

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.<sup>79</sup> 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-

ording 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" hold-out. 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.<sup>80</sup> 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 non-existent. 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.<sup>81</sup> Of those, the vast majority of defendants were convicted by a jury.<sup>82</sup> 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.<sup>83</sup>

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.