ORDER AS A FORM OF PERSUASION

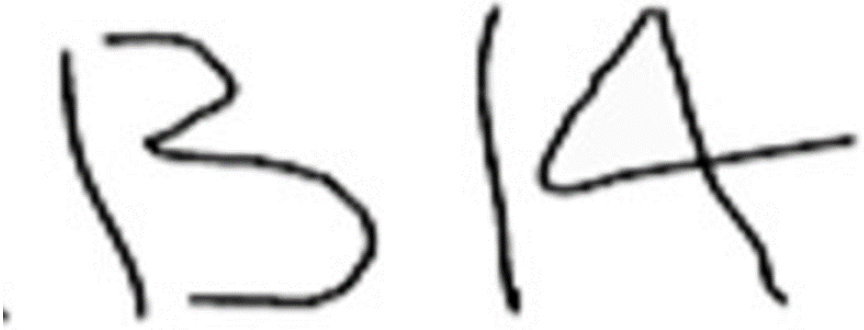
The power of ordering – where you place a fact or argument – should be beyond question. But read on – what goes first at trial may not always determine outcome.

The importance of ordering is known well beyond the courtroom and is the starting place for much of cognitive psychology. It is proved in the simplest of ways.

Test yourself: start at the left with the below picture, and read aloud.

Presumably, you read “A, B.”

Now, start at the right and read aloud.



Predictably, you would read “14, 13.”

Now, see the ‘whole picture.’

Nothing has changed with the middle character.

What brought this to mind? A recent (February 17) lecture by Itiel Dror – "Improving Forensic Decision Making: a Human-Cognitive Perspective discussed the importance of "linear sequential unmasking." [You can see the lecture and a posted article at https://forensicstats.org/blog/portfolio/improving-forensic-decision-making/]

The gist is simple – when a fingerprint examiner or other analyst performs their work, they should get data in a particular order to avoid any information that might distort the analysis. An analyst should not be told "the suspect confessed" before seeing if their prints match those from the crime scene, as the result will be to look for matching features and possibly ignore those that vary. More generally, examiners are now taught to look at the print lifted from the crime scene and identify its salient features *before* looking at the suspect's exemplar, because if they proceed in the opposite order the analyst may be looking for what they hope to find.

But this article is about courtroom ordering, not crime labs. What's the link? During the February lecture, Dr. Dror referenced an article published more than fifty years ago, Lawson, Order of Presentation as a Factor in Jury Persuasion, 56 KY. L.J. 523 (1968). He cited it as a work showing that the idea that order counts is true in many places, even the courtroom.

In this article, Lawson was particularly concerned about criminal trials where the prosecution had both the primacy (first opening) and recency (final closing words) advantage. Based on the research extant in 1968, Lawson posited the following regarding jury trials: "It is possible to predict with a reasonably high degree of confidence that 'primacy effects' do influence the decisions of jurors." Lawson

found a study showing how primacy's power might be offset - warning decision makers of the risk of being over-persuaded by a first impression had some success in reducing the primacy effect. L:awson then concluded with a question –

"Is the deliberation process of jurors, as it is presently conceived, frustrated as a consequence of the unbalanced effectiveness of persuasive communications resulting from the order in which they are presented?"

Intrigued, my goal was to follow up on Lawson. The most recent article to cite Lawson is Engel, Timme, and Glockner, ***Coherence-Based Reasoning and Order Effects in Legal Judgments***, 26 Psych. Pub. Pol. and L. 333 (2020). It's research and conclusions were surprising.

"Coherence" is a concept familiar to all who teach the importance of story-telling – the story gives the framework [here, the "coherence"] to the discrete facts that are presented at trial. Simply, if the opening statement provides a story board framework that the listener adopts, then facts presented at trial will be made coherent when they fit the story and rejected, or minimized, or explained away when they don't.

Engle and colleagues look at the interplay between coherence-based reasoning and the order of evidence presentation. It asks a basic question – if primacy is what generates the story, does primacy drive coherence drive verdict? One might expect the answer to be yes, especially after Lawson's work. The answer, at least from the experiments the researchers conducted, is a surprising "no."

How was this tested? Test subjects all reviewed the same case study:

> [A] company accused one of its employees of having stolen money from the company safe. The evidence consisted of 12 pieces of information (6 facts and 6 background beliefs). The money was stolen using the regular access code, which only a few persons had. The money was stolen in the evening and the time was recorded. Important proguilty [incriminating] facts were the low number of persons who knew the access code for the safe from which the money was stolen, and the high confidence level of an eyewitness who, afterward, reported having seen the defendant at the site of the crime.

> The strongest con-guilty [exculpatory] fact was that the defendant was seen shortly after the moment of the crime in a place that was hard to reach in such a short time.

26 Psych. Pub. Pol. at 336.

There were four groups – two received the pro-guilty evidence first; and the other received a "balanced" accounting of the case. One group from each condition – pro-guilty and balanced – was also asked a question before receiving the balance of the evidence:

> You have now received half of the evidence for the case. Please take a bit of time to think about the case. Toward which judgment would you lean, based on the available evidence? Your leaning is, of course, not binding, and you can decide differently after you have seen the remaining evidence. I lean toward thinking (a) that Hans H. is guilty of committing the crime versus (b) Hans H. is not guilty.

Id.

Not surprisingly, those who saw only proguilty evidence had strong leanings toward conviction at the halfway point of this mock trial. But that impact was not enduring. Here are the results at the end of the trials, when the mock jurors had received the entire set of facts. "Presenting proguilty evidence first and con-guilty evidence last led to 32% convictions, as compared to 40% with a balanced presentation." *Id.,* 337. In other words, what jurors learned last had more of an impact than what they heard first.

There was more. The authors predicted that the early, primacy-driven conclusions of mock jurors would only magnify and entrench through the course of the trial. The results crushed that prediction. "There was no support for our second hypothesis: we had predicted that primacy effects would be amplified (and recency effects reduced) after an initial leaning." *Id.* In other words, asking people where their heads were at midway through trial did not, even coupled with primacy, lead to more convictions.

Are there takeaways from this? I find at least three. First, the primacy-coherence connection does exist and operates in some areas of persuasion, such as

consumer choice. This means that as much as lawyers should look to studies in other sectors they don't always transfer to the courtroom. Second, primacy and coherence still count – they just don't control. Finally, that last word [recency] may be where the real courtroom power lies.