

This habeas corpus petition contains 11 claims, significantly more than the number of claims generated in the great majority of criminal cases, including many other serious cases with life sentences like this one.

Most of these numerous claims are attributable to an unexpected and unreasonable failure of trial counsel to present any of the mountain of exonerating evidence that had been accumulated by predecessor counsel.

Unbeknownst to petitioner at the time that he retained trial counsel, counsel had a longstanding aversion to presenting affirmative defense evidence in the cases he tried. By all accounts (including his own), counsel had a settled practice of cross-examining prosecution witnesses based on inconsistencies and implausibilities in their statements and testimony; making a personal assessment of whether he had established reasonable doubt through cross-examination; and if so, resting without presenting defense evidence.

Counsel adhered to that practice in this case, but did so without engaging in the due diligence necessary to make a reasoned choice of trial strategy. He personally spoke to only two of the more than 20 potential witnesses who had been strongly recommended by his co-counsel and his investigator. He wrote off the great majority of them without any personal contact, notwithstanding their manifestly exculpatory prior statements to the police and to investigators.

This failure of due diligence violated the well-settled principle of Sixth Amendment case law that an attorney must review potential defense witnesses as a necessary foundation for making a reasoned decision about trial strategy.

The following summary conveys the extraordinarily exculpatory import of the witnesses who were available. As to complaining witness J.B., she told two of her female friends in the weeks and months after April 25, 2003, that her sexual relations with petitioner were “the best sex she had ever had”, and “one of her best sexual experiences”. JB also acknowledged her sexual relations with petitioner to other friends without any mention of coercion or rape.

In addition, on the evening in question, there were two men who also spent the night at petitioner’s residence, and who overheard J.B. and petitioner engaging in loud, enthusiastic and prolonged sexual relations.

As to N.T., a close friend of hers gave a statement to a defense investigator in which she reported that N.T. had described her sexual relations with petitioner in a light-hearted and favorable manner. In addition, there were multiple witnesses who had reported that petitioner had an ongoing relationship with N.T. for some weeks, not merely the one occasion for which she claimed rape. By any standard, that was dynamite defense evidence.

Finally, there were expert witnesses who had been prepared and interviewed by co-counsel regarding helpful psychological and pharmacological testimony about memory formation and recollection and the effects of alcohol and drugs on memory.

All of these witnesses had been subpoenaed by counsel's investigator, but none were called. However, even without any defense evidence, the first jury went to the brink of acquittal, but hung with the vote in favor of acquittal on all three counts.

The legal landscape changed dramatically for the retrial. The prosecution, recognizing that the complaining witnesses' testimony was by itself underwhelming, announced its intent to present a significantly more aggressive case.

The primary change was to prominently portray the Church of Scientology, of which petitioner was a member, as a villainous force that had discouraged the complaining witnesses from reporting their allegations of rape to the police in 2003, and that was actively harassing the complaining witnesses in retaliation for making their complaints in 2017. To this end, the prosecution persuaded the court to reverse its prior ruling that excluded evidence about Scientology doctrine and practice, and instead to permit testimony from an anti-Scientologist that Scientology doctrine purportedly authorized, if not demanded, the harassment and bullying of the complaining witnesses. This evidence provided the foundation for the climax of the

prosecution's closing argument, a Jeremiad against both petitioner and Scientology.¹

Notwithstanding the prosecution's more aggressive approach, defense counsel announced that he was going to retry the case exactly as he had conducted the first trial. That decision was again made without the exercise of due diligence regarding the exculpatory value of the numerous available witnesses. For the retrial, counsel interviewed no additional witnesses, had no witnesses under subpoena, and presented no evidence.

Not surprisingly, petitioner was convicted of two counts, and one count was mistried and dismissed. The two convictions are attributable to (1) the prosecution's more aggressive evidentiary presentation that focused on Scientology; (2) the complaining witnesses' inevitably enhanced capacity to parry counsel's cross-examination at the second trial; and (3) counsel's failure to present any independent evidence to impeach the complaining witnesses. or to develop any of the complementary avenues of defense that predecessor counsel provided to him. In sum, the jury saw only the tip of the iceberg of available defense evidence in the form of the complaining witnesses' inconsistent

¹ They were raped. They were punished for it. And they were retaliated against by their Church. As I mentioned, the Scientology law told them there is no justice for them. You have an opportunity to show these victims that there is. You have an opportunity to show these victims that there is justice. It does exist. There were no consequences for Mr. Masterson by this internal justice system from the Church. You have the opportunity to show Mr. Masterson that there are consequences for raping. They do exist.

statements while the wealth of directly exculpatory evidence went unused for no viable tactical reason.