

THE INVESTIGATIVE OMISSIONS DEFENSE: Some Thoughts for Defense Counsel©

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INTRODUCTION

“The Point is a simple one, but the Inspector overlooked it”
~ Sherlock Holmes²

In an interesting and informative article, forthcoming in Volume 57 of the *Criminal Law Bulletin* (2021), entitled, *Investigating and Presenting an Investigative Omission Defense*,³ Lisa J. Steele, Esq., an experienced defense attorney, has authored an excellent primer on investigative *omissions* in the context of criminal defenses. Before delving into the substance of her article, there are a few foundational issues that practitioners need to know and understand.

First, while in varying forms, the defense has been around a long time (recall author Sir Arthur Conan Doyle’s fictional private detective’s adventures in his *Sherlock Holmes* series, where the police missed or ignored obvious evidentiary items, noted above). The defense got the *imprimatur* of the Supreme Court of the United States in *Kyles v. Whitley*, 514 U.S. 419 (1995), where Justice Souter, writing for the Court noted “the defense could have attacked the investigation as shoddy.” *Id.* at 442 n. 13. There, in the context of *Brady* violations, he went on to observe:

Damage to the prosecution's case would not have been confined to

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² All quotations attributable to “Holmes,” are from Sir Arthur Conan Doyle’s *The Original Illustrated Sherlock Holmes* (Castle ed.) [hereinafter, “Original Holmes”], *The Adventure of the Reigate Squire*, at 267, unless otherwise noted. As one author concluded, “Sherlock Holmes may have been fictional, but what we learn from him is very real. He tells us that science provides not simplistic answers but a rigorous method of formulating questions that may lead to answers.” E.J. Wagner, *The Science of Sherlock Holmes* (Wiley & Sons, 2006).

³ Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665740 [Last accessed: 26 SEP 2020].

evidence of the eyewitnesses, for Beanie's various statements would have raised *opportunities to attack* not only the probative value of crucial physical evidence and the circumstances in which it was found, but *the thoroughness and even the good faith of the investigation*, as well. [Emphasis added].

Id. at 445. The Justice went on to observe “the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence.” *Id.* at 447. Finally noting that with the undisclosed *Brady* material, the “defense could thus have used his statements to throw the reliability of the investigation into doubt and to sully the credibility of Detective Dillman” *Id.*

Second, if you are not familiar with the basic principles or “best practices” regarding *suspected* crime scenes,⁴ stop: educate yourself first, there are plenty of excellent resources available.⁵ But, even if one is familiar with proper crime scene practices and precedents, do *not* assume (or presume), that you are qualified to cross-examine the prosecution’s “experts,” i.e., detectives / investigators of long-standing experience, because most likely—without more—you are not. The purpose of this essay is to help familiarize defense counsel with these issues, in the context of Ms. Steele’s contribution, of *when* defense counsel need to engage a *qualified* crime scene expert.⁶ Fundamentally, counsel need to recognize that not all crime scene investigations are or must be approached in the same way,

⁴ “Suspected” because just because there’s a dead body, does not—without more—mean that the death is crime related; it could be suicide or a heart attack.

⁵ See, e.g., Chisum & Turvey, *Crime Reconstruction* (2nd ed., 2011); *Guiding Principles for Crime Scene Investigation and Reconstruction*, available at: https://www.nist.gov/system/files/documents/2020/06/10/OSAC%20Proposed%20Standard_Guiding%20Principles_CS-DI%20SAC%20APPROVED_March%202020.pdf [Last accessed: 26 SEP 2020]; Davis & Leo, *A Damning Cascade of Investigative Errors Flaws in Homicide Investigation in the USA*, available at: https://www.researchgate.net/profile/Deborah_Davis4/publication/315449833_A_Damning_Cascade_of_Investigative_Errors/links/5a19ba934585155c26ac55b1/A-Damning-Cascade-of-Investigative-Errors.pdf [Last accessed: 26 SEP 2020]; M. Reid, *A CSI Story: The Past, Present, and Future of Crime Scene Collection and What Litigators Need to Know*, 8 Wake Forest J.L. & Pol’y 101 (2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3164770 [Last accessed: 26 SEP 2020]; and finally, John Grisham’s first non-fiction book, *The Innocent Man* (Doubleday, 2006).

⁶ “Qualified” does not necessarily mean a retired police detective or investigator, with 30 years experience as a cop. Some certainly may be, but many may not be. Indeed, a classic example is the prosecution’s purported blood-spatter “expert”—a retired Sheriff’s deputy—referenced in Ms. Steele’s article in the case of *Camm v. Faith*, 937 F.3d 1096 (7th Cir. 2019), required reading in-and-of itself on this issue. More on *Camm infra*.

viz., there are major difference in approaching a shooting homicide versus an arson homicide versus a bombing homicide, etc., and those differences can be significant. For example, a shooting in a bedroom will in most cases be confined to the bedroom area while a major bombing incident may encompass hundreds of square yards, if not more.

Third, another purpose of this article is to provide some guidance to those defense counsel who are lucky—and I do mean lucky—enough to get actual access to a crime scene before it is “cleared and released.” This will most likely occur within a day or two after the incident and long before defense counsel can ascertain if she needs to retain a scene reconstruction expert, and if so, actually doing so, and thus not within the “window of opportunity” for defense access to the scene.⁷ As in interviewing witnesses, counsel *must never* do it alone unless one is prepared to become a fact-witness versus counsel. Whether it is one’s paralegal, investigator, or friend, that person needs to be a proficient photographer—in all likelihood, this will be the defense’s only opportunity to gain access to the scene, so one must make it count.

Finally, for military practitioner’s, obtain and read the relevant AFOSI, CID, NCIS regulations pertaining to crime scene processing. This is easier said than done, absent a court order, as they are not generally “open-sourced” documents,⁸ but be prepared to agree to a “protective order” (as if they might contain “professional” secrets).

I. IN THE BEGINNING – “FIRST RESPONDERS.”

“You see, but you do not observe. The distinction is clear.”
~ Sherlock Holmes⁹

⁷ This is almost always going to require a Court Order.

⁸ See, USACIDC Pamphlet 195-10 *Criminalistics Handbook*, AFOSI Manual 71-124 *Crime Scene Manual*, NCIS Field Guide *Crime Scene Manual*.

⁹ Original Holmes, *A Scandal in Bohemia*, at 12.

First responders to a crime scene generally fall within three broad categories: civilians, law enforcement, and animals/insects.¹⁰ For the most part, civilians usually encompass, e.g., a homeowner returning from a weekend away, only to discover her house had been broken into and valuable art and jewelry stolen. Additionally, this category includes spouses, relatives, etc., who discover a dead body in a scene of bloody mayhem. Law enforcement first responders tend to be the cop on the beat or MP on patrol, who respond to a 911 dispatch. According to usual police protocols, this generally includes (1) checking the scene for perpetrators or other obvious dangers; (2) securing the scene from intruders to *reduce* contamination; and (3) requesting detective assistance, medical assistance, crime scene technicians, etc.

While seemingly trivial, every person entering a potential crime scene, regardless of how careful, contaminates it in some way. Alternatively, it can inadvertently move or remove trace evidence—hence the necessity to keep the scene personnel to a minimum.

II. MS. STEELE’S INSIGHTS.

If you are not aware of the “Investigative Omission Defense,” this is the place to start. She begins by reminding us of something important to all defense attorneys: “the failure to gather physical evidence at the crime scene impairs the State’s ability to prove its case.”¹¹ She too discusses the import of *Kyles v. Whitley* on the issue of “investigative omissions.” She defines the “investigative omission defense” as follows: “It is about mistakes – why an investigator made a decision that is flawed in hindsight, and why the fact-finder should find reasonable doubt in the lack

¹⁰ This category is frequently overlooked and thus, a fertile source for considering an “omission” defense, especially if, e.g., a body is outdoors or otherwise exposed to the elements. Failing to consider and consult with a qualified forensic entomologist can deprive the investigation of crucial information, especially relevant to “time of death” calculations. That topic is far beyond the scope of this article, but *see generally*, Mona *et al.*, *Forensic Entomology: A Comprehensive Review*, 6 Adv. Life Sci. 48 (2019), available at: <http://submission.als-journal.com/index.php/ALS/article/viewFile/579/266> [Last accessed: 30 SEP 2020].

¹¹ Quoting *State v. Ware*, 881 P.2d 679, 686 (N.M. 1994).

of evidence caused by the decision.”

She defines an “investigative omission” as “when investigators are aware of potential evidence and do not follow up on leads, collect evidence, or test the evidence that they have collected.” She goes in-depth (with plenty of citations) as to why this happens—something that everyone needs to be aware of. And the importance of all of this is, as she explains, because “it questions whether the prosecution has met its burden of proof.” Here, I would add one important caveat—tie the lack of or investigative omission directly to the applicable *reasonable doubt* instruction. *See, Army Benchbook*.¹² This argument dovetails nicely with the “lack of evidence” prong component of the Reasonable Doubt Instruction. In that regard, Ms. Steele’s citations to Massachusetts and Connecticut authorities on this point are especially helpful. Remember to use that language in your own requested instructions.

II. DECEPTION, FRAUD, AND PERJURY AT THE CRIME SCENE: THE *CAMM* v. *FAITH*, CASE.¹³

Ms. Steele’s article, in a number of places, focuses on the *Camm* murder case in Indiana—with good reason. It is literally a textbook case where the defense successfully used a version of the “Investigative Omission,” or *Kyles* “shoddy investigation” defense—some of which was negligent, some inadvertent, but unfortunately, much intentional. One can note where the Court is headed when reading from the beginning of the opinion:

¹² DA Pam. 27-9, at 49 (2020 ed.). **NOTE:** The Army, Navy, USMC, an CG all include a “lack of evidence” prong in their Reasonable Doubt Instructions—only the Air Force does not and that issue is pending in a *Petition for Review* at CAAF as of this date.

¹³ *Camm v. Faith*, 937 F.3d 1096 (7th Cir. 2019). **DISCLAIMER:** The author here assisted David Camm’s defense counsel in his *third* trial for three counts of murder—his wife and two children. Specifically, this consisted of gathering and organizing impeachment material about the prosecution’s blood-spatter “expert,” Rodney Englert. Read the opinion to see a shocking case of a wrongfully convicted man, who after 13 years in prison, was exonerated at his third trial, by exposing crime scene bungling, fraud, and perjury, which protected the actual perpetrator until DNA evidence proved otherwise.

[O]fficers obtained a warrant for [Camm's] arrest, relying almost exclusively on the observations of Robert Stites—a plainly unqualified forensic assistant who was not trained to do anything more than photograph evidence.

937 F.3d at 1100. The Court continued:

Stites has since admitted that he is not a crime-scene reconstructionist, has never taken a basic bloodstain-analysis course, and has almost no scientific background of any kind.

Id. at 1101. Continuing, the Court commented:

[Stites] then went further, finding HVIS^[14] bloodstains on the garage door, shower curtains, breezeway siding, a mop, and a jacket. In hindsight only the stain on the T-shirt turned out to be blood, much less HVIS. Stites also told the officers that given its viscosity, he could tell that the blood was manipulated by a high pH cleaning substance. He said this even though he had never been to a crime scene where fresh blood was present. Nor had he ever seen serum separation, the natural and innocent phenomenon that actually explained the blood's viscosity.

Id. The Court's "knock out" punch to Mr. Sites came as follows:

Stites testified that he was a crime-scene reconstructionist and was working on his master's degree and Ph.D. in fluid dynamics. . . . Those statements were indisputably false. To start, Stites is not a crime-scene reconstructionist. He has never pursued a degree in fluid dynamics. In fact, he has never taken a single course in the field. His only degree is in economics, and *while he did take a single chemistry course in college, he flunked it.* [Emphasis added].

Id. at 1102.

The Court next turned its wrath on the police investigators:

Alas, the discovery of the real killer did Camm more harm than good. Investigators aggressively pursued a theory that Boney merely helped Camm commit the murders; ***they apparently never once considered the possibility that Boney committed the murders alone.*** They interviewed Boney three times covering more than 20 hours of interrogation, pressuring him to implicate Camm. They suggested various connections between the two and proposed scenarios in which Boney might have witnessed Camm shoot his family. ***They also told him that he had to tell the whole story—translation:***

¹⁴ "HVIS" refers to *High Velocity Impact Spatter* – a term of art in the context of forensic blood-spatter.

implicate Camm—in order to avoid the death penalty. [Emphasis added].

Id. at 1103. David Camm was acquitted at his *third* murder trial.

Finally, Stites’ boss at the time, Rodney Englert—a retired Sheriff’s Deputy with no formal scientific training—was characterized by the Court as, “a private forensics analyst based in Oregon. Englert specializes in blood-spatter analysis, a subjective field he now admits is only partly scientific.” *Id.* at 1101. The Seventh Circuit concluded by noting:

[T]here is a wealth of evidence here that Stites, Englert, Faith^[15], and Clemons^[16] contributed false statements and withheld crucial information, either intentionally or with reckless disregard for the truth.

Id. at 1106.

There is much to be learned from Ms. Steele’s article, especially in conjunction with the decision in *Camm v. Faith*. It is a valuable arrow in the defense quiver— particularly in the context of demonstrating reasonable doubt.

¹⁵ The District Attorney at Camm’s first trial who personally prosecuted the case.

¹⁶ The lead police investigator.