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Before the Verdict and Beyond the Verdict: The CSI Infection within Modern Criminal Jury Trials

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I. INTRODUCTION

The term "*CSI* Effect,"[1] in the context of criminal jury trials, is commonly used to define the impact that viewing fictional criminal investigation shows like *Crime Scene Investigation*[2] ("*CSI*") has upon jurors' real life decision-making processes.[3] The *CSI* Effect has been used to explain unexpected jury verdicts;[4] however, this Article coins a

1. Scholars and practitioners disagree regarding the existence of the *CSI* Effect. *See, e.g.*, J. Herbie DiFonzo & Ruth C. Stern, *Devil in a White Coat: The Temptation of Forensic Evidence in the Age of* CSI, 41 NEW ENG. L. REV. 503, 506 (2007) (stating that studies have not yet proven how much the media influences juries, judges, and lawyers); Simon Cole & Rachel Dioso, *Law and the Lab: Do TV Shows Really Affect How Juries Vote? Let's Look at the Evidence*, WALL ST. J., May 13, 2005, at W13 (suggesting that it is not even clear what the *CSI* Effect really is). Prosecutors claim it makes juries more likely to acquit because they have exceedingly high expectations of proof, and defenders claim it makes juries convict because they believe any forensic evidence presented is conclusive proof of guilt. *Id.*; *see also* Simon A. Cole & Rachel Dioso-Villa, CSI *and its Effects: Media, Juries, and the Burden of Proof*, 41 NEW ENG. L. REV. 435, 463 (2007) [hereinafter CSI *and its Effects*] (expressing the opinion that prosecutors who complain about the *CSI* Effect are merely offering an excuse for failed prosecution of certain cases, i.e., "sour grapes"); Kimberlianne Podlas, *"The* CSI *Effect": Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429, 461 (2006) (suggesting that "frequent viewers of *CSI* are no more influenced by *CSI* factors than are non-frequent viewers."); Donald E. Shelton et al., *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "*CSI *Effect" Exist?*, 9 VAND. J. ENT. & TECH. L. 331, 362 (2006) (positing the opinion that "[t]he use of the term 'CSI effect' is too crude . . . . [I]increased expectations of and demands for scientific evidence is more likely the result of much broader cultural influences related to modern technological advances . . . a 'tech effect'"). Often the first issue in the debate centers around the existence, or lack of existence, of the *CSI* Effect itself. *See* Tom R. Tyler, *Viewing* CSI *and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1055 (2006).

2. *CSI* is currently one of the most popular fictional crime investigation television shows aired on network television. *See* Nielsen Television - TV Ratings for Primetime: Season to Date, http://tvlisitngs.zap2it.com/ratings/season.html (last visited July 26, 2009) [hereinafter Nielsen Ratings] (listing *CSI* as the sixth most watched show on television during the 2008–2009 season). Out of the top twenty network primetime shows during the 2008–2009 season, six shows depicted criminal investigations. *Id.* Two versions of the *CSI* franchise, *CSI: Miami* and *CSI: New York*, are rated at thirteen and nineteen respectively. *Id.* The show *CSI* revolves around a team of forensic investigators. The show typically begins when they are called to a murder scene to collect and analyze the evidence left by the killer. Their leader, Gil Grissom, has an ironclad dedication to the idea that evidence is the only neutral truth teller. His team adheres to his belief of the nature of evidence, and they use it to solve the crime as the plot culminates to a conclusion of the episode, a conclusion that leaves the viewer with an absolute certainty of who the wrongdoer is and precisely how the crime occurred.

3. United States v. Fields, 483 F.3d 313, 355 n.39 (5th Cir. 2007).

4. The two basic problems and fears are that: (1) jurors' expectations are unrealistically high based on the fictional versions of criminal investigations and prosecutions that are regularly viewed on television; and (2) jurors are improperly pre-conditioned to believe all forensic science experts because most television shows depict the scientific evidence as infallible and conclusive proof of guilt. *See* CSI *and Its Effects*, *supra* note 1, at 439. Either of these biases, if present in the juror, can induce incorrect verdicts in the form of false acquittals or wrongful convictions. *See* N.J. Schweitzer & Michael J. Saks, *The* CSI *Effect: Popular Fiction About Forensic Science*

new term, the "*CSI* Infection," in order to more appropriately describe the thorough impact that the criminal investigation television pop culture phenomenon[5] has made upon the criminal justice system as a whole.[6] The concept of the *CSI* Infection recognizes the multiple areas that the alleged[7] *CSI* Effect impacts, including areas before the verdict, not just the verdict itself. The entire criminal litigation process is potentially influenced by the fear that the *CSI* Effect has created a population of "*CSI* Infected Jurors" that respond to the criminal case and its evidence in different and unexpected ways. This review will address the *CSI* Infection phenomenon through a discussion of real cases, real experiences of litigators, real commentary by jurors, and real trial and appellate rulings by judges on significant constitutional and procedural issues of fair trial related to the *CSI* Effect. For example, is it appropriate for prosecutors to change their presentation of evidence to a strategy of defensive prosecution based on the perceived fear of *CSI* Infected Jurors?[8] Does it lower the government's burden of proof when the court or the prosecution tells the jury that the case does not have to be proven with *CSI*-type evidence?[9] Is it appropriate to ask a testifying

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Affects The Public's Expectations About Real Forensic Science, 47 JURIMETRICS J. 357, 358 (2007).

5. Marcia A. Mardis, *It's Not Just Whodunnit But How: "The* CSI *Effect," Science Learning, and the School Library*, 35 KNOWLEDGE QUEST 12, 12 (Sept./Oct. 2006) (referencing a national survey of middle and high school teachers in 2004 which found that 77% of these educators taught forensic techniques in the science classroom, which they directly attributed to the popularity of the *CSI* television show). The popularity of the show has extended beyond high school and college campuses into other areas of leisure and entertainment. *See* Elderhostel: Adventures in Lifelong Learning, http://www.elderhostel.org/programs/search_res.asp?keyword=csi (last visited Mar. 10, 2009). One can take a *CSI* learning vacation. *Id.* Elderhostel offers three to five day immersion vacations on the subject for adults and children across the country. *Id.* One can purchase and play, for less than twenty-dollars, the *CSI* board game. *See CSI*: Crime Scene Investigation The Board Game, http://www.amazon.com/CSI-Crime-Scene-Investigation-Board/dp/B00018H66M (last visited Mar. 10, 2009).

6. This Article addresses *CSI* Infection during the trial phase of the litigation process and before the verdict. However, the *CSI* Infection can be found at earlier stages of the case, such as the charging phase, wherein prosecutorial discretion is exercised regarding which charges to file, if any, and at the plea bargaining phase regarding which cases to negotiate to lesser charges and which to present to the jury. The prosecutor's perception of how the jury will receive certain forensic evidence or the lack of forensic evidence in a particular case now, more than ever before, colors the prosecutor's exercise of discretion on pre-trial decisions.

7. Shelton et al., *supra* note 1, at 335–36; Tyler, *supra* note 1, at 1053.

8. State v. Cooke, 914 A.2d 1078, 1088 (Del. Super. Ct. 2007) (finding that in order to counter vulnerability to defense arguments of insufficient investigative and scientific testing, "prosecutors now are almost required to engage in . . . 'defensive prosecution'").

9. *See* United States v. Harrington, 204 F. App'x 784, 788–89 (11th Cir. 2006); Drake v. State, 975 A.2d 204, 208–12 (Md. Ct. Spec. App. 2009) (holding that the trial judge's voir dire questions asking whether, in light of their experiences with fictional television dramas,

crime scene analyst if his job is like *CSI*?[10] Can litigants make reference to *CSI* during voir dire, opening statement, or closing argument?[11] Can a cross-examination or closing argument be curtailed by the court due to fears that *CSI* Infected Jurors will misconstrue certain evidence or argument?[12] Are new and special jury instructions needed to explain the law as well as the task of fact finding to the modern jury—a potentially *CSI* Infected jury?[13] Is it appropriate to ask prospective jurors about their television viewing habits?[14] Correspondingly, is it valid to excuse a juror from serving because he or she watches too many crime shows on television?[15]

These are the types of substantive legal questions that the courts must consider in the age of the *CSI* Infection. This Article articulates the

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prospective jurors could still convict a defendant without "evidence of scientific quality" was not improper); State v. Ash, No. A07-0761, 2008 WL 2965555, at *7 (Minn. Ct. App. Aug. 5, 2008) (finding the prosecutor's comment in rebuttal closing about *CSI* Effect was not prosecutorial misconduct); Goff v. State, 14 So. 3d 625, 652–53 (Miss. 2009) (holding that the prosecutor's reference to *CSI* in closing was not an error).

10. *See* State v. Swope, 762 N.W.2d 725, 729 n.3 (Wis. Ct. App. 2008) (providing an example of the defense tactic of triggering the jury's pop cultural references instead of focusing on the actual testimony from the expert witness).

11. *See Harrington*, 204 F. App'x at 788–89 (holding that "the district court's comments that 'CSI' evidence would not be required to convict Harrington" was not an abuse of discretion); Mathis v. State, No. 25, 2006, 2006 WL 2434741, at *4 (Del. Aug. 21, 2006) (finding mention of *CSI* Effect comment in opening statement allowable); Boatswain v. State, No. 408, 2004, 2005 WL 1000565, at *1–2 (Del. Apr. 21, 2006) (discussing the prosecutor's question during closing argument: "Can they meet CSI?"); *Ash*, 2008 WL 2965555, at *7 (finding the prosecutor's comment in rebuttal closing about *CSI* Effect was not prosecutorial misconduct); *Goff*, 14 So. 3d at 652–53 (holding that prosecutor's reference to *CSI* in closing was not error).

12. Evans v. State, 922 A.2d 620, 628 (Md. Ct. Spec. App. 2007) (instructing jurors via curative jury instruction that the government is not required to utilize specific investigative techniques or scientific tests); *Boatswain*, 2005 WL 1000565, at *1–2; *Ash*, 2008 WL 2965555, at *7 (finding prosecutor's comment in rebuttal closing about *CSI* Effect was not prosecutorial misconduct); *Goff*, 14 So. 3d at 652–53 (holding that prosecutor's reference to *CSI* in closing was not error).

13. *Evans*, 922 A.2d at 628 (instructing jurors via curative jury instruction that the government is not required to utilize specific investigative techniques or scientific tests); *see also infra* Part III.A.2–3 (discussing the instruction of jurors before and after all the evidence).

14. *See Harrington*, 204 F. App'x at 788–89.

15. People v. Wells, 850 N.E.2d 637, 642 (N.Y. 2006) (finding the prosecutor's use of a peremptory challenge to excuse an African-American female juror who stated she frequently read mystery novels survived a *Batson* challenge with the court accepting the prosecutor's explanation of the *CSI* Effect as his race neutral reason for striking the juror). *Cf.* United States v. Hendrix, No. 06-CR-0054-C-01, 2006 WL 3488970 (W.D. Wis. Nov. 30, 2006) (finding that watching *CSI* alone was not a valid race-neutral reason to survive a *Batson* challenge for excluding African American jurors. However, *CSI* watching coupled with the information that the juror also had a relative in prison provided a sufficient race-neutral basis for excluding the African American juror). The *Hendrix* court further stated: "It is possible that because shows such as CSI rely heavily on scientific evidence in solving crimes, jurors that watch these shows expect the government to produce similar evidence in any criminal case." *Id.* at *5.

essence of the concerns being raised by litigants as well as the judicial response by the trial and appellate courts. This Article provides needed analysis of the constitutional and procedural ramifications of the court rulings on these important yet increasingly routine issues in modern criminal jury trials. Further, the Article questions whether certain remedial measures contained in recent rulings are consistent with the constitutional strictures of fair trial and due process.

There is a delicate adversarial balance in criminal litigation. For the public's safety, the prosecution must be given a legitimate opportunity to present and prove its case with whatever evidence is available. That evidence must be weighed without preconceived biases. At the same time, the accused's presumption of innocence must be protected, and a fair opportunity to challenge any evidence presented against him must be facilitated by courts. One of the obstacles courts face in dealing with litigants' reactions to the fear of *CSI* Infected Jurors is to refrain from tipping the delicate balance to unconstitutionally favor any one party.

Every criminal defendant is entitled to a fair trial.[16] This Sixth Amendment[17] constitutional right is inextricably linked to the analysis of the *CSI* Infection and its impact upon criminal prosecutions.[18] Therefore, this discussion is pivotal to justice. It is imperative for judges to prevent litigants from using tactics that infringe on the fairness of the trial.[19] Moreover, judges must institute procedural safeguards to combat the *CSI* Infection's potential to derail a fair trial. If ignored, the *CSI* Infection may induce inaccurate verdicts, which then impose upon society a very high cost.[20] When factually guilty violent criminals are acquitted because the jury misinterpreted or improperly weighed the evidence, the safety of the public is compromised.[21] When factually

16. *See* U.S. CONST. amends. VI, XIV.

17. U.S. CONST. amends. VI, XIV.

18. U.S. CONST. amends. VI, XIV.

19. U.S. CONST. amends. VI, XIV.

20. U.S. CONST. amends. VI, XIV; *see also infra* Part II.B (providing an example of what drives litigants' belief that *CSI* Infected Jurors exist).

21. *See In re* Winship, 397 U.S. 358, 364 (1970) (articulating the proof beyond a reasonable doubt standard for criminal trials). The founding idea of the American criminal justice system is that it is "far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372 (Harlan, J., concurring). Notwithstanding the fact that most cases reported as having been impacted by the *CSI* Effect are false acquittals, the American criminal justice system is better equipped to bear the burden of a false acquittal than a wrongful conviction. Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 138 (2008) (identifying false acquittals as a minor problem compared to wrongful conviction). "Thus, failure to convict the guilty is a serious problem, but this failure is not inherently the equivalent of wrongfully convicting the innocent, either as a matter of constitutional priority or sound policy judgment." *Id.*

innocent individuals are convicted due to the same type of juror confusion, a more severe injury to society occurs. Both mistakes jeopardize the legitimacy of the criminal justice system.[22] However, wrongful convictions are inherently more repugnant to justice.[23]

Some scholarly observers and experts criticize the entire theory and doubt the existence of the *CSI* Effect.[24] Critics highlight the lack of empirical data supporting the conclusion that television shows actually impact jurors' decisions.[25] Proponents point to jurors' statements and illogical, or surprising verdicts as sufficient evidence to prove that the *CSI* Effect is real and worthy of remedial attention. Although much is made of the debate about the existence of the *CSI* Effect, empirical studies may never fully be able to explain how, and to what extent, the *CSI* Effect influences jurors. Moreover, notwithstanding the fact that scholars can neither affirmatively prove, nor effectively explain away the *CSI* Effect, court pleadings establish that the *CSI* Infection exists within modern criminal litigation.[26] Thus, while debate continues, and

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22. Findley, *supra* note 21, at 138; *see also infra* Part II (discussing action within the criminal justice system).

23. Donald J. Sorochan, *Wrongful Convictions: Preventing Miscarriages of Justice, Some Case Studies*, 41 TEX. TECH L. REV. 93, 112–13 (2008) (comparing Justice William Blackstone's comment "that it is better for ten guilty men to go free than one innocent man be condemned to the gallows" to the former Communist leader of Cambodia, Pol Pot's, comment "[h]e who protests is an enemy; he who opposes is a corpse! . . . You can arrest someone by mistake; never release him by mistake. . . . Better to kill an innocent by mistake than spare an enemy by mistake! . . . Better to arrest ten innocent people by mistake than free a single guilty party! . . . No gain in keeping no loss in weeding out."). *See also* Findley, *supra* note 21, at 138.

24. *See* CSI *and Its Effects*, *supra* note 1, at 463; Simon A. Cole & Rachel Dioso-Villa, *Investigating the 'CSI Effect' Effect: Media and Litigation Crisis in Criminal Law*, 61 STAN. L. REV. 1335, 1342 (2009); Shelton et al., *supra* note 1, at 362. Although there are several remaining open questions about *CSI* Infected Juror behavior, there is significant research to support that watching fictional crime shows on television has an impact on its viewers. *See* Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 U. FLA. J.L. & PUB. POL'Y 37, 46–47 (1997). Eight out of the eleven studies concluded that the viewers of the television crime shows *Law & Order*, *Cagney & Lacey*, and *Hill Street Blues*, were impacted by their viewing. *Id.* at 45–46. Six studies found viewers had increased anxiety from watching these shows, and two studies found reduced anxiety in viewers. *Id.*

25. CSI *and Its Effects*, *supra* note 1, at 436; *cf.* Tyler, *supra* note 1 (citing psychology studies supporting the contrary premise that television can influence jurors). Nevertheless, the opinions of the "individuals in the courtroom" are drastically different from the opinions of the critical observers "outside the courtroom." MARICOPA COUNTY ATT'YS OFFICE, CSI: MARICOPA COUNTY: THE CSI EFFECT AND ITS REAL-LIFE IMPACT ON JUSTICE 2 (June 30, 2005), *available at* http://www.ce9.uscourts.gov/jc2008/references/csi/CSI_Effect_report.pdf.

26. *See* Podlas, *supra* note 1. *See also* CSI *and Its Effects*, *supra* note 1; Shelton et al., *supra* note 1, at 332–33 (analyzing the questionnaire responses of 1027 potential jurors). Nevertheless, empirical study of the *CSI* Effect is still early and ongoing. *Id.*; *cf.* Schweitzer & Saks, *supra* note 4, at 358, 363 (discussing how *CSI* viewers are more critical of forensic science evidence when presented at trial and find it less believable; however, there is no statistically significant difference between their likelihood to convict).

more empirical analysis is conducted, courtrooms are addressing the issues and the perceived manifestations and mutations of the alleged *CSI* Effect.

The concern for and impact of the *CSI* Effect permeates modern criminal trials. Litigators and judges are forced to deal with it. Motions are based on it, and trial strategies are built around it. Further, judges issue rulings directed at its operation in their real cases and real juries. The *CSI* Infection is now inside the courtroom in a way that can no longer be ignored.[27]

This Article seeks to appropriately change the focus of the *CSI* Effect debate. It will expand the conversation beyond the speculated impact that is based solely upon the rise and fall of acquittal and conviction rates.[28] Instead, the approach taken here will analyze how *CSI*, as a larger popular culture phenomenon, infects criminal trials at all levels of the criminal justice process. It appears from all accounts by the actual participants in the day-to-day workings of the criminal justice system, that the television show *CSI*, and shows like it, have immeasurably changed the way criminal litigation is conducted today.[29]

Identifying and eliminating any harm that results from the *CSI* Infection within criminal litigation is the ultimate goal of this research. It contributes practical relevance to the discussion of the *CSI* Effect by utilizing a thorough analysis of current and real cases, and it concentrates on how judges adjudicate the evidentiary, procedural, and constitutional issues surrounding the *CSI* Effect. Following this Introduction, Part II describes the perceived heightened expectation of jurors, and perceived fears by litigants, that the *CSI* Effect creates.[30] Part II is important to this Article because it exposes the perspectives of criminal litigators who interact daily with jurors. Part III illuminates real cases and contains the constitutional and procedural essence of this Article.[31] Questions of selecting unbiased jurors, instructing them properly on the law of the case, and procedures of the court are tackled. Moreover, issues regarding how evidence and arguments are presented to the jury are explored to provide valid remedies that are in accord with the requirements of due process. Significant consideration is given to whether the current remedial measures devised by the courts to prevent potential harm by *CSI* Infected Jurors are consistent with paramount

27. *See infra* Part IV (discussing the distortion of evidence by the *CSI* Infection).

28. Cole & Dioso-Villa, *supra* note 24, at 1356–64.

29. *See infra* Part II (discussing *CSI* Infection in action within the criminal justice system).

30. *See infra* Part II (discussing *CSI* Infection in action within the criminal justice system).

31. *See infra* Part III (discussing *CSI* Infection at various phrases of trial).

principles of fairness as prescribed by the fair trial guarantees of the Constitution. This Article suggests utilizing a special jury instruction to help minimize potential juror confusion and evidence distortion—the special instruction would warn jurors not to use information gained from fictional sources in their consideration and deliberation of the evidence. Part IV discusses the multiple cultural factors impacting the modern American jury.[32] Factors in addition to the *CSI* Effect can conflate and distort a juror's otherwise clear view of the evidence. In conclusion, Part V highlights that this Article bridges the gap between the theoretical *CSI* Effect debate and litigants' practical encounters with jurors in everyday criminal trials.[33]

II. FEARS REGARDING *CSI* INFECTED JURORS

Criminal justice statistics indicate that only a small percentage of criminal cases go to trial and reach a jury verdict.[34] At first glance, ten percent may appear to be a small percentage of the overall criminal justice caseload. However, cases that proceed to jury trial carry the highest stakes and most severe punishments; allegations often include violent rape or murder.[35] For this reason, addressing the *CSI* Infection is a paramount concern. The risk of false acquittals and wrongful convictions threatens public safety as well as the constitutional rights of the accused.[36] This is problematic because the legitimacy of the American criminal justice system relies on juries to arrive at a just result.[37] Although the accuracy rate of juries can never be one hundred

32. *See infra* Part IV (discussing various other factors affecting the modern juror).

33. *See infra* Part V (concluding).

34. Nancy Jean King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 59 (1999) (highlighting that only a fraction of criminal cases actually go all the way to jury trial—approximately three to ten percent).

35. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 217995, STATE COURT SENTENCING OF CONVICTED FELONS, 2004 - STATISTICAL TABLES (2007), http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04401tab.htm (indicating only three percent of convictions resulted from jury trials in U.S. state courts). Of the three percent of convictions resulting from jury trials in U.S. state courts, over half were violent crimes such as murder, sexual assault, and robbery. *Id.*

36. Edson R. Sunderland, *Verdict, General and Special*, 29 Yale L.J. 253, 262 (1920) (stating that the need for correct jury decision making and the desire to avoid the appearance of error requires that "[t]he record . . . be absolutely flawless, but such a result is possible only by concealing, not by excluding mistakes").

37. *See also* FED. R. EVID. 606(b) ("Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations of to the effect of anything upon that or any other juror's mind or emotions as influencing the juror . . . ."). *See generally* Tanner v. United States, 483 U.S. 107 (1987) (holding evidence of juror intoxication during the trial and deliberations was insufficient to reverse jury verdict). The *Tanner* Court stated: "There is little doubt that post verdict investigation into juror

percent, anything that increases the possibility of error in an already imperfect system is important to investigate.

Some believe that the regular viewing of fictional crime shows, like *CSI,* manipulates jurors[38] into considering real cases "through a misleading prism of fiction," which may skew them into reaching "conclusions contrary to justice."[39] Jury trials have always required litigants to carefully navigate the delicate psyche of the lay fact-finder.[40] Today, however, a successful trial lawyer must effectively traverse beyond the fixed opinions and pre-judgments that jurors often have before hearing the case. This requires jurors to dislodge themselves from romanticized notions of crime scene investigations and scientific forensic evidence. Instead, jurors must undertake the unfamiliar, perhaps uncomfortable, role of fact-finder, which is a complex job because not every factual question or concern will be answered in a real criminal trial.[41] This is the unpleasant reality of real crimes,[42] the plot

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misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it." *Id.* at 120.

38. Schweitzer & Saks, *supra* note 4, at 358.

39. MARICOPA COUNTY ATT'YS OFFICE, *supra* note 25, at 2 (surveying everyday prosecutors and their opinions about whether the juries they encounter are *CSI* Infected); *see also* Andrew P. Thomas, *The* CSI *Effect: Fact or Fiction*, 115 YALE L.J. POCKET PART 70 (2006), *available at* http://www.thepocketpart.org/2006/02/thomas.html. Based on a survey of Maricopa County prosecutors, many prosecutors experienced heightened jury expectation for forensic evidence and believe that shows like *CSI* "can create a bias in the jury if not properly addressed at trial." *Id.* at 70.

40. GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 205–06 (2003). Unpredictability of the jury verdict is one factor that drives the high percentage of plea bargains, a fact that is often criticized as a weakness of the criminal justice system. *Id.* It is considered a weakness because individuals often plead guilty. *Id.*

41. People v. Williams, 21 P.3d 1209, 1216 (Cal. 2001) (finding that jurors are required to follow the court's instructions). In *United States v. Battiste*, the court stated:

> [I]t [is] the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection. . . . Every person accused as a criminal has a right to be tried according to the law of the land, the fixed law of the land; and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.

United States v. Battiste, 24 F. Cas. 1042, 1043 (C.C.D. Mass 1835) (No. 14,545). *See also* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 10 (2008) (confronting the historical fact-finders' moral discomfort with rendering final judgment in a criminal case). In a criminal case, the jury must find all material elements of the crime beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 364 (1970).

42. *See* Richard Willing, 'CSI *Effect' Has Juries Wanting More Evidence*, USA TODAY, Aug. 5, 2004, at 1A.

> [R]eal scientists say *CSI's* main fault is this: The science is always above reproach.

is unscripted, and no professional actors deliver the scenes.[43] In order to achieve a just result predicated on realistic and logical inferences from the real case evidence, litigants must overcome the modern juror's heightened expectations and even their misinformation from fictional sources. The perception is that the prevailing party must potentially convince a *CSI* Infected Juror.

This Article targets a new area within the *CSI* Effect discussion. It spotlights the major legal impact that the supposition of a *CSI* Infected Juror makes within the criminal litigation process; this includes jury selection, presentation of evidence, and potentially even the ultimate verdict. Not only have the strategies and arguments of trial lawyers on both sides significantly changed; in fact, trial and appellate courts have also made evidentiary, procedural, and constitutional rulings to address the perceived dangers that *CSI* Infected Jurors impose upon the ultimate fairness of the jury trial process.

> "You never see a case where the sample is degraded or the lab work is faulty or the test results don't solve the crime," says Dan Krane, president and DNA specialist at Forensic Bioinformatics in Fairborn, Ohio. "These things happen all the time in the real world."

Id.

43. DiFonzo & Stern, *supra* note 1, at 504–05 (stating: "In the world of *CSI*, valuable forensic evidence is there for the taking. It is never contaminated, and human error never compromises its analysis.").

Many anecdotal juror,[44] litigator,[45] and judicial comments[46] reveal that media and popular culture[47] influence jurors' expectations.[48] Some scholars assert that media and culture have always impacted jurors and that the *CSI* television show is no different than science fiction literature, mystery novels, or the *Perry Mason* and *Matlock* television shows.[49] Although it is true these other forms of popular fiction did precede *CSI* and *Law and Order*, the force and scope of the older, more traditional and lower-tech versions of the crime drama never reached the sophistication, popularity, or universal cultural reference of *CSI*. It is almost like asserting that the telegraph and the Internet are essentially

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44. *See, e.g.*, Kit R. Roane, *The CSI Effect*, U.S. NEWS & WORLD REP., Apr. 25, 2005, at 48 (reporting the grave results of a forensically disappointed jury). A gang member, on trial for rape, faced a mountain of prosecutorial evidence in court. *Id.* The jury, however, was disappointed that the investigators did not test evidence to confirm that dirt found in the victim's body matched soil from the crime. *Id.* These jurors were convinced such a test existed because they learned on *CSI* that such police tests were possible. *Id.*; *see also* Jane Ann Morrison, "CSI *Effect*" *May Have Led Binion Jurors to Demand Harder Evidence*, LAS VEGAS REV. J., Dec. 2, 2004, at 1B. In *Binion*, Las Vegas jurors heard evidence pertaining to a case whose facts achieved much notoriety. *Id.* *See CSI* Show Guide: Season Two, Episode, #01, *available at* http://www.episodelist.com/site/index.php?go=seasons.view&season_id=226. The sophomore season of the hit crime drama began with an episode remarkably similar to the *Binion* case, involving the death of a popular Las Vegas casino executive. *Id.*

45. Michael J. Watkins, Forensics In the Media: Have Attorneys Reacted to the Growing Popularity of Forensic Crime Dramas? (Aug. 3, 2004) (unpublished M.S. thesis, Florida State University), http://www.coolings.net/education/papers/Capstone-Electronic.pdf; *see also* Jimmy Bunn Jr., *The* CSI-*Factor: A Problem or an Opportunity?*, THE SOURCE, Spring 2005, at 4, *available at* http://www.ok.gov/osbi/documents/Spring%202005.pdf.

46. *See* Ty McMahan, *Real Life Meets 'CSI': Television Dramas Leave Fingerprints on Local Juries' Expectations*, DAILY OKLAHOMAN, May 2, 2005, at 1A. This article points to Judge Jerry Bass, who believes, "if he watches television shows like *CSI: Crime Scene Investigation*, so do many of his jurors, which is why questions about television viewing habits have become standard during jury selection." *Id.* Judge Bass is an example of judges who understand that "the new challenge in [the] courtroom is making sure jurors understand the difference between television and reality." *Id.*

47. David Ray Papke, *The Impact of Popular Culture on American Perceptions of the Courts*, 82 IND. L.J. 1225, 1226 (2007) (defining popular culture as "cultural commodities and experiences produced by the culture industry and marketed to mass audiences").

48. *See generally* National Clearinghouse for Science, Technology, and the Law, Bibliography of Resources Related to CSI Effect, http://www.ncstl.org/education/CSI%20Effect%20Bibliography (last visited Aug. 7, 2009). Hundreds of newspaper and magazine articles have reported on individual cases wherein the *CSI* Effect was cited as the reason for the jury's acquittal—often quoting juror statements regarding the lack of forensic proof like DNA, fingerprints, or other definitive proof, also known as "*CSI*-type evidence." *Id.* In addition to the anecdotal quotes of jurors, prosecutors and defenders have been surveyed and consistently report their belief in a *CSI* Effect impacting the jury. *Id.* Some judges have echoed the same sentiment in their court rulings and interviews. Telephone Interview with Marcia G. Cooke, Judge, U.S. District Court (Feb. & June 2007) [hereinafter Cooke Interview]. However, the views among the judges are mixed. *See* MARICOPA COUNTY ATT'YS OFFICE, *supra* note 25.

49. *See* Cole & Dioso, *supra* note 1, at W13.

the same because they both allow individuals to communicate with each other just like before—nothing has changed. While it is true the Internet facilitates e-mails just like the telegraph facilitated telegrams allowing individuals to communicate, the speed, volume, and manner of communication has totally transformed because of the Internet. Additionally, the influence of the Internet created a cultural change.[50] In a similar way, the enthusiasm for and influence of the modern criminal investigation shows entered a new dimension in the last decade.[51] The emergence and popularity[52] of the television shows *Law and Order* and *CSI* tutor the American viewing public in criminal law from a pro-law enforcement vantage point. These shows are purposely skewed for entertainment value[53] and unrestrained by the Federal Rules

50. *See* Mardis, *supra* note 5, at 12 (reporting that middle and high school science classes have changed); Willing, *supra* note 42, at 1A (noting that the popularity of forensic science as a college major has increase). *CSI* themed vacations are now available. *See* Elderhostel: Adventures in Lifelong Learning, *supra* note 5. A board game has been developed to allow you to play *CSI* at home.

51. Something similar to the *CSI* Effect has been an issue as early as the airing of the show *Perry Mason*. *See* Michael Mann, *The "*CSI *Effect": Better Jurors through Television and Science?*, 24 BUFF. PUB. INT. L.J. 211, 213–14 (2005–06) (explaining that the "*Perry Mason* Syndrome" refers to the hit TV show, and "describes the expectations on defense attorneys to coerce an admission from the prosecution's star witness upon cross-examination"). At times, comparisons are made between the "*Perry Mason* Syndrome" and the *CSI* Effect. *Id.* at 220 n.36. However, the impact of these popular televisions shows is very different. *Id.* at 221–22. On *Perry Mason*, the expected result was the magic bullet of the defense attorney getting the prosecution's witness to confess to lying, therefore exonerating the defendant. *Id.* As presented in the plot of the *Perry Mason* show, the accused was factually innocent. *Id.* However, aspects of the dramatic presentation of Perry Mason's witness examining techniques began to feed real jurors' expectations at the time. *See* Amy Lennard Goehner et al., *Where CSI Meets Real Law and Order*, TIME, Nov. 8, 2004, at 69. Perry Mason used to lean in on the witness box as he questioned a witness, despite the fact that real trial procedure at the time required attorneys to remain at their podium while questioning took place. *Id.* Nonetheless, because jurors saw how Mason talked to witnesses, they thought something was wrong with lawyers who did not approach the witness in the same way. *Id.* This is similar to the unrealistic depictions of criminal investigations on crime dramas that modern jurors are coming to expect in a real court room. *See* State v. Swope, 762 N.W.2d 725, 729 n.3 (Wis. Ct. App. 2008). The argument surrounding the *CSI* Effect is different. The "*Perry Mason* Syndrome" represents the lawyer who realizes he has not been able to measure up to the fictional Perry Mason. *See* Fred Graham, *The Impact of Television on the Jury System: Ancient Myths and Modern Realism*, 40 AM. U. L. REV. 623, 628 (1990–91). The *CSI* Effect, on the other hand, may involve an accused who is factually guilty, a prosecutor whose case lacks forensic evidence, and a jury induced to falsely acquit. *See* DiFonzo & Stern, *supra* note 1, at 508–11. Conversely, the *CSI* Effect may involve an accused who is factually innocent, a prosecutor who presents forensic evidence, and a jury induced to wrongfully convict. *Id.*

52. *See* Nielsen Ratings, *supra* note 2 (rating *CSI* sixth). *See also Law & Order*, http://www.nbc.com/Law_and_Order/about (last visited Aug. 8, 2009) (noting that *Law & Order* is not only the longest running crime based drama, but also the second longest running drama "in the history of television").

53. David Berman and Jon Wellner are actors and writers for *CSI: Crime Scene Investigation*.

of Evidence or Ethical Rules of Professional Conduct.[54] Yet, in real life, the jury is picked from a group of individuals very familiar with the format and content of the fictional version of criminal investigations, evidence gathering, crime solving, and prosecutions.[55] However, these shows fail to present the reality of criminal investigations, such as crime lab backlogs[56] and resource limitations, which real criminal investigators and litigators must surmount. A potential juror's exposure to this distorted version of the prosecutorial process prior to jury service shapes his or her understanding and expectations.

Additionally, fictional television depictions of criminal investigations and prosecutions are not required to follow the mandatory limitations

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David Berman & Jon Wellner, "Inside the World of *CSI: Crime Scene Investigation*," Presentation at the Eighth Annual Forensic Science and Law Conference: A National Symposium on the Intersection of Forensic Science and Popular Culture, Cyril H. Wecht Institute of Forensic Science and Law, Duquesne University (Apr. 5, 2008) [hereinafter National Symposium]. They gave a presentation at the Eighth Annual Forensic Science and Law Conference, April 2008, in which they articulated that "all ideas for the show come from real forensic evidence theories, but for television purposes the procedures are either exaggerated or dramatized for entertainment value." *Id.* However, Berman and Wellman admit this rule was not one hundred percent followed in early episodes; for example, there was an episode in *CSI*'s first season that showed that a plaster mold of a knife wound could be made to replicate the actual knife used to stab the victim. *See CSI Crime Scene Investigation: $35K O.B.O.*, (CBS television broadcast Mar. 29, 2001). Berman and Wellman elaborated that in real life it is possible to make a plaster mold of the exterior wound only. *See* National Symposium, *supra*. Unlike what is indicated in the episode, it is not possible to make a plaster cast of an interior knife wound in order to identify the kind of knife used. *Id.* Although this might appear to be a slight creative license, in actuality it can misinform real jurors about what forensic science can prove. *See* Papke, *supra* note 47, at 1232.

54. *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL RULES OF EVIDENCE: WITH ADVISORY COMMITTEE NOTES AND LEGISLATIVE HISTORY (2008). The Federal Rules of Evidence, which is adopted in whole or in part by most states, regulates the information the jury is allowed to hear. *Id.* The rules require evidence to be relevant, reliable, and not unfairly prejudicial before introducing it to the jury. FED. R. EVID. 401. Many of the most sensational or entertaining facts are thereby excluded in a real case. *See, e.g.*, FED. R. EVID. 1101 (articulating the specific courts and proceedings to which the federal rules of evidence apply).

55. *See* Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 STAN. L. & POL'Y REV. 381, 388 (2004) (stating: "The point is that the American public, if not the world, is being perpetually inundated with distorted perceptions of forensic science's capabilities."); *see also* Catherine M. Guthrie, *The* CSI *Effect: Legitimate Concern or Popular Myth?*, 41 PROSECUTOR 14, 14 (July/Aug. 2007) (describing *CSI*-type shows as "glorify[ing], simplify[ing] and sometimes flat out distort[ing] the use of scientific evidence in crime solving").

56. Travis Pratt et al., *This Isn't* CSI*: Estimating the National Backlog of Forensic DNA Case and the Barriers Associated with Case Processing*, 17 CRIM. JUST. POL'Y REV. 32, 32 (2006); Joseph Varlaro & Barry Duceman, *Dealing with Increasing Casework Demands for DNA Analysis*, 5 PROFILES IN DNA (Sept. 2002), *available at* https://www.promega.de/profiles/502/ProfilesinDNA_502_03.pdf.

and requirements imposed by the United States Constitution.[57] Real prosecutors are bound by these limitations[58] in order to ensure fairness throughout the entire criminal litigation process.[59] Potentially, these shows sway more than juror expectations; specifically, they may color a juror's analysis of the real evidence presented in court,[60] as well as influence the amount of evidentiary value placed upon certain items of proof.[61] Thus, *CSI* Infected Jurors may have unusually high

57. U.S. CONST. amends. IV, V, VI. The Fourth, Fifth, and Sixth Amendments to the United States Constitution place strict limitations on the way the government can investigate crimes and question citizens regarding their potential involvement in criminal actions. *Id.* The Fourth Amendment limits the government's ability to invade one's privacy and further mandates that the government may not search or seize items or a person, unless it is done reasonably, based upon probable cause and a warrant obtained by a neutral and detached magistrate. *See* U.S. CONST. amend. IV.; Katz v. United States, 389 U.S. 347, 356–57 (1967). The Fifth Amendment limits police officers from conducting custodial interrogations without advising an individual that he/she has the right to remain silent and the right to have an attorney present during questioning. U.S. CONST. amend. V; *see also* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966). The Sixth Amendment protects the ultimate fairness of the criminal trial process, which includes: (1) rules governing pre-trial interrogations; (2) identifications of the formally charged criminal defendant; (3) procedures during trial to ensure fairness, such as providing indigent criminal defendants with a court appointed lawyer to effectively defend them against the allegations; (4) making sure the judge and jury are neutral and unbiased fact-finders; (5) ensuring that the jury affirmatively understands the defendant is cloaked with the presumption of innocence and that the in-court adversarial tactics by the prosecution do not undermine that right; (6) and requiring the government to prove all the allegations beyond a reasonable doubt. U.S. CONST. amend. VI. *See generally* Batson v. Kentucky, 476 U.S. 79, 97–98 (1986) (addressing the accused's right to a fair jury of one's peers without discriminatory exclusion of certain potential jurors); *In re* Winship, 397 U.S. 358, 364 (1970) (articulating the proof beyond a reasonable doubt standard for criminal trials); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (explaining the criminal defendant's right to a fair trial of his peers); Massiah v. United States, 377 U.S. 201, 206 (1964) (prohibiting the government's elicitation of post-indictment confessions); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (mandating the appointment of counsel in felony jury trials). These matters of constitutional law significantly impact the way real criminal cases are investigated and prosecuted, yet in no way inhibit how fictional versions of real cases are depicted for entertainment purposes on television. *See generally* United States v. Jacobsen, 466 U.S. 109, 113 (1984) (articulating that constitutional restrictions only apply to official government agents and their representatives, not private actors).

58. *See* R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 15 (2005) (referencing the probable cause standard for prosecution articulated in ABA Model Rule 3.8).

59. U.S. CONST. amend. XIV. The Fourteenth Amendment requires equal protection of the laws and forbids governmental discrimination in the enforcement of its laws. *Id.*; *see also* McCleskey v. Kemp, 481 U.S. 279, 286 (1987) (challenging Georgia's death penalty scheme as intentionally discriminatory). This amendment protects fairness in certain pre-trial issues such as a prosecutor's decision to file criminal charges. *See* Wayte v. United States, 470 U.S. 598, 607–08 (1985); *see also* United States v. Armstrong, 517 U.S. 456, 464–65 (1996).

60. Papke, *supra* note 47, at 1227 ("Cultivation theorists argue that regular viewers of television programming or avid consumers of other varieties of popular culture come to see social reality differently."); *see also* DiFonzo & Stern, *supra* note 1, at 507 (outlining that the most significant problem with the *CSI* Effect is its adverse consequences "on the process of evaluating the corpus of evidence at trial").

61. DiFonzo & Stern, *supra* note 1, at 508 (referencing dialogue from an episode of *CSI* to

expectations for the evidence they believe should be presented, and they may have strong opinions regarding the absence of such evidence in trials.[62] Although it is still unclear how alleged heightened expectations and fictional understandings of forensic science are ultimately resolved by each individual jury, one possibility is that information learned from fictional sources, remaining unsatisfied after all the real evidence has been presented, creeps into jury deliberations. The two dreaded consequences of this scenario are that: (1) due to unrealistic expectations the jury will remain unsatisfied after all the real evidence

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highlight that *CSI*-type shows skew jurors' views regarding the value of certain types of evidence by devaluing low tech and over-valuing high tech forensic science evidence). "Detective Jim Brass: 'We got the eyewitnesses lined up, ready to go.' Gil Grissom: 'Testimonials, Jim? I don't consider that evidence.'" *Id.* (quoting *CSI Crime Scene Investigation: Blood Lust* (CBS television broadcast Dec. 5, 2002), *available at* http://www.crimelab.nl/transcripts.php?series=1&season=3&episode=9); *see also* Cynthia Di Pasquale, *Beyond the Smoking Gun*, DAILY RECORD, Sept. 8, 2006, at 1, *available at* http://www.law.umaryland.edu/faculty/conferences/conf40/Beyondthesmokinggun.pdf (reporting a criminal prosecution wherein multiple eye witnesses observed and testified that they saw the accused shooter shoot and flee police; however, the jury failed to convict because the prosecution did not pull fingerprints from the gun). "People always wanted a smoking gun . . . But now, they need the smoking gun, the smoke from the gun and a videotape of it." *Id.* Under the American criminal justice model governed by Sixth Amendment jurisprudence, the judge makes determinations of law, whereas the jury makes determinations of fact. *See Duncan*, 391 U.S. at 156–158; GRAHAM C. LILLY, PRINCIPLES OF EVIDENCE 21(4th ed. 2006). Therefore, the judge decides the admissibility of the proffered evidence, but the jury decides the weight that will be given to that evidence. *See* FED. R. EVID. 104; LILLY, *supra*, at 21. Based upon preconceived notions regarding the value of certain types of evidence, the jury could in fact erroneously place the incorrect amount of weight on a given piece of evidence. *See* Willing, *supra* note 42, at 1A. For example, in most of the criminal investigation shows forensic science evidence is routinely collected, quickly tested, and then shown in the episode to effectively prove the perpetrator of the crime without any doubt. *Id.* "The programs also foster . . . the mistaken notion that criminal science is fast and infallible and always gets its man. . . . Real crime scene investigators say that because of the programs, people often have unrealistic ideas of what criminal science can deliver." *Id.* This repeated portrayal could lead the average viewer to think that forensic science evidence is always collected, quickly tested, and never incorrectly identifies a suspect. *Id.* This incorrect, yet commonly held, assumption about forensic science evidence could influence the amount of evidentiary value that a juror places on the forensic evidence in a real case, and could also impact the juror's opinion regarding the importance of always having forensic science evidence, i.e., any good and thorough criminal investigation would include a dusting for fingerprint evidence, even if a fingerprint is completely irrelevant to the case. *See* Kate Coscarelli, *The CSI Effect: T.V.'s False Reality Fools Jurors*, THE STAR-LEDGER, Apr. 18, 2005, at 1.

62. *See* Paul Erwin Kish & Herbert Leon MacDonell, *Absence of Evidence is Not Evidence of Absence*, 46 J. FORENSIC IDENTIFICATION 160, No. 2, (1996), http://www.crime-scene-investigator.net/absenceofevidence.html. "Should no exculpatory evidence be discovered[,] the absence of evidence is not evidence of absence." *Id.* In essence, this highlights the fact that the absence of certain evidence may be meaningless, as well as the presence of certain evidence being similarly meaningless. *Id.* In reality, it is the totality of the evidence that must be examined, not the presence or absence of familiar types of proof which somehow hold "gold star standard" reliability. *Id.*; *see also* Findley, *supra* note 21, at 138.

has been presented, or (2) the evidence the jury expected to see based on this misunderstanding of forensic evidence will improperly become crucial to their decision-making process and potentially sway the verdict in unexpected or illogical ways.[63] The true juridical query underlying the fear of *CSI* Infected Jurors is that the jurors will not only violate their oath, but also circumvent the constitutional rights of the accused as well as procedural and evidentiary rules of criminal litigation and due process.

A. Defining the Concern of Juror Expectation

Generally, when individuals speak about the *CSI* Effect, they are referring to the perceived anti-prosecution impact of the phenomenon, namely jurors rendering false acquittal verdicts.[64] The rationale for the false acquittal is that the verdict was a mistake; it was a mistake based either on a misunderstanding of the real evidence when compared to its fictional, television counterpart, or because the jury held the prosecution to the television standard of proof, not the real life standard of proof.[65] Tom Tyler pointed out in *Viewing CSI and the Threshold of Guilt*[66] that it is unknown whether the *CSI* Effect has a "positive" or "negative" impact upon a juror's ultimate decision.[67] Psychological studies of jurors suggest that a *CSI* Effect is possible, but the effect could just as easily induce wrongful convictions as it could induce false acquittals.[68] However, it may even aid the jury in reaching a correct result.[69] Therefore, it is critical to explore what occurs before the verdict; this entails examining the multiple phases of the criminal litigation

63. Guthrie, *supra* note 55, at 15.

64. *See generally* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS (5th ed. 2002) (exploring the application and use of social science terms, methodology, and techniques in legal scholarship and in litigation). False acquittal is used here in the same way a false negative would be defined in social science research. *Id.* Thus, under this definition, a false acquittal would occur against the weight of the evidence and where the defendant was factually guilty—acquitted by the jury based on an obvious misunderstanding or evidentiary bias on the part of the jury. Specifically, this Article focuses on the juror's misunderstanding or misinterpretation of facts as opposed to one's misunderstanding of the instructed law.

65. *In re* Winship, 397 U.S. 358, 364 (1970) (articulating the proof beyond a reasonable doubt standard for criminal trials).

66. Tyler, *supra* note 1, *passim.*

67. *Id.* at 1063. Thus, the viewpoint of this Article is that it is important to consider both types of impacts the *CSI* Effect may have upon the criminal justice system.

68. *Id.*

69. *Id.*

process.[70] In-depth focus on the criminal trial itself is necessary to determine where and how the *CSI* Infection impacts results.

B. Example of What Drives Litigants' Belief that CSI *Infected Jurors Exist*

Consider the following factual scenario: the DNA of the alleged rapist's saliva is confirmed on the victim's breast, items of the accused are found at the scene of the crime, positive eyewitness identification is made by the victim, plus incriminating testimony from both the emergency room nurse and the police officer is received. The jury is asked to consider all of this evidence and decide whether the accused raped the victim. Normally, this amount of evidence would be enough to convict in the typical stranger-rape abduction case. However, in the age of the *CSI* Infected Juror, a jury in Peoria, Illinois required more.[71]

The above facts are from a real alleged rape case that occurred in 2004 and was later tried.[72] The victim was a sympathetic young teenage girl; the defendant was a hardened gang member.[73] The jury heard all the evidence, including the gold star of forensic proof—DNA from saliva on the victim's body. Yet, the jurors remained unsatisfied; they wanted more. In considering the substantive requirements of criminal law and the charge of rape, one might query what more they could have possibly wanted. In this case it is not a mystery what other evidence they wanted. Based on the commentary of a juror after trial, the jurors wanted more forensic evidence—specifically they wanted the victim's cervix tested for dirt to match the dirt at the crime scene.[74]

The Peoria case is repeatedly cited as an example of the *CSI* Effect in action because of the fanciful nature of the juror's comment and the seemingly romantic attraction to forensic testing even though it had no logical connection to the material elements of the case. The Peoria rape case has become somewhat of a poster child for the principle that the pop culture phenomenon of the *CSI*-type television show makes people believe that forensic tests are instantly available to test anything and

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70. *See generally* ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: ADJUDICATION 9–10 (2008) (describing, in part, the sequence of events in a criminal prosecution). Although there are additional phases to the criminal litigation process, this Article will specifically focus on the following distinct parts of the criminal trial: jury selection, opening statement, presentation of evidence, closing argument, jury instructions, and verdicts.

71. *See* Roane, *supra* note 44.

72. *See id.*

73. *See id.*

74. *See id.* (noting that the jury entered a verdict of not-guilty because they were "[u]nmoved by the DNA evidence, [and] felt police should have tested 'debris' found in the victim to see if it matched soil from the park").

everything, and further, that the lack of forensic tests indicates insufficiency in the prosecution's proof. The Peoria case is a classic example of jurors misunderstanding the necessity, or lack thereof, of forensic evidence. Compounding the misunderstanding of what the hypothetical forensic soil tests could prove, these jurors also exhibited confusion about the required material elements of rape. One might wonder if the confusion about the law and their task as jurors was caused by a preconceived fascination with certain forensic tests they expected but did not receive in this case. Cases like the Peoria rape case confirm for many litigators that the alleged *CSI* Effect is all too real.

Critics who dispute the existence of the *CSI* Effect espouse that there could be many untold reasons why the jury acquitted the defendant in the Peoria rape case and that too much is being made of this one case. However, according to the statement of a juror, there was one reason for acquittal—the prosecution did not test the dirt found inside the victim against the dirt at the crime scene. While it could have only been one juror that felt strongly about that point, in a criminal litigation having one juror that disagrees is enough to sway a verdict because criminal convictions are solely based on unanimous verdicts.[75]

In analyzing what the Peoria case means, it is also important to keep in mind some additional procedural rules. The law protects the jury from being required to explain its reasons for the verdict. Jurors are not mandated to speak to anyone after the completion of a case and any information revealed in debriefing after trial is purely voluntary on the part of an individual juror. Thus, it is significant that at least one juror in the Peoria case volunteered his or her reason behind the acquittal.

In a criminal case, the prosecution has the burden of proving all the material elements of the charge "beyond a reasonable doubt."[76] Thus, in order for a jury to acquit a defendant, the acquittal decision must be based on reason.[77] The jury can only acquit if there is a reasonable

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75. Thomas, *supra* note 39, at 71.

> What may be of the greatest concern is what goes on in the jury room, after arguments are made. In 72% of the cases, [the Maricopa County] prosecutors suspect that jurors who watch shows like *CSI* claim a level of expertise during jury deliberations that sway other jurors that do not watch those shows.

Id.

76. *In re* Winship, 397 U.S. 358, 364 (1970) (articulating the proof beyond a reasonable doubt standard for criminal trials).

77. Although acquittals are not as thoroughly analyzed due to the inability of the prosecution to appeal the verdict in the American criminal justice system, application of the reasonable doubt standard requires both guilty and not guilty verdicts to be based upon reason. Therefore, false acquittals, like those alleged to occur due to the *CSI* Effect, are believed to be verdicts without reason. *See* MONAHAN & WALKER, *supra* note 64.

doubt regarding a material element of the charge. Reasonable doubt is "a doubt based on reason, a doubt for which [one] can give a reason,"[78] and not "mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt."[79] Moreover, reasonable doubt "is not a fanciful doubt, nor a whimsical doubt, nor a doubt based on conjecture . . . . The government is not required to establish guilt beyond all doubt, or to a mathematical certainty or a scientific certainty."[80] Therefore, when the Peoria jury entered its verdict of not guilty, finding reasonable doubt in the proof on the charge of rape, the reason upon which their doubt was based, according to the juror's statement, was lack of forensic testing of the victim's cervix for dirt matching the crime scene. This type of juror reasoning is illogical. An analysis of the material elements of the rape charge this jury was asked to consider may illuminate why the jurors' logic seems so very flawed to many.

In Illinois, the crime of rape is defined as forced sex or sex without consent.[81] Therefore the material elements that must be established by the government are that the accused had some form of sex with the victim by force or lack of consent of the victim. The only two issues are sex and consent. The victim testified that she did not consent and the sex with the defendant was forced.[82] The nurse who examined the victim after the rape testified that her rape-kit physical examination of the victim was consistent with rape.[83] The defendant's saliva was found on the victim's breast, which strongly indicates the defendant had sexual contact with the victim.[84]

It is possible that the jury did not believe that sex occurred. Instead of the defendant's saliva getting on the victim's breast during a sex act, possibly the defendant spit on the victim and it landed on her breast.

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78. YOUNG LAWYER'S SECTION, BAR ASS'N OF THE DIST. OF COLUMBIA, CRIMINAL JURY INSTRUCTIONS FOR THE DIST. OF COLUMBIA, § 2.09 (4th ed. 1993) [hereinafter D.C. JURY INSTRUCTIONS] (reasonable doubt).

79. COMMITTEE ON CALIFORNIA CRIMINAL JURY INSTRUCTIONS, CALIFORNIA CRIMINAL JURY INSTRUCTIONS, § 2.90 (West, 7th ed. 2003) (presumption of innocence, reasonable doubt, burden of proof).

80. D.C. JURY INSTRUCTIONS, *supra* note 78, § 2.09 (reasonable doubt).

81. 720 ILL. COMP. STAT. 5/12-13(a) (2006).

> The accused commits criminal sexual assault if he or she: (1) commits an act of sexual penetration by the use of force or threat of force; or (2) commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent . . . .

Id.

82. Roane, *supra* note 44.

83. *Id.*

84. *Id.*

But that is not what the juror commented. There was no comment about the proof of sex being insufficient to convict. Alternatively, perhaps the jury was not convinced regarding consent. But, if the jury was concerned regarding the victim's consent, particular dirt in the cervix does not relate to that concern. Matching dirt relates to the location of the crime scene. Possibly the jury thought the victim was lying as to the location of the sex and actually had consensual sex with the defendant at another location without dirt. As one can see from this exercise, trying to extrapolate what the jury could have thought, maybe thought, did or did not think, is endless. We do know what the juror said influenced the verdict—lack of forensic testing of the dirt inside the victim which, as a legal matter, is not tied to any materiality in the case. However, on a television show, scientifically analyzing the dirt would be a very glitzy and high tech issue for entertainment value, notwithstanding its minuscule legal relevance or probative value regarding the rape charge.

This case stands out as an example of the *CSI* Effect because it is believed to exhibit a glimpse into the insatiable appetite modern jurors have for forensic proof, even when the results of the forensic test appear irrelevant to the material elements in question. The juror comment in the Peoria rape case implies a heightened expectation for exhaustive forensic testing that prosecutors fear. This fear drives the *CSI* Infection throughout the various phases of the trial. Litigants on each side are now vigilantly guessing at how the *CSI* Infected Juror will receive the real case evidence as well as what unanswered questions they might have due to their exposure to the fictional version of criminal investigations and prosecutions.[85] Although it might sound extreme, after Peoria and other cases like it, some trial lawyers began to seek judicial intervention.

The Peoria case stands as an example of a tainted jury, tainted by the *CSI* Effect that allegedly blurs a juror's ability to understand the realities of crimes, crime scene investigations, and true evidence. A *CSI* Infected Juror is perceived to fixate on the presence or absence of certain forensic proof to the exclusion of all other evidence and make factual findings which appear unreasonable and unexplainable. The acquittal in the Peoria case exemplifies the insatiable appetite *CSI* Infected Jurors have for "complex scientific proof," and demonstrates how jurors will disregard testimony from witnesses and law

85. Thomas, *supra* note 39. "[I]n about 40% of the [Maricopa County] prosecutors' cases, jurors have asked questions about evidence like 'mitochondrial DNA,' 'latent prints,' 'trace evidence,' or 'ballistics'—even when these terms were not used at trial." *Id.* at 70.

enforcement officers when their appetite is not satisfied.[86] There seems to be almost no logical limit to the amount of proof a *CSI* Infected jury will demand, notwithstanding normal inferences of guilt or innocence. This phenomenon poses a danger to society because it allows, for example, rapists to walk away free from punishment and to rape again.[87] In this environment, criminals are not acquitted because of insufficient evidence to convict them; rather, they are acquitted because the evidence did not satisfy the jurors' need for over-exhaustive forensic tests like those fictitiously done on television.[88]

The Peoria case is just one of many criminal cases where the *CSI* Infection has been in action and operating to skew jurors' perceptions of proof.[89] Even before the first witness is sworn in, or the first exhibit is marked, many jurors likely have preconceived judgments about what type of evidence a "good" criminal prosecution should include. It is a modern reality that jurors have opinions about law and science, especially regarding how scientific evidence relates to criminal justice. Such preconceptions are inevitable due to the average juror's exposure to television depictions of crime scenes, crime scene investigations and criminal prosecutions.[90] These depictions are replete with impeccably choreographed, Hollywood-style plot development, and romantically handsome leading men who deliver star-powered acting and convey the

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86. Sherri M. Owens, *The* CSI *Effect*, ORLANDO SENTINEL, July 27, 2005, at B1.

87. *See* Roane, *supra* note 44.

> Defense attorneys, predictably, are capitalizing on the popularity of shows like *CSI*, seizing on an absence of forensic evidence, even in cases where there's no apparent reason for its use. In another Peoria case, jurors acquitted a man accused of stabbing his estranged girlfriend because police didn't test her bloody bedsheets for DNA. This man went back to prison on a parole violation and stabbed his ex again when he got out—this time fatally.

Id.

88. *See* Karin H. Cather, *The* CSI *Effect: Fake T.V. and It's Impact on Jurors in Criminal Cases*, 38 APR PROSECUTOR 9, 12 (2004).

> Abbe Rifkin, a long-time prosecutor with the Miami State Attorney's Office, observes: "These shows have had a tremendous deleterious effect on criminal trials and prosecutions, because jurors expect us to be able to do a lot more forensically than we're really able to do. As such, they've almost raised our burden of proof from 'beyond and to the exclusion of every reasonable' to 'scientifically, no doubt at all.'"

Id.

89. *See* Clayton M. Robinson, Jr., *The* CSI *Effect on Sexual Assault Prosecutions*, SEXUAL VIOLENCE JUST. INST. SMART SOURCE, Nov./Dec. 2005, at 1, 1–2, *available at* http://www.mncasa.org/documents/November%202005.pdf.

90. The American viewing audience (i.e., the jury pool) is hooked: among the twenty most popular prime-time shows, criminal justice dramas represented over one-quarter of the programming during the 2008–2009 season. *See* Nielsen Ratings, *supra* note 2 (ranking *NCIS* fifth, *CSI* sixth, *The Mentalist* eighth, *Criminal Minds* twelfth, *CSI: Miami* thirteenth, *CSI: NY* nineteenth).

drama of each scene. Our modern jury pool is overwhelmed by television shows that do not reflect real justice or investigation at all;[91] instead, such fictional depictions may in fact be creating injustice for the victims of crime and undermining the public's safety.

Crime scene images, evidence, and lab reports analyzing the critical evidence necessary to solve the case bombard potential jurors.[92] Every "television-land cold-case" is solved with uncanny precision; it is a recurring scenario observed so often on television and film that it almost seems real. In other words, the idea that all crimes are solvable becomes real,[93] as does the concept that evidence is always perfectly linear and conclusive to only one explanation—the guilt of the accused. Further, it also begins to seem real that sophisticated forensic evidence is always found if a thorough investigation is conducted, and, therefore, inversely implies to the frequent viewer that the lack of such dispositive evidence indicates sloppy police work or weak prosecutorial evidence.[94] Although the lay jury pool may become educated about, or even fascinated with,[95] criminal justice by watching these *CSI*-type shows, their newly gained knowledge is often false, unrealistic, and misapplied.[96] Jurors' erroneous, yet rigid, beliefs about crimes, criminal investigations, and criminal evidence, whether consciously or unconsciously obtained, can lead to both false acquittals and wrongful convictions in some of the most serious cases of rape and murder.[97]

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91. *See* Nielsen Ratings, *supra* note 2 (ranking *NCIS* fifth, *CSI* sixth, *The Mentalist* eighth, *Criminal Minds* twelfth, *CSI: Miami* thirteenth, *CSI:NY* nineteenth).

92. Papke, *supra* note 47, at 1228 (acknowledging the social science research of the cultivation effect and noting that "the overall presence and power of popular culture should not be minimized").

93. *Id.*

94. *See* United States v. Fields, 483 F.3d 313, 355–56 (5th Cir. 2007) (ruling the balancing test of prejudice versus probative value under Federal Rule of Evidence 403 is swayed due to the *CSI* Effect that heightens juror expectation for an explanation or forensic evidence); *see also* Old Chief v. United States, 519 U.S. 172, 188–89 (1997) (noting that the prosecution must generally be allowed to present its case free from a defendant's option to stipulate because jurors may hold it against prosecutors when they are not fully satisfied by the manner in which evidence is presented).

95. *See* Mardis, *supra* note 5, at 12; *see also* Willing, *supra* note 42 (noting that *CSI*-type television programs have helped to draw more students into forensic studies).

96. *See* Roane, *supra* note 44.

97. *See, e.g.*, Morrison, *supra* note 44, at 1 (reporting the perceived *CSI* Effect in the Las Vegas *Binion* murder case); *see also* Findley, *supra* note 21; Andrew Blankstein & Jean Guccino, *'CSI' Effect or Just Flimsy Evidence? The Jury is Out*, L.A. TIMES, Mar. 18, 2005, at A1, *available at* http://articles.latimes.com/2005/mar/18/local/me-jurors18?pg=1 (discussing the perceived *CSI* Effect on the Robert Blake murder case in California and noting that some jurors acknowledged that television crime shows created for them a "higher expectation" of proof); Willing, *supra* note 42 (discussing the Robert Durst case from Texas and the Durst defense strategy of selecting *CSI* Infected Jurors).

III. THE *CSI* INFECTION IN ACTION WITHIN THE CRIMINAL JUSTICE SYSTEM

Quelling ill effects of the *CSI* Infection within criminal litigation is the ultimate goal of this research. This Part examines the relevant arguments of litigants as well as rulings by courts on these issues. The stages of the trial that are particularly relevant to the *CSI* Infection discussion include: jury selection, opening statement, closing argument, admission of scientific forensic tests and corresponding expert witness testimony, and jury instructions. Litigants' perceived fears of *CSI* Infected Jurors can be minimized by: (1) targeting voir dire questions to identify biased jurors and eliminate them from the panel; (2) structuring the litigant's case-in-chief specifically to combat improper inferences by the jury and misconceptions regarding the presence or absence of forensic evidence; (3) utilizing opening statements and closing arguments as the opportunity to minimize any impact from the *CSI* Infection; and (4) drafting special jury instructions that direct jurors to use *only* the standards articulated by the court to weigh the evidence, not standards learned from television or other sources outside the courtroom.

The following will discuss how judges adjudicate the evidentiary, procedural, and constitutional issues surrounding the *CSI* Effect.

A. *Identification and Analysis of the* CSI *Infection in Each Phase of Trial*

In the discussion and analysis of the *CSI* Infection, one must be mindful of the adversarial system in which these issues exist. Litigants on both sides of a criminal case are faced with diverging concerns about the fear of *CSI* Infected Jurors and how they may react throughout the trial to the evidence in the case. Prosecutors may worry that jurors will have unrealistic expectations of proof and that jurors will misinterpret the forensic evidence because of their exposure to fictional versions of crime scene investigations and prosecutions.[98] The defense may predict that *CSI* Infected Jurors will reject some of the prosecution's low-tech evidence and use that as an opportunity by attempting to trigger jurors' pop culture references and misconceptions in cross-examination questions and closing arguments to gain an acquittal.[99] Criminal

98. *See* Kate Coscarelli, *The 'CSI' Effect*, STAR-LEDGER, Apr. 18, 2005, at 1.

99. *See* State v. Swope, 762 N.W.2d 725, 729 (Wis. Ct. App. 2008), *review denied*, 765 N.W.2d 578 (Wis. 2009) (providing an example of the defense tactic of triggering the jury's pop cultural references instead of focusing on the actual testimony from the expert witness). The

defense attorneys may also worry that attempts to directly address the perceived *CSI* Effect within the jury will improperly lower the prosecution's burden of proof, thus leading to an unfair guilty verdict.[100] While respecting the legitimate value of the litigants' competing adversarial concerns, the court cannot ignore the issues and allow a reduction in the government's burden of proof nor allow litigants to manipulate jurors' vulnerabilities. Instead, the objective is to enable jurors to independently assess the case without improper influence stemming from fictional sources outside of the courtroom.

This Article proposes including additional and specific instructions for the jury regarding the dangers of allowing fictional information to color the analysis of real case facts. Correctly identifying biased jurors is nearly impossible. Therefore, all seated jurors must be properly instructed regarding the dangers of allowing the media, as well as fictional television, to influence their service as jurors. Although this Article is primarily concerned with the negative consequences of *CSI* Infected Jurors rendering wrongful convictions and false acquittals, one positive consequence of *CSI* Infected Jurors may, in fact, be their overall enthusiasm and interest in criminal investigations. This could present added value to the overall litigation process.[101]

The new special jury instruction proposed herein optimizes the modern juror's increased enthusiasm[102] for criminal investigations and

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prosecution's expert witness, a death analyst, was asked by the defense, on cross examination, to compare his work with the FBI to the television show, *Quincy, M.E.*, an NBC television series running from 1976 to 1983. *Id.* The expert witness answered:

> Yes, it's television and . . . it is a problem for law enforcement I think because there is an expectation by people who watch those shows, things like *Criminal Mind*. The FBI profile does not have a Gulf Stream that we fly around in. Contrary to popular opinion we still fly coach. What they do in television just many times is simply not feasible in the real world and it-it really takes . . . a critical detailed review of these types of crimes or these types of death scenes to figure out what is going on, and it is very tedious, and it is not very glamorous, but that really would not work in a television show, so I think although it is entertaining, it is simply not reality.

Id. at 729 n.3; *see also* Willing, *supra* note 42 (discussing the Robert Durst case as an example where *CSI* Infected jurors were successfully targeted by defense attorneys to gain an acquittal). In *Evans v. State*, a defense cross-examination of a police officer asking why the officer did not use audio surveillance to capture the accused's incriminating statements triggered the court to give the jury Maryland's *CSI* jury instruction: a curative instruction that there was no legal requirement that the prosecution use any specific investigative technique or scientific evidence to prove its case. Evans v. State, 922 A.2d 620, 620 (Md. Ct. Spec. App. 2005).

100. *See* United States v. Harrington, 204 F. App'x 784, 788 (11th Cir. 2006).

101. *See* Mann, *supra* note 51, at 214 (asserting that the heightened interest of jurors in forensic science, due to *CSI* television shows, is beneficial to the criminal justice system). *See* Mark Findlay, *Juror Comprehension and the Hard Case—Making Forensic Science Simpler*, 36 INT'L J. L. CRIME & JUST. 15 (2008).

102. Another part of the *CSI* Effect is that the average lay juror is intrigued about criminal

prosecutions, while minimizing any misinformation gained from television.[103] A juror's expectation for more proof is not necessarily a bad thing.[104] Actually, the opposite is true. Increased scrutiny of the prosecution's evidence by the jury is important. It is beneficial to the legitimacy of the criminal justice system.[105] The *CSI* Infection becomes problematic when litigators surreptitiously manipulate jurors' analysis of evidence, in the belief that jurors will improperly use skewed information gained from fictional entertainment sources.[106] Problems arise when jurors unconsciously use their fictionally-based knowledge to make specious inferences in real cases.[107] This is the point where the *CSI* Infection most dangerously threatens justice and must be remedied.

1. Selecting and Instructing the Jury: Voir Dire Questioning

The *CSI* Infection must be addressed with potential jurors immediately, before any jurors are selected. Therefore, effective use of the voir dire process is necessary.[108] Voir dire questioning must

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law, criminal investigations, and criminal prosecutions because of their increased exposure to *CSI*-type fictional television dramas. *See* Roane, *supra* note 44.

> The whole investigation genre is hot, from NBC's *Law & Order* series on down to the documentary-like recreations of A&E's *Forensic Files*. America is in love with forensics, from the blood spatter and bone fragments of TV's fictional crime scenes to the latest thrust and parry at the Michael Jackson trial.

Id.

103. *See infra* Part III.A.2–3. New *CSI* Infection instructions are suggested as part of the standard instructions given at the beginning and throughout the case as well as given at the conclusion of all the evidence along with the reasonable doubt instruction.

104. Challenging the government's evidence and holding the government to its high burden of proof is an important and necessary component of the American criminal justice system. There is no need to remedy instances wherein a jury acquits based on reason.

105. *See* U.S. CONST. amend. VI; *In re* Winship, 397 U.S. 358, 364 (1970) ("[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.").

106. *See* Willing, *supra* note 42. The juror consultant, Robert Hirschhorn, is a perfect example. *Id.* Hirschhorn advised Robert Durst's defense attorneys to select jurors who watched shows like *CSI* because he believed they would expect the prosecutors to produce forensic evidence which was beyond what the prosecutors could give them. *Id.* Durst was accused of dismembering the body of a person he claimed to have shot in self defense. *Id.* The head of the body was never found and the defense emphasized that wounds to the head might have proved their claim of self defense. *Id.* The defense gambled that *CSI*-infected jurors would expect the prosecution to produce this kind of evidence and the gamble paid off: Durst was acquitted. *Id.*

107. *See, e.g.*, Morrison, *supra* note 44; Roane, *supra* note 44; Willing, *supra* note 42.

108. *See* Anne M. Payne & Christine Cohone, *Jury Selection & Voir Dire in Criminal Cases*, 76 AM. JUR. TRIALS 127, §1 (2009).

> Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored, as without adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.

initially identify, and then eliminate, biased jurors from the panel. The procedure for voir dire varies depending upon the jurisdiction, as well as the customs of the presiding judge. Questions can be asked either by the litigants or by the judge;[109] typically, in federal court, judges ask the majority of questions, while in state court judges generally allow litigants to ask most questions.[110]

This Section discusses *United States v. Harrington*[111] as an example of the effective use of voir dire to address the potential *CSI* Infection of jurors. In *Harrington*, the presiding federal district court judge, Marcia Cooke, asked potential jurors targeted voir dire questions to identify individual *CSI* Infected Jurors. Defendant Harrington objected to the targeted questioning and appealed.[112]

In considering Harrington's objection, one may wonder whether it is customary for judges to inquire about the television viewing habits of potential jurors. Although judges maintain wide discretion in determining voir dire questions, not all judges seek to identify, and possibly eliminate, *CSI* Infected Jurors from the venire. In fact, Judge Cooke is one of few judges who actively engage in this modern, but imperative, exercise.[113]

Id.

109. *Id.* §§ 4, 5.

110. *See id.*

111. United States v. Harrington, 204 F. App'x 784, 788 (11th Cir. 2006).

112. *Id.*

113. One reason Judge Cooke gave as to why she asks voir dire questions regarding the potential *CSI* Infection where other judges do not, is because she also was a trial lawyer in the post-*CSI/Law & Order* era. Cooke Interview, *supra* note 48. Prior to her appointment to the federal bench, as a litigator she encountered the *CSI* Effect operating within her trial juries. *Id.* Judge Cooke says she understands the issue of the *CSI*-phenomenon and its impact in the courtroom and finds that it is important to: (1) identify *CSI* Infected Jurors, and (2) remind all potential jurors that the case they are about to hear is real life, not television. *Id.* Although she is not the only judge that is taking note and taking action regarding the *CSI* Infection, her perspective is interesting especially considering her procedure was appealed and affirmed as appropriate. *See also* McMahan, *supra* note 46 (demonstrating that Judge Bass shares Judge Cooke's concerns); *cf.* MARICOPA COUNTY ATT'YS OFFICE, *supra* note 25 (demonstrating that judges in Maricopa County State Court treat prosecutors' concern regarding the *CSI* Infection within the jury venire as nonsensical). *See Harrington*, 204 F. App'x at 788–89.

Not all judges tackle this thorny issue.[114] Judge Cooke, therefore, is not typical, and instead, is unique among her peers.[115] A 2005 survey by the Maricopa County Attorney's Office in Arizona found that the majority of prosecutors in Maricopa County think that state court judges do not effectively acknowledge the *CSI* Infection; in fact, some prosecutors feel that judges find the *CSI* Infection a silly notion.[116] Even if novel or innovative, it is perfectly appropriate for judges, sua sponte, or upon the request of counsel, to ask these types of questions during jury selection in order to ensure fair and impartial jurors are impaneled as the triers-of-fact in every criminal case.

> [D]istrict courts "have broad discretion in formulating jury instructions provided that the charge as a whole accurately reflects the law and the facts,' and [appellate courts] will not reverse a conviction on the basis of a jury charge unless 'the issues of law were presented inaccurately, or the charge improperly guided the jury in such a substantial way as to violate due process."[117]

An interview with Judge Marcia Cooke revealed more insight into why she addresses the latent *CSI* Infection within her courtroom.[118] Judge Cooke explained that she finds it necessary to query potential jurors, before they are selected, regarding any *CSI* Effect biases they may have because it could impact their decision-making processes. Judge Cooke asks the following types of questions: (1) can the juror make the distinction between the fictional cases depicted on the *CSI*-type shows and real cases; (2) can the juror convict even if *CSI*-type evidence is not presented; and (3) does the juror understand that some of the tests and investigation procedures used on television shows may not even be possible in real life?[119] Jurors who indicate that they will

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114. *Compare* Honorable Donald E. Shelton, *The 'CSI Effect': Does It Really Exist*, NIJ JOURNAL NO. 259, Mar. 2008, at 6, *available at* http://www.ncjrs.gov/pdffiles1/nij/221501.pdf ("[J]udges should understand, anticipate, and address the fact that jurors enter the courtroom with a lot of information about the criminal justice system and the availability of scientific evidence.") *and* McMahan, *supra* note 46 (demonstrating that Oklahoma County District Judge Jerry Bass shares Judge Cooke's concerns) *with* MARICOPA COUNTY ATT'YS OFFICE, *supra* note 25, at 9–10 (noting that only nineteen percent of Maricopa County, Arizona prosecutors experienced cases in which judges communicated with juries about the *CSI* Effect and one prosecutor said, "Most judges think it's silly I even address these questions in *voir dire*").

115. Cooke Interview, *supra* note 48.

116. *See* MARICOPA COUNTY ATT'YS OFFICE, *supra* note 25, at 9–10.

117. United States v. Prather, 205 F.3d 1265, 1270 (11th Cir. 2000) (quoting United States v. Arias, 984 F.2d 1139, 1143 (11th Cir. 1993)).

118. Cooke Interview, *supra* note 48.

119. *Id.*; *see also* Schweitzer & Saks, *supra* note 4, at 358 ("One forensic scientist estimates that 40% of the 'science' on *CSI* does not exist, and most of the rest is performed in ways that crime lab personnel can only dream about."); *CSI: Crime Scene Investigation: $35K O.B.O.*, *supra* note 53 (discussing an example of a television portrayal of investigative techniques that are

require a showing of *CSI*-type evidence in order to convict are appropriate candidates to be dismissed for cause.[120]

In *Harrington*, the defendant was convicted by jury verdict of multiple felony drug trafficking charges.[121] He contributed to a marijuana trafficking operation by sailing boats from Jamaica to South Florida that contained hidden compartments full of marijuana.[122] Harrington challenged his conviction by arguing that Judge Cooke abused her discretion by instructing jurors that they could base their conviction only on evidence they learned in court.[123] Additionally, Harrington claimed that the instruction allowing jurors to only use "in-court evidence," coupled with Judge Cooke's statement that *CSI*-type evidence would not be required for a conviction, were erroneous.[124]

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not possible in real life).

120. Judge Cooke also accepts excessive viewing of *CSI*-type shows as a race-neutral reason to dismiss jurors if there is a peremptory challenge by one of the parties. Cooke Interview, *supra* note 48; *see also* People v. Wells, 850 N.E.2d 637, 642 (N.Y. 2006) (finding that a prosecutor's use of a peremptory challenge to excuse an African-American female juror who stated she frequently read mystery novels survived a *Batson* challenge and the court accepted the prosecutor's explanation of the *CSI* Effect as his race neutral reason for striking the juror). *But see* United States v. Hendrix, No. 06-CR-0054-C-01, 2006 WL 3488970 (W.D. Wis. Nov. 30, 2006), *aff'd*, 509 F.3d 362 (7th Cir. 2007). In *Hendrix*, the Defendant appealed for a new trial alleging that the trial judge erred "in finding that the government had made a race-neutral showing for its striking of the only two African-Americans on the jury panel . . . ." *Hendrix*, 2006 WL 3488970, at *1. The court ruled that there was no timely *Batson* objection to the striking of these jurors and further accepted the government's race-neutral reason being that both African-American jurors had a close relative in prison on a felony charge. *Id.* However, in significant dicta, the *Hendrix* court went on to say:

> I agree with [the] defendant that watching *CSI* is not a valid reason by itself for striking prospective juror Woodland when many other panelists had reported watching the same show. However, it gave [the prosecutor's] decision a modest amount of added heft in combination with the fact that [juror] Woodland has a relative in prison, particularly when the case was one in which there was no scientific evidence to prove the defendant's possession of the firearm. (It is possible that because shows such as *CSI* rely heavily on scientific evidence in solving crimes, jurors that watch these shows expect the government to produce similar evidence in any criminal case.)

Id. at *5; Tyler, *supra* note 1; *see also* Schweitzer & Saks *supra* note 4.

121. United States v. Harrington, 204 F. App'x 784, 786 (11th Cir. 2006).

122. *Id.*

123. *Id.* at 788. Judge Cooke did not give the jurors a direct *CSI* instruction during voir dire, nor at the beginning or close of the evidence. *Id.* Instead she questioned potential jurors about their understanding of the difference between television depictions of criminal investigations and the real life version of criminal investigations and prosecutions. *Id.* at 789. Giving a *CSI* jury instruction at the close of evidence was done, however, in *State v. Evans*, which is discussed below. *See infra* III.A.3.

124. *Harrington*, 204 F. App'x at 899; *see also* Evans v. State, 922 A.2d 620, 627 (Md. Ct. Spec. App. 2005) (instructing jurors via curative jury instruction that the government is not required to utilize specific investigative techniques or scientific tests). The curative *CSI* instruction in *Evans* was given in response to the defense argument that the police had not used all the investigative equipment available because the investigating detective did not use audio and

Harrington asserted that Judge Cooke's voir dire lessened the government's burden of proof and undermined the court's later reasonable doubt instruction.

Harrington's argument raised due process concerns over lowering the government's burden of proof.[125] The argument echoed the sentiment of every defense attorney whenever there is an attempt by the government or a judge to query the venire in voir dire, or even to caution a seated panel of jurors in either opening statement or closing argument about the dangers of imposing television standards on real cases.[126] However, the United States Court of Appeals for the Eleventh Circuit rejected Harrington's challenge of Judge Cooke's jury selection procedure:

> Here, we conclude from the record that the district court did not abuse its discretion by telling the jury venire that it could only convict Harrington based on evidence presented in court. The district court's use of the word "convict" was a matter of phrasing and did not change the burden of proof. Additionally, the district court did not err by questioning jurors about whether they would be able to separate television shows from the facts of the case and stating that there may not be "CSI" evidence presented to them. The district court's statements were not actual instructions and did not inaccurately reflect the law. Further, the district court instructed the paneled jury, before opening arguments [sic], on the applicable burden of proof, and the jury is presumed to have followed this instruction. Thus, the district court did not abuse its discretion.[127]

The Eleventh Circuit's ruling in *Harrington* appears to be a logical and correct result.[128] What could be more appropriate than the trial judge instructing her jurors to consider only admissible evidence learned in court when determining guilt or innocence in a criminal case? It is important to query potential jurors about their ability to focus on

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visual surveillance equipment during the controlled drug transactions which would have corroborated the detective's testimony. *Id.* Evans' conviction was affirmed on appeal. *Id.*

125. Prosecutors and judges may not seek to lower the state's burden of proof in a criminal case. *See* State v. Cooke, 914 A.2d 1078, 1088 (Del. Super. Ct. 2007) (highlighting that one must be careful not to denigrate, disparage, or minimize the burden of proof in a criminal case).

126. *See Harrington*, 204 F. App'x at 784 (challenging the judge's voir dire questioning as lowering the government's burden of proof); Mathis v. State, No. 25, 2006, 2006 WL 2434741 (Del. Aug. 21, 2006), *aff'd*, 968 A.3d 492 (Del. 2009) (challenging prosecutor's opening statement as lowering the government's burden of proof); Boatswain v. State, No. 408, 2004, 2005 WL 1000565 (Del. Apr. 27, 2005), *aff'd*, 962 A.2d 256 (Del. 2008) (challenging prosecutor's closing argument as disparaging the government's burden of proof); *Evans*, 922 A.2d at 620 (challenging the jury instructions are lowering the government's burden of proof).

127. *Harrington*, 204 F. App'x at 789.

128. *Id.*

reality and distinguish fiction. It is the judge's duty to make sure that jurors rely only on admissible evidence in their deliberations, and not on knowledge learned from television, newspapers, independent investigations, or other unauthorized sources.[129]

However, the appellate arguments that challenged the use of targeted questions to eliminate the *CSI* Infection seem to presuppose that it is appropriate for jurors to consider evidence learned outside the courtroom.[130] Yet, if jurors were permitted by the judge to consider evidence learned outside of court, the defense would object on due process grounds, and rightly so.[131] When jurors in deliberation on a criminal case are allowed to consider evidence obtained from unknown sources, unrestrained by the evidentiary and constitutional strictures of the American criminal justice system, the fairness of the trial proceeding is completely compromised.[132] Warning jurors against this danger, and questioning a juror regarding his or her ability to conform to this requirement is necessary and appropriate.

Appellate courts have also reviewed the appropriateness of the prosecutor, instead of the judge, questioning prospective jurors about their television-viewing habits. In a recent capital murder case, *Goff v. State*,[133] the prosecutor asked whether the potential jurors could separate what they see on television from what they see in the courtroom.[134] The prosecutor also asked the potential jurors if they could keep an open mind about the case and "listen to the evidence and not speculate because they don't have, say, DNA or they don't have fingerprints and things you may see or hear about on CSI? Can everyone tell me they can do that? Yeah?"[135]

> The prosecutor again reminded the jurors of the question posed during voir dire. In closing argument, the prosecutor stated: "[Y]ou were asked in voir dire, you all know about CSI. Can you set that aside if it's not needed and return a verdict, and you all said yes. So we ask you to hold to that. It's not necessary here, and it's not needed. The evidence is overwhelming."[136]

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129. *See infra* Part III.A.2; *see also infra* note 166 and accompanying text.

130. *Harrington*, 204 F. App'x at 788.

131. Letters to the Editor, *When Jurors Seek Evidence Online*, N.Y. TIMES, Mar. 23, 2009, at A20 [hereinafter *Seek Evidence Online*].

132. U.S. CONST. amend. VI; Crawford v. Washington, 541 U.S. 36, 68 (2004) (holding that in a criminal case the only testimonial evidence the jury is allowed to consider is evidence that the defendant has had the opportunity to cross-examine).

133. Goff v. State, 14 So. 3d 625 (Miss. 2009).

134. *Id.* at 652–53.

135. *Id.*

136. *Id.*

Thus, in closing argument the prosecutor urged the jury that DNA testing was "not necessary" and "not needed" to convict the accused, Mr. Goff.

In *Goff*, the facts of the crime were very gruesome.[137] The female victim, Brandy, was stabbed to death, her organs ripped out of her body through a hole in her chest allegedly by her boyfriend, Joseph Goff, and the crime scene and the body were set on fire.[138] Notwithstanding the bloody crime scene and the fact that items retrieved from the murder scene and from Goff's car contained blood and tissue, DNA testing was not performed on any of the evidence.[139] Furthermore, the testing that was conducted did not identify the source of the blood.[140]

Brandy had left her husband and child to be with Joseph Goff, her new boyfriend.[141] Brandy and Goff were staying at a motel, but she became scared of Goff and called her husband to help her.[142] Her husband had arranged to come get her the next morning.[143] However, by the next morning she was dead.[144]

Goff gave a Mirandized statement stating that when he left the motel room Brandy was alive, and when he came back she was dead and mutilated.[145] Goff further admitted lying on top of Brandy's body when he returned and found her murdered.[146] Detective Lambert, who investigated the case, testified at trial that "the original request for DNA . . . was withdrawn once he determined Goff was in the motel room and that Goff had lain on top of Brandy['s body]."[147] At trial Goff contended that Brandy's husband killed her.[148] Goff presented evidence attempting to imply a domestic violence history between Brandy and her husband as a motive.[149] Despite this defense, the jury convicted Goff of murdering Brandy and sentenced him to death.[150]

137. *See id.* at 636–38 (summarizing the facts of the crime).
138. *Id.*
139. *Id.* at 638–39.
140. *Id.*
141. *Id.* at 633.
142. *Id.*
143. *Id.*
144. *Id.* at 634.
145. *Id.* at 636.
146. *Id.*
147. *Id.* at 639 n.13.
148. *Id.* at 639.
149. *See id.* (implying that the history of domestic violence suggested a motive).
150. *Id.* at 672.

Goff presents a different legal question than *Harrington*. In *Harrington*, the *CSI* Effect issue was neutrally addressed by the court as a routine matter. Based on the interview with Judge Cooke, she asks all jurors similar questions, and the voir dire in *Harrington* was not special, nor tailored toward the impending facts of the case.[151] In *Goff*, the *CSI* Effect issue was raised adversarially, by the prosecutor, with an eye toward the government's lack of DNA evidence in that case. Moreover, in *Goff*, the voir dire questions were followed up with the jury, in an adversarial manner, during the prosecution's closing argument when the jurors were asked to remember what they promised in jury selection—that they would put aside *CSI* and listen to all the evidence even if there was no DNA evidence. Goff challenged the prosecutor's voir dire questioning and closing argument under the theory that the prosecutor improperly "sought a promise from the jury that they would be able to convict Goff even in the absence of DNA evidence."[152] At first glance, it seems like the prosecutor "made a deal" with the jurors that they would convict Goff without DNA. But upon close inspection of the prosecutor's language, he did not ask if they could convict without DNA evidence, he asked if they would listen to the evidence and not speculate; and further, whether, in the age of *CSI*, they could listen to all the evidence and not speculate even in a case that did not have DNA evidence.[153] This type of language is consistent with the wording of the reasonable doubt standard that forbids speculation.[154] Thus, the prosecutor's statements contained a correct statement of the law.[155] However, when the prosecutor referenced the *CSI* Effect discussion again in closing argument, was the prosecutor asking the jurors to fulfill a promise and convict, or simply to consider all the evidence presented

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151. Cooke Interview, *supra* note 48.

152. *Goff*, 14 So. 3d at 652–53.

153. *Id.*

154. *See, e.g.*, *supra* notes 78–79; *see also* People v. Williams, 21 P.3d 1209, 1216 (Cal. 2001) (holding that jurors are required to follow the law as instructed by the court). In *Curley v. United States*, the Court stated:

> The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy.

Curley v. United States, 160 F.2d 229, 232 (D.C. Cir. 1947).

155. *Goff*, 14 So. 3d at 652–53; *see also* Taylor v. State, 672 So.2d 1246, 1264 (Miss. 1996) (explaining that the prosecutor's questions during voir dire were simply used to gain insight into the prejudices of the potential jurors rather than to commit them to a verdict).

in the case—such as Goff's statements and evidence found at the crime scene and in Goff's car?[156]

Upon close inspection of the language in a sterile transcript record, it is clear what the prosecutor asked—he asked for them to consider all the evidence. The trepidation is still whether it was understood that way by the jurors during the heat of a live and impassioned closing argument in court. There is the residual impression that the jurors were asked to follow up on a promise to convict, yet technically what they promised in jury selection was actually to keep an open mind. The substance of the closing argument appropriately highlights that the DNA evidence is not needed to convict due to the overwhelming nature of the actual evidence that was presented throughout the trial.[157] On appeal, Goff's conviction was affirmed and the prosecutor's statements in voir dire and closing argument were found to be proper.[158] The court rejected Goff's allegations of error.[159]

As advocates discuss perceived *CSI* Effect issues with potential jurors during voir dire, lawyers must be careful not to improperly influence jurors or extract a promise from them prior to trial.[160] Such a promise violates due process.[161] Jurors cannot be put in a "box" or make a promise that prevents them from considering all the evidence relevant to the criminal charges.[162] It is reversible error to ask a juror to commit to returning a particular verdict.[163] Although most state courts liberally allow the attorneys to conduct voir dire, it is a constitutionally safer practice to allow the court to perform voir dire regarding the *CSI* Effect issues wherein there is no adversarial spin to the questioning nor any pressure placed on jurors to "come through as promised" for one side or the other.

The prosecutor in *Goff* walked a thin, but straight, line with the jury and did not violate any constitutional or procedural rules.[164] However, more importantly, the prosecutor addressed the elephant in the room:[165]

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156. *Goff*, 14 So. 3d at 652–53.

157. *Id.*

158. *Id.*

159. *Id.* at 672.

160. Stringer v. State, 500 So. 2d 928, 938–39 (Miss. 1986) (stating that such a promise prevents jurors from considering all the factors relevant to a verdict).

161. *See id.* (explaining that it is reversible error to ask a juror during voir dire to commit to returning a particular verdict).

162. *Id.*

163. *Id.* at 938.

164. *Goff*, 14 So. 3d at 652–53.

165. Although rules of procedure often prevent the jury from learning about certain prejudicial facts, it is also widely suspected that jurors talk about the exact issues that courts instruct them

the expectation for *CSI*-type evidence, particularly in a serious murder case. Since most murder cases on television or film conduct DNA testing of the blood evidence, discussion of the topic with the jury was relevant and warranted. Focusing the jury to consider all the evidence is key to fair deliberations in all cases, but it is particularly imperative in death penalty cases, which carry the most serious punishment that the law currently allows.

This Article next addresses whether *CSI* Effect issues should be discussed with the jurors before any evidence is heard, after all the evidence has been received, or both.

2. Instructing Jurors Before Any Evidence

At the beginning of a case, and prior to the admission of any evidence, jurors receive standard jury instructions. These instructions remind jurors of their role as fact-finders and caution them about technical due process concerns in layperson's terms. Jurors are told: (1) to keep an open mind; (2) not to make conclusions about the case until all the evidence is heard; (3) not to discuss the case with anyone until the end of the case; (4) at the end of the case, to only discuss the case with their fellow impaneled jurors who have taken an oath to be fair and have heard all admissible evidence (as well as proper cross-examination of that evidence); (5) not to read any news accounts about the case; and (6) not to conduct any personal investigation.[166] These instructions are given at the beginning of a case and typically restated daily when the court adjourns.[167] Jurors are reminded about their role, oath, duty, objectivity, and fairness.[168] Human nature makes following some of these instructions difficult, which is one reason that jurors are commonly reinstructed on these points multiple times during the case. Still, some jurors fail to comply fully with these directives,[169] and, depending on the severity of the violation of the court's instruction, it

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not to talk about. Therefore, there is value in bringing the issue to the forefront and discussing it openly for the jury to consider. Further, the case evidence did address why there was no DNA—the request was withdrawn once it was learned that the accused's DNA in the room could not connect him to the crime because it was his motel room and his admission about lying on the body. It is still curious that DNA testing was not done to exclude the husband as a suspect, especially since Goff's defense in part was to point blame at the husband as the likely killer. *Id.*

166. COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS—FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT §§ 1.9, 2.1 (West Group 2000) [hereinafter MODEL JURY INSTRUCTIONS].

167. *Id.*; *see also* People v. Williams, 21 P.3d 1209, 1216 (Cal. 2001) (explaining that jurors are required to follow the law as instructed by the court).

168. MODEL JURY INSTRUCTIONS, *supra* note 166.

169. *Seek Evidence Online*, *supra* note 131.

could cause a mistrial.[170] When the fairness of the trial is substantially compromised, the parties are entitled to a new trial with a new jury that will follow the court's directive.[171]

Cautioning potentially *CSI* Infected Jurors earlier and more often during the case is suggested. An amended standard jury instruction could be given at this stage of the trial to address potential *CSI* Effect issues. The additional language would remind jurors that knowledge gained from fictional sources, such as television shows, cannot be used in their assessment of the case. Currently courts give some version of the following instruction to jurors:

1.3 WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are, consists of:

(1) the sworn testimony of any witness;

(2) the exhibits which are to be received into evidence; and

(3) any facts to which all the lawyers stipulate.

1.4 WHAT IS NOT EVIDENCE

The following things are *not* evidence, and you must not consider them as evidence in deciding the facts of this case:

(1) statements and arguments of the attorneys;

(2) questions and objections of the attorneys;

(3) testimony that I instruct you to disregard; and

(4) anything you may see or hear when the court is not in session even if what you see or hear is done or said by one of the parties or by one of the witnesses.

In the age of the *CSI* Infection, an additional fifth bullet could be added to the standard instruction already entitled "What is not Evidence." This would highlight that information learned outside the courtroom from fictional television, movies, and books about criminal investigations cannot be considered in the jurors' decision-making process. This fifth point would address the difficulties faced by lay jurors attempting to differentiate between fact and fiction. The blurring between fact and fiction is becoming grayer and increasingly difficult for lay jurors to separate.[172] Although many television shows are based

170. *See* John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1.

171. *See id.* (describing a series of recent cases, both criminal and civil, in various jurisdictions, wherein juror violations have created varying responses by judges on the question of mistrial).

172. Papke, *supra* note 47, at 1231.

on plots ripped from the headlines, they are not legally accurate depictions of the cases, but rather, sensationalized versions.[173] Television shows are not bound by the Constitution or rules of evidence. The general facts depicted can be similar to reality, but the manner by which those facts are discovered, and the reliability of the investigative methods used in obtaining them, as well as their admissibility in court, are stretched and manipulated by producers for entertainment purposes and better ratings.[174] Due to the widespread popularity of this type of entertainment, jurors must be cautioned.

An additional reminder can only help. Warning early in the case, before evidence is heard, poses a lesser threat to unfair prejudice.[175] An additional remedy, that will be discussed next, considers instructing the jury about *CSI* Effect issues after the evidence is heard.[176] However, instructing early and before the evidence is received is a more neutral and potentially more effective approach.

One may debate the efficacy of adding another admonishment to the current standard instructions. However, this Article urges that the appropriate role of the court is to instruct jurors on how to avoid the pitfalls of the *CSI* Infection and any negative impact of pop culture influences that could skew their findings. Adding this cautionary instruction fits the needs of the modern criminal jury.

3. Instructing Jurors After All the Evidence

Giving jurors further instruction after all the evidence is heard can be beneficial too.[177] Arguably, it is insufficient to only give cautionary instructions at the beginning of trial, during the juror selection process, or during the daily case adjournments. The final instructions given at

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173. Thomas, *supra* note 39, at 70; *see also* Richard Catalani, *A* CSI *Writer on the* CSI *Effect*, 115 YALE L.J. POCKET PART 76 (2006), http://www.yalelawjournal.org/images/pdfs/34.pdf.

174. *See* Nielsen Ratings, *supra* note 2.

175. Curley v. United States, 160 F.2d 229, 232 (D.C. Cir. 1947) ("The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy.").

176. *See, e.g.*, Evans v. State, 922 A.2d 620, 628 (Md. Ct. Spec. App. 2007) (illustrating an example of instructing the jury about these issues after the evidence had been heard); *see also* discussion *infra* Part III.A.3 (discussing the benefit of giving the jury instruction after all the evidence is heard).

177. In all criminal cases the jury is instructed at the end of all the evidence. The instructions at the beginning of the case and during the recesses primarily address the procedural issues regarding the jurors' role as fact-finder. The instructions at the end of the case additionally advise the jurors regarding the substantive law that applies. For example, the jury is instructed about the law regarding direct and circumstantial evidence and how to weigh it as a general instruction in every case, and they are instructed regarding the specific criminal law of the charges, e.g., murder or robbery.

the close of the evidence are crucial to a fair and effective deliberation because it is the last time jurors can be reminded to avoid analyzing the facts of the case through the lens of fiction.

At the end of the case, immediately prior to deliberations, jurors must be accurately focused on their task and guided to use only admissible evidence and information during deliberations. Consistent with the instructions during voir dire at the beginning of the case, information gained outside the courtroom, especially from fictional sources, is still not appropriate information with which to analyze the weighty case evidence.[178] Jurors should again be explicitly instructed regarding this requirement at the close of the evidence. Although jurors use their own common sense[179] in their deliberations, the common sense used should be knowingly drawn from reality, not from fiction or fantasy.[180]

A special *CSI* Infection jury instruction should be available and routinely used for this purpose. This type of special jury instruction can further train jurors against using improper sources of information for the purpose of fact-finding and decision-making. Jury instructions have the potential to blunt the impact of any remaining traces of the jury's *CSI* Infection and can reduce the risk of possible erroneous factual analysis, and correspondingly, wrong verdicts. The research conducted by the Maricopa County Attorney's Office indicates that eighty-three percent of prosecutors suggested using special jury instructions for this purpose.[181]

However, the controversy persists regarding the language of any special jury instruction directed at the perceived *CSI* Effect. This Article urges the use of a neutral *CSI* Infection instruction aimed at steering jurors away from using fictional information learned outside of court and instead focusing them solely on the information learned in the

178. *See* Schweitzer & Saks, *supra* note 4 (indicating that *CSI* Infected Jurors tend to use knowledge gained during excessive viewing of *CSI*-type programming in the decision-making process as jurors). Specific instructions to the contrary may change the behavior of the excessive *CSI* watchers that Saks discusses. *Id.*

179. COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, § 1.04 (1998), *available at* http://www.ca7.uscourts.gov/pjury.pdf (Weighing the Evidence-Inferences). This instruction states:

> You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life. In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this 'inference.' A jury is allowed to make reasonable inferences. Any inferences you make must be reasonable and must be based on the evidence in the case.

Id.

180. *See* Papke, *supra* note 47 (reducing the cultivation effect of jurors during deliberations).

181. MARICOPA COUNTY ATTY'S OFFICE, *supra* note 25, at 10.

courtroom from the admissible evidence. Yet, another type of *CSI* Effect instruction is being used in Maryland. In *Evans v. State,*[182] a case of first impression in Maryland regarding jury instruction aimed at curbing any perceived *CSI* Effect, the following special jury instruction was given:

> During this trial, you have heard testimony of witnesses and may hear argument of counsel that the State did not utilize a specific investigative technique or scientific test. You may consider these facts in deciding whether the State has met its burden of proof. You should consider all of the evidence or lack of evidence in deciding whether a defendant is guilty. However, I instruct you that there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove its case. Your responsibility as jurors is to determine whether the State has proven, based on the evidence, the defendants' guilt beyond a reasonable doubt.[183]

The defense in *Evans* objected to this instruction, arguing that the court's remedial attempt was too strong and that the instruction, instead, improperly lowered the government's burden of proof therefore prejudicing the defendant.[184] On the question of whether to give the special jury instruction, the trial court determined that the defense's cross-examination of the testifying investigating detective in the case triggered the necessity for this curative instruction.[185] During trial, the defense questioned the detective regarding his failure to use video or audio surveillance during his investigation.[186] This line of questioning was intended to make the point that electronic surveillance could have corroborated his testimony.[187] The lack of corroboration was again brought out by the defense in closing argument.[188] In arguing to the jury, counsel stressed the lack of the State's evidence to demonstrate a "cross-check of reliability":

> There are very significant facts in this case that create reasonable doubt that my client and [the other] client were acting in a conspiracy, in concert to distribute drugs. Now, one factor in this case is whether or not there are any cross-checks of reliability. Cross-checks of reliability means that apart from the testimony of one officer who is

182. Evans v. State, 922 A.2d 620 (Md. Ct. Spec. App. 2007).

183. *Id.* at 628.

184. *Id.* at 627–28.

185. *Id.*

186. *Id.*

187. *Id.* at 628. "The trial judge was prompted to give the above instruction by the cross-examination of Detective Bradley, which inquired as to specific investigative techniques that were not used in this case." *Id.*

188. *Id.*

> telling you what he claims happened, are there any other cross-checks of reliability? Well, we know in this case that there is no video of this event, no surveillance tapes of this event. There were questions asked of the detective whether that may have been a possibility, could have broken out a video camera, worn an audio, was it available. I think that could have been done. It wasn't done here. That would have been a cross-check of reliability so that besides the testimony of the detective, you would have something else to cross-check . . . .
>
> . . . [there is] the lack of any video surveillance evidence, whatever, none of that, absolutely none of that exists in this case.[189]
>
> . . . So how about a videotape or an audiotape? Remember, Detective Bradley said, "Well, you know, we have the stuff, but my particular unit didn't have it. We would have to ask the sergeant, or the sergeant would have to ask somebody else." . . . *I[t] strikes me that if you've got the equipment, you use the equipment. You have a situation where there are absolutely no scientific tests that implicate my client in any way. There's no audio. There's no video. There's no fingerprints. There is nothing.*[190]

The appellate court in *Evans* ruled that the trial court's curative jury instruction correctly informed the jury that the prosecution was not required to present any specific type of evidence in order to meet its burden of proof.[191] The prosecution was not required to use audio or video to prove its case; the case could have been proven solely with eyewitness testimony from the detective.[192] The appropriate weight and credibility to give that eyewitness testimony is up to the jury to decide.[193] Thus, it is legally correct to instruct jurors that prosecutors are not required to use particular kinds of evidence, even scientific forensic evidence, to prove their criminal cases.[194] The jury is required,

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189. *Id.* Counsel continued:

> Now, I asked a number of questions, because *I can't believe that people would get convicted on a case like this or even charged on a case like this* but I asked—and [appellant's counsel] used the term "cross-checks"—but I asked about certain things because it makes sense to me that if you're going to convict somebody of felonies, of serious crimes, you've got to have some evidence.

Id. at 628–29 (emphasis added). According to Maryland Lawyers' rule of Professional Conduct 3.4(e), a lawyer shall not "state a personal opinion as to the justness of a cause." MARYLAND LAWYER'S RULES OF PROFESSIONAL CONDUCT R. 3.4(e) (2007). Therein co-counsel Peak's corresponding statement regarding his opinion of the charges during argument was improper. *Evans*, 922 A.2d at 628–29 n.6.

190. *Id.* at 628–29 (emphasis added).

191. *Id.* at 632–33.

192. *Id.* at 632.

193. *Id.* at 632–33.

194. *Id.* at 632.

instead, to consider the totality of all the evidence introduced and weigh whether the government's burden has been satisfied.[195]

Yet, the *Evans* case is still curious. The trial court was prompted to give these *CSI* Effect jury instructions based on the defense "cross-examination of Detective Bradley, which inquired as to specific investigative techniques that were not used in this case."[196] However, the cross-examination of Detective Bradley was proper cross-examination. In other words, there were no objections during the cross-examination. There were no substantive, evidentiary, or procedural errors during the cross-examination. Instead, the defense made legitimate points regarding the investigative methods used and the corresponding lack of electronic corroborative evidence available due to the type of investigation Detective Bradley conducted.

It is part of the accused's constitutional right to be able to confront the evidence presented against him in court.[197] Evans simply exercised his right by asking Detective Bradley cross-examination questions. Yet, he was essentially punished for effective advocacy by triggering a curative instruction. Curative instructions, as the name implies, are only given when there is error.[198] Hence they are a device to cure error or unfair prejudice.[199] Although the trial court claimed the cross-examination triggered the curative *CSI* Effect instruction given, there was no error in the cross-examination.[200] Procedurally, the *Evans* court was wrong to give a curative instruction in this circumstance.

Substantively, the court's curative instruction is also troubling. Since the burden of proof in a criminal case is on the prosecution,[201] the defense is not required to present any evidence.[202] Additionally, for

195. *Id.* at 632–33.

196. *Id.* at 628.

197. Crawford v. Washington, 541 U.S. 36 (2004).

198. *See* JACOB STEIN, CLOSING ARGUMENTS § 1:105 (2d ed. 2009).

199. *Id.*

200. *See Evans*, 922 A.2d at 628.

201. COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, *supra* note 179, § 2.03. Instruction 2.03 reads as follows:

> 2.03 PRESUMPTION OF INNOCENCE - BURDEN OF PROOF: The defendant is presumed to be innocent of [each of] the charge[s]. This presumption continues during every stage of the trial and your deliberations on the verdict. It is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty as charged. The government has the burden of proving the guilt of the defendant beyond a reasonable doubt. This burden of proof stays with the government throughout the case. The defendant is never required to prove his innocence or to produce any evidence at all.

Id.

202. *Id.*

many defendants, their primary defense strategy is challenging the government's evidence via rigorous cross-examination of the government's witnesses. This is a legitimate and proper strategy.[203] The Sixth Amendment further guarantees the accused this right.[204] However, if exercise of this right triggers an adverse curative instruction, the instruction improperly welcomes the jury to infer that the substance of the defense's cross-examination is not legitimate or important. Therein the defendant is unfairly prejudiced, and the prosecution's evidence is improperly endorsed. Both consequences are constitutionally invalid.

In addition, an *Evans*-type instruction may mislead jurors into thinking a lower amount of proof is required for conviction. Defendant Evans claimed the judge's curative instruction was improper exactly for that reason.[205] Yet, the appellate court rejected the argument and affirmed the Evans conviction.[206] In a subsequent case in Maryland, this same *Evans*-type instruction was requested by the prosecution.[207] However, the legal question in *Johnson v. Maryland* was slightly different. In *Johnson*, although the *Evans*-instruction was requested by the prosecution, ultimately it was not given. Therefore, the constitutional issue was not whether the jury was potentially instructed regarding a lower standard of proof, but instead, whether the threat of an *Evans*-type instruction chilled the accused's constitutional right to rigorously confront the evidence.[208]

In *Johnson*, the defendant was charged with possession of a firearm.[209] A central contention of the defense was the lack of evidence regarding the defendant's fingerprints on the gun.[210] The prosecution

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203. *See* Sample v. State, 550 A.2d 661, 663 (Md. 1988) (stating that when the prosecution fails to use a well-known, readily available, and superior method of proof linking defendant to the crime, the defendant should be able to comment on this lack of evidence); Eley v. State, 419 A.2d 384, 387 (Md. 1980) ("It is the State which has the burden of producing evidence sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty.").

204. U.S. CONST. amend. VI.

205. *See Evans*, 922 A.2d at 627–28 (explaining appellant's argument that "the net effect of advising the jury that the State has no obligation to produce evidence...relieved the State, in the minds of the jurors, of the burden to establish guilt beyond a reasonable doubt").

206. *Id.* at 633.

207. Brief of Appellant at *32–34, Johnson v. Maryland, 2009 WL 1348753 (Md. Ct. Spec. App. Apr. 7, 2009) (No. 1687).

208. *See* Brief of Appellant, *supra* note 207, at *33–34 (arguing that the judge's decision to withhold the instruction "chilled" the defense's right to attack the weaknesses of the prosecution's evidence).

209. *Id.* at *21 n.5.

210. *See id.* at *35 (arguing that the evidence was insufficient as the arresting officer never saw the appellant holding a gun).

requested an *Evans*-type *CSI* Effect instruction to be given at the close of evidence, essentially instructing the jury that the prosecution was not required to present fingerprint evidence.[211] The trial judge did not grant the prosecution's request at that time, but instead ruled that the prosecution's request could be renewed after the defense attorney's closing argument and the judge would decide whether or not the *Evans*-instruction was necessary.[212] The following discussion regarding the jury instructions was made on the record:

> THE COURT: Additions, exceptions [to the jury instructions]
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> MS. LIPSCOMB [Prosecution]: Hopefully, I just didn't miss it. Did you give your scientific evidence [*CSI* Effect instruction]?
>
> THE COURT: Not yet.
>
> MS. LIPSCOMB [Prosecution]: Okay.
>
> THE COURT: *I will give [*CSI *Effect instruction] depending on the argument. If the [defense] argument is made that [the government] didn't do this test and [the government] didn't do that test, then I will give the scientific evidence instruction [*CSI *Effect instruction] at that time.*[213]

Following the defense's closing argument, the prosecution did not renew its request for the *Evans*-instruction, and ultimately, no special instruction was given. Johnson was convicted and appealed, claiming his constitutional right to a fair trial and his opportunity to wage a full defense were chilled by the *Evans*-instruction being held in abeyance, contingent upon the substance of the defense's closing argument.[214] Therefore, there is a related concern, not just in cases where an *Evans*-type instruction is actually given to the jury, but also in cases where the instruction is even a possibility following the defense's closing argument.

4. Substance and Timing of the Instructions Given to the Jury

Evans and *Johnson* are compelling cases to analyze. The outcome in *Evans* may be palatable because in a simple drug case, high-tech audio and visual surveillance does not appear necessary or essential to establish the crime beyond a reasonable doubt, particularly in light of the available direct testimony in the case.[215] However, in a gun possession case like *Johnson*, the fingerprint evidence is more relevant,

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211. *Id.* at *33.

212. *Id.*

213. *Id.* (emphasis added) (citing Transcript of Record at Vol. 3, 39–40, Johnson v. Maryland, 2009 WL 1348753 (Md. Ct. Spec. App. Apr. 7, 2009) (No. 1687)).

214. Brief for the Appellant, *supra* note 207, at *34.

215. Evans v. State, 922 A.2d 620, 628 (Md. Ct. Spec. App. 2007).

although still not essential. But, consider the possibility of other more complex cases wherein the proof is highly technical as well as circumstantial. Could an *Evans*-type curative instruction survive scrutiny in highly contested cases built on circumstantial evidence? Could an *Evans*-type curative instruction survive a constitutional challenge in a case like *Goff*,[216] a death penalty case wherein the blood evidence was never tested for DNA? Further, consider that in *Goff* the defense included the defendant's assertion that the victim's husband was the killer and that DNA testing, if done, could have excluded the husband. Without the DNA testing being conducted in *Goff*, the defense would have a legitimate argument that some doubt as to the identity of the killer still remained. It would be up to the jury to determine whether that doubt was truly reasonable doubt. From this example, one can see how an *Evans*-type instruction may improperly taint the jury against the legitimacy of the defense argument in the most serious of cases, a murder charge based on circumstantial evidence.[217]

As the seriousness and complexity of the case facts change, the potential risk for unfair prejudice against the accused becomes more apparent. The Maryland method in the form of the *Evans*-type instruction is not optimal. While it contains a correct statement of the law, that is not the full extent of the inquiry. One must also consider whether the *Evans*-type instruction adequately guides the jury not to violate due process.[218] Therefore, analysis of the timing, and not just the substance, of the instruction is necessary to determine whether due process was violated. The likelihood of unfair prejudice to the defense depends largely on the phase of the trial in which an *Evans*-type instruction is given.[219] It could prejudice a legitimately waged defense by the accused challenging the sufficiency of the government's proof.[220]

In *Evans*, the instruction was given immediately after the defendant's closing argument—prior to the state's rebuttal.[221] One view is that this timing was best to limit the defendant's ability to manipulate the *CSI* Infection and mislead the jury into using an improper analysis.[222] Yet,

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216. *Goff*, 14 So. 3d at 625.

217. *Id.* at 663.

218. United States v. Prather, 205 F.3d 1265, 1270 (11th Cir. 2000).

219. *See* Brief for the Appellee at 25–27, Johnson v. Maryland, 2009 WL 1865879 (Md. Ct. Spec. App. May 15, 2009) (No. 1687) (arguing for defendant that even the threat that an *Evans*-type instruction could be given chilled the defense's ability to vigorously advocate its case during closing argument). *Cf. Evans*, 922 A.2d at 628–29 (outlining defense's argument that the instruction given after the defense's closing argument was unfair).

220. *See also supra* Part III.A.3.

221. *Evans*, 922 A.2d at 629.

222. *See* Willing, *supra* note 42 (discussing the jury selection strategy in the Robert Durst

a defendant's closing argument will inevitably attack perceived weaknesses in the government's proof and question why more evidence, of whatever kind, was not produced. Permitting judges to instruct jurors regarding evidence that the prosecution is *not* required to produce should accompany general instructions and should not be singled out and highlighted following the defendant's one opportunity to argue against the weight of the evidence. The court in *Evans* walked a fine line between acting as the gatekeeper for fairness and becoming the second prosecutor in the courtroom.

In *Harrington*, the discussion by the court with potential jurors about not requiring *CSI*-type evidence came in the beginning of the case. It was done in a neutral manner and not in reference to particular facts the jury had already heard, or to defense cross-examination, or to argument about the lack of scientific testing. Similarly, in *Goff*, the prosecutor's discussion with potential jurors, asking them to consider all the evidence even when there is no DNA evidence, was done in advance of any evidence being admitted, or jurors hearing cross-examination regarding why the DNA testing was not done. In an effort to best preserve an accused's constitutional right to fairly challenge the evidence, it is preferred to caution jurors early in the case. An unbiased and early cautionary instruction in the context of the other general instruction that does not reference or comment upon either the defense's or the prosecution's case should be most acceptable. It is a neutral and constitutionally sound approach to instruct jurors regarding how to temper their exposure to false information about criminal law, criminal investigations, and criminal prosecutions. In that way, the instruction cannot be perceived as discrediting a legitimate defense challenge to the sufficiency of the government's proof.[223] Although proof beyond a reasonable doubt is required in every criminal case, there is no requirement regarding the type of evidence the prosecutor must utilize to prove the case. Thus, specific investigative techniques or forensic tests are not required. However, the reality of modern trials is that jurors will expect such techniques or tests. Once jurors learn that such tests were possible but not done, the benefit shifts to the defense and some doubt regarding the evidence is raised in the minds of many

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case). *See generally* United States v. Saldarriaga, 204 F.3d 50, 52 (2d Cir. 2000) (considering the effect of a judge's instruction regarding which evidence the prosecution presented at the trial).

223. *See Evans*, 922 A.2d at 628–29. *Evans* may have limited application because the judge gave the *CSI* Effect instruction only to respond to the defense's closing argument. *Id.* The court recognized the defense's argument as an improper attempt to distract the jury from the applicable legal standard. *Id.*

jurors.[224] Although it is important for the court to be mindful of, and to aggressively curb, the *CSI* Infection's impact upon the verdict,[225] one must still consider whether the *Evans*-type instruction goes too far. There is potential prejudicial impact to criminal defendants who legitimately illuminate a lack of evidence or sloppy investigative techniques if a court inserts a curative instruction that, in practical effect, bolsters the government's case.[226] This is precisely why the *Evans* instruction walks a very thin curative line.

Thus far, defense attorneys challenge all attempts to direct the jury away from fanciful television standards and back to reality as an improper attempt to lower the government's burden. Nonetheless, a middle ground can be found. Instead of instructing the jury regarding what techniques the government is not required to use in order to prove its case, special jury instructions should focus on instructing jurors how to properly weigh evidence and highlight the consideration of the totality of the evidence. This includes how to weigh non-scientific evidence when either side presents it.[227] In other words, although the weight of the evidence is determined by the jury, scientific evidence is not automatically given more weight over non-scientific evidence.[228]

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224. *See generally supra* Part II.B (discussing Peoria rape case wherein jurors' doubt based on the lack of forensic testing of the victim's cervix for dirt was misplaced vis-à-vis the material elements of the charge).

225. *See* Curley v. United States, 160 F.2d 229, 232 (D.C. Cir. 1947) (explaining that it is the province of the court to set the parameters of the jury's determination).

226. *Evans*, 922 A.2d at 628.

227. *See, e.g.*, COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, *supra* note 179, § 1.05. These instructions state the following regarding the weight of direct and circumstantial evidence:

> 1.05 DEFINITION OF "DIRECT" AND "CIRCUMSTANTIAL" EVIDENCE: Some of you have heard the phrases "circumstantial evidence" and "direct evidence." Direct evidence is the testimony of someone who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a series of facts which tend to show whether the defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. You should decide how much weight to give to any evidence. All the evidence in the case, including the circumstantial evidence, should be considered by you in reaching your verdict.

Id. Instructions similar to the circumstantial and direct evidence instructions should be devised to combat the modern juror's bias against non-scientific evidence. Notably, the lack of scientific evidence can also be used to disadvantage the defendant. The jury needs to know that just because the defense did not present DNA to confirm innocence does not mean the defendant is factually guilty.

228. This is similar to the instruction regarding expert and lay witnesses, where the jury must determine what weight to give to the witness. *See, e.g.*, *id.* § 3.07 (Weighing Expert Testimony). The expert testimony sample instruction reads as follows:

> You have heard a witness [witnesses] give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge

The proposed instruction suggested in this Article is one focused on the sources of *CSI* Infection that originate outside of the courtroom—television, media, films, books, and the like. An instruction not to use outside standards, like those used in forensic crime television shows, when making judgments about guilt or innocence inside the courtroom more appropriately balances the mutual interests of the litigants. The secondary goal is to remind jurors to apply only the legal standard as instructed by the judge, i.e., the burden of proof beyond a reasonable doubt, not some fictional standard of proof.

B. Litigants Speak Directly to a CSI *Infected Jury*

Opening statements and closing arguments both present an opportunity for litigants to directly address the jury; that is, the impaneled jurors that survived the voir dire screening process.[229] Not every voir dire process will effectively address the *CSI* Infection of the venire.[230] Even if dealing with *CSI* Infection is a goal of voir dire, not every infected juror is noticed, nor is every infected juror excused from service. Thus, even in the rare case of a voir dire that addresses the *CSI* Infection within the jury, infected jurors will remain. Therefore, parties should be given the opportunity to address the *CSI* Infection throughout litigation, not just during voir dire or jury instructions.[231]

Prosecutors have attempted to do this with mixed success. In *Mathis v. State*, during opening statement, the prosecutor reminded the jury of the following: "Now keep in mind you're listening to the testimony from the witness stand. It's not *CSI: Miami*, it's not *Law and Order*. Nobody involved in the case, no one in the room is an actor. These are

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> the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications, and all of the other evidence in the case.

Id.

229. *See* MARICOPA COUNTY ATT'YS OFFICE, *supra* note 25, at 3.

230. In state courts, the litigants are typically allowed to ask the jurors questions with latitude. *See* Sanders v. State, 707 So. 2d 664, 668 (Fla. 1998). Even still, the litigants may not be allowed to ask all their desired questions of the potential jury panel. *Id.* In federal court, the voir dire is primarily done by the judge. Dennis G. Terez, *Who Said Voir Dire Wasn't Important?*, CHAMPION MAG., April 2006, at 56, *available at* http://www.nacdl.org/public.nsf/0/549658461382a9a88525716300527c65?OpenDocument. It is within the trial judge's discretion which questions are asked, and some judges are not willing to delve into the issue of the *CSI* Effect with the jury. *See generally* Posting of Robert W. Kelley to The Florida Jury Selection Blog, The Role of the Judge, http://www.juryblog.com/the-role-of-the-judge (last visited Aug. 11, 2009) (commenting on trial judge's role in voir dire).

231. This statement holds especially true in long trials where there is a necessity to be able to frankly address the jury about the dangers of misapplication inherent within the *CSI* Infection.

real people."[232] The defendant argued on appeal "that reminding the jury of their role sets up a television expectation that trivializes the constitutional reasonable doubt standard."[233] The appellate court in *Mathis* rejected the defendant's argument and found no error in the prosecutor's opening statement.[234]

The *Mathis* appellate ruling and the court's analysis appear to give more leeway to litigants during opening statement; however, some prosecutors have been less successful in their attempts to discuss *CSI* Infection issues during closing arguments.[235] In *Boatswain v. State*, during closing argument, the prosecutor stated:

> The one issue left in this case is: Was it him? The defense would say, well—and you know they will—there are no fingerprints of him. They didn't print the money. They didn't find his prints on the note. In today's day and age, unfortunately, the police and the State aren't put in the same test that they wrote 200 years ago in the Constitution in which they said the proof must be beyond a reasonable doubt. Unfortunately, the test, of course, of criminal defendants now is, can they meet the TV expectation that they hope folks like you want. Can they meet *CSI*?[236]

The *Boatswain* court found this argument improperly disparaged the reasonable doubt standard.[237] However, mentioning the *CSI* Effect in closing argument is not completely off limits—other courts have approved it.[238]

Attempts by either litigant to alter the burden of proof to something other than the "beyond a reasonable doubt" standard are always prohibited.[239]

C. A Good Defense is Always the Best Offense: The Age of Defensive Prosecution

The presentation of evidence is another important battleground during the trial. Aimed at thwarting the dangers of any potential *CSI*

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232. Mathis v. State, No. 25, 2006, 2006 WL 2424741, at *4 (Del. Aug. 21, 2006).

233. *Id.*

234. *Id.*

235. *See* Boatswain v. State, No. 408, 2004, 2005 WL 1000565, at *3 (Del. Apr. 27, 2005).

236. *Id.* at *1.

237. *Id. See* Morgan v. State, 922 A.2d 395, 401–02 (Del. 2007) (finding the prosecutor's rebuttal comment to be error, but not plain error).

238. *See* State v. Ash, No. A07-0761, 2008 WL 2965555, at *7–8 (Minn. Ct. App. Aug. 5, 2008) (finding prosecutor's rebuttal closing comments about *CSI* Effect was not prosecutorial misconduct); Goff v. State, 14 So. 3d 625, 672 (Miss. 2009) (holding that the prosecutor's reference to *CSI* in closing was not error).

239. *See In re* Winship, 397 U.S. 358, 364 (1970).

Infection within the jury, many prosecutors have expanded their expert witness lists and requested permission to introduce a broader array of explanatory evidence in their case-in-chief.[240] This type of prosecution strategy is called defensive prosecution.[241] Jurors want to know why certain types of tests were not done, and an explanation regarding the absence of evidence is helpful to overcome any reasonable doubt the jury may have and curb unrealistic expectations and misinformation regarding forensic science and its capabilities.[242] Defensive prosecution also attempts to blunt arguments raised by the defense regarding insufficiency of the evidence.[243]

Defensive prosecutions, however, do not proceed without objection by the defendant.[244] As a counter-tactic to the prosecution's request to admit evidence that explains the investigation and why certain scientific evidence is absent, defendants have objected on evidentiary grounds that the admission of negative or inconclusive scientific evidence is either irrelevant, or alternatively, unfairly prejudicial.[245] This type of objection forces the court to consider the *CSI* Infection head-on because the heightened juror expectation is part of the state's proffer regarding the material relevance and necessity of the evidence for which it is seeking admission.[246] In *State v. Cooke*,[247] the court ruled on the impact of the *CSI* Effect issue on evidentiary grounds, holding:

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240. MARICOPA COUNTY ATT'YS OFFICE, *supra* note 25; Thomas, *supra* note 39.

241. *See* State v. Fields, 483 F.3d 313, 355 (5th Cir. 2007) (reasoning that the government's use of graphic photos of the murder victim were relevant, necessary, and not prejudicial, especially considering heightened juror expectation and the *CSI* Effect); State v. Cooke, 914 A.2d 1078, 1088 (Del. 2007) (finding that in order to counter vulnerability to defense arguments of insufficient investigative and scientific testing, "prosecutors now are almost required to engage in . . . 'defensive prosecution'"). "In this age of the supposed 'CSI Effect,' explaining to the jury why the Government had little in the way of physical or scientific evidence was arguably critical to the Government's case." *Fields*, 483 F.3d at 355 (footnote omitted).

242. *Cooke*, 914 A.2d at 1088. *See also Goff*, 14 So. 3d at 638-39 (describing that although much blood evidence was collected, no DNA testing was conducted). In *Goff*, however, the prosecution introduced into evidence an explanation as to why the test was not conducted. *Id.* at 639 n.13.

243. *Cooke*, 914 A.2d at 1087–88.

244. *Id.* at 1091–92 (objecting to the admission of negative and inconclusive scientific evidence as irrelevant under FED. R. EVID. 401 or alternatively as unfairly prejudicial under FED. R. EVID. 403).

245. *Id.*

246. *Id.* at 1088.

> [P]rosecutors are caught in a "Catch 22" conundrum. If they produce no record that scientific tests were sought, they are subject to criticism and risk verdict reversal if they, nevertheless, remark about the "CSI Effect." And then, if there were tests which were inconclusive but again do not introduce evidence that the tests were even conducted, the State's case is exposed to the argument that not enough was done.

Id. (footnote omitted).

> The State's "CSI Effect" argument has merit in two respects. First, this Judge in a number of trials in the last several years or so has witnessed defendants increasingly . . . taking advantage of it by asking witnesses about tests they know were not conducted and contending in closing argument that the failure to test raises reasonable doubt. They are taking appropriate advantage of a different kind of proof expectations with which some jurors come into the courthouse in the last several years as a result of these programs. *It would be naïve not to recognize and acknowledge all of this. This does not mean the Court finds that there is "CSI Effect" but, in fact, it means that there is enough of a possibility of it that it cannot be ignored.*[248]

Although courts have been reluctant to affirmatively rule on the existence of the *CSI* Effect, they are mindful of its potential deleterious impact if left unchecked, and have ruled on evidentiary challenges to allow prosecutors to present this type of evidence.[249] For this reason, courts have found negative scientific evidence to be relevant under the evidentiary requirements for admissibility.[250] Prosecutors want to explain the total story of the crime scene as well as its investigations, including unsuccessful, unavailable, and inclusive test results.[251] It is now common for prosecutors to call a latent fingerprint examiner to testify, even in cases where no fingerprint evidence was found, to explain to the jury why fingerprint evidence is absent from the case.[252] Ultimately, defendants must yield to the defensive prosecution strategy because the evidentiary rules give deference to the prosecutor, who carries the burden to prove the case as he or she sees fit.[253]

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247. *Id.* at 1080–88 (surveying the available literature and finding merit in the state's argument regarding the *CSI* Effect notwithstanding the absence of specific empirical studies affirming its existence).

248. *Id.* at 1088 (emphasis added). *See generally* Mathis v. State, No. 25, 2006, 2006 WL 2434741 (Del. Aug. 21, 2006) (finding mention of *CSI* Effect comment in opening statement allowable); Boatswain v. State, No. 408, 2004, 2005 WL 1000565 (Del. April 27, 2005) (ruling mention of *CSI* Effect in closing argument to be improper).

249. *See supra* note 248 and accompanying text (citing cases supporting the proposition).

250. *Cooke*, 914 A.2d at 1088.

251. *See id.*

252. *See id.*

253. Notably, in a criminal trial the entire burden of proof is on the prosecution and the defense is not required to prove anything. *See* U.S. CONST. amend. V; *In re* Winship, 397 U.S. 358, 364 (1970). However, because the prosecution carries a high burden of proof, the court correspondingly allows the state to introduce its evidence according to its preferences and theory of the case without strategic interference or manipulation by the defense. Old Chief v. United States, 519 U.S. 172, 186–87 (1997). The reason that a criminal defendant cannot typically avoid the introduction of additional evidence of a particular element of the offense by stipulation is that the government must be given the opportunity "to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight." *Id.* at 187 (quoting Dunning v. Maine

IV. THE *CSI* INFECTION IS DISTORTING THE MEANING OF THE EVIDENCE

Studies of juries have long indicated that lay jurors impose a higher threshold of proof to convict.[254] The research of Kalven and Zeisel and its subsequent replications indicate that there is an asymmetrical disagreement between judges and juries with regard to their conviction rates. Upon reviewing the same case "judges tend to convict when juries would acquit more than juries tend to convict when judges would acquit."[255] Thus, although jury expectations have historically been higher than those of professional fact-finders, the *CSI* Infection goes well beyond the application of a lower or higher burden of proof; it delves into the realm of warping, skewing, and manipulating the realities of evidence in a way that threatens the accuracy of the verdict and the legitimacy of the criminal justice system.

Empirical studies of the *CSI* Effect are ongoing. The first studies help to identify differences between jurors who watch *CSI*-type shows and jurors who do not.[256] While the results have mixed conclusions, they do seem to indicate that jurors who watch large amounts of *CSI,* or other, similar television shows, have higher expectations for scientific forensic evidence. Further, *CSI* viewing jurors are increasingly hesitant to believe the forensic science actually presented at trial.[257] In any event, the consensus among practitioners is that *CSI* Infected Jurors routinely appear in their criminal jury trials.[258] This Article can neither confirm nor reject the accuracy of the fear of the *CSI* Infected Juror, yet instead, it urges that the constitutional issues underlying the *CSI* Effect

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Central R.R. Co., 39 A. 352 (1897)).

254. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 181 (Little, Brown & Co. 1966) (explaining study of American jury system).

255. Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of the Kalven & Zeisle's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 183 (2005) (confirming the existence of judge-jury disparity in more empirical studies); *see also* Sherri M. Owens, *The* CSI *Effect*, ORLANDO SENTINEL, July 27, 2005, at B1 (illustrating a case wherein the prosecutor and the jury disagreed regarding the overwhelming nature of the proof). Michael Ofette, an assistant state attorney in Lake, Florida, presented a sexual assault case without DNA evidence. *Id.* "The jury thought [the government] should have had DNA . . . . [Ofette, the prosecutor] thought the evidence was overwhelming." *Id.*

256. *See, e.g.*, Podlas, *supra* note 1 (researching the empirical evidence of whether *CSI* Effect impacts the criminal justice system); Shelton et al., *supra* note 1 (studying jurors to investigate existence and extent of *CSI* Effect); Schweitzer & Saks, *supra* note 4 (testing the impact of *CSI* Effect on jurors).

257. *See* Schweitzer & Saks, *supra* note 4, at 358 (discussing viewer expectations). The Schweitzer and Saks study strengthens the argument that *CSI*-type shows cause *CSI* watchers to have different juror expectations than non-*CSI* watchers have, yet it fails to establish a significant correlation with ultimate verdict differences. *Id.* Shelton's study found a neutral impact, or no difference, between the different types of jurors. Shelton et al., *supra* note 1.

258. Watkins, *supra* note 45.

debate are significant enough to warrant further exploration of the matter. The *CSI* Effect issue cannot be easily dismissed as non-existent or a myth while more and more courts rule regarding it. Additionally, the anecdotal commentary of jurors after trial confirms the basis of litigants' unease.[259]

Multiple factors explain why jurors want more proof. The extreme and recent popularity of fictional crime dramas and forensic crime shows, designed to entertain, is merely one of several important factors.[260] Other factors that may affect jurors' expectations include: (1) the Innocence Project's[261] uncovering of many cases where juror errors, forensic science errors, or eyewitness identification errors resulted in unconscionable stories of innocent men spending decades in jail for crimes they did not commit; (2) the materialization of DNA as a new reliable forensic technology with the remarkable ability to implicate or exonerate the criminally accused; (3) the emergence of the technology era in which science and technology can do more, and do it faster and more accurately than ever before; and (4) the fall from grace of law enforcement due to numerous scandals[262] that exposed corrupt practices such as planting evidence or lying under oath. These factors may encourage citizens to become skeptical of police testimony and the alleged incriminating physical evidence or confessions obtained during a criminal investigation.[263]

As a general proposition, it is important that jurors rigidly hold the government's case to its requisite high burden of proof beyond a

259. *See* MARICOPA COUNTY ATT'YS OFFICE, *supra* note 25; Watkins, *supra* note 45.

260. Shelton et al., *supra* note 1.

261. The following is an excerpt explaining the Innocence Project:

> The Innocence Project is a non-profit legal clinic affiliated with the Benjamin N. Cardozo School of Law at Yeshiva University and created by Barry C. Scheck and Peter J. Neufeld in 1992. The project is a national litigation and public policy organization dedicated to exonerating wrongfully convicted people through DNA testing and reforming the criminal justice system to prevent future injustice.

The Innocence Project, http://www.innocenceproject.org/about (last visited Sept. 25, 2009). Two hundred and fifteen people have been exonerated since the inception of the Innocence Project. *Id. Cf.* Margaret A. Berger, *The Impact of DNA Exonerations on the Criminal Justice System*, 34 J.L. MED. & ETHICS 320, 322 (2006) ("Despite the 172 exonerations, there is still unease in some quarters about allowing challenges to the finality of convictions.").

262. ROGER KOPPL, CSI FOR REAL: HOW TO IMPROVE FORENSIC SCIENCE 7 (Dec. 2007), *available at* http://reason.org/files/d834fab5860d5cf4b3949fecf86d3328.pdf; Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Crime Testing Case in Houston Cases*, N.Y. TIMES, Aug. 5, 2004, *available at* http://www.nytimes.com/2004/08/05/us/new-doubt-cast-on-testing-in-houston-police-crime-lab.html; Adam Liptak, *2 States to Review Lab Work of Expert Who Erred on ID*, N.Y. TIMES, Dec. 19, 2002, at A24.

263. Shelton et al., *supra* note 1.

reasonable doubt.[264] It is appropriate and reasonable for modern criminal jurors to expect better proof as investigatory technology and forensic techniques improve; however, the danger that the *CSI* Infection presents is not that jurors expect more forensic science, but rather that fictional entertainment will lead to misinformation about criminal investigations, prosecutions, and forensic science. The problem is not merely a television show. The greatest threat is the inappropriate application of fictional analysis in real life cases, which in some instances has induced erroneous conclusions of fact and faulty verdicts.

The criminal justice system relies on lay people, ordinary citizens untrained in the law, to consider the evidence presented to them in court as neutral outsiders.[265] These lay jurors are asked to render conclusive factual determinations. Some people argue a juror's status as a neutral decision-maker may be compromised by the type of indoctrination that may occur from excessive exposure to fictional sources on criminal matters.[266] The crime novels, television shows, and films depicting crimes, criminal investigations, and criminal prosecutions are altered purposely for entertainment purposes, causing the line between reality and fiction to be intentionally blurred by artists to make the film, novel, or television show seem real, yet still entertaining. The artists' motivation is not malicious; instead, it is mainly commercially driven. Nonetheless, the knowledge learned from such sources may trick viewers into believing they are trained to some degree to interpret the law and science.[267]

As the Shelton study suggests, *CSI* watchers have a higher expectation for forensic science evidence.[268] That statistic alone may

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264. *In re* Winship, 397 U.S. 358, 364 (1970).

265. *See* COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, *supra* note 179, § 1.01.

> 1.01 THE FUNCTIONS OF THE COURT AND THE JURY: Members of the jury, you have seen and heard all the evidence and the arguments of the attorneys. Now I will instruct you on the law. You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone. Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them. Perform these duties fairly and impartially. Do not allow sympathy, prejudice, fear, or public opinion to influence you. [You should not be influenced by any person's race, color, religion, national ancestry, or sex.] Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

Id.

266. Tyler, *supra* note 1, at 1062–63.

267. Schweitzer & Saks, *supra* note 4, at 358.

268. Shelton et al., *supra* note 1.

seem appropriate and non-prejudicial. However, the Schweitzer & Saks study also found that *CSI* watchers are less likely to believe the forensic science presented to them in court.[269] This statistic suggests that high volume *CSI* watchers substitute their own research and expertise, gained from watching entertainment television, for that of the legally qualified[270] experts testifying in court. Notably, what the current studies do not indicate is how heightened expectations influence the actual verdicts, if at all. Some scholars that focus primarily on conviction rates opine that no change has occurred in the age of *CSI*.[271] However, a review of the cultural landscape, the current case law, and the commentary of participants in criminal litigation reveals that *CSI* has caused some type of change in modern criminal jury trials. The content of a jury's considerations are private and protected as secret unless or until a juror volunteers to reveal it.[272] Therefore, it is quite difficult to fully assess what most influences jurors during deliberations or even what facts they consider reliable. Notwithstanding the limitation of jury privacy, it is important not to ignore[273] these indications of change and risks of error.

While it is true as a matter of law that it is well within the purview of the jury to decide the weight of the evidence and the credibility of the witnesses, it is improper for jurors to base their determinations on fiction.[274] Therefore, it is in the best interest of the larger society to minimize the potential impact that the fictional justice system scripted in Hollywood has upon the real American criminal justice system demystified in actual courtrooms all across the country.

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269. Schweitzer & Saks, *supra* note 4, at 358.

270. *See* FED. R. EVID. 702 (defining the standard for expert testimony); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–48 (1999) (explaining the *Daubert* gatekeeping function); Daubert v. Merrell Dow Pharm., 509 U.S. 579, 589 (1993) (setting forth factors to be considered in determining whether to admit expert testimony).

271. Cole & Dioso-Villa, *supra* note 24, at 1356–64.

272. Morrison, *supra* note 44; Roane, *supra* note 44; Willing, *supra* note 42.

273. The court cannot bury its head in the proverbial sand, like an ostrich, and ignore the situation. President Woodrow Wilson, Speech at Des Moines, Iowa (Feb. 1, 1916) ("America cannot be an ostrich with its head in the sand.").

274. COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, *supra* note 179, § 1.04.

> 1.04 WEIGHING THE EVIDENCE-INFERENCES: You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life. In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this "inference." A jury is allowed to make reasonable inferences. Any inferences you make must be reasonable and must be based on the evidence in the case.

Id.

V. CONCLUSION

The alleged existence of a *CSI* Effect has become a significant adversarial issue within criminal jury trials in recent years—a new aspect of modern criminal jury trials. The fear of *CSI* Infected Jurors impacts the evidentiary, procedural, and constitutional issues in an ordinary criminal trial. Procedural and substantive issues regarding the *CSI* Effect have been raised in seemingly minor cases involving drug[275] or gun[276] possession as well as in the most serious death penalty murder[277] convictions.

Although some scholars still debate the existence of the *CSI* Effect, as well as the correct title for it, litigators and judges are dealing with the *CSI* Effect. Rulings are based upon the *CSI* Effect, and the *CSI* Effect, thus, operates in real cases on real juries. This Article seeks to bridge the gap between the theoretical debate, the limited and early empirical research, and the practical experience of litigators and trial judges. The examination of recent appellate rulings that address various phases of the criminal trial gives additional context to the ongoing conversation. No matter what it is called, there is a real phenomenon occurring in courtrooms all across the nation at both the state and federal levels. The *CSI* Effect must be controlled to ensure fairness within criminal jury trials. Vigilance toward protecting the constitutional fairness of the American criminal justice system can never be too excessive—the stakes are too high and false outcomes are too devastating.

275. *See, e.g.*, United States v. Harrington, 204 F. App'x 784 (11th Cir. 2006) (affirming conviction of defendant on various counts of drug trafficking); Evans v. State, 922 A.2d 620 (Md. Ct. Spec. App. 2007) (affirming defendant's conviction of multiple drug-related offenses).

276. *See, e.g.*, Brief for the Appellee, Johnson v. Maryland, 2009 WL 1865879 (Md. Ct. Spec. App. May 15, 2009) (No. 1687).

277. *See, e.g.*, Goff v. State, 14 So. 3d 625 (Miss. 2009) (affirming defendant's conviction of capital murder).


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