THE SCRIVENER

English Test For Lawyers: Fall Semester 2020

By Scott Moïse

Professor Scrivener noticed that our South Carolina lawyers have not had a test for two years. That will never do. To make sure that your skills are still sharp, we will have a Fall Semester COVID-19 remote edition of the English Test for Lawyers. You may begin.

1. The court ruled that the expert's testimony was based on reliable methodology, not *ipse dixit*. What is *ipse dixit*?
(A) **an unproved or dogmatic statement**
(B) **false underlying premises**
(C) **junk science**

ANSWER:
(A) Something said but not proved; a dogmatic statement

As readers with good memories may remember, we covered the meaning of the Latin phrase "*ipse dixit*" in a previous column, but that was before the South Carolina Court of Appeals used the phrase and was astute enough to define it, knowing that some of us would not know the meaning:

> The phrase "*ipse dixit*," which translates as "he himself said it," was coined by Cicero, who used it to belittle the reasoning and argumentative powers of the followers of Pythagoras. When asked to justify their positions, the followers would just say "*ipse dixit*," opting out of the merits of the debate altogether. Cicero, *De Natura Deorum*, I.V. (H. Rackham trans., Loeb Classical Library 1933).

State v. Warner, 430 S.C. 76, 87 n.1, 842 S.E.2d 361, 366 n.1 (Ct. App. 2020) (holding that the expert's testimony on cell site location information was based on reliable methods and substance, not *ipse dixit*).

EXTRA CREDIT: Translate "*De Natura Deorum*."

2. Who let the dogs out? Not ____!
(A) **I**
(B) **Me**

ANSWER:
(A) I

The pronoun "**I**" is in the nominative case, so "I" is used for subjects in a sentence. In this situation, "I" is the subject because I am doing the acting: "I did not let the dogs out."

The pronoun "**me**" is in the objective case, so it is used for objects in a sentence. For example, "Who did the dog bite?" Not me! In that situation, I am being acted upon by the dog.

Even though grammatically correct, saying "not I" may sound a little pretentious, like I think I am Queen Elizabeth or something. On the other hand, I do not want to use poor grammar. Therefore, I will just evade the problem by answering like this: I did not let the dogs out. That solves the problem. Woof, woof, woof, woof.

3. "As her just _____ for trying to poison Snow White, the wicked queen is made to dance in red hot slippers 'till she fell dead on the floor, a sad example of envy and jealousy.' " *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 796 (2011).

(A) **deserts**
(B) **desserts**
(C) **dessert's**

ANSWER:
(A) deserts

"**Deserts**" means "the punishment that one deserves." *See "Just Deserts" or "Just Desserts?*, Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/just%20deserts. "**Desserts**" means "a sweet course or dish served at the end of a meal." *Id.* at https://www.merriam-webster.com/dictionary/dessert. The two words have the same pronunciation, so the confusion is understandable.

Justice Scalia knew the answer to this question. *See Brown*, 564 U.S. at 796 (quoting *The Complete Brothers Grimm Fairy Tales* 198 (2006 ed.). In fact, 439 opinions have gotten it right. Unfortunately, 179 court opinions have not, with the U.S. District Court of Nevada being the latest outlaw. *See Atkins v. Gittere*, No. 202CV01348JCMBNW, 2020 WL 3893628, at *43 (D. Nev. July 10, 2020) ("Only [after the sentencing phase of a capital trial] can the sentencer truly weigh the evidence before it and determine a defendant's just desserts.").

As for "dessert's," I would have to subtract points if you chose that answer. "Desserts" is not only the wrong word, it is not being used as a possessive noun that would require an apostrophe (as in "I ate the dessert's frosting"), and YOU CANNOT USE AN APOSTROPHE TO MAKE THE WORD PLURAL. I cannot say that enough.

4. According to The Bluebook, which words should be italicized in the following case citation:

See, e.g., Turner Mfg. Co. v. Watson, 395 F. Supp. 3d 352, 360 (D.S.C. 2019) (Garfinkle, J., dissenting) (emphasis added) (citing Lietzow v. Hill St. Chem. Corp., 299 F. 2d 44, 48 (3d Cir. 2015)), (reversing trial court's ap-

plication of the maxim "expressio unius est exclusio alterius"), cert. denied, 930 F.2d 22 (4th Cir. 2020).

ANSWER:
See, e.g., ***Turner Mfg. Co. v. Watson***, 395 F. Supp. 3d 352, 360 (D.S.C. 2019) (Garfinkle, J., dissenting) (emphasis added) (citing ***Lietzow v. Hill St. Chem. Corp.***, 299 F. 2d 44, 48 (3d Cir. 2015)), (reversing trial court's application of the maxim "***expressio unius est exclusio alterius***"), ***cert. denied***, 930 F.2d 22 (4th Cir. 2020).

- Italicize or underline signals such as *see*; *see, e.g.*,; and *cf.*, including any periods in signal abbreviations (such as *e.g.*); however, do not italicize or underline the comma after "*e.g.*"
- Italicize or underline case names.
- Italicize or underline explanatory phrases in prior or subsequent history, such as *aff'd*, *vacated*, *remanded to*, *rev'd en banc*, *overruled by*, and *superseded by statute*.
- However, do not italicize or underline phrases in related authority parentheticals such as "concurring," "dissenting," "citing," and "translating."
- Italicize non-English words and phrases unless they have been incorporated into common English usage. Latin words and phrases that are often used in legal writing are considered to be in common English usage and should not be italicized. However, very long Latin phrases and obsolete or uncommon Latin words and phrases should remain italicized. *See The Bluebook: A Uniform System of Citation* (21st ed. 2020).
- This is for law nerds only: (1) The Bluebook rule for the order of parentheticals within a citation is Rule 1.5(b); (2) The new twenty-first edition of the Bluebook was just published.

5. What is a straw man argument?
(A) an argument that misleads or distracts from a relevant question, meant to lead to a false conclusion
(B) an argument that distorts the speaker's own position to make it easier to defend
(C) an argument that presents an either-or position without considering all relevant possibilities

ANSWER:
Answer (C). In *Herrera v. Finan*, 176 F. Supp. 3d 549 (D.S.C. 2016), a prospective college student sued the South Carolina Commission on Higher Education (CHE) when—although she had been a resident of this state for almost her whole life—she was denied residency status for tuition and scholarship purposes because she was a dependent child of undocumented immigrants. Under CHE regulations, a dependent child of undocumented immigrants was presumed to be a non-resident. In support of her due process claim, the student argued that even if this presumption was rebuttable, the regulation still burdened her familial right of association because rebutting the presumption would interfere with her right to live with her parents and require her to disassociate from her parents and their support. The court disagreed:

> This argument is a **straw man**. It assumes without justification that in order to rebut the presumption a dependent student would need to become an independent person under the applicable regulations. Rather, as clearly elucidated in the CHE guidance document, a dependent student with undocumented parents may be granted in-state residency status if he or she provides sufficient evidence of South Carolina residency . . . .

Id. at 581 (internal citation omitted).

6. In Question 5 above, what are the names of the arguments set forth in Answers (A) and (B)?

ANSWER:
- Answer (A) is a red herring: an argument that misleads or distracts from a relevant question, meant to lead to a false conclusion.

In *McGirt v. Oklahoma*, No. 18-9526, 2020 WL 3848063, at *26–27 (U.S. July 9, 2020), the U.S. Supreme Court reversed three sexual assault convictions because the state court lacked jurisdiction over the defendant, a member of the Seminole Nation of Oklahoma. Jurisdiction rested on the issue of whether the land granted to the Native American Indian Nation had retained its status as a reservation. The majority ruled that it did because Congress has not adopted any single statute that explicitly terminates that status. In Chief Justice John Roberts' dissent, he argued that the majority had made several arguments to show that Congress had not explicitly disestablished the reservation, none of which he believed had any relevancy to the point of the matter. "This," he stated, "is a school of **red herrings**." *Id.* at 26 (Roberts, C.J., dissenting). "School of red herrings": priceless.

- Answer (B) is a false dilemma: an argument that presents an either-or position without considering all relevant possibilities.

For example, in *Simmons v. South Carolina*, 512 U.S. 154, 171(1994), the jury was presented with evidence of the defendant's future dangerousness if he were to be released, setting up an either-or argument: either sentence the defendant to death or he will be a dangerous threat to society. The Supreme Court realized the fallacy of this argument:

> The State may not create a **false dilemma** by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole.

7. Judge Porter (stricked, struck, strucked) the affidavit because it was not notarized. After the affidavit was (stricked, struck, stricken, strickened), the defendant submitted a new, notarized affidavit.

ANSWER:
• Judge Porter struck the affidavit.

The past tense of the verb "to strike" is struck.

• After the affidavit was struck OR stricken, the defendant submitted a new affidavit.

The preferred past participle is "struck." "Though *stricken* often appears as a past participle, grammatical authorities have long considered it inferior to *struck*." Bryan A. Garner, *Garner's Modern American Usage* 481–82 (3d ed. 2009). Mr. Garner calls "strickened" a "double bobble" (when someone reaches for a word, the wrong word, and then mistakes another word for that wrong word).

Although "struck" is by far the form of the word most used in judicial opinions, "stricken" is also widely used. The double bobble "strickened" does appear in 49 cases, none in South Carolina, but it is mostly used when quoting pro se parties' written court submissions. Sometimes, though, the court itself uses the word. *See, e.g.*, *Mortg. Elec. Registration Sys., Inc. v. Scalise*, No. CV030198286S, 2004 WL 1326055, at *1 (Conn. Super. Ct. May 27, 2004) ("[T]he first, third and fourth special defenses are **strickened** as the same are conclusory or the pleading of legal effect.") (also omitting the Oxford commas, which is something I cannot live with). As an aside, three courts have used the adjective "panic-strickened," but that is also incorrect; the word is "panic-stricken."

8. Which of the following number ranges are correct:
(a) The quotation can be found on pages 223–224.
(b) The quotation can be found on pages 223–24.
(c) Former Chief Justice Costa M. Pleicones served on the South Carolina Supreme Court from 2000–2016.
(d) Former Chief Justice Costa M. Pleicones served on the South Carolina Supreme Court from 2000–16.
(e) The legislature amended §§ 8880–8887 of the Cosmetology Act.
(f) The legislature amended §§ 8880–87 of the Cosmetology Act.

ANSWER:
(b), (c), (e)
• For a range of page numbers, separate the range with an en dash (preferred) or a hyphen, and retain only the last two digits in the range: pages 223–24; pages 2233–34; pages 23–24. (Bluebook Rule 3.2(a).)
• For an range of all other numbers, retain all numbers: the years 2000–2016; §§ 8880–8887 ; ¶¶ 100–103. (Bluebook Rule 3.3(b).)

9. Which of the following are actions taken by judges in response to poor legal writing?
(A) Issued an order for the lawyer to show why he should not be suspended or disbarred for ineptitude in his poorly written appellate brief
(B) Warned lawyers that they were prime candidates for the Worst Federal Pleading of the Year Award
(C) Sanctioned a lawyer for filing a reply brief late on the afternoon before an 8:30 a.m. hearing without copying the opposing counsel, violating the court rules, and failing to provide protruding tabs for the exhibits
(D) Dismissed an appeal for the lawyer's failure to cite to the record in his appellate brief.

ANSWER:
All of the above.

(A) In *Sambrano v. Mabus*, 663 F.3d 879, 882 (7th Cir. 2011), the court found that a lawyer had "massacred" any potential claim against the defendant in a "wretched" brief that—among other things—had violated court rules, cited the incorrect standard of review, and in the argument section (which was one and a half pages, total) failed to show how the trial court erred. The Seventh Circuit Court of Appeals spared no words in describing the lawyer's performance on his appellate brief, which had bypassed the only possible nonfrivolous grounds for appeal and instead was based on an argument "with no prospect of success."

(B) In a sua sponte opinion, *Scott v. Arrow Chevrolet, Inc.*, No. 01 C 7489, 2001 WL 1263498, at *1 (N.D. Ill. Oct. 22, 2001), the late Judge Milton Shadur was irate at the answer filed by the defendant's counsel in a civil rights action. In addition to naming the defendant's counsel as the front-runner to the "award," Judge Shadur struck the answer, with leave to amend, and ordered the lawyers to send a copy of the opinion to their client, copying the judge, along with a letter advising that no charge would be made for time and expense of correcting the counsel's own errors.

(C) In *Reed v. Illinois Department of Corrections*, No. 17 C 5560, 2019 WL 5184030, at *1 (N.D. Ill. Oct. 15, 2019), the court issued monetary sanctions and a whole lot of angry commentary that was triggered by a five-page brief that cited no cases or rules of federal civil procedure, violated a local rule for briefs, and contained "unpersuasive" arguments. And do not think that those missing exhibits tabs were insignificant to the judge because he mentioned them twice. To be fair,

the judge was also angry at the defendant's discovery conduct, but the brief seemed to push him over the edge in issuing over $1,000 in sanctions.

(D) In *Han v. Stanford University*, 210 F.3d 1038, 1040 (9th Cir. 2000), the plaintiff's lawyer filed a 15-page brief that made no reference to the record below to substantiate his statements concerning deposition testimony and documentary evidence. The lawyer's appeal was dismissed because he had "exhibited complete disregard for the requirements" of the appellate rules respecting citations to the record after being notified that the brief was noncompliant. *Id*.

10. Where does the colon go in these sentences?

(A) Katie knew she needed a basket full of supplies for example boxes of disposable masks, hand sanitizer, hand soap, and lens cleaners.
(B) We made several evidentiary objections on the grounds of hearsay, failure to authenticate, and violation of the best evidence rule.
(C) Bart was having a bad day recalcitrant witnesses, motions for sanctions, and car trouble.
(D) The doors to the courthouse were locked all we could do was stand outside in the rain until someone came to let us in.

ANSWER:

(A) Katie knew she needed a basket full of supplies: for example, boxes of disposable masks, hand sanitizer, hand soap, and lens cleaners.
(B) We made several evidentiary objections on the grounds of hearsay, failure to authenticate, and violation of the best evidence rule.
(no colon)
(C) Bart was having a bad day: recalcitrant witnesses, motions for sanctions, and car trouble.
(D) The doors to the courthouse were locked: All we could do was stand outside in the rain until someone came to let us in.

Colons are signals that show what is to follow in a sentence. In general, use them only if your sentence has an independent clause (in other words, in non- schoolmarm language, a complete sentence) **before** the colon.

- (A) A colon may go after "supplies" because it follows a full sentence ("Katie knew she needed a basket full of supplies"). The colon could not go after "for example" because "Katie knew she needed a basket full of supplies, for example" is not a complete sentence.
- (B) "We made several evidentiary objections on grounds of" is not a complete sentence.
- (C) and (D) Colons are appropriate because complete sentences precede the colon. Note that (D) has two independent clauses on either side of the colon. In that situation, a semicolon would also be correct.

The general rule has an exception. You may use colons after an introductory clause that is not a complete sentence when a list of items follows on a separate line:

- Grounds for excluding the testimony are:

(1) unreliability of the expert's opinion;
(2) irrelevance of the subject matter;
(3) failure to identify the expert until after the scheduling order deadline; and
(4) prejudice to the defendant.

Knowing when to capitalize following a colon is easy. When a complete sentence follows the colon, you have the option of capitalizing the first word after the colon or using a lowercase letter. If the text following the colon is not a complete sentence, do not capitalize the first word after the colon (unless it is a proper noun or another word that should always be capitalized).

The answer to the extra credit question in Question 1, which asked you to translate "*De Natura Deorum*," is "On the Nature of the Gods." Be sure to include that Latin in your next brief to the Court of Appeals and try your hardest to avoid winning the "Worst Brief of the Year" Award. *Dum spiro spero*.