

CAN FICTION IMPEDE CONVICTION? ADDRESSING CLAIMS OF A “CSI EFFECT” IN THE CRIMINAL COURTROOM

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INTRODUCTION

CSI and numerous other programs in the “forensic drama” genre have been among television’s most popular shows for over ten years. Many of these programs regularly depict law enforcement employing forensic investigation techniques that are rarely used, unavailable to local police, or completely fanciful. There has been significant media coverage of a purported “CSI effect” – the process by which forensic dramas such as *CSI* contribute to unrealistic expectations among their viewers about the type of evidence available during criminal trials.¹ These expectations could lead jurors to have unrealistic demands for the amount or type of forensic evidence that must be produced in order to convict.² If the effect exists in both parts – unrealistic expectations leading to unrealistic demands – it would put prosecutors at a disadvantage at trial and could lead to defendants being acquitted despite evidence of guilt beyond a reasonable doubt.

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¹ See, e.g., Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1052 (2006).

² This Article will use “forensic evidence” to refer to a broad range of forensic sciences and technologies. Forensic science itself is a general term for science as applied to law. The American Academy of Forensic Sciences defines forensic science as “the application of scientific principles and technological practices to the purposes of justice in the study and resolution of criminal, civil, and regulation issues.” *About AAFS*, AMERICAN ACADEMY OF FORENSIC SCIENCES, <http://www.aafs.org/about-aafs> (last visited Sept. 23, 2013). Forensic science encompasses a range of disciplines, such as biology, document examination, fingerprint examination, pathology, physical anthropology, and toxicology. See *id.*

There is little evidence that forensic dramas raise jurors' demands for evidence, and abundant evidence that they do not.³ Nonetheless, some scholars have identified an alternative "tech effect," in which widespread notions of advancing science and technology contribute to higher expectations of forensic evidence.⁴ Even if such a phenomenon exists, expectations involved with the tech effect are not necessarily unrealistic and they do not necessarily lead to higher demands for evidence to convict.

While scholars have examined whether a CSI effect and a tech effect exist, much less has been written about whether courts should attempt to counter unrealistic juror expectations and what those attempts might look like. What has been written has suggested the use of various mechanisms, including voir dire, argument by attorneys, and jury instructions, to counter unrealistic demands for evidence to support conviction.⁵ This literature is echoed in a number of judicial opinions in the last three years, mostly in Maryland, that have discussed potential remedies for the CSI effect.⁶ In this Article, I consider the rapidly developing case law surrounding how courts could react to these issues, analyzing the potential pitfalls and relative merits of two responses that can directly involve the trial judge – jury instructions and voir dire.

After examining the case law in light of the research regarding the existence of a CSI effect and a tech effect, I take the restrained approach of a skeptic. I conclude that courts should avoid giving instructions to counter the CSI or tech effect and

³ See, e.g., Kimberlianne Podlas, *"The CSI Effect:" Exposing the Media Myth*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 429, 460-64 (2006).

⁴ See, e.g., Donald E. Shelton, Young S. Kim & Gregg Barak, *A Study of Juror Expectations and Demands Concerning Scientific Evidence: Does the "CSI Effect" Exist?*, 9 *VAND. J. ENT. & TECH. L.* 331, 362-65 (2006).

⁵ See Caroline L. Kinsey, *CSI: From the Television to the Courtroom*, 11 *VA. SPORTS & ENT. L.J.* 313, 324-59 (2012) (finding evidence for CSI effect convincing and proposing that methods including voir dire, argument by attorneys, additional prosecutorial witnesses, and jury instructions be used to ensure it does not affect trials); Tamara F. Lawson, *Before the Verdict and Beyond the Verdict: The CSI Infection Within Modern Criminal Jury Trials*, 41 *LOY. U. CHI. L.J.* 119, 169-73 (2009) (finding that a "CSI infection" exists in trials and arguing that judges and prosecutors are already using a variety of mechanisms to counter it, and that they should continue to do so and expand their efforts).

⁶ See *infra* notes 110, 159-63, 250, 253.

should allow voir dire only cautiously. Instructions that tell jurors that the government does not need to conduct any specific tests to prove its case are especially problematic, because they lower the government's burden of proof and insert the opinion of the trial judge into the case. These instructions should be given only to correct improper arguments by defense counsel.

Independent of the possible existence of a CSI effect or a tech effect, there are benefits to allowing broad voir dire.⁷ Consequently, for those concerned with unrealistic juror expectations, voir dire may provide a permissible procedural response in some circumstances. Voir dire is less problematic than jury instructions in terms of burden lowering and judicial commentary – it comes at the beginning of trial rather than appearing to comment on recently concluded evidence, it takes the form of questions rather than instructions, and it may be done by attorneys.⁸

Because there is little evidence of an effect on juror expectations caused by forensic dramas, any voir dire or jury instructions should avoid mentioning *CSI* or similar forensic television shows. Mentioning these shows may suggest to jurors that they have unrealistic expectations for evidence, when in fact they may not. If jurors do expect more scientific evidence than they used to, whether because of *CSI* or not, the best solution is for the government to do a better job of producing additional forensic evidence or of explaining why it cannot.

Part I of this Article provides a short historical overview of perspectives on the CSI effect, both in the popular media and in scholarly research. Significant media coverage has brought national attention to the possibility of a CSI effect. But there is little evidence that a CSI effect actually exists, and several scholars have labeled it a myth. An alternative, and more likely,

⁷ See, e.g., Neal Bush, *The Case for Expansive Voir Dire*, 2 LAW & PSYCHOL. REV. 9, 9 (1976).

⁸ Voir dire is conducted entirely or partially by attorneys in forty-one states but not in federal courts or the District of Columbia. See Marie Comiskey, *Does Voir Dire Serve as a Powerful Disinfectant or Pollutant? A Look at the Disparate Approaches to Jury Selection in the United States and Canada*, 59 DRAKE L. REV. 733, 743 n.63 (2011) (citing Gregory E. Mize, Paula Hannaford-Agor & Nicole L. Waters, *The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report* (2007), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/juries/id/112>).

hypothesis is the existence of a “tech effect.” The tech effect hypothesis suggests that jurors expect prosecutors to make significant use of legitimate advances in science and technology to prove their cases. This part concludes by asking whether court procedures should respond to cultural and media phenomena, and what threshold of evidence for such a phenomenon would merit a response.

Part II moves to a consideration of jury instructions. Several recent cases have considered the propriety of jury instructions that tell jurors the government has no duty to conduct any specific types of tests to prove its case. But, these “no-duty” instructions raise two distinct dangers: they could lower the government’s burden of proof by leading jurors to think forensic tests are not important, and they could insert the opinion of the trial judge into a question for the jury about how important the absence of scientific tests should be. Various courts have developed three different approaches to no-duty instructions, each of which I will consider in turn. Maryland has taken a restrictive approach, and I will explore in some detail the history of how Maryland courts reached this position. Ultimately, I conclude that Maryland’s approach is the best available and provides a model for other jurisdictions to follow.

Part III briefly considers voir dire as an alternative means of countering unrealistic expectations. Cases in several jurisdictions have found no error when a judge asked jurors whether they would demand forensic evidence. Still, voir dire can be problematic, especially when it is conducted by the judge. Two concurring judges in Maryland have expressed concern that trial judges, who conduct most of the voir dire in Maryland, should not be able to send the same message to the jury in voir dire that they cannot send via instructions. I also consider Massachusetts cases that have recognized an inherent tension between the right to present a defense and voir dire on juror expectations of forensic evidence. Part III concludes that although voir dire would be a better way to counter a CSI effect or tech effect than jury instructions, it should be permitted only if the questions are carefully worded so as not to lessen the government’s burden. This is especially important when the questioner is the judge.

While the available evidence does not suggest that courts, as a general matter, need to act to counter CSI and tech effects, there could be cases where jurors display unrealistic demands for forensic evidence. Moreover, a defense lawyer in a particular case may make an improper argument about the lack of forensic evidence and what it means. Part IV concludes with some considerations raised in instances like these that should guide any judicial remedies related to a CSI effect or a tech effect.

I. THE CSI EFFECT(S) AND THE TECH EFFECT

A. *The History of the CSI Effect*

CSI: Crime Scene Investigation premiered on CBS in the fall of 2000.⁹ The show was immediately successful, and by 2002 it was the highest rated program on television.¹⁰ It remained in the top ten among primetime television programs until 2009 and continues to air.¹¹ Additionally, there were several spin-offs,¹² as well as similar shows on all of the major networks.¹³ Several of these programs have reached similar levels of popularity.¹⁴ It is widely accepted that the techniques and tests used by

⁹ See INTERNATIONAL TELEVISION AND VIDEO ALMANAC 5, 16 (47th ed. 2002).

¹⁰ See INTERNATIONAL TELEVISION AND VIDEO ALMANAC 16 (34th ed. 2004).

¹¹ CBS renewed *CSI* for a thirteenth season in March 2012. See Bill Gorman, *CBS Renews 18 Shows: 'The Good Wife,' 'Blue Bloods,' '2 Broke Girls,' 'The Mentalist,' 'Mike & Molly' & Many More*, TV BY THE NUMBERS, (Mar. 14, 2012), <http://tvbythenumbers.zap2it.com/2012/03/14/cbs-renews-18-shows-the-good-wife-blue-bloods-2-broke-girls-the-mentalist-mike-molly-many-more/124487/>.

¹² *CSI: Miami* and *CSI: New York*. See Elizabeth Harvey & Linda Derksen, *Science Fiction or Social Fact?: An Exploratory Content Analysis of Popular Press Reports on the CSI Effect*, in THE CSI EFFECT: TELEVISION, CRIME, AND GOVERNANCE 3 (Michele Byers & Val Marie Johnson eds., 2009).

¹³ Other crime dramas that similarly focus on or feature forensic investigation have included *NCIS*, *Crossing Jordan*, *Bones*, *Cold Case*, *Without a Trace*, and *Numb3rs*. See *id.*

¹⁴ *NCIS* and *NCIS: Los Angeles*, which feature lab technicians in addition to other law enforcement officers, have been among the highest rated programs of recent seasons. The Nielsen ratings for 2011-12 put both shows in the top ten most popular programs. See Bill Gorman, *Complete List of 2011-12 Season TV Show Viewership: 'Sunday Night Football' Tops, Followed By 'American Idol,' 'NCIS' & 'Dancing With the Stars'*, TV BY THE NUMBERS, (May 24, 2012), <http://tvbythenumbers.zap2it.com/2012/05/24/complete-list-of-2011-12-season-tv-show-viewership-sunday-night-football-tops-followed-by-american-idol-ncis-dancing-with-the-stars/135785/>.

investigators in many of these forensic science dramas are unrealistic.¹⁵

As *CSI* became more popular, coverage of a purported effect that the program was having on jurors began to receive significant coverage in the news media.¹⁶ The first news stories mentioning a “CSI effect” appeared in 2002, shortly after the series began.¹⁷ Still, for three years there were relatively few reports of the CSI effect.¹⁸ Reports began to rise in 2004, including an article specifically about the CSI effect in *USA Today*.¹⁹ The media coverage of the CSI effect spiked in 2005, with approximately fifty stories,²⁰ including a cover story in *U.S. News and World Report*.²¹ The coverage appears to have peaked in 2006, with seventy-eight stories, before beginning to drop again.²²

Beginning in 2005, scholars began considering whether the CSI effect existed and what it could look like if it did.²³ While *CSI*

¹⁵ According to forensic experts cited in news reports, *CSI* compresses the time required for tests, makes tests appear more conclusive than they are, makes expensive or rarely used tests seem normal, and completely fabricates some tests that do not exist. Simon A. Cole & Rachel Dioso-Villa, *CSI and Its Effects: Media, Juries, and the Burden of Proof*, 41 *NEW ENG. L. REV.* 435, 439 (2007). One particularly implausible example of a fake test from *CSI* was an episode where investigators poured caulk into a flesh wound to make a mold of a knife. See Richard Willing, ‘*CSI Effect*’ Has Juries Wanting More Evidence, *USA TODAY*, (Aug. 5, 2004, 1:06 AM), available at http://www.usatoday.com/news/nation/2004-08-05-csi-effect_x.htm.

¹⁶ Two comprehensive surveys of press reports about the “CSI effect” have been published. See Harvey & Derksen, *supra* note 12, at 3; Simon A. Cole & Rachel Dioso-Villa, *Investigating the ‘CSI Effect’ Effect: Media and Litigation Crisis in Criminal Law*, 61 *STAN. L. REV.* 1335, 1364-70 (2009).

¹⁷ See, e.g., Jeffrey Kluger et al., *How Science Solves Crimes*, *TIME*, Oct. 21, 2002, at 36.

¹⁸ See Harvey & Derksen, *supra* note 12, at 12 (counting twenty-four stories over the three-year period); Cole & Dioso-Villa, *supra* note 16, at 1339 (counting sixteen stories over the same period).

¹⁹ Willing, *supra* note 15.

²⁰ See Harvey & Derksen, *supra* note 12, at 12 (counting forty-eight stories); Cole & Dioso-Villa, *supra* note 16, at 1339 (counting fifty-six stories).

²¹ Kit R. Roane, *The CSI Effect: On TV It’s All Slam-Dunk Evidence and Quick Convictions. Now Juries Expect the Same Thing – And That’s a Big Problem*, *U.S. NEWS AND WORLD REPORT*, (Apr. 17, 2005) available at <http://www.usnews.com/usnews/culture/articles/050425/25csi.htm>.

²² See Cole & Dioso-Villa, *supra* note 16, at 1339 (counting sixty-five stories in 2007 and forty-three in 2008).

²³ See, e.g., Simon Cole & Rachel Dioso, Op-Ed, *Law and the Lab: Do Television Shows Really Affect How Juries Vote? Let’s Look at the Evidence*, *WALL ST. J.*, (May 13, 2005), at W13.

could raise expectations for evidence, it could potentially have other, widely divergent, effects on its viewers. Scholars have posited two,²⁴ three,²⁵ or even eight,²⁶ different effects. Several scholars have also noted that an effect benefiting the government is perfectly plausible and at least as likely as the more common iteration of the CSI effect that suggests the government is invariably harmed by it.²⁷ Even some forensic scientists have

²⁴ See Tyler, *supra* note 1, at 1064-76. In addition to possibly helping defendants, Tyler suggested that *CSI* could also hurt them in at least three different ways: by promoting the need for closure in criminal cases, by exaggerating the probative value of scientific evidence, and by focusing so much on the investigation that the trial looks like a formality. *Id.*

²⁵ See Podlas, *supra* note 3, at 433-34. Podlas claimed that *CSI* could: (1) raise the burden of proof on prosecutors by creating unrealistic expectations among jurors of the possibilities of forensic science; (2) lead jurors to blindly believe forensic evidence, benefitting the prosecution; or (3) make jurors more interested in forensic evidence and help them understand it. *Id.*

²⁶ See Cole & Dioso-Villa, *supra* note 16, at 1345. Cole and Dioso-Villa list eight possible CSI effects: (1) the strong prosecutor's effect, whereby jurors are more likely to acquit because of higher expectations for forensic evidence; (2) the weak prosecutor's effect, whereby prosecutors compensate for an absence or weakness of forensic evidence; (3) the defendant's effect, whereby jurors give greater credibility to forensic science witnesses; (4) the producer's effect, whereby jurors become more knowledgeable of forensic science; (5) the educator's effect, whereby students are more attracted to careers in forensic science; (6) the police chief's effect, whereby criminals adopt counter measures to avoid detection by forensic science; (7) the tech effect, whereby jurors have higher expectations because of actual developments in forensic technology; and (8) the victim's effect, whereby crime victims expect forensic testing in every case. *Id.*

²⁷ See Tyler, *supra* note 1, at 1063; Podlas, *supra* note 3, at 437-38. Podlas has argued that the CSI effect, as popularly characterized, conflicts with the broad research on how television affects its viewers. She described television's influence on law with a genre-specific cultivation theory. Cultivation theory says that "the overall pattern of television programming to which viewers are exposed cultivates in them common perceptions of reality." *Id.* at 447. But the CSI effect would constitute a very sophisticated, and unlikely, model. Not only would viewers have to be influenced by *CSI*, they would have to latch onto a piece of the content narrative, interpret it in a specific way, and apply it broadly in a courtroom setting. Far more likely, Podlas posits, is that viewers would be influenced by the overall narrative of *CSI*, in which the investigators and their techniques are always right, and they always ensure closure by getting the bad guy. *Id.* at 437-38. *But see* N.J. Schweitzer & Michael J. Saks, *The CSI Effect: Popular Fiction About Forensic Science Affects the Public's Expectations About Real Forensic Science*, 47 JURIMETRICS J. 357, 362 (2007) (finding that viewers of forensic science programming were more critical of forensic science evidence presented in a simulated trial).

made similar statements.²⁸ Additionally, various effects could co-exist: one can imagine *CSI* giving jurors unrealistic ideas about the capabilities of forensic testing and simultaneously making younger viewers more interested in pursuing careers as forensic scientists. The majority of these hypothetical effects do not cause any harm that needs to be remedied through criminal trial procedures.²⁹

B. Is There a CSI Effect?

1. Media Reports and Practitioners' Surveys

The media stories covering the CSI effect have tended to look very similar.³⁰ Many stories featured statements by prosecutors, claiming that *CSI* created unrealistic expectations among jurors about the types of scientific evidence that could be gathered and tested.³¹ These stories often claimed that CSI-affected jurors ignored relevant evidence and acquitted defendants because their

²⁸ See Willing, *supra* note 15 (quoting a DNA specialist as saying, in reference to CSI, "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.").

²⁹ Cole and Dioso-Villa considered the implications of each of their eight effects on the criminal justice system, concluding that only two of them posed potential problems that could be countered procedurally – the strong prosecutor's effect and the defendant's effect. See Cole & Dioso-Villa, *supra* note 15, at 447-54. Five other effects were benign and did not need to be countered. *Id.* Finally, while the police chief's effect has troubling ramifications, the procedures of a criminal trial would be ineffective in countering it. *Id.*

³⁰ This may be because many of the articles more or less copied earlier ones. Harvey and Derksen found that the articles they reviewed cited "just a tiny handful of original sources," featured the same prosecutors and defense lawyers, and, in many cases, were based on the content of a single 2002 *Time* article. Harvey & Derksen, *supra* note 12, at 11. See also Cole & Dioso-Villa, *supra* note 16, at 1367 (positing that CSI effect stories lend themselves to "localization," whereby an earlier story is rewritten using local characters).

³¹ See, e.g., Willing, *supra* note 15. Initially, some prosecutors apparently believed that *CSI* would help improve their status and even help them get additional funding. In 2002, the National District Attorney's Association recruited George Eads, one of the stars of *CSI* to record a public service announcement. The press release for this campaign proclaimed that *CSI* was one of the few shows that demonstrated the importance of providing prosecutors with the most accurate evidence possible. See Robin Franzen, *TV's CSI Crime Drama Makes It Look Too Easy*, THE OREGONIAN, Dec. 10, 2002, at A01.

unrealistic expectations for forensic evidence were not met.³² One of the most common types of stories centered on a local high profile case, resulting in an acquittal, and speculated that *CSI* could have affected the outcome.³³

While some stories acknowledged that *CSI* could have a variety of effects on its viewers, the large majority focused on whether the program increased acquittals.³⁴ The news stories have arguably provided some evidence for the existence of a *CSI* effect.³⁵ But by their nature, news stories have been anecdotal, repetitive, and lack any degree of scientific testing.³⁶ Whatever evidence they present is outweighed by the contrary evidence compiled by methodological studies.³⁷ Additionally, the sources

³² See, e.g., Zofia Smardz, *The Jury's Out; How 12 Reasonable People Got Hung Up on Reasonable Doubt*, WASH. POST, June 26, 2005, at B1.

³³ See, e.g., Allison Klein, *Art Trips up Life: TV Crime Shows Influence Jurors*, BALTIMORE SUN, (July 25, 2004), available at http://articles.baltimoresun.com/2004-07-25/news/0407250246_1_priest-csi-acquittals (speculating, based on interviews with prosecutors, that the *CSI* effect led jurors in two recent robbery and shooting cases to disregard witness testimony and acquit because of a lack of scientific evidence).

³⁴ See Harvey & Derksen, *supra* note 12, at 15 (finding fifty-six mentions of unrealistic juror expectations and twenty-eight reports of negative juror impact in seventy news articles); See also Cole & Dioso-Villa, *supra* note 16, at 1369 (finding 197 mentions of the *CSI* effect benefitting defendants, compared to twenty-one mentions of it benefitting prosecutors, in 258 news articles). A good example of this focus was *The Baltimore Sun* story, which never mentioned the possibility of any effect other than one helping defendants. See Klein, *supra* note 33.

³⁵ Some scholars have found the reports of *CSI*-influenced jurors convincing enough to call for action. See Kinsey, *supra* note 5, at 324-29, 335; Lawson, *supra* note 5, at 119. Lawson argues that there is a real threat of “inappropriate application of fictional analysis in real life cases, which in some instances has induced erroneous conclusions of fact and faulty verdicts.” *Id.* at 171. She calls this phenomenon “*CSI* infection.” *Id.* Lawson bases this argument primarily on media reports of jurors relying on *CSI*-influenced, unrealistic expectations for scientific evidence. *Id.* at 136-41 (focusing on the example of a juror in Illinois who voted to acquit in a rape case because she expected the government to match dirt from the defendant’s cervix to dirt at the crime scene. *Id.* at 136-37. – a tactic that has been used repeatedly on *CSI*). Kinsey focuses on similar reports – including the same Illinois case and the Robert Blake murder trial – to support her conclusion that there is evidence for the *CSI* effect, though it is not conclusive. Kinsey, *supra* note 5, at 327-29. Kinsey also relies heavily on surveys of judges and attorneys. *Id.* at 324-27.

³⁶ For these reasons, the scholarly consensus has generally not been kind to the media reports and has not treated them as evidence for the existence of a *CSI* effect. See Harvey & Derksen, *supra* note 12, at 11-12; Cole & Dioso-Villa, *supra* note 16, at 1367; Tyler, *supra* note 1, at 1053-54; Kimberlianne Podlas, *The “CSI Effect” and Other Forensic Fictions*, 27 LOY. L.A. ENT. L. REV. 87, 92 (2007).

³⁷ See *infra* Part II.B.2.

relied on by the media have not uniformly supported a CSI effect.³⁸ For all these reasons, the news reports should not be considered a reliable source of evidence for the existence of a CSI effect.³⁹

Surveys of practitioners comprise a similar source of evidence, and can be equally problematic. In 2005, the Maricopa County District Attorney conducted a survey of 102 prosecutors in Phoenix.⁴⁰ The survey showed that many of the prosecutors thought the CSI effect was having some impact on the outcome of their cases.⁴¹ In another survey of judges, prosecutors, and defense lawyers, 79% of responders recalled at least one specific instance where they believed a jury's decision had been impacted by forensic dramas.⁴²

As scholars have noted, practitioners' surveys present a range of problems if used as evidence for the CSI effect. Surveys of judges and attorneys cannot reliably show jurors' reasons for

³⁸ One early article noted that prosecutors did not all agree that jurors were becoming less likely to convict based on lack of forensic evidence. Tyler, *supra* note 1, at 1055 n.14 (citing Karin H. Cather, *The CSI Effect: Fake TV and Its Impact on Jurors in Criminal Cases*, PROSECUTOR, Mar./Apr. 2004, at 9-10). One interview led to this conclusion: "Regarding the question of the impact on juries resulting from forensic TV shows, we are seeing no impact," says Elaine Leschot, a supervising prosecutor in Monmouth, New Jersey, who oversees 18 trial lawyers assigned to seven courts. "Juries are returning verdicts based on evidence in court with the same consistency seen before these shows began." *Id.*

³⁹ Cole and Dioso-Villa have drawn a comparison between the media's treatment of the CSI effect and the similar treatment of the so-called "litigation explosion" in the 1980s. See Cole & Dioso-Villa, *supra* note 16, at 1364-66.

⁴⁰ Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, 115 YALE L.J. POCKET PART 70 (2006), [HTTP://WWW.YALELAWJOURNAL.ORG/IMAGES/PDFS/32.PDF](http://www.yalelawjournal.org/images/pdfs/32.pdf).

⁴¹ *Id.* (finding that 38% of prosecutors believed that at least one of their trials had resulted in an acquittal or hung jury because of a lack of forensic evidence). Tom Tyler disputed the results of the survey because they were based on prosecutors' discussions with jurors after trial and, therefore, depended entirely on jurors' own abilities to know whether their verdicts were influenced by particular standards for evaluating evidence and whether they got those standards from *CSI*. Tom R. Tyler, *Is the CSI Effect Good Science?*, 115 YALE L.J. POCKET PART 73 (2006), [HTTP://WWW.YALELAWJOURNAL.ORG/IMAGES/PDFS/33.PDF](http://www.yalelawjournal.org/images/pdfs/33.pdf).

⁴² See Monica L.P. Robbers, *Blinded by Science: The Social Construction of Reality in Forensic Television Shows and its Effect on Criminal Jury Trials*, 19 CRIMINAL JUSTICE POLICY REVIEW 84, 91-92 (2008), available at <http://www.sagepub.com/spohnstudy/articles/4/Robbers.pdf>. Robbers also found that 50% of responders reported a perceived preference among jurors for forensic evidence and 53% reported jurors discounting eyewitnesses. *Id.* at 92.

acquitting.⁴³ For example, surveys are based on the prosecutors' ideas about whether a defendant should have been convicted.⁴⁴ Additionally, the information provided by surveys tends to be incredibly speculative.⁴⁵ At best, these surveys show the intuitions of people involved in the criminal justice system. At worst, they could simply be sour grapes.

Additionally, practitioners' surveys present a danger of "hypothesis swapping," or using evidence of one type of CSI effect to prove another.⁴⁶ Commentary on the Maricopa County survey says that prosecutors have had to take measures to counter the CSI effect.⁴⁷ But this is simply evidence of prosecutors changing their behavior in response to *CSI*, whether or not jurors have actually changed their requirements for convicting.⁴⁸ Using this behavior as evidence that the CSI effect benefits defendants puts the cart before the horse.

2. Studies of Jurors

Several empirical studies, in the form of juror surveys and hypothetical trial scenarios, have attempted to determine the existence of a CSI effect. None has showed any definitive results.

⁴³ While legal actors have a front-row seat to the trial, they are not present during deliberations. As Tyler noted, "[b]ecause the prosecutors cannot step into the minds of jurors and are not conducting experimental studies that vary exposure to *CSI*, their opinions are, basically, opinions." Tyler, *supra* note 1, at 1054 n.8.

⁴⁴ The 38% of prosecutors who believed that a conviction had turned on the lack of forensic evidence "believed the existing testimony by itself was enough to sustain a conviction." Thomas, *supra* note 40, at 70. But this begs the question. Presumably, if prosecutors believed they did not have enough evidence to bring charges, they would not bring them. See MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (A "prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").

⁴⁵ For example, the Maricopa County survey reported that prosecutors "suspect" that in 72% of cases jurors who watch forensic dramas sway other jurors by claiming expertise during deliberations. Thomas, *supra* note 40, at 71. The only cited answers in the survey that were not completely speculative were reports that jurors had asked questions about forensic evidence in "about 40% of cases." *Id.* at 70.

⁴⁶ See Cole & Dioso-Villa, *supra* note 16, at 1346-47; Cole & Dioso-Villa, *supra* note 15, at 453.

⁴⁷ See Thomas, *supra* note 40, at 72.

⁴⁸ See Cole & Dioso-Villa, *supra* note 16, at 1346. In Cole and Dioso-Villa's typology, Thomas is substituting evidence of a "weak prosecutor's effect" for evidence of a "strong prosecutor's effect." *Id.*

Indeed, most of them cast serious doubt on the existence of an effect that benefits defendants.

Kimberlianne Podlas published the first study in two parts in 2006⁴⁹ and 2007.⁵⁰ In three groups, she surveyed college students, graduate students, and adults showing up for jury duty.⁵¹ Podlas' study used two hypothetical cases in which the only pieces of evidence were the conflicting, facially-credible stories of a complainant and a defendant.⁵² Conviction should be impossible in this scenario because, without being able to judge demeanor, the hypothetical juror has no way to find guilt beyond a reasonable doubt.⁵³ Jurors voting not guilty were asked to identify from a list the factors that influenced their verdicts. Four of the seven factors involved forensic evidence, such as fingerprints or DNA.⁵⁴ Jurors requesting more forensic evidence were then broken down between those who watched *CSI* and similar shows frequently and those who did not.⁵⁵ The survey results showed that frequent viewers of forensic dramas were no more likely to demand forensic evidence for a guilty verdict than jurors who did not watch such shows.⁵⁶ In fact, while not proving the opposite, Podlas noted that frequent viewers were actually less likely to base not-guilty verdicts on the lack of forensic evidence.⁵⁷

⁴⁹ See Podlas, *supra* note 3, at 429.

⁵⁰ See Podlas, *supra* note 36, at 87, 112-121.

⁵¹ *Id.* at 115.

⁵² Podlas, *supra* note 3, at 455.

⁵³ See *id.* Later researchers Shelton, Kim, and Barak questioned the results of Podlas' first study because she surveyed college students rather than actual jurors, did not give participants the option of saying they were not sure how they would vote, did not include jurors who gave guilty verdicts in the analysis, and used a rape case as the hypothetical scenario (because jurors may be more demanding in rape cases, regardless of *CSI*). Shelton et al., *supra* note 4, at 361. The authors of another study also criticized Podlas' first study for using a hypothetical scenario that did not involve forensic evidence. See Schweitzer & Saks, *supra* note 27, at 360 N.12 (arguing that Podlas' results were likely caused by viewers and non-viewers alike recognizing the irrelevance of forensic evidence in the hypothetical case).

⁵⁴ Podlas, *supra* note 3, at 456.

⁵⁵ *Id.* at 457. A large majority of the students surveyed, 75%, were frequent viewers. *Id.*

⁵⁶ *Id.* at 461.

⁵⁷ *Id.* at 461-62. Because Podlas' study was based only on jurors who voted not guilty, it was impossible to reach any conclusions about a pro-prosecution effect. *Id.* Podlas suggested that this might actually be evidence of some form of her third *CSI*

A 2007 study of forty-eight university students by N.J. Schweitzer and Michael J. Saks had somewhat different findings.⁵⁸ This study gave participants a hypothetical case that largely turned on the testimony of a forensic scientist who matched hair samples.⁵⁹ The study found that viewers of CSI-type shows were more critical of the forensic evidence and reported that they had a better idea of the tasks of forensic scientists than non-viewers.⁶⁰ But the study found no statistically significant differences in verdicts between the two groups.⁶¹ The authors speculated that a larger study might need to be done to determine if a CSI effect led to acquittals,⁶² but also speculated that the difference in expectations might not be enough to lead to a difference in verdicts.⁶³

Donald Shelton, Young Kim, and Gregg Barak conducted a larger study consisting of two surveys, three years apart, of prospective jurors in two counties in Michigan.⁶⁴ The two studies yielded similar results, finding some evidence of increased expectations for forensic evidence. Importantly, however, these studies did not find increased demands for such evidence in order to vote for a guilty verdict.

The first study surveyed 1,027 perspective jurors in Washtenaw County.⁶⁵ In summary, the authors of the study asked jurors (1) how often they watched certain categories of law-related television shows, including *CSI*, (2) what types of evidence they expected in different types of criminal prosecutions, and (3) how

effect – that viewers of the show might be more educated on burdens of proof and more stringent in assessing evidence. *Id.*

⁵⁸ Schweitzer & Saks, *supra* note 27, at 361-62.

⁵⁹ *Id.* Participants were given a transcript of the expert's testimony to read. *Id.*

⁶⁰ *Id.* at 362.

⁶¹ *Id.* (finding 29% guilty verdicts by non-viewers and 18% guilty verdicts by viewers).

⁶² *Id.* at 363. The authors also cautioned that studies involving different forensic techniques could lead to different results because theirs had only involved hair analysis. *Id.* at 364.

⁶³ *Id.*

⁶⁴ See Shelton et al., *supra* note 4, at 337 (surveying jurors in Washtenaw County, where Ann Arbor is the county seat); Donald E. Shelton, Young S. Kim & Gregg Barak, *An Indirect-Effects Model of Mediated Adjudication: The CSI Myth, the Tech Effect, and Metropolitan Jurors' Expectations for Scientific Evidence*, 12 VAND. J. ENT. & TECH. L. 1, 11-12 (2009) (surveying jurors in Wayne County, where Detroit is the county seat).

⁶⁵ Shelton et al., *supra* note 4, at 336.

likely they were to find the defendant guilty or not guilty based on the types of evidence presented.⁶⁶ After analyzing all the data, the study's authors concluded that regular viewers of *CSI* were more likely to expect all types of evidence – including non-scientific evidence such as eyewitness testimony.⁶⁷ Though *CSI* viewers had higher expectations for more relevant scientific evidence, they also had lower expectations for less relevant scientific evidence.⁶⁸

On the question of guilt, the authors asked if jurors would be likely to convict in cases of various crimes where the evidence included either eyewitness testimony or circumstantial evidence but no scientific evidence.⁶⁹ Both viewers and non-viewers were likely to convict in cases with victim or other eyewitness testimony but likely to acquit in cases based on circumstantial evidence.⁷⁰ There were few statistically significant differences between viewers and non-viewers in the different scenarios presented.⁷¹

The second survey essentially replicated these methods in Wayne County, both larger and more urban than Washtenaw County.⁷² The Wayne County survey reached similar results, finding that 58.3% of jurors expected scientific evidence in every case.⁷³ The authors reported, however, that the data on both juror expectations for scientific evidence and conditions for acquitting confirmed the first survey's conclusion that watching forensic dramas had no effect.⁷⁴

Shelton, Kim, and Barak reached several conclusions about the *CSI* effect from these studies. First, expectations among all jurors for scientific evidence were high, with almost half expecting

⁶⁶ *Id.* at 340-42. Similar to Podlas' sample, a high percentage of jurors watched *CSI* regularly (22.7%) or on occasion (41.8%). *Id.* at 345. *Law and Order* had similar numbers of viewers. *Id.*

⁶⁷ *Id.* at 353.

⁶⁸ *Id.* *CSI* viewers had significantly higher expectations for certain kinds of relevant evidence, including ballistics in a murder case and fingerprints in a breaking and entering case. *Id.*

⁶⁹ *Id.* at 354.

⁷⁰ *Id.* at 357.

⁷¹ There were differences in only four of thirteen scenarios, and three of these were only marginally different. *Id.*

⁷² See Shelton et al., *supra* note 64, at 12-17.

⁷³ *Id.* at 17.

⁷⁴ *Id.* at 18-21.

some scientific evidence in every case.⁷⁵ Second, *CSI* viewers had higher expectations for scientific evidence, but these expectations were also more realistically correlated to the type of case than those of other jurors.⁷⁶ Third, as a condition of guilt, all jurors were likely to expect scientific evidence in rape cases and any type of case relying on circumstantial evidence.⁷⁷ Finally, and most importantly, *CSI* viewers were not more likely to *demand scientific evidence as a condition of guilt* than non-viewers.⁷⁸

3. Acquittal Rates

Acquittal rates should reflect any large-scale effect of *CSI* and other forensic dramas on juror deliberations.⁷⁹ Cole and Dioso-Villa have analyzed recent acquittal rates and concluded that they do not indicate the influence of a *CSI* effect.⁸⁰ These researchers compiled data from the federal court system as well as the eight states where it was available.⁸¹ While the acquittal rate did rise in 2001 and 2002, this was a continuation of a rising trend that had begun in 1998, after a significant drop in 1997.⁸² After 2002, the rate began to fall back to roughly where it had been from 1998-2000. Finally, the acquittal rate in 2005 dropped to a

⁷⁵ *Id.* at 19.

⁷⁶ The authors hypothesized that viewers of *CSI* and similar shows may actually be better educated, and concluded that, in any event, their expectations were not unrealistic. See Shelton et al., *supra* note 4, at 358.

⁷⁷ *Id.* at 359-60.

⁷⁸ *Id.* at 362.

⁷⁹ See Cole & Dioso-Villa, *supra* note 16, at 1356 (“Even if surveys and jury simulations did provide evidence for the strong prosecutor’s effect, one would presumably want to look for changes in the rate of jury acquittals in American criminal trials before concluding that *CSI* is influencing jury verdicts.”).

⁸⁰ See *id.* at 1363-64.

⁸¹ *Id.* at 1357 (California, Florida, Hawaii, Illinois, New York, North Carolina, Texas, and Vermont).

⁸² Cole and Dioso-Villa conducted two different analyses. The first treated the acquittal rate within a state for a year (1986-2008) as a single observation. *Id.* at 1360. After conducting a linear regression of the acquittal rates, they concluded that there was no statistically significant difference after 2000. *Id.* at 1361. Their second analysis treated each trial, rather than each state, as an observation. *Id.* at 1362-63. They calculated the proportion of acquittals and the differences between these proportions. Ultimately, they did not find a statistically significant increase in acquittals when they compared years after *CSI* to 2000 (pre-*CSI*). *Id.* at 1363. Comparing the year 2000 to the years 2003-06, there appeared to be a statistically significant decrease in acquittals. *Id.* at 1364.

historical low and remained there for three years.⁸³ Cole and Dioso-Villa concluded that there is no evidence of a CSI effect in the acquittal rates, though they noted that the possibility remained of two different CSI effects cancelling each other out.⁸⁴

C. The “Tech Effect” Hypothesis

If the CSI effect is not real, could there be another basis for the widespread perceptions that jurors now expect more forensic evidence than they have in the past? Based on their research, Shelton, Kim, and Barak have hypothesized a more general “tech effect” that could cause such heightened expectations.⁸⁵ They define this tech effect as jurors’ significant expectation “that prosecutors will use the advantages of modern science and technology to help meet their burden of proving guilt beyond a reasonable doubt.”⁸⁶ As they have argued, this type of effect would be expected given the “technology revolution” that our society has seen over the last thirty years.⁸⁷ If this tech effect is caused by legitimate scientific and technological advances, it is itself, legitimate – as opposed to a CSI effect based on televised fiction.

⁸³ *Id.* at 1358.

⁸⁴ *Id.* at 1364. Without analyzing whether convictions have actually decreased, Tom Tyler considered three possible alternatives to the CSI effect that could cause an increase. *See* Tyler, *supra* note 1, at 1063-76. He posited that any of three effects could lower conviction rates over time: sympathy for the defendant, a higher threshold for jurors than judges, and growing distrust of the government. *Id.* at 1076. The first two would not appear to change over time, though Tyler does point to some phenomena that could evince growing sympathy, such as increased acceptance of excusing conditions like post-traumatic stress disorder. *Id.* at 1077. There is evidence from polling to suggest that distrust of government has risen dramatically since the 1960s and that confidence in the criminal justice system is very low. This long-term trend, however, would not necessarily help to explain a post-2000 decrease in convictions. *See id.* at 1080-81.

⁸⁵ Shelton et al., *supra* note 4, at 362-65. While Shelton, Barak, and Kim have shown that jurors expect forensic evidence in trials, their studies are unable to demonstrate a *rising* interest in such evidence because there is no point of comparison with lower expectation for scientific evidence. *See id.* Thus, my use of the term “tech effect hypothesis.”

⁸⁶ *Id.* at 364.

⁸⁷ *Id.* at 362-63 n.47 (citing Richard Silbergliitt et al., *The Global Technology Revolution 2020: In-Depth Analyses: Bio/Nano/Materials/Information Trends, Drivers, Barriers, and Social Implications*, at xvii (2006), available at http://www.rand.org/pubs/technical_reports/2006/RAND_TR303.sum.pdf (last visited Dec. 16, 2013)).

Shelton, Kim, and Barak built tests for the tech effect into their CSI effect studies. In their study of Wayne County jurors, they tested whether jurors who were more exposed to television portrayals of the criminal justice system, or more technologically savvy, expected more scientific evidence at trials.⁸⁸ The study asked how often jurors watched nineteen shows about the criminal justice system, including non-fiction programming.⁸⁹ It found an increased relationship between exposure to these nonfiction television programs and heightened expectations and demands for forensic evidence.⁹⁰ On the other hand, the relationship between viewing *CSI*-type programs and heightened demands was low.⁹¹ Additionally, there was an increased relationship between use of technological devices – such as a computer, smartphone, or GPS – and demands for scientific evidence.⁹²

Shelton, Kim, and Barak also expanded the source of the effect to include not only real advances in science and technology but also perceived ones. They broadly described an “indirect-effects model of juror influences” that would combine the tech effect, the generalized effect of media portrayals about crime, and the media coverage of the CSI effect itself.⁹³ This indirect-effects model assumes a system of “mutually influencing factors” that varies but does not determine outcomes, rather than a simple cause-effect relationship between phenomena and outcomes.⁹⁴

They also argued that the tech effect is neither an unreasonable nor undesirable phenomenon.⁹⁵ If forensic science evolves, and indeed it *has* developed substantially in recent years, then jurors should demand more from the government.⁹⁶ Where a

⁸⁸ The study tested for forty-nine different scenarios. Each scenario was a combination of one type of crime being prosecuted and one type of evidence presented, taken from separate lists. Shelton et al., *supra* note 64, at 35-36.

⁸⁹ *Id.* at 33 (including programs such as news and documentaries in addition to dramas).

⁹⁰ *Id.* at 36 (finding a statistically significant higher demand for evidence in thirty-two of forty-nine scenarios).

⁹¹ *Id.* at 37 (ten of forty-nine scenarios).

⁹² *Id.* (nineteen of forty-nine scenarios).

⁹³ *Id.* at 40.

⁹⁴ *Id.*

⁹⁵ See Shelton et al., *supra* note 4, at 365-67.

⁹⁶ See *id.* at 367.

test could have been performed and was not, for example, that could form the basis for a reasonable doubt.⁹⁷ The authors argue that where police and prosecutors have not been given resources to perform scientific tests, juries will force them to do so.⁹⁸

The tech effect hypothesis has several advantages over the CSI effect hypothesis as a framework for analyzing jurors' expectations for scientific evidence. The tech effect helps explain the findings of studies that indicate there is a low correlation between high expectations for scientific evidence and viewing forensic dramas.⁹⁹ The tech effect hypothesis also comports with the results of the Michigan juror studies. Other scholars have supported the notion of a tech effect and distinguished it from the CSI effect.¹⁰⁰

D. What Should be Done to Counter Any Effect?

Should courts take steps to counter either a CSI effect or tech effect among jurors? What would such steps look like? Scholars have suggested and courts have considered several actions that judges and attorneys could take to counter either the CSI effect or the tech effect. These include: doing nothing,¹⁰¹ giving law enforcement more resources to conduct additional tests,¹⁰² allowing prosecutors to comment on the CSI effect in opening and closing statements,¹⁰³ allowing instructions by the judge on what

⁹⁷ Courts have agreed. *See, e.g.*, *Smith v. United States*, 709 A.2d 78, 82 (D.C. Cir. 1998) (holding that a jury may consider the lack of corroborating evidence in deciding whether the government has met its burden of proof).

⁹⁸ *Shelton et al.*, *supra* note 4, at 365.

⁹⁹ *See Podlas*, *supra* note 3, at 461-62; *See also Schweitzer & Saks*, *supra* note 27, at 363.

¹⁰⁰ *See Cole & Dioso-Villa*, *supra* note 16, at 1347.

¹⁰¹ *See Podlas*, *supra* note 3, at 465 (“*CSI* horror stories of justice denied may drive legal ‘reforms’ when no reforms are needed or cause the issue to improperly enter trial arguments.”). *See also Shelton et al.*, *supra* note 64, at 43 (arguing that prosecutors and judges actually contribute to turning the CSI effect from myth into reality by talking about in the courtroom).

¹⁰² *See Shelton et al.*, *supra* note 4, at 368 (arguing that, to adapt to the tech effect, “law enforcement officials will have to commit additional resources to obtaining scientific evidence in many more situations.”).

¹⁰³ *See Boatswain v. State*, No. 408,2004, 2005 WL 1000565, at *2 (Del. Apr. 27, 2005); *Lawson*, *supra* note 5, at 165-66; *Thomas*, *supra* note 40, at 72 (noting that Maricopa County prosecutors are already making anti-CSI effect arguments).

evidence should be considered¹⁰⁴ or whether the state is required to perform forensic tests,¹⁰⁵ and designing voir dire to discover and remove jurors who have unrealistic demands for forensic evidence.¹⁰⁶

Part II explores the use of courtroom procedures that might address a CSI effect or a tech effect – specifically, jury instructions and voir dire. These procedures directly involve the trial judge, not just attorneys or law enforcement. In the last few years, several courts have considered various CSI-effect and “no-duty instructions,”¹⁰⁷ as well as voir dire on jurors’ expectations for scientific evidence.¹⁰⁸ Maryland courts have been the most prolific in addressing these issues, with thirteen opinions in less than five years. Both the facts that gave rise to these CSI-effect remedies and the reasoning of the courts in allowing or disallowing them shed light on the relative merits of these remedial procedures. I consider jury instructions first, as they are more direct, and ultimately, more problematic. I then consider whether voir dire is a viable alternative.

II. CSI-EFFECT JURY INSTRUCTIONS AND NO-DUTY INSTRUCTIONS

This section examines the propriety of jury instructions as a means to try to counter a CSI effect or tech effect. I start by tracing the story of Maryland’s evolving, restrictive approach to CSI-effect instructions – that is, instructions telling jurors that the government has no duty to use any specific investigative techniques or scientific tests to prove its case. Because they have considered CSI-effect instructions so many times and in such

¹⁰⁴ See Kinsey, *supra* note 5, at 351-57; Lawson, *supra* note 5, at 153-55 (arguing for a preliminary instruction that information learned from fictional television, movies, and books is not evidence).

¹⁰⁵ See *Evans v. State*, 922 A.2d 620 (Md. Ct. Spec. App. 2007) (approving instruction that government had no duty to utilize any specific investigative technique or scientific test to prove its case); MODEL CRIM. JURY INSTRUCTIONS R. 4.14 (3rd Cir.) (2009).

¹⁰⁶ See *Goff v. State*, 14 So. 3d 625 (Miss. 2009); Lawson, *supra* note 5, at 144 (arguing that voir dire is necessary because the “CSI Infection must be addressed with potential jurors immediately”); Thomas, *supra* note 40, at 72.

¹⁰⁷ See *infra* notes 158-63.

¹⁰⁸ See *infra* note 252.

depth, the Maryland cases are instructive for other courts that are asked to decide if these instructions are appropriate. An in depth analysis of the Maryland case law illustrates the varied factual scenarios and legal questions that surround CSI-effect instructions. Ultimately, because of concerns about lowering the government's burden of proof and the insertion of the judge's opinion into the province of the jury, Maryland now allows CSI-effect instructions only as a remedy for improper defense argument. I compare Maryland's rule to the very permissive federal law on no-duty instructions and the approach taken by D.C., which falls between the other two. Given the legal concerns raised by these novel instructions, and the uncertainty about the existence of any CSI effect, Maryland's restrictive rule is optimal. I conclude this section with a brief examination of a related concern – whether judges should mention television programs such as *CSI* at all when instructing jurors. Looking at a recent case from Massachusetts, I conclude that the dangers of burden-lowering and juror confusion outweigh any potential benefits from drawing attention to forensic dramas.

A. CSI-Effect Jury Instructions in Maryland

The Maryland courts have taken a very restrictive approach to CSI-effect jury instructions. There have been five published opinions on these instructions in Maryland since 2007.¹⁰⁹ The first of these, *Evans*, did not mention the CSI effect, but it approved an instruction that the government had no duty to conduct any specific scientific tests. Maryland's highest court subsequently disapproved the instruction from *Evans*, without explicitly overturning the earlier case. Four later cases reversed convictions because the trial judge read the instruction approved in *Evans*.

¹⁰⁹ *Stabb v. State*, 31 A.3d 922 (Md. 2011); *Atkins v. State*, 26 A.3d 979 (Md. 2011); *Samba v. State*, 49 A.3d 841 (Md. Ct. Spec. App. 2012); *Allen v. State*, 42 A.3d 708 (Md. Ct. Spec. App. 2012); *Evans v. State*, 922 A.2d 620 (Md. Ct. Spec. App. 2007).

1. A Correct Statement of the Law: *Evans*

In 2007, Maryland's intermediate appellate court, the Court of Special Appeals, decided *Evans*.¹¹⁰ There, Evans and a codefendant were convicted of various drug distribution offenses.¹¹¹ The primary evidence in the case was the testimony of an undercover officer who bought heroin from the defendants.¹¹² At trial, defense counsel for both defendants attacked the undercover officer's failure to electronically record the transaction using available audio or visual equipment.¹¹³ Subsequently, the prosecutor requested the following instruction, which the judge read to the jury after the close of all the evidence:

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.¹¹⁴

Evans' counsel did not object to the instruction, but his codefendant did.¹¹⁵

The trial judge ruled that the instruction was a correct statement of Maryland law and that the issue had been generated by the defendants' cross-examinations, which asked the police officer numerous questions about why he did not record the drug

¹¹⁰ *Evans*, 922 A.2d at 620. Evans was represented on appeal by the George Washington University Law School's Federal, Criminal, and Appellate Clinic, where I currently teach.

¹¹¹ *Id.* at 622.

¹¹² *Id.* at 622-24.

¹¹³ *Id.* at 628. Both attorneys cross-examined on this point and argued reasonable doubt based on the failure to record the transaction in closing argument. *Id.* at 628-29.

¹¹⁴ *Id.* at 628. The opinion said nothing about the prosecutor's source for the instruction.

¹¹⁵ *Id.* at 629.

transaction.¹¹⁶ The judge also relied on similar instructions upheld in two federal cases.¹¹⁷

Subsequently, the Court of Special Appeals looked at Maryland's standard three-part test for whether requested jury instructions should be read: whether the instruction is (1) a correct statement of law, (2) applicable under the facts and circumstances of the case, and (3) not covered by other instructions.¹¹⁸ The court found that all three parts were met.¹¹⁹

Evans added caution, noting a risk that the instruction could relieve the government of its burden to prove guilt beyond a reasonable doubt if the instruction were "predominant in the overall instructions and its relation to the reasonable doubt standard unclear."¹²⁰ Therefore, the court concluded that the "preferable practice" would be to give the instruction at issue in conjunction with the reasonable doubt instruction.¹²¹ Though *Evans* was decided at the height of the media and scholarly attention to the CSI effect, the opinion made no mention of *CSI* – either as a reason for the trial judge's decision to read the instruction or as a reason to uphold that decision.

Curiously, the Court of Special Appeals quoted the closing arguments of both defense attorneys at length, rather than discussing their cross-examinations of the undercover officer.¹²² In

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing *United States v. Saldarriaga*, 204 F.3d 50 (2d Cir. 2000); *United States v. Mason*, 954 F.2d 219, 222 (4th Cir. 1992), *cert. denied*, 504 U.S. 925 (1992)). Specifically, the court found *Saldarriaga* "instructive" in its decision. *Evans*, 922 A.2d at 631.

¹¹⁸ *Id.* at 630. See *Stevenson v. State*, 882 A.2d 323, 325 (Md. Ct. Spec. App. 2005) (quoting *Ellison v. State*, 657 A.2d 402, 405 (Md. Ct. Spec. App. 1995)). This test is based on Maryland Rule 4-325(c), which says that the court "shall" give a requested instruction that is not already covered. MD. CODE ANN., RULES § 4-325(e) (2005).

¹¹⁹ *Evans*, 922 A.2d at 632. Specifically, the court found that the instruction was a correct statement of the law because the State had no legal duty to conduct any specific tests to prove its case. *Id.* The instruction was applicable because defense counsel's "vehement closing arguments" warranted it. *Id.* Finally, the instruction on direct and circumstantial evidence did not cover the same ground. *Id.* Additionally, the court said that there was no requirement that instructions be pattern instructions in order to be read, even though the court noted the strong preference in Maryland for the pattern instructions. *Id.* at 630-31 (citing *Green v. State*, 736 A.2d 450, 457 (Md. Ct. Spec. App. 1999)).

¹²⁰ *Evans*, 922 A.2d at 633.

¹²¹ *Id.*

¹²² *Id.* at 628-29.

Maryland, as they were in this case, jury instructions are given before closing arguments.¹²³ Therefore, defense counsel had not made the arguments in question at the time the judge read the requested instruction. Indeed, the forceful closing arguments on the issue may have been, at least in part, a reaction to the judge's instruction.

2. Use With Caution: *Atkins*

Courts across Maryland were soon using the *Evans* instruction.¹²⁴ This would not last long, however.¹²⁵ In 2011, the Court of Appeals disapproved of CSI-effect instructions in a pair of

¹²³ See MD. CODE ANN., RULES § 4-325(a) (2005) (“The court shall give instructions to the jury at the conclusion of all the evidence and before closing arguments and may supplement them at a later time when appropriate.”). The *Evans* opinion itself makes clear that the arguments about what instructions to give happened before closing argument, and that the judge was prompted to give the instruction by the cross examination, not the closing argument. *Evans*, 922 A.2d at 628.

¹²⁴ The points of origin of the four appellate decisions show the wide use of the *Evans* instruction. *Evans* and *Allen* were both tried in Baltimore – by different judges. See *Allen v. State*, 42 A.3d 708 (Md. Ct. Spec. App. 2011); *Evans*, 922 A.2d at 620. *Atkins* was tried in Montgomery County, and *Samba* was tried in Prince George's County, both in suburban Washington, D.C. See *Atkins v. State*, 26 A.3d 979 (Md. 2011); *Samba v. State*, 48 A.3d 841 (Md. Ct. Spec. App. 2012). *Stabb* was tried in Wicomico County on Maryland's Eastern Shore. *Stabb v. State*, 31 A.3d 922 (Md. 2011).

¹²⁵ Scholars had expressed concerns about *Evans* in the interim. Lawson, while advocating for jury instructions to counter the CSI effect, found the *Evans* ruling problematic. See Lawson, *supra* note 5, at 159. Lawson raised concerns about the instruction's effect on the reasonable doubt standard, expressed a preference for CSI-effect instructions that come before rather than after evidence, and noted that the *Evans* court justified the instruction as a remedy for cross examination that was not itself improper. *Id.* at 158-61. Additionally, Shelton reiterated the court's caution from *Evans*, saying:

The advice in *Evans* is worth heeding. If the trial judge gives an instruction regarding the lack of scientific evidence, whether requested or *sua sponte*, it should be cast in terms of reasonable doubt to make sure that the jury understands that while a lack of scientific evidence alone does not mean there is reasonable doubt, they must never nevertheless determine whether the government has proven, without such scientific evidence, the defendant's guilt beyond a reasonable doubt.

Donald E. Shelton, *Twenty-First Century Forensic Science Challenges for Trial Judges in Criminal Cases: Where the 'Polybutadiene' Meets the 'Bitumen'*, 18 WIDENER L. J. 309, 390 (2009).

cases released in close succession, *Atkins v. State*¹²⁶ and *Stabb v. State*.¹²⁷

Atkins was convicted of assault following a fight in which three people were stabbed or cut.¹²⁸ He claimed he had defended himself with a pocketknife.¹²⁹ The State introduced a large knife found in his home to counter his self-defense claim, but *Atkins*' defense counsel challenged the lack of any blood or DNA testing conducted on the knife.¹³⁰ At the end of the evidence, the State requested a jury instruction identical to the one in *Evans*, which the trial judge read.¹³¹ The Court of Special Appeals upheld the conviction in an unreported opinion.¹³²

Subsequently, the Court of Appeals granted certiorari to consider whether the instruction on scientific and investigative techniques violated the United States and Maryland constitutions "by undermining the defense's legitimate strategy and bolstering the State's case."¹³³ Answering affirmatively, the court overturned *Atkins*' conviction.¹³⁴ The court based its opinion on two separate but interrelated principles in Maryland law: (1) that it is improper for a judge to comment on a question of fact for the jury,¹³⁵ and (2) that any instruction that lessens the government's burden to prove guilt beyond a reasonable doubt is improper.¹³⁶

The court concluded that the instruction had "[b]asically...directed the jury to ignore the fact that the State had not presented evidence connecting the knife to the crime."¹³⁷ The

¹²⁶ 26 A.3d 979 (Md. 2010). Like *Evans*, *Atkins* was represented on appeal by the Federal, Criminal, and Appellate Clinic.

¹²⁷ 31 A.3d 922 (Md. 2011).

¹²⁸ *Atkins*, 26 A.3d at 981.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 982-83. The judge reviewed *Evans* before deciding to give the instruction. *Id.* at 982 n.5.

¹³² *Id.* at 983.

¹³³ *Id.* at 980. The constitutional rights in question were both the right to due process and a fair trial by an impartial jury. *Id.* See U.S. CONST. amend. V, VI; Md. Decl. of Rights art. 21, 23.

¹³⁴ *Atkins*, 26 A.3d at 983.

¹³⁵ Such commentary by a trial judge invades the province of the jury. *Gore v. State*, 522 A.2d 1338, 1343 (Md. 1987) (quoting *Coffin v. Brown*, 50 A. 567, 572 (Md. 1901)).

¹³⁶ *State v. Evans*, 362 A.2d 629, 635 (Md. 1976).

¹³⁷ *Atkins*, 26 A.3d at 989. The court also said that "the instruction effectively plugged a hole in the State's case." *Id.* at 990.

judge had usurped the role of the jury by declaring that the evidence was not relevant to determining guilt. Underlying this conclusion was the danger of instructing jurors on facts and inferences generally.¹³⁸ *Atkins* falls squarely in a long line of Maryland cases distinguishing between instructions on the applicable law, which are required,¹³⁹ and instructions on facts and inferences, which are almost never required and are impermissible in many instances.¹⁴⁰

The extent of a trial judge's influence on jurors troubled the court. Even if an instruction is a correct statement of the law – and *Atkins* never said that the CSI-effect instruction in and of itself was not – the “high and authoritative” position of the judge gives it more effect than an argument by counsel.¹⁴¹ The court

¹³⁸ *Id.* at 985 (citing *Patterson v. State*, 741 A.2d 1119, 1122 (Md. 1999) (noting that such instructions may either cause the jury to give an inference undue weight or overemphasize one of many proper inferences for the jury to draw)).

¹³⁹ MD. CODE ANN., RULES § 4-325(c) (2005).

¹⁴⁰ For example, the Maryland appellate courts have a long history of skepticism toward missing witness instructions. Recently the Court of Special Appeals held that the refusal to read a missing witness instruction is *never* reversible error. *See Colkley v. State*, 42 A.3d 646, 661-62 (Md. Ct. Spec. App. 2012) (citing *Patterson*, 741 A.2d at 1122-23 (Md. 1999)). Reading missing witness instructions where unwarranted, on the other hand, is error. *See, e.g., Dansbury v. State*, 1 A.3d 507, 524-25 (Md. Ct. Spec. App. 2010) (holding that instruction was not warranted because witnesses were not peculiarly available to one side). The appellate courts' opinions on missing evidence instructions are also generally negative. *See, e.g., Patterson*, 741 A.2d at 1121-22. In one decision, the Court of Appeals did reverse after a judge refused to read a missing evidence instruction. *Cost v. State*, 10 A.3d 184 (Md. 2010) (holding that the evidence that had been destroyed was highly relevant, in the State's custody, and of the type that would normally be retained and examined). But *Cost* constituted an “exceptional circumstance,” *Id.*, and more recently, the Court of Special Appeals has refused to extend the decision beyond its narrow facts. *See Hajireen v. State*, 39 A.3d 105 (Md. Ct. Spec. App. 2012) (holding that missing audio from video recording was never in State's possession and therefore not subject to missing evidence instruction); *Gimble v. State*, 18 A.3d 955 (Md. Ct. Spec. App. 2011) (holding that a backpack that contained drugs but was subsequently destroyed was not central to State's case).

¹⁴¹ *Atkins*, 26 A.3d at 990. Indeed, in several of the cases on instructions about facts and inferences, the opinions point out that counsel are still free to make the points restricted in instructions. *See, e.g., Davis v. State*, 633 A.2d 867, 879 (Md. 1993). The reason is the difference between a judge's instruction and an attorney's argument:

Where a party raises the missing witness rule during closing argument, its use is just that—an argument. Trial judges typically instruct the jury, as in this case, that the parties' arguments do not constitute evidence. Furthermore, the opposing side also has an opportunity to refute the argument and counter with reasons why the inference is inappropriate.

went so far as to “envision a scenario” where jurors would remember the instruction during deliberations and believe that the government had no duty to connect the knife, and the defendant, to the crimes.¹⁴²

Still, *Atkins* declined to overturn *Evans*. Because the issue was unpreserved in *Evans*, the court held that it had been waived, and therefore *Evans*’ discussion of the propriety of the instruction was dicta.¹⁴³ But the Court of Appeals did not stop with this potentially dispositive conclusion. Instead, the court considered the centrality of the evidence. In the court’s view, defense counsel in *Evans* had superfluously pointed out missing tests in a case that was ultimately about eyewitness identification.¹⁴⁴ The court concluded that this made the instruction more proper as a remedy.¹⁴⁵ In *Atkins*, on the other hand, the instruction invited the jury to ignore a key defense argument that was central to the case.¹⁴⁶ Additionally, the court found that *Atkins* “had every right to inquire about steps the State undertook to connect the defendant” and the knife.¹⁴⁷ The questioning was proper and should not have generated a remedial instruction.¹⁴⁸

Although based on constitutional principles, the opinion in *Atkins* was capable of a narrow reading. Importantly, the court based its conclusion on the “particular facts” of the case, and did not hold that the instruction would be improper under different circumstances.¹⁴⁹ The court also deferred to the Maryland

Id.

¹⁴² *Atkins*, 26 A.3d at 990.

¹⁴³ *Id.* at 987.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 987-88.

¹⁴⁷ *Id.* at 989 (citing *Sample v. State*, 550 A.2d 661, 663 (Md. 1988) (holding that “when the State has failed to utilize a well-known, readily available, and superior method of proof to link the defendant with the criminal activity, the defendant ought to be able to comment on the absence of such evidence.”)).

¹⁴⁸ *Atkins* also made the same misleading point about the closing argument in *Evans* as the *Evans* court itself – holding that the “robust and vehement” closing argument was a justification for the instruction, even though the instruction was given before closing. *Atkins*, 26 A.3d at 988.

¹⁴⁹ *Id.* at 980.

Criminal Pattern Jury Instruction Committee to draft a model jury instruction on the issue.¹⁵⁰

3. Anti-CSI-Effect Instructions: the *Atkins* Concurrence and *Stabb*

Three judges concurred in *Atkins*, focusing on the CSI effect for the first time in Maryland.¹⁵¹ Judge Harrell, writing the concurrence, began by saying he was setting out to write about a broad array of situations where “anti-CSI-effect instructions,” or no-duty instructions, may be appropriate.¹⁵² Harrell characterized the topic as “still emerging” and “hot” – thus worthy of more detailed consideration.¹⁵³ He further castigated the majority opinion, which he said could not “bring itself to utter the phrases ‘CSI effect’ or ‘anti-CSI effect,’” and therefore avoided making the issue clear, especially to lay readers.¹⁵⁴

After a thorough overview of the history of the CSI effect in the media and the relevant scholarly literature, Harrell concluded that there was not solid evidence for or against the existence of a CSI effect.¹⁵⁵ He further noted, however, that whether the effect was real, it had injected itself into the criminal justice system through jury instructions, prosecutor tactics, and voir dire.¹⁵⁶

Turning to a “National Response to the ‘CSI Effect,’” Harrell gave an overview of measures taken by various courts to counter

¹⁵⁰ *Id.* at 980 n.1 (cautioning that any instruction should be “neutral in light of the State’s burden to prove its case beyond a reasonable doubt, and consistent with the rules of evidence”).

¹⁵¹ *Id.* at 991 (Harrell, J., concurring).

¹⁵² *Id.* at 991-92 (Harrell, J., concurring).

¹⁵³ *Id.* at 992 (Harrell, J., concurring).

¹⁵⁴ The concurrence specifically said these phrases should be used for the benefit of readers:

Although both phrases certainly are pop culture in origin, they communicate concepts about which this case is all about, especially in the eyes of the general public, some of whom actually may read judicial opinions from time-to-time, or read about them in more widely-circulated popular media; therefore, usage of these phrases aids in communication.

Id. at 991 n.1 (Harrell, J., concurring).

¹⁵⁵ *Id.* at 992-94 (Harrell, J., concurring). Harrell cited several of the same articles cited in my introduction, *supra*, including Podlas, *supra* note 3, and Tyler, *supra* note 1.

¹⁵⁶ *Atkins*, 26 A.3d at 994-95 (Harrell, J., concurring).

the CSI effect, focusing primarily on jury instructions.¹⁵⁷ He discussed cases from several federal circuits,¹⁵⁸ the District of Columbia,¹⁵⁹ New York,¹⁶⁰ Massachusetts,¹⁶¹ and Connecticut¹⁶² that either approved or disapproved of CSI-effect or no-duty instructions.¹⁶³ Several of these cases arose before *CSI* started its run on television. Importantly, the concurrence interpreted this phenomenon as the federal courts recognizing “signs of the so-called ‘CSI effect’” even before there was a *CSI* television show.¹⁶⁴

In conclusion, Judge Harrell said that he objected to the “situation in which the instruction was given,”¹⁶⁵ rather than its specific wording. Like the majority, Harrell also pointed to the distinguishing feature of *Evans* – the “robust and vehement closing arguments” by defense counsel.¹⁶⁶ Because there was no similar argument here, the instruction was not needed to cure anything and was therefore impermissible. Harrell concluded by making clear that his opinion would be different if defense counsel had attempted to “take advantage . . . of the so-called ‘CSI effect.’”¹⁶⁷

¹⁵⁷ *Id.* at 995 (Harrell, J., concurring). The concurrence also mentioned comments by prosecutors and cited to one case that has approved of them. *Id.* (citing *State v. Cooke*, 914 A.2d 1078, 1088 (Del. Super. Ct. 2007)). It also cited a case that refused to overturn a conviction based on CSI-effect voir dire. *Atkins*, 26 A.3d at 995 n.5 (Harrell, J., concurring) (citing *Goff v. State*, 14 So. 3d 625, 653 (Miss. 2009)).

¹⁵⁸ *Atkins*, 26 A.3d at 996-1000 (Harrell, J., concurring) (citing *United States v. Saldarriaga*, 204 F.3d 50, 53 (2d Cir. 2000); *United States v. Sanchez Solis*, 882 F.2d 693, 697 (2d Cir. 1989); *United States v. Cheung Kin Ping*, 555 F.2d 1069, 1073 (2d Cir. 1977); *United States v. Walker*, No. 94-5661, 1995 WL 551361, at *5-6, 1995 U.S. App. LEXIS 26457, at *14-17 (4th Cir. Sept. 18, 1995); *United States v. Mason*, 954 F.2d 219, 222 (4th Cir. 1992); *United States v. Cota-Meza*, 367 F.3d 1218, 1223 (10th Cir. 2004)).

¹⁵⁹ *Wheeler v. United States*, 930 A.2d 232, 238 (D.C. 2007); *Brown v. United States*, 881 A.2d 586, 594 (D.C. 2005); *Greer v. United States*, 697 A.2d 1207, 1211 (D.C. 1997).

¹⁶⁰ *People v. Rodriguez*, 529 N.Y.S.2d 318, 320 (N.Y. App. Div. 1988).

¹⁶¹ *Commonwealth v. Seng*, 924 N.E.2d 285, 295-98 (Mass. 2010).

¹⁶² *State v. Collins*, 10 A.3d 1005 (Conn. 2011).

¹⁶³ A no-duty instruction tells the jury that the State has no duty to conduct any specific tests or produce specific evidence to prove its case. See *infra* Part II.B.

¹⁶⁴ *Atkins v. State*, 26 A.3d 979, 996 (Md. 2011) (Harrell, J., concurring). See discussion of tech effect, *supra* Part I.C, and comparison of CSI-effect instructions and no-duty instructions, *infra* Part II.B.

¹⁶⁵ *Id.* at 1001 (Harrell, J., concurring).

¹⁶⁶ *Id.* (Harrell, J., concurring).

¹⁶⁷ *Id.* at 1002 (Harrell, J., concurring).

Released only two months later, *Stabb* picked up precisely where the concurrence in *Atkins* left off. *Stabb* involved similar circumstances as *Atkins*,¹⁶⁸ but the court gave significantly more guidance to lower courts on CSI instructions and cast more doubt on whether they were ever appropriate.

This time, Judge Harrell wrote the majority opinion, and the opinion again provided a brief summary of the CSI effect scholarship.¹⁶⁹ The court concluded that both the scholarly research and the judicial view of the CSI effect were as “inconsistent and inconclusive” as when *Atkins* was decided only months earlier.¹⁷⁰

Stabb found the instruction to be improper for the same two reasons as *Atkins* – the judge’s abrogation of what should be a jury finding, and the lowering of the government’s burden of proof.¹⁷¹ Specifically, the court pointed out that defense counsel did not suggest that evidence from a rape kit would be favorable to the defense; rather, he attacked the government’s decision not to conduct the test.¹⁷² The government then properly responded to this attack by pointing out why no test was necessary.¹⁷³ At that point, the issue was properly before the jury, but the judge injected the CSI-effect instruction and “effectively” instructed the jury not to consider the lack of physical evidence.¹⁷⁴

The opinion then distinguished *Evans* in the same way that both the majority and concurrence did in *Atkins*, by pointing to the propriety of defense counsel’s closing argument. Rather than the “robust and vehement” argument in *Evans*, defense counsel’s comments about the missing physical evidence in *Stabb* were “legitimate, brief, and reasonable.”¹⁷⁵

Stabb provided a broader ruling than *Atkins* by removing any requirement that the evidence implicated in the lack of testing be

¹⁶⁸ In *Stabb*, a child sex offense case, the defendant challenged the lack of a rape kit at trial. *Stabb v. State*, 31 A.3d 922, 924 (Md. 2011). As in *Atkins*, the Maryland Court of Appeals affirmed. *Id.* at 924-27.

¹⁶⁹ *Id.* at 923, 930-31.

¹⁷⁰ *Id.* at 931.

¹⁷¹ *Id.* at 932-33.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 932-33.

¹⁷⁵ *Id.* at 932.

central to the defense case. In *Atkins*, the missing test went to the heart of the government's case. The government produced no evidence to connect the knife found in Atkins' home to the crime.¹⁷⁶ Pointing out this lack of any forensic test was critical to the defense. In *Stabb*, a rape kit appeared to be completely unnecessary. The complaining witness never testified that there was penetration, only that the defendant put his hand in her underwear.¹⁷⁷ The government had no trouble presenting evidence that this kind of test truly would have been superfluous and did so at trial.¹⁷⁸ While the *Stabb* opinion said that the missing evidence was still "an integral part of the defense's theories,"¹⁷⁹ the holding on the facts of the case pointed to a presumption of harm. The court now appears likely to find reversible error when a CSI-effect instruction is given, whether the instruction is likely to actually effect the jury's verdict or not.

Stabb also concluded with stronger guidance for the future. First, the court said that the use of CSI-effect instructions was "fraught with the potential for reversible error."¹⁸⁰ The court specifically cited as the reason for caution "the currently inconclusive state of the scholarly legal and/or scientific communities' research" on whether the CSI effect existed.¹⁸¹ The court then essentially confined any use of CSI-effect instructions to "curative" situations by warning against their use before closing argument.¹⁸² Finally, the court left the door open to revisit the issue if: 1) scholarly research demonstrated a CSI effect to exist, and 2) "an appropriate response through voir dire questions and/or jury instructions" could be tailored.¹⁸³

Given all of this caution, the court's position on CSI-effect instructions became clear. With a strong threat of reversal

¹⁷⁶ *Atkins v. State*, 26 A.3d 979, 981 (Md. 2011).

¹⁷⁷ *Stabb*, 31 A.3d at 924.

¹⁷⁸ The detective testified at trial that the chance a rape kit would have yielded any medical evidence was "very minimal" and that she had never heard of anyone obtaining fingerprints from a rape kit. *Id.* at 926.

¹⁷⁹ *Id.* at 932. The court noted that the lack of physical evidence "may not have been as critical to the strength of the State's case" as in *Atkins*, though defense counsel did mention it in closing. *Id.* at 931-32.

¹⁸⁰ *Id.* at 933.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

hanging over their heads, both trial judges and the Court of Special Appeals would be very hesitant to continue to allow the *Evans* instruction absent a case of serious overreach by defense counsel.

4. The Cautious Approach Applied: *Allen* and *Samba*

In *Allen* and *Samba*, its first opinions on the issue after *Stabb*, the Maryland Court of Special Appeals found error where trial judges read the *Evans* instruction.¹⁸⁴ In *Allen*, the government conceded that reading the instruction “may have been error” but argued that *Atkins* and *Stabb* should only apply prospectively.¹⁸⁵ After a lengthy review of *Evans*, *Atkins*, and *Stabb*, the court concluded briefly that the instruction was not needed to cure any defense argument because the defense had not distorted the law or overreached in its attack on the lack of testing.¹⁸⁶ The court then turned to the question of whether *Atkins* and *Stabb* applied to the case before it, finding that they did because *Allen* was already on direct review when they were decided.¹⁸⁷ *Samba* had also been on direct review when *Atkins* and *Stabb* were decided. In *Samba*, the court reversed, finding that there had been no “overreaching” by defense counsel that would

¹⁸⁴ See *Samba v. State*, 49 A.3d 841, 843 (Md. Ct. Spec. App. 2012); *Allen v. State*, 42 A.3d 708, 709-10 (Md. Ct. Spec. App. 2012). Both cases involved the lack of testing for fingerprints or DNA to prove possession. In *Allen*, police officers recovered a bag that they had seen thrown out the window when they began pursuing a car. *Allen*, 42 A.3d at 710. The bag contained a scale and several smaller bags of cocaine. *Id.* The police conducted no fingerprint tests of the bag or its contents. *Id.* At the trial of the vehicle’s two occupants, defense counsel challenged the lack of testing for fingerprints or DNA on cross-examination of the officer. *Id.* The trial judge read the CSI-effect instruction after the government requested it, and both sides discussed the issue in closing arguments. *Id.* at 710-11. In *Samba*, police officers recovered a gun from under the defendant’s seat in the car he was driving shortly after another man had exited the vehicle. *Samba*, 49 A.3d at 843. The police did not test the gun for fingerprints. *Id.* at 844. Defense counsel argued about this lack of evidence in opening and closing and questioned the officer about it. *Id.* The defense also objected to the instruction. *Id.* at 844-45.

¹⁸⁵ *Allen*, 42 A.3d at 711.

¹⁸⁶ *Id.* at 714.

¹⁸⁷ *Id.* at 721. The court read *Atkins* and *Stabb* as applying constitutional principles to new factual scenarios rather than creating a new constitutional rule that would be applicable on collateral review, but the court did not actually decide whether the decisions would apply to cases on collateral review. *Id.*

justify a curative measure, and therefore, the instruction undermined a legitimate “failure to fingerprint’ defense.”¹⁸⁸

In the end, the Maryland courts have exercised a high degree of caution with regard to CSI-effect, or no-duty, instructions. Even where an instruction is a correct statement of the law, the danger of violating a defendant’s right to fair trial is too great. Given the dearth of evidence that forensic television dramas contribute to unrealistic demands for evidence, or that jurors have unrealistic demands at all, *Stabb* took appropriate steps to halt a new and potentially dangerous practice. The Court of Appeals gave no compelling reason for not overturning *Evans*, though it could have relied on the lack of preservation in that case. Still, given the courts’ direction in *Stabb* and *Allen*, it seems likely that the *Evans* instruction is effectively obsolete in Maryland.¹⁸⁹

B. Permissive Approaches to No-Duty Instructions

Several other jurisdictions have taken less cautious approaches to no-duty and CSI-effect instructions. While the approved instructions vary between jurisdictions and cases, they have typically informed jurors that the government has no duty to conduct any specific type of test to meet its burden, while also instructing them that the lack of testing or evidence can be considered when determining whether there is reasonable doubt.¹⁹⁰

¹⁸⁸ *Samba*, 49 A.3d at 843. *Samba* involved clearer error than *Allen*, or even *Atkins* and *Stabb*, because the instruction did not contain any reference to reasonable doubt. The judge only told the jury:

During this trial you have heard testimony of witnesses and may hear arguments of counsel that the State did not utilize a specific investigative technique or scientific test. However, I instruct you that there is no legal requirement that the State utilize any specific investigative technique or scientific test to prove this case. Your responsibility as jurors is to determine whether the State has proven based solely on the evidence presented the defendant’s guilt beyond a reasonable doubt.

Id. at 844. Additionally, the prosecutor repeatedly and specifically invoked the instruction in closing argument. *Id.*

¹⁸⁹ For example, *Atkins* distinguished *Evans* based on the centrality of the absent evidence. See *Atkins v. State*, 26 A.3d 979, 987 (Md. 2011). But, the absent evidence in *Stabb* – a rape kit where there was no allegation of penetration – was as peripheral as in *Evans*. See *Stabb v. State*, 31 A.3d 922, 924-27 (Md. 2011).

¹⁹⁰ See, e.g., MODEL CRIM. JURY INSTRUCTIONS R. 4.14 (3rd Cir.) (2009).

This section reviews two alternative approaches that courts have taken to no-duty instructions, demonstrating that each is problematic when viewed in light of the two concerns raised by the Maryland cases. The first approach, taken by several federal circuits, as well as Connecticut, views no-duty instructions as correct statements of the law and essentially stops there. The second approach, taken by the District of Columbia, is more restrictive. It allows an instruction where the defense has argued that tests not conducted would have yielded results favorable to the defense.

1. No-Duty Instructions as Correct Statements of Law

Four federal circuits – the Second,¹⁹¹ Third,¹⁹² Fourth¹⁹³ and Tenth¹⁹⁴ – have approved no-duty instructions, as has Connecticut.¹⁹⁵ These courts have expressed little concern about the due process ramifications of no-duty instructions, and the Fourth Circuit has even approved an instruction that went far beyond the instruction at issue in *Evans*.

The Third Circuit's model instruction uses similar language as the *Evans* instruction.¹⁹⁶ The commentary shows that the

¹⁹¹ *United States v. Saldarriaga*, 204 F.3d 50, 53 (2d Cir. 2000); *United States v. Sanchez Solis*, 882 F.2d 693, 697 (2d Cir. 1989); *United States v. Cheung Kin Ping*, 555 F.2d 1069, 1073 (2d Cir. 1977).

¹⁹² While the Third Circuit has never considered the propriety of a no-duty instruction in an opinion, its Model Criminal Jury Instructions contain one. MODEL CRIM. JURY INSTRUCTIONS R. 4.14 (3rd Cir.) (2009) (citing *Saldarriaga*, 204 F.3d at 51-52).

¹⁹³ *United States v. Mason*, 954 F.2d 219, 222 (4th Cir. 1992).

¹⁹⁴ *United States v. Cota-Meza*, 367 F.3d 1218, 1223 (10th Cir. 2004).

¹⁹⁵ *State v. Collins*, 10 A.3d 1005 (Conn. 2011).

¹⁹⁶ In full, the instruction says:

During the trial you heard testimony of witnesses and argument by counsel that the government did not use specific investigative techniques such as (mention omitted techniques that have been addressed in testimony or argument; e.g., fingerprint analysis, DNA analysis, the use of recording devices). You may consider these facts in deciding whether the government has met its burden of proof, because as I told you, you should look to all of the evidence or lack of evidence in deciding whether the defendant is guilty. However, there is no legal requirement that the government use any of these specific investigative techniques or all possible techniques to prove its case. There is no requirement to (mention omitted techniques; e.g., attempt to take fingerprints or offer fingerprint evidence, gather DNA evidence or offer DNA analysis, or use recording devices or offer recordings in evidence).

instruction was designed to counter jurors' increasing expectations for forensic evidence, noting that jurors "may arrive at the trial with preconceptions about the use of specific investigative techniques," including fingerprints, fibers, and DNA tests.¹⁹⁷ It concludes that the no-duty instruction may be appropriate if the defense has argued that the government's failure to conduct a specific test makes its case deficient, and it says that the court should "be careful not to place its imprimatur on the investigative choices of either party."¹⁹⁸

The commentary reflects the same concern as proponents of the CSI effect – that jurors who expect scientific evidence will be less likely to rely on witness testimony.¹⁹⁹ But this runs counter to the conclusions reached by several studies, showing that jurors still rely heavily on witness testimony and are not swayed in their decision-making by a lack of scientific evidence.²⁰⁰

The Fourth Circuit's cases discussing no-duty instructions have been even more troubling. The instruction in the earliest case, *Mason*, was similar to the *Evans* and Third Circuit instructions.²⁰¹ In *Mason*, however, the trial judge also said that

Your concern, as I have said, is to determine whether or not the evidence admitted in this trial proves the defendant's guilt beyond a reasonable doubt.

MODEL CRIM. JURY INSTRUCTIONS R. 4.14 (3rd Cir.) (2009).

¹⁹⁷ *Id.* (other citations omitted). The commentary also expressed concern jurors may be less likely to rely on witness testimony. *Id.*

¹⁹⁸ *Id.* The commentary gave no further guidance on this point, and appeared to assume that the language of the instruction itself was not enough to give the impression that the judge is excusing the government's investigatory choices.

¹⁹⁹ See, e.g., Thomas, *supra* note 40, at 71.

²⁰⁰ See *supra* Part I.B.2.

²⁰¹ *United States v. Mason*, 954 F.2d 219, 222 (4th Cir. 1992). In full, the instruction in *Mason* said:

[D]uring the trial you have heard testimony of witnesses and arguments by counsel that the government did not utilize specific investigative techniques. For example, there was reference to fingerprints and certain specific tests.

You may consider these facts in deciding whether the government has met its burden of proof, because, as I told you, you should look to all of the evidence or lack of evidence in deciding whether the defendant is guilty. However, you are also instructed that there is no legal requirement that the government use any of these specific investigative techniques to prove its case.

There is no legal requirement of an attempt to take fingerprints or to do any particular scientific test. And it is not required that the government offer that kind of evidence to you.

“[l]aw enforcement techniques are not your concern.”²⁰² The court held that while this sentence was not entirely clear, the instructions taken as a whole adequately advised the jury on the relevance of the government’s failure to conduct certain tests.²⁰³ The court has more recently upheld nearly identical instructions, without further explanation, in several unpublished decisions.²⁰⁴ In each of the subsequent cases, the district judge gave the *Mason* instruction in its entirety, including the unclear statements.

The *Mason* instruction compounded the dangers inherent in anti-CSI-effect and no-duty instructions by explicitly telling jurors that the investigative techniques of law enforcement were not something to consider. As the *Atkins* court cautioned, any no-duty instruction could lead jurors to believe that the government had no duty to connect the defendant, or the crime, to evidence such as a weapon or drugs.²⁰⁵ In *Mason*, and the subsequent Fourth Circuit cases, the court essentially told jurors precisely that.

In *Saldarriaga*, the Second Circuit approved a less problematic no-duty instruction, and considered the potential danger it posed.²⁰⁶ The instruction there was specifically given as a response to “irrelevant” arguments by defense counsel.²⁰⁷ Saldarriaga’s counsel had repeatedly questioned the government’s investigative techniques, and the judge had repeatedly reprimanded him.²⁰⁸ At the end of trial, the judge explained why he had “chastised” defense counsel, told the jury that the government did not have to use every scientific technique in every case, instructed that the lack of scientific evidence could be a

Law enforcement techniques are not your concern. Your concern, as I have said, is to determine whether or not on the evidence before you or the lack of evidence the defendant’s guilt has been proven beyond a reasonable doubt.

Id.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See *United States v. Brown*, No. 11-4722, 2012 U.S. App. LEXIS 6992 (4th Cir. Apr. 5, 2012); *United States v. Temple*, No. 97-4128, 1997 U.S. App. LEXIS 23850 (4th Cir. Aug. 19, 1997); *United States v. Walker*, No. 94-5661, 1995 U.S. App. LEXIS 26457 (4th Cir. Sept. 18, 1995).

²⁰⁵ *Atkins v. State*, 26 A.3d 979, 990 (Md. 2011).

²⁰⁶ *United States v. Saldarriaga*, 204 F.3d 50, 52 (2d Cir. 2000).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

ground for reasonable doubt, and gave a specific example.²⁰⁹ *Saldarriaga* held that the court had only properly told the jury to consider the evidence or lack of evidence before it when determining reasonable doubt.²¹⁰ While the instruction was “somewhat chatty,” the court decided that its substance was legally sound.²¹¹

The federal courts have embarked on a disturbing corrective course that has no basis in evidence for unreasonable juror demands. Of the no-duty instructions, only *Saldarriaga*’s arose in response to extensive arguments by counsel about missing scientific evidence. And only the *Saldarriaga* instruction balanced the no-duty instruction with a very clear and more strongly worded caution that jurors could consider a lack of evidence as a basis for reasonable doubt.²¹² While raising similar concerns as the Maryland cases, at least the Second Circuit’s decision was based in the context, and conduct, of a specific trial.

The Fourth Circuit’s instruction, on the other hand, removed consideration of the government’s investigation from jurors’ consideration. While intended to counter unrealistic expectations of evidence, no-duty instructions such as the Third and Fourth Circuits’ raise concerns about violating due process by impermissibly lowering the government’s burden of proof.²¹³ Instructions that emphasize the lack of any requirement for the government to conduct specific tests could lead jurors to believe

²⁰⁹ *Id.* In pertinent part, the judge instructed:

The government has no obligation to use all the possible techniques that are available to it. The government’s function is to give enough evidence to satisfy you beyond a reasonable doubt that the charges are true, and the fact that there are a thousand[] other things they could have done is wholly irrelevant.

However, if suggesting things that they could have done leads you to think, well, maybe I have a reasonable doubt because I didn’t have any evidence on that subject, if that happens, why, then, of course, that is a reasonable doubt like anything else.

Id.

²¹⁰ *Id.* This was essentially the later holding of *Evans*. See *Evans v. State*, 922 A.2d 620, 632 (Md. Ct. Spec. App. 2007).

²¹¹ *Saldarriaga*, 204 F.3d at 52-53.

²¹² *Id.* at 52.

²¹³ The Fifth Amendment’s due process clause requires that every criminal case be proved beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 364 (1970).

that they should not consider whether the lack of such tests raises a reasonable doubt. This is especially perilous given the evidence that many jurors do not understand the reasonable doubt standard,²¹⁴ or already employ a lower standard for guilt.²¹⁵ On the other hand, there is no evidence of a CSI effect, or any unreasonable demands for scientific evidence by jurors. Therefore, the courts should avoid intervening. To do so risks violating constitutional rights in the interests of fighting a popularly conceived, but unsubstantiated, problem.

2. No-Duty Instructions as Remedies for Defense Missing Evidence Arguments

The Court of Appeals of the District of Columbia has taken a more restrictive approach, limiting no-duty instructions to remedial uses. Specifically, it has allowed no-duty instructions to correct speculative arguments about missing scientific evidence. This approach is still not optimal. While inappropriate arguments by counsel might need to be corrected, no-duty instructions are insufficiently related to the harm for their value as a remedy to outweigh the issues of burden lowering and inappropriate commentary that they introduce.

The District of Columbia Court of Appeals has held that no-duty instructions may be used as a remedy for an argument that implies that evidence that could have been collected, but was not, would have undermined the government's case.²¹⁶ While the defense must be allowed to make such an argument, in certain cases the government may be entitled to an instruction that it had

²¹⁴ See Irwin A. Horowitz, *Reasonable Doubt Instructions: Commonsense Justice and Standard of Proof*, 3 PSYCHOL. PUB. POL'Y & L. 285 (1997); Elisabeth Stoffelmayr & Shari Seidman Diamond, *The Conflict Between Precision and Flexibility in Explaining "Beyond a Reasonable Doubt,"* 6 PSYCHOL. PUB. POL'Y & L. 769 (2000). See also Larry Laudan, *Is Reasonable Doubt Reasonable?*, 9 LEGAL THEORY 295, 295 (2003); Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 88 (2002); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 134-46 (1999).

²¹⁵ But see Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of the Kalven & Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 185-89 (2005) (summarizing empirical studies that show jurors are more likely to acquit than judges).

²¹⁶ See *Wheeler v. United States*, 930 A.2d 232, 238 (D.C. 2007).

no duty to collect the evidence in question.²¹⁷ The no-duty instruction is the opposite of a missing evidence instruction.²¹⁸

The instruction is rooted in *Greer*, a 1997 case in which the Court of Appeals said that a defendant must establish that the failure to collect evidence violated police procedures before arguing that missing evidence would have been favorable to the defendant.²¹⁹ Therefore, if the defendant argues that missing evidence would have been beneficial, the government “probably could obtain an instruction, that it was under no legal obligation to create corroborative evidence.”²²⁰

For the instruction to be warranted, defense counsel must do more than simply argue that the government failed to produce enough evidence to meet its burden.²²¹ Rather, the instruction is only necessary to counter an unfounded inference about what the missing evidence would have shown.²²² Where there is no such missing evidence argument, a no-duty instruction risks confusing the jury by contradicting the instruction on reasonable doubt,

²¹⁷ *Id.*

²¹⁸ *Id.* (citing *Graves v. United States*, 150 U.S. 118, 121 (1893) (“[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.”)).

²¹⁹ See *Greer v. United States*, 697 A.2d 1207, 1210 (D.C. 1997). *Greer* reversed where a judge, in the middle of defense counsel’s closing argument about the lack of a videotape of the crime, instructed that the jury should base its decision on “evidence which has been presented, and not on evidence that has not been presented.” *Id.* The court also found that defense counsel had not crossed the line into an impermissible missing evidence argument. She had not argued that the evidence, a videotape, would have been favorable to her client, only that the lack of it was grounds for reasonable doubt. *Id.* Therefore, the court found error based on a longstanding precedent that jurors may find reasonable doubt based on evidence *or* lack of evidence. See *id.* (citing *Bishop v. United States*, 107 F.2d 297, 303 (D.C. Cir. 1939)).

²²⁰ *Greer*, 697 A.2d at 1211.

²²¹ See *Brown v. United States*, 881 A.2d 586, 593-94 (D.C. 2005). In *Brown*, defense counsel simply argued that the government’s failure to produce fingerprints gave rise to reasonable doubt, without arguing that the prints would have been favorable to the defendant. *Id.* at 594. Therefore, the court reversed because the instruction was improper unless the government had laid an evidentiary foundation that officers were not required to collect fingerprints. *Id.*

²²² *Wheeler*, 930 A.2d at 238-39. In *Wheeler*, the police actually attempted to collect the fingerprint evidence at issue, but were unable to. *Id.* Thus, the court held that defense counsel was not making a missing evidence argument about what fingerprints would have shown. *Id.* Rather, defense counsel argued that without fingerprints there was insufficient evidence to convict. *Id.*

which says that reasonable doubt may be based on a lack of evidence.²²³ The most recent case, *Wheeler*, reversed the defendant's conviction where the instruction was given after a general defense argument about the lack of evidence rather than as an attempt to counter a defense inference that missing evidence would have undermined the government's case or been favorable to the defense.²²⁴

This remedial approach lacks a strong nexus between the instruction and the problem it seeks to correct. In these cases, defense counsel has not argued that the government has a duty to conduct specific tests or present scientific evidence. *Wheeler* never satisfactorily explained why the remedy for an argument that missing evidence would favor the defendant is an instruction that the government has no duty to conduct specific tests. If this instruction is improper in response to general defense arguments about missing evidence, why is it proper in response to (equally legitimate) defense arguments about what the missing evidence would have shown? A more tailored instruction could be crafted, telling the jury not to speculate about what missing evidence would have shown.

The DC cases are problematic on an additional level. Not only is the instruction not connected to what it seeks to correct, but it is not a remedy at all. *Wheeler* said that defense counsel's missing evidence argument was proper, or at least, could not be precluded.²²⁵ If that is the case, why should the judge counter the argument by telling the jury that the government is not required to perform specific tests? When it comes to what the government is or is not required to present, responsive arguments by the government would seem to be more appropriate.²²⁶

C. Mentioning Television Shows: Additional Concerns

Jury instructions that directly talk about *CSI* or the *CSI* effect present distinct harms aside from the typical anti-*CSI*-effect

²²³ *See id.* at 239.

²²⁴ *Id.*

²²⁵ *Id.* at 238.

²²⁶ The government could argue that the jury cannot know and should not speculate about the results of tests that were not or could not have been conducted. The government could also present testimony about why the tests were not conducted.

or no-duty instruction.²²⁷ Only Massachusetts has directly considered this question.²²⁸ Unlike the *Evans* instruction, the instruction before the Massachusetts court actually talked about the television show *CSI*.²²⁹

The *Seng* instruction was given for similar reasons as the *Evans* instructions. Over the course of *Seng*'s trial, the defense argued that the police had ignored evidence and conducted an incomplete forensic investigation.²³⁰ At the close of trial, the judge instructed the jury on missing testimony and the *CSI* effect:

And I remind you that this is real life and not *CSI*. I say that without being facetious. It's been observed across the country that people who've watched that particular program and similar programs tend to think that life is all that sort of science fiction and it's not.

²²⁷ Kinsey has argued that a jury instruction that references *CSI* and similar shows as fiction could be an effective mechanism to prevent biased jurors from influencing jury verdicts. See Kinsey, *supra* note 5, at 351. As an example, she suggested the following instruction:

Television shows, such as *CSI* and *Law & Order*, are fictional. When assessing the evidence and determining if the State has met its burden of proving every element of defendant's guilt beyond a reasonable doubt, you may not use knowledge you have obtained from forensic science television programs in any manner. This knowledge may not be used to assess the weight of presented evidence or decide defendant's fate. You may not rely upon outside investigatory standards or techniques utilized by television programs and must only assess value to the evidence or lack of evidence introduced within this courtroom. You may not use books, magazines, newspapers or television programs in any manner when making any judgment about the defendant and must separate what you may have observed on television from the facts brought forth during the course of this trial.

Id. at 355-56. Kinsey argues that this instruction avoids the problems of *Evans*-type instructions because it avoids telling jurors that the government has no duty to present specific types of evidence. *Id.* at 355. For the reasons discussed in this section, I believe that Kinsey's instruction would raise similar potential problems as other instructions that directly reference *CSI* and instruct jurors on the differences between television and reality.

²²⁸ See generally *Commonwealth v. Seng*, 924 N.E.2d 285 (Mass. 2010). In his *Atkins* concurrence, Harrell discussed *Seng* in detail as part of the nationwide response to the *CSI* effect. *Atkins v. State*, 26 A.3d 979, 998 (Md. 2011) (Harrell, J., concurring). Also, *Stabb* cited *Seng* for the proposition that there is little empirical evidence supporting the existence of the *CSI* effect. *Stabb v. State*, 31 A.3d 922, 931 (Md. 2011).

²²⁹ *Seng*, 924 N.E.2d at 296.

²³⁰ *Id.* at 289-90. *Seng* was convicted of three counts of murder. *Id.* at 289.

Now, it may be, I say it may be, it may not be but if it is, then maybe you would like to have heard the testimony of a person or somebody or persons for that matter, that neither side had called has a witness. Once again, you may not speculate or guess as to what that witness's testimony might have been. Not knowing the testimony, of course, you can't tell which side it would have helped or hurt. I urge you, therefore, not to spend any time arguing about why so and so didn't testify.²³¹

There is no evidence on the record in *Seng* that the prosecutor asked for the instruction.

Massachusetts law says that a trial judge cannot prevent a defendant from basing his defense on the lack of evidence produced by the government.²³² *Seng* argued that the CSI instruction impermissibly precluded the jury from considering his defense of lack of forensic evidence.²³³ The court disagreed, holding that the instruction did not violate the right to present a defense.²³⁴ Rather, the court characterized the trial judge's action as a permissible admonishment to the jurors against inventing their own evidence.²³⁵ The court held that "the jury may consider evidence of absence, but they may not fill that void with evidence conjured from their own speculation."²³⁶

²³¹ *Id.* at 296.

²³² *Id.* This is the "*Bowden* doctrine." See *Commonwealth v. Bowden*, 399 N.E.2d 482 (Mass. 1980). In *Bowden*, the trial judge instructed the jurors that they were not to consider the lack or non-existence of scientific tests as evidence in the case. *Id.* at 491. The court held that the instruction was improper because the lack of scientific tests or evidence was a permissible ground on which to build a defense, and it could raise a reasonable doubt in the minds of the jury. *Id.*

²³³ *Seng*, 924 N.E.2d at 296.

²³⁴ *Id.*

²³⁵ *Id.* (citing *Commonwealth v. Tolan*, 904 N.E.2d 397, 412-13 (Mass. 2009)).

²³⁶ *Seng*, 924 N.E.2d at 296. The key to the court's reasoning lies in another provision of Massachusetts law – the "*Bowden* instruction." Massachusetts permits the reading of a *Bowden* instruction in cases where a defense is raised based on lack of evidence. *Id.* at 295-96. Specifically, a *Bowden* instruction advises the jury exactly as one would expect: that reasonable doubt can arise from a finding that law enforcement failed to adequately investigate the crime. *Id.* at 296. Importantly for *Seng*, a *Bowden* instruction should not invite the jury to speculate about non-existent evidence, only to consider "actually presented" evidence of a failure to investigate as grounds for reasonable doubt. *Id.* The court held that the particular CSI-effect instruction was a perfectly legitimate precaution against speculation about missing tests or witnesses. *Id.* at 296-97. In *Seng*, the judge read the CSI instruction directly after the *Bowden*

After finding that the instruction was not erroneous, *Seng* cautioned against giving it. The court concluded that the CSI effect “may be largely speculative[,]” and its existence was too uncertain for a judge to take judicial notice of it.²³⁷ Thus, an instruction like that in *Seng* would suggest to the jury that real investigators did not have the same types of investigative techniques at their disposal as the characters on *CSI* – even though there was no evidence in the record as to that conclusion.²³⁸ Ultimately, the court said the instruction was unnecessary, because “jurors can and should be trusted to separate what they see on television from what evidence is presented at trial.”²³⁹

Discussion of *CSI* in front of the jury presents two distinct types of harm. First, just like a no-duty instruction, it inserts the judge into a jury question and lowers the government’s burden of proof. As with telling jurors that the government has no duty to conduct scientific tests, telling them that “the real world is not like *CSI*” is an open invitation to jurors to give the government a pass on missing scientific evidence.²⁴⁰ Indeed, to the extent that jurors might have higher expectations for evidence, there is no reason to believe that these expectations are triggered by forensic television dramas.²⁴¹ Therefore, there is no reason to tell jurors that reality is not like fictional television. Therefore, *Seng* rightly cautioned that courts should trust jurors to tell the difference between television and evidence presented at a trial.²⁴² Pattern instructions, that jurors are to base their decisions on the evidence

instruction. *Id.* at 296. Thus, the judge’s instruction in *Seng* was an extension of the *Bowden* instruction he had just given. *See id.*

²³⁷ *Id.* at 297 (quoting Tyler, *supra* note 1, at 1053).

²³⁸ *Seng*, 924 N.E.2d at 297.

²³⁹ *Id.* (citing *Commonwealth v. Furr*, 788 N.E.2d 592, 597 (Mass. App. Ct. 2003) (quoting *Commonwealth v. Roberts*, 389 N.E.2d 989, 997 (Mass. 1979))).

²⁴⁰ *Seng* recognized this possibility. *See Seng*, 924 N.E.2d at 297 (“The implication of a ‘CSI’ instruction, such as the one given here, is that the actual capabilities of law enforcement forensics are much less than that of ‘CSI’ specialists, in the absence of any evidence on the subject.”).

²⁴¹ *See* Shelton et al., *supra* note 64, at 39-40. As the authors also note, the demands are also not unrealistic and do not lead to higher demands for scientific evidence to convict. *Id.* at 40.

²⁴² *See Seng*, 924 N.E.2d at 297.

that was presented in court, provide a far preferable alternative to warnings about television programs.²⁴³

Second, discussion of *CSI* or a *CSI* effect could actually heighten a belief among jurors that a *CSI* effect exists, creating artificially lowered expectations for scientific evidence to compensate. As noted earlier, scholars have characterized the *CSI* effect as, in large part, a media-created myth.²⁴⁴ When media stories talk repeatedly about a *CSI* effect, people begin to believe that it exists. Given the large number of news stories about the effect, it is likely that at least some jurors are aware of it and believe in it.

In a similar way, the actions of judges could lead to a false belief among jurors that the *CSI* effect exists. The indirect-effects model of Shelton, Kim, and Barak demonstrates this.²⁴⁵ This model “assumes a reciprocal system of mutually-influencing factors” in which behavioral outcomes are not determined by a single cause, such as *CSI*, but may vary considerably, “especially in relation to the complexity of the criminal case.”²⁴⁶ In this model, jurors see judges and lawyers acting as if the *CSI* effect exists and come to believe that it might actually exist, just as if they had read a news account about it.²⁴⁷ A belief that *CSI* causes jurors to have too high an expectation for scientific evidence could lead jurors in specific cases to overcompensate and to ignore shortcomings in the government’s presentation of scientific evidence. Specifically, when a judge tells jurors that the courtroom is not like television, and implicitly that the government does not have to perform those types of scientific tests, jurors might well believe that they had unrealistic expectations for forensic evidence when they did not. Jurors could then disregard proper reasonable doubts about missing scientific tests because the judge has told

²⁴³ See, e.g., MD. MODEL CRIM. JURY INSTRUCTIONS § 3.00 (2012) (telling jurors that they are to consider the testimony from the witness stand, physical evidence, and any stipulations, depositions, and judicially noticed facts from the trial).

²⁴⁴ See Harvey & Derksen, *supra* note 12, at 11-12; Cole & Dioso-Villa, *supra* note 16, at 1367; Tyler, *supra* note 1, at 1053-54.

²⁴⁵ See *supra* Part I.C.

²⁴⁶ Shelton et al., *supra* note 64, at 40.

²⁴⁷ See Donald E. Shelton, *Juror Expectations for Scientific Evidence in Criminal Cases: Perceptions and Reality About the “CSI Effect” Myth*, 27 T.M. COOLEY L. REV. 1, 27 (2010).

them not to hold the government to a fictional television standard for evidence that the jurors were not considering in the first place.

III. CSI-EFFECT VOIR DIRE: A BETTER ALTERNATIVE?

Voir dire has provided an alternative avenue for some lawyers and judges to attempt to counter a theorized CSI or tech effect. Several scholars have advocated for voir dire to serve this function.²⁴⁸ Courts in a few states have considered voir dire questions, designed to address issues raised by the CSI effect.²⁴⁹

Voir dire already helps guarantee a fair trial, and “plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.”²⁵⁰ Therefore, good reasons exist for supporting broad rights to voir dire, especially where attorneys ask the questions of prospective jurors.²⁵¹ Voir dire on CSI-related issues may avoid some of the problems arising with anti-CSI instructions. A consideration of the case law in Maryland and Massachusetts shows that voir dire presents a viable opportunity to remove jurors who may have unrealistic demands for scientific evidence. But courts should still exercise precautions, especially given the lack of evidence for the CSI effect.

A. Maryland: Neutral Questions

Since 2010, six Maryland cases have considered whether voir dire questions related to the CSI effect are proper.²⁵² As with jury

²⁴⁸ See Kinsey, *supra* note 5, at 336-44; Lawson, *supra* note 5, at 144; Thomas, *supra* note 40, at 72.

²⁴⁹ See *Commonwealth v. Perez*, 954 N.E.2d 1 (Mass. 2011); *Charles v. State*, 997 A.2d 154 (Md. 2010); *Goff v. State*, 14 So. 3d 625 (Miss. 2009).

²⁵⁰ *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1988). See also *White v. State*, 821 A.2d 459, 463 (Md. 2003).

²⁵¹ See Bush, *supra* note 7; Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People With Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1182, 1194-1200 (2003) (arguing that limited voir dire is ineffective and leads to stereotyping by attorneys and recommending broader voir dire procedures – including questionnaires, questioning by attorneys, and a range of case-specific questions).

²⁵² See *State v. Stringfellow*, 42 A.3d 27, 30-32 (Md. 2012) (reversing *Stringfellow v. State*, 20 A.3d 825 (Md. Ct. Spec. App. 2011)); *Charles v. State*, 997 A.2d at 156 (reversing *Drake v. State*, 975 A.2d 204 (Md. Ct. Spec. App. 2009)); *Burris v. State*, 47 A.3d 635 (Md. Ct. Spec. App. 2012); *Morris v. State*, 42 A.3d. 83, 85 (Md. Ct. Spec. App.

instructions, the extensive consideration Maryland courts have given the CSI-effect voir dire should be instructive for other jurisdictions that are considering whether juror demands for evidence need to be countered.

Voir dire in Maryland focuses on “issues particular to the defendant’s case so that biases directly related to the crime, the witnesses, or the defendant may be uncovered.”²⁵³ The Maryland courts have rejected an overly comprehensive “shotgun” approach to voir dire, which would involve questions not directly relevant to the issues in the case.²⁵⁴ Additionally, the trial judge, rather than the parties, propounds all voir dire questions.²⁵⁵ When no statute or rule prescribes particular questions, Maryland law leaves the questions to the “sound discretion” of the trial judge.²⁵⁶ Prior to 2010, the Court of Appeals had never overturned a criminal conviction after a judge asked an improper question, though the court has repeatedly done so based on the refusal to ask an essential question²⁵⁷ or the improper conduct of voir dire.²⁵⁸

The Maryland Court of Appeals first considered the issue of CSI-effect voir dire in the consolidated case *Charles v. State* in

2012); *McFadden v. State*, 13 A.3d 68, 74 (Md. Ct. Spec. App. 2011); *Kelly v. State*, 6 A.3d 396, 411 (Md. Ct. Spec. App. 2010). While there have been six cases, there have actually been eight published opinions, with the Maryland Court of Appeals reversing Court of Special Appeals decisions in *Stringfellow* and *Charles*.

²⁵³ *State v. Logan*, 906 A.2d 374, 385 (Md. 2006) (quoting *State v. Thomas*, 798 A.2d 566, 569 (Md. 2002)).

²⁵⁴ *Stewart v. State*, 923 A.2d 44, 47 (Md. 2007) (holding that trial judge did not abuse discretion by refusing to ask questions that were too broad to support a challenge for cause, such as questions about narcotics in a child molestation case).

²⁵⁵ MD. CODE ANN., RULES § 4-312(d) (2005). The rule states that the parties *may* conduct voir dire, but this is not the normal practice. *Id.*

²⁵⁶ *Moore v. State*, 989 A.2d 1150, 1155 (Md. 2010) (quoting *Corens v. State*, 45 A.2d 340, 343 (Md. 1946)).

²⁵⁷ *See, e.g., Moore*, 989 A.2d at 1153 (whether jurors would be less likely to believe defense witnesses); *Sweet v. State*, 806 A.2d 265, 267 (Md. 2002) (whether child molestation charges stir up such strong emotions that jurors could not be fair); *State v. Thomas*, 798 A.2d 566, 567 (Md. 2002) (whether jurors had such strong feelings about drug laws that they could not be fair); *Hernandez v. State*, 742 A.2d 952, 953 (Md. 1999) (whether jurors harbored racial bias against accused); *Langley v. State*, 378 A.2d 1338, 1338 (Md. 1977) (whether jurors would give more credibility to testimony of a police officer than a civilian).

²⁵⁸ *Wright v. State*, 983 A.2d 519, 521 (Md. 2009) (allowing answers only at the end of a quick succession of seventeen questions); *Dingle v. State*, 759 A.2d 819, 820 n.1 (Md. 2000) (requiring responses only from jurors who did not think they could be impartial).

2010.²⁵⁹ Based on the wording of a CSI-effect question, *Charles* reversed the defendants' convictions for second-degree murder and several handgun offenses.²⁶⁰ At the same time, it overturned an earlier published opinion of the Court of Special Appeals that had allowed the question.²⁶¹

The prosecutor requested three questions dealing with "CSI-type" evidence, and the judge eventually asked only the following question, which he wrote:

I'm going to assume that many of you, from having done a few of these, watch way too much TV, including the so-called realistic crime shows like CSI and Law and Order. I trust that you understand that these crime shows are fiction and fantasy and are done for dramatic effect and for this dramatic effect they purport to rely upon, "scientific evidence," to convict guilty persons. While this is certainly acceptable as entertainment you must not allow this entertainment experience to interfere with your duties as a juror. Therefore, *if you are currently of the opinion or belief that you cannot convict a defendant without "scientific evidence,"* regardless of the other evidence in the case and regardless of the instructions that I will give you as to the law, please rise.²⁶²

On appeal, Charles argued that, by asking if jurors "cannot convict a defendant without scientific evidence," the court's question instructed jurors to convict based exclusively on non-scientific evidence that the state would produce.²⁶³ The State argued that the specific wording of the question was within the discretion of the trial judge and that the question was properly

²⁵⁹ *Charles v. State*, 997 A.2d 154, 157 (Md. 2010). The cases of defendants Charles and Drake, who were tried together, were consolidated on appeal. *Id.* at 156.

²⁶⁰ The defendants had been acquitted of first-degree murder as well as conspiracy. *Id.* at 156 n.1.

²⁶¹ *Drake v. State*, 975 A.2d 204 (Md. Ct. Spec. App. 2009). In *Drake*, the Court of Special Appeals emphasized the discretion of trial judges in propounding voir dire questions. *Id.* at 209. On the specific question asked, *Drake* held that the judge did not direct jurors that whatever evidence put before them would be enough to sustain a conviction. *Id.* at 210. Rather, he sought to identify jurors who could not convict absent CSI-type evidence, and thus properly attempted to discover biases. *Id.* at 210-11.

²⁶² *Charles v. State*, 997 A.2d at 156-57.

²⁶³ *Id.* at 158.

designed to identify jurors who would require scientific evidence and disregard other evidence.²⁶⁴

The Court of Appeals agreed that the judge abused his discretion by asking the question. Specifically, the wording of the question made it appear to the jury that conviction was the only option.²⁶⁵ The court compared the wording in this question to *Hutchinson v. State*, a 1980 Maryland case in which a judge's instruction about the verdict sheet had a similar effect.²⁶⁶ In *Hutchinson*, the judge talked the jury through a verdict sheet, explaining the process of deciding one count of rape in the first degree and one count of rape in the second degree, *without ever mentioning the possibility of a not guilty finding on both counts*.²⁶⁷ Ultimately, the court in *Charles* decided to "leave for another day"

²⁶⁴ *Id.*

²⁶⁵ The court contrasted the Mississippi Supreme Court's reasoning about a "neutral" CSI-effect voir dire question. *Id.* at 161-62 (citing *Goff v. State*, 14 So. 3d 625 (Miss. 2009)). In *Goff*, the trial judge asked the jury:

[Y]ou know, if you watch TV a lot, you probably get to watch-I don't know how many of you-how many of you watch CSI? Well, raise your hand. See, there's a lot of you. A lot of you. It's a very popular show. My kids love it. All right. They're older and they love that show. They like Law and Order.

But, can everybody tell me that they can separate what they see on TV from what you see in the courtroom? I know that sounds like a silly question, but some people go, oh, well, it was on CSI, so how come they don't do it in every case? All right.

And I can tell you how I know, I know CSI and Law and Order are make-believe. If you flip the channel, you may see Scotty beaming somebody else up, and that's on TV. All right?

So, can everybody tell me—and, again, this kind of goes to the burden of proof, you know, about what evidence you have—and *can everyone tell me that they will 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?

Goff, 14 So. 3d at 652-53 (emphasis added).

The Mississippi Supreme Court considered whether the prosecutor's question, and a subsequent reference to it in closing argument, sought to commit the jury to a particular verdict. *Id.* at 653 (citing *Stringer v. State*, 500 So. 2d 928, 938-39 (Miss. 1986) (finding error when prosecutor asked jurors to promise that they would impose death penalty if they found the defendant guilty)). The court found that the question was not in error because it properly asked the jurors to return a verdict based on the evidence and did not seek to commit them to any particular result. *Goff*, 14 So. 3d at 653-54.

²⁶⁶ See generally *State v. Hutchinson*, 411 A.2d 1035 (Md. 1980).

²⁶⁷ *Id.* at 1037.

the issue of whether a CSI-effect voir dire question would be theoretically permissible,²⁶⁸ focusing only on the specific wording of the question at hand.²⁶⁹ To date, *Charles* has been the first and last Court of Appeals decision overturning a conviction on the basis of a CSI-effect voir dire question.

Within two years, the Court of Special Appeals considered four more cases with voir dire questions nearly identical to *Charles*. The court affirmed convictions despite similar questions in *Kelly*²⁷⁰ and *Burris*.²⁷¹ Unlike in *Charles*, defense counsel in

²⁶⁸ *Charles* was the first Maryland opinion to mention a CSI effect. *Charles*, 997 A.2d at 154 (Md. 2010). While the existence of the effect did not prove dispositive to the case, the majority acknowledged at some length the debate over whether the effect exists, citing much of the relevant scholarship. *Id.* 157-58 (Md. 2010) (citing news reports as well as Thomas, *supra* note 40, at 70, in support of an effect, and Cole & Dioso-Villa, *supra* note 15, at 455, and Tyler, *supra* note 1, at 1050, in opposition).

²⁶⁹ The court distinguished other cases dealing with the purpose of questions, and concluded, “The present case, however, presents us with a seminal opportunity to consider the appropriateness of specific language of a voir dire question, rather than the aim of the question itself.” *Charles*, 997 A.2d at 160.

²⁷⁰ *Kelly v. State*, 6 A.3d 396 (Md. Ct. Spec. App. 2010). In *Kelly*, for example, after acknowledging that jurors watch shows such as *CSI* and also recognizing that jurors should understand that they are fantasy, the judge said,

While this is certainly acceptable as entertainment, you must not allow your entertainment to interfere with your duties as a juror. Therefore, if you are currently of the opinion that you cannot convict a Defendant without “scientific evidence,” regardless of all of the other evidence in the case and regardless of the instructions that I give you as to the law of the case, please stand.

Id. at 411.

²⁷¹ *Burris v. State*, 47 A.3d 635 (Md. Ct. Spec. App. 2012). In *Burris*, the judge asked,

Now, ladies and gentlemen, there are many different types of evidence. There is direct evidence. There is circumstantial evidence. Direct evidence is someone who says, I saw this. I did this. I heard this. So and so said this to me. That’s direct evidence. Circumstantial evidence is evidence that you have to draw a conclusion based upon it about something important in the case.

Within this world of, of science or circumstantial evidence is the world of scientific evidence and within that world there is now what is referred to as crime scene investigation type of evidence. The type of evidence that’s been dramatized in the television programs, the Hannibal Lecter books and movies that deal with trace evidence. Trace evidence being hair and fingerprints and DNA and one book fingerprints on an eyeball. These are dramatizations of forms of circumstantial evidence. The jurors will be called upon to consider all of the evidence that is presented no matter who it is presented by. No matter what the person, the party is urging you to consider. Is there any member of the jury panel who would require trace evidence in order to accept

these cases did not preserve the issue by objecting to the question. While acknowledging that the question was improper, the court declined to invoke plain error review to reverse.²⁷²

Conversely, in *McFadden*²⁷³ and *Stringfellow*²⁷⁴ the Court of Special Appeals reversed convictions based on objections to identical questions, citing *Charles* as controlling.²⁷⁵ In neither case did the court discuss the aim of the questions, confining itself to the specific language.²⁷⁶ On petition for certiorari in *Stringfellow*, the Maryland Court of Appeals reversed the court decision below and also disapproved of *McFadden*.²⁷⁷ The court held that while defense counsel had objected to the voir dire questions, he had waived the objection by not objecting again to the makeup of the jury at the close of all questioning.²⁷⁸

Only four judges fully joined the majority opinion in *Stringfellow*, with one concurring in the judgment and two filing a

a proposition presented by one of the parties? In other words, you say well, she didn't present this or he didn't present that. I can't accept it. Is there any member of the jury panel who set that form of artificial standard? If your answer is, yes, please stand and I'll take your number. Okay, your number in the back, sir, again.

Id. at 645. The court declined to review the unpreserved issue for plain error. *Id.* at 665. However, the court also said that the instruction would not be erroneous regardless because it asked whether jurors would expect either party to produce trace evidence. *Id.* at 665 n.14 (distinguishing *Stabb v. State*, 31 A.3d 922, 933 (Md. 2011)).

²⁷² *Burris*, 47 A.3d at 664-65 (“Plain error review is extraordinary so as to encourage trial counsel to preserve the record.”). See also *State v. Rich*, 3 A.3d 1210, 1216-17 (Md. 2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009) (laying out stringent four-part test for plain error review)).

²⁷³ *McFadden v. State*, 13 A.3d 68, 75-77 (Md. Ct. Spec. App. 2011).

²⁷⁴ *Stringfellow v. State*, 20 A.3d 825, 832 (Md. Ct. Spec. App. 2011), *cert. granted*, 28 A.3d 644 (Md. 2011) and *rev'd*, 42 A.3d 27 (Md. 2012).

²⁷⁵ *Id.* at 832; *McFadden*, 13 A.3d at 77. *McFadden* contained precisely the same question as *Kelly* – both cases were tried before the same judge in Baltimore City. *Id.* at 68; *Kelly*, 6 A.3d at 396. *Stringfellow* was also tried in Baltimore City, but before a different judge. *Stringfellow*, 20 A.3d at 825. There the judge asked, “Does any member of the panel believe that the State is required to utilize specific investigative or scientific techniques such as fingerprint examination in order for the defendant to be found guilty beyond a reasonable doubt?” *Id.* at 828.

²⁷⁶ *Stringfellow*, 20 A.3d at 831; *McFadden*, 13 A.3d at 77.

²⁷⁷ *State v. Stringfellow*, 42 A.3d 27, 33-34 (Md. 2012).

²⁷⁸ *Id.* at 32 (“Generally, a party waives his or her voir dire objection going to the inclusion or exclusion of a prospective juror (or jurors) or the entire venire if the objecting party accepts unqualifiedly the jury panel (thus seated) as satisfactory at the conclusion of the jury-selection process.” (citing *Gilchrist v. State*, 667 A.2d 876, 881 (Md. 1995))).

concurring opinion.²⁷⁹ The two concurring judges argued that the objection was not waived, disagreeing with the majority's characterization of what is or is not an objection to the composition of the jury.²⁸⁰ The concurrence went on to find that asking the voir dire question was error.²⁸¹ Citing *Stabb* and *Atkins*, the concurring judges reasoned that "we should not treat as legitimate a message sent to the jury during voir dire, when we have held that same message is prejudicial when given during jury instructions."²⁸² Ultimately, however, they concurred because they agreed that the error in allowing the voir dire question was harmless.²⁸³

The only case to fully consider a CSI-effect instruction since *Charles*, without being controlled by preservation considerations, was *Morris*.²⁸⁴ In *Morris*, the judge explained that much of the science in shows like *CSI* is exaggerated, asked jurors if they would be unable to ignore crime dramas, and asked if they would be "so persuaded" by such shows that they would be unable to judge the case fairly.²⁸⁵ The Court of Special Appeals held that there was no error because, unlike *Charles*, the judge in *Morris* did not suggest that finding the defendant guilty was a foregone

²⁷⁹ *Stringfellow*, 42 A.3d at 36 (Bell, C.J., concurring in judgment only) (Adkins, joined by Battaglia, JJ., concurring).

²⁸⁰ *Id.* at 38 (Adkins, J., concurring) (arguing that an objection to a judge's course of action in voir dire was not an objection going to the inclusion or exclusion of jurors).

²⁸¹ *Id.* at 39 (Adkins, J., concurring) (citing *Stabb v. State*, 31 A.3d 922, 923 (Md. 2011); *Atkins v. State*, 26 A.3d 979, 980 (Md. 2011)).

²⁸² *Stringfellow*, 42 A.3d at 39 (Adkins, J., concurring).

²⁸³ *Id.* (Adkins, J., concurring).

²⁸⁴ *Morris v. State*, 42 A.3d 83, 87-89 (Md. Ct. Spec. App. 2012).

²⁸⁵ *Id.* at 85. In full, the judge said,

Ladies and gentlemen, televisions shows such as C.S.I., Crossing Jordan and some of the like are fiction. They are not true. Many of the scientific methods used in those kinds of television shows are exaggerated or do not even exist. If you are selected as a juror in this case[,] you will be required to base your decisions solely on the evidence presented in court. Would any potential juror be unable to ignore the so called crime dramas they have been seeing on television, the movies and Internet or such and putting that aside in making your decision based solely on the evidence that you hear in court and not through some expectation of something that you've seen through the media or television? Is there anyone who would be so persuaded by such a show that they would not be able to judge this case fairly and impartially? Please rise if that applies to you. Let the record reflect that there is no such response.

Id.

conclusion or the only option. Rather, the judge asked if jurors could decide the case solely on the evidence.²⁸⁶

What conclusions can be drawn from these cases? Unlike jury instructions, the Maryland Courts' consideration of voir dire has turned on the specific language used. The language in *Charles*, and subsequent similar cases, went too far in directly suggesting that conviction was the proper outcome. But the Court of Appeals has decided that judges will be given significant leeway in voir dire without the threat of reversal – not only through the focus on harmful language, but also through stringently imposed preservation requirements. Additionally, *Morris* shows that talking about *CSI* is not an error itself.

Two considerations from Maryland's lenient approach should be noted: First, as the concurrence in *Stringfellow* said, a judge should not be allowed to leave the same impression during voir dire that she cannot during instructions.²⁸⁷ In addition to questions that make conviction appear to be the correct result, courts should prohibit questions that could lead jurors to discount a lack of evidence as a ground for reasonable doubt. The content of the *Evans* instruction, for example, rephrased as a question would raise similar concerns as the instruction itself.

Second, judges should refrain from talking about *CSI* and similar shows for the same reason that they should avoid it in instructions. Absent evidence of the *CSI* effect, there is simply no reason to confuse fantasy and reality. So, while the form of the question itself in *Morris* might not have been problematic, the judge's discussion of *CSI* was irrelevant at best and simply confusing at worst. As discussed previously, by talking about *CSI* judges also risk reinforcing notions that the *CSI* effect exists and leading jurors to overcompensate by ignoring legitimate questions about absent scientific evidence.

B. Massachusetts: "Inherent Tension" with the Right to Present a Defense

The Massachusetts appellate courts have taken a slightly more restrictive approach to *CSI*-effect instructions than

²⁸⁶ *Id.* at 87-88.

²⁸⁷ *See Stringfellow*, 42 A.3d at 39 (Adkins, J., concurring).

Maryland. Two Massachusetts cases, *Young* and *Perez*, have analyzed CSI-effect voir dire and its relationship to a defendant's right to present a defense.

In *Young*, the trial judge asked three jurors, “[I]f the Commonwealth presented only testimony of witnesses, and presented no corroborating scientific evidence, would you automatically find the defendant not guilty, or would you make an independent assessment of the evidence?”²⁸⁸ *Young* argued that this question impermissibly made jurors think that the only basis for reasonable doubt was the evidence presented at trial, not a lack of evidence.²⁸⁹ The court disagreed. Without mentioning *CSI* or the CSI effect, the court held that the judge was only trying to ensure that jurors would not automatically acquit if there was no scientific evidence.²⁹⁰ The judge reminded jurors that the government was not required to produce any particular kind of evidence, which was legally correct.²⁹¹ She also did nothing to prevent *Young* from presenting his defense based on the lack of police investigation.²⁹²

In 2011, the Supreme Court of Massachusetts reached the same conclusion after considering scientific-evidence voir dire.²⁹³ In *Perez* the trial judge asked several questions, beginning with whether jurors believed that “the Commonwealth is never able to prove a case beyond a reasonable doubt unless it presents scientific evidence to corroborate witness testimony.”²⁹⁴ Thirty-one prospective jurors were excluded for cause after answering affirmatively, including twenty-four who were excluded based on their answer to the question.²⁹⁵ Expressing concern at the number of jurors being excluded, many of whom might be favorable to a

²⁸⁸ Commonwealth v. Young, 899 N.E.2d 838, 844 (Mass. App. Ct. 2009).

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ See generally Commonwealth v. Perez, 954 N.E.2d 1 (Mass. 2011).

²⁹⁴ *Id.* at 9. The judge also asked the question worded slightly differently – whether jurors agreed or disagreed with the statement that the Commonwealth must always produce scientific evidence. *Id.* at 9 n.8. Additionally, the judge asked follow-up questions of some jurors, including whether the juror would feel required to return a verdict of not guilty if there was no scientific evidence presented. *Id.*

²⁹⁵ *Id.* at 9 n.9.

defense of inadequate testing, the defendant objected to the questions.²⁹⁶

Though the questions did not mention *CSI*, the court interpreted them as an effort to “ferret out” juror bias related to the CSI effect.²⁹⁷ Citing *Seng*, and the scholarly articles it relied upon, the court again stated that there was little evidence to support the “so-called” CSI effect.²⁹⁸ Still, the court reasoned that *Young* and opinions from Maryland, Mississippi, and Missouri had allowed “at least some form” of questioning on expectations of scientific evidence.²⁹⁹

The court upheld the questions in *Perez* as proper for several reasons. First, they fell within the trial judge’s broad discretion in voir dire.³⁰⁰ Second, the questions were tailored to find jurors who would decide the case without bias and based on the evidence.³⁰¹ Third, unlike the question in *Charles*, the questions in *Perez* did not commit the jury to a verdict in advance or select jurors who were predisposed to convict the defendant based on the government’s evidence.³⁰² Finally, the questions never suggested that a lack of scientific evidence could not be considered as a basis for reasonable doubt.³⁰³

Still, the court gave an important caution, acknowledging an “inherent tension” between voir dire about jurors’ beliefs regarding scientific evidence and the right to put on a defense.³⁰⁴ The court held open the possibility that in “certain circumstances”

²⁹⁶ *Id.* at 10 n.13.

²⁹⁷ *Id.* at 9.

²⁹⁸ *Id.* (other citations omitted). The court again characterized the evidence for the CSI effect as “anecdotal reports and media coverage.” *Id.*

²⁹⁹ *Id.* at 9-10 (citing *Commonwealth v. Young*, 899 N.E.2d 838 (Mass. App. Ct. 2009); *Charles v. State*, 997 A.2d 154, 157-58 (Md. 2010); *Goff v. State*, 14 So. 3d 625, 652-54 (Miss. 2009); *State v. Taylor*, 317 S.W.3d 89, 94-95 (Mo. Ct. App. 2010)).

³⁰⁰ Similarly to Maryland, trial judges in Massachusetts are afforded “a large degree of discretion in the jury selection process.” *Commonwealth v. Vann Long*, 647 N.E.2d 1162, 1166 (Mass. 1995). Additionally, the scope of voir dire “is in the sound discretion of the trial judge and will be upheld absent a clear showing of abuse of discretion.” *Commonwealth v. Garuti*, 907 N.E.2d 221, 226 (Mass. 2009).

³⁰¹ These are the stated goals of voir dire under Massachusetts law. *Perez*, 954 N.E.2d at 9-10. This is similar to saying the questions were correct statements of the law.

³⁰² *Id.* at 10.

³⁰³ *Id.*

³⁰⁴ *Id.* at 10 n.13.

questions on scientific evidence could violate the right to raise a defense based on lack of evidence, prejudicing the defendant.³⁰⁵ Ultimately, based on this tension and the practical difficulty of formulating a question that jurors can understand,³⁰⁶ the court suggested that judges use “caution” when exercising their discretion in asking the question.³⁰⁷ At present, this is the court’s last word on the relationship between measures to counter the CSI effect and the principle that defendants should not be precluded from raising a lack of evidence as a basis for reasonable doubt.

Voir dire is a better method than jury instructions for preventing unrealistic demands for evidence from affecting verdicts. Preliminary questions to root out prejudice in jurors need not lower the government’s burden or imply a comment on evidence. Additionally, when done by attorneys, there is less danger of the judge appearing to belittle the defendant’s case. Still, the inherent tension recognized by *Perez* is troubling. Courts will continue to attempt to set limits on CSI-effect voir dire. As they do, judges should keep in mind the dangers that such voir dire can pose when it is not carefully worded, appears to undermine the government’s burden of proof, or talks about *CSI* or the CSI effect.

IV. GUIDANCE FOR JUDGES

Because there is no proof that jurors have unrealistic demands for forensic evidence, courts should not generally give CSI-effect instructions or ask CSI-effect voir dire questions. But, what if the court feels the need to respond to arguments by defense counsel that, as in *Saldarriaga*,³⁰⁸ go too far in speculating about evidence? What if a judge supports a broad voir dire, and wishes to permit attorneys to ask questions about jurors’ expectations for forensic evidence? The case law that has emerged on these issues, though only a few years old, raises several important considerations. A careful analysis of these cases

³⁰⁵ *Id.*

³⁰⁶ The trial court had expressed concerns about jurors’ comprehension of the question in *Perez*. *Id.* at 11 n.13.

³⁰⁷ *Id.*

³⁰⁸ *See supra* Part I.B.1.

suggests the following questions that should be considered before allowing voir dire or providing instructions to jurors:

First, to what is the court responding? Judges should not instruct on the CSI effect or duty to conduct specific tests out of general concerns about jurors' expectations or demands for forensic evidence. Care should be taken when responding to defense questioning or argument that goes too far. The general means for responding should be explanation by witnesses or argument by the government as to why the test was unnecessary or impossible. Jury instructions should not be used to counter a vigorous defense, and all instruction should be directly responsive to any harm they intend to remedy.

Second, is the instruction or question a correct statement of law? While this question alone is not determinative, it is a necessary precursor to a more in depth analysis of the instruction or question's effects. As in *Charles*, small changes in wording can make all the difference.

Third, does the instruction or question still carry dangers even if legally correct? Not every correct statement of law should be given to the jury. An instruction might be incomplete or subject to misunderstanding. It might overemphasize one factor to the detriment of another, such as the government's burden of proof. Given the inherent tension recognized in *Perez*, courts should exercise caution with voir dire as well.

Fourth, who is doing the asking? It should matter if it is the judge as opposed to an attorney. In Maryland, and other jurisdictions with voir dire conducted by judges, questions can be as problematic as instructions, given the authoritative position of the judge. The *Stringfellow* concurrence properly recognized this.

Finally, does the instruction or question mention *CSI* or other fictional television shows? There is not enough evidence of a CSI effect to justify injecting fictional drama into the courtroom. The Massachusetts Supreme Court was correct: judges should trust jurors to know the difference between television and reality. Furthermore, talking about *CSI* and how unrealistic forensic dramas are runs the risk of contributing to belief in the CSI effect, leading to overcompensation by jurors.

CONCLUSION

As courts continue to deal with this rapidly developing area of law, further lessons will undoubtedly arise. Until these lessons emerge, the guidance offered in Part IV provides an analytic framework for assessing whether remedial procedures should be considered. Courts should not speculate about the influence of popular television dramas on jurors' evaluation of evidence in court, and judges should be wary of allowing remedies for problems that may not exist.

As Gil Grissom, the fictional lead investigator on *CSI* said, "The evidence never lies."³⁰⁹ In the case of the CSI effect, there is no evidence that television leads to faulty verdicts by giving jurors unrealistic demands for forensic evidence. The demands that jurors do have are realistic reactions to living in a scientific and technologically advanced society. In light of the constitutional right to due process, there are significant reasons for judges to avoid attempting to counter any CSI effect or tech effect. When instruction is necessary or voir dire requested, courts should proceed only with the utmost caution.

³⁰⁹ See *CSI: Crime Scene Investigation: Quotes*, IMDB.COM, www.imdb.com/title/tt0247082/quotes (last visited Dec. 17, 2013).

