in fact, denied on direct appeal on that basis. However, it is disingenuous to assume that none of the twelve jurors would have viewed this case differently, and would have developed a different narrative, given any or all of this additional evidence. Taken from the jurors' perspectives, there is little question that Mr. Blackwell's plea deal and admission of involvement in the crime provided him otherwise unwarranted credibility. Still, had the jurors heard the totality of the background of the case it seems possible, if not likely, that they would have at least developed a different and more accurate narrative, if not a different verdict.

Ironically, Armstrong's case was not resolved on the basis of any of the evidentiary issues discussed above. The Duke Clinic managed to encourage cooperation from the current police department and district attorney, and, in 2012, they reran prints found at the scene. In a stroke of unbelievable luck, the actual perpetrator's prints had been entered into the system just a few weeks before, and thus, after languishing as an "unknown" palm print over the murdered Ms. Compton's body for years, the mystery was solved. The State agreed to release Mr. Armstrong.

Unfortunately, as in other exonerations, the evidentiary issues did not make the front page, or the pages of precedent. Although the Armstrong case is a remarkable example of justice gone awry, the reality is that an argument can be made that the jury still did its job. Given an "admitted" co-conspirator as a key witness, multiple "confession" witnesses, a plausible if unproven motive, and little else to go on, the jurors had little choice but to develop a narrative that encompassed all those details. That, combined with a natural bias toward the prosecutor's position resulted in a supportable, if entirely incorrect, verdict.

While Mr. Armstrong's case is a particularly egregious example of how *Brady* and *Napue*-related issues can produce devastating results, it is in no way an isolated situation. The Duke Clinic,[73] now in its fifth year of operation, has pursued exonerations for a total of twelve innocent petitioners. Of those, five have resulted in exonerations while the remaining seven continue to wend their way through the system. All except three have included one or more *Brady*-progeny claims.[74] Those nine cases exemplify the reality that the presentation of false and misleading evidence, and the absence of critical exculpatory and relevant evidence, play a significant role in convicting the innocent.[75]

A number of the *Brady*-related claims in the Duke Clinic cases involve coercion or inducement of key witnesses, often resulting in completely falsified testimony at trial.[76] Others relate to blatant withholding of evidence that fails to fit with the narrative the prosecution wants to assert; still others represent post-conviction discovery of false testimony by the police officers involved in the case. Several of the filed-but-not-resolved cases rely on *Brady*-related issues for more than one-half of the claims asserted.[77] Of course, it can easily be argued that merely raising a *Brady* claim does not establish an actual *Brady* violation, especially since none have been accepted within the courts. However, certainly the sheer volume of *Brady* issues uncovered by the Duke Clinic investigations raises a red flag of concern about the efficacy of the power of *Brady* and its progeny.

The five exonerations have some interesting similarities: none involved DNA evidence,[78] neither at trial nor in post-conviction relief,

73. The Duke Clinic is organized under the Duke Center for Criminal Justice and Professional Responsibility, which has also recently launched a research division to track and examine the root causes of wrongful conviction. The statistics and generalizations referred to here are based on both clinic-driven exonerations and court outcomes of other cases currently in litigation.

74. The three Duke Clinic cases without *Brady*-type claims are special cases. The first is one in which a non-English speaking defendant pled guilty on the advice of counsel, thus his entire claim is based on ineffective assistance of counsel. By pleading guilty, the defendant avoided a trial, which undoubtedly would have raised many of these same issues. The second case also relied on ineffective assistance of counsel claims, as well as a victim recantation. The third petitioner was released in cooperation with the District Attorney without a Motion for Appropriate Relief (innocence petition), though there were clear *Brady*-related issues in that trial as well.

75. In total, the Clinic has put forth twenty-nine *Brady*-related claims in the filed MARs of sixty-one individual claims asserted. Of the nine cases that do include evidentiary issues like these, they comprise more than fifty percent of the issues raised.

76. The generalizations and statistics here are based on the most recent review of all Duke Clinic cases, both resolved and in litigation.

77. Other common claims include ineffective assistance of counsel, new evidence, and Constitution-based claims of due process violations.

78. It is important to note that post-conviction relief without the benefit of DNA or other new physical evidence to establish innocence must rely on constitutional claims to open the door

and all were resolved with the cooperation of the current district attorneys and other investigative personnel in the jurisdiction of the original conviction. Because of this cooperative effort, none of the convictions have been vacated on the basis of *Brady* or *Giglio*, or any other specific claims for that matter. While the process at work here demonstrates a positive reflection of some jurisdictions' willingness to right past wrongs, it also means that no case law has been established from these cases that reflect the "harmful" effects of misleading, false, or absent evidence on the original verdicts.

More profoundly, the narratives developed in each of the twelve trials considered above barely resemble the narratives developed through post-conviction investigation. As important information is uncovered, the gaps are filled and the distortions are corrected, and the resultant story is often barely recognizable against the original impressions of the trial transcript. Clearly, at least in these cases of established innocence, it is unfair to expect any jury to play the role of gatekeeper in protecting the innocent.

B. J. L. Hardee's Jury Experience with Admissibility Issues

Admissibility issues also arise in a significant proportion of exoneration cases, but they are less visible than *Brady* and *Napue* issues. Admissibility issues are generally dealt with prior to trial, with motions presented and judicial decisions rendered outside of the jury's presence. Of course, the results of these motions, right or wrong, will alter the narrative developed by a jury, whatever the righteous or devious intentions of counsel and the judge. Furthermore, because these issues are typically addressed and dismissed on direct appeal (again, typically under the harmless error doctrine), they are not available as strong arguments in innocence petitions unless the cumulative effect of these errors can show a due process violation. As the following example indicates, questionable outcomes in this area can create potentially disastrous results, both for the defendant *and* for the individual juror.

A 2012 autobiographical book by J. L. Hardee, *Justice or Injustice*, recounts the author's experience as a young juror in a 1999 capital

to a new trial. In the best cases, the investigation results behind those constitutional claims also establish clear innocence, and the state will either agree to the exoneration or at least refuse to retry the released defendant.

case in South Carolina.[79] Mr. Hardee's experience was devastating to his psyche, and even more so to the defendant, who might not have been convicted given a different, more accurate selection of evidence available at trial. While the story is a retrospective account by just one juror, it does provide anecdotal insight about one jury's construction of a narrative leading to conviction of a potentially innocent defendant.

Winston-Salem resident Kimberley Renee Poole was charged with murder and conspiracy for the shooting death of her husband on a South Carolina beach late one summer night. According to trial testimony, Ms. Poole and her husband had some marital issues. She had worked as a stripper, at her husband's insistence, and they had frequently included other women in their sex life. Ms. Poole began an affair with John Boyd Frasier, a customer at her strip club, and at one point left her husband to move in with Mr. Frasier. However, when her husband threatened to divorce Ms. Poole and take full custody of their daughter, Ms. Poole broke up with Mr. Frasier and returned to the family home. A few months later, Ms. Poole planned a weekend getaway to Myrtle Beach with her husband to celebrate their three-year anniversary. Late one night, after having marital relations on the beach, a masked man approached and shot Mr. Poole to death.

The investigation turned immediately to Ms. Poole, as would be expected, and was exacerbated by a call from Mr. Poole's family accusing Ms. Poole and her ex-boyfriend of the murder. Very early in the morning following the murder, Winston-Salem police were dispatched to the ex-boyfriend's home for an interview. The police reported that Mr. Frasier appeared to have been asleep when they arrived, and his vehicle's hood was cool to the touch, indicating it had not been driven recently. The drive between Myrtle Beach, where the crime occurred between 11:00 p.m. and midnight, and Winston-Salem, where Mr. Frasier was interviewed at around 5:00 a.m., is at least a four-hour trip. There was no physical evidence to rely on, but one middle-aged couple claimed to identify Mr. Frasier as someone they saw on the beach, in the dark, on the night of the murder.

Immediately following the crime, the Myrtle Beach police interviewed Ms. Poole for seventeen hours straight. While she requested an attorney, her relatives summoned the family attorney, who was not, in fact, a criminal attorney. He was scheduled to leave for a European

79. J. L. HARDEE, JUSTICE OR INJUSTICE? WHAT REALLY HAPPENS IN A JURY ROOM (2012). The synopsis of the Poole case that follows is derived primarily from Mr. Hardee's autobiographical account, and thus citations for each line would be repetitive and unwieldy.

vacation the following day, and pushed the interview along by essentially grilling his own client for the police. He repeatedly insisted that Ms. Poole needed to tell the police what they wanted to know and even questioned her himself. After seventeen hours of denials, the police threatened to have Ms. Poole's daughter removed from her custody, and she finally "admitted" that she might have told the ex-boyfriend that she and her husband were going to Myrtle Beach for the weekend. At trial, the police claimed that Ms. Poole was not a suspect until she actually confessed, seventeen hours into the interrogation. In addition to the confession, the state presented the two "eyewitnesses" who testified with baffling certainty that they saw Mr. Frasier on the beach earlier that night.

Mr. Hardee writes primarily about his own experience in the jury room. The first vote was split, six guilty, four not guilty, and two guilty only on the conspiracy charge. The deliberations, as Mr. Hardee describes them, essentially revolved around the confession and its legitimacy. It was clear to a number of jurors that both detectives were deceitful in their testimony regarding when and whether Ms. Poole was considered a suspect, and compounded by the circumstances of the interrogation, several jurors doubted the validity of the confession. Others, including the strong-willed (and possibly biased) forewoman, were convinced that the confession was the final word, and refused to consider the light weight of the other evidence.

The confession, even if believed, was not sufficient to warrant conviction alone, because Ms. Poole merely admitted that she "may have" told the ex-boyfriend about the vacation to Myrtle Beach; there was no admission of conspiracy to murder her husband. Mr. Hardee reflects on the differences among his and other jurors' understanding of the confession evidence. Because both he and his wife had been adulterous early in the marriage, he had a very different perspective on if and why Ms. Poole might have mentioned the trip to the ex-boyfriend. He presumed that she *would* have told the boyfriend about the trip, primarily to ensure that he would not be tempted to call or check in during that time. Other jurors, who seemed to have strong negative feelings toward adulterers as a class, were convinced that Ms. Poole's actions were wholly nefarious, and that the *only* purpose in telling the ex about the trip would be to conspire to murder the husband.

The jury members twice sent a message to the judge attesting to the hung jury, and twice were ordered to continue deliberating. Ac-

cording to Mr. Hardee's recollection of events, the forewoman harassed and intimidated the "not guilty" voters until, one by one, they changed their votes to "guilty", leaving Mr. Hardee as the lone "not guilty" holdout. After nine hours of deliberations with no breaks allowed by the judge, Mr. Hardee, in desperate need of a cigarette, also capitulated and agreed to a guilty verdict. He immediately regretted his decision. His distress was obvious enough that he was called into chambers by the judge immediately following the reading of the verdict. Mr. Hardee voiced his concerns, but the judge essentially patted Mr. Hardee on the back and told him he had done the right thing.

The following day, Mr. Hardee called and met with Ms. Poole's defense attorney, filling him in on the details of the deliberations and his remorse over going along with the verdict. The defense counsel informed Mr. Hardee that not only should the "confession" not have been allowed, but that several important facts were unfairly excluded. Apparently, there had been a viable third-party suspect to the shooting that was kept from the jury because the poor investigation "painted the Myrtle Beach police in a bad light." Also, there was an email message from Mr. Frasier to a friend a few days before the crime, in which he grumbled that Ms. Poole refused to communicate with him anymore, meaning she could not have been an active conspirator, even if Mr. Frasier was actually the perpetrator.

The interesting point that this new information highlights is that, in this case, *all* of the narratives developed by the jurors were arguably inaccurate. The "guilty" voters presumed that, because Ms. Poole was established as an adulterer, it followed that she was also a conspirator with the boyfriend in the murder of her husband. For Mr. Hardee, and perhaps other jurors with relevant life experience, the presumption was that Ms. Poole might well have articulated her weekend plans to the boyfriend, but with the intention of protecting her marriage rather than for more malicious reasons.

While these two versions of the narrative clearly result in opposite verdicts (at least on the conspiracy charge), the irony is that neither of these stories are factually accurate. As Mr. Hardee discovered after the verdict, there was strong evidence that Ms. Poole had not, in fact, communicated with the ex-boyfriend at all in the weeks leading up to the murder. Therefore, not only did jurors create different narratives to explain the circumstances, each of those versions were factually incorrect. Certainly, this result is not the intended consequence of our justice system's evidentiary procedures and, ultimately, it is a dis-

credit to the justice system for fixable issues such as missing, misleading or false evidence to result in a verdict based on an entirely false narrative of the case.

Later, another jury convicted Mr. Frasier of murder on similarly weak evidence. That conviction was overturned on direct appeal on evidentiary issues; he was retried, and was found guilty again. Although errors were again identified in his second trial, his direct appeal was denied upon a finding of harmless error. Recently, the Wake Forest Law School's Innocence and Justice Clinic evaluated Mr. Frasier's claims of innocence, and it is now in the hands of a South Carolina-based clinic. Ms. Poole, after losing her direct appeal, fired her counsel and is currently searching for a new pro bono defense team. It is likely that a number of *Brady*, *Giglio,* and other evidentiary issues, including those noted here, will be addressed in each of their innocence petitions.

The evidentiary issues here are simple and clear, yet reflect the serious conundrum placed on jurors who are not provided the whole story. Research has established that the jury's behavior here was expected—people are extremely swayed by the existence of a confession, no matter how weak, contrived, or unjust the circumstances surrounding the admission.[80] Hence, the reason for the Exclusionary Rule and the safeguards against unreasonable behavior—coercion, unfair pressure, *Miranda*—on the part of the police. Clearly, Ms. Poole's confession, such as it was, should have been a ripe candidate for the Exclusionary Rule. By allowing a clearly questionable and incomplete confession to be presented as the primary evidence, without any corroborating facts, the jurors were forced to depend and rely on it as unrealistically valid.

The two critical facts left out of the Poole trial, the alternative suspect and Mr. Frasier's unprovoked admission of having no communication with Ms. Poole, absolutely seem relevant in light of the entire narrative developed by the jury, though the judge opted to disallow both items of evidence as irrelevant. If nothing else, those jurors leaning toward acquittal were deprived of available evidence to support their position. Ostensibly, this wrong should have been righted on direct appeal. At the time however, appeals courts were generally in the habit of rubber stamping the trial courts' work, and these clear violations of evidentiary standards slipped through.

80. HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY (1966).

Mr. Hardee's short but insightful account of his experience as a juror on a capital trial reveals a tremendous number of issues and complications within the jury system, from the lack of understanding of their rights and responsibilities, to the pressures applied by the system to compromise their opinions. In fact, the issue of evidence in and evidence out is a relatively minor one in Mr. Hardee's story. Still, it is not difficult to see that this case, its defendant, and at least some of the jurors, did suffer because of the admissibility issues of key evidence and its impact on their ability to develop an accurate narrative of the case.

V. THE BOTTOM LINE

The realization of how often the types of evidentiary issues may arise in the growing number of exonerations raises a number of deeper questions about how jurors interpret and assimilate the information they are and are not provided, and it suggests the reality that many erroneous verdicts likely spring from the development of false narratives. Closer investigation of these issues may well lead to policy and procedure changes to curb the incidence of wrongful convictions.

As noted above, the appellate courts have shown a tendency to dismiss both *Brady* and admissibility issues as "harmless" relative to the ultimate verdicts. From a policy standpoint, the apparent issue is that accountability related to *Brady*-type violations is essentially nonexistent. Clearly, more work must be done to establish the insidious nature of withheld, misleading and false evidence on faulty verdicts. As the rapidly growing assemblage of exonerations reflects, these issues may have far greater impact on jurors' decision-making than currently acknowledged. Without question, the allowance of absent, misleading, or false evidence must influence the narrative the jury develops, and the final verdict absolutely springs from that narrative. In order to reduce erroneous convictions, these evidentiary problems and their consequences must be analyzed and addressed.

As of this writing, the National Registry of Exonerations contains over 1,560 cases of exonerations throughout the United States.[81] Of those, the vast majority of defendants were convicted by a jury.[82] The

81. NAT'L REGISTRY OF EXONERATIONS, A PROJECT OF THE U. OF MICH. L. SCH., *supra* note 29.

82. However, a record 17% of those cases added this past year were convictions through plea bargains, raising the total to 152 of 1433 exonerations (just over 10%) that were initially disposed through guilty pleas.

top six contributing errors (many cases feature more than one of the following) include: perjury or false accusation (55%, typically informants or snitches, often incentivized); official misconduct (46%, from *Brady* violations to misleading questions or statements regarding forensic evidence); mistaken witness identification (over 34% of cases); false or misleading forensic evidence; false confessions (a shocking 13% of known exonerations); and inadequate defense counsel.[83]

The weight of responsibility of the jury in these cases is unclear, although it is very likely to be negligible. As considered above, juries in general do a very respectable job of dealing with the evidence as it is presented, and tend to *want* to do the right thing. However, when the evidence presented is false or misleading or simply nonexistent at trial, the jury cannot be held responsible for creating an erroneous narrative and thus a wrongful verdict.

Ultimately, it seems clear that, for the overwhelming number of cases, the jury's primary role in wrongful convictions is one that carries no fault—they are simply doing the best they can given often prejudicial evidence and arguments. In short, evidentiary issues at trial are a very common causal factor in wrongful convictions.

The U.S. Constitution guarantees the right to a fair trial, but not one free from error, and it is from this notion that the harmless error doctrine is justified. However, it certainly appears from at least an anecdotal standpoint, that the line between "harmless" and fundamentally unfair might currently be misplaced. It is hoped that the development of a comprehensive root cause analysis methodology will elucidate and define the extent of the problem of harmless error and other doctrines, policies, and procedures, as well as lead to practical potential solutions that will reduce the incidence of wrongful convictions in the future.

83. NAT'L REGISTRY OF EXONERATIONS, A PROJECT OF THE U. OF MICH. L. SCH., *supra* note 29.