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State v. Whitlow and Ineffective Counsel: No Record, Foreshadowing the Record, and Making a Record

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ARTICLE

STATE V. WHITLOW AND INEFFECTIVE COUNSEL: NO RECORD, FORESHADOWING THE RECORD, AND MAKING A RECORD

Judge Douglas C. Harkin*

INTRODUCTION

Joe Chastain may have wondered why his defense counsel didn't ask follow-up questions of the two jurors who expressed reservations, given the nature of the charges, about their ability to judge his case fairly. Neither juror was challenged for cause or excluded by the use of the defendant's peremptory challenges. Upon direct appeal of the defendant's convictions for sexual intercourse without consent and sexual assault, the Montana Supreme Court remanded the case for retrial.[1] The Court said that when "defense counsel abandons his client's right to challenge a juror for no apparent reason, error must be attributed to the lawyer."[2] Even the presence of one juror who

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1. State v. Chastain, 285 Mont. 61, 947 P.2d 57 (1997). As the presiding judge at Chastain's trial, I certainly wondered. The proposal contained herein would have helped; hindsight is a great teacher.

2. *Id.* at 65.

could not fairly assess the credibility of the witnesses must be presumed prejudicial.[3]

Chastain made it very clear that defense counsel must ask follow-up questions when a prospective juror makes statements which suggest bias against the defendant. The trial record in *Chastain* did not contain any reason why, after jurors indicated their possible bias against the defendant, defense counsel neither inquired further nor removed the jurors with a peremptory challenge. The absence of reasons "why" defense counsel did not act was sufficient to find ineffective assistance of counsel.[4]

The *Chastain* rule, that a claim of ineffective assistance of counsel could be found in a record devoid of reasons defense counsel did not ask follow-up questions of apparently biased jurors, stood as good law for only four years. Not discussed in *Chastain*, but ready to pounce on an unwary defendant, was the rule that when claims of ineffective assistance of counsel are based on facts of record in the underlying case, they must be raised in the direct appeal.[5] Conversely, where ineffective assistance of counsel claims cannot be documented from the record, those claims can only be raised by petition for post-conviction relief.[6]

Kenneth Whitlow may also have wondered why his defense counsel didn't ask follow-up questions when jurors in his kidnapping and sexual intercourse without consent trial said it would be "hard to be impartial" and "the nature of the case is an upsetting thing."[7] On direct appeal, with appellate counsel different from trial counsel, Whitlow did not raise a claim of ineffective assistance of counsel and his conviction was affirmed.[8] Over a year later, Whitlow's new appellate counsel filed in the trial court a petition for post-conviction relief claiming ineffective assistance of counsel. The trial court dismissed Whitlow's petition for post-conviction relief because support for his claim of ineffective assistance of counsel could be found within the trial record. Since the claim could have reasonably been raised on direct appeal, the trial court held it

3. United States v. Eubanks, 591 F.2d 513, 517 (9th Cir. 1979).
4. *Chastain*, 285 Mont. at 65.
5. MONT. CODE ANN. §46-21-105(2) (2001).
6. Hagen v. State, 1999 MT 8, 293 Mont. 60, 973 P.2d 233 (1999).
7. State v. Whitlow, 2001 MT 208, ¶ 14, 306 Mont. 339, ¶ 14, 33 P.3d 877, ¶ 14.
8. State v. Whitlow, 285 Mont. 430, 949 P.2d 239 (1997).

was time barred under §46-21-105, M.C.A.[9]

On appeal of the trial court's dismissal of Whitlow's petition for post-conviction relief, the Montana Supreme Court was compelled to fully address the argument that they must overrule *Chastain* to allow Whitlow's petition for post-conviction relief. Whitlow's claim of ineffective assistance of counsel was based upon voir dire answers nearly identical to those presented in *Chastain*.[10] Responding to this argument compelled the *Whitlow* court to be sharply divided: a four judge majority, a special concurrence by the author of the majority opinion, a combination concurrence and dissent, and finally a third concurrence. The concurring/ dissenting opinion ominously predicted that: "Our approach here -parsing the sorts of voir dire responses for which the failure to follow up will be considered presumptively prejudicial – provides no guidance to the practicing bar and will generate nothing but confusion along with the necessity to appeal every case involving a *Chastain* issue."[11]

This case note discusses the *Whitlow* court's conflicting explanations for defense counsel's actions, the dilemma *Whitlow* presents to defense counsel and the court, and proposes a modest solution.

BACKGROUND

Jurors Felix, Sellers, and Brouelette made the comments which were the focus point of *Whitlow*. Juror Felix said, during voir dire examination by the county attorney, that he had "read about it in the papers and discussed it with the family" but acknowledged there was nothing that would prevent him from "reserving judgment until all the evidence came in this case."[12] Juror Sellers said he hoped nothing would prevent him from being impartial to either side, "but the nature of the case is an upsetting thing."[13] Juror Brouelette said he could reserve judgment but he had heard about the case and "read everything that they put [in] the paper. I just don't know how partial–you know–. . .I do have three little girls, so it's hard to be impartial."[14] Whitlow's trial counsel did not ask any follow-up

9. *Whitlow*, 2001 MT 208, ¶ 9.
10. *Whitlow*, 2001 MT 208, ¶ 19.
11. *Id.* at ¶ 41.
12. *Id.* at ¶ 14.
13. *Id.*
14. *Id.*

questions or move to excuse any of these jurors.

To fully appreciate the nuances of the problem *Whitlow* presented to the Montana Supreme Court, it is helpful to briefly review the interplay between direct appeal and post-conviction relief, ineffective assistance of counsel standards, and appellate trial strategy.

Direct Appeal / Petition for Post-conviction Relief

First, the law is clear that ineffective assistance of counsel claims which find support in the record must be raised on direct appeal.[15] Grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a petition for post-conviction relief.[16] Ineffective assistance of counsel claims must be considered on an individual basis. A finding on direct appeal that counsel was not ineffective does not automatically preclude consideration of ineffective claims in a petition for post-conviction relief. In fact, if consideration of matters outside the record is necessary to establish a claim of ineffective assistance of counsel, a petition for post-conviction relief is the only way the court can consider the outside evidence.[17]

Strickland Test

Second, it is equally clear that Montana reviews claims of ineffective assistance of counsel under the two-prong test of *Strickland v. Washington.*[18] The defendant is required to prove that his counsel's performance was (1) deficient and (2) prejudicial. On the issue of counsel's deficiency, it is presumed that counsel's actions were based on sound trial strategy. Counsel's trial tactics and strategic decisions are entitled to great deference, and disagreement about tactics and strategy cannot be the basis to find ineffective assistance of counsel.[19]

Appellate Counsel's Strategy

Third, Whitlow's second appellate counsel was faced with the task of overcoming the *Strickland* presumption that trial

15. Hagen v. State, 1999 MT 8, ¶ 12, 293 Mont. 60, ¶ 12, 973 P.2d 233, ¶ 12.
16. MONT. CODE ANN. §46-21-105(2) (2001).
17. *Hagen*, at ¶ 12.
18. 466 U.S. 668 (1984).
19. Bone v. State, 284 Mont. 293, 306 944 P.2d. 734, 742 (1997).

been abducted but escaped, he had "strong feelings about it" and this could bias his feelings unfavorably toward the defendant.[21] The second juror said he had read something about the case and it did "evoke some strong feelings."[22]

In *Whitlow*, the State pointed out that the same "nothing in the record" to explain "why" defense counsel didn't ask follow-up questions that existed in *Chastain* was also found in *Whitlow*.[23] Ergo, because *Chastain* was reversed on direct appeal with nothing in the record but the statements of the jurors to support the claim of ineffective assistance of counsel claim, the same "nothing in the record" was available to Whitlow and should have been raised on his direct appeal. Ergo again and marching forward to the State's final conclusion, since Section 46-21-105(2) M.C.A prohibits raising matters in petitions for post-conviction relief that could have been raised on direct appeal, Whitlow had no right to raise the ineffective counsel issue on a petition for post-conviction relief. In a nutshell, with essentially identical responses from jurors in both *Chastain* and *Whitlow*, *Chastain* would have to be overruled if Whitlow was allowed to have a post-conviction hearing.

Rejecting the State's argument, the four-member majority in *Whitlow* stood by their decision that the *Chastain* jurors' statements of "strong feelings" and how this could bias them against the defendant did demand further inquiry by Chastain's counsel. But, the statements of the *Whitlow* jurors that the case was "unsettling" and that "it would be hard to be impartial" did not demand further inquiry by Whitlow's trial counsel.[24] The court in *Whitlow* believed "trial counsel could have known other facts about these prospective jurors which led counsel to reasonably believe that, despite their possible prejudices, placing these jurors on the panel would be favorable to his client."[25] With that said, the *Whitlow* court remanded the case to the District Court for a post-conviction hearing. Go figure; as the dissent so aptly put it, ". . .if there is a rule of law lurking somewhere in all of this, I am hard pressed to state what it is."[26]

21. State v. Chastain, 285 Mont. 61, 63, 947 P.2d 57, 59 (1997).
22. State v. Chastain, 285 Mont. 61, 64, 947 P.2d 57, 60 (1997).
23. *Whitlow*, 2001 MT 208 ¶ 19.
24. *Id.* at ¶ 21.
25. *Id.*
26. *Id.* at ¶ 40.

counsel's decision to not ask follow-up questions or challenge the jurors was a conscious tactical decision. The *Strickland* presumption is often an insurmountable hurdle, but appellate counsel had placed in the District Court record an affidavit of Whitlow's trial counsel. In the affidavit, trial counsel admitted he had no particular tactical reason for not questioning or moving to remove jurors Felix, Sellers, and Brouelette.[20] The judicial equivalent of a smoking gun, the trial counsel's affidavit foreshadowed the evidence which would be presented at a post-conviction hearing and was tantamount to conclusive proof of ineffective assistance of counsel. If it could be considered at a post-conviction hearing, it would undoubtedly compel a finding of ineffective assistance of counsel. If Whitlow could have a post-conviction hearing, the pieces would fall neatly into place: (1) trial counsel would testify consistent with his affidavit that he had no particular tactical reason for not asking follow-up questions or challenging the jurors, (2) the presumption that counsel's inaction was sound trial strategy would be overcome, (3) the unpursued statements of jurors who said the case was "unsettling" and "hard to be impartial" would clearly establish ineffective counsel, (4) ineffective counsel was prejudicial to the defendant since the jurors were on the jury which convicted the defendant, and (5) last, but most definitely not least, Whitlow would get a new trial.

Placing the affidavit of Whitlow's trial counsel into the record was a masterful stroke by Whitlow's second appellate counsel. Indulging only slight speculation, the affidavit imposed incredible pressure on the Supreme Court to permit its consideration if the Court could find a way to allow a hearing for post-conviction relief.

Navigating the Shoals of Chastain

But *Chastain* stood squarely in the way of a post-conviction hearing. The State argued in *Whitlow* that the Supreme Court in *Chastain* had held in the defendant's favor and found ineffective assistance of counsel despite the fact that there was "nothing in the record" to explain counsel's failure to ask follow-up questions or move to exclude the seemingly biased prospective jurors. In *Chastain*, one prospective juror said he had read about Chastain's case, and because his little sister had

20. State v. Whitlow, 2001 MT 208, ¶ 18, 306 Mont. 339, ¶ 18, 33 P.3d 877, ¶ 18.

Concurring Opinions

Things start to get interesting with the concurring opinions in *Whitlow*. Justice Regnier, author of the majority opinion, wrote a separate concurring opinion to "express my view that, had I the votes to do so, I would modify, in part, our holding in *Chastain*.[27] Justice Regnier felt that the statement of the *Chastain* juror who saw an article about the case, and how it invoked "strong feelings," was not sufficient to overcome the presumption that counsel's decision was not the product of sound trial strategy. He said there could have been numerous reasons to keep the juror on the panel and, like the *Whitlow* case, the trial record was not enough to find ineffective assistance of counsel for the juror with "strong feelings."[28] Justice Regnier would have liked to modify the "holding in *Chastain* to reflect that counsel's decision not to further question or move to exclude this juror, without more, was not ineffective assistance."[29]

Justice Trieweiler concurred separately because he felt *Chastain* was factually distinguishable from the *Whitlow* case and he did "not believe this decision is in any way inconsistent with our decision in (*Chastain*)."[30] Although the initial statement of the *Whitlow* jurors indicated possible bias, during further questioning by the county attorney, all the jurors said that their "prior knowledge, feeling, or experience would not prevent him or her from being impartial."[31] These subsequent statements of impartiality seemed to Justice Trieweiler to remove any need to ask follow-up questions or remove the jurors. Regarding the *Chastain* decision, Justice Trieweiler said it made no sense, if defense counsel had some special knowledge about the jurors that made their damaging statements irrelevant, to have questioned the jurors in the first instance and seek court permission to examine at least one of the jurors outside the presence of the other jurors.[32] Justice Trieweiler also commented, in response to the opinion of Justice Nelson, that he was of the opinion that the key consideration, when follow-up questions are not asked of a juror who had made

27. State v. Whitlow, 2001 MT 208, ¶ 27, 306 Mont. 339, ¶ 27, 33 P.3d 887, ¶ 27.
28. *Id.* at ¶ 30.
29. *Id.*
30. *Id.* at ¶ 45.
31. *Id.* at ¶ 48.
32. *Id.* at ¶ 51.

statements suggesting bias, is whether the juror eventually denies bias. If the juror finally denies being bias, there is no presumed prejudice; when there is no ultimate denial of bias, counsel's inaction is presumptively prejudicial.[33] Justice Cotter joined in this concurrence.

Dissenting Opinion

Justice Nelson was not particularly charitable to the majority in his special concurrence and dissent. "Logical and procedural inconsistency and legal error aside, I must also agree with the State. . ."[34] Justice Nelson first argued that *Chastain* was not concerned with *why* defense counsel failed to ask follow-up questions. "Rather, it was enough – presumptively prejudicial, in fact – that he did not. . .And, we reached these conclusions from a record silent as to defense counsel's rationale or lack thereof."[35] Therefore, to be logically consistent, "we should similarly conclude that Whitlow's failure to raise his *Chastain* claims on direct appeal statutorily bars those claims from post-conviction review."[36] On the other hand, if the court remands *Whitlow* for a post-conviction hearing, "then we should overrule *Chastain*."[37]

But Justice Nelson's strongest argument for overruling *Chastain* was simply – "*Chastain* was wrongly decided."[38] Chastain's claim of ineffective assistance of counsel should not have been treated as a direct appeal issue but rather as a matter best left to a post-conviction hearing where the court could learn the *why* of counsel's actions. But, because the record in *Chastain* was silent about *why* defense counsel failed to ask follow-up questions, "one can speculate all day long about why counsel did not ask follow-up questions. . . .The point is that without asking him or her, who knows?"[39]

Regardless of whether *Chastain* should be overruled (per Justice Nelson), modified (per Justice Regnier), or affirmed (per Justice Trieweiler), it is abundantly clear that Justice Nelson got it right when he wrote that the *Whitlow* decision "provides

33. *Whitlow*, 2001 MT 208, ¶ 52, 306 Mont. 339, ¶ 52, 33 P.3d 887, ¶ 52.
34. *Id.* at ¶ 40.
35. *Id.* at ¶ 34.
36. *Id.* at ¶ 35.
37. *Id.* at ¶ 36.
38. *Id.* at ¶ 38.
39. State v. Whitlow, 2001 MT 208, ¶ 38, 306 Mont. 339, ¶ 38, 33 P.3d 887, ¶ 38.

no guidance to the practicing bar and will generate nothing but confusion along with the necessity to appeal every case involving a *Chastain* issue. Rather than opting for a clearly expressed rule, we have, to the contrary, muddied this area of the law immeasurably."[40] I agree.

ANALYSIS

What a mess! Should the prosecutor, defense counsel, and the trial judge: (1) simply ignore the *Chastain/ Whitlow* tangled claim of ineffective assistance of counsel and let the issue be sorted out on appeal or (2) take action at the time of trial to clear up the issue by making a trial record which removes the *Chastain / Whitlow* conundrum?

Without thinking the matter to its final conclusion, the prosecution may be pleased that defense counsel apparently didn't notice that the juror indicated a bias against the defendant. Moving quickly along to other jurors and hoping defense counsel doesn't move to remove the juror with a peremptory challenge only leaves a ticking time bomb for appellate counsel to raise on direct appeal – *Chastain* style – or throw back into a post-conviction hearing – *Whitlow* style. Either way, the case may have to be tried again; bad result.

Defense counsel may simply decide to not question the juror further and remove the juror with a peremptory challenge. However, if more jurors make such remarks than can be removed with the number of peremptory challenges allowed, and defense counsel has not asked follow-up questions of any of them, defense counsel will be faulted. Defense counsel may have a good reason to keep the juror on the panel and does not want to risk revealing the reason by asking follow-up questions; a good strategy until the defendant is found guilty but defense counsel has no record to support his trial strategy. Finally, defense counsel may simply have been distracted and not mentally processing a juror's reply indicating bias. Obviously not fair to the defendant, embarrassing to defense counsel, and again - defense counsel was in error. Another bad result.

The trial judge wants a fair trial. The emphasis is on "a" and "fair." Not two trials, and not a trial tainted by ineffective assistance of counsel. The trial judge is placed in a very awkward position when defense counsel does not ask follow-up

40. State v. Whitlow, 2001 MT 208, ¶ 41, 306 Mont. 339, ¶ 41, 33 P.3d 887, ¶ 41.

questions after a juror indicates bias against the defendant. Does defense counsel: (1) simply believe the juror does not have bias against the defendant, (2) intend to remove the juror by a peremptory challenge if the prosecution doesn't strike the juror, (3) have special information about the juror that more than offsets the indicated bias, (4) have a lack of awareness that the juror's answer was bias against the defendant, (5) believe the bias shown was not worth the risk of aggravating the juror if the judge would not strike the juror, (6) et cetera, et cetera, et cetera? As Justice Nelson so aptly put it, ". . .who knows. . .?"

Ineffective Assistance of Counsel Hearing

And so, we come to the heart of this case note: a procedure that can be used at the time of trial that will place into the record the "why" that is so elusive. If successful, it would benefit all of the trial participants and save the appellate court the wrenching hair splitting (the "parsing" described by Justice Nelson[41]) over what constitutes a juror answer that demands follow-up questions. The obvious and basic problem is the trial record; it contains the juror's potentially bias answers, no follow-up questions, and no apparent reasons for defense counsel's inaction. "Light" juror bias begs for a post-conviction hearing (per *Whitlow*). Alternatively, the "heavy" juror bias, even though defense counsel may have had very valid reasons for not asking follow-up questions, gets the case remanded for a new trial (per *Chastain*). The problem is exacerbated when the ineffective counsel issue is not raised on direct appeal, the ineffectiveness is clear (per *Chastain*) or not clear (per *Whitlow*), or the juror's answers are susceptible to different interpretations (per the *Whitlow* concurring opinions on *Whitlow* and proposed modifications to *Chastain*). With that said, what it comes down to is that a trial record devoid of reasons for defense counsel's failure to ask follow-up questions does not give justice to the defendant, a solid conviction to the prosecutor, a good reputation to the defense counsel, and one fair trial to the trial judge.

Don't despair – embodied within the opinions of Justice Nelson and Justice Regnier may be a solution. Justice Nelson said ". . .without asking him or her, who knows?' Justice Regnier made reference to *People v. Mendoza*.[42]

41. State v. Whitlow, 2001 MT 208, ¶ 41, 306 Mont. 339, ¶ 41, 33 P.3d 887, ¶ 41.

42. 6 P.3d 150, 172, (Cal. 2000) stating that claims of ineffective assistance must be denied "*unless counsel was asked* for an explanation and failed to provide one. . ."

Asking for Reasons

What a novel idea: just ask defense counsel for an explanation. The reasons will then be in the record and no one has to guess or speculate about defense counsel's secret information, the cleansing power of subsequent avowals of impartiality, or whether defense counsel was just careless.

Asking, or allowing, defense counsel to place in the trial record the reasons for not asking follow-up questions or challenging an apparently biased juror has its own set of problems. First, the prosecution and trial judge must be alert and recognize the apparent bias of the juror. Second, there must be an appropriate time to bring the matter forward without damaging defense strategy if the reasons are proper, but before the defendant is irretrievably damaged if defense counsel is clearly ineffective. Third, defense counsel must be able to make a record for counsel's own protection without disclosing defense strategy to the prosecution. Finally, the trial judge must be fully appraised of defense counsel's reasons in order to have a substantive basis to find defense counsel acted properly. Such a finding by the trial judge would be appreciated by the prosecution and defense counsel because it would likely be given considerable weight upon appeal. On the other hand, if the trial judge finds defense counsel is ineffective, it would serve to protect the defendant's right to a fair trial by removing defense counsel immediately.

If asking defense counsel to place on the record the reasons for not asking follow-up questions or challenging apparently biased jurors seems likely to settle most conflicts spawned by *Chastain* and *Whitlow*, the mechanics of "when" and "how" of making the record must not be permitted to consume the solution. In this regard, *Batson v. Kentucky*[43] may be helpful. *Batson* was concerned with peremptory juror challenges being based on improper discriminatory reasons and permitted the trial court to hold an immediate hearing to consider the issue. In a like manner, when an apparently biased juror is not asked follow-up questions or challenged for cause, the trial judge could hold a hearing to consider whether counsel is ineffective.

[emphasis added].

43. 476 U.S. 79 (1986).

When to Raise the Issue

Timing soon became an important consideration in *Batson* hearings. The *Batson* decision did not identify the time at which allegations of discriminatory challenges need to be made and considered by the trial court.[44] Recently the Montana Supreme Court considered this precise issue and held that the latest time the *Batson* challenge can be made is after the peremptory challenges are made but before the jury is sworn and before the venire is dismissed.[45] Logically, this makes sense because it is only after all preemptory challenges are made that all the discriminating behavior is disclosed.

The time for an ineffective assistance of counsel hearing should be immediately after the issue is fully presented. When the issue is the failure of defense counsel to ask needed follow-up questions involving one or many jurors, it may be necessary to take into account all of the voir dire, not just the failure to ask questions of the particular juror currently being examined. On balance, in the absence of an egregious situation which demands immediate intervention (i.e. a prospective juror says the defendant is clearly guilty and a challenge for cause is not made), it seems most appropriate to wait until all jurors have been examined but before the exercise of peremptory challenge.

Caveat - do not wait to raise the issue of ineffective assistance of counsel until after the jury is impaneled and sworn. Jeopardy to the defendant attaches the moment the jury is impaneled and sworn. Following the holding of *Keating v. Sherlock*,[46] the Montana legislature amended Section 46-11-503 M.C.A. and provided that a second prosecution for the same offense is barred if the former prosecution was terminated for reasons not amounting to an acquittal and took place in a jury trial when the jury is impaneled and sworn.[47] If the trial court finds it necessary to remove defense counsel as ineffective before the jury is sworn, jeopardy has not attached; the case may proceed to trial, on another day, after the defendant is represented by more effective counsel. The prosecution undoubtedly would appreciate this opportunity for another trial and is less likely to want to press forward with the present trial in the face of grave concerns about ineffective counsel.

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44. State v. Ford, 2001 MT 230, ¶ 22, 306 Mont. 517, ¶ 22, 39 P.2d 108 ¶ 22.
45. *Id.* at ¶¶ 26-28.
46. 278 Mont. 218, 924 P.2d. 1297 (1996).
47. MONT. CODE ANN. § 46-11-503(1)(d)(i) (2001).

How to Raise the Issue

With the "when" set at immediately after voir dire closes, it is appropriate to turn to the "how" of raising the issue of ineffectiveness of defense counsel. Timing is important when bringing the *Chastain/Whitlow* issue before the court for an ineffective assistance of counsel hearing. There are basically two scenarios. First, either the prosecution or the trial judge has concerns that defense counsel did not ask follow-up questions or challenge jurors who indicated bias toward the defendant. Alternatively, or coextensively, defense counsel may want an expanded record for any of several reasons: (1) to prevent future allegations of ineffective assistance of counsel by letting the record contain the reasons for not asking follow-up questions or not making challenges for cause, (2) to show that the defendant has been appraised of the reasons for defense counsel's actions, or (3) to obtain a ruling from the trial judge that counsel was not ineffective.

In the aftermath of *Whitlow*, trial judges should be alerted to an ineffective assistance issue when defense counsel does not ask follow-up questions or challenge jurors indicating bias. The same awareness can be expected of the prosecution because of their interest in a solid conviction. Likewise, defense counsel's desire to avoid the legal and professional problems associated with claims of ineffective counsel should increase awareness.

The issue is most likely to be raised by the prosecution requesting to make a motion outside the presence of the jury, defense counsel requesting permission to place a matter on the record outside the presence of the jury, or the trial judge excusing the jury while a "procedural matter" is considered. Both prosecution and defense counsel must move swiftly with their request for an ineffectiveness of counsel hearing before any peremptory challenges are made.

Ineffectiveness Hearing Procedure

When a request is made for a *Chastain/Whitlow* hearing, the judge should adjourn to chambers with the prosecutor, defense counsel, defendant, and court reporter. After the ineffective assistance of counsel question is placed in the record, the judge should excuse the prosecutor from the room and let the "why" be placed in the record. The prosecutor should not be present because the prosecutor should not be exposed to defense strategy, defense counsel's knowledge of special information

about a juror, possible arguments between defendant and defense counsel, and challenging questions from the trial judge. The jury is not present for the same reasons. The record should reflect that the prosecutor and jurors are not present, but that the Defendant is present. What might be helpful to the judge is a written list of questions from the prosecutor to be answered by defense counsel, if deemed appropriate by the trial judge, addressing *Chastain / Whitlow* concerns.

Ineffectiveness Hearing Questions

An ineffectiveness of counsel hearing could be as simple as asking or allowing defense counsel for an explanation of his/her actions. Or, it could become rather involved as the trial judge inquires into defense counsel's trial strategy, calculations of degree of juror bias, or possession of special information about an apparently biased juror.

At the ineffectiveness of counsel hearing, the basic question was appropriately framed by Justice Nelson – "why?".[48] What will guide the "why" inquiry is whether defense counsel's explanation is reasonable. As the Court said in *State v. Harris:*[49]

When a tactical or strategic reason for defense counsel's alleged deficient performance is apparent in the record on appeal or proffered by counsel in post-conviction proceedings, the court must evaluate whether this underlying reason is "reasonable" before indulging the strong presumption demanded by *Strickland* that a tactical or strategic act falls within the wide range of reasonable and sound professional assistance. Strickland, 466 U.S. at 688-89, 104 S. Ct. at 2064-65; *Jones v. Wood* (9th Cir. 1997), 114 F.3d 1002, 1010. When a challenged act or omission reflects an unreasonable defense strategy, stems from neglect or ignorance, or results from a misunderstanding of the law, counsel's deficient performance meets the first prong of the *Strickland* test.[50]

Unreasonable defense strategy, neglect, ignorance, or misunderstanding of the law will meet the first prong of the Strickland test. Accordingly, a few preliminary questions come to mind: Does defense counsel recall the answers given by the

48. State v. Whitlock, 2001 MT 208, ¶ 40, 306 Mont. 339, ¶ 40, 33 P.3d 887, ¶ 40 (Nelson, J., concurring and dissenting).

49. 2001 MT 231, ¶ 22, 306 Mont. 525, ¶ 22, 36 P.3d 372 ¶ 22.

50. *See also* State v. Gonzales, 278 Mont. 525, 532, 926 P.2d 705, 710 (1996).

jurors? How does defense counsel evaluate these answers? What is defense counsel's understanding of the law that applies to disqualification of a juror for bias? How does not asking follow-up questions fit into defense counsel's overall trial strategy? Why weren't the jurors challenged? Does defense counsel intend to remove the jurors in question by peremptory challenges? If so, why weren't the jurors challenged for cause?

Once the record has been made with the reasons defense counsel did not ask follow-up questions or challenge the juror, most of the problems associated with *Chastain/Whitlow* dichotomy are resolved. The trial court can make a finding that the trial should continue because defense counsel's action was "reasonable," and therefore the first prong of the *Strickland* test has not been met, or alternatively, that defense counsel is ineffective and should be removed.

Options After Ineffective Counsel Hearing

What is also instructive from *Batson* are the options available to the trial judge when discriminatory conduct occurs. The Montana Supreme Court in *Ford*[51] noted that in *Batson* the U.S. Supreme Court offered the following alternative possibilities upon a finding of discrimination: the court may discharge the venire and select a new jury from a panel not previously associated with the case, or it may disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated in the venire.[52] Essentially, either alternative allows the trial judge to "turn back the clock" and correct the error of counsel and thereby afford a fair trial to the defendant.

The Court in Ford was quite explicit about the prerogative of the trial judge to take direct action to correct a *Batson*-type error. After noting that a *Batson* challenge made after the jury is sworn would ". . .deprive the district court of the ability to correct any error in the proceeding in a timely fashion," the Court further stated that it has ". . .consistently held that the purpose of a timely objection is to give a district judge the first opportunity to correct any error.[53] Affording the trial court the opportunity to correct the error of counsel in a timely manner not only helps give the defendant an impartial jury, it is

51. State v. Ford, 2001 MT 230, ¶ 23, 306 Mont. 517, ¶ 23, 39 P.2d 108, ¶ 23.
52. *Id.*
53. *Id.*, at ¶ 27.

valuable to the prosecution's interest to not try the case a second time. The trial judge in an ineffective counsel situation should have the same opportunity to make a record or take appropriate action when ineffective counsel is suspected.

The Record

When deciding a *Batson* discriminatory challenge, the trial judge needs to make sure there is a record of all relevant facts and a full explanation of the trial court's rationale.[54] The complete record and full explanation of the rationale are of great assistance to the appellate court and to the trial judge's decision making process. A similar procedure is appropriate for an ineffectiveness of counsel hearing.

Regardless of whether defense counsel is removed at the time of trial, the most valuable result of an ineffectiveness of counsel hearing is that the issue of ineffective assistance of counsel can be easily resolved on direct appeal - there is no need to speculate if defense counsel had secret reasons for not asking follow-up questions. Juror answers and defense counsel's inaction may be evaluated by reference to the reasons given by defense counsel. Further, it is to the defendant's advantage that the trial judge has reviewed defense counsel's effectiveness at an early stage of trial. It is of only modest consolation to a defendant to gain a new trial after languishing in prison waiting to present proof at a post-conviction hearing that his/her trial counsel was ineffective.

CONCLUSION

The Montana Supreme Court's attempt to reconcile *Whitlow* and *Chastain* left the law in some confusion: what type of juror answer demands follow-up questions, when should the defendant claim ineffective defense counsel, does a juror's subsequent claim of lack of bias cancel earlier statements of bias or should follow-up questions still be required, and should defense counsel risk alerting the prosecution to jurors that the defense intends to peremptory challenge by comments designed to explain not asking follow-up questions?

The proposal submitted herein, that before a jury is sworn and the venire is discharged a hearing be held and a record

54. State v. Ford, 2001 MT 230, ¶ 18, 306 Mont. 517, ¶ 18, 39 P.2d 108 ¶ 18, (citing U.S. v. Diaz, 26 F.3d 1533 (11th Cir. 1994)).

made to fully disclose defense counsel's reasons for not asking follow-up questions or challenging apparently biased jurors, would have the advantage of putting on the record the all-important question about defense counsel's actions - "WHY?".