

APRIL 2007

NEWS & VIEWS

THE CRIMINAL LAW SECTION / STATE BAR OF MICHIGAN NEWSLETTER

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Events

Council Meeting
April 24, 2007
Sheraton Hotel, Lansing

Our next monthly council meeting will be held in the Hemingway Room of Christie's Bistro, located within the hotel. The hotel is located at 925 South Creyts Road, immediately off I-496 at the Creyts Road exit. Social hour begins at 6:00 p.m., with dinner and the meeting beginning at 6:30 p.m.

Biennial Criminal Law Section Policy Conference
"Solving Parole Problems"
June 15-17, 2007
Grand Hotel, Mackinac Island

Parole Reform: Is it time? What is the best policy for Michigan? State policy on the granting and management of parole is critical to your case at sentencing. The availability of constructive alternatives to prison is an important consideration. Parole realities impact the administration of incarceration. Should the availability and quality of post-prison services influence parole policy? How about the availability of prison space, and state budget problems? We know that when a parolee fails to manage freedom, the outcome "rains" on the goal of letting the right offenders out early. What policies are right for Michigan in these difficult economic times? How are other states managing parole? Criminal Law Section conferees will address these questions at our classic every-other-year Mackinac Island policy conference.

Everyone who registers for the conference will receive a complimentary copy of Judge Dennis Kolenda's newly updated Potentially Dispositive Pre-Trial Motions. Judge Kolenda will be present at the conference to discuss the changes and answer your questions. Return the enclosed Grand Hotel form to pre-register for the conference. For alternative Mackinac Island accommodations, check www.mackinac.com. A \$50 registration fee, payable at the door, covers a registering Section member and spouse or non-CLS member guest for all conference events, including receptions. With questions about the conference, call Charles Marr at 248-596-1599. With questions about the Grand Hotel, call Jim Shonkwiler at 517-927-6103.

The “CSI Effect” – Is It Real?

by

Hon. Donald E. Shelton*

Film and television have long found fodder in courtroom dramas. However, in recent years the media’s use of the courtroom as a vehicle has not only proliferated, it has changed its focus. Now many media representations of the courtroom are based on actual cases and an apparent fascination with our criminal justice process. *Court TV* now makes live “gavel to gavel” Internet coverage of ordinary trials available on a subscription basis.

But then the media also clouds the line between real trials and pure fiction. The blurring of reality begins with the so-called crime magazine television shows, such as *48 Hours Mystery*, *American Justice*, and even *Dateline NBC* on occasion. These shows portray actual cases but only after editing and narrating for dramatic effect.

A next level of reality distortion about the criminal justice system includes the extremely popular crime fiction television programs. *Law and Order* is everywhere on television now and promotes its plots as “ripped from the headlines”, as it replicates some issue in an actual case that was widely disseminated in the rest of the media.

However, the most popular courtroom portrayals, whether actual or edited or purely fictional, have been about the use of new science and technology to solve crimes. *CSI* has been called the most popular television show in the world. It is so popular that it has spawned other versions of itself that dominate the traditional television ratings. Its success has also produced similar forensic dramas, like *Cold Case*, *Bones*, *Numb3rs*, and many others.

Many prosecutors, judges and journalists have claimed that watching television programs like *CSI* have caused jurors to wrongfully acquit guilty defendants when no scientific evidence is presented. As one prosecutor complained, “jurors . . . expect us to have the most advanced technology possible, and they expect it to look like it does on television.” These complaints are based primarily on anecdotes without any empirical support.

Working with Professors Gregg Barak and Young Kim of Eastern Michigan University, we undertook the first empirical study to determine whether this so-called “CSI Effect” exists. The complete results of the study were recently published in the *Vanderbilt Journal of Entertainment and Technology Law* and are available online at <http://law.vanderbilt.edu/journals/jetl/articles/vol9no2/Shelton.pdf>.

We set out to answer three basic questions: do jurors expect prosecutors to present scientific evidence?; do jurors demand scientific evidence as a condition for a guilty verdict?; are juror expectations and demands for scientific evidence related to watching law related television shows?

We surveyed 1027 persons called for jury duty in Washtenaw Circuit Court between June and August of 2006. The anonymous survey was administered prior to jury selection or any preliminary instruction and jurors were assured that it was unrelated to their potential selection as a juror. First we asked about their television watching habits in six categories of crime related shows and whether they believed those shows accurately portrayed the criminal justice system. Next we asked them what types of evidence, both scientific and non-scientific, they expected the prosecutor to present in several different case scenarios.

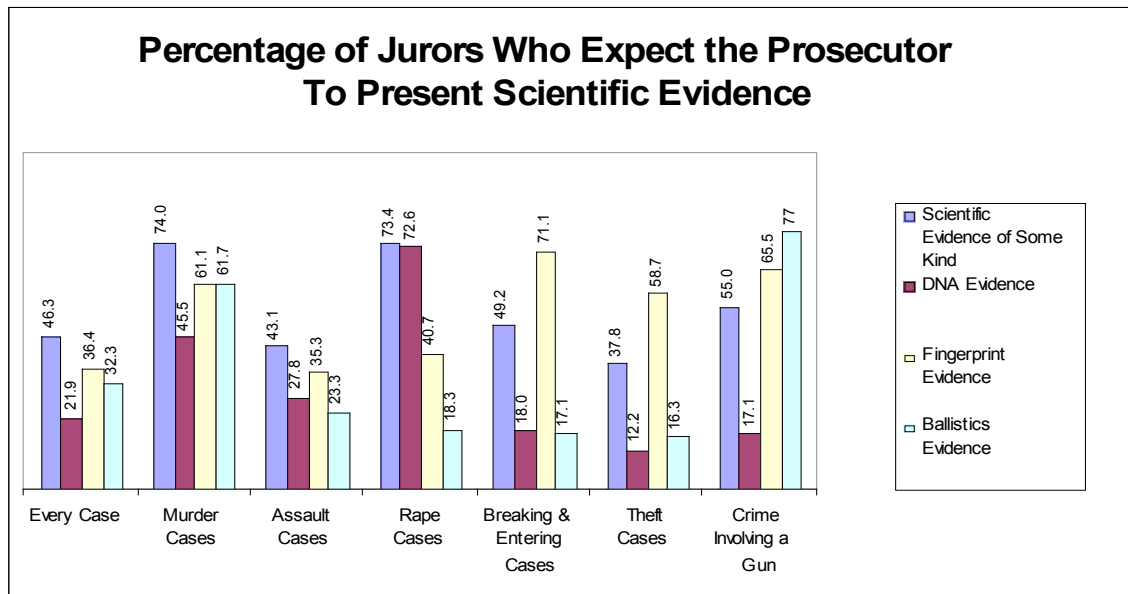
We wanted to find out not only if jurors expected scientific evidence but also whether they would demand to see scientific evidence before they would find a defendant guilty. To do so, we asked them for their probable verdict in case scenarios with various types of evidence. So that they would be in a similar legal position, we gave them the standard presumption of innocence and reasonable doubt instructions. We also obtained demographic data about the jurors for analysis purposes.

*Special thanks to the Honorable Donald E. Shelton, from the Twenty-Second Circuit Court, for contributing this article. Judge Shelton is currently the Presiding Judge of the Civil/Criminal Division in Washtenaw County.

Our findings about television watching habits were not surprising:

- *Law and Order* (44.6%) and *CSI* (41.8%) are the two most frequently watched crime related TV programs.
- Frequent *CSI* watchers also watch other law-related programs frequently.
- The more frequently jurors watch a given program, the more accurately they perceive the program to be.
- Demographically, *CSI* watchers are more likely to be female, political moderates with less education.

Do these modern jurors really expect the prosecution to present more scientific evidence? Our survey indicates that they do. Indeed, 46.3% of jurors expect to see some kind of scientific evidence in every criminal case. But these jurors' expectations were not just blanket expectations for scientific evidence but rather the expectations for particular kinds of scientific evidence seem to be rational:

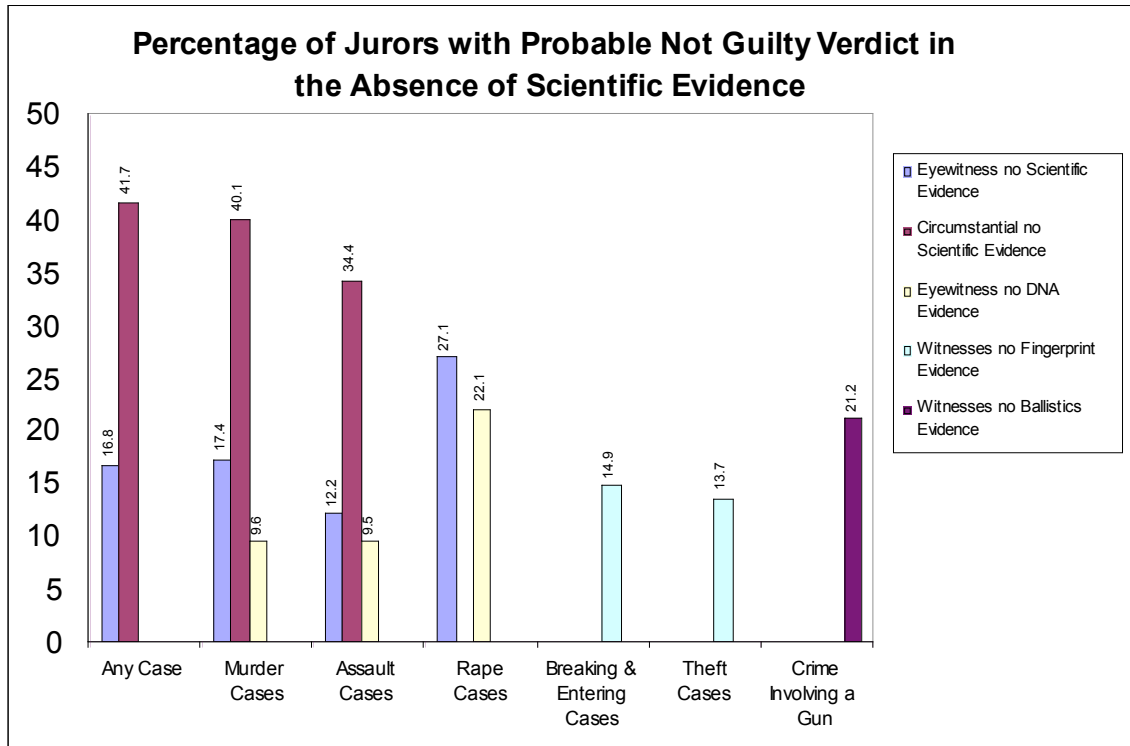


They also expect to see more traditional forms of evidence in these cases. While most jurors expect to see non-scientific evidence, such as testimony from victims and eyewitnesses and circumstantial evidence in most criminal cases, their expectation about scientific evidence is more crime specific. In each of seven different types of criminal case, a majority of jurors expect to see non-scientific evidence such as testimony from the victim or an eyewitness or at least circumstantial evidence. So, while most jurors expect to see non-scientific evidence, such as testimony from victims and eyewitnesses and circumstantial evidence in most criminal cases, their expectation about scientific evidence is more crime specific.

What does *CSI* have to do with these expectations? In fact, they may be more discriminating jurors. *CSI* watchers as a group have higher expectations about scientific evidence that is more likely to be relevant to a particular crime than non-*CSI* watchers, and they have lower expectations about evidence that is less likely to be relevant to a particular crime than do non-*CSI* watchers.

So jurors do have high expectations for scientific evidence. The more important question is whether those expectations will result in an acquittal if they are not met. Do jurors demand to see scientific evidence before they will find a defendant guilty? The results may surprise you. Where the

jury hears the testimony of the victim or other witnesses but gets no scientific evidence more would find the defendant guilty than not guilty in every kind of case, except a rape case. On the other hand, if the prosecutor is relying on circumstantial evidence, jurors *will* demand some kind of scientific evidence before they will return a guilty verdict:



So is this all because of *CSI*? All that television watching must be the cause of these demands for scientific evidence, right? In fact, our survey did *not* find that watching *CSI* had a significant impact on whether jurors were likely to acquit a defendant without scientific evidence:

- Significant statistical differences between *CSI* and non-*CSI* watchers exist in only four out of thirteen scenarios and in three of those the difference is only marginal.
- In “every criminal case” *CSI* watchers are actually *more* likely than non-*CSI* watchers to find a defendant guilty without any scientific evidence if eyewitness testimony is presented.
- *CSI* watchers are actually *more* likely than non-*CSI* watchers to find the defendant guilty in “breaking and entering” and “theft” cases without any fingerprint evidence.
- *CSI* watchers are actually *less* likely than non-*CSI* watchers to find a defendant not guilty if there is testimony from a victim even without dna evidence.

We concluded that generally juror expectations that they will be presented with scientific evidence are high and that jurors’ demand for scientific evidence as a condition of guilt is high in all rape cases and in all other types of cases that rely on circumstantial evidence but there apparently is no “*CSI* Effect” that results in acquittals.

Well if it is not watching *CSI*, what cause the increased expectations and demands? Blaming *CSI* or similar television shows for this effect is just too simplistic. We suggest that a broader “tech effect” of changes in our culture may more likely account for these increased expectations and demands of jurors.

This is an amazing technological age. The last thirty years have brought about such scientific discoveries and developments that some justifiably have called it a technology revolution. At the same time, new technology has been used to create another revolution in information availability and transmission. These developments in science and information are not only contemporaneous; they feed off of each other. The information technology system uses its media to grab scientific discoveries and quickly make them part of our popular culture. Ordinary people know, or at least think they know, more about science and technology from what they have learned in the media than they ever learned in school. Every week, this new scientific and information age comes marching through the courtroom door in the psyche of almost every juror that claims a seat in the box.

Perhaps jurors are right in expecting much more from the prosecution today than they have in the past. Our legal system demands proof beyond a reasonable doubt before the government is allowed to punish alleged criminals. Where there is an available scientific test that would produce evidence of guilt or innocence, and the prosecution chooses not to perform that test and present its results to the jury, it may not be unreasonable for the jury to have a doubt about the strength of the government's case. Jurors appear to have decided that today it is "reasonable" to expect more from the prosecution in the way of scientific evidence than they have expected in the past.

How should the prosecution respond to these findings? The obvious answer is to get the evidence the jury wants. That will take a major commitment to increase law enforcement resources by equipping investigating agencies with the modern forensic science equipment that jurors know is available and providing significant increases in forensic science personnel that will enable the results of forensic testing to be available in a timely manner.

A second suggestion is less expensive but more difficult. Prosecutors need to find better ways to address these expectations and demands of jurors, especially when those expectations are not rational or relevant to a particular case. When scientific evidence is not relevant, prosecutors need find better ways of explaining the lack of relevance to jurors.

How should defense counsel adapt to these findings? Some suggestions include:

- Make discovery motions - the backlog at the police laboratories often means the government wants to wait until the last moment before trial to produce its forensic evidence
- When the prosecution does not produce scientific evidence emphasize that lack of evidence to the jury.
- Emphasize the factual witnesses. One thing lawyers can learn from this study is that jurors still believe, erroneously, that eyewitness testimony is the most important type of evidence.
- Use expert testimony or at least expert background information to see if there are problems with the reliability of the government's forensic evidence.
- Take the offensive and obtain defense scientific evidence.

Everyone in the criminal justice system needs to adapt to this new jury. Most importantly attorneys must understand, and address, the fact that jurors come into the courtroom filled with a great deal of knowledge about the criminal justice system and the availability of scientific evidence. And they are usually right.

Recent State & Federal Criminal Cases

People v Gadomski, 268568 (February 1, 2007). In a per curiam opinion, the Court of Appeals found that the defendant's motion to suppress evidence was improperly granted. The defendant, who was charged with safe-breaking and home invasion, challenged the admission of business records held by third parties. Two subpoenas were directed at pawnshops and sought transaction records involving the defendant, another subpoena was directed at a retailer and sought purchase records of the defendant, and a final subpoena was directed to a credit-reporting agency and sought defendant's credit report. The defendant argued that the subpoenas were inadmissible because no charges had been filed against him

at the time of their issue, and that they did not comply with the statute permitting investigative subpoenas. The court concluded that the defendant lacked standing to challenge the admission of business records held by third parties since he had no expectation of privacy in the records because they were not his private papers. Under the statute, only the person to whom the subpoena was directed could challenge it, and the subpoenas issued in this case were not directed to defendant but rather three business entities. The court further found that the fact that the subpoenas used to obtain the records did not comply with the statute governing their admission did not require that the evidence be excluded. Indeed, the text of the statute did not allude to the exclusionary rule as a remedy for noncompliance. The trial court thus erred in applying it to remedy a statutory violation.

People v Buehler, 131943 (February 6, 2007). The defendant was sentenced to probation for indecent exposure and being a sexually delinquent person even though the minimum sentence range under the guidelines was scored at forty-two to seventy months. The Court of Appeals affirmed the sentence, but the Michigan Supreme Court reversed, and remanded the cause to the trial court to state substantial and compelling reasons for the departure. The Michigan Supreme Court found that, when the sentencing guidelines require a term of imprisonment, probation is not a valid alternative. Rather, the minimum sentence must be within the appropriate sentence range unless the court states substantial and compelling reasons to depart. The Court noted that the sentencing guidelines were enacted after the probation statute - they are more specific and provide a mandatory sentencing procedure for all enumerated crimes - and thus control for a crime that could be punished under the guidelines or with probation.

People v Jackson, 125250 (February 9, 2007). By previous order, the Michigan Supreme Court remanded the case to the circuit court for an evidentiary hearing, and directed the trial court to make additional findings regarding the defendant's request to present evidence regarding the defendant's stepbrother's alleged prior false accusation of sexual abuse. The Court peremptorily reversed the Court of Appeals judgment affirming the defendant's conviction for criminal sexual conduct, and remanded for a new trial. It found that, under the rules of evidence, evidence that the complainant had previously been induced by his father to make prior false allegations of sexual abuse against other people the father disliked was admissible. It further found that the same evidence was not excluded under the rape shield statute.

People v Clark, 265776 (February 13, 2007). The defendant was charged and convicted of felony murder and felony-firearm following the armed robbery and shooting of a man several years prior. On appeal, the court affirmed the defendant's convictions. He subsequently filed two separate motions for relief from judgment, which the trial court denied. The defendant never raised the issue of improper jury instructions in his appeal, or in his motions for relief from judgment, but later filed a third motion for relief from judgment raising the jury instruction issue for the first time and also an ineffective assistance of counsel issue for failing to object to the jury instructions. The trial court found that the jury instructions were inadequate, and that the defendant had suffered actual prejudice because trial and appellate counsel were ineffective for failing to raise the instructional issue earlier, and granted the motion. The Court of Appeals disagreed. It found that, because the defendant failed to show both good cause for not raising his claim of instructional error in both his appeal and his prior motions for relief from judgment and failed to show actual prejudice, the trial court erred in granting his motion for relief from judgment. The court did not remand for another "good cause" determination, because the trial court also erred in ruling that the defendant fulfilled

the other requirement under the statute of showing actual prejudice.

Lawrence v Florida, 05-8820 (February 20, 2007). The defendant sued for a writ of habeas corpus, claiming thirteen counts of ineffective assistance of appellate counsel. The defendant was convicted of first-degree premeditated murder and sentenced to death. He exhausted his appeals and post-conviction relief in the state courts, and then petitioned for a writ of habeas corpus in federal court. The district court dismissed the petition, finding it barred by the one-year limitations period. The United States Supreme Court found that, for purposes of the one-year statute of limitations for seeking federal habeas corpus relief from a judgment entered by a state court, a state application is not still pending when the state courts have entered a final judgment but a petition for certiorari has been filed.

United States v. Barnwell, 04-2143 (February 27, 2007). Following a second jury trial, the defendant was convicted of embezzlement and theft of labor union assets, and conspiracy to engage in misappropriation of union assets. On appeal, he challenged his convictions, alleging that five ex parte communications violated his constitutional rights. On the evening of the first day of jury deliberations in his first trial, federal agents in a separate and unrelated matter intercepted a telephone call using a wiretap authorized by the district judge in this case. The call was between two people who were the subject of an investigation the government contended had been going on for nearly fifteen years. During the conversation, the individuals discussed the trial of “our friend” downtown, and indicated that a woman had told them the vote was eight to four for conviction at one point but had then shifted towards acquittal in a vote of ten to two. A federal prosecuting attorney called the judge and left a message indicating that he needed to discuss an important issue with the judge. Five ex parte meetings and communications occurred between the district judge, the prosecution, government agents, and the jury foreperson in his case. The government contended that the communications were necessary to protect the existence of a wiretap in a “completely unrelated case,” a part of an “ongoing criminal investigation,” which allegedly involved the commission of several federal offenses. However, counsel for the government could not provide any details, and stated only that the investigation was ongoing and involved public corruption. The defendant’s attorney not only did not know the substance of the communications, but also had no knowledge that they were even occurring. The Sixth Circuit Court of Appeals concluded that, if ex parte communications are to be allowed at all, they must continue no further than the extent to which they are absolutely necessary to protect the state’s compelling interest. It remanded for a new trial, finding that the defendant’s constitutional rights to due process, effective assistance of counsel, and trial by an impartial judge and jury were violated.

Whorton v Bockting, 05-595 (February 28, 2007). The United States Supreme Court reversed the judgment of the Ninth Circuit Court of Appeals, which reversed the district court in holding that *Crawford* applied retroactively. The defendant sued the director of the department of corrections for a writ of habeas corpus, claiming that the court denied his constitutional right to confront his accuser at trial. The defendant was convicted of three counts of sexually assaulting a minor and sentenced to life imprisonment. The only witness in the trial was the defendant’s six-year-old stepdaughter, who became upset and uncommunicative during her testimony at trial. The judge declared that the girl was unavailable for trial, but admitted into evidence her hearsay statements to a detective. The Court found that *Crawford v Washington*, 541 US 36 (2004), which held that out-of-court statements that are testimonial are inadmissible unless the defendant has had the opportunity for cross-examination, was not retroactive because it is a new rule of law that was not dictated by prior precedent.

United States v Rice, No. 06-5245 (March 2, 2007): The government brought forth an interlocutory appeal challenging the district court's order to suppress the fruits of a wiretap related to an alleged drug operation, and an order denying its motion for reconsideration. The Sixth Circuit Court of Appeals found that the district court did not err in suppressing the fruits of the wiretap because there is not a good-faith exception for warrants improperly issued under the statute (Title III of the Omnibus Crime Control and Safe Streets Act). In this case, another phone wiretap recorded a discussion with Defendant Rice regarding the imminent arrival of "a hundred." A federal agent thought this was a reference to a large quantity of cocaine and, within ten days of hearing this conversation, the government sought permission to use the wiretap. The wiretap was issued, which resulted in the government collecting evidence leading to the defendants' indictments. The district court held that the agent's affidavit used in the application for the wiretap failed to satisfy the requirements under the statute, and granted the defendants' motion to suppress the fruits of the unlawful wiretap. The Sixth Circuit Court of Appeals affirmed, holding that the district court did not commit clear error in determining that the statements about the physical surveillance in the agent's affidavit were misleading and made recklessly, and that the affidavit did not meet the "necessity requirement." The Sixth Circuit, in an issue of first impression, further held that there is no "good faith" exception to warrants improperly issued under the statute in question because the language and legislative history of the statute strongly militate against imposing one. Chief Justice Bell filed a dissent in the case.

People v Osantowski, No. 264368 (March 8, 2007): Pursuant to the Michigan Anti-Terrorism Act, the defendant was convicted for conduct stemming from electronic chat room conversations he engaged in using the screen name "nazi_bot_sadistic." During these chats, he communicated his feelings of hate and his plans for the infliction of death and terror upon his own family members and other individuals. On appeal, he asserted that the statute was vague and failed to provide fair notice of the prohibited conduct. The Court of Appeals disagreed, holding that the statutes at issue prohibited only "true threats," as they encompassed the communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. It further found that, because the statutes require the existence of intent to "intimidate or coerce," they extended beyond the type of constitutionally protected speech or expressive conduct. Accordingly, the statutes were neither unconstitutionally vague nor overbroad. The court also held that the statute criminalized communicating to any other person a serious expression of intent to commit an act of terrorism. Specifically, the statute criminalized communicating to any other person a serious expression of an intent to commit a "willful and deliberate act" constituting "a violent felony" under state law, which the communicator "has reason to know is dangerous to human life," and is "intended to intimidate or coerce a civilian population or influence or affect the conduct of government." The statute thus provided a person of ordinary intelligence a reasonable opportunity to know what behavior or conduct was prohibited.
