

## BRAIN SCIENCE AND BRANDEIS BRIEFS

It should come as no surprise that evidence rules and their application are often without regard to, and indeed in conflict with, scientific findings. That is a challenge every advocate faces, the law as it is versus the law as it should be. But science can be enlisted to try and change evidence or evidence-related precedent.

The method when no record on that science was developed below is the classic “Brandeis brief,” described by one court as follows:

The term *Brandeis brief* is used to describe a brief which emphasizes statistics and commission reports more than judicial precedents, and the origin of the appellation is a brief filed by Louis D. Brandeis when he appeared as counsel in *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908).

Torres v. Seaboard Foods, LLC, 2016 OK 20, P6, fn 1. That same court noted that, at least in Oklahoma, such briefs are forbidden -even from *amici curiae* – because “In an appeal, the brief of an *amicus curiae* is limited to facts and issues raised by the parties that have not been "presented adequately" by the parties from the viewpoint of the *amicus curiae*. Okla. Sup. Ct. R. 1.12 (b)(1). This language does not allow an *amicus curiae* to expand the record on appeal via a *Brandeis* brief.” *Id.*

I am not from Oklahoma, and don’t practice there. But I do suggest that – absent an express prohibition - science belongs in briefs. Here are three options/illustrations:

### 1. Science and the *amicus* brief

In Pennsylvania, the state Supreme Court granted allowance of appeal – the equivalent of a *writ of certiorari* – on the issue of whether, under Pennsylvania’s double jeopardy guarantee, proof of a *Batson* violation should bar retrial. Here is how science was used, after setting forth the legal principle, by the *amicus* team:

*Batson* is fundamental to the right to a fair trial because diverse

juries enhance and indeed may ensure verdict reliability. As early as 1973, well before *Batson* was decided, this general principle was recognized:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable . . . . [I]ts exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

*Peters v. Kiff*, 407 U.S. 493, 503-504 (1972) (Marshall, J., opinion announcing judgment of the Court, joined by Douglas and Stewart, JJ.). As the Court affirmed in *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005), racial discrimination in jury selection "casts doubt" over the entire legal process, permits prejudices to cloud judgment, and compromises the right of trial by impartial jury.

Other states' highest courts agree that a *Batson* violation undermines verdict reliability. One court concluded succinctly, "diversity begets impartiality." *State v. LaMere*, 2 P.3d 204, 212 (Mont. 2000); *see also State v. Saintcalle*, 309 P.3d 326, 337 (Wash. 2013) ("more diverse juries result in fairer trials").

That which courts have intuited has been borne out by social science research. Diverse juries deliberate longer and more thoroughly and, as a result, generate verdicts of greater reliability. As a 2019 survey of research concludes, "diversity among jurors has a positive influence on the quality of jury deliberations and verdict fairness." Margaret Bull Kovera, *Racial Disparities in the Criminal Justice System: Prevalence, Causes, and a Search for Solutions*, JOURNAL OF SOCIAL ISSUES, Oct. 31, 2019, available at <https://doi.org/10.1111/josi.12355> (last visited Apr. 7, 2021).<sup>2</sup>

The most-cited research on this point is Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple*

*Effects of Racial Composition on Jury Deliberations*, 90 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 597-612 (2006). Of particular note is Sommers' finding that:

[h]eterogeneous groups deliberated longer and considered a wider range of information than did homogeneous groups. However, these differences did not simply result from Black participants adding unique perspectives to the discussions. Rather, White participants were largely responsible for the influence of racial composition, as they raised more case facts, made fewer factual errors, and were more amenable to discussion of race-related issues when they were members of a diverse group.

---

<sup>2</sup>This correlates with other research which demonstrates that "jurors mak[e] harsher judgments about defendants from different racial or ethnic groups (*i.e.*, outgroup members) or, conversely, more favorable judgments for defendants from the same racial or ethnic group . . . ." Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANNUAL REV. LAW Soc. SCI. 269-88 (2015).

*Id.* at 606.

One other finding has special significance: "[D]iverse groups made fewer factual errors than all-White groups [and] inaccuracies were more likely to be corrected in diverse groups." *Id.* at 608. A *Batson* violation—a deliberate attack on jury diversity—therefore meets the second criterion of the *Smith/Johnson* cases: it is an act that occurs with the purpose of denying the defendant his constitutional right to a fair trial.

The argument did not prevail – the Court was concerned less about racial justice and more about opening the ‘floodgates’ to post-conviction claims. But the science spoke.

## 2. Science on the Merits

When the Pennsylvania Superior Court, the Commonwealth’s intermediate appellate court, created a new rule – if you lose a motion *in limine* and then preemptively bring out the challenged [bad] proof, you waive the right to appeal – the appeal of that decision had no record to be limited by. The issue was fresh, and so too was the slate on which argument would be written.

Here, too, science was embraced by the challenger to the new rule.

Once a criminal conviction (or any other form of proof challenged *in limine*) is deemed admissible, it should be judged for its worth and not with the added baggage of who disclosed or failed to disclose it. If the opposing party – here, Mr. Stevenson – does not disclose in order to preserve the right to appeal, then once the jury hears of the proof in the prosecution case he is damned not only by that impeaching fact but also by his lawyer being seen as someone lacking trustworthiness, a belief that may spread beyond the specific impeaching fact.<sup>fn</sup>

---

**Fn** That credibility comes with the disclosure of adverse proof is well-established. *See, e.g.,* Waites, COURTROOM PSYCHOLOGY AND

ADVOCACY 336 (2003) (“Research in the field of social psychology tells us that to admit a weakness or fear about one’s position can increase credibility dramatically.”).

This challenge – telling Pennsylvania to reject the U.S. Supreme Court’s ruling in the *Ohler* case -- was just briefed and the case will take roughly a year to resolve. The science is essential – without it, there is just conjecture to try and prove the unfairness of the rule.

### 3. Science for the Future

If you have a criminal law background or include criminal law/Confrontation Clause cases in an Evidence course, you know the basics of the *Bruton* rule – if codefendants are tried together and one confessed, the portion of that confession that details the guilt of another codefendant must be “redacted.” In the simplest terms, that means taking out all mention of that non-confessing codefendant or replacing their name with a generic phrase like “somebody else” *and* instructing the jury that the confession may be used only against the person who made it.

This is because in *Bruton* the Court – in a rare move – held that leaving in the codefendant’s name could not be ‘fixed’ by an instruction telling jurors to ignore the confession when deciding that person’s guilt. If the confession was “I robbed the bank and Jules shot the guard,” telling the jury “disregard the words ‘Jules shot the guard’ when deciding Jules’ guilt” was deemed – and rightly so – a mental gymnastic that simply couldn’t be performed.

Why tell this story? Because in June, 2023, the U.S. Supreme Court ruled that if you changed the confession to “I robbed the bank *and the other guy shot the guard,*” a jury instruction of “don’t use that confession against Jules” [the only “other guy” in the courtroom] would work and thus prevent a Confrontation Clause violation.

Really? Based on no science? Yes. And now that is settled law – science be damned; if we say jurors can follow that instruction then indeed they can and justice is served.

So how can science be enlisted to offset this? By testing this proposition in rigorous jury studies. This is now being proposed to the American Psychological Association. The outlines of such a study (proposed by this author to a research psychologist colleague) would be:

1. A case file with no codefendant confession. Then get a baseline/norm of how many people would vote guilty for each defendant.
2. The same case file, but now with the codefendant's confession restricted solely to that person's own conduct (with no mention whatsoever of even the involvement of a second person) and the jury instruction that the confession may only be used as to deciding the speaker's guilt and not when deciding the non-confessing codefendant's guilt. Now see how many vote guilty for the non-confessing codefendant.
3. The same case file, but with the codefendant's confession coming in and referencing "**an** other person" and the same jury instruction, again measuring guilty verdicts for the non-confessing codefendant.
4. Finally, the same as condition 3 but the confession references "**the** other person" and the same jury instruction...

And if the results confirm what we intuit - that the instruction "don't consider the confession against *the other guy*" don't work and guilty verdicts increase beyond the baseline – then it is time to bring science into the courtroom with challenges under state constitutions and/or Rule 403.

"Science" can be wrong – it evolves, it makes mistakes – but it is often better than intuition and deserves a place in advocacy and persuasion.