

# Art vs Craft: Expert Evidence in the England and Wales Criminal Justice System

Nicci MacLeod

Northumbria University, UK

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**Abstract.** *Standards for expert testimony in England & Wales have long been described as laissez-faire and in desperate need of reform, with decisions about admissibility being left entirely to the trial judge (Turner 2009) and numerous calls for legislation going unheeded. Rules for the methods and content of an expert's written and oral evidence therefore derive entirely from common law together with the publications of the Forensic Science Regulator (FSR). With extensive reference to a recent murder trial involving determining the meaning of a particular Urban British English lexical item where I had the rare opportunity to watch an opposing expert in action, this paper discusses current requirements and the obstacles these may present for the delivery of justice. The implications of admitting expertise in the form of unstructured, unquantifiable art alongside that which adopts a rigorous, replicable craft-like approach are drawn out in relation to this case and to the law as it stands. The paper concludes with a two-pronged solution for addressing these issues. Firstly, a dedicated training programme or system of guidance to enable judges to identify reliable expertise is proposed. Secondly addressing the 'widespread ignorance' (Heydon 2020) in the legal system of lesser-known fields of scholarship (such as forensic linguistics) is identified as a key strategy for improving standards of expert evidence.*

**Keywords:** *Expert evidence, determining meaning, standards, drill.*

**Resumo.** *Há muito que as normas aplicáveis a perícias em Inglaterra e no País de Gales são descritas como sendo tipicamente "laissez-faire" e como carecendo urgentemente de reforma, uma vez que as decisões sobre admissibilidade ficam inteiramente nas mãos do juiz (Turner 2009) e os inúmeros pedidos de legislação são ignorados. As regras relativas aos métodos e conteúdo de uma perícia oral e escrita decorrem integralmente da "common law", em conjunto com as publicações do regulador de ciências forenses (FSR, Forensic Science Regulator). Fazendo extensiva referência a um julgamento recente de homicídio que exigiu a análise de*

*significados para determinar o significado de um vocábulo de inglês britânico urbano no qual tive a rara oportunidade de ver o perito da outra parte em ação, este artigo discute os atuais requisitos e obstáculos que estes podem representar para a administração de justiça. Avalia-se as implicações subjacentes à admissão de perícias de forma não estruturada e não quantificável, em paralelo com perícias que adotam uma abordagem rigorosa e replicável, no contexto deste caso e no contexto da lei. O artigo termina com a proposta de uma solução bifaseada para resolver estas questões. Primeiro, propõe-se um programa de formação ou sistema de orientação dedicado para permitir aos juizes identificar perícias fiáveis. Em segundo lugar, a “ignorância generalizada” (Heydon 2020) no sistema judicial relativamente a áreas de conhecimento menos conhecidas (como a linguística forense) é identificada como uma estratégia crucial para melhorar os padrões de provisionamento de perícia.*

**Palavras-chave:** Prova pericial, análise de significados, normas, exercício.

## Introduction

In England & Wales the provision of expert evidence in criminal proceedings is legislated for by section 30 of the Criminal Justice Act 1988, which states merely that ‘an expert report shall be admissible as evidence’ and that ‘if it is proposed that the person making the report shall not give oral evidence, the report shall only be admissible with the leave of the court’. The question of who qualifies as an expert and what qualifies as expertise remains undefined in statute.

Perhaps unsurprising then that expert evidence in this jurisdiction has been described as being admitted ‘too readily’ and ‘with insufficient scrutiny’ with a ‘laissez-faire’ approach (Law Commission 2011; Hodgkinson and James 2020), and these concerns have led to a number of attempts to reform the law relating to expert evidence, with the Law Commission (2011) and later the Forensic Science Regulator (2019) calling for admissibility to be put on a statutory footing. Ward and Fouladvand (2021) alert us to the ‘very real’ danger of ‘unbalanced anecdotal experience being accepted as expertise’, warning that courts need to take more seriously the new and more rigorous approach to expert evidence that was supposed to result from s.19A of the *Criminal Practice Directions* originally issued in 2015 (*Amendment No. 11 (2020) EWCA Crim 1347*) (hereafter CPD 2020).

Despite calls for legislation on the matter of expert evidence, in England and Wales common law remains the only source of criteria for assessing its admissibility (for example, *National Justice Cia Naviera SA v. Prudential Assurance Co. Ltd (The Ikarian Reefer)* (1993) 2 Lloyd’s Rep 68; *R v. Bowman* (2006) EWCA Crim 417). Indeed, there has been explicit resistance against any moves to impose a standard admissibility test: ‘so long as the field [of expertise] is sufficiently well-established to pass the ordinary tests of relevance and reliability, then no enhanced test of admissibility should be applied, but the weight of the evidence should be established by the same adversarial forensic techniques applicable elsewhere’ (Munday 2018: 523). There are a number of concerns with this position, which this paper goes on to explore.

Most recently the Forensic Science Regulator (2021b) publishing an Appendix to their Codes of Practice and Conduct (CPC) setting out to standardise approaches to expressing expert opinion across disciplines. Aside from these CPC the only binding

obligations for experts for both Prosecution and Defence are those set out in Part 19 of the Criminal Procedure Rules 2015 (Amended 2020) (hereafter CrPR 2020) – a statutory instrument enabled by the Courts Act (2003) – and the aforementioned CPD which it supplements.

This paper summarises the requirements laid out in these documents and discusses movements towards standardisation, before illustrating the challenges surrounding the provision of expert evidence in England & Wales with reference to a genuine murder case with which the author was involved in March 2021. The case perfectly illustrated two diametrically opposed understandings of the nature of ‘expertise’: on the one hand as an art, the result of some supposed innate understanding, and on the other as craft, with an emphasis on the correct application of particular tools and skills to produce entirely replicable results.

The paper concludes with some thoughts on the issues at hand, and suggestions for how the situation might be improved.

### **The admissibility of expert evidence**

Common law holds that expert evidence is admissible if it fulfils the following criteria (CPD 2020):

- (i) it is relevant to a matter in issue in the proceedings;
- (ii) it is needed to provide the court with information likely to be outside the court’s own knowledge and experience; and
- (iii) the witness is competent to give that opinion.

The first criterion seems fairly straightforward, dealing as it does with the requirement that expert evidence can only be provided by someone who is an expert in the relevant field (see *O’Brien (Respondent) v. Chief Constable of South Wales Police (Appellant)* (2005) UKHL 26; *R v Barnes* (2005) EWCA Crim 1158). As we shall see, however, the matter of which field is the relevant field is seemingly not clear-cut in all cases. *R v Turner* (1975) 1 All ER 70 provides one of the most widely cited explanations of the second criterion, that being that an expert would be required only where they would ‘furnish the court with scientific information that was likely to be outside the experience and knowledge of the judge or jury’.

On the matter of the third criterion, paragraph 19A.4 CPD (2020) encourages courts to enquire into factors around the reliability of an expert and be satisfied that the evidence has a sufficiently reliable scientific basis before admitting it (*R v Dlugosz and Others* (2013) EWCA Crim 2) and also lists a number of factors they **may** take into account to determine this. These includes the extent and quality of data upon which the expert relies, the extent to which their methods have been subjected to peer review, and the extent to which their opinion is based on material falling outside their field of expertise (19A.5). CPD (2020) further advises courts to be ‘astute to identify potential flaws’ and includes among these insufficiently scrutinised hypotheses, flawed data, and relying on inferences or conclusions that have not been properly reached (19A.6).

CrPR 19.2 (3) (d) requires the expert to notify those instructing them, who in turn must notify the court in order to assist in making such an assessment as detailed above, anything ‘which might reasonably be thought capable of— (i) undermining the reliability of the expert’s opinion, or (ii) detracting from the credibility or impartiality of the expert’

(CrPR 19.3 (3) (c)). This might relate to lack of accreditation, or to a history of inadequate methods or failure to observe recognised standards (CPD 2020 : 19A.7). We return to the obligations of the expert in the next section.

Expert evidence is an exception to the rule that witnesses' testimony must be evidence only of fact and not of opinion (Hodgkinson and James 2020; Forensic Science Regulator 2021b), an exception statutorily preserved in the *Criminal Justice Act 2003* s. 118 (1) 8, which states that an expert witness may 'draw on the body of expertise relevant to his field', i.e., on information provided by others, which under other circumstances would be excluded as hearsay evidence. As Ward and Fouladvand (2021) point out, we can find some courts interpreting 'body of expertise' more broadly than it was in *Dlugosz*, acknowledging that the best informed witnesses will often be people who have gained expertise not through academic or professional training but because their work or experiences bring them into contact with the criminal activity at issue, for example the police (e.g. *Myers v R* (2015) UKPC 40) and – crucially for the purposes of this paper – even people who have gained expertise through a criminal career of their own (e.g. *R v Chatwood* (1980) 1 WLR 874).

The lack of statutory intervention and the insistence that 'no enhanced test of admissibility should be applied' (Munday 2018: 580) has been explained by some as a result of judicial reluctance to identify a suitably recognised body of knowledge before admitting evidence, particularly when some disciplines develop at such an advanced rate. The result of this reluctance has been the admission of non-expert evidence in a range of areas including handwriting analysis (*R v Silverlock* (1894) 2 QB 766) and voice comparison (*R v Robb* (1991) 93 Cr. App. R. 161), and a general acceptance as described above that witnesses who have gained their expertise through advanced familiarity with a topic rather than formal education are entirely capable of fulfilling the required criterion of furnishing the jury with information outside of their knowledge (Ward and Fouladvand 2021; see also *R v Byrne* (2021) EWCA Crim 107).

This leads us to a very specific problem: if a jury have been assessed as incapable of deciding some matter at issue without the assistance of an expert, how are they expected to do so when presented with two alternative expert opinions, particularly when there is no formal regulation of the provision of such evidence? This is a long-discussed contradiction in theory (see Hand 1901), and in practice this exact tension has led to the evidence of experts for both sides being excluded (*R v Edwards* (2001) EWCA Crim 2185). We return to this challenge later.

We must also consider that the jury's level of scientific knowledge may be such as to severely impede its understanding of the expert evidence that is given. The danger is that the jury, lacking confidence in its own abilities to assign the appropriate weight to the evidence it hears, accepts the opinion of the expert who gives their evidence most convincingly, rather than being assisted to reach its own conclusions (Roberts and Zuckerman 2010). This latter point, of course, could arguably be applied to the adversarial system in its entirety, but appears magnified in the context of expert opinion, which may be shrouded in mystery as far as the jury is concerned.

The trend for admitting expert evidence and allowing it to be tested by the usual 'adversarial forensic techniques' also suffers from the drawback that, frequently, the defence does not obtain its own expert evidence in rebuttal of a prosecution expert. Reasons

for this are largely financial – the Legal Aid Agency (2020), on whom many defendants rely for financial support, are bound by the *Criminal Legal Aid (Remuneration) Regulations* 2013 as amended, which sets rates for expert witnesses' payment (interestingly, while 'voice recognition' is listed as a recognised expertise, 'linguistics' does not appear, and the allowable rate for linguists is thus determined on a case-by-case basis). The prosecution is not bound in such a way, having almost limitless resources, and thus many experts find themselves, perhaps understandably, taking on more prosecution work than defence.

Financial constraints are not the only limitation to a defence team's ability to call on the services of expert witnesses. There is also the matter of access; while police forces across the UK have access to the National Crime Agency's (NCA) Expert Adviser's database, no register of equal scope is accessible for defence solicitors. There are a number of agencies, such as The Medical Expert Witness Alliance (MEWA)<sup>1</sup> who charge the client as fee on top of that charged by the expert; and there are a number of registers, such as The Academy of Experts<sup>2</sup> and the UK Register of Expert Witnesses<sup>3</sup> which require payment of a fee from the expert themselves, as well as testimonials from previous clients, in order to join. These databases are open for anyone to search. While it could be argued that the requirement for a fee ensures a high-quality membership, it is undeniably something of a barrier as compared to the free-of-charge NCA register, which requires simply a one-off reference and annually updated CV. Thus, many experts rely on word-of-mouth in order to pick up defence work – the case reported on below came my way as a result of the involvement of a cultural scholar with whom I had happened to converse at the end of an academic talk she gave. Had that serendipitous meeting not occurred, and had she not been moved to recommend me on becoming aware of the facts of the case, then the prosecution evidence described below would have proceeded entirely uncontested from a linguistic perspective – as, one presumes, it does in courtrooms across the country on a regular basis.

### **Obligations of the Expert**

According to section 19.2 of the CrPR (2020), an expert must help the court by giving opinion which is (i) objective and unbiased, and (ii) within the expert's area or areas of expertise. The duty overrides any obligation to the party from whom the expert receives instruction and/or payment. General legal obligations of the expert are set out in more detail by the Forensic Science Regulator (2020b).

Drawing on the CPD (2020) and the CrPR (2020) as well as a number of judgments, FSR (2020a) sets out the legal requirements for an expert report in guidance supplementary to its Codes of Practice and Conduct (discussed below). FSR (2020b) notes that while Section 9 of the Criminal Justice Act 1967 details the requirements of a written statement, including the declaration of truth that must accompany all written statements submitted in evidence, there is no statutory prescription for the contents of an expert report. However, CrPR (2020) provides a list of issues that an expert report must cover, including 19.4 (f) requiring the expert to:

- where there is a range of opinion on the matters dealt with in the report —  
(i) summarise the range of opinion, and (ii) give reasons for the expert's own opinion',

and (j) requiring that expert reports:

- contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty.

A suggested wording for the statements of understanding and declarations is provided in section 19B of the CPD, and includes, inter alia, a confirmation that the expert has read and complied with Part 19 of CrPR and a confirmation that they have acted in accordance with the code of practice or conduct for experts of their discipline (see also para. 28.2 of the Forensic Science Regulator (2021a: 83). CPD 19B further stipulates that in the case of prosecution witnesses, they must confirm that they have read and followed the guidance relating to disclosure set out in CPS (2019) and complied with their duties under the Criminal Procedure and Investigations Act 1996.

CrPR 19.6 and CPD 19C deal with the phenomenon often referred to colloquially as 'hot-tubbing', whereby at the direction of the court experts instructed by both parties in a trial are required to discuss the issues at hand in order to establish the extent to which they agree and formulate short descriptions of points on which they do not. They are then required to provide a joint statement to this effect.

Let us return now to the matter of expressing one's opinion, as it relates to the expert's obligations to the court. A landmark case in this area was that of *R v Atkins* (2009) EWCA Crim 1876, in which an appeal was brought against conviction on the basis that a facial recognition expert's evidence for the prosecution had been expressed using a sliding scale of propositions – not dissimilar from that set out in Coulthard *et al.* (2017: 197) and adopted by a number of forensic linguists practicing around the globe. In *Atkins* the appellants argued that the expert's expressions of likelihood should not have been put before the jury, and that instead they should have been presented with the similarities and differences and left to draw their own conclusions. This position was rejected by the appeal judge, who, although cautioning against numerical expressions of opinion, stated that:

leaving the jury to make up its own mind as to the similarities and dissimilarities, with no assistance at all as to their significance, would be to give the jury raw material with no means of evaluating it. It would be as likely to result in over-valuation as under-valuation. It would be more, not less, likely to result in an unsafe conclusion than providing the jury with the expert's opinion, properly debated through cross-examination...

He further added that should the expression of opinion be inadmissible it would, in effect, nullify all expert testimony. It would of course be impossible to cross-examine an expert about the significance of certain facial similarities if they had been prevented from providing their opinion on their significance in the first instance. Considered with the point made earlier about jurors' confidence in their abilities to interpret scientific testimony, this represents an important balancing act as far as the presentation of expert opinion is concerned.

In the wake of several high-profile miscarriages of justice in England, including the convictions of the Birmingham Six and the Guildford Four, and those of mothers of babies who had died of Sudden Infant Death Syndrome (SIDS) (Campbell and Walker 2007), the regulation of expert testimony had established itself firmly at the top of the criminal justice agenda by the late 1990s. The Council for the Registration of Forensic Practitioners (CRFP) was established in 1999 (Kershaw 2000) in an attempt to restore public confidence in forensic practice but disbanded following cuts to government funding in

2009. Despite denials from the Home Office, the disbandment was widely regarded as presenting a genuine blow for justice, given the CRFP's role in 'sifting rogue scientists'<sup>4</sup>.

Many of the responsibilities of the CRFP then passed to the newly established office of the Forensic Science Regulator (FSR), an independent agency responsible for leading on the development of quality standards and advising providers on matters of compliance. Over the past ten years the FSR has published seven issues of their Codes of Practice and Conduct (CPC) for forensic science providers. The CPC set standards that are to be adhered to by both sides in criminal cases, and despite the FSR's lack of any statutory powers, these are mandatory. From the first issue, the FSR state that 'standards are not intended to stifle innovation' and 'the courts will always be free to consider evidence derived from methods... [where] there simply hasn't been time to include the technique in their scope of accreditation' (Forensic Science Regulator 2011: 2). The FSR is thus clearly cognizant of judicial unwillingness to impose any 'enhanced test of admissibility' as discussed earlier.

One obligation listed in this first outing of the CPC is that an expert should 'seek access to exhibits/productions/information that may have a significant impact on your findings' (2011: 9) and this remains in the most current guidance at time of writing (Forensic Science Regulator 2021a: 19). Further stipulations include taking 'reasonable steps to maintain and develop your professional competence' and to 'act... only within the limits of your professional competence' (Forensic Science Regulator 2021a: 19). The requirements of an expert witness are thus readily available in a range of easily accessible locations. The FSR are also responsible for the latest available guidance specific to expressing evaluative opinion, published as an Appendix to the CPC in 2021 (Forensic Science Regulator 2021b). The document sets out to standardise the provision of expert opinion across disciplines and enhance the transparency and understanding of opinion evidence in the courts, explicitly naming authorship analysis and speech science on its list of scientific areas to which the guidance applies. This appears to be the first formal attempt to regulate forensic linguistic testimony – albeit only two tasks from the vast range that linguists are called upon to engage with – since the *Forensic Linguistics (Standards) Bill* (2016), which did not make it past its first reading in the House of Commons. Forensic Science Regulator (2021b) calls for, among other things, a standard verbal scale of likelihood to be adopted across disciplines.

### **On the meaning of *killy*: a case study of linguistic expertise**

In February 2021 I was approached by a defence solicitor whose client – I later found out – was on trial for murder along with two of his acquaintances. The solicitor asked me to read and respond to a set of three expert reports that had been authored in June, July, and October 2020 by a Mr X, who had been instructed by the police to provide interpretations of a range of material, including music videos, handwritten notes, instant messages, voice messages, and transcribed phonecalls, much of which was in a variety of English that linguists would call Multicultural London English (MLE) or Urban British English (UBE) (see Drummond 2016), but which Mr X consistently referred to in his reports (and later in the witness box) as 'street slang'. 'Slang' is a term that lacks useful definition (Dumas and Lighter 1978) as well as imposing an arguably negative value judgment. Thus, outside of quoting other sources, I will instead make use of the label UBE. The defendants and their associates were also fans, and sometime amateur artists, in the world of drill music: a genre of hip hop characterised by violent lyrical content set to

sparse accompaniment which originated in Chicago in 2010, entered the UK via Brixton, South London in 2012, and has established scenes in London and Toronto, among other places in the English-speaking world.

According to the preamble in his report, Mr X's expertise derived from his lived experiences as a member of a street gang some twenty years prior for which he had spent some time in prison. On release he had begun working in the area of safeguarding, educating both young people and the professionals who work with them on the dangers and warning signs of involvement in gang culture. He had established a charity to carry out such work, and through this made connections with the local police force who made use of his services for training, working with young people, and, it would seem, interpreting the language of communications in suspected gang-related cases. None of the reports contained the statement of understanding and complying with duty to the court, a requirement under CrPr 19.4(j), and certainly did not state compliance with CrPR 19 itself nor with any code of practice, as required by CPD 19B.

The defence solicitor presented me with two tasks: one, to review Mr X's interpretation of a particular word, *killy*, as it appeared in two transcribed phone calls (note these calls had been transcribed by the police and Mr X was not given access to the audio; we will revisit this point later). Mr X had interpreted this word to mean the feeling of wanting to kill. I was to produce a report of my findings to be served in the trial. Secondly, I was asked to examine the remainder of Mr X's reports and provide a review, purely for the use of the defence team. The triangulation of methods I used to address the first of these tasks will be familiar to readers who have encountered the work of Grant (e.g. 2017) in the field of ascertaining meaning in forensic contexts.

The two instances of *killy* on which I was asked to focus were the following, both contained within transcriptions of phonecalls where one party was on remand in prison:

1. [first utterance of the call] *Ay yo yo my killy do*
2. *Calm calm calm. Hey listen man its my fucking killy. I'm gonna call you M innit, I love you man yeah love you my fucking bro. Come on bro \*\*\*inaudible\*\*\* baboosh.*

With traditional print reference sources on interpretations of 'slang' being of no use in this instance, my first port of call was [UrbanDictionary.com](http://UrbanDictionary.com). It goes without saying that an online reference source comprised solely of community contributions and relying on its membership to 'upvote' and 'downvote' those contributions as the only indicator of their validity is not without its limitations. It is, of course, susceptible to inaccuracy, incompleteness, and potentially even manipulation. Furthermore, it is impossible to determine geographical origins of definitions or their upvotes. Nevertheless, it provides us with a legitimate springboard for deeper analysis. As Grant (2017) points out, the contributors of definitions and votes to such sites can be reasonably assumed to belong to a community of practice who uses the variety; it would be 'wrong to ignore [wikidictionaries'] unmediated connection to language users' (2017: 9).

The top ranked definition for *killy* on [UrbanDictionary.com](http://UrbanDictionary.com) at time of writing, with a total of 121 upvotes and just four downvotes, is a very close friend that you trust. The example sentence provided is

*J1 is my Killy you know, known man from young still.*



The use of *man* as a pronoun (Hall 2020) and the utterance-final *still* (sometimes spelled *styll*) (Denis 2016) tell us that this example is UBE, or at least a West Indian-influenced variety – much like the variety under discussion in this case. This is not an example from some far-removed linguistic variety that is markedly different from that the individuals are using in the questioned materials – it is entirely comparable, and thus relevant to our interpretation.

Some much lower ranking definitions did include a force similar to that which Mr X had attributed: *A feeling of wanting to kill multiple people for being shitbags, but knowing you can't and won't do it* (12 up, 7 down) and *an expressed need or feel to be morbid or kill someone imaginary* (2 up, 5 down). The UK slang dictionary Genius.com provides the further information that while in the original Jamaican patois *killy* refers to a *killer*, it states that in London it is a term most commonly used to refer to *a close friend or gang member*.

Of course, dictionary sources are not enough. The next step was to examine the use of *killy* on Twitter. Rather than focussed explanations of meaning as we see on urbandictionary.com, the instances of the lexical item on Twitter are genuine, naturally-occurring examples of language in use, and thus have privileged status over elicited data (Potter 1997; Johnstone 2000).

Scraping Twitter for mentions of *killy* between the 9th and 17th of March 2021 using QSR NCapture resulted in around 1650 results. A substantial proportion of these were not helpful – either the word was contained in the username, e.g. *emily\_killy*, the tweet referred to the Canadian rapper Killy, the Star Trek character Captain Killy, the anime character Killy, the area of Newcastle-upon-Tyne Killingworth, or used *killy* as a portmanteau of the names Kelly Monaco and Billy Miller, onscreen spouses in the US soap opera *General Hospital*, who apparently have a minor online fanbase. Manual removal of such entries left a corpus of 579 tweets, which with the help of WordSmith Tools (Scott 2020) were explored to determine the senses in which the item was being used. The vast majority of the concordance lines represent a definition of *killy* as akin to ‘close friend’, as illustrated in Figures 1 and 2 below.

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312 lly Person. Every time I got a trim "eyyy yo my killy the ting sharp...come smoke wid us" Everything
313 ero" My Killy sending them man to the GULAG "My killy sold weed to a pregnant woman when we were 17
314 pretty much all to do with women and kids." My Killy!!!! B https://t.co/uecFAtxcKh My killy. Tomor
315 pillar of my community. Neighbourhood Hero" My Killy sending them man to the GULAG "My killy sold
316 season. https://t.co/s9FEIojFKw Odegaard is my killy idc fuck Lamela "Oh dear, I gave intel on the
317 uy. More blessings! https://t.co/yBUr8QtLzD "My killy said he needed extra dough brought him onto t
318 all i can associate with killy now It's okay my killy Laca due to unleash today Kill off killy Kill
319 ds." My Killy!!!! B https://t.co/uecFAtxcKh My killy. Tomorrow we shine. https://t.co/JU5X0vd2ou M
320 . Tomorrow we shine. https://t.co/JU5X0vd2ou My killy?? https://t.co/JQNicPP1AD My killy?? https://t.co/tqbSFPWkGH
321 heanacho scored his first prem hat trick???? My Killy It is interesting that when you first start w
322 guy|. More blessings! https://t.co/yBUr8QtLzD My killy my famlee Happy Birthday my guy. More blessin

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Figure 1. Selected ‘my killy’ concordance lines

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574 killy killy JOKER Aguero una missed you killy free killy man https://t.co/1p6dwD9T9P free k
575 - Killy Killy https://t.co/R02aumdi9M Prada you killy https://t.co/XurpfrqWLL Preorders for Final
576 e 4ever. I put faith in my killy yeah I see you Killy @AdzChhetz https://t.co/Cwmc9eAg8Y i want to
577 ass https://t.co/DerPnMiX41 "@joekay love you killy. keep going. " @jsavvv16 Ma killy @julielus
578 uck... lol @rillaSL What did that man do to you killy @rnero 47 happy birthday my killy @rnero 47
579 killy dem sha https://t.co/xWj9SwwDcI Ma young killy Sycho is way too chilly on Drill ?] https://t.co/tqbSFPWkGH
580 /t.co/tqbSFPWkGH This time last season my young Killy was hooping on loan at Huddersfield...now he
581 Killy's are when it gets real You know who your Killy's are when it gets real You see that group que

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Figure 2. Selected ‘you/young/your killy’ concordance lines

Collocations with *famlee* (Figure 1, line 322) and constructions like *you know who your killy's are* (Figure 2, line 581) present a straightforward equivalence between *killy* and *friend*.

So too is there evidence for the other definition discovered on *Urbandictionary.com* and named by Mr X as the only interpretation, i.e. as an adjective describing the state of wanting to kill, or having a proclivity to do so:

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29     rs have robbing urges, or Murderers getting all Killy. "@shirtsoty o soco killy https://t.co/s8BOBA3
30     Ah, man, when I see those plaques I just go all killy https://t.co/wVPsAt92cZ Alice hanging out and
31     Vietnam, tried to become "we must be scary and killy", and turned into basic stormtroopers (german,
32     e my chanza getting to heaven through Tirry and Killy's mount of impiety to hear it all, aviary word
33     y killy dat!! "@flamerotted ? ? ? ?perhaps ?and killy too ?| just the way I want it but that part's
34     e is literally kitty, kitty pop, kitty poo, and Killy. I've failed him. More life killy killy https:
35     t'd be nice if men could stop being so rapy and killy. @tyzokz @ameerszn @AspireUnit Cahmon Henry
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Figure 3. Selected 'all/and killy' concordance lines

Attributing the characteristic to *murderers* (line 29) and the pairing of *killy* with *scary* and *rapy* (lines 31 and 35) clearly demonstrates this adjectival use. However, it should be stated that unlike the tweets that use *killy* to mean *friend*, there is nothing in the tweets using the adjectival *killy* that suggests the authors are part of a community that uses UBE. For this community at least, the overriding definition of the word appears to be akin to *close friend*. This interpretation also fits with the context of the word in the two extracts – following the greeting *ay yo yo* and within an utterance which is clearly designed to bring reassurance – *calm calm* - to the hearer about the speaker's solidarity with them - *I love you man yeah love you my fucking bro*. It occupies a nominal position and the adjectival meaning of *feeling of wanting to kill* simply makes no sense in these contexts.

A few days after submitting my reports and a day before Mr X was due to give evidence, I received via the instructing solicitor a counter-report that Mr X had prepared in response, at the behest of a police officer. In it, he said that he concurred with my opinion that *killy* had the alternative meaning of *close friend*. However, he said that in his original report he had interpreted the word:

*'as short and brief as possible [the interpretation being sterile and almost binary one to be objective] with impartiality and being as neutral as possible in mind. During giving evidence would have been the correct opportunity and time to expand on the wider meaning as I have done in this report for the Crown and Jury.'* (Mr X counter-report, p.2)

Mr X labeled his original interpretation, *the feeling of wanting to kill*, as 'sterile', 'binary', 'impartial' and 'neutral'. This contrasted with my interpretation, *close friend*. I will leave it to the reader to determine which, if either, of these terms is the more 'neutral'. Mr X also asserts here that his decision to include just one possible interpretation of *killy* in his original report was a justified one, and that he intended to elucidate when he entered the witness box.

Let us remind ourselves of CrPR Part 19.4, particularly bullet (f), which states that an expert's report **must**:

- (f) where there is a range of opinion on the matters dealt with in the report—
  - (i) summarise the range of opinion, and
  - (ii) give reasons for the expert's own opinion;

Coupled with the omissions of compliance statements as detailed above, the lack of any description of the full range of potential meanings of *killy* in Mr X's original report further calls its admissibility into question.

Mr X described my consultation of the sources *urbandictionary.com* and Twitter as 'laughable' and 'subjective' and suggested that it was my unfamiliarity with 'the gangs and street-based culture' that necessitated my methods. Suffice to say that building and examining a mini-corpus of genuine language use by an online community which includes many members of the speech community under examination is a method that substantially outweighs native speaker intuition in the validity stakes, and one that I would have utilised even had I been fully conversant in UBE.

Mr X's counter-report moves on to cite the work of Hallsworth and Young – after some searching I established this as Hallsworth and Young (2006) (note the requirement set out in CrPR19.4 (b) to give details of literature relied upon and Forensic Science Regulator (2020b) elaboration that this should 'include sufficient detail to enable another expert to identify the relevant document' (para. 10.3.24)) – to explain a typology of urban collectives widely accepted in the criminology community: 'a] peer group, b] street gang and c] an organised criminal network'. He argued that if the group in question is merely a 'peer group', for whom criminal activity is not central to their self-definition, then he concurred with my interpretation of *killy*. If, on the other hand, the group is identified as being a 'street gang', then Mr X disputes my interpretation, and instead favours *killer friend/the feeling of wanting to kill*. This is the first appearance of *killer friend* – up to this point we had only seen Mr X interpret *killy* as *the feeling of wanting to kill*. It appeared to me, and to the defence counsel, that *killer friend* had been added to bridge the gap between Mr X's original interpretation and mine .

Furthermore, the basis of the semantic differentiation between 'peer group' and 'street gang' definitions is unclear, and particularly puzzling given the information provided by Mr X that peer groups 'copy and imitate [gang] culture' – strange that this would not extend to their language use. Moreover, Mr X said that he had no knowledge of the participants or their situation at the time of his analysis – no knowledge that one of the speakers was speaking from prison where he was on remand having been charged with a suspected gang-related murder. This raised the question of what led him to attribute the 'gang' meaning of the questioned word rather than the arguably more neutral 'peer group' meaning?

The defence team invited me to observe Mr X's evidence, and for three full days I logged in to the Crown Court's online system to hear him being examined, cross examined, and re-examined. In the witness box, Mr X began by explaining that he 'didn't need' to consult any sources in ascertaining the meaning of the UBE items, because it was 'a second language' to him. But it is widely noted in linguistics that native speaker intuition about language is often markedly different from what we can observe in a corpus of actual language use (e.g. Biber *et al.* 1998) – and that is if we accept that he is indeed a 'native speaker'. Mr X was cross examined on the matter of how he keeps his understanding of 'street slang' current, given that his gang involvement dates back some twenty years. His response was that his work with young people and his contact with younger family members enabled this. 'Are your family gang members?' he was asked – his negative response, of course, begging the question of how, if gang and non-gang meanings attached to a particular lexical item are so different, his association with non-

gang member family members could possibly qualify him to comment on the meaning of a word by an alleged gang member.

On the matter of his original interpretation of *killy*, Mr X stated that in his report he had ‘tried to keep it vague’, planning to elaborate during his oral testimony. It is difficult to see how providing one interpretation of a word and then nine months later (i) conceding it could have a completely unrelated, far less incriminating meaning and (ii) adding a brand new third definition, could possibly be described as ‘elaboration’. The opinion had undisputedly been completely transformed.

During his direct examination, the audio recordings of the telephone calls were played to the court. In the transcript of the phone call that began *ay yo yo my killy do*, one party questions the other about whether a particular event has taken place: you know what I want to talk about... is it true? Receiving an affirmative answer, the speaker, according to the transcript, responds shouting man fucking get in. The audio told a different story, which the judge himself pointed out: the speaker clearly responded *my fucking killy, not man fucking get in*. Mr X concurred. If he had had access to the audio, he reiterated, his interpretation would have been different. Mr X argued that this second appearance of *killy* after the revelation of some act, presumably the fatal stabbing at the centre of the trial, lent support to his interpretation killer friend (a possible meaning that had not appeared until after Mr X had viewed my report). This reinforces a point made by Grant and MacLeod (2020: 179) about the importance of an expert ‘learning to insulate oneself from the broader facts of the case... create a deliberate ignorance in which a rigorous analysis can proceed without bias’. I counter-argued, if *killy* can make an appearance both before and after the proclamation then the use of the word is clearly not contingent on that proclamation. Speaker A refers to his friend as *killy* long before there is any acknowledgement that this particular event has taken place. The other point to be made here is that when commenting on linguistic issues for the court, one should always request access to the original audio rather than working from notoriously unreliable police transcripts (see Fraser 2020). As discussed earlier, seeking access to significant products is a requirement of expert witnesses stipulated in FSR CPC (2021a).

As reported in Grant (2017), it requires little expertise to provide a ‘plain English’ gloss of ‘slang’ or patois items. As academic linguists we do not necessarily bring knowledge of a specific variety to a case, but a rigorous methodology. In the *killy* case I was not called to give evidence, which would have given me the opportunity to elaborate on my methodology. Instead, defence counsel considered that the jury’s response to his devastating cross examination of Mr X would suffice, and the interests of justice (and the public purse) could be served adequately without me.

## Conclusions

A widely-cited aim for forensic linguistics is the use of language analysis to ‘improve the delivery of justice’ (Grant and MacLeod 2020: 180), and I conclude here with thoughts about how we might do so organised around some central questions that have transpired from the current discussion.

Firstly, how can we expect jurors to weigh up not just two contradictory opinions, but two wildly disparate methods for reaching those opinions? How can we expect them to assess the validity of lived experiences as compared to empirical linguistic analysis,

or as I have expressed it in the title of this paper, of expertise as an art: the consequence of a perceived innate ability, or as a craft: the duplicable result of learned skills? Clearly we need to strike the balance between judges' understandable reluctance to assign disproportionate credibility to certain professional organisations and methods, and juries' need for a degree of guidance on what constitutes reliable expert evidence. This question ties back to earlier discussion about how, if a jury has been deemed to require expert testimony to assist with something outside of its normal knowledge and experience, it can possibly make decisions about the reliability of said testimony when they hear it.

We can accept that sufficient expertise can be gleaned from sources other than professional or academic training, while nevertheless maintaining that witnesses claiming to possess such expertise must have their methods scrutinised in the same way as experts who have followed the more traditional route. They must be subject to the same rules, as set out in CrPR (2020) and CPD (2020), as experts such as the many among our readership who have studied to doctoral level, honed their skills over many years, and been part of a global community responsible for the rigorous empirical research that underpins casework of this nature. It goes without saying that there can be no allowances made for experts based on the grounds for their expertise – no easing of their obligations owing to their close working relationship with the police, and judicial scrutiny of all listed expert witnesses is crucial. Such scrutiny could potentially be encouraged through specially developed education schemes, or as recommended by the Law Commission (2011), through published guidelines for the judiciary. As discussed above, Mr X's evidence failed to meet a number of legal requirements, and sufficient critique from the judge may well have led to it being excluded on those grounds.

How can we best strike the balance between assisting the jury in reaching its conclusion while preserving its role as trier of fact? I discussed above about the danger that juries may focus on 'perceived pointers to reliability (such as the expert's demeanour or professional status)' (Law Commission 2011: 4). As experts, we must be careful not to intimidate the jury when our legal obligation is to assist it. This is a phenomenon that barristers are aware of – in the *killy* case defence counsel explicitly stated that he would prefer not to call me, because in his experience jurors tend not to respond well to what they perceive as attempts to 'bamboozle' them.

We have talked about the legal precedent for providing a semantically encoded sliding scale of opinion, and about the formal requirement to do so as set out in FSR 2021b. As Coulthard, Johnson & Wright point out, however, one issue with such scales is that it is impossible to know if the jury are attaching exactly the same meaning to the scales as the expert is; and furthermore, regardless of the expert's tentativeness, the jury ultimately have to make a binary decision about guilt (2017: 198). On this last point, and echoing CrPR 19.2 (1) (a), it is the responsibility of the expert to restrict their opinion to their own area of expertise – which does not encompass the guilt or otherwise of the defendant. For example, in the *killy* case described above, an expert's job is to comment on the likelihood that each of the potential meanings was accurate, given the context in which the word was used – not to select a definition based on one's belief about the speakers' membership of a gang, with the centrality of criminality that that implies. As soon as Mr X's testimony strayed into this arena, it should have been struck from the record.

In the absence of a statutorily imposed test for admissibility it would appear that engaging with judges on the matter of reliability in general, and empirical methods more specifically, would be one effective method for improving the standards of expert testimony in England & Wales. This is an endeavour I hope to embark on with a syndicate of other experts in the near future.

But there is also a wider solution that is the responsibility of all of us, whether or not we undertake expert work. If solicitors, barristers, and most importantly judges are largely unaware of the existence of disciplines like our own, it should scarcely be a surprise that expertise based on highly questionable methods such as those of Mr X is so easily admitted without question, and the threat of miscarriages of justice looms so menacingly. The more visible forensic linguists, cultural scholars, and academics from other lesser-known scientific disciplines are, the more level the playing field becomes for defendants. A concerted attempt by our disciplines to promote our craft in public fora will inevitably lead to information seeping into the psyche of the legal profession, as well as that of jurors who ultimately decide how much weight to assign to the evidence they hear. We must be shameless self-promoters, taking every opportunity we can to publicise our work – not simply in the interests of our disciplines themselves but in order to alert the legal profession to our existence and our capacity to inform their practice. This clearly has the potential to take us leaps and bounds on the journey to improving access to justice.

## Notes

<sup>1</sup><https://www.mewa.org.uk/>

<sup>2</sup><https://academyofexperts.org/>

<sup>3</sup><https://www.jspubs.com/>

<sup>4</sup><https://www.theguardian.com/science/2009/apr/05/forensic-science-government-funding>

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