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I. COURT SETS NEW PROCEDURES FOR JUROR QUESTIONS TO A WITNESS

In *Day v. Kilgore*[1] the South Carolina Supreme Court dealt with an unusual event that can frustrate an attorney's best efforts to control the production of evidence: direct juror questions from the jury box to a witness. In *Day* the court remanded an automobile wreck case for a new trial because the trial court allowed improper questions and requests from jurors. Writing for a unanimous court, Justice Toal noted that although allowing a juror to question a witness has "few benefits and great dangers,"[2] the court would continue in its refusal to apply an absolute prohibition against juror questions to witnesses.[3] However, the court outlined new and stricter procedures to foreclose against the possibility of prejudice, thereby modifying *State v. Barrett*[4] by narrowing the discretion given to trial judges.

In *Day* the plaintiff won a jury verdict for physical injuries he received from a three-automobile collision.[5] During defendant's re-cross examination, the trial judge allowed the jurors to ask the plaintiff questions while he was on the stand. The trial judge also permitted the plaintiff's attorney to interrupt the defendant's re-cross examination in order to lay the foundation for a photograph of Day's car that a juror requested. The defendants appealed the verdict, and the South Carolina Court of Appeals, relying on *Barrett*, held that reversal was required because the trial court had abused its discretion by allowing the jury "to go on a fishing expedition and ultimately, in effect, present evidence."[6] The supreme court agreed with the court of appeals' result and affirmed, but used the opportunity to clarify the procedures regarding juror questions to witnesses and to strengthen the standard for abuse of discretion created by *Barrett*.

The court in *Day* outlined the following procedure for courts to follow when dealing with a juror's request to ask questions of a witness during trial:

1. The jurors should immediately be sent to the jury room with instructions not to deliberate and the entire process should be performed out of their presence.

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1. ___ S.C. ___, 444 S.E.2d 515 (1994).
2. *Id.* at ___, 444 S.E.2d at 517.
3. *Id.* at ___, 444 S.E.2d at 518.
4. 278 S.C. 414, 297 S.E.2d 794 (1982) (per curiam), *cert. denied*, 160 U.S. 1045 (1983).
5. *Day*, ___ S.C. at ___, 444 S.E.2d at 516.
6. Day v. Kilgore, ___ S.C. ___, ___, 427 S.E.2d 683, 685 (Ct. App.), *aff'd*, ___ S.C. ___, 444 S.E.2d 515 (1994).

2. The jurors should write their questions on a sheet of paper, which should be sent from the jury foreman through the bailiff to the trial judge.
3. After the question is read by the trial judge into the record, the judge should hear objections from all sides and make a ruling on the relevance and competence of the question in accordance with general law.
4. If the trial judge determines that the juror's question is relevant and competent, the judge should then independently review the question and determine "whether the question may lead the jury out of their normal role of passive finders of fact and into the role of advocate."[7]

The court reiterated that the trial judge is responsible for preserving the adversarial system, and stressed that any deviation from the set procedure would necessarily be an abuse of discretion.[8]

Citing *Morrison v. State*,[9] a decision that absolutely prohibits direct juror questions to a witness, the court outlined two major rationales for discouraging juror questions to a witness. First, the court noted that active participation by a jury in the fact finding process may cause them to lose their impartiality and prematurely deliberate the case by deviating from their role as passive listeners.[10] Second, jurors are untrained in the rules of evidence and may ask or elicit irrelevant, prejudicial, or improper evidence.[11] This presents a difficult problem for the trial lawyer, who must either risk antagonizing the jury by objecting to an improper question, or risk losing a possible grounds for appeal by failing to object.[12] Further, the court stated that improper or uncontrolled juror questions present the appellate courts with difficulty "in measuring the effect of juror questions on the verdict."[13] Thus, the fundamental precepts of the adversary system, which require passive and impartial triers of fact, impartial judges, and partisan advocates who present the evidence, are undermined by the intertwining of roles caused by direct juror questions to witnesses.[14]

However, the South Carolina Supreme Court "declined to follow the Texas lead" in holding juror questions reversible *per se* despite the fact that

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7. *Day*, ___ S.C. at ___, 444 S.E.2d at 518.
8. *Id.* at ___, 444 S.E.2d at 519.
9. 845 S.W.2d 882 (Tex. 1992) (en banc). Texas, Georgia, and Nebraska are the only states that absolutely prohibit juror questions. *See infra* notes 50-61 and accompanying text.
10. *Day*, ___ S.C. at ___, 444 S.E.2d at 517 (citing *Morrison*, 845 S.W.2d 882).
11. *Id.* at ___, 444 S.E.2d at 517.
12. *Id.* at ___, 444 S.E.2d at 517 (citing *Morrison*, 845 S.W.2d 882).
13. *Id.* at ___, 444 S.E.2d at 519.
14. *Id.* at ___, 444 S.E.2d at 517.

it was persuaded by, and cited, the arguments of the Texas court concerning the dangers of juror questions.[15] The court justified its rejection of the Texas *per se* rule by analogizing juror questions to questions by the trial judge, which have long been permitted.[16] The court noted that trial judges have discretion to inquire of a witness only where they convey no opinion about any fact, issue or other unintended prejudicial effect to the jury. However, because trial judges are schooled in principles of law, the need for protection against prejudice resulting from a jury is greater,[17] justifying imposition of the strict procedures outlined above.

The procedures created by *Day* do not alter the extent of the trial judge's discretion when ruling on the relevance and materiality of a juror question; however, they do restrict the manner in which a trial judge may exercise that discretion. *Day* thus partially overrules *State v. Barrett*,[18] which allowed the trial judge considerably more discretion.

In *Barrett* the foreman submitted a written question to be asked of the defendant on the stand.[19] The juror's question, which asked whether the gun at issue was cocked and whether it was a single or double barrel shotgun, was allowed by the trial judge and answered by the defendant.[20] The judge then invited the jury to ask any more questions of the defendant that they had, prompting seven more questions from the jury to the defendant.[21] The *Barrett* court found no prejudice and affirmed the defendant's conviction.[22]

Day represents a departure from *Barrett* in a number of respects. First, although the *Barrett* court strongly discouraged direct juror questions and noted that asking jurors to reduce their questions to writing was the "safer practice," it did not impose any strict limits on the proper procedure for handling such questions.[23] *Day*, on the other hand, flatly prohibits anything other than extended review of written juror questions outside of their presence.[24] Second, the *Barrett* court noted that trial judges may ask jurors to wait until the end of that witness' testimony, explaining that "the matter of [their] concern will very likely be covered in due course by further questions

15. Day v. Kilgore, ___ S.C. ___, ___, 444 S.E.2d 515, 517-18 (1994) (citing *Morrison*, 845 S.W.2d 882).

16. *Id.* at ___, 444 S.E.2d at 518.

17. *Id.* at ___, 444 S.E.2d at 518.

18. 278 S.C. 414, 297 S.E.2d 794 (1982) (per curiam), *cert. denied*, 460 U.S. 1045 (1983), *and overruled by* Day v. Kilgore, ___ S.C. ___, 444 S.E.2d 515 (1994).

19. *Id.* at 416, 297 S.E.2d at 795.

20. *Id.*

21. *Id.*

22. *Id.* at 417-18, 297 S.E.2d at 795-96.

23. *Barrett*, 278 S.C. at 418, 297 S.E.2d at 796.

24. *Day*, ___ S.C. at ___, 444 S.E.2d at 518.

on direct or cross-examination."[25] The trial judge under *Barrett* could also require witnesses to hold their questions until the end of trial.[26] Under *Day* a juror's wish to question a witness immediately triggers the procedures outlined in that case[27] and requires that the jury be excused to write any questions for submission to the judge whenever a juror expresses a desire to ask one.[28] Third, while *Barrett* only suggests that trial judges show the written questions to the attorneys and hear objections from them,[29] *Day* requires submission to the attorneys, an opportunity to hear objections, and a ruling by the judge.[30] Finally, *Day* requires that the trial judge conduct a more extensive review of any possible adverse impact of the juror question than *Barrett*. While *Barrett* requires trial judges to rule on the question's relevance,[31] which of course includes a determination of prejudice, *Day* goes further to require that judges independently weigh the question to see if it, although relevant, might conflict too much with the jury's proper role in the adversary system as a passive judge of the facts.[32] Thus, the *Day* court largely mandated what had been previously suggested in *Barrett*.[33]

As noted earlier, *Day* relies heavily on the reasoning outlined in *Morrison v. State*.[34] In *Morrison* the defendant appealed his conviction of murder because the trial judge allowed written questions from the jurors. Morrison argued that he was prejudiced because one of the juror's questions, which was ruled inadmissible, "tipped off" the prosecution to offer more evidence on the issue about which the juror was concerned.[35]

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25. *Barrett*, 278 S.C. at 417, 297 S.E.2d at 795.

26. *Id.* at 417, 297 S.E.2d at 795-96.

27. *Day*, ___ S.C. at ___, 444 S.E.2d at 518.

28. *Id.* at ___, 444 S.E.2d at 518.

29. *Barrett*, 278 S.C. at 418, 297 S.E.2d at 796.

30. *Day*, ___ S.C. at ___, 444 S.E.2d at 518.

31. *Barrett*, 278 S.C. at 417-18, 297 S.E.2d at 796.

32. *Day*, ___ S.C. at ___, 444 S.E.2d at 518.

33. *Barrett*, 278 S.C. at 417-18, 297 S.E.2d at 795-96. Specifically, the court stated:

> [The juror] may be advised to reduce his question to writing and pass it on to the judge. The judge may then call the attorneys to the bench and present the request to them. He may hear and rule on an objection to the question, on the record and out of hearing of the jury. He may rule that the question is or is not proper to be asked. He may ask it himself or permit one of the attorneys to ask it. The juror may be told to wait until the testimony is concluded, and if then his question remains unanswered may submit his request in writing to the court. If the trial judge determines that it is relevant, competent and material, he should arrange for its presentation. By tactful handling, the trial judge should be able to discourage questions from jurors.

Id.

34. 845 S.W.2d 882 (Tex. 1992) (en banc).

35. *Id.* at 883. The appellant had evidently chased his victim throughout her house with a butcher knife. The juror in the case wished to know if any of the blood found in the hallway of the victim's home was the appellant's. The question was ruled inadmissible, but the prosecution

The majority in *Morrison* began their discussion by recognizing the fundamental importance of the adversary system to a society where individual dignity is respected and governmental power is distrusted.[36] Texas, the majority noted, is fiercely loyal to the proposition that where "the participants, judge, juror, and advocate [are] each [devoted] to a single function, . . . the fairest and most efficient resolution of the dispute" is achieved.[37] Texas is so loyal to these adversary system principles that it rejects Federal Rule of Evidence 614 and prohibits the calling of witnesses by the court.[38] The *Morrison* majority found that questions to witnesses by either jurors or judges are at odds with the adversary system and lead actors away from their proper role.[39] Just as questions by the judge may convey his opinion of the case to the jury and influence their decision, questions by jurors may encourage premature deliberation and unduly influence other jurors.[40] Further, the *Morrison* court noted that the adversary system's fundamental goal is to protect the individual and not always to seek truth.[41] As opposed to inquisitorial systems, the adversary system is tolerant of acquitting even the guilty if it means that the procedures primarily designed to protect the innocent are upheld.[42] Accordingly, the Texas court refused to follow the trend towards emphasizing truth-seeking at the expense of adversary precepts.

The *Morrison* court also discussed a number of practical problems with procedures designed to reduce the possibility of prejudice from juror questions. First, the court noted that the lack of impartiality resulting from juror questions is often subtle and incapable of a ready determination of its prejudice.[43] Thus, it is difficult to review these determinations on appeal and

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later recalled one of the witnesses to question him about the appellant's "physical well being" on the night of the murder. The witness testified that the appellant was not injured. *Id.* at 883 n.2.

36. *Id.* at 884-85.

37. *Id.* at 885.

38. *Id.* at 888 n.18.

39. *Morrison*, 845 S.W.2d at 887 n.12.

40. *Id.*

41. *Id.* at 884.

42. *Id.* at 884-85. The court noted:

> Rules of evidence also operate to keep information from the jury. Legal commentators suggest that we have implemented such evidentiary barriers because we are more appalled by the conviction of an innocent person than by the acquittal of a guilty individual. Such barriers decrease the chance of conviction of an innocent person, but also increase the chance that a guilty person will escape conviction.

Id. at 884 n.7 (citations omitted).

43. *Id.* at 888. The court noted:

> [T]he belief that premature impartiality can somehow be circumvented by screening the number or manner of questions submitted assumes that such impartiality will be so obvious as to be clearly reflected in the questions asked. We think it more likely that juror impartiality is generally elusive of detection or measurement and for this reason any practice which may impart impartiality should not be condoned.

determine prejudice from the cold record. Next, the *Morrison* court set out a laundry list of questions it felt were left open even when courts establish procedures in an effort to reduce the prejudice of juror questions:

> For instance, what is the permissible scope of juror questions? Should jurors be told of the reasons for exclusion of a submitted question? Should a witness be recalled if a juror thinks of a question after that witness has been dismissed? If a juror's questions indicate that the juror is becoming prematurely partial should the judge declare a mistrial? Should jurors be allowed to question a defendant who chooses to take the stand? Especially troublesome is the possibility that juror partiality may arise as the result of a single question or may arise in one juror as a result of another's questions, however impartial those questions may appear.[44]

These difficulties, coupled with the tendency of any established procedures to slow the "already sluggish and cumbersome trial process," led the Texas court to adopt a *per se* rule.

The dissent in *Morrison*, written by Judge Benavides and cited with approval in *Day*,[45] agreed that a juror question "impugns adversary procedure [by diminishing] juror passivity and [interfering with] the usual assignment of responsibility for nonproduction of evidence," but also opined that strict judicial control aimed at preventing "advocacy or premature commitment by the jurors" would foreclose any detriment to the adversary system.[46] Further, Judge Benavides noted that the adversary system has undesirable side effects, including the possible obscuring of important evidence by the courtroom skills of talented lawyers and the defeat of litigants with valid claims who may suffer because they hire incompetent counsel.[47] Under this view, because our justice system is "intended mainly, although not exclusively, for the discovery of truth . . . trial judges should be allowed to implement

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Id. at 888 n.15. Earlier, the court quoted Justice Frankfurter in Offutt v. United States, 348 U.S. 11 (1954): "These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, *justice must satisfy the appearance of justice.*" *Id.* at 887 n.12.

44. *Morrison*, 845 S.W.2d at 888.

45. *Day*, ___ S.C. at ___, 444 S.E.2d at 518.

46. *Morrison*, 845 S.W.2d at 904 (Benavides, J., dissenting).

47. *Id.* at 904-05. Judge Benavides wrote:

> The adversary process, as any institutional process, has some undesirable side effects. However we may relish a contest between talented advocates because we think the outcome of trial to depend more on their respective skills than on the relative merits of their positions, we do not pretend that the official goal of such a contest is really to identify the better lawyer. And, while we accept the occasional incompetence or inadvertence of attorneys which might sometimes produce avoidable losses for litigants, both public and private, we do not think that the system is working well when this happens.

Id.

truth-finding measures not forbidden by law so long as they do not thereby compromise fundamental standards of the adversary system."[48] Judge Benavides suggested that the adversary system is best preserved if jurors are forbidden from investigating either outside the courtroom or inside whenever one party is excluded. Furthermore, Judge Benavides would not allow jurors to question at length or in a manner that indicates predisposition although he noted that attorneys must be given a chance to object outside of the presence of the jury.[49]

Generally, courts in this country have adopted one of three viewpoints regarding the issue of juror questions to a witness: a few prohibit them, most discourage but reluctantly allow them, and others find nothing terribly wrong with them.[50] Georgia, like Texas, generally does not permit the practice.[51] In *State v. Williamson*, for example, the Georgia court noted that "[j]urors are not schooled in the rules of evidence which govern the posing of questions in a trial and are likely to be personally offended" if attorneys object to their questions.[52] The *Williamson* court also noted that even jurisdictions that allow the practice do so with caution. However, Georgia courts have been unwilling to overturn criminal convictions where defense counsel either failed to object to the juror questions or no prejudice or harm ultimately occurred.[53] Interestingly, the court in *Matchett v. State* justified its finding that no harm occurred despite a proper objection to the juror's question because the trial judge had "properly instructed the jury as to the appropriate form of asking questions."[54] This finding may signal a possible retreat from the flat prohibition against juror questioning expressed in *Williamson*[55] and an earlier Georgia case, *Hall v. State*.[56]

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48. *Id.* at 905.

49. *Id.*

50. Jeffery S. Berkowitz, *Breaking the Silence: Should Jurors Be Allowed to Question Witnesses During Trial?*, 44 VAND. L. REV. 117, 128-29 (1991).

51. *See* Matchett v. State, 364 S.E.2d 565 (Ga. 1988); State v. Williamson, 279 S.E.2d 203 (Ga. 1981). In *Matchett* the trial court allowed the prosecutor to reopen redirect examination of a state's witness after a juror indicated to the court that he wished to know how much alcohol had been consumed by the victim and defendant at the witness's house on the day of the murder. After this further redirect examination, the juror directly asked the witness how long the parties were together. The trial judge sustained the defendant's objection to the question after the witness had barely begun her answer. *Matchett*, 364 S.E.2d at 566-67. In *Williamson* the court instructed the jurors to raise their hands if they became confused, and subsequently the judge allowed jurors to directly ask questions of witnesses. *Williamson*, 279 S.E.2d at 204.

52. *Williamson*, 279 S.E.2d at 204 (holding, however, that because the defendant's attorney had a twenty minute recess during which he could have objected to the questions outside the presence of the jury, the issue was waived on appeal).

53. *See Matchett*, 364 S.E.2d at 567; *Williamson*, 279 S.E.2d at 204.

54. *Matchett*, 364 S.E.2d at 567.

55. *Williamson*, 279 S.E.2d at 204 (noting that the "practice is not permitted").

56. 244 S.E.2d 833, 837 (Ga. 1978) (remarking that because the court "found no Georgia

Nebraska also falls among the trio of states which flatly prohibit the questioning of witnesses by jurors. In *State v. Zima*[57] the trial judge invited jurors to ask questions after the parties completed their examination of each witness in a criminal trial for drinking and driving. Nebraska's supreme court noted that the written question procedures enacted by decisions such as *Barrett* not only facilitate review of the juror's question for relevance but also address the possibility of an attorney's reluctance to object.[58] Nonetheless, the *Zima* court found that these procedures fail to deal with the fundamental problem that such questions may affect juror's impartiality, because jurors have an "investment in obtaining answers to the questions they have posed" and may "become advocates and possible antagonists of the witnesses."[59] The court reiterated the incompatibility between the rules of evidence and juror questioning, and held that the due process requirement of an impartial jury prevented it from allowing the practice.[60] Despite strong derogation of juror questioning by the *Zima* court, it held, like Georgia courts, that the defendant had waived the issue by arguing against the prosecutor's motion for a mistrial.[61]

Most states have adopted a middle view which allows juror questions but discourages or regulates them, either by procedure or discretion of the trial judge.[62] Most of these jurisdictions have used reasoning similar to that of *Day v. Kilgore* and require written juror questions rather than direct juror questioning of the witness.[63] However, these states differ from South

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authority [it] conclude[s] that jurors are not permitted during trial to interrogate witnesses").

57. 468 N.W.2d 377 (Neb. 1991). In *Zima* the juror and the state's expert witness engaged in a two-way discussion about past problems with various machines used by the police to test the breath for alcohol. The juror contradicted the witness immediately after the witness stated that he was not aware of such an incident, stating that she was aware of a previous incident where a police breath analysis machine had not worked correctly. *Id.* at 378-79.

58. *Id.* at 379-80 (citing, *inter alia*, State v. Barrett, 278 S.C. 414, 297 S.E.2d 794 (1982) (per curiam)).

59. *Id.* at 380.

60. *Id.* at 379-80.

61. *Zima*, 468 N.W.2d at 380. The court stated that "a party cannot silently tolerate error, gamble on favorable results, and then complain he or she guessed wrong." *Id.*

62. *See, e.g.*, People v. Cummings, 850 P.2d 1, 48 (Cal. 1993) (en banc) (requiring juror questions be written), *cert. denied*, 114 S.Ct. 1576 (1994); Stancombe v. State, 605 N.E.2d 251, 256 (Ind. Ct. App. 1992) (holding that reversible error did not exist merely because the juror questions were not written beforehand); State v. Hays, 883 P.2d 1093, 1102 (Kan. 1994) (holding that questions should be written); Commonwealth v. Urena, 632 N.E.2d 1200, 1206 (Mass. 1994) (requiring written questions); State v. Jumpp, 619 A.2d 602, 611 (N.J. Super. Ct. App. Div.) (holding that questions should be written), *cert. denied*, 634 A.2d 522 (N.J. 1993). For a list of citations to many older decisions on this issue from various jurisdictions, see *Urena*, 632 N.E.2d at 1203 n.2, State v. Zima, 468 N.W.2d 377, 379 (Neb. 1991), and Morrison v. State, 845 S.W.2d 882, 904 n.7 (Tex. 1992) (en banc) (Benavides, J., dissenting).

63. *See, e.g., Cummings*, 850 P.2d at 48; *Hays*, 883 P.2d at 1102; *Urena*, 632 N.E.2d at

Carolina and each other regarding various other procedural mechanisms to be followed. For example, *Day* requires that its procedure be triggered immediately when a question is raised by a juror.[64] California, on the other hand, allows the trial judge to let the attorneys decide whether or not, and when, to ask the questions submitted by jurors for the witness. In *People v. Cummings* the trial judge occasionally passed notes from the jurors to the attorneys that asked for clarification of evidence.[65] The California court held that allowing the attorneys discretion in deciding whether to ask the questions did not indicate a lack of sufficient control over the process because the judge initially reviewed the questions before giving them to the attorneys.[66] On the other hand, the Massachusetts decision of *Commonwealth v. Urena* suggests that juror questions must wait until the end of a witness' testimony, and requires that the parties then be allowed to reopen examination after juror questions.[67] Additionally, the judge is required to give instruction to the jury on the opportunity to ask questions.[68]

New Jersey follows the timing procedure set forth in *Urena*, but makes no mention of a preliminary procedure or instruction.[69] Regarding preliminary jury instructions, Indiana courts hold that while a trial judge may refuse to instruct a jury about the opportunity to ask questions, it is error for the trial judge to instruct a jury that questions are not permitted.[70] Several appellate courts have not granted relief when their suggested procedures are violated despite the strict tone of their opinions.[71]

1206; *Jumpp*, 619 A.2d at 611. *But see Stancombe*, 605 N.E.2d at 254-55; State v. Howard, 360 S.E.2d 790, 794-95 (N.C. 1987); State v. Johnson, 784 P.2d 1135, 1144-45 (Utah 1989). In *Cummings* the witness testified he recognized the defendant Gay after a juror passed a note to the judge suggesting, "why no one tell Gay to remove his glasses (sic)." The witness had previously testified that Gay did not look like the man he identified at the lineup. *Cummings*, 850 P.2d at 47. In *Urena* the jurors asked direct questions to the defendant as well as a prosecution witness. All of the testimony given in response to the questions "merely repeated or clarified testimony already given by the witness." *Urena*, 632 N.E.2d at 1202. In *Jumpp* the jurors asked both directly and through the judge whether the defendant had given a reason for "turning himself in." *Jumpp*, 619 A.2d at 609.

64. Day v. Kilgore, ___ S.C. ___, 414 S.E.2d 515, 518 (1994).

65. *Cummings*, 850 P.2d at 46.

66. *Id.* at 48.

67. *Urena*, 632 N.E.2d at 1206.

68. *Id.*

69. *See Jumpp*, 619 A.2d at 611.

70. Stancombe v. State, 605 N.E.2d 251, 253 (Ind. Ct. App. 1992) (citing Cherry v. State, 280 N.E.2d 818 (Ind. 1972)).

71. *See, e.g., Urena*, 632 N.E.2d at 1205; *Jumpp*, 619 A.2d at 612; *cf. Day*, ___ S.C. at ___, 444 S.E.2d at 519 (holding that any deviation from the outlined procedure is an abuse of discretion).

Federal courts have generally agreed with those states that reluctantly allow juror questions to a witness.[72] Of these federal decisions, *DeBenedetto v. Goodyear Tire & Rubber Co.*[73] provides a thorough discussion of the dangers of juror questioning and has been cited in a number of state cases, including *Day v. Kilgore*.[74] *DeBenedetto* is interesting in that it advances the argument that in most trials one or two jurors dominate the rest.[75] Therefore, the *DeBenedetto* court argues, answers to questions propounded by jurors will "take on a stronger significance" than those developed in the "normal adversarial way."[76] On the other hand, the Fifth Circuit argued in *United States v. Callahan*[77] that occasional juror questions make "good common sense" whenever a juror is unclear about the evidence, because attorneys become so familiar with a case that they may gloss over issues the jury finds complicated.[78]

As the above analysis demonstrates, courts have adopted widely disparate approaches to the issue of questions by a juror. The method set out by the court in *Day v. Kilgore* represents a reasonable solution to a difficult problem and is consistent with the majority view. Empirical studies have shown that the primary benefit gained from juror questions is "eliminating a juror's dissatisfaction with the trial process, [rather] than . . . discovering intentionally concealed or previously unconsidered facts."[79] If this is true, then juror questions should remain a rare tool to be used only in the most complicated of trials. One potential shortcoming of *Day v. Kilgore* is that it may have removed too much discretion from the trial judge in deciding when questions shall be taken and answered. By requiring that the procedure be triggered immediately upon submission of a question, *Day* may lead to unneeded delay if juror questions become frequent at trial.

S. Creighton Waters

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72. *See, e.g.*, United States v. Johnson, 914 F.2d 136, 138 (8th Cir. 1990); United States v. Nivica, 887 F.2d 1110, 1123 (1st Cir. 1989), *cert. denied*, 494 U.S. 1005 (1990); United States v. Land, 877 F.2d 17, 19 (8th Cir.), *cert. denied*, 493 U.S. 884 (1989); DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 516-17 (4th Cir. 1985).

73. *DeBenedetto*, 754 F.2d at 515-17. In *DeBenedetto* the trial judge allowed jurors to orally direct their questions to him. He would allow the questions if he thought they were proper after objection by the attorneys. *Id.* at 515.

74. Day v. Kilgore, ___ S.C. ___, ___, 444 S.E.2d 515, 518 (1994).

75. *DeBenedetto*, 754 F.2d at 517.

76. *Id.*

77. United States v. Callahan, 588 F.2d 1078 (5th Cir.), *cert denied*, 444 U.S. 826 (1979).

78. *Id.* at 1086. In *Callahan* the jurors for a tax evasion case asked when the Internal Revenue Service first made the defendant aware that he was being investigated. *Id.*

79. Berkowitz, *supra* note 50, at 129.

II. CODEFENDANT'S CONFESSION THAT IMPLICATES DEFENDANT BY INFERENCE AND POST-HYPNOTIC TESTIMONY HELD ADMISSIBLE

In *State v. Evans*[1] the South Carolina Supreme Court held that a non-testifying codefendant's confession is admissible in a joint trial even if the admission implies the guilt of the defendant when linked with other properly admitted evidence; only direct statements about the defendant must be redacted before admission.[2] The court also held that post-hypnotic testimony by a witness is admissible under certain conditions and established guidelines for judges to follow in determining admissibility.[3]

Evans involved the prosecution of a hit and run driver, Jerry Evans, in connection with an accident in which four children walking on the side of a road were struck by a truck. Two of the children were killed. The State also prosecuted a passenger, Victor Altman, for misprision of felony.[4] Evans and Altman were tried in a joint trial. The State never located the truck, but witnesses testified that Evans owned a truck that fit the description. Also, a witness testified that he saw Evans driving the truck forty minutes after the accident when Evans and Altman pulled into Evans' driveway and that the truck appeared to be damaged and had red "paint" on the damaged area.[5]

A witness for the State testified that Altman confessed that he was involved in the accident, but stated, "I wasn't driving anyway." A second critical witness for the State was the victims' grandfather, who was with the children at the time of the accident. The grandfather was hypnotized by police a couple of hours after the incident to help him remember the truck and the driver more clearly. He testified about the events he observed before and after the truck hit the children and gave a description of the truck.[6]

Evans was convicted of two counts each of manslaughter, leaving the scene of an accident involving death, and leaving the scene of an accident involving personal injury.[7] Evans appealed his conviction to the South Carolina Supreme Court, alleging several errors in the admission of evidence at trial. Evans claimed, *inter alia*, that his codefendant's confession and the grandfather's post-hypnotic testimony were erroneously admitted.[8] In a

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1. ___ S.C. ___, 450 S.E.2d 47 (1994).

2. *Id.* at ___, 450 S.E.2d at 50.

3. *Id.* at ___, 450 S.E.2d at 51.

4. Misprision of felony is "[t]he offense of concealing a felony committed by another, but without such previous concert with or subsequent assistance to the felon as would make the party concealing an accessory before or after the fact." BLACK'S LAW DICTIONARY 1000 (6th ed. 1990).

5. *Evans*, ___ S.C. at ___, 450 S.E.2d at 49.

6. *Id.* at ___, 450 S.E.2d at 49.

7. *Id.* at ___, 450 S.E.2d at 49.

8. Evans also challenged the admission of expert testimony based on hypothetical facts, *id.*

four-to-one decision, the South Carolina Supreme Court rejected Evans' arguments and affirmed the conviction.

The court first considered Evans' claim that the admission of Altman's confession violated the Confrontation Clause of the Sixth Amendment.[9] In *Bruton v. United States*[10] the United States Supreme Court held that a defendant's rights under the Confrontation Clause were violated at a joint trial by the admission of a non-testifying codefendant's statement that expressly inculpated the defendant, even though a limiting instruction was given.[11] Evans urged the court to find that a *Bruton* violation occurred because, although all express references to him had been redacted, the statement, "I wasn't driving anyway," clearly implicated him. Evans argued that because it was a joint trial, this implication allowed the jury to improperly infer that Evans was the driver, even without other evidence. Because Altman did not testify and could not be cross-examined, according to Evans the admission of the testimony violated *Bruton* and the Confrontation Clause.[12]

The court declined to adopt Evans' extension of *Bruton*. Instead, relying on *Richardson v. Marsh*[13] the court found that no Confrontation Clause violation occurred because the non-testifying codefendant's confession contained no direct reference expressly inculpating the defendant.[14] The court found that the statement did not incriminate Evans "on its face," although it did point to him as the driver of the truck by implication when connected with other properly admitted evidence. According to the court, because Altman's statement standing alone did not connect Evans to the crime, its admission did not violate *Bruton*.[15]

Unlike in *Evans*, the trial judge in *Richardson* instructed the jury not to hold the codefendant's confession against the defendant. According to the Court in *Richardson*, this instruction prevented the jury from drawing impermissible inferences from the confession and protected the defendant's

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at ___, 450 S.E.2d at 51-52; the admission of testimony by a police investigator for lack of personal knowledge, *id.* at ___, 450 S.E.2d at 52; and the exclusion of potentially exculpatory statements made by a fellow inmate, *id.* at ___, 450 S.E.2d at 52. The supreme court upheld the lower court's rulings on these three issues.

9. The Sixth Amendment provides in part that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

10. 391 U.S. 123 (1968).

11. *Id.*

12. *Evans*, ___ S.C. at ___, 450 S.E.2d at 49-50.

13. 481 U.S. 200 (1987).

14. *Evans*, ___ S.C. at ___, 450 S.E.2d at 50; *accord Richardson*, 481 U.S. at 211 (holding that admission of an inferentially incriminating codefendant's confession which is redacted of any direct reference to the defendant does not violate the Confrontation Clause if a proper limiting instruction is given).

15. *Evans*, ___ S.C. at ___, 450 S.E.2d at 50.

confrontation rights.[16] Although the South Carolina Supreme Court adopted the *Richardson* rationale, it did not find the lack of a limiting instruction in this case troubling. Rather, the court stated that because Evans did not request a limiting instruction, nor argue that the failure to provide a limiting instruction was error, these arguments had been waived.[17]

The dissent in *Evans* disagreed with the majority on this issue. First, the dissent found the redaction of the codefendant's confession incomplete because the statement still indicated the presence of a more culpable individual, and it was a clear reference to Evans without the use of other evidence.[18] Second, the dissent objected to the majority's disregard of the importance of a limiting instruction.[19] According to the dissent, Evans did not have to request a limiting instruction in order to preserve the issue for appeal because once the trial judge had refused to redact the inferential portion of the statement, a request for a limiting instruction would have been futile.[20]

The second issue on appeal was Evans' claim that the grandfather's post-hypnotic testimony about the description of the truck was *per se* inadmissible under *State v. Pierce*,[21] or in the alternative, that the admission of this testimony violated the Confrontation Clause. The court rejected both theories.[22]

Pierce answered the question of whether persons present during the hypnosis of a witness may testify as to the results of the examination. The court held that "testimony as to the results of the hypnotic examination is not admissible if offered for the truth of the matter asserted."[23] The *Evans* court noted that *Pierce* is limited in application to testimony of persons other than the declarant.[24] In *Pierce*, the defendant proffered the testimony of a hypnotist who would testify about what happened in the examination.[25] Here, however, because the grandfather was the declarant, he was free to testify about his recollection of the events leading up to the tragedy and the

16. *Richardson*, 481 U.S. at 208 n.3.

17. *Evans*, ___ S.C. at ___ n.1, 450 S.E.2d at 50 n.1 (citing State v. Hoffman, ___ S.C. ___, 440 S.E.2d 869 (1994)).

18. *Id.* at ___, 450 S.E.2d at 53 (Finney, J., dissenting); *cf.* State v. LaBarge, 275 S.C. 168, 170-71, 268 S.E.2d 278, 280 (1980) (holding that the substitution of a fictitious name in place of a defendant's name in a statement by a codefendant was unacceptable under *Bruton*).

19. *Evans*, ___ S.C. at ___, 450 S.E.2d at 53.

20. *Id.* at ___ n.1, 450 S.E.2d at 53 n.1 (citing State v. Bryant, ___ S.C. ___, 447 S.E.2d 852 (1994) (holding that when a judge overrules an objection to questioning, defense counsel need not move to strike in order to preserve the issue for appeal)).

21. 263 S.C. 23, 207 S.E.2d 414 (1974).

22. *Evans*, ___ S.C. at ___, 450 S.E.2d at 51.

23. *Pierce*, 263 S.C. at 30, 207 S.E.2d at 418.

24. *Evans*, ___ S.C. at ___, 450 S.E.2d at 50.

25. *Pierce*, 263 S.C. at 30, 207 S.E.2d at 417-18.

description of the truck. Thus, the court concluded that while *Pierce* precludes witnesses who observed the hypnosis from testifying about what the declarant says during the examination, it does not prohibit the declarant himself from testifying.[26]

The court then analyzed the use of post-hypnotic testimony under the Confrontation Clause. Noting that this issue was novel in South Carolina, the court considered the views that other jurisdictions have adopted in dealing with hypnotically-refreshed testimony of a witness.[27] The court had several options available in deciding this question. Although the United States Supreme Court has held that a defendant's post-hypnotic testimony is not *per se* inadmissible because it would violate the defendant's Confrontation Clause rights,[28] it has not yet decided whether hypnotically-refreshed testimony of a witness should be admissible and under what circumstances admissibility is acceptable.

Some states have adopted the position that post-hypnotic testimony is *per se* inadmissible.[29] Other states allow admission of post-hypnotic testimony where the hypnotic session is conducted in compliance with certain procedural safeguards to ensure that the hypnosis was a reasonably reliable means of restoring the witness's memory.[30] The Fourth Circuit Court of Appeals has adopted an alternative approach, requiring that the trial judge determine the admissibility of this testimony by evaluating its reliability on a case-by-case basis.[31] Finally, some jurisdictions have adopted a *per se* admissibility rule[32]

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26. *Evans*, ___ S.C. at ___, 450 S.E.2d at 50.

27. *Id.* at ___, 450 S.E.2d at 50-51.

28. Rock v. Arkansas, 483 U.S. 44 (1987).

29. *E.g.*, State v. Mena, 624 P.2d 1274 (Ariz. 1981) (en banc); People v. Shirley, 723 P.2d 1354 (Cal.), *cert. denied*, 459 U.S. 860 (1982).

30. *E.g.*, State v. Hurd, 432 A.2d 86, 96-97 (N.J. 1981) (listing specific safeguards that the proponent of the testimony must establish by clear and convincing evidence: the hypnosis is administered by a psychiatrist or psychologist with hypnosis experience; the hypnotist is independent of the prosecutor, the defense and the investigation; all information given to the hypnotist is recorded so that it can be determined what the hypnotist could have communicated to the witness directly or through suggestion; the witness's recollection of events is recorded prior to hypnosis; all hypnotic sessions are recorded; and only the hypnotist and the witness should be present during all phases of the hypnotic session); Wicker v. McCotter, 783 F.2d 487 (5th Cir.), *cert. denied*, 478 U.S. 1010 (1986); Clay v. Vose, 771 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1022 (1986).

31. *E.g.*, McQueen v. Garrison, 814 F.2d 951 (4th Cir.), *cert. denied*, 484 U.S. 944 (1987); Harker v. Maryland, 800 F.2d 437 (4th Cir. 1986) (holding that hypnotically-refreshed testimony may be admissible, but in order to protect a defendant from its dangers, the in court testimony must be shown to be independent of the dangers associated with hypnosis).

32. *E.g.*, United States v. Awkard, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979); United States v. Narciso, 446 F. Supp. 252 (E.D. Mich. 1977).

but allow the hypnosis to be a factor affecting the credibility of the witness's testimony.[33]

The court rejected the methodology proposed by Evans: that the admissibility of post-hypnotic testimony turn on an evaluation of the procedures used in the hypnotic session. Instead, the court held that a witness's post-hypnotic testimony is admissible when: "1) the witness's trial testimony was 'generally consistent' with pre-hypnotic statements, 2) considerable circumstantial evidence corroborates the witness's post-hypnotic testimony, and 3) the witness's responses to examination by counsel 'generally were not automatic responses of a preconditioned mental process.'"[34] The court did not agree that procedural safeguards were determinative of the reliability of the testimony;[35] it therefore declined to include these safeguards in its test.[36] The court also specified that these determinations should be made in camera and if the testimony is found to be admissible, questions of credibility of the witness may then be raised before the jury.[37]

After reviewing the record, the court found that the hypnotically-refreshed testimony of the grandfather was admissible, even though no record of the grandfather's statement was made before the hypnosis and procedural safeguards to ensure reliability were not strictly followed.[38] According to the court, the grandfather's post-hypnotic recollection was very similar to his pre-hypnotic recollection. His post-hypnotic testimony was corroborated by physical evidence found at the scene of the accident and the testimony of other witnesses. Lastly, his uncertain responses demonstrated a lack of a preconditioned mental process.[39]

By holding that a non-testifying codefendant's confession is admissible at a joint trial even if the confession inferentially incriminates the defendant when linked with other evidence, the South Carolina Supreme Court has potentially complicated matters for joint criminal defendants. After *Evans*, the best a defendant in a joint trial can hope for is redaction of all express references and a limiting instruction. In holding that a witness's hypnotically-refreshed testimony is admissible and does not violate the defendant's confrontation rights if, after an in camera review, the trial judge finds that the testimony

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33. *See Awkard*, 597 F.2d at 669.

34. *Evans*, ___ S.C. at ___, 450 S.E.2d at 51 (citing McQueen v. Garrison, 814 F.2d 951, 959-61 (4th Cir.), *cert. denied*, 484 U.S. 944 (1987)).

35. "The three testimonial dangers associated with hypnosis are suggestibility, confabulation, and memory hardening." *Id.* at ___ n.3, 450 S.E.2d at 51 n.3. For a full discussion of the dangers posed by post-hypnotic testimony, see Harker v. Maryland, 800 F.2d 437, 439-40 (4th Cir. 1986).

36. *Evans*, ___ S.C. at ___ & n.5, 450 S.E.2d at 51 & n.5.

37. *Id.* at ___, 450 S.E.2d at 51.

38. *Id.* at ___, ___, 450 S.E.2d at 51, 54.

39. *Id.* at ___, 450 S.E.2d at 51.

qualifies under guidelines developed by the court, the court has embraced the approach taken by the Fourth Circuit Court of Appeals.

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