

## WORKING ON YOUR INNOCENCE CASE

BUY A NOTEBOOK AND A PACKET OF SECTION DIVIDERS WITH TABS

CASE CHART AND CASE SUMMARY

WORK WITH YOUR FRIEND/LOVED ONE ON A STRATEGY OF WHAT IS NEEDED TO PROVE INNOCENCE

OBTAIN RECORDS

WORK ON LIST OF WITNESSES (those who testified or gave statements and those who did not)

1. Inculpatory
2. Exculpatory (Are they cumulative?)
3. Whereabouts
4. Question on when and where to contact them
5. Chart on statements vs. testimony
- 6.

TIMELINES CHART

EVIDENCE

1. Evidence used to convict
2. New evidence (Is it cumulative?)
3. Was it preserved? (Find out what is preserved)
4. Chart of evidence (Where is it? When & Where recovered?)
5. Statement/Evidence comparisons

MISCONDUCT

1. Police (cocrcion, failure to have a warrant, beatings, threats, tampering with evidence, video/taping issues, destroying evidence, false testimony)
2. Prosecutor (failure to disclose exculpatory evidence; Kyles ruling on requirements for prosecutor; Brady)

INTERVIEWS

1. Cautions (May get only one chance)
2. Reliability of witness
3. Taking another person along
4. In person vs. phone
5. Telling the truth when introducing yourself
6. Not leading the witness
7. To record or video or not
8. Getting an affidavit
9. Is the person willing to testify?
10. Confidentiality

## FINDING PEOPLE

1. Databases
2. Facebook
3. Zabasearch (free)
4. Finding someone with a higher level database
5. Use of an investigator
6. Talking to people in the neighborhood

## INNOCENCE PROJECT VS HIRING A LAWYER

### HIRING A LAWYER

## PREPARATION OF AN INNOCENCE NOTEBOOK

1. LIST OF INNOCENCE CLAIMS BY CLIENT: Divide it into 2 categories:
  - a. Evidence in hand
  - b. Evidence believed to be obtainable through investigation. (Have client develop this list first and then scrutinize it)
2. DNA: If DNA involved, establish whether it was used for conviction. If not, evidence that could be tested needs to be identified and found.
3. Non DNA: Establish argument in favor of each claim of innocence and how investigation could lead to exoneration.
4. ALTERNATIVE NARRATIVE TO THE STATE'S CASE: Work with client to come up with his/her version of what really happened. Back it up with evidence to support narrative.
5. OTHER ISSUES THAT LED TO CONVICTION: (Eyewitness and/or witness testimony, Confession, Interrogation, Snitch, No alibi, Past record, Ineffective assistance of counsel, Prosecutorial misconduct, Police misconduct, No or little mitigation, No actual innocence claim). Can these be combated in post conviction?
6. INNOCENCE PROJECT: Would a Project be likely to take the case? If not, what are other alternatives in client's state? (Check Guidelines in client's state of any IP)

### PREPARING ACTUAL NOTEBOOK: BACKGROUND WORK

1. Read transcripts of client and anyone else involved in case, including all appeals
2. Read statements of witnesses and client and compare to testimony
3. Make charts of discrepancies
4. If Ineffective assistance an issue, check record of counsel involved. Do most of this person's cases result in convictions?
5. Check background and reputation of prosecutor. Does this person usually seek the death penalty? Is the county a high crime, high conviction jurisdiction?
6. Have any exonerations come out of the area? If so, any of the same lawyers involved?
7. Contact defense lawyers best known for capital defense work in state and/or jurisdiction. Get advice from them
8. Contact investigators and mitigation people who worked on case.
9. If forensic evidence was used, check reputation of lab and experts involved in case.

### INCLUDE IN NOTEBOOK:

1. Case Summary
2. Case for Innocence
3. Alternative narrative by client (including diagrams, charts)
4. Statements vs. Testimony, pointing out discrepancies (possibly as charts)
5. Records, Reports, Testing Results, Available Evidence, Witnesses (including those never disclosed to defense and/or those that never testified)
6. State Laws that might affect conviction and/or sentencing
7. New evidence (affidavits, witnesses, actual evidence)
8. Problems anticipated
9. Cases that might affect this case
10. Appeals summarized or included, if short
11. Jury instructions
12. Miscellaneous information

## WAYS TO BOTCH AN INVESTIGATION

1. Not seeking/getting adequate funding for a full investigation
2. Relying on information from the prosecutor and/or a co-defendant's trial
3. Failure to ensure that prosecutor has turned over all exculpatory evidence and relevant material
4. Failure to use a team approach for brainstorming the case
5. Non-communication with the client, family, and loved ones
6. Failure to obtain all the records: police reports, medical, school, counseling etc
7. Failure to do mitigation investigation
8. Failure to interview all interested parties, separately when possible. Eyewitnesses, people who think they have info even if hearsay, where Defense initiated victim outreach possible (DIVO) attempt to meet with victims
9. Failure to make charts comparing initial statements with subsequent statements and, if post conviction, trial testimony
10. Failure to document all activities and findings, keep records, file information
11. Talking to the media inappropriately
12. Bias in either direction as to innocence or guilt
13. Lying to witnesses/client, family; making promises to witnesses for help; hidden recording or videotaping in jurisdictions where not legal
14. Failure to separate fact from allegation so that even when following a hunch or gut feeling you are still following the evidence.

## Cognitive Bias/Confirmation Bias

A **cognitive bias** is a mistake in reasoning, evaluating, remembering, or other cognitive process, often occurring as a result of holding onto one's preferences and beliefs regardless of contrary information. Psychologists study cognitive biases as they relate to memory, reasoning, and decision-making. Many kinds of cognitive biases exist. For example, a **confirmation bias** is the tendency to seek only information that matches what one already believes. Memory biases influence what and how easily one remembers. For example, people are more likely to recall events they find humorous and better remember information they produce themselves. People are also more likely to regard as accurate memories associated with significant events or emotions (such as the memory of what one was doing when a catastrophe occurred).

## Brady Violation

The Brady doctrine is a pretrial discovery rule that was established by the United States Supreme Court in *Brady v. Maryland* (1963). The rule requires that the prosecution must turn over all exculpatory evidence to the defendant in a criminal case. Exculpatory evidence is evidence that might exonerate the defendant.

## Kyles v. Whitley (1995)

The Court held that Kyles should be granted a new trial. The Court noted *Brady v. Maryland* (1963), which held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. The Court also discussed *Strickland v. Washington* (1984) and the reasonable probability of a different result standard. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." It noted that this test was not a sufficiency of the evidence test. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Finally, the Court noted that the evidence must be considered in whole, not piece by piece. Ultimately, the Court found that based on the evidence that was not brought to light, a reasonable juror could have found Kyles not guilty.<sup>11</sup>

**PROBATIVE:** having the quality or function of proving or demonstrating something; affording proof or evidence.

**MITIGATION:** the act of mitigating something or the state of being mitigated : the process or result of making something less severe, dangerous, painful, harsh, or damaging

**INEFFECTIVE ASSISTANCE OF COUNSEL:** In United States law, **ineffective assistance of counsel** is a claim raised by a convicted criminal defendant where the innocent defendant's legal counsel performed so ineffectively that it deprived the defendant of the constitutional right guaranteed by the Assistance of Counsel Clause of the Sixth Amendment to the United States Constitution. Having the **benefit of counsel** or **assistance of counsel** means that the criminal defendant has had a competent attorney representing them. Competence is defined as reasonable professional assistance and is defined in part by prevailing professional norms and standards. To prove they received ineffective assistance, a criminal defendant must show two things:

1. Deficient performance by counsel
2. Resulting prejudice, in that but for the deficient performance, the result of the proceeding would have differed

The foregoing test was set forth in *Strickland v. Washington* (1984), in which the United States Supreme Court also established that failure to inform a defendant of the direct consequences of a sentence qualifies as ineffective assistance of counsel, but failure to inform of collateral consequences of criminal charges does not.