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ARTICLES

Is Eyewitness Testimony Inherently Unreliable?

By Aileen P. Clare - May 28, 2012

To those who follow crime and courts, the stories are familiar and unnerving. Cornelius Dupree spent 30 years imprisoned in Texas for a 1979 rape and robbery he did not commit, largely due to a single eyewitness identification. He was freed in 2011 through new DNA evidence. Derrick Williams of Florida was freed through DNA evidence after spending 18 years in prison for a rape based on eyewitness misidentification. Johnny Pinchback, a Texas inmate convicted of a 1984 rape based on eyewitness misidentification, was freed through DNA testing after 27 years in prison. Alvin Jardine was freed through DNA testing after serving 20 years jailed in Hawaii, again due to eyewitness misidentification. Of the 21 cases on the Innocence Network's 2011 exoneration report, 19 wrongful convictions involved eyewitness testimony. Innocence Network Report, 2011. This is consistent with statistics showing that more than three-quarters of wrongful convictions later overturned by DNA evidence relied on faulty eyewitness evidence.

Even after hearing the statistics, we are reluctant to distrust a sincere eyewitness, but decades of research show that memory is neither precise nor fixed. For instance, we would expect a moment of high stress to focus the mind and sharpen recall, but the opposite is true. Violence, stress, and the presence of a weapon during an incident actually weaken memory. Racial differences between the witness and the suspect can impair identifications. Unconscious transference, or confusing someone seen in one place with someone seen in another place, is common. Identification can also be impaired by how long the witness is exposed to the suspect, the delay between the incident and the identification, and post-event information, such as feedback from the police or other witnesses.

Our evidentiary system presumes the reliability of eyewitness testimony unless it has been tainted by official action. Jurors, too, are mostly "not sensitive to the malleability of human memory" and tend to over-credit eyewitnesses. The challenge for criminal-justice systems is twofold: at the front end, minimizing circumstances that corrupt eyewitness accounts, and, at the trial stage, giving the jury the information it needs to critically assess the evidence.

System Variables: Things the Criminal-Justice System Can Control

In a recent watershed opinion, the New Jersey Supreme Court, after reviewing a special master's record of 300 exhibits, including 200 scientific studies, thoughtfully divided the factors affecting eyewitness evidence into two categories: system variables and estimator variables. *State of New Jersey v. Henderson*, 27 A.3d 872 (N.J. 2011).

System variables are things that can be controlled by the criminal justice system. The predominant system variable is the photographic or physical lineup. Studies show that witnesses select the wrong suspect from a photo lineup roughly a quarter of the time. When the suspect is

left out of a lineup, witnesses pick an innocent person more than a third of the time—even when told that the suspect may not appear in the lineup.

Lineups are responsible for many misidentifications, but there are practical steps that a law-enforcement agency can take to minimize error, and for litigants, the absence of these steps can raise a red flag.

Lineups should be blind or double-blind, meaning that the officer administering the lineup does not know who the suspect is. This removes the danger of unintentional suggestion. The officer should emphasize that the suspect may not appear in the lineup. The witness should not feel obligated or pressured to pick anyone.

Of course, lineups should be constructed so that the suspect does not stand out. Photos should have similar lighting, and headshots should be the same size. Errors tend to increase when there are too many photos to choose from; the optimal number seems to be six. Two suspects should not appear in the same lineup. Multiple viewings of the same suspect should be avoided.

The police should carefully avoid post-identification feedback or confirmation, which can create a false sense of confidence in a witness. If a witness hears that he or she did a "good job" picking a certain face, even the wrong one, she is more likely to repeat the mistake at trial. For the same reason, multiple witnesses to the same event should be told not to discuss the identification procedure among themselves.

"Show-up" identifications, where the police produce a single suspect for identification, are inherently suggestive, although sometimes necessary. The accuracy of a show-up identification diminishes quickly following an event, so show-ups should be used, if at all, within two hours of the event.

Estimator Variables: Things the System Can't Control

Estimator variables are things that are beyond the control of the criminal justice system but can affect a person's ability to perceive and recall.

A person under high psychological stress at the time of an event is less likely to make a reliable identification later. Studies of eyewitnesses, including one controlled study of military personnel, consistently show that high stress impairs recall and identification.

When a weapon is present during an event, it can distract the witness's attention away from the suspect and lead to poor descriptions and misidentification later, especially when the event has a short duration. Weapon focus has been shown to decrease the accuracy of identifications by about 10 percent.

Other proven estimator variables reflect conventional wisdom. Distance, lighting, and how long a witness had to view the suspect are all important, as are the witness's personal characteristics, such as age, race bias, or level of intoxication. Personal characteristics of the suspect, even

something as simple as wearing a hat or different facial hair, have been shown to affect identifications.

Memory decay is inevitable and irreversible. The more time that passes between the event and the identification, the more likely a witness is to misidentify or fail to recall a suspect. This is an estimator variable, but the system can minimize its effect by staging identifications as soon as possible after the event.

Who Gets a Suppression Hearing? What If You Don't?

The Supreme Court set the standard for suppressing eyewitness identification in 1977. *Manson v. Brathwaite*, 432 U.S. 98 (1977). It has remained virtually unchanged since then.

Under *Manson*, the court may grant a pretrial suppression hearing on identification if the defendant shows that the police used a suggestive identification procedure, such as showing the witness a single photograph of the defendant instead of a neutral photo lineup. At the hearing, the court weighs the "corrupting effect" of the suggestive procedure against factors affecting reliability: the witness's opportunity to view the suspect, the degree of attention, the accuracy of description, confidence during the identification process, and the time between the event and the identification. The evidence should be suppressed only if there is a "very substantial likelihood of irreparable misidentification."

Henderson modified this test for New Jersey courts. A New Jersey defendant still needs to show suggestiveness to get a suppression hearing, but he or she does not need to show that it resulted from police action. The state must respond with proof that the identification is reliable, taking into account system and estimator variables. The defendant bears the burden of proving misidentification. The court should suppress the evidence if it finds from a totality of the circumstances that there is a very substantial likelihood of irreparable misidentification. If the evidence is admitted, the judge should give the jury specific instructions grounded in science.

Several months after *Henderson*, the Supreme Court weighed in. In *Perry v. New Hampshire*, 132 S.Ct. 716 (2012), the Court reaffirmed *Manson*'s rule that the defendant must make a threshold showing of suggestive police action before getting a suppression hearing. Suggestive action by private actors, or the presence of other "corrupting" influences, does not warrant suppression as a matter of constitutional right.

It appears defendants outside of New Jersey may still have to show suggestive police action to suppress eyewitness evidence, but *Henderson*'s analysis and conclusions can inform the rest of us.

Educating the Jury

The Constitution, *Perry* said, protects against wrongful convictions not by barring questionable evidence, but by giving the defendant "the means to persuade the jury that the evidence should be discounted as unworthy of credit." Although *Perry* reaffirmed the narrow suppression threshold, it acknowledged the high incidence of misidentification and encouraged defendants to

challenge unreliable eyewitness testimony through the traditional means of cross-examination and compulsory process. Additionally, it said, defendants can move for exclusion on the non-constitutional ground that the evidence's prejudicial effect outweighs its probative value.

Rules of evidence generally permit expert testimony if it will assist the jury and if it represents valid scientific or technical knowledge. Some courts are resistant to expert testimony on eyewitness identifications, questioning its scientific basis and perceiving it as an intrusion on the jury's traditional role of weighing witness credibility. *E.g.*, *United States v. Rodriguez-Berrios*, 573 F.3d 55 (1st Cir. 2009); *United States v. Smith*, 122 F.3d 1355 (11th Cir. 1997). Five states—Kansas, Louisiana, Nebraska, Oregon, and Pennsylvania—have categorically excluded expert testimony on misidentification, but a substantial and growing number of jurisdictions are open to this kind of testimony where it is reliable and relevant. *Ferensic v. Birkett*, 501 F.3d 469 (6th Cir. 2007); *United States v. Brownlee*, 454 F.3d 131 (3rd Cir. 2006).

Regardless of jurisdiction, defendants can cite *Henderson* and the studies it cites for the proposition that scientific research on eyewitness evidence is now established and reliable. If relevant, expert testimony on this science should be among the devices that *Perry* promotes as safeguards against wrongful conviction.

Additional Reading

The *Henderson* court reviewed the law and science as well as any law review could, but for further reading, especially on the admissibility of expert evidence on this topic, see:

- George Vallas, "A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses," 39 Am. J. Crim. L. 97 (2011);
- Margery Koosed, "Reforming Eyewitness Identification Law and Practices to Protect the Innocent," 42 Creighton L. Rev. 595 (2009);
- Bethany Shelton, "Turning a Blind Eye to Justice: Kansas Courts Must Integrate Scientific Research Regarding Eyewitness Testimony into the Courtroom," 56 *U. Kan. L. Rev.* 949 (2008);
- Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*, (Harvard Univ. Press 2011).

Keywords: litigation, trial evidence, eyewitness testimony, system variables, estimator variables

Aileen P. Clare serves as attorney advisor to the U.S. Probation Office in the District of South Carolina.

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Managing the CSI Effect in Jurors

By Katie L. Dysart - May 28, 2012

The now-ubiquitous term the "CSI Effect" has been used to describe the phenomenon whereby high-tech, forensic science dramatized in television crime dramas such as CSI, Law & Order, and Forensic Files theoretically promotes unrealistic expectations among jurors of how apparently clearly and definitely forensic evidence can determine innocence or guilt or, from the perspective of the civil litigator, causation or liability. CSI, a hit CBS television series that first appeared on the small screen in October 2000, has more than 67 million viewers a week, and the franchise has spawned a national obsession with forensic science, from an interactive educational exhibit opened in Times Square to an increase in forensic science degrees. See Max M Houck, "CSI: Reality" [PDF], Scientific American, July 2006 at 85; see also Claire Sanders, "Forensic Courses Cut Open for Analysis," Times Higher Educ., May 2, 2003, at 8.

As indicated in a study by Donald Shelton, the problem is not specific to *CSI* or related programs, as the "tech effect" is derived from the evolution and advancement of modern technology. Donald E. Shelton, Young S. Kim, and Gregg Barak, "A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the '*CSI* Effect' Exist?" 9 *Vand. J. Ent. & Tech. L.* 331, 334 (2006).

So the question remains: How does the *CSI* Effect impact jurors in both the criminal and civil context? Is this high-tech evidence expected or demanded by our jury system in all cases, and if so, how can jurors' expectations be managed by the advocates?

How Does the CSI Effect Influence Jurors?

The *CSI* Effect has purportedly led to jurors' unreasonable demands for definite physical evidence at trial. The vice president of the National District Attorney Association said, "Jurors now expect us to have a DNA test for just about every case. They expect us to have the most advanced technology possible, and they expect it to look like it does on television." *See* Houck, *supra*. The *CSI* Effect has perhaps rewritten the standard burden of proof in the criminal context from "beyond a reasonable doubt" to "beyond any doubt." In other words, it is completely dependent on seemingly error-proof forensic, scientific, technological evidence. In the civil context, jurors' expectations for *CSI*-like evidence may effectively raise the standard from "beyond a preponderance of the evidence" to a standard more akin to that in the criminal context. In much the same way that today's consumer expects a cell phone to operate on voice command, today's jurors expect the introduction of evidence packed with modern science and technology in trials. These high expectations result in part from the amalgamation of public awareness, use, and availability of modern science and technology derived from a variety of sources, including, but not limited to, mass media.

For instance, take the example of a recent, high-profile murder trial. If you were not living under a rock during the summer of 2011, you are familiar with the Casey Anthony trial for the murder of her two-year-old daughter, Caylee Marie Anthony, and the subsequent outrage regarding the not-guilty verdict. Despite being built on circumstantial evidence, the prosecution presented a seemingly iron-clad case for at least one guilty verdict of the three major offenses. Within seconds of the outright acquittal, the assembled media advanced the explanation that the acquittal was due at least in part to the *CSI* Effect. In fact, one of the jurors on the Casey Anthony case indicated there was not enough physical evidence to find her guilty.

A troublesome aspect of the *CSI* Effect is that some of the technology jurors may have come to expect may not exist, and, even if it does exist, availability does not correlate with admissibility. Advocates are limited by certain legal norms in court, specifically, the U.S. Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, codified in Federal Rule of Evidence Rule 702, which set the framework for the admissibility of scientific and expert evidence. The *CSI* Effect is said to cause jurors to automatically attach reliability and relevance to high-tech evidence to the point that they are unwilling to divorce their preconceived notions from whether the evidence is in fact reliable and admissible under the legal rules or jurisprudence.

The *CSI* Effect does not operate only in criminal cases. While it is typically referred to in the context of criminal cases, it spills over into civil litigation, especially in complex civil litigation involving anything technical in nature. Trial Consultant Rich Matthews noted:

It has been documented that prosecutors are offering scientific evidence that they wouldn't have even a few years ago—either because it is on a point that isn't really that important or because managing the resources and priorities of a crime lab would have led to not producing it. They must do it now, lest a jury wonder where the CSI stuff was, and assume that **an absence of proof is a proof of absence**. . . . And really, that is the linchpin of the danger of the "CSI Effect"; a lack of evidence which is expected by an amateur leads to the assumption that if the evidence existed anywhere in the universe, the [advocate] would have offered it, which he or she did not, so therefore it doesn't exist and the claimed event never happened.

Richard Matthews, "The CSI Effect . . . in Civil Cases as Well as Criminal Ones," *The Jury Expert*, June 2007, at 10. Matthews warned that even in cases that do not appear technical in nature, if any piece of the story or evidence occurs through technical means, such as an email, jurors may expect a lavish presentation regarding the availability of the high-tech evidence and mistake silence as proof of absence.

Managing Expectations Manifested by the CSI Effect

Regardless of your belief in the *CSI* Effect and/or the degree to which it may influence the jury, the question becomes whether or not to alter trial strategy to counteract it. Several potential

tactics before, throughout, and/or at the conclusion of the trial may be employed as countermeasures to potential *CSI* Effect issues in a given case.

Screening for Potential CSI Effect Issues

After living and breathing a case day in and day out for years, trial lawyers may lose some perspective of the case, and a fresh set of eyes through the use of a consultant may be beneficial. It may be a good idea to have a consultant review the case for potential *CSI* Effect issues that are not anticipated by the trial lawyer.

Mock Jury

A mock jury can provide the opportunity to test your case and theories to identify any *CSI* Effect issues and help you to understand how a lay jury will attempt to solve the case at issue. Thus, a mock jury could help to identify *CSI* Effect or tech issues beforehand, making it possible to be prepared for the potential issues at trial.

Voir Dire

Voir dire presents a unique opportunity to identify potential *CSI* Effect issues in a given case. Questioning jurors regarding their occupation, spare-time activities, and personality type can provide insight into their thought processes in general and, more specifically, their problemsolving inclinations. Furthermore, jurors should be questioned regarding their education and/or reliance on technology.

Juror questionnaires may also offer unique insight regarding potential jurors' television-watching or technology habits. Recently, potential jurors in the Conrad Murray trial were given questionnaires that specifically asked if they watched *CSI* in preparation for presenting the particular evidence taken from Michael Jackson's bedroom that, unlike in *CSI*, does not clearly show what caused Jackson's death. *Showbiz Tonight* (HLN television broadcast, September 21, 2011). The advantages and disadvantages of maintaining jurors whose lists are topped with high-forensic shows such as *CSI* should be carefully assessed in the context of a given case.

Opening and Closing Statements

Opening and closing statements offer another opportunity to buffer the potential *CSI* Effect by informing the jurors regarding the production or lack of scientific evidence in a particular case and the implications or reasons for the same. Again, the importance of reminding the jury of the appropriate burden in the respective criminal or civil case cannot be overstated. It will also be important to realize that a juror may assume that the resources available in a murder case are equally available in a contract case. Educating the juror with no legal education on the particular case's issues will be fundamental to removing or inhibiting the impressions largely formed from the mass media.

Presentation of Exhibits

Where potential *CSI* Effect issues are present, carefully consider introducing offensive *CSI* Effect tactics, such as presenting high-tech exhibits to demonstrate or simplify complex issues in

criminal and/or civil cases. This offensive strategy may, for example, impress a younger jury that may be more reliant on technology and thus more susceptible to the *CSI* Effect.

Experts and Witnesses

If the case has the potential for *CSI* Effect issues, experts should be chosen carefully. Specifically, be prepared to question experts directly about the absence of scientific evidence. In fact, some trial lawyers now utilize "negative-evidence witnesses" to inform jurors that it is not rare that real investigators fail to find physical evidence. In the civil context, during the presentation of evidence through witnesses, trial lawyers may lessen the effect of any preconceived notions regarding the nature of the evidence to be presented at trial by simply reminding the jury that the type of evidence they have come to expect as seen on television will not be seen in the respective trial.

Cross-Examination

The cross-examination of witnesses and experts provides another potential avenue to emphasizing the lack of evidence or the presence of evidence to the jury. It also allows an avenue to respond to the opposition's utilization of certain scientific evidence presented at trial and allows for a counter of any *CSI* Effect issues introduced by the opposition. Specifically, the opponent's experts should be cross-examined regarding the reliability of the high-tech evidence at issue or, in the context of witnesses, as to the types of testing performed or not performed that jurors may know (or think) is available.

Jury Instructions

Certain measures should be taken to lessen the *CSI* Effect on the verdict or judgment at the close of trial and on the commencement of jury deliberations. Specifically, request jury instructions that are written clearly and simplistically, without references to unnecessary legal jargon, to avoid miscomprehension of the laws the jurors are instructed to apply. This practice is not exclusive to deliberation time—jurors should be informed as to the law of the particular case both before and after the trial to ensure they understand the legal principles of the case throughout the trial and to minimize any unreasonable expectations they may have by virtue of cultural influences.

Conclusion

While the *CSI* Effect may not necessarily be the direct effect of watching the *CSI* program aired on CBS, the cultural phenomenon resulting from broad cultural changes, enhanced by mass media and television programs, cannot be ignored. Rather than fight against this growing mindset, trial lawyers should adapt their trial skills to manage unrealistic expectations and ensure that the cornerstone of deductive reasoning in our legal system is not buried by potentially inadmissible evidence and/or lost to fallible science and technology. There is an obvious increase in pressure and attention on the use of modern science in the courtroom. The *CSI* Effect influences all trial participants in the context of a jury trial—the prosecution and the defense in criminal cases, the plaintiff and the defendant in civil cases, and the presiding judge in both criminal and civil cases. While the *CSI* Effect is usually described as a defendant's advantage

given that jurors are reluctant to convict or find liable without some clear and definite evidence, it can also cut the other way where jurors are more likely to accept and give credit or attach relevance to the scientific evidence.

Trial lawyers should be prepared to manage juror's expectations resulting from the *CSI* Effect by utilizing certain questioning of prospective jurors on voir dire, by reconfiguring opening and closing statements, by tailoring the examination of witnesses and experts, by introducing offensive *CSI* Effect evidence and/or negative evidence, and by calling for certain jury instructions regarding the presence or absence of certain scientific evidence.

Keywords: litigation, trial evidence, *CSI* Effect, forensics, jurors

Katie L. Dysart practices in the Advocacy Group of Baker Donelson Bearman Caldwell & Berkowitz's New Orleans, Louisiana, office.

Interview with Gregory A. Presnell, District Judge

By James E. Foster Esq. – May 28, 2012

(Editor's note: This interview was conducted Wednesday, March 14, 2012, at the U.S. District Court for the Middle District of Florida.)

James E. Foster: Good afternoon, Your Honor. I appreciate very much your willingness to be interviewed on behalf of the Trial Evidence Committee of the Section of Litigation.

As you know, the Trial Evidence Committee is very interested in talking to district judges to get their view of trial evidence, how to handle evidence in the courtroom, and then also, just generally, anything that you might have to say about trial procedure, anything that you have seen in the courtroom that you have found particularly effective, and, conversely, anything that you have seen in the courtroom that you have found particularly ineffective if not offensive. So that will be the thrust of the conversation that we have here today. But could I first ask you to introduce yourself to the reader?

Judge Gregory A. Presnell: Sure. I'm Greg Presnell. I was appointed to the district bench on August 2, 2000. I think I was President Clinton's last appointment in Florida, And I've been a district judge since that time, full time. I'm taking senior status in two weeks, so I'm looking forward to that, although I'm going to stay actively involved. It's been an interesting ride and an educational experience. For the most part, I have enjoyed every minute of it.

So I'm happy to be here, and if I can provide some insights to help trial lawyers with their craft, then it's my pleasure.

Foster: Thank you, sir. Let's talk briefly about trial evidence. Is there any area of admission of oral testimony or documents that you have seen as particularly troublesome for practitioners?

Presnell: Well, as you know, Jim, in federal court, we tend to resolve most of these problems before we get to trial through a pretrial process of lawyers conferring, and so I don't know that there's any specific thing. You have the typical problems of hearsay, which remain a mystery to most lawyers and judges. And beyond that, I don't—I can't think of anything specific.

We have a tradition in this court, in the Orlando Division, of interviewing juries after every jury verdict. I have learned an awful lot about how juries think and what they like and what they don't like because I've probably interviewed well over a hundred juries now in the last 12 years.

I have developed three rules from that experience. The first rule is "Don't waste the jury's time. I can't tell you how many times I've talked to juries who have told me that they were really offended by the time wasted by one or both of the lawyers.

The second main complaint I get from them is "Don't treat us like children." Our juries here, particularly in Orlando, tend to be well educated. They are conscientious and attentive. They're there to perform a civic duty, and they expect to be treated like intelligent adults. A lot of lawyers lose sight of that fact.

Foster: Is it a question of talking down to the jurors, as though they had a third-grade education, when they don't?

Presnell: It's a matter of talking down to them. It's a matter of repetition, which is part of Rule No. 1. You don't have to tell the jury the same thing over and over. They'll get it the first time or two. So it's both. It's lawyers who feel that they have to keep making the same point over and over again with every witness, and then also treating them like they are not intelligent enough to understand this mysterious legal process that's going on before them.

And then the third rule is back to the first, "Don't waste their time." That has to do with both the evidence that's presented, the way that you interrogate witnesses, and the repetition often involved. It has to do with objections. As you know, trial lawyers need to be strategic in their objections. Because if you sit there—well, actually, stand there, hopefully—and make objections that are repeatedly overruled, the jury's going to get the impression that you're either trying to hide the truth or don't know what you are doing. Neither one of those is a good thing for you to convey to the jury.

So most of my observations about trial practice since I came over here involve, basically, those simple rules.

Foster: Well, let me, Judge, if I might, talk about the repetition. One of the things that I've always heard, as a trial lawyer, is that if you simply say it once in front of a jury, then a number of the jury members will miss it, because of whatever reason. Do you find that to be true? I mean, is some repetition appropriate?

Presnell: Well, sure. I think you have to make choices, and some of these lines are difficult to draw. My observation is that most lawyers tend to draw the line way over; [they] go way overboard in terms of repeating what they think the jury needs to know because they don't trust juries to understand the intricacies of a complex civil case. They don't think juries are really capable of understanding the nuances of commercial transactions and difficult—sometimes very difficult—concepts. And I often tell people that after doing this for 12 years, in my experience, the jury gets it right 90 percent of the time, and the other 10 percent, I'm probably wrong. So the typical jury we get here, I think, is quite capable of understanding it without much repetition.

Foster: Is there anything that you would recommend a practitioner to do with demonstrative exhibits or exhibits that go into evidence, that would help the practitioner make the point that he needs to make to the jury, and then be able to move on to the next topic so that he's comfortable that the jury did, in fact, get the point he's trying to make—he or she is trying to make?

Presnell: Well, a couple comments. First, we've got very sophisticated evidence-presentation equipment now, and lawyers either use the overhead screen for publishing evidence or they use the PowerPoint presentation. Both can be very effective. You know, humans learn—information is conveyed both verbally and visually, and subtly, through body language, and all are important. So, you know, if you have something you want to get across to the jury, being able to present it both visually and verbally at the same time is, I think, important and very effective.

Another thing I do, for example, in a contract case, or a case that involves a critical document or something that you want the jury to see, [is] I'll have the lawyers put together a book of exhibits. It can't be more than a handful—a couple—and I'll bind them and give it to every juror when the case starts, before opening statements. And that way they've got Tabs A, B, C, and D, and when you start talking about the contract, you can refer to Tab A, page so-and-so, and the jury's got their own copy. They can sit there and mark it up. My jurors take notes. And they can absorb the information that way and have the document in hard copy in front of them and keep it with them. So I've found that to be an effective way to educate the jury without wasting valuable time.

The same with stipulations. You know, our pretrial statement, we require the lawyers to put in writing the matters that are not in dispute—the factual matters. And I'll often type those up, give it to the jury, and tell them you can assume these facts as proven and true.

Foster: All right. With regard to PowerPoints, I've heard both good and bad about PowerPoints. Is there any practice, pointer, or tip that you could give to practitioners as to an effective PowerPoint, as opposed to one that drones on?

Presnell: Well, I guess the same, going back to my Rule No. 1. It can be very effective. It can also be very boring. You have to make use of it appropriately and not overdo it. But I think it's the same, whether you're doing it [with] PowerPoint or whether you're doing it [with] Q and A or whatever. You want to be precise and relatively concise in your presentation.

Foster: Do you find that PowerPoints that are just basic slides are more effective at capturing the jury's attention, or with the PowerPoints you can create—I won't call it animation—but you have the ability to slide things in to make it a little bit more interesting?

Presnell: My take on it is that by introducing different kinds or levels of visual depiction is helpful. It keeps the human mind engaged, as opposed to just watching a screen that has printed material on it. So highlighting, different typeface, sliding things in and out, is, I think, effective. And I think the one thing you need to avoid—and sometimes you see this—juries, like people, sometimes root for the underdog. And if you have, for example, a plaintiff's lawyer, with his client, by himself, at one table, and at the other table, you've got three defense lawyers, two paralegals, a media specialist and people running around putting on slide shows, I'm not sure that's a good signal to send to the jury. So I think you need to be a little bit conscious of what I call the underdog effect and not over-try your case.

Foster: With respect to "don't waste time," obviously, there's the issue about repetition. Is there anything else that you see, or have heard back from the jurors, that indicates that they find this to be wasteful?

Again, my example would be, as the trial lawyer, you want to make sure that you win, and so, if you have a particularly important point, you could call Witness A, but you could also call Witness B, C, and D. The old question: How much is enough?

Presnell: Well, part of it, Jim, is learning as you go. You know, a trial is a very dynamic thing. And I know lawyers that aren't used to trying cases in front of me, typically, they'll say, "Judge, this is going to be a five-day trial," and I'll look and I'll say, "No, we can do it in three." "Oh, no, Judge. It's going to take five days." And after two and a half days, both lawyers are beginning to realize that they're at a point of diminishing returns with this jury and that, indeed, they can effectively try this case in three days. So I think a lot of being a good trial lawyer is like life. You learn as you go. And just because you have a witness list and you have a guy ready to testify, [that] doesn't mean you have to put him on or her on. Go with the flow. Roll with the punches, you know. And learn as you go and don't overdo it. I think most cases end up trying in a shorter period of time than either lawyer thought [they] would.

Foster: And is that something that you're able to control by imposing time restrictions? Or how does that happen?

Presnell: I don't impose time restrictions, but here's what I do, and I think most good trial judges do. I voir dire the jury, and in the process of voir dire, I tell them that my job is to make sure that their time is not wasted. So, from the get-go, they know I'm on their side, OK? And, you know, judges are human beings, and we get frustrated with the lawyers, and I think sometimes it shows. And a jury can sense, I think, when a trial judge—well, I know they can, because they tell me this afterward—is not happy with one particular side or the other because the judge thinks they're wasting time.

So, during the process of the trial, the lawyers, I think, begin to understand that the trial judge should have a very good rapport with that jury, because I'm the only one in there that's protecting their interests, an interest in—I have an interest in a fair trial. I also have an interest in their time not being wasted. And they know those are my two goals.

So when a lawyer abuses the time that he's got, I don't impose any—I never have imposed a time restriction, but it's self-imposed on a good trial lawyer because they'll begin to understand that this is not playing well in front of this jury, with this judge, and I better speed things up a little bit.

Foster: When you get frustrated with a lawyer, is there any recurring theme that you see that tends to irritate you? You've made the point about "Don't waste my time or the jury's time." Is there anything else that comes about that you see?

Presnell: Well, there's another observation that, yes, I've learned here in respecting juries and that is [that] they expect the lawyers to be professional. They expect them to treat each other and everyone in the courtroom with dignity and respect. And lawyers who lose sight of that do not look good in front of the jury. So, when you object, you can stand and say, "Excuse me, Your Honor, but I have an objection to that," or you can be a jerk about it and suffer the eventual ire of the jury who thinks you're just being a jerk. And so, you know, I guess that's an observation. Whatever you do in that courtroom, in front of that jury, do it professionally, do it civilly, do it politely. That doesn't mean you shouldn't be firm in terms of cross-examining someone, but there's a differences between being firm and overreaching.

Foster: Let me talk about the objections for just a moment. I have noticed that lawyers will, in a courtroom, make what is referred to as a speaking objection. How do you, as the trial judge, deal with that? And what do you perceive [to be] the effect of that, if any, on a jury?

Presnell: Well, speaking objections are a difficult problem. Obviously, every judge is different, and the lawyers have to learn how to deal with each judge. Typically, judges do not like speaking objections, and, if you engage in one, you'll be dressed down. On the other hand, sometimes, you know, a lawyer will make a general objection, and I can be a little troubled by the question, but not really understand what the objection is, and I'll say, "Grounds?" and then the lawyer can give me a little bit more information about the nature of his objection.

And then that also raises the issue of sidebars. Some judges hate them, won't use them, won't allow them. My experience has been that sidebars, as long as they're used judiciously and not abused, save time. And I can't tell you how many times we've had a really difficult evidentiary issue come up, and I'll do a sidebar, and I'll listen to the objection. I'll listen to the lawyer who wants to get it in, and we can, at the sidebar, mediate how this evidence can get in and not be objectionable without the lawyer standing up and asking four or five different questions that are "objection sustained," until he finally hits on the right way to go about it.

So, I'm one of those judges. While I don't solicit sidebars, I do believe that, occasionally, they are very useful and actually save time. And what I do, so as not to penalize the lawyers, is after I go back to the bench, I thank the jury for their patience and tell them that we've had a little issue I had to resolve and I think we've saved some time in the process and you may continue. So that takes the heat off the lawyers. It doesn't make them look like they're wasting time in front of the jury, because I've told the jury that actually we saved time over here.

Foster: Well, since this is on behalf of the Trial Evidence Committee and you referenced difficult evidentiary issues, is there anything that you can recall that might be of assistance to the reader about what those evidentiary issues were and how you went about resolving them?

Presnell: They're usually 403-type issues. Evidence that has some relevance to the proceedings, but, if presented in a certain way, would be very prejudicial. They probably occur more in criminal cases than in civil, you know, with prior acts, that sort of thing, 404(b)-type evidence or

whatnot. But it happens in civil cases, too. But, you know, if you had to pick one rule, it would be 403. There's no bright line on 403. It's very difficult. And sometimes I find a sidebar is the best way to deal with a 403 issue.

Foster: Anything else on the evidence issues? You mentioned hearsay. How do you handle—well, what is your view of hearsay? And how do you see that objection being used or misused in the courtroom?

Presnell: Well, the problem with hearsay is that, as I said, I think, even after doing this for 40 years or so, there are a lot of lawyers and judges that don't—and I'm not being critical, because it's a very difficult concept with all the exceptions—I tend to generally take a very practical, commonsense view of hearsay, and that kind of forms my foundation for how I ultimately rule. Obviously, you have business records, and you have all the other exceptions. Other than that, Jim, the objection and hearsay rule comes up in so many contexts, I'm not sure that I can be any more specific about it than that.

Foster: Well, let me talk about business records for a moment, because I have seen—take, for example, emails—people tend to think that emails are per se admissible.

Presnell: Nope.

Foster: So how do you deal with emails?

Presnell: Well, usually they're an admission against interest or an email from a party that really is not hearsay or falls within an exception. Frankly, you don't see a whole lot of email hearsay objections because, unlike just a verbal statement, it's memorialized in writing, and the lawyers have had an opportunity to look at it and decide whether it's objectionable or not. So we really—I don't really see emails being that problematic or troublesome from a hearsay standpoint, because it is in writing and because, you know, it's obviously hearsay, unless it falls within an exception usually. The lawyers and the court have had an opportunity beforehand to kind of flesh that out and know whether it's objectionable or not.

Foster: Well, let me give you an example. An email to Bob from Tom that says, "Dear Bob, I spoke to Jane, and Jane told me whatever, and . . . ," hit send. How do you deal with what Jane said?

Presnell: It's probably hearsay, or there could be an exception.

Foster: Depending on who Jane is.

Presnell: Yes.

Foster: OK. And then I assume you'd have to prove who Jane is in order to determine whether or not she's an agent and whether that statement by the agent would be admissible against the party against whom it's offered.

Presnell: Yes. It's hearsay within hearsay. I mean, you know, there are all kinds of problems with that. I mean, I hate to say this, but I—and I guess that means we probably shouldn't publish it, but I think that a lot of judges, including myself, look at a hearsay objection in the context of "Is this evidence really harmful? Is it probative? Is it harmful if it's not authentic? And what is the likelihood that it's not authentic?" And that's kind of where you start your analysis. Now, there's no book that tells you to do that. Other judges will tell you they just flip a coin because they're going to be right half the time anyway. I don't know. I don't think there's anything more difficult for a trial lawyer and for the judiciary than dealing with hearsay objections.

Foster: I do know, from a trial lawyer's perspective, you don't want to over-make that objection, especially when, as you point out, the judge may not truly understand it. So maybe the lesson to be learned here is "Look at what is coming into evidence and decide if it's worth the fight."

Presnell: That's another good point, and it really goes to the overall Rule No. 1. You don't have to object to something just because it's objectionable. If it doesn't hurt you, if it doesn't matter, let it go. Because, like you say, the judge may not see it your way and you'll end up losing the objection, and then you've accomplished—you've shot yourself in the foot, so to speak.

Foster: Yeah, may have highlighted the concern. You mentioned that Rule No. 2 was "Don't treat them like children." Is there anything that comes to mind that would be useful to the reader that would help further extricate what you're talking about in the "Don't treat me like a child" [rule] or an example where you saw it happen?

Presnell: Yeah. I've got war stories that I could tell you.

Foster: Yes. Tell me a war story.

Presnell: I tried a case for another judge that was a multiple-death case. And it was a products case. Evidence was presented that would had suggested that the injuries were caused by user errors rather than a defect with the product in the trial of the case. I think one of the side's attorneys violated Rule No. 2. And I just remember they had an expert on the stand, talking about the product. The expert was giving his testimony as to the conditions that affected the use of the product. Changing the facts, as I don't want to discuss the details of that particular case, the expert was asked a very simple question, which, for the purpose of an example (as this is not factually what the expert said), I will say was "In what direction is up?" And after receiving the answer, then the lawyer asked, "What direction is down?" I interrupted and said that I would assume that's the opposite direction from up. And the jury just started laughing because, I believe, they were thinking the same thing. I mean, we're not idiots, and the lawyers should not treat the jurors as idiots.

Now, is that a meaningful war story? I don't know, but it's just an example of some of the stuff you see. I mean, you know, you don't have to explain to a jury of seven or eight people what direction down is, particularly when you've already told them what direction up is.

Foster: Well, I know the committee likes war stories. Is there a war story that you could relate that you think might help practitioners that comes to mind? Anything from a recent trial that—

Presnell: Yeah. I'll tell you one of the most effective closing arguments I've ever seen. I tried a ladder case. I guess the tallest A-frame ladder they make is 10 feet. And this involved a ladder—a products case in which the plaintiff had fallen and claimed that the spreader bar, when he was on the next-to-the-top step, separated, and when it separated, the legs came out and he came down and suffered, you know, a pretty serious back injury. And, in the courtroom, they had the ladder in question there, and, of course, it was kind of bent and broken. And then they had an exemplar ladder, which was an identical ladder, but, instead of having spreader bars, it had a little piece of twine as the spreader bars. And so, after the testimony was over—and the defendant had called an engineering expert who testified that the spreader bars don't bear any weight, all they do is make sure that the angle of the rails [is] proper, and that the failure of a spreader bar is not going to cause the ladder to fail in use, unless there's some other contributing cause.

And this lawyer, about your age, sets up the exemplar in front of the jury and starts his closing. And then, as he's talking about ladder design—and this is the exemplar ladder with just strings, spreader bars—he steps on the first step. And, then, as he goes into his argument, he gets on the second step. And then he gets on the third step, and he says, "And you'll see, the higher I get on this ladder, the strings, which represent the spreader bars, actually start to sag, meaning, they bear no weight at all." By now, he's up at the ceiling, talking to the jury down below him. And the obvious point is "Look, this ladder has no spreader bars. I'm standing 10 feet up in the ceiling of this courtroom. Do you really believe this ladder failed because a spreader bar broke?" You know, it didn't take that jury long to come back with a defense verdict. I thought it was a clever way to demonstrate the defendant's contention. The closing may well have been objectionable, but what's the plaintiff's lawyer going to do, say, "Your Honor, I object to him climbing this ladder during the middle of his closing"?

So, I thought that was a very interesting way to demonstrate in your closing, you know, the fallacy of the plaintiff's position. You see a lot of fun stuff over here.

Foster: In terms of the opening statement, is there anything that you can tell us that you've seen that was "Gee, that was really effective"? Anything come to mind?

Presnell: Similar, but keep it short. You know, some lawyers, for some reason, feel that they have to tell the jury everything about their case, and that's a real mistake. You just want to hit the high points. Tell them what the case is about. Tell them, you know, what the essential issues are going to be and the critical factual evidence that you think is going to bear on it and thank them for their service and sit down.

Foster: So, obviously, the length of an opening is going to vary depending on the complexity of a case, but 15 minutes to 45 minutes, you would think, would be enough for the vast majority, not for all of them, obviously?

Presnell: I think that, in the vast majority of cases over here, an opening should not be any more than 30 minutes. Because, one thing I tell the jury, "Look, this is an opening. It's an opportunity for the lawyer to tell you what their case is about, but it's not about summarizing everything. It's just going to set the stage." I've tried very few cases that couldn't be competently done with a 30-minute opening. And, you know, use your visuals, as long as you're using stuff that's not objectionable. You can use a demonstrative, as long as the other side—this is my practice, anyway, as long as the other side agrees or you bring it to my attention beforehand. Don't use the demonstrative in opening, unless you've cleared it, basically. But sure, use the overhead, use the PowerPoint, if you want, use boards, whatever you think is effective, but keep it short.

Foster: Well, Judge, thank you very much. I appreciate you taking your time out to do this for us. I hope the readers find this very instructive. We really do appreciate your time.

Presnell: Well, it's my pleasure. I hope there's some gems of wisdom in here after all these years. If not, we'll edit it down to just the opening and closing.

Foster: Thanks, Judge.

Keywords: litigation, trial evidence, district judge, juries, hearsay, opening statements, closing statements

James E. Foster Esq. is a shareholder with Akerman, Senterfitt in Orlando, Florida.

Barefoot-Insole-Impression Evidence: The Curious Case of Mr. Jones's Feet

By Ben Lewis

Jeffrey Louis Jones has two very peculiar feet, so said the State of South Carolina. Mr. Jones's feet are so remarkable that they have twice caused him to be sentenced to death. On both occasions, Mr. Jones's convictions were overturned by the South Carolina Supreme Court, due in part to concerns over the reliability of barefoot-insole-impression evidence. Proponents of barefoot-insole-impression evidence maintain that individuals can leave different impressions on the insoles of the shoes they wear and that it is possible to determine, to an acceptable degree of certainty, who has primarily worn a particular pair of shoes by comparing the insoles of the shoes with the feet of the suspected wearer.

It is important to distinguish barefoot-insole-impression evidence from shoe-print-identification evidence. The former concerns impressions left by a suspect's feet and toes *inside* a shoe or boot, whereas the latter concerns marks left by the exterior sole of the shoe or boot on the ground.[1] Shoe-print-identification evidence is deemed more reliable than barefoot-insole-impression evidence and is generally admissible.[2] There are only two barefoot-insole-impression-evidence experts in North America: Robert Kennedy and Bill Bodziak. Both became involved in Mr. Jones's case.[3]

The Crime Scene and First Trial

At around 6.30 p.m. on Friday, February 2, 1996, Ms. Susie Furman and Mr. John Pipkin were at their home in West Columbia, South Carolina.[4] Ms. Furman was on the telephone with her friend Doris Moore. Ms. Moore heard the doorbell ring, followed by a strange man's voice and then a scream from Ms. Furman before the phone line went dead. Mr. Pipkin's stepson later found Ms. Furman and Mr. Pipkin dead. Both had been killed by blunt trauma to the head, likely caused by a number of blows from a hammer. The attack was described by the South Carolina Supreme Court as a "horrific assault."

Mr. Jones and an alleged accomplice, James Brown, were subsequently arrested and charged with two counts of capital murder and related charges. The evidence against Mr. Jones was entirely dependent upon the testimony of Mr. Brown, Mr. Jones's roommate. Mr. Brown had an extensive criminal record and a history of striking favorable plea deals with the Lexington County solicitor's office, the same office responsible for the prosecution of Mr. Jones. The South Carolina Supreme Court thought Mr. Brown's criminal record and plea-bargain history noteworthy enough to merit inclusion in what became known as the *Jones I* decision. Mr. Brown testified that he and Mr. Jones had robbed and murdered the victims after Mr. Jones had become displeased with Mr. Pipkin, his boss, for withholding an excessive amount from his paycheck to cover refreshments consumed by Mr. Jones while at work. Mr. Brown testified that he had smoked crack with Mr. Jones on February 2, 1996, and that Mr. Jones had then suggested

robbing Mr. Pipkin. Mr. Brown further testified that the pair entered the Furman/Pipkin residence and that Mr. Jones struck Ms. Furman repeatedly with a brick. Mr. Brown confessed to hitting Mr. Pipkin once with a hammer, but claimed that Mr. Jones then took the hammer from him and proceeded to beat the victims to death.

The only physical evidence allegedly linking Mr. Jones to the murders was a single bloody boot print left at the crime scene. The print was linked to a pair of steel-toe boots that were recovered from the Jones/Brown residence and that the prosecution alleged belonged to Mr. Jones.[5] Ownership was disputed. At Mr. Jones's first trial, the prosecution introduced barefoot-insole-impression testimony in support of its case. The South Carolina Supreme Court described such evidence in *Jones I*: "[t]he central thesis of 'barefoot insole impression' evidence is that the primary wearer of footwear, over time, begins to leave an impression of the wearer's foot in the footwear insole."[6] Proponents of barefoot-insole-impression evidence engage in certain analytical steps such as "[i]nked impressions of the suspected wearer's feet" and "photos of the suspected wearer's known insoles." In addition, "a standing cast of the suspected wearer's foot are compared to the impression in the boots, both visually and by using calipers to compare distances between toes and other features among the various exhibits." Devotees of barefootinsole-impression evidence maintain that it is possible to tell, to a reasonable degree of certainty, who has worn a particular pair of shoes if one has access both to the shoes and to the suspect's feet.

The jury at Mr. Jones's first trial was allowed to hear barefoot-insole-impression evidence "matching" Mr. Jones to the steel-toe boots, which were in turn matched to the single bloody boot print at the crime scene. The jury thus heard "scientific" evidence putting Mr. Jones at the locus of the murders at or around the time they were committed. Mr. Jones was convicted of two counts of murder, first-degree burglary, armed robbery, and criminal conspiracy and received two death sentences and lengthy prison sentences on the related charges. Mr. Jones appealed his conviction to the South Carolina Supreme Court, questioning, inter alia, the validity of barefoot-insole-impression evidence. Mr. Jones raised issues relating not only to the latent unreliability of such evidence but also to the manner in which the evidence in his case had been analyzed—neither the agent who performed the barefoot-insole-impression analysis, nor any other agent in the South Carolina State Law Enforcement Division (SLED), had ever undertaken this type of test before. Indeed, SLED did not even have a written protocol for this type of analysis.

The *Jones I* Decision and Second Trial

In *Jones I*, the South Carolina Supreme Court considered the admissibility of barefoot-insole-impression evidence under the appropriate legal standards. The admissibility of such evidence is governed by Rule 702 of the South Carolina Rules of Evidence. The *Jones I* court referred to a four-pronged test: (i) The evidence must assist the trier of fact; (ii) the expert must be qualified; (iii) the underlying science must be reliable; and (iv) the probative value of the evidence must outweigh its prejudicial effect. The trial court's decision was reviewed for abuse of discretion. The *Jones I* court reviewed the trial testimony of Robert Kennedy, one of the two experts in this

field, including his admission that he was still in the process of collecting data to determine which standards were appropriate for comparison purposes. The court also mentioned Mr. Kennedy's acknowledgment that previous work in this field had been discredited. The South Carolina Supreme Court in its unanimous *Jones I* opinion concluded:

In our opinion, it is premature to accept that there exists a science of "barefoot insole impressions" . . . the trial judge erred in permitting expert testimony purporting to demonstrate that 'barefoot insole impression' testing revealed appellant's foot to be consistent with the impression made by the primary wearer of the "steel toe" boot. The admission of this evidence mandates reversal of appellant's convictions.

This unanimous slap-down did not deter Mr. Jones's prosecutors. Mr. Jones found himself back in the Lexington County Circuit Court, facing retrial. Once again, the state sought to use barefoot-insole-impression evidence to secure the death penalty for Mr. Jones.[7] Both sides secured the services of one of the two experts in this field, the state retaining Robert Kennedy, and defense counsel retaining Bill Bodziak. The defense did not intend to call Mr. Bodziak as a trial witness and was no doubt somewhat surprised when the state subpoenaed Mr. Bodziak to testify at trial. Defense counsel's attempts to quash the subpoena were unsuccessful, and Mr. Bodziak testified at Mr. Jones's retrial. The jury once again heard barefoot-insole-impression evidence, which the state argued had become scientifically reliable in the period between *Jones I* and the retrial. Mr. Jones may have felt a certain unpleasant déjà vu when he was convicted of two counts of murder and one count each of first-degree burglary, armed robbery, and criminal conspiracy. Mr. Jones was sentenced to death for each count of murder and was awarded lengthy prison sentences on the related charges. He appealed.

The Jones II Decision

The South Carolina Supreme Court heard Mr. Jones's second appeal on April 7, 2009. By 2009, concerns about "junk science" and the misleading impact it may have on jurors were widespread. It has been suggested that the adversarial system has failed to unearth and discount faulty forensic science,[8] possibly due to lack of funding for defense counsel and a lack of scientific expertise at the criminal-defense bar. In addition, jurors find "scientific" evidence particularly compelling. This phenomenon is sometimes referred to as the "CSI effect" and, when coupled with unreliable forensic science and analysis, can lead to miscarriages of justice. Such concerns reached Congress (if not the Lexington County Solicitor's Office) and the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2006 became law on November 22, 2005. That statute authorized the National Academy of Sciences to conduct a study on forensic science. The resulting report, "Strengthening Forensic Science in the United States: A Path Forward" was published in 2009. The report detailed a number of concerns regarding forensic science and stated that, "[w]ith the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."

The South Carolina Supreme Court reversed Mr. Jones's convictions and sentences for a second time in Jones II.[9] Interestingly, the Jones II court did not find fault with the state's subpoena of Mr. Bodziak or the trial judge's decision to deny Mr. Jones's motion to quash the subpoena. The court explained that barefoot-insole-impression evidence and the existence of only two experts in the field created an extremely rare factual situation in which the state could compel testimony from a non-testifying expert witness retained by the defense. [10] However, the court did not agree with the state's argument that barefoot-insole-impression evidence had become scientifically reliable in the period between *Jones I* and the retrial.[11] The court noted that there had not been any subsequent research developments validating barefoot-insole-impression evidence. The court also pointed to other failures of the SLED agent who performed the barefoot-insole-impression analysis, namely that the known shoes of Mr. Jones were size 10.5, yet the steel-toe boots were size 9.5. The agent also failed to obtain exemplars from other residents of the house where the steel-toe boots were found, despite the fact that Mr. Brown lived in the same property and had admitted leaving another pair of boots in the same room on the day of the murder. The *Jones II* court held that barefoot-insole-impression evidence was not admissible, as the state did not present any evidence to indicate that the evidence had become scientifically reliable. The court held that a harmless-error analysis could not be employed, as there was no other physical evidence linking the defendant to the crime scene. A concurring opinion by Justice Pleicones, the author of *Jones I*, sought to foreclose the possibility of barefoot-insole impression being used against Mr. Jones in the future. So ends, one hopes, our latter-day Sisyphus's barefoot journeys between Lexington County Circuit Court and the Supreme Court of South Carolina.

Keywords: barefoot insole impression evidence, Jones I, Jones II

Ben Lewis is an associate in the New York, New York, office of Hogan Lovells US LLP.

"Barefoot-Insole-Impression Evidence: The Curious Case of Mr. Jones's Feet," by Ben Lewis, September 23, 2010, Criminal Litigation, http://apps.americanbar.org/litigation/committees/criminal. © 2010 by the American Bar Association. Reprinted with permission. All rights reserved.

Endnotes

- 1. In Hurrelbrink v. State, 46 S.W.3d 350 (Tex. App. 2001), a rare third class of imprint evidence was considered-a bloody sock print was found at the crime scene, which the state sought to link to the defendant through expert testimony.
- 2. See, e.g., United States v. Ford, 481 F.3d 215, 218 (3d Cir. 2007) ("The Court found that there was general acceptance of shoeprint analysis in both the federal courts and the forensic community, the theory has been subject to peer review and publication, the potential error rate is known, and there are standards and techniques commonly employed in the analysis.") (reviewing the trial court's admission of shoeprint analysis).
- 3. *See* State v. Jones, 383 S.C. 535, 541-542, 681 S.E.2d 580, 583 (S.C. 2009) (Jones II). The Jones II court referred to an extract from Mr. Bodziak's book "Footwear Impression Evidence" concerning barefoot-insole-impression evidence: "There have been many previously reported 'identifications' of a suspect as the wearer of a shoe. The consensus

among experienced examiners is that identifications are rare because the random individual characteristics necessary for an identification are rarely encountered. Although, in theory, random individual characteristics could exist in a foot and be transferred to a shoe or foot impression, those characteristics are normally not present nor are they retained with the detail necessary to achieve an identification."

- 4. State v. Jones, 343 S.C. 562, 566, 541 S.E.2d 813, 814 (S.C. 2001) (*Jones I*).
- 5. *Jones II*, 383 S.C. at 539.
- 6. Jones I, 343 S.C. at 572.
- 7. Jones II, 383 S.C. at 581.
- 8. See, e.g., Brandon Garrett & Peter Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, by, 95 VA. L. REV. 1 (2009). The authors-the latter of whom is the co-founder and co-director of the Innocence Project-reviewed the forensic-science testimony by prosecution experts in the trials of defendants who were later exonerated by post-conviction DNA testing. According to Garrett and Neufeld, in 60 percent of the cases reviewed, forensic experts called by the prosecution provided invalid testimony at trial.
- 9. The Court of Appeals of North Carolina considered barefoot-impression evidence in State v. Berry, 143 N.C. App. 187, 546 S.E.2d 145 (2001), concluding that barefoot-insole-impression testimony of Robert Kennedy was improperly admitted but that its admission constituted harmless error. The *Jones II* court cited an additional decision in which barefoot-insole-impression evidence was rejected. R. v. Dimitrov, 68 O.R.3d 641 (Ontario Ct. App. 2003).
- 10. Jones II, 383 S.C. at 586.
- 11. The *Jones II* opinion mentions three jurisdictions that have admitted barefoot-insole-impression evidence. *See* Thiel v. State, 762 P.2d 478, 485 (Alaska App. 1988); United States v. Ferri, 778 F.2d 985 (3rd Cir. 1985); Hurrelbrink v. State, 46 S.W.3d 350 (Tex. App. 2001) (dealing with a slightly different issue as this case concerned a bloody sock print left at the scene rather than barefoot-insole-impression evidence. Mr. Kennedy testified for the defendant and stated that a socked foot on a cement floor does not provide the clarity where it can be said that the impression only belongs to one person). In addition, barefoot-insole-impression evidence was admitted in State v. Hasan, 205 Conn. 485, 534 A.2d 877 (Conn. 1987).

The Shifting Grounds of the Constitutional Right to Confrontation

By Emily R. Schulman and Melissa Turitz - October 12, 2011

The Confrontation Clause of the Sixth Amendment, made binding on the states by the Fourteenth Amendment, guarantees that in all criminal prosecutions, the accused shall have the right to "be confronted with the witnesses against him." This procedural guarantee—of the right to face one's accusers—generally requires that a defendant has the opportunity to cross-examine witnesses. Questions about the limits of the Confrontation Clause's protection arise, however, when witnesses are unavailable for cross-examination.

In such cases, prior to 2004, the Confrontation Clause provided little additional protection to the protection already provided by the rules of evidence. In criminal litigation, as enunciated in the U.S. Supreme Court's decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), "reliability" was the touchstone of Confrontation Clause evaluations. Statements for which defendants did not have an opportunity for cross-examination would nonetheless be admissible if they met one of the hearsay rules' exceptions or otherwise bore indicia of trustworthiness or reliability.

Almost a quarter of a century later, in 2004, and again in 2006, the Supreme Court revisited the Confrontation Clause and, rejecting reliability, began developing a new bright-line inquiry focusing solely on whether the statements were testimonial or non-testimonial. These decisions—*Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006) (decided jointly with *Hammon v. Indiana*, 547 U.S. 813 (2006))—suggested a judicial revival of the Confrontation Clause. Justice Scalia, writing for the Court in both opinions, emphasized that the Confrontation Clause stood as an independent guarantee separate from the rules of evidence and promised greater predictability with the Court's new approach.

In contrast to the Court's promises in 2004 and 2006, the recent Supreme Court decision in *Michigan v. Bryant*, No. 09-150, 131 S. Ct. 1143 (Feb. 28, 2011), appears to stand as a setback to judicial efforts to provide greater predictability and differentiate the Confrontation Clause from the rules of evidence. With its renewed references to reliability, *Bryant* reopens the question of whether reliability is relevant to constitutional evaluations of testimony under the Confrontation Clause. And with the *Bryant* Court's employment of a multifactorial evaluation, Confrontation Clause jurisprudence again becomes significantly more malleable and outcome oriented.

The consequences of *Bryant* for criminal defendants are considerable. Under *Bryant*, if faced with unavailable witnesses, defendants will be left arguing over what are considered non-testimonial statements, especially in the context of "ongoing emergencies." Multiple factors—including the formality of the interrogation during which a statement is made, the use of a weapon, the private nature of the dispute, the existence of an ongoing emergency, and the actions and statements of both the witness and interrogator—must be examined. Defendants will face the

possibility that any witness statements made to first responders, including police officers, medical responders, or 911 operators—until such time that the defendant is apprehended, or at least his or her motive, identity, and location are learned—could be considered non-testimonial. Moreover, defendants will need to assume knowledge of both the witness's perspective and motives in making his or her statements and the first responders' motives and perspective in taking such a statement. In any given case, the defendant may need to argue that either the primary purpose of the witness, in making the statement, or the first responder, in taking the statement, is paramount to the evaluation regarding what is testimonial.

Confrontation Clause Jurisprudence Pre-*Bryant*

Prior to 1980, the Supreme Court had ruled on Confrontation Clause issues but had not sought to proclaim a general doctrine for Confrontation Clause evaluations. *See Ohio v. Roberts*, 448 U.S. 56, 64 (1980) ("[T]he process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions. The Court has not sought to map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay exceptions.") (internal quotations omitted). In 1980, as noted above, the Supreme Court announced that "reliability" was the touchstone of Confrontation Clause evaluations. Since that time, the Supreme Court has experienced a sea change in approach, as it first rejected reliability and then attempted to provide further guidance for the courts for when statements should be considered testimonial and when they should be considered non-testimonial and subject only to the varying rules of evidence.

Indicia of Reliability

In *Ohio v. Roberts*, 448 U.S. 56 (1980), a defendant was convicted of forgery and receiving stolen property, among other things, partially on the basis of statements made during a preliminary hearing by a defense witness who subsequently became unavailable for trial. *Id.* at 58–60. At the preliminary hearing, the defense counsel questioned the witness at length but did not request to have her declared hostile or to place her on cross-examination; the prosecution never questioned the witness. *Id.* at 58. At trial, and on appeal, the defendant objected to the admission of a transcript of the witness's preliminary hearing statements as a violation of his rights under the Confrontation Clause. *Id.* at 59–60. After the Supreme Court of Ohio held that the transcripts were inadmissible because the witness had not been cross-examined at the preliminary hearing, although the defendant had an opportunity to do so, the U.S. Supreme Court granted certiorari. *Id.* at 61.

The Supreme Court attempted to clarify the relationship between the Confrontation Clause and the evidentiary rules regarding hearsay. *Id.* at 62. It emphasized the importance of "face-to-face confrontation at trial" to test a witness's accuracy but recognized that competing interests existed for sometimes dispensing with the requirement of cross-examination. *Id.* at 63–64. The root of the test defined in *Roberts* was whether the proposed evidence bore some "indicia of reliability." *Id.* at 66. In that manner, the Court found that the rules of hearsay and the Confrontation Clause were closely bound and that for the purposes of Confrontation Clause exceptions, "[r]eliability

can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception [or] particularized guarantees of trustworthiness." *Id.* at 66.

Testimonial Versus Non-Testimonial Statements

Twenty-four years later, in *Crawford v. Washington*, 541 U.S. 36 (2004), Justice Scalia's majority opinion rejected *Roberts* and its use of "reliability" for Confrontation Clause evaluations. *See Id.* at 60–65. In *Crawford*, a defendant accused of assault and attempted murder contested the trial court's admission of his wife's witness statements, which were made during a recorded police interview shortly after the attack. *Id.* at 40–41. The wife did not testify at trial and, thus, was unavailable for cross-examination. *See id.* After the Washington Supreme Court unanimously concluded that the wife's statements were admissible because they bore "guarantees of trustworthiness," the Supreme Court granted certiorari to consider whether the statements violated the Confrontation Clause. *Id.* at 41–42.

The Crawford opinion explained that conditioning the admissibility of hearsay evidence only on whether it falls within a "firmly rooted hearsay exception" or bears other guarantees of trustworthiness did not adequately address the concerns behind the Confrontation Clause. See id. at 60. In the Court's 2004 opinion, it was not sufficient for a statement to be merely reliable; the Confrontation Clause required that the reliability be tested, if a statement was testimonial, by cross-examination. Id. Thus, Crawford imposed "an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine." Id. Although it did not provide a "precise articulation" or "comprehensive definition" of "testimonial," Crawford was clear that out-of-court statements could be testimonial, depending on whether they were "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 52, 61 (internal quotations omitted) (including ex parte in-court testimony, such as affidavits, custodial examinations, or prior testimony that the defendant could not cross-examine; extrajudicial statements, such as depositions or confessions; or statements made where an objective witness could reasonably believe that he or she could be used at trial or for prosecutorial purposes). The Court also announced that the term unquestionably covered at least two types of statements: (1) prior testimony at a preliminary hearing, grand jury session, or former trial and (2) police interrogations. *Id.* at 68.

Moreover, in *Crawford*, Justice Scalia faulted the *Roberts* reliability test because the "framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations." *Id.* at 63. *Crawford* stated that there were "countless factors bearing on whether a statement is reliable." *Id.* at 63. ("Whether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each one.") Accordingly, in the Supreme Court's view, reliability was a dangerous way to decide Confrontation Clause exceptions, because the test could result in contradictory findings, depending on the court and the weight ascribed to the various factors.

Ongoing Emergencies and the Primary Purpose Test

Two years after Crawford, Justice Scalia, again delivering the opinion for the Court, applied the

testimonial doctrine announced in *Crawford* to two domestic violence matters in which the defendants objected to the admission of evidence as violative of the Confrontation Clause. In one, *Davis v. Washington*, 547 U.S. 813 (2006), a declarant/victim provided information to a 911 emergency operator, regarding a domestic dispute. During the call, the 911 operator asked what was going on, where the victim was, whether the attacker had a weapon, and the identity of the attacker. The victim answered these questions, and then informed the operator that her attacker was running away. *Id.* at 817. In the other matter, *Hammon v. Indiana*, 547 U.S. 813 (2006), the police, responding to a domestic disturbance report, found the declarant/victim outside her house. *Id.* at 819. The victim appeared frightened but informed the police officers that nothing was the matter In further questioning by the police, the victim told the police about the domestic dispute, while other officers restrained her husband in a separate room. *Id.* at 820. After the interrogation, the police had the victim complete and sign a battery affidavit describing the altercation. *Id.*

The Supreme Court opinion in *Davis* confirmed that the Confrontation Clause only applies to "testimonial" evidence; thus, the touchstone of the Confrontation Clause evaluations must be whether a statement is "testimonial." *See id.* at 821–22. The Court held as follows:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

Applying its holding to the facts in *Davis*, the Supreme Court found that the declarant's initial statements to the 911 operator were not testimonial, because (1) the declarant spoke about events "as they were actually happening"; (2) the declarant's 911 call was a call for help in regard to a real physical threat, and "any reasonable listener would recognize that [the declarant] was facing an ongoing emergency"; (3) the substance of the questions and answers were necessary to "resolve the present emergency"; and (4) the 911 call was frantic and made in an "environment that was not tranquil or even . . . safe." *Id.* at 827 (emphasis in original).

In contrast, viewing the facts in *Hammon*, the Supreme Court found that the statements made to the police officers and in the signed affidavit were testimonial because the interrogation "was part of an investigation into possibly criminal past conduct." *Id.* at 829–30. The Court observed that in *Hammon*, (1) there was no emergency in progress when the police arrived, and the declarant had initially told police that she was not in danger; (2) the declarant was actively separated from the defendant, who was forcibly restrained from participating in the interrogation; (3) the statements "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"; and (4) the statements were made after the events had occurred. *See id.* at 830.

In differentiating the two situations, the Court emphasized that in *Davis*, the declarant was alone, unprotected, in immediate danger, and in the process of seeking assistance, while in *Hammon*, there was no such contemporary danger to the declarant, nor were there any contemporary requests for assistance. *Id.* at 831.

In *Davis*, the Court also provided guidance that statements could evolve from non-testimonial to testimonial. *See id.* at 829. For example, in *Davis*, after the victim informed the 911 operator that her attacker was running away, the operator continued to ask, and was provided with additional information, about the attacker and the context of the assault. *Id.* at 818. In that context, after the operator had gained the information necessary to address the ongoing emergency and after the threat to the declarant had apparently ended, the statements made in response to the "battery of questions" posed by the operator could be considered testimonial. *See id.* at 828–29.

Michigan v. Bryant

In *Michigan v. Bryant*, the Supreme Court extended the Confrontation Clause jurisprudence and applied its testimonial inquiry to a situation that involved the interrogation by the police of a gunshot victim lying in a parking lot, not domestic violence. Justice Sotomayor delivered the opinion for the Court, with dissenting opinions from Justice Scalia and Justice Ginsburg, and a concurrence from Justice Thomas.

The question in *Bryant* was whether statements made in the parking lot to several police officers by the gunshot victim, Anthony Covington, were admissible at the trial of Richard Bryant. Covington died shortly after his interrogation, and Bryant was prosecuted for his murder. *Bryant*, No. 09-150, slip op. at 1. After the trial, which included testimony from the police officers regarding Covington's statements that identified and described Bryant as the shooter and identified the location of the shooting, the jury convicted Bryant of second degree murder. *Id.* Bryant appealed, claiming that the admission of Covington's statements violated his rights under the Confrontation Clause. *Id.*

The Supreme Court found that Covington's statements were not testimonial; accordingly, their admission did not violate the Confrontation Clause. It held that "the circumstances of the interactions between Covington and the police objectively indicate that the 'primary purpose of the interrogation' was to 'enable police assistance to meet an ongoing emergency." *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

The Facts of Bryant

In *Bryant*, police officers were dispatched to a gas station parking lot to respond to a report that a man had been shot. *Id.* at 2. The officers found Covington lying in the parking lot, bleeding from a gunshot wound to the abdomen. *Id.* At the time, the officers did not know the victim's identity, the location of the shooting, the shooter's identity or location, or the motives for the shooting. *Id.* at 25.

In the 5 to 10 minutes it took for emergency medical services to arrive, the police interrogated Covington about the shooting, asking him, among other questions, what had happened, who had shot him, and where the shooting had occurred. *Id.* at 2. During this time, Covington lay bleeding on the ground, appeared to be in great pain, and had trouble speaking and breathing. *Id.* at 29. In response to questioning by the police, Covington identified Bryant as his shooter and provided a description of Bryant's voice. He stated that he had been shot at Bryant's house and had then driven to the gas station where he was found. *Id.* at 2. Covington did not know Bryant's whereabouts at the time of his questioning by the police.

Discussion and Application of the Law

Reviewing the history of Confrontation Clause jurisprudence, the Supreme Court stated that under *Crawford* and *Davis*, the proper inquiry for Confrontation Clause violations is whether the evidence is "testimonial." To make this determination, the Court confirmed that courts should consider whether there was an ongoing emergency and, if so, whether "the primary purpose of the interrogation is to enable police assistance to meet [it]." *Id.* at 9–11 (internal quotations omitted). Because the facts in *Bryant* did not involve a domestic dispute, the Court found that there was a need to clarify and further expand on the "ongoing emergency" circumstances and the "primary purpose of the interrogation" inquiries that had previously been employed. *Id.* at 12.

The Court first confirmed that the "primary purpose of the interrogation" inquiry is objective. *See id.* at 12. It stated that under *Davis*, "the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had." *Id.* at 13. The circumstances of the interrogation, including the location of the interrogation (at or near the scene of the crime), the timing of the interrogation (during an ongoing emergency or afterward), and the statements and actions of both the interrogators and the respondents are all factors to be considered in determining what the primary purpose of the interrogation would be for reasonable participants. *Id.* at 13.

The Supreme Court then attempted to flesh out several of the circumstances of the interrogation: (1) the existence of an ongoing emergency; (2) the statements, actions, and conditions of both the interrogator and declarant, including the medical condition of the declarant; and (3) the formality of the interrogation. It used these circumstances to determine, first, the existence of an ongoing emergency in *Bryant* and, second, given the ongoing emergency, whether the primary purpose of Covington's interrogation was "to create a record for trial" or gain information necessary to address the emergency.

Existence of an Ongoing Emergency

The court stated that the existence of an ongoing emergency is the "most important circumstance," although not the sole circumstance, for the primary purpose inquiry. *Id.* at 14. In the Court's view, the existence of the ongoing emergency is important because it "focuses the participants on something other than proving past events potentially relevant to later criminal prosecution." *Id.* at 14 (quoting *Davis*, 547 U.S. at 822, 832). The Court reasoned that, like the rationale behind the excited utterance hearsay exception, "the prospect of fabrication in

statements given for the primary purpose of resolving [the ongoing] emergency is presumably diminished." *Id.* Thus, these types of non-testimonial statements are permitted despite the Confrontation Clause's requirement for cross-examination.

In *Bryant*, as in *Davis*, the Supreme Court left the boundaries of ongoing emergencies undefined. It recognized that determining whether there is an ongoing emergency is a "highly context-dependent inquiry." *Id.* at 16. The Court explained, however, that the scope of the "ongoing emergency" extends "beyond an initial victim to a potential threat to the responding police and the public at large." *Id.* at 12. Thus, the ongoing emergency assessment must encompass not only the initial threat to the first victim but also the potential continued threat, if any, to first responders and the public. *Id.* at 17. The Court made clear that the end of the violent act does not necessarily mean that the broader emergency has also ended. *Id.* at 27. Similarly, if the police do not know the identity or motivation of an assailant, the emergency does not automatically abate just because the first victim is secured. *Id.* at 17.

In this manner, the Court contrasted *Davis* with *Bryant*. According to the Court, *Davis* involved a confined ongoing emergency with "a narrower zone of potential victims"—in *Davis*, there was one victim, an identified assailant, a weaponless attack, and a known motivation. *See id.* at 16–17. In contrast, *Bryant* was "a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim." *Id.* When the police arrived, nothing indicated to them whether the dispute was a private one, what the motives for the shooting were, or whether the threat had ended. *Id.* at 26. Because the violence was committed with a gun, the Court concluded that physical separation "was not necessarily sufficient to end the threat in this case." *Id.* at 27. As a result, the Court determined that there was an ongoing emergency in existence when Covington was interrogated by the police.

The Court acknowledged that an ongoing emergency could evolve into an ended emergency. For example, if the police learned information from the declarant, showing that "what appeared to be an emergency is not or no longer is an emergency or what appeared to be a public threat is actually a private dispute," the ongoing nature of the emergency could end. *Id.* at 18. Similarly, the Court stated that the ongoing emergency could terminate upon the apprehension of the suspect, his disarming, surrender, or flight. *See id.* The Court did not attempt to determine when the ongoing emergency ended in regard to Covington, as the interactions all took place shortly after the police found him and well before they had secured the scene of the shooting or located Bryant. *Id.* at 28.

Statements and Actions of Both the Declarant and Interrogator

The Court also explained that the primary purpose inquiry needed to account "for both the declarant and interrogator." *Id.* at 12. The Court reasoned that a mixed inquiry is more reliable than focusing solely on one participant's actions because that participant—either the interrogator or declarant—could have mixed motives for asking the questions or providing the answers. *Id.* at 21. Although it recognized that the declarant's statements, not the interrogator's questions, are

subject to the Confrontation Clause, the Court claimed that it was best to allow courts engaged in a primary purpose test to "consult[] all relevant information, including the statements and actions of interrogators." *Id.* at 23.

The Court further explained that the medical condition of the victim/declarant is relevant to the primary purpose inquiry because the medical condition of the declarant "sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one." *Id.* at 17–18. Similarly, the medical condition of the declarant provides context that can assist first responders in determining "the existence and magnitude of a continuing threat to the victim, themselves, and the public." *Id.*

Having concluded that there was an ongoing emergency with respect to Covington, the Court proceeded to determine, given the context of Covington's interrogation, whether the primary purpose of the interrogation was testimonial or whether it was to enable police assistance for the ongoing emergency. *Id.* at 28. In doing so, it examined separately the circumstances of the inquiry from both the interrogator's and the declarant's perspectives.

The Court emphasized the nature of Covington's injuries and condition, observing that he had been lying in a parking lot, bleeding from a gunshot wound to the abdomen; that his answers were interspersed with questions about when emergency medical services would arrive; and that he was "obviously in considerable pain and had difficulty breathing and talking." *Id.* It concluded that "we cannot say a person in Covington's situation would have had the primary purpose to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 29 (internal quotations omitted).

The Court also examined the circumstances of the police, emphasizing that when they responded to the report, "they did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime had occurred." *Id.* The Court further observed that the questions the police asked were those that would enable the police to assess the situation and the safety threat presented, reasoning therefore that they solicited the information for the purposes of the ongoing emergency. *See id.* at 30.

Formality of the Interrogation

Finally, the Court explained that the formality of the interrogation is another factor in the primary purpose inquiry. In the Supreme Court's opinion, the more formal the interrogation, the less likely that there is an ongoing emergency and the more likely that "the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 19 (internal quotations omitted).

Applying this to the facts before it, the Court considered the informality of the situation and interrogation that occurred in the gas station parking lot. *Id.* at 31. It observed that the

circumstances surrounding Covington's interrogation were "fluid and somewhat confused." *Id.* at 31. Likening the situation to the 911 call in *Davis*, as opposed to the police station interrogation in *Crawford*, the Court concluded that "[t]he informality suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements." *Id.* at 31.

The Implications of Bryant

In Davis, the Supreme Court noted that the factors differentiating Davis from Hammon were the existence of an immediate threat to the victim, who was presently unprotected by the police; the contemporary description of ongoing events; and the frantic nature of the interrogation. In light of these differences, despite the clearly domestic nature of *Hammon*, the distinction between Bryant and Hammon seems somewhat artificial. For all the police knew when they arrived at the gas station parking lot, Bryant could have been a domestic or familial dispute that involved a gun rather than fists and a victim located in a public place, not a residence. In both cases, the declarant was physically separated from his or her attacker and protected by a police presence during the interrogation. It is difficult to argue that either declarant was in immediate danger from his or her attacker; it seems unlikely that the attacker would have been able to break through the police protection at the scene of the interrogation to cause further injury. Similarly, in both Bryant and Hammon, the declarant discussed past events as opposed to describing a contemporary threat. While Covington required medical attention to treat his gunshot wounds, he had already fled from the threat posed by Bryant and was physically separated by time and distance from the attack. Finally, although the Bryant court described the nature of the situation and interrogation as "fluid," it is also clear that the interrogation took place in the presence of police and outside the presence of the attacker, as in *Hammon*.

It is important to note that even in *Davis*, where the Supreme Court found that the declarant's initial statements to the 911 operator were non-testimonial, the Court indicated that after the attacker had fled, her subsequent statements made in the same conversation to the 911 operator were testimonial. *See Davis*, 547 U.S. at 828–29. The ongoing emergency interrogation had evolved into a testimonial interrogation. *See id.* This is so although there was still a potential threat to first responders if the attacker had chosen to return. The 911 operator did not know whether the attacker in *Davis* would return, possibly with a weapon, or commit other acts of violence against other members of the public as a result of his anger.

In the wake of *Bryant*, unpredictability in the case law is likely to increase. Although the Court claimed to have followed the precedent set in *Crawford* and *Davis*, the approach that *Bryant* announced resembles the multifactor "indicia of reliability" evaluation criticized in *Crawford* for its unpredictability. First, there is no guidance as to the weight courts should give the various factors of the primary purpose inquiry, beyond the heavy weight given to the existence of an ongoing emergency. Moreover, after *Bryant*, the universe of circumstances contributing to the primary purpose inquiry is still undefined, leaving it up to the lower courts or subsequent

Supreme Court opinions to announce what other circumstances may play a role in determining the primary purpose of an interrogation. Second, there is no clear answer regarding the outer boundaries of an ongoing emergency. Questions still remain regarding how wide an exception *Bryant* creates for hearsay evidence. In the dissents by Justices Ginsburg and Scalia, it was claimed that *Bryant* "creates an expansive exception to the Confrontation Clause for violent crimes." *Michigan v. Bryant*, Scalia, J., dissent, at 10 (quoted in Justice Ginsburg's dissent, slip op. at 1). Third, the *Bryant* Court's reference to reliability reopens the question of what relevance reliability has to Confrontation Clause analyses.

Unpredictable Results of the Multifactor Balancing Test

In *Crawford*, Justice Scalia complained of the unpredictability inherent in applying *Roberts*, objecting that "reliability is . . . amorphous, if not entirely subjective" and that "countless factors bear[] on whether a statement is reliable." *Crawford*, 541 U.S. at 63. Instead, the *Crawford* Court chose what it considered to be a purer constitutional standard—whether or not a statement was "testimonial." *Id.* In *Davis*, Justice Scalia, writing for the Court, attempted to clarify further what was meant by "testimonial." Now, in his dissent from *Bryant*, Justice Scalia objected that "[i]nstead of clarifying the law, the Court makes itself the obfuscator of last resort." *Bryant*, Scalia, J., dissent, at 1.

In *Bryant*, the Court's multifactor primary purpose evaluation considered the formality of the situation, the existence of an ongoing emergency, and the actions and statements of both the declarant and interrogators. The Court, however, did not confine the "circumstances of the encounter" to just those four circumstances. Nor did it explain how the factors should be weighed if found to conflict, beyond stating that an ongoing emergency is the most important circumstance to consider. Thus, defendants and prosecutors are left to argue over what other circumstances may play a role in Confrontation Clause evaluations, and the lower courts are left to decide those circumstances and their relative weights.

In addition, the *Bryant* Court did not provide guidance on how to resolve scenarios of "mixed motives," in which the declarant's and the interrogator's intentions conflict. For example, *Bryant* did not identify whose perspective is more important in the primary purpose analysis. As Justice Scalia claimed, although the Court created a mixed-motive inquiry, it did "not provide an answer to this glaringly obvious problem, probably because it does not have one." *Bryant*, Scalia, J., dissent, at 3.

A court may find itself presented with a situation in which the police officers are gathering information to meet what they perceive to be an ongoing emergency, but the declarant, believing himself or herself to be safe once the police arrive, provides information "to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. In such a case, despite the declarant's intent, it is unclear whether his statements would be excluded as testimonial because of the police officers' conflicting motives. According to Justice Scalia, the benefit of *Bryant*'s primary purpose inquiry, despite its disregard for the concerns that prompted

the Confrontation Clause, is its "totality of the circumstances" approach, which "leaves judges free to reach the 'fairest' result." *Bryant*, Scalia, J., dissent, at 5.

No Clear Answer for What Ends an Ongoing Emergency

Ouestions also remain over how wide the *Bryant* exception is for hearsay evidence that may be admitted despite a lack of confrontation. Although the Bryant Court noted the importance of Covington's gunshot wound, it did not confine its analysis to only those situations involving guns. Moreover, the Court noted that "[a]n emergency does not last only for the time between when the assailant pulls the trigger and the bullet hits the victim," id. at 27, and that an emergency, "at least as to certain weapons," cannot be said to "last only precisely as long as the violent act itself." *Id.* The Court further commented that "an out-of-sight sniper paus[ing] between shots" does not end the emergency between during those pauses. Id. Although an ongoing emergency would seem to clearly encompass a situation in which an unseen sniper pauses between shots, to reload or target a new victim, it is unclear how much further an ongoing emergency extends. The Court noted that did not mean to suggest that the ongoing emergency in Bryant extended until Bryant's arrest in a different state a year later, but the Court also noted that at the time of Covington's statements, the police did not know the location of the shooter or his motives. Bryant, slip op. at 27–28. Justice Scalia argued in dissent that the police's lack of knowledge regarding a suspect's motive or location is a "dangerous definition of emergency," as "[m]any individuals who testify against a defendant at trial first offer their accounts to police in the hours after a violent act." Bryant, Scalia, J., dissent, at 10.

Practically speaking, using the police's lack of knowledge regarding a perpetrator's motive or location could open up a much lengthier period for Confrontation Clause exceptions than the hour or less found in *Bryant*. If the police canvas a neighborhood the evening of a shooting, could all witness statements be considered non-testimonial? What if the search lasts longer and covers an area where the police believe a suspect, still armed, *may* be located? Further, what if the unidentified, un-located assailant is armed with not a gun, but a knife? Does that make the assailant sufficiently less of a threat to the public and first responders such that the situation would no longer be considered an ongoing emergency? Finally, returning to the unknown shooter identified in *Bryant*, what if, like the D.C. sniper, the police investigation takes much longer than one evening, and the "paus[e] between shots" is longer than a few moments? *See id.* at 27. At what point does the ongoing emergency end, if not when the declarant is provided with police protection or when the suspect is taken into custody or at least located?

The Role of Reliability in the Confrontation Clause Evaluation

Finally, the *Bryant* Court's discussion of reliability also raises questions as to whether reliability is still a factor in Confrontation Clause evaluations and, if so, how. Reviewing the case law, the Court stated, "Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." *Bryant*, slip op. at 14. It further stated that "[i]n making the

primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant." *Id.* at 11–12. With such statements, Justice Scalia claimed that the Court's opinion in *Bryant* "is a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned." *Bryant*, Scalia, J., dissent, at 12. More mildly, Justice Ginsburg claimed that the majority's opinion in *Bryant* "confounds our recent Confrontation Clause jurisprudence" that states that reliability is irrelevant to determinations regarding whether a statement is testimonial. *Bryant*, Ginsburg, J., dissent, at 1.

It is not clear how, if at all, the Court considered reliability in deciding *Bryant*. Certainly, the Court did *not* state that reliability was a factor in its determination, nor did it discuss why Covington's statements could be considered reliable. However, with its statement regarding *Davis* and the rules of hearsay, the majority of the Supreme Court left open for interpretation how, if at all, courts should treat reliability when conducting a primary purpose inquiry.

Keywords: litigation, criminal litigation, Bryant, testimonial, primary purpose test, Crawford, multifactor balancing test, ongoing emergency

Emily R. Schulman is a partner and Melissa Turitz is a senior associate with Wilmer Cutler Pickering Hale and Dorr LLP in Boston, Massachusetts.

"The Shifting Grounds of the Constitutional Right to Confrontation," by Emily R. Schulman and Melissa Turitz, Fall 2011, Criminal Litigation 12:1, Criminal Litigation, http://apps.americanbar.org/litigation/committees/criminal. © 2011 by the American Bar Association. Reprinted with permission. All rights reserved.

NEWS & DEVELOPMENTS

Uncontradicted Testimony Must Still Be Given Weight

In *Hamilton v. Hojeij Branded Food, Inc.*, No. 11-AA-332, 2012 WL 1215317 at *1–5, *7, *11 (D.C. April 12, 2012), an appeal of a denial of a claim for unemployment compensation benefits, the District of Columbia Court of Appeals considered the proper weight to give uncontradicted testimony.

After a series of absences from and a late arrival at work, Hamilton was fired. A claims examiner denied her claim for unemployment compensation benefits, and she appealed the decision to an administrative law judge. Hamilton testified as to the reasons for her absences and claimed that all of them were beyond her control. The employer presented no evidence to rebut her claims. The administrative law judge, however, determined that Hamilton had engaged in misconduct and was therefore ineligible for unemployment compensation benefits. She then appealed that ruling to the court of appeals.

While citing precedent cautioning against appellate fact-finding, the court of appeals recognized that there is "a rebuttable presumption that each witness, including [a] part[y], has sworn to the truth." It also noted that testimony that has not been contradicted or discredited may not be ignored by the fact-finder. The court discussed the possibility that even uncontradicted testimony could be disregarded if it was found to not be credible, but the court found that there were no indicia of lack of credibility in this case. The court finally concluded that the administrative-law judge failed to give sufficient weight to Hamilton's uncontradicted testimony and reversed.

Keywords: litigation, trial evidence, District of Columbia, uncontradicted testimony

Federal Circuit Denies Settlement Negotiations Privilege

In *In re MSTG*, *Inc.*, Misc. No. 996, 2012 WL 1155736 (Fed. Cir. Apr. 9, 2012), a mandamus case in the course of a patent action, the Federal Circuit considered, as a matter of first impression, the existence of a settlement negotiations privilege.

MSTG sued several cellular providers for patent infringement, eventually settling with all but AT&T. Several of the settlement agreements involved the granting of licenses to the patents at issue to the defendants. In the course of discovery, MSTG produced these settlement agreements. AT&T sought further discovery into the negotiations that produced the agreements. Eventually, the district court entered an order compelling MSTG to produce the negotiation documents. MSTG then petitioned the Federal Circuit for a writ of mandamus to vacate the order.

The Federal Circuit declined to invoke Rule 501 of the Federal Rules of Evidence to recognize a settlement negotiations privilege. The court cited several factors identified by the Supreme Court

that weigh against the finding of such a privilege, including the lack of an equivalent privilege at the state level, Congress's failure to create such a privilege when drafting Rule 408 of the Federal Rules of Evidence, the dubious nature of the purported public good such a privilege would serve, and the quantity of exceptions that would be necessary for such a privilege. These factors, in addition to the protections available under the Rule 26 discovery process, led the court to deny recognition of a settlement negotiations privilege.

Keywords: litigation, trial evidence, settlement negotiations privilege, Federal Rules of Evidence, Federal Circuit

Are Photos Taken a Year Later Helpful to Juries?

Lambert v. Coonrod, 2012 IL App (4th) 110518 (4th Dist. March 5, 2012), a mortgage foreclosure case, involves the question of whether pictures of an accident scene taken a year after the accident are helpful to the jury or unduly prejudicial.

"In August 2009, Richard [Lambert] filed a complaint in negligence against Coonrod after an October 2008 fall with injury on Coonrod's property. Richard alleged he was helping Coonrod with a project that required him to reach for a light above him. While mounting a coil spool, Richard fell backward and landed on the spool." At trial, Coonrod offered into evidence photos of the scene of the accident. Richard objected because the photos were taken a year after the accident, and they showed a ladder and other items that were not present at the time of the accident. The trial court allowed the pictures.

The appellate court stated that the decision of whether to admit a photograph was within the sound discretion of the trial court, so long as a witness who has personal knowledge of the subject matter depicted in the photograph testifies that the photographs are a fair and accurate representation of the subject matter at the relevant time. According to the appellate court, the decision of whether to allow photographs requires balancing the tendency of the photographs to help determine a fact in question with any possibility that the photographs are misleading or prejudicial.

In this case, the court found that the defendant was able to identify that the pictures were a fair and accurate representation of the scene of the accident and the layout of the shed, although not the particular items present at the scene at the time of the accident. The court found that the fact that the pictures showed a ladder that was not available at the time of the accident was not unduly prejudicial because the jury was able to understand that the ladder wasn't there at the time of the accident, the defendant testified that he purchased the ladder after the accident, and the court admonished the jury that the photos were being admitted to show the layout of the accident scene and not to concern itself with the items depicted in the photos.

Keywords: litigation, trial evidence, photographs, admissibility

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