
CRIMINAL LAW — JOINT TRIALS — NEVADA SUPREME COURT REVERSES CONVICTION ON THE BASIS OF SPILLOVER PREJUDICE. — *Stewart v. State*, No. 53100, 2010 WL 4226456 (Nev. Oct. 22, 2010).

Trials involving multiple defendants present problems for juries that do not exist when the government tries a single defendant. One prominent problem is the possibility of the spillover effect, which occurs when the disproportionality of the evidence against one defendant subjects a second defendant to “a kind of forensic guilt by association from merely sitting at the same table in the courtroom ‘with the really ugly guy.’”¹ Nevertheless, joint trials are commonplace,² and severance is rarely granted.³ Although courts recognize that joint trials may inherently involve some level of prejudice,⁴ they generally maintain that prejudice can be cured through jury instructions and that any remaining prejudice is outweighed by considerations of judicial economy.⁵ Recently, in *Stewart v. State*,⁶ the Nevada Supreme Court reversed Clarence Stewart’s conviction on the grounds that the spillover prejudice stemming from his codefendant’s public notoriety was so overwhelming that it precluded the jury from making a reliable judgment.⁷ *Stewart* is inconsistent with two fundamental presumptions underlying the jury system, namely that voir dire produces a fair and impartial jury and that jurors follow their instructions. By holding that Stewart had a right to a severed trial despite extensive voir dire and clear jury instructions, the Nevada Supreme Court undermined the necessary trust our system places in a jury verdict.

On September 13, 2007, Clarence Stewart entered room 1203 of the Palace Station Hotel in Las Vegas, Nevada, accompanied by Orenthal James (O.J.) Simpson⁸ and four other men.⁹ The men, several of

¹ James R. Lucas, *Criminal Joinder and Severance*, INTER ALIA, Jan. 1992, at 17, 20. For a discussion of other problems associated with spillover prejudice, see Robert R. Calo, *Joint Trials, Spillover Prejudice, and the Ineffectiveness of a Bare Limiting Instruction*, 9 AM. J. TRIAL ADVOC. 21, 21, 26–27 (1985).

² See Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 366 (2006) (finding that 23.5% of federal criminal trials between 1999 and 2003 involved multiple defendants).

³ See *id.* at 361.

⁴ See *Krulewicz v. United States*, 336 U.S. 440, 454 (1949) (Jackson, J., concurring) (“It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.”).

⁵ See *Spencer v. Texas*, 385 U.S. 554, 562 (1967); Leipold & Abbasi, *supra* note 2, at 359–60.

⁶ No. 53100, 2010 WL 4226456 (Nev. Oct. 22, 2010).

⁷ See *id.* at *2.

⁸ Simpson, a former Heisman Trophy winner and member of the Pro Football Hall of Fame, was the subject of the so-called “Trial of the Century” in 1995, when he was tried for the murders of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman. He was acquitted.

⁹ *Simpson v. State*, No. 53080, 2010 WL 4226452, at *11 (Nev. Oct. 22, 2010).

whom were armed, held two sports memorabilia dealers at gunpoint while they searched the room and seized over \$100,000 worth of merchandise.¹⁰ Three days later, Simpson was arrested.¹¹ He admitted to entering the room but maintained that the seized memorabilia were rightfully his.¹² Stewart was arrested the next day.¹³

The State of Nevada tried Stewart and Simpson jointly for their roles in the robbery.¹⁴ Prior to the trial, Stewart moved to sever his trial from Simpson's for fear that he would be subject to "spillover prejudice from being tried with his codefendant based on public bias."¹⁵ The trial court denied the motion.¹⁶ Stewart then petitioned the Nevada Supreme Court for a writ of mandamus.¹⁷ The Supreme Court denied the petition, maintaining that use of the writ was not warranted because "the district court may yet be able to sufficiently address petitioner's concerns . . . through the jury selection process."¹⁸

The trial opened with extensive voir dire.¹⁹ A significant portion of the proceedings was dedicated to Simpson's 1995 double murder trial and subsequent civil suit in Los Angeles.²⁰ The prospective jurors filled out a twenty-seven-page questionnaire with 116 questions.²¹ This lengthy survey was followed by four days of oral questioning during which Stewart's lawyer specifically asked prospective jurors if they "could put aside their feelings about the outcome of the California cases and consider the facts and evidence in a fair and impartial manner."²² After a month-long trial, the jury convicted both defendants.²³

The Nevada Supreme Court reversed Stewart's conviction.²⁴ The court held that the district court had erred when it refused to grant

¹⁰ *Id.* at *9.

¹¹ Francis McCabe, *O.J. Simpson Arrested*, LAS VEGAS REV.-J., Sept. 17, 2007, at 1A.

¹² See Brian Haynes, *Simpson to Be Tried*, LAS VEGAS REV.-J., Nov. 15, 2007, at 1A.

¹³ David Kihara & Brian Haynes, *Another Suspect Busted*, LAS VEGAS REV.-J., Sept. 18, 2007, at 1A.

¹⁴ David Kihara, *Experts: Past Haunted O.J.*, LAS VEGAS REV.-J., Oct. 5, 2008, at 3A. The other four men involved in the break-in were offered plea bargains. *Id.*

¹⁵ *Stewart v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, No. 52348, 2008 WL 6058514, at *1 (Nev. Sept. 5, 2008).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See *Stewart*, 2010 WL 4226456, at *2.

²⁰ See *id.*

²¹ Francis McCabe, *Complete O.J. Simpson Juror Questionnaires Released After Supreme Court Order*, LAS VEGAS REV.-J., Dec. 29, 2009, at 1B.

²² *Simpson v. State*, No. 53080, 2010 WL 4226452, at *3 (Nev. Oct. 22, 2010). Beyond these general questions, the court limited questioning "about why and how [jurors] disagreed or agreed with the California cases." See *id.* The state supreme court endorsed this limitation. See *id.*

²³ See *id.* at *1; *Stewart*, 2010 WL 4226456, at *1.

²⁴ See *Stewart*, 2010 WL 4226452, at *1. The court, however, affirmed Simpson's conviction. See *Simpson*, 2010 WL 4226452, at *1.

Stewart's motion to sever the trial.²⁵ The court determined that "[t]he facts of this case, specifically, that Simpson was Stewart's codefendant, compromised Stewart's right to a fair trial and prevented the jury from making a *reliable* judgment."²⁶ In support of this conclusion, the court noted that "Stewart was tried with one of the most notorious public figures in this country,"²⁷ and cited a 2001 public opinion poll finding that "72 percent of Americans continue to believe that O.J. Simpson is guilty of the murders of his ex-wife and her friend."²⁸

The court supplemented its finding of spillover prejudice by citing other facets of the trial that may have prejudiced Stewart.²⁹ First, the court maintained that Simpson was the focus of the trial, drawing this inference from the dominant line of questioning during voir dire proceedings.³⁰ Second, the court noted that the testimony focused on competing theories of ownership of the memorabilia, which overshadowed Stewart's theory of defense.³¹ Finally, the court asserted that the central piece of evidence — an audio recording of the robbery — was more incriminating against Simpson than it was against Stewart.³²

In determining that Simpson's notoriety compromised Stewart's right to a fair trial and prevented the jury from making a reliable judgment, the Nevada Supreme Court's decision was inconsistent with two fundamental presumptions underlying the jury system: first, that the process of voir dire, if performed in conformance with constitutional requirements, results in a fair and impartial jury; and second, that the jury follows limiting instructions. These presumptions do not change when multiple defendants are tried jointly. By ignoring these presumptions, *Stewart* undermined the critical trust we place in juries to wade through the evidence in reaching a verdict.

Voir dire — the process by which a jury is chosen — "enabl[es] the court to select an impartial jury."³³ In its modern formulation, voir dire consists of several steps, all designed to achieve this central purpose. First, the jury pool must consist of "a fair cross section of the community."³⁴ Second, the judge and the litigants question potential jurors to reveal any biases that they may harbor. This questioning is often conducted both through written questionnaires and through oral

²⁵ See *Stewart*, 2010 WL 4226456, at *1.

²⁶ *Id.* at *2.

²⁷ *Id.*

²⁸ *Id.* at *2 n.2 (citing *United States v. Lentz*, 58 F. App'x 961, 966 (4th Cir. 2003)).

²⁹ See *id.* at *2–3.

³⁰ See *id.* at *2.

³¹ See *id.*

³² See *id.* at *3. Stewart also challenged his conviction on the ground of antagonistic defenses. The court declined to reach the merits of this portion of Stewart's appeal. See *id.* at *3 n.3.

³³ *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991).

³⁴ *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975).

questioning.³⁵ Jurors who cannot render an impartial verdict based solely on the evidence at trial are excused for cause. Third, each party is given a number of peremptory challenges to strike any juror it wishes. The parties enjoy broad latitude in exercising these challenges,³⁶ given that “a principal reason for peremptories [is] to help secure the constitutional guarantee of trial by an impartial jury.”³⁷ Once this process is completed and the jurors swear that they can render an impartial verdict, courts accept their word in nearly all circumstances.³⁸

In determining that the jury could not reliably render a verdict, the *Stewart* court implicitly discounted the background presumption that proper voir dire results in an impartial jury. First, all of the jurors affirmatively stated that whatever their thoughts about Simpson’s prior cases, they could be fair and impartial here. More importantly, the Nevada Supreme Court, in reviewing both Stewart’s and Simpson’s convictions, found no problem with the voir dire process.³⁹ In fact, the United States Supreme Court has upheld less rigorous voir dire procedures. In *Skilling v. United States*,⁴⁰ in which Enron’s CEO was tried in a politically charged and potentially prejudicial environment,⁴¹ voir dire lasted only five hours⁴² and the preliminary questionnaire contained just seventy-seven questions.⁴³ The Court held that this voir dire — which was far less extensive than that in *Stewart* — sufficed to ensure an impartial trial.⁴⁴

By discounting voir dire’s presumed effects without finding a defect in the jury selection process itself, the *Stewart* court not only im-

³⁵ See, e.g., *Skilling v. United States*, 130 S. Ct. 2896, 2909–10 (2010) (written and oral questioning); *Mu’Min*, 500 U.S. at 419–21 (oral questioning).

³⁶ Peremptory challenges are limited only by the Equal Protection Clause. Neither the government, see *Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986), nor the defendant, see *Georgia v. McCollum*, 505 U.S. 42, 59 (1992), may exercise a peremptory challenge that uses a juror’s race as a predictor of bias. See generally George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804, 824–33 (1995).

³⁷ *Skilling*, 130 S. Ct. at 2923 n.32 (quoting *United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000)) (internal quotation marks omitted); see also *Batson*, 476 U.S. at 91 (“[Peremptory] challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury.” (citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965))).

³⁸ See *Skilling*, 130 S. Ct. at 2923–25; *Mu’Min*, 500 U.S. at 422 (citing *Connors v. United States*, 158 U.S. 408, 413 (1895)).

³⁹ See *Simpson v. State*, No. 53080, 2010 WL 4226452, at *3 (Nev. Oct. 22, 2010); *Stewart*, 2010 WL 4226456, at *2. In fact, the court explicitly rejected Simpson’s contention that the State had impermissibly stricken jurors in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and that the district judge had erred in limiting the scope of voir dire questions regarding Simpson’s murder trials. See *Simpson*, 2010 WL 4226452, at *3.

⁴⁰ 130 S. Ct. 2896.

⁴¹ *Skilling* was tried in Houston, the epicenter of the Enron scandal that surfaced in 2001, and his indictment was the subject of substantial pretrial publicity. See *id.* at 2908–09.

⁴² See *id.* at 2918.

⁴³ See *id.* at 2909.

⁴⁴ See *id.* at 2918.

plied that jurors' affirmations of impartiality could not be trusted, but also suggested that even extensive voir dire processes cannot be relied upon to produce impartial juries. Such implications strike at the heart of the concept of a jury trial. If the court assumes that front-end protections are insufficient, then it must be able to look into jury deliberations to see whether the jurors truly fulfilled their charge.

Courts, however, categorically refuse to do so; once a verdict is rendered, it is nearly unassailable. Juror deliberations take place in a "black box,"⁴⁵ and courts are loath to inquire into what goes on inside of it because doing so would express a fundamental distrust of the system itself.⁴⁶ Even when we *know* that jurors have not followed a court's instructions to be fair and impartial, we still do not question their verdict after the fact. For example, in *Tanner v. United States*,⁴⁷ the United States Supreme Court refused to allow two jurors to impeach their verdict with testimony stating that numerous jurors had been drinking alcohol, taking naps, and using hard drugs during trial.⁴⁸ The Court noted that "[t]here is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it."⁴⁹ Given such a choice, the Court opted to maintain the unimpeachable status of jury verdicts.

Stewart is also inconsistent with another core principle of the American jury system — juror fidelity to limiting instructions. The United States Supreme Court has repeatedly recognized that a "crucial assumption underlying our constitutional system of trial by jury [is] that jurors carefully follow instructions."⁵⁰ Otherwise, "it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury

⁴⁵ Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1398 (1994) (citation omitted) (internal quotation marks omitted).

⁴⁶ See *Gacy v. Welborn*, 994 F.2d 305, 313 (7th Cir. 1993) ("[A] defendant could not upset a verdict . . . even if all of the jurors signed affidavits describing chaotic and uninformed deliberations. Instead of inquiring what juries actually understood, and how they really reasoned, courts invoke a 'presumption' that jurors understand and follow their instructions." (citations omitted)).

⁴⁷ 483 U.S. 107 (1987).

⁴⁸ See *id.* at 113–16, 127.

⁴⁹ *Id.* at 120; see also GEORGE FISHER, EVIDENCE 5 (2d ed. 2008) ("*Tanner* stands for the system's unwillingness to look past the jury's verdict to expose whatever flaws in reasoning or understanding might lie behind the curtain of the deliberation room.").

⁵⁰ *Francis v. Franklin*, 471 U.S. 307, 325 n.9 (1985); see also *id.* at 324 n.9 ("The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them."). The presumption of juror fidelity is expressed in countless appellate decisions. See, e.g., *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); see also Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 170–73 (2004).

was improperly instructed.”⁵¹ This presumption of juror fidelity is fundamental to the concept of a fair trial.⁵² Thus, even in circumstances in which jury instructions ask jurors to put aside highly prejudicial evidence, we trust juries to reach fair verdicts. For example, the Court has upheld the admission into evidence of: a codefendant’s confession that, while not facially incriminating to the defendant, nevertheless became incriminating when linked to evidence introduced later at trial;⁵³ statements taken in violation of *Miranda v. Arizona*⁵⁴ used to impeach the defendant’s credibility;⁵⁵ prior criminal convictions for purposes of sentencing enhancements;⁵⁶ an accomplice’s confession used to evaluate the truthfulness of the defendant’s claim that his own confession was coerced;⁵⁷ and unlawfully seized evidence used to assess the defendant’s credibility.⁵⁸ In each of these situations, the jury was instructed not to consider the evidence in determining guilt.

The presumption of juror fidelity by no means disappears when multiple defendants are tried together,⁵⁹ even if the admissibility of evidence differs with respect to each defendant.⁶⁰ Limiting instructions — given throughout a trial and just before a jury begins its deliberations — explain which evidence is admissible against which defendant, and how to weigh the evidence.⁶¹ The mitigating effects of such instructions on prejudicial evidence in joint trials are nearly universally recognized and accepted.⁶²

⁵¹ *Parker v. Randolph*, 442 U.S. 62, 73 (1979) (plurality opinion); *see also* *Bruton v. United States*, 391 U.S. 123, 135 (1968) (“Unless we proceed on the basis that the jury will follow the court’s instructions . . . the jury system makes little sense.” (quoting *Delli Paoli v. United States*, 352 U.S. 232, 242 (1957))) (internal quotation marks omitted)).

⁵² *See Francis*, 471 U.S. at 325 n.9 (“[W]e must assume that juries for the most part understand and faithfully follow instructions. The concept of a fair trial encompasses a decision by a tribunal that has understood and applied the law . . .” (alteration in original) (quoting ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 73–74 (1970))).

⁵³ *See Richardson*, 481 U.S. at 208.

⁵⁴ 384 U.S. 436 (1966).

⁵⁵ *See Harris v. New York*, 401 U.S. 222, 226 (1971).

⁵⁶ *See Spencer v. Texas*, 385 U.S. 554, 563–64 (1967).

⁵⁷ *See Tennessee v. Street*, 471 U.S. 409, 413–14 (1985).

⁵⁸ *See Walder v. United States*, 347 U.S. 62, 64–65 (1954).

⁵⁹ *See Oppen v. United States*, 348 U.S. 84, 95 (1954) (“Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial.”).

⁶⁰ *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (“Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness ‘against’ a defendant if the jury is instructed to consider that testimony only against a codefendant. This accords with the almost invariable assumption of the law that jurors follow their instructions . . .” (citation omitted)).

⁶¹ *See, e.g.*, COMM. ON FED. CRIMINAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT, *PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT* 51 (1998), available at <http://www.ca7.uscourts.gov/Rules/pjury.pdf>.

⁶² *See Zafiro v. United States*, 506 U.S. 534, 539 (1993) (“Evidence that is probative of a defendant’s guilt but technically admissible only against a codefendant also might present a risk of

The presumption of juror fidelity may be abandoned only in “extraordinary situations.”⁶³ In *Bruton v. United States*,⁶⁴ for example, the United States Supreme Court held that a defendant’s Confrontation Clause rights are violated when a nontestifying codefendant’s confession that facially incriminates the defendant is introduced at their joint trial, regardless of whether the jury has been properly instructed to ignore these statements in relation to the defendant.⁶⁵ *Bruton* was premised on the idea that “there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.”⁶⁶ Thus, to fall under this “narrow exception,” there must exist an “overwhelming probability of [the jury’s] inability” to obey the instruction.⁶⁷

The Nevada Supreme Court failed to consider whether any such “extraordinary situations” qualified *Stewart* for the narrow *Bruton* exception. Although the court focused on the disproportional emphasis of the evidence toward Simpson, nowhere did it mention the extraordinary circumstances necessary to override the presumption that the jury followed its limiting instructions. Considering that the court has engaged in such analysis in the past,⁶⁸ it is odd that the court declined or failed to do so here and instead ignored the presumption of juror fidelity altogether. Moreover, even if the court had considered such circumstances, this case would not have fallen under the exception. The disproportionality of the evidence in *Stewart* was justified by the fact that the trial centered on ownership of the memorabilia. In any separate trial, the same evidence and the same emphasis on Simpson would be present. In fact, nearly the same voir dire would likely be conducted. Given the near-identical nature of the hypothetical separate trials, there would be little benefit but significant burden to severance, and thus jury instructions could play their proper role.⁶⁹

The *Stewart* court’s decision to ignore the presumption of juror fidelity is dangerous because the presumption is a necessary premise of our constitutional system.⁷⁰ It “is not a bursting bubble, applicable

prejudice. . . . [L]imiting instructions[] often will suffice to cure any risk of prejudice.”); *see also* Leipold & Abbasi, *supra* note 2, at 359.

⁶³ *See* Francis v. Franklin, 471 U.S. 307, 325 n.9 (1985).

⁶⁴ 391 U.S. 123 (1968).

⁶⁵ *See id.* at 136–37.

⁶⁶ *Id.* at 135 (citations omitted).

⁶⁷ Richardson v. Marsh, 481 U.S. 200, 208 (1987).

⁶⁸ *See, e.g.,* Duckworth v. State, 966 P.2d 165, 166–67 (Nev. 1998) (per curiam) (analyzing *Bruton* in determining whether the jury obeyed the court’s instructions).

⁶⁹ *See* Zafiro v. United States, 506 U.S. 534, 539–40 (1993).

⁷⁰ *See* Spencer v. Texas, 385 U.S. 554, 562 (1967) (“To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects . . . would threaten . . . large areas of trial jurisprudence.”); *see*

only in the absence of better evidence,”⁷¹ and it is not rebuttable whenever social science data⁷² suggests that it would be unreasonable to follow.⁷³ Instead, the presumption of juror fidelity buttresses the “backbone of the American judicial program”⁷⁴ and thus should only be abandoned when logically compelled.⁷⁵

As it has developed over the centuries, the jury system has come to represent the democratic ideal, the role of “We the People” in the truth-seeking function of trial.⁷⁶ We have chosen to place great faith in the jury, trusting that twelve people, through careful scrutiny and deliberation, will come to the right decision.⁷⁷ And in our collective experience, the jury system in virtually all cases does just that. The system, however, depends on a careful evolution of rules and presumptions. Disturbing or ignoring that foundation without proper grounds, as the Nevada Supreme Court did in *Stewart*, seriously threatens the entire institution.

also sources cited *supra* notes 50–58; cf. *Gacy v. Welborn*, 994 F.2d 305, 312 (7th Cir. 1993) (“The Constitution establishes a system of jury trials, which necessarily tolerates the shortcomings of that institution. Pointing to one of these shortcomings, no matter how vivid, does nothing to undercut the Constitution’s own method.”).

⁷¹ *Gacy*, 994 F.2d at 313; see *id.* (“[The presumption] is a rule of law — a description of the premises underlying the jury system, rather than a proposition about jurors’ abilities and states of mind.” (citing *Parker v. Randolph*, 442 U.S. 62, 73 (1979) (plurality opinion))).

⁷² Indeed, social science has challenged many premises of the jury system, including jury instructions, see J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71 (1990), and inconsistent verdicts, see Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771 (1998). See generally HARRY KALVEN, JR., & HANS ZEISEL, *THE AMERICAN JURY* (1966). Interestingly, however, a recent study of joint trials challenges the conventional wisdom that joining codefendants increases the likelihood of conviction, see Leipold & Abbasi, *supra* note 2, at 370–71, and finds that “[j]oinder of defendants standing alone seems to have little effect,” *id.* at 384.

⁷³ See *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (“The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.”).

⁷⁴ *Free v. Peters*, 12 F.3d 700, 707 (7th Cir. 1993) (Bauer, J., concurring).

⁷⁵ It is important to remember, of course, that our system does not allow jurors access to all available evidence. Indeed, evidence law itself “is about the limits we place on the information juries hear.” FISHER, *supra* note 49, at 1. For example, Rule 802 of the Federal Rules bars hearsay evidence, see FED. R. EVID. 802, Rule 404(a) bars “evidence of a person’s character . . . for the purpose of proving action in conformity therewith,” *id.* 404(a), and Rule 403 bars evidence that is unduly prejudicial, even if it is highly probative and otherwise admissible, see *id.* 403.

⁷⁶ See JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 1–2 (1994).

⁷⁷ See *Free*, 12 F.3d at 707 (Bauer, J., concurring) (“Our faith in the jury is based on our national belief, quite correct in my opinion, that the collective wisdom of twelve people . . . produces a far better result in the search for fairness and truth than any individual opinion or even a consensus of several individual opinions.”).