Chapter 22

Suppression Hearings

§ 22.01 THE TIMING OF THE SUPPRESSION HEARING

As explained in Chapter 7, motions practice varies considerably among jurisdictions. Some States require motions to suppress to be made in writing and filed by a specified pretrial deadline; other States allow the motions to be made in writing or orally at trial.

In jurisdictions that require pretrial motions, the hearing on the motion may, depending upon the jurisdiction, be conducted in advance of trial or in the midst of trial. In some jurisdictions, evidentiary hearings on motions to suppress are routinely held days or even weeks before the trial. (Such an early scheduling of suppression hearings is particularly advantageous to the defense, since it enhances the usefulness of the hearings for discovery. See §§ 22.02, 22.04 *infra.*) In other jurisdictions the suppression hearing is commonly held immediately before trial and, depending upon local practice, defense counsel may or may not find it easy to obtain a continuance of the trial for the purpose of getting a transcript of the suppression hearing. In still other jurisdictions the suppression hearing (frequently called a *voir dire*) takes place in the course of trial, at the time when the first witness is asked about the challenged evidence.

The trial-objection procedure, which has fallen into disfavor in most jurisdictions as pretrial motions practice has developed, permits the respondent to object to suppressible evidence for the first time at trial. A *voir dire* hearing is then held on the objection. In jury trials, the jury is removed while the hearing proceeds, with the judge sitting as the trier of whatever issues of fact are dispositive of the respondent's suppression claims. To be sure, even in jurisdictions that require pretrial motions, the defense can request the suppression of evidence for the first time at trial in exceptional circumstances – for example, when defense counsel could not reasonably have known of the challenged evidence or the factual or legal grounds for challenging it prior to trial. See § 22.07 *infra.* Similarly, in these pretrial-motion jurisdictions the defense can renew a previously denied suppression motion at trial on the basis of newly discovered evidence. See § 22.07 *infra.* What distinguishes the trial-objection jurisdictions is that objections to suppressible evidence are routinely entertained, with no need to show special circumstances, at the time when the evidence is presented by the prosecution in its case-in-chief at trial. But the objection must be made when the first prosecution witness begins to testify about the suppressible evidence; an objection made later in the trial will be held untimely.

§ 22.02 DEFENSE GOALS AND STRATEGIES AT A SUPPRESSION HEARING

Suppression hearings may be used by the defense for several different purposes. To put a hearing to the most effective use, defense counsel needs to make a preliminary determination of which purposes s/he should be pursuing in this particular case. Often, a clear-cut choice between one purpose and another will be necessary, because the purposes or important means for

achieving them are inconsistent. This is ordinarily not a choice that can be put off until the time of the evidentiary hearing: Both the content of the suppression motion and the nature of counsel's pre-hearing preparation will vary considerably depending upon counsel's choice of goals and consequent strategies for the hearing.

The first and most obvious potential goal is to win the hearing and secure suppression of whatever evidence is challenged. Victory in a suppression hearing will frequently result in the prosecutor's having to dismiss the entire case against the respondent. For example, suppression of the drugs and all police testimony relating to their seizure in a drug possession case usually leaves the prosecutor without any evidence of the respondent's alleged wrongdoing. In many cases suppression of eyewitness identification testimony or of a confession deprives the prosecution of the only available evidence of the respondent's identity as the perpetrator of the offense. Even when a defense victory at the suppression hearing does not terminate the prosecution, the suppression ruling may create major gaps in the prosecutor's proof and thereby substantially improve the chances for an acquittal at trial.

An alternative defense goal at the suppression hearing is to obtain discovery of the prosecution's theory of the case and supporting evidence on the issue of guilt. Depending upon which claims are litigated and the way in which defense counsel shapes the hearing, the prosecutor's evidence at the suppression hearing may provide a full preview of the prosecution's case-in-chief at trial. For example, if the suppression motion challenges the legality of the respondent's arrest on the ground that the arresting officers lacked probable cause, the prosecutor may be obliged to present extensive testimony regarding the facts of the crime known to the police and the facts that led the police to believe that the respondent was the perpetrator. In addition to obtaining this disclosure of the prosecution's evidence, counsel may also be able to obtain discovery of documents that would not otherwise be available until mid-trial: In some jurisdictions the prosecution's presentation of a witness in a suppression hearing activates a prosecutorial duty to turn over to the defense any prior written statements of that witness or documents prepared by that witness. *See, e.g.,* N.Y. FAM. CT. ACT § 331.4(3)(a) (2022). Beyond this discovery of the content of the prosecution's case, defense counsel also gains a valuable opportunity to watch prosecution witnesses on the stand and acquire insights into their vulnerability to particular approaches on cross-examination. Indeed, it is often possible to use a suppression hearing to test risky lines of cross-examination in order to determine what questions can be safely used at trial. In jurisdictions where delinquency cases are tried to a jury or where liberal recusal rules permit the defense to obtain a different judge for the trial (see § 22.07 *infra*), the ultimate trier of fact will never hear the results of defense counsel's experimentation. And even when the judge presiding at the motion hearing does sit at the respondent's bench trial, counsel can use experimentation in the motion hearing to decide what evidence should be put into the trial record. Naturally, these discovery benefits will be enhanced in jurisdictions where the suppression hearing is held in advance of trial. However, even discovery procured in a mid-trial hearing can prove immensely useful in determining what additional cross-examination would be fruitful or dangerous and in deciding other questions of trial tactics, such as whether to put the respondent on the stand or to present other defense witnesses.

A third potential goal of the suppression hearing is to extract concessions from prosecution witnesses on the record, for defense counsel's use in examining and impeaching those witnesses at trial. Often prosecutors fail to coach their witnesses prior to the suppression hearing with the same care that they employ in preparing for trial, and it will be possible to lure an unwary prosecution witness into conceding affirmatively helpful points. At the very least, counsel can circumscribe the damage that any witness will be able to do at trial, by locking him or her into a version of the facts that s/he cannot alter without being exposed to impeachment by the inconsistent testimony that s/he gave at the hearing. See §§ 22.04(c), 31.11 *infra,*. Finally, the mere fact that the witness is telling his or her version of the facts twice – once at the suppression hearing and again at trial – often proves beneficial: Particularly when the suppression hearing takes place some time before trial, witnesses will change details in their stories and can then be discredited by confronting them with the discrepancies. All of these means of controlling or undercutting prosecution witnesses' trial testimony will be greatly enhanced by obtaining a transcript of the suppression hearing to use for impeachment at trial. See § 22.07 *infra.*

There are several other benefits that the defense may gain from litigating suppression motions. The most important ones are catalogued in § 7.03(a) *supra*. But while these benefits should be considered as factors in counsel's initial decision whether or not to file a suppression motion and bring it on for evidentiary hearing – together with the countervailing considerations of cost and risk that such a motion may entail (see § 7.07 *supra*) – they will seldom play more than a minor role in shaping counsel's tactics and techniques for conducting the hearing. Counsel's primary determinants in preparing for and handling an evidentiary suppression hearing will almost always be strategies for pursuing one or more of the three key goals of getting prosecution evidence suppressed, obtaining discovery, and/or creating impeachment material for use at trial. When these three goals prove inconsistent, counsel will have to choose among them. See § 22.04 *infra.*

§ 22.03 PROCEDURAL ASPECTS OF THE SUPPRESSION HEARING

§ 22.03(a) The Defense Response When a Prosecution or Defense Witness Fails To Appear

Frequently, the prosecutor will announce that an essential prosecution witness has failed to appear and that the prosecution is therefore seeking a continuance of the suppression hearing. Police witnesses are particularly common no-shows. If the hearing is scheduled for the day of trial and the prosecutor is requesting a continuance of the trial as well, counsel should invoke any applicable speedy-trial sanctions, such as dismissal of the case or release of a respondent who is detained. See Chapter 15. Even if the suppression hearing is scheduled days or weeks before trial, counsel should ask for sanctions as a result of the prosecutor's unwillingness to proceed: If the prosecutor or the judge remarks that the hearing can be re-scheduled without delaying the trial, counsel should respond that sanctions are nonetheless appropriate to deter prosecutors from cavalierly ignoring suppression hearing dates, to the detriment of the court's calendar and discouragement of defense witnesses. The apt sanction, counsel should insist, is a judicial ruling

that the motion has been conceded (in essence, forfeited) by the prosecution. *See, e.g., People v. Goggans,* 123 A.D.2d 643, 506 N.Y.S.2d 908 (N.Y. App. Div., 2d Dep't 1986). If the judge seems dubious about the appropriateness of this remedy, counsel should point out that it is the closest possible analogue to the trial-date sanction of dismissal when the prosecutor is declines to proceed and also that it is the only effective deterrent of prosecutorial neglect. For discussion of *Goggans* and of remedies for prosecutorial unreadiness, see § 15.03 *supra*.

Occasionally, prosecutors will attempt to get around a witness's failure to appear by going forward with hearsay testimony to cover the matters that the missing witness would have recounted. Although hearsay testimony usually is admissible in suppression hearings, counsel should point out the inherent unreliability of second-hand information that is insulated from testing by cross-examination and should argue accordingly that the hearsay testimony is not sufficient to satisfy the prosecutor's burden of persuasion at the hearing. See §§ 22.03(d), 22.03(e) *infra.*

A trickier problem for defense counsel arises when a missing prosecution witness is crucial for the *respondent's* case at the hearing and the prosecutor elects to go forward by presenting other witnesses who participated in the same events or observed them. Defense counsel is well advised to forestall this situation by subpoenaing all prosecution witnesses whom s/he may need, including police and other law enforcement personnel. See § 10.02 *supra.* If counsel has failed to subpoena a prosecution witness who is crucial for the defense case, counsel will need to seek a continuance, and that continuance will probably be charged to the defense for speedy-trial purposes. See § 15.04 *supra.* If counsel did subpoena the prosecution witness, then counsel should explain that the witness is essential to the defense presentation and, in requesting a continuance, should ask that the continuance be charged to the prosecution – or, as a fall-back position, that the continuance be charged jointly to defense and prosecution. The prosecutor will undoubtedly argue that, because the prosecution is willing to go forward, the continuance should be charged solely to the defense; but counsel's surrebuttal is that any delay resulting from the failure of a witness to obey a court subpoena should be charged to the party with whom the witness is allied and which is best able to control the witness. If the witness is a law enforcement agent, counsel should point out that delays resulting from the dilatoriness or negligence of such personnel are ordinarily counted against the prosecution in the speedy-trial calculus, even when the prosecutors themselves have not been derelict. *See Doggett v. United States*, 505 U.S. 647, 652-53 (1992); *United States v. Velazquez*, 749 F.3d 167, 175-77, 180-81 (3d Cir. 2014).

If the missing witness is needed by the defense solely to impeach another prosecution witness in the event that the latter witness denies a prior inconsistent statement, defense counsel does not necessarily have to request a continuance. Counsel has the option of alerting the judge to the possible need for the witness and then offering to proceed without the witness, on the understanding that counsel will be given the opportunity to complete the hearing by calling the missing witness at a later date if necessary. As counsel can point out to the judge, it may never be necessary to present the missing witness, because the testifying witness may admit to making the impeaching statement. See § 31.11 *infra.* In any such colloquies with the judge, defense counsel

must carefully guard against alerting the prosecutor to the nature of the anticipated impeachment; if the court wishes a detailed proffer, counsel should insist that that proffer be made *ex parte* to avoid disclosure of defense strategies to the prosecution.

If the missing witness is solely a foundational witness (for example, a police communications division officer whose testimony will establish the standard police procedures for recording radio communications), defense counsel should consider offering to go forward if the prosecutor will stipulate to the foundational facts that counsel wishes to adduce. The stipulation should, in most cases, suffice to fill counsel's needs. It is usually advisable to make the stipulation offer in open court. Then, if the prosecutor refuses to stipulate and defense counsel is forced to ask for a continuance to obtain the missing foundational witness, the judge will know to attribute the disruption of the court's calendar to the prosecutor's obstructionism and will be more disposed to grant the continuance. Or the judge may intervene and put pressure on the prosecutor to agree to the stipulation.

Whenever defense counsel does need to seek a continuance of a suppression hearing, counsel should be ready to argue both the factual basis for the request and the respondent's legal right to obtain a continuance in order to prepare adequately for the hearing. See § 15.02 *supra.* In requesting the continuance, however, counsel should again be alert to the danger of revealing defense strategies to the prosecution. If the continuance is necessitated by a defense witness's failure to appear and if revelation of the witness's name might lead the police to interview the witness before the next hearing, counsel should simply omit the witness's name or offer to reveal it to the judge *ex parte.*

§ 22.03(b) Waiving the Respondent's Presence in Suppression Hearings That Involve an Identification Suppression Claim

Counsel litigating an identification suppression claim should consider waiving the client's presence during the testimony of all witnesses whose eyewitness identifications s/he is challenging. This waiver is strongly desirable from the defense perspective for two reasons.

First, the eyewitness's observation of the respondent during the suppression hearing will aggravate the effect of prior suggestive police procedures and may ensure the witness's identification of the respondent at trial. Not only will the witness have seen the respondent for an additional, prolonged period of time, so that s/he will be more likely to feel and testify persuasively at trial that the respondent "looks familiar" but also the witness will have seen the respondent in a highly suggestive setting. (Unlike a lineup, the setting of the suppression hearing makes it quite obvious which person in the courtroom has been charged as the culprit.) Second, the presence of the respondent at the suppression hearing frustrates any hope of obtaining from the witness an unvarnished description of the perpetrator for use in arguing the suppression motion: The witness will simply describe the youth s/he is observing at counsel table.

In several jurisdictions the courts have recognized the accused's right to waive his or her

presence at an identification suppression hearing, relying on either or both of two rationales: (i) that the constitutional protections against suggestive pretrial identification procedures entitle the defense to avoid an additional unnecessary and suggestive encounter between the accused and the eyewitness, and (ii) that the accused's right to be present during all court hearings is a personal, waivable right because it exists solely for the accused's protection and not for the protection of any governmental interests. *See, e.g., People v. Huggler,* 50 A.D.2d 471, 473-74, 378 N.Y.S.2d 493, 496-97 (N.Y. App. Div., 3d Dep't 1976); *Singletary v. United States,* 383 A.2d 1064, 1070 (D.C. 1978).

The court will usually insist that counsel demonstrate on the record that the respondent's waiver is a knowing and voluntary relinquishment of the right to be present at the hearing. Counsel can make the requisite showing either: (i) by presenting a written waiver signed by the respondent (and, if the respondent is very young, also signed by the respondent's parent), which sets forth the respondent's understanding of his or her right to be present, the reasons for waiving the right to be present, and the respondent's desire to waive the right; or (ii) by bringing the respondent to the hearing solely for the purpose of responding to the court's inquiry into the voluntariness of the waiver and then sending the respondent out of the courtroom before the eyewitness enters.

Whether the respondent's presence should be waived for all or only part of the hearing depends upon the roster of witnesses who will testify at the hearing. If most of the witnesses are eyewitnesses to the crime, then the respondent's presence should be waived during the entire hearing and the respondent should be kept away from any parts of the courthouse where s/he might encounter or be observed by any of the eyewitnesses. On the other hand, if there is a significant portion of the hearing that the respondent can safely attend – and naturally also if the respondent will take the stand at the hearing – then counsel should waive the respondent's presence only during the portions of the hearing when eyewitnesses will be in or around the courtroom. Counsel should make arrangements for the respondent to sit during those portions of the hearing in a location where s/he is not likely to be observed by any of the eyewitnesses and to enter and leave the courtroom by a route that will not lead to any encounters with the eyewitnesses.

§ 22.03(c) Enforcing the "Rule on Witnesses" in a Suppression Hearing

Throughout a trial both parties have the right to insist that the opposing witnesses be excluded from the courtroom, in order to prevent them from hearing information that might affect their testimony. See § 27.11 *infra.* This "rule on witnesses" should similarly be invoked by the defense at a suppression hearing. At the beginning of the hearing, defense counsel should request that the courtroom be cleared of any prosecution witnesses who might testify either at the suppression hearing or at the trial. Counsel also must be alert throughout the hearing to the possibility of a prosecution witness entering and remaining in the courtroom. If, notwithstanding counsel's precautions, a prosecution witness does overhear another witness's testimony, counsel should request that the court impose the only sanction that will both remedy the violation and

deter future misconduct by prosecution witnesses: exclusion of the witness's testimony at the suppression hearing and trial.

As at trial the operation of the rule on witnesses does not bar the respondent from the courtroom. S/he has a right to be present while all testimony in the case is taken. See § 27.01 *infra.* For discussion of the circumstances under which the respondent should waive his or her right to be present at a suppression hearing, see § 22.03(b) *supra.*

§ 22.03(d) Who Proceeds First in the Suppression Hearing: The Burdens of Production and Persuasion

Even though the suppression motion is a defense motion, it is customary in many jurisdictions for the prosecution to proceed first and to present the testimony of all police officers and other witnesses whom the prosecution intends to call. As a result, the defense has the distinct advantage of being able to cross-examine (and thereby lead and control) the officers and other prosecution witnesses. In some jurisdictions, however, the defense is expected to proceed first, at least on some suppression issues. In these jurisdictions, defense counsel will usually want to invoke the constitutional caselaw dealing with burdens of production and persuasion, described in this section, to argue that the prosecutor should be required to proceed first. On rare occasions, the defense may reap some benefit from proceeding first and calling the police officers as defense witnesses – for example, when: (i) the officers are known to be unprepared and the prosecutor is an experienced and able examiner who can effectively shape their testimony on direct; or (ii) the rules of evidence in the particular jurisdiction permit parties to lead and impeach their own witnesses; or (iii) the judge will permit the officers and other prosecution witnesses to be called as hostile witnesses (see § 33.25 *infra*). But in most jurisdictions the greater latitude allowed for leading and impeaching witnesses on cross-examination makes it wise for defense counsel to force the prosecutor to proceed first whenever possible.

The allocation of the burden of production (also known as the burden of going forward) and of the burden of persuasion (also known as the burden of proof) varies with the constitutional issue being litigated:

(i) *Search and seizure issues.* Federal constitutional law permits the burden of going forward to be imposed on the defense, *see Rawlings v. Kentucky,* 448 U.S. 98, 104-05 (1980), although, of course, state statutes, court rules, or state constitutional caselaw can elect to impose that burden on the prosecution instead. *See, e.g., State v. Boyd*, 275 Kan. 271, 273, 64 P.3d 419, 422 (2003); *State v. Carrawell*, 481 S.W.3d 833, 837 (Mo. 2016) (dictum); *People v. Dodt,* 61 N.Y.2d 408, 415, 474 N.Y.S.2d 441, 445, 462 N.E.2d 1159, 1163 (1984). *Cf. Commonwealth v. Long*, 485 Mass. 711, 152 N.E.3d 725 (2020), summarized in § 23.28 *infra.* In jurisdictions where the defense does bear the burden of going forward on Fourth Amendment issues, that burden is easily satisfied whenever the search or seizure was made without a warrant. Once the defense has shown that a search or seizure was conducted and that the police lacked a warrant authorizing it, the Fourth Amendment shifts the burden of persuasion to the prosecution to prove

that the warrantless search or seizure falls within one of the established exceptions to the warrant requirement. *Riley v. California*, 573 U.S. 373, 382 (2014) ("[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement"); *McDonald v. United States,* 335 U.S. 451, 456 (1948); *United States v. Jeffers,* 342 U.S. 48, 51 (1951); *United States v. Curry*, 965 F.3d 313, 319 (4th Cir. 2020) (en banc); *cf. Vale v. Louisiana,* 399 U.S. 30, 34 (1970); *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 222 (1973) (dictum); *Florida v. Royer,* 460 U.S. 491, 497 (1983) (plurality opinion); see § 23.02(a)(i) *infra*. *And see State v. Jones*, 172 N.H. 774, 235 A.3d 119 (2020) (two police officers approached the defendant and one talked with him for about 20 minutes while the other ran a warrants check; when the latter officer learned that there was an outstanding bench warrant for the defendant, the officers arrested him; on his motion to suppress evidence seized incident to the arrest on the ground that he had been unconstitutionally seized during his conversation with officer number one, only officer number two testified, so the record contained no significant information about the interaction between officer number one and the defendant, other than officer number two's observation from beyond hearing distance that it appeared to be very laid back; the New Hampshire Supreme Court reverses the denial of suppression and the ensuing conviction on the ground that the prosecution failed to meet its burden of proving that the defendant was not seized before the officers learned of the outstanding warrant for his arrest). When the police did possess a warrant authorizing the search or seizure, federal constitutional law would appear to permit the imposition of the burden of persuasion of the invalidity of the warrant or the search upon the defense, *see, e.g., Malcolm v. United States,* 332 A.2d 917, 918-19 (D.C. 1975), but some States impose the burden of persuasion upon the prosecution even in these cases. *See, e.g., Graddy* v. *State*, 277 Ga. 765, 596 S.E.2d 109 (2004)*; State v. Heald,* 314 A.2d 820, 828-29 (Me. 1973); *State v. Martin*, 145 N.H. 362, 364, 761 A.2d 516, 518 (2000). As for the quantum of evidence that the prosecution must present to satisfy its burden, on most issues the federal constitution requires nothing more than a preponderance of the evidence, *United States v. Matlock,* 415 U.S. 164, 177, 178 n.14 (1974); *cf. Colorado v. Connelly,* 479 U.S. 157, 167-69 (1986); *Nix v. Williams,* 467 U.S. 431, 444 n.5 (1984); *and see Bourjaily v. United States,* 483 U.S. 171, 175-76 (1987) (dictum), although "the States are free, pursuant to their own law, to adopt a higher standard" with respect to the prosecutorial burden. *Lego v. Twomey,* 404 U.S. 477, 489 (1972). Some States have, indeed, imposed upon the prosecution the higher standard of clear-and-convincing evidence in proving certain specific exceptions to the warrant requirement. *See, e.g., Stone v. State*, 348 Ark. 661, 669, 74 S.W.3d 591, 596 (2002) (consent searches); *Blair v. Pitchess,* 5 Cal. 3d 258, 274, 486 P.2d 1242, 1253, 96 Cal. Rptr. 42, 53 (1971) (consent searches); *People v. Zimmerman,* 101 A.D.2d 294, 475 N.Y.S.2d 127 (N.Y. App. Div., 2d Dep't 1984) (consent searches); *People v. Dorney,* 17 Ill. App. 3d 785, 788, 308 N.E.2d 646, 648 (1974) (abandonment); *State v. Ibarra*, 953 S.W.2d 242, 245 (Tex. Crim. App. 1997) (consent searches). In jurisdictions where the defense is assigned a burden of persuasion in warrant cases, the applicable standard is a preponderance of the evidence. *See, e.g., State v. Edwards,* 98 Wis. 2d 367, 297 N.W.2d 12 (Wis. 1980).

(ii) *Challenges to the admissibility of a confession.* When the issue is the voluntariness of a confession or other incriminating statement by the respondent, the prosecution bears the burden

of persuasion. *Lego v. Twomey,* 404 U.S. at 489 (dictum); *see also United States v. Raddatz,* 447 U.S. 667, 678 (1980); *Missouri v. Seibert*, 542 U.S. 600, 608 n.1 (2004) (plurality opinion). The quantum of proof required as a matter of federal constitutional law is "a preponderance of the evidence," *Lego v. Twomey,* 404 U.S. at 489; *accord*, *Missouri v. Seibert*, 542 U.S. at 608 n.1 (plurality opinion), although several States have, "pursuant to their own law, . . . adopt[ed] [the] . . . higher standard" (*Lego v. Twomey,* 404 U.S. at 489) of proof beyond a reasonable doubt. *See, e.g., People v. Jiminez,* 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978), *partially overruled on an unrelated point*, *People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr.2d 582 (1993); *State v. Carter,* 412 A.2d 56, 60 (Me. 1980); *Lowe v. State*, 800 So.2d 552, 554-55 (Miss. App. 2001); *In the Matter of Jimmy D.*, 15 N.Y.3d 417, 423, 938 N.E.2d 970, 973, 912 N.Y.S.2d 537, 540 (2010). Although the jurisdictions vary with respect to which party bears the burden of production in a confession suppression hearing, the Supreme Court's imposition of the burden of persuasion on the prosecution and the fact that it is the prosecutor who is proffering the evidence support the argument that the proper procedure is to place the burden of production on the prosecution. When the issue is a waiver of *Miranda* rights, the prosecution again bears the burden of persuasion, *Miranda v. Arizona,* 384 U.S. 436, 475-76, 479 (1966); *see also Brewer v. Williams,* 430 U.S. 387, 402-04 (1977); *Tague v. Louisiana,* 444 U.S. 469 (1980) (per curiam); *Missouri v. Seibert*, 542 U.S. at 608 n.1 (plurality opinion); *J.D.B. v. North Carolina*, 564 U.S. 261, 269-70 (2011), by a preponderance of the evidence, *Colorado v. Connelly,* 479 U.S. at 167-69; *Missouri v. Seibert*, 542 U.S. at 608 n.1 (plurality opinion). Although the *Connelly* opinion states unequivocally that "[w]henever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence" (479 U.S. at 168), it is possible that a heavier burden of proof exists on the separate issue raised by *Edwards v. Arizona,* 451 U.S. 477 (1981), in *Miranda* cases in which "an accused has [once] invoked his right to have counsel present during custodial interrogation," *id.* at 484. *Edwards* held that an accused person in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id*. at 484-85. *See also Smith v. Illinois,* 469 U.S. 91, 95 (1984) (per curiam); *Minnick v. Mississippi*, 498 U.S. 146, 150-56 (1990); *Davis v. United States*, 512 U.S. 452, 458 (1994) (dictum); *Montejo v. Louisiana*, 556 U.S. 778, 794-95 (2009) (dictum); § 24.11(c). "The [*Edwards*] rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms." *Minnick v. Mississippi*, 498 U.S. at 151. The Supreme Court has repeatedly said that "[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application" – its capacity to provide ""clear and unequivocal"' guidelines to the law enforcement profession." *Id*., quoting *Arizona v. Roberson*, 486 U.S. 675, 682 (1988). Arguably, to preserve the clarity and firmness of "[t]his 'rigid' prophylactic rule," *id.,* embodying an unprecedented "*per se* approach," *Solem v. Stumes,* 465 U.S. 638, 647 (1984), the prosecution should be required to show by clear and convincing evidence "once a suspect has invoked the right to counsel, [that] any subsequent conversation . . . was initiated by him," *id.* at

641. *See Smith v. Illinois,* 469 U.S. at 95 n.2; *and see, e.g.*, *State v. Tidwell*, 775 S.W.2d 379, 386 (Tenn. Crim. App. 1989). But the question remains an open one. *Compare Commonwealth v. Gonzalez*, 487 Mass. 661, 670, 169 N.E.3d 485, 494 (2021), quoted in § 24.11(c) *infra* (applying a beyond-a-reasonable-doubt standard in holding that the prosecution failed to meet its burden on the initiation issue), *with Moore v. Berghuis*, 700 F.3d 882, 888 (6th Cir. 2012), discussed in § 24.11(c) *infra*, reasoning that "[t]he government did not show by a preponderance of the evidence, and the [state] . . . trial court did not clearly find, that Moore, and not the officer, initiated further conversation" after Moore had invoked his right to counsel under *Edwards*. The Sixth Circuit opinion does not explicitly consider its choice of this quantum of proof or address possible alternatives; and because its "review [of] the district court's denial of Moore's petition for a writ of habeas corpus [was restricted by] . . . the standards of review as set forth in the Antiterrorism and Effective Death Penalty Act of 1996" (*id*. at 886; see § 39.03(b) *infra*), its phrasing of the quantum cannot be taken as addressing the applicable burden in non-AEDPA cases.

(iii) *Identification suppression issues.* When the issue is whether the respondent's right to counsel at a post-arraignment lineup was violated, the prosecution bears the burdens of production and persuasion and must show either that counsel was actually present or that there was a valid waiver of the right to counsel. *See, e.g., United States v. Garner,* 439 F.2d 525, 526-27 (D.C. Cir. 1970). If a violation of the right to counsel is established, then the prosecution cannot elicit an in-court identification unless it shows by clear and convincing evidence that the in-court identification has an independent source. *See United States v. Wade,* 388 U.S. 218, 240 n.31 (1967); *United States ex rel. Whitmore v. Malcolm,* 476 F.2d 363, 365 n.2 (2d Cir. 1973). If the suppression motion challenges eyewitness identification procedures on due process grounds, most jurisdictions require that the defense satisfy an initial burden of showing suggestivity, with the burden then shifting to the state to show by clear and convincing evidence that the identification was nevertheless reliable. *See, e.g., People v. Monroe*, 925 P.2d 767, 774 (Colo. 1996); *People v. McTush,* 81 Ill. 2d 513, 520, 410 N.E.2d 861, 865, 43 Ill. Dec. 727 (1980); *State v. Howe*, 129 N.H. 120, 123, 523 A.2d 94, 96 (1987); *People v. Rahming,* 26 N.Y.2d 411, 417, 259 N.E.2d 727, 731, 311 N.Y.S.2d 292, 297 (1970).

In jurisdictions where the defense is ordinarily expected to proceed first at suppression hearings, defense counsel can insist that the order of procedure be reversed for any issues on which federal constitutional caselaw requires the prosecution to bear the burden of production. (Where the allocation of the burden of production has not yet been resolved by the Supreme Court but has been imposed upon the prosecution by state courts in other jurisdictions, counsel should use the logic of that caselaw to urge the local court to alter its practice.) If defense counsel once succeeds in convincing the court that the Constitution places the burden of production upon the prosecutor on at least one issue, counsel can then argue that the hearing will be too unwieldy if the defense is left to carry the burden of production on other issues. Counsel should point out that the alternation of burdens of production would result in both parties calling the same witnesses to the witness stand and alternating styles of examination depending upon the issue to which each particular question is relevant – a procedure calculated to result in numerous time-

consuming objections and rulings.

If the judge is not persuaded and insists that the defense must carry the burden of production on some issues, counsel should request leave to call police officers and any other persons who are allied in interest with the prosecution as hostile witnesses, with the right to ask leading questions on direct examination. See § 33.25 *infra.* (In support of this request, counsel should point out that police personnel not only have reasons of professional pride and self-advancement for seeking to uphold the legality of arrests, searches, seizures, confessions, and identification procedures in which they have participated but are also subject to potential civil and criminal liability if their conduct in these connections is found to have violated constitutional rights. *See, e.g., Monroe v. Pape,* 365 U.S. 167 (1961) (civil liability under the federal Civil Rights Acts); *Screws v. United States,* 325 U.S. 91 (1945) (criminal liability under the federal Civil Rights Acts); *and see United States v. Price,* 383 U.S. 787, 794 (1966) (criminal liability of private individuals who are "willful participant[s] in joint activity with the State or its agents").) When the respondent's burden of production can be satisfied by proving an easily-established threshold fact – for example, that the search was warrantless – counsel should seek a stipulation from the prosecutor conceding the threshold fact and, once the stipulation is made, insist that the prosecutor proceed with his or her witnesses, allowing subsequent opportunity for rebuttal testimony by the defense. As a rule, such requests should be made in open court at the beginning of the hearing so that, if the prosecutor refuses to stipulate, the judge will understand that the prosecution is the party responsible for wasting the court's time by disputing the indisputable. Counsel should then announce that s/he will present evidence only to the extent necessary to prove the threshold fact, reserving further testimony for rebuttal.

§ 22.03(e) The Admissibility of Hearsay Testimony in Suppression Hearings

As a general matter, hearsay is admissible in suppression hearings. *United States v. Matlock,* 415 U.S. 164, 172-77 (1974); *United States v. Raddatz,* 447 U.S. 667, 679 (1980) (dictum). However, there are certain limitations upon the prosecution's use of hearsay. The defense has a right to confront and cross-examine the prosecution's witnesses at a suppression hearing, *see, e.g.*, *United States v. Hodge*, 19 F.3d 51, 53 (D.C. Cir. 1994); *United States v. Salsedo*, 447 F. Supp. 1235, 1241 (E.D. Cal. 1979), *vacated on an unrelated point*, *United States v. Torres*, 622 F.2d 465 (9th Cir. 1980) (per curiam) (summarized in § 22.03(f) second paragraph *infra*); *People v. Edwards*, 95 N.Y.2d 486, 491, 719 N.Y.S.2d 202, 204-05, 741 N.E.2d 876, 878-79 (2000); *State v. Ehtesham,* 309 S.E.2d 82, 84 (W. Va. 1983), and a prosecutor cannot use hearsay evidence in such a way as to deprive the defense of meaningful cross-examination of a prosecution witness. *See, e.g., State v. Terrell,* 283 N.W.2d 529, 531 (Minn. 1979) (the prosecution cannot make its case at a suppression hearing merely by submitting a transcript of grand jury testimony to show the lawfulness of a search); *People v. Kaufman*, 457 Mich. 266, 577 N.W.2d 466 (1998) (per curiam) (explaining the Michigan rule that precludes the prosecution from "relying exclusively on preliminary examination transcripts in the conduct of suppression hearings" (*id*. at 273, 577 N.W.2d at 469), and adopting a limited exception for cases in which "the lawyers . . . cho[o]se to have the motion decided on the basis of

the preliminary examination transcript" (*id*. at 276, 577 N.W.2d at 471); the court observes that "[c]ertainly, there are cases in which further testimony would be harmful to the defendant's interests, and that determination is normally reserved for defense counsel" (*id*.))).

A second limitation upon the general rule of admissibility of hearsay is that the prosecutor's hearsay evidence is subject to exclusion if particularized reasons appear for doubting its reliability. Thus if defense counsel has a good-faith basis for asserting that the out-of-court declarant lacked personal knowledge of the matters s/he reportedly stated or had some bias against the respondent, the prosecutor should be required to produce the declarant for cross-examination by the defense. *See United States v. Matlock,* 415 U.S. at 175-77 (in holding that hearsay evidence was admissible at a suppression hearing, the Court stresses that the witness "harbored no hostility or bias against respondent that might call her statements into question" and that the hearsay statements "were also corroborated by other evidence received at the suppression hearing" and bore "indicia of reliability"). Multiple hearsay can be challenged as particularly unreliable because of the inherent potential for errors and inaccuracies when a statement is relayed between several individuals.

Finally, even if the proffered hearsay evidence is admissible, it may be insufficiently persuasive to meet the prosecutor's burden of proof (see § 22.03(d) *supra*) on a particular suppression issue. *See, e.g.*, *People v. Moses*, 32 A.D.3d 866, 868, 823 N.Y.S.2d 409, 411 (N.Y. App. Div., 2d Dep't 2006) (the prosecution's burden of production at a hearing on a motion to suppress identification testimony as the fruit of an unlawful *Terry* stop was not satisfied by the testimony of a police officer who transported the complainant to the location of the show-up but was not involved in the stop of the defendant, could not testify to the circumstances of the stop, and offered nothing more than a "vague and equivocal hearsay" account of a statement made by the arresting officer which "was inadequate to demonstrate" the validity of the arresting officer's actions in stopping and detaining the defendant and transporting him to the location of the show-up).

§ 22.03(f) The Defense Right to Disclosure of Prior Statements of Prosecution Witnesses

In some jurisdictions, statutes or court rules give the respondent the right to obtain from the prosecutor all prior statements of witnesses who testify for the prosecution at the suppression hearing. *See, e.g.,* N.Y. FAM. CT. ACT § 331.4(3)(a) (2022); *United States v. Dockery*, 294 A.2d 158 (1972). The prosecutor typically is obligated to disclose all written or oral statements in his or her possession or the possession of the police or other governmental agencies. The statutes and rules usually provide that this disclosure must be made after each witness has finished his or her direct examination. As a practical matter, however, counsel can often obtain the prior statements of all prosecution witnesses from the prosecutor at the beginning of the suppression hearing by requesting them at that time in the interest of efficiency. If the prosecutor refuses counsel's request and insists upon the prerogative of turning over the statements only at the technically obligatory time, counsel should inform the judge of this and explain that there may be delays

during the hearing while counsel pauses to read the statements turned over by the prosecutor. Mentioning the issue before the hearing commences may lead the judge to lean on the prosecutor to turn over the statements immediately; at the least, it will improve the judge's patience when defense counsel does indeed take time to read the statements during the course of the hearing.

In jurisdictions that do not provide for disclosure by statute or court rule, counsel should nevertheless request all prior statements of each prosecution witness and should assert that the denial of access to these materials is an unconstitutional infringement upon the respondent's right to cross-examine. *Cf. United States v. Salsedo*, 477 F. Supp. 1235 (E.D. Cal. 1979), *vacated on an unrelated point*, *United States v. Torres*, 622 F.2d 465 (9th Cir. 1980) (per curiam) (the district court relied on a federal statute to order the government to "deliver to the defendants all documents in its possession relating to the issue of probable cause for the stop, seizure pursuant to the stop, and the fruits of the stop and seizure" (477 F. Supp. at 1244); the district court explained that "[d]epriving the defendants of the government's records as to what the agents knew at the time of the stop makes meaningful cross-examination almost impossible," and the '"deni[al] [of] the right of effective cross-examination . . . is . . . constitutional error of the first magnitude'" (*id*. at 1241, quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)); on appeal by the government, the court of appeals vacates the district court's order because "[a]fter the filing of the district court opinion, the government delivered to the defendants the notes requested at the suppression hearing," withholding only "the surveillance logs," and then, "[a]t oral argument, the government stated: (1) it would deliver the surveillance logs to the district court for *in camera* inspection; and (2) in the event that the district court determined that the surveillance logs were relevant to the subject matter of the government agent's testimony, the logs would be released to the defendants" (622 F.2d at 465)). In the event that the judge refuses to order the production of the documents, defense counsel should request their disclosure again at trial (see § 27.12(a)(1) *infra*) and then consider whether they reveal any basis for a motion to reopen the suppression hearing on the ground of newly discovered information contained in the documents.

In those jurisdictions where the respondent is expected to proceed first at the suppression hearing and is obligated to conduct direct examinations of police officers, defense counsel should nevertheless request all prior statements of the officers in the possession or control of the prosecution. To support the logic of this request, counsel can point to the disclosure provision in the Federal Rules of Criminal Procedure, which declares that, for purposes of the rules on "Producing Statements at a Suppression Hearing," "a law enforcement officer is considered a government witness." FED. RULE CRIM. PRO. 12(h) (2022). As the commentary to the federal rule explains, this provision reflects the practical consideration that a police officer's loyalty invariably belongs to the government regardless of who has called the officer as a witness; the systemic interest in testing the credibility of the officer can be effectuated only by permitting defense counsel to have access to prior statements of the witness. If the court denies access, counsel will again have to be alert to the possibility of moving to reopen the suppression hearing after obtaining the documents at trial.

§ 22.04 TECHNIQUES FOR CROSS-EXAMINING PROSECUTION WITNESSES AT A

Defense counsel must tailor his or her cross-examination style and the form of cross-examination questions to fit the goal that s/he is pursuing in litigating the suppression hearing. See § 22.02 *supra.* The nature of the cross-examination will vary considerably depending on whether counsel is trying to win the hearing, obtain discovery, or create impeachment material for use at trial.

§ 22.04(a) Examination Techniques When Counsel's Primary Goal Is To Win the Suppression Hearing

If counsel has decided that winning the suppression hearing takes precedence over any other potential goals, s/he will often have to pass up tempting opportunities for discovery on cross-examination in order to avoid the risk of eliciting material that would bolster the prosecution's case on suppression issues. For example, if the defense is seeking suppression of objects seized from a respondent incident to arrest and is urging that the arrest was invalid for lack of probable cause, counsel would not cross-examine an arresting officer whose direct examination by the prosecutor established that the officer acted upon incriminating information from an informant but neglected to address the subject of the informant's veracity. See § 23.32(b) *infra*.

When the goal of winning the hearing overrides that of discovery, counsel will ordinarily proceed in the following ways:

(i) As suggested by the preceding illustration, counsel will forgo cross-examination of a prosecution witness altogether when the prosecutor's direct examination has left holes in the showing which the relevant doctrinal rules require the prosecution to make in order to sustain the legality of the law-enforcement activity which counsel is challenging. The temptation to cross-examine for discovery may be intense in this situation, precisely because counsel would like to know the omitted information and whether it could be put to defense use at trial on the issue of guilt or innocence. But that temptation has to be resisted because the witness's answers on cross or on redirect examination by the prosecutor may serve to cure the defects in the prosecution's justification for the law-enforcement agent's actions.

(ii) When counsel does choose to cross-examine a prosecution witness, s/he will tailor his or her questions to elicit only material that undermines the credibility of statements made by the witness on direct without broadening the subjects of the witness's testimony. That is, counsel will ask only questions that disparage the witness's direct testimony by eliciting some retraction or concession which limits what the witness has said explicitly on direct, and will avoid asking any questions that inject new material into the examination. The trick is to be sure to stay out of areas that could open the door to redirect questioning which adds anything to what the witness said on direct, even though those areas would be ideal for discovery. (As indicated in § 31.01(c) *infra*, redirect examination is ordinarily not permitted to go into matters that are beyond the

scope of the cross.)

(iii) Counsel's cross-examination questions will be tightly framed and closed-ended – seeking yes-or-no answers or their equivalent, rather than the kind of open-ended questions suitable for discovery purposes. For example, in litigating a claim that the police did not have probable cause to arrest the respondent on the basis of the complainant's description, counsel might ask: "Officer, the description you received from Ms. [*X*] did not include any mention of a blue coat, did it?" Counsel would not ask: "What exactly did the complainant say when she was describing her assailant?" Although the latter question would provide excellent discovery, it also gives the officer the chance to bring up portions of the description that match the respondent.

(iv) During the prosecutor's direct examination of witnesses, counsel will object to all potentially inadmissible evidence that could impair the chances of winning the suppression hearing, even though counsel might like to know the inadmissible information for discovery purposes.

In addition to passing up opportunities to obtain discovery of the prosecution's case, counsel may also allow a strong prospect of winning the hearing to dictate the otherwise inadvisable course of revealing facets of the defense case (including, for example, statements taken from prosecution witnesses by defense investigators) that ordinarily would be saved until trial. And suppression hearings that have a realistic chance of winning are the only suppression hearings in which counsel should seriously consider presenting the testimony of defense witnesses and the respondent. See § 22.05 *infra.*

§ 22.04(b) Examination Techniques When Counsel's Primary Goal in Litigating the Suppression Motion Is To Obtain Discovery

When counsel is contemplating using a suppression hearing for the purpose of discovery, s/he will have to engage in a cost-benefit analysis, weighing the value to the defense of each particular item of discovery in preparing for trial against the likelihood and value of winning the suppression motion and the extent to which that likelihood might be impaired by any particular discovery tactic. As implied in § 22.04(a) *supra,* defense counsel would usually be ill-advised to pursue discovery when the chances of winning the suppression of crucial prosecution evidence are very strong, since the cross-examination questions necessary for discovery often will fill gaps in the prosecutor's case at the hearing. If, however, the chances of winning the hearing are remote or if the damage that questioning for discovery could cause to those chances is minimal, then counsel can take advantage of the excellent discovery opportunities afforded by a suppression hearing.

Defense strategies and techniques in a hearing conducted primarily for discovery purposes are the converse of those just described for handling a suppression hearing aimed to produce a defense victory:

(i) Counsel should ordinarily cross-examine every prosecution witness to the maximum extent permitted by the court, covering every area that could conceivably arise at trial. But counsel should not refer to any prior statements of the witness or other documents of which the prosecutor might be unaware that could give the defense an edge at trial.

(ii) Counsel should use predominantly open-ended cross-examination questions, for example: "What was the description of the perpetrator?" "What else did the complainant say?" "What did you do next?" Follow-up questions should be used to assure that subjects are canvassed from every angle: *e.g.*, "Think back and tell us everything s/he said in describing the perpetrator." "Tell us her exact words as best you can recall them." "Anything else she said about the perpetrator's clothing?" "Anything at all about the perpetrator's facial characteristics?" Closed-ended questions should be used only to bottom out each subject of inquiry before moving to the next: "Have you now told us everything said between you and the complainant that provided you with any information which could be used to identify the perpetrator?" [Followed – unless the answer is a categorical "no" – by: "What else? We want the court to hear everything that was said."] By definition, questions calling for yes-or-no answers cannot unearth any *new* subjects of information or alert counsel to the possible existence of subjects s/he does not already know about. What's wanted are forms of questioning that invite the witness to tell everything s/he knows about the case. Counsel should use questions like, "Is there anything else you haven't mentioned about [*X topic*] [*X episode*] [*X time period*]?" and "What more can you remember about [*X topic*] [*X episode*] [*X time period*]?" to get at material that counsel may not have previously contemplated.

(iii) Counsel should not put the respondent or any other defense witnesses on the stand at the suppression hearing. Since the hearing is not being conducted to win, there is no reason to give the prosecutor discovery of the defense case at trial or to risk producing material that the prosecutor can use for impeachment of defense witnesses at trial.

In preparing to use a suppression hearing for discovery, counsel's major task will be to construct reasonable arguments to justify every cross-examination question as relevant to some issue being litigated at the hearing. The problem here is similar to the one discussed in § 4.33 *supra* relating to probable-cause hearings. The prosecutor will predictably object to defense cross-examination questions that appear to be aimed at obtaining discovery of the prosecution's trial evidence. (The technically correct prosecutorial objection here is irrelevancy, although many prosecutors cite the nonexistent objection that a question should be disallowed simply because it is "discovery.") When the prosecutor does object, most judges will be inclined to curb defense questioning in order to speed up the hearing, and even judges who are sympathetic to the defense effort to obtain some discovery will need to protect the record by demanding that defense counsel explain how the challenged question can produce information bearing on the suppression claim that is being adjudicated. Accordingly, for every discovery-oriented cross-examination question that counsel intends to ask, s/he will need to be prepared to demonstrate that the question is relevant to the issues at the suppression hearing. For this purpose, it is useful to keep in mind that a cross-examination question is technically relevant whenever (i) any possible answer to it would

make any fact that supports the respondent's legal theory or theories on the suppression motion more probable, or would make any fact that supports the prosecution's theory or theories less probable, than it would be without the answer; *or* (ii) any possible answer would reflect adversely upon the general credibility of the witness or upon the accuracy of any fact supporting the prosecution's theory or theories which the witness's direct-examination testimony bolsters; *or* (iii) any possible answer would decrease the force of any inference that might be drawn from any piece of testimony given by the witness on direct examination in support of the prosecution's theory or theories; *or* (iv) any possible answer might begin a process of undermining the witness's confidence in any piece of testimony given on direct examination that supports the prosecution's theory or theories, so that the witness might be led eventually to retract it.

In preparing for a suppression hearing at which the primary goal is discovery, counsel will also need to plan out thoroughly the sequence of cross-examination questions for each prosecution witness. Even if counsel is able to justify the questions against the prosecutor's objections of irrelevancy, the judge may increasingly lose patience with an attorney who appears to be primarily engaged in seeking discovery and may, at some point, rule out further cross-examination. Thus counsel will want to structure the cross-examination of every witness in such a way that the key questions covering the matters in which counsel is most interested are asked early in the examination, before questioning is likely to be cut off. In order to decrease judicial impatience, it is useful to intersperse questions that bear clearly and directly on the issues being litigated among counsel's more suspiciously discovery-oriented questions: Judges are far less likely to cut off cross-examination when they feel that discovery is a secondary goal rather than counsel's primary purpose. Counsel should also strive to keep the cross-examination questions flowing at a rapid-fire rate; judges with crowded calendars will not tolerate slow examination styles or delays while the attorney thinks of new questions or consults documents.

To the inexperienced practitioner it may seem that suppression hearings conducted for the purpose of discovery require little preparation. As the foregoing discussion has suggested, however, counsel will need to devote substantial time to planning before the hearing in order to be able to take full advantage of the opportunities for discovery.

§ 22.04(c) Examination Techniques When Counsel's Primary Goal Is To Lay a Foundation for Impeachment at Trial

In suppression hearings conducted primarily for the purpose of creating transcript material that can be used to impeach prosecution witnesses at trial, counsel will usually be pursuing one or more of the following objectives:

(i) To lure the witness into making statements that are affirmatively helpful because:

(a) They tend to negate some element of the offense (thereby preventing conviction altogether or limiting conviction to a lesser included charge);

(b) They tend to establish some fact that supports an affirmative defense (for example, self-defense);

(c) They tend to establish some fact that mitigates the gravity of the offense and will thereby help at sentencing (for example, the fact that the respondent was the look-out and was not directly involved in the beating of the complainant).

(ii) To circumscribe unfavorable testimony so that the witness cannot make even more damaging statements at trial (for example, by pinning an eyewitness down to the statement that s/he could not have observed the face of the perpetrator for more than a minute, in order to prevent the witness from lengthening the time when s/he testifies at trial and thus enhancing the persuasiveness of his or her identification of the respondent).

Generally, in pursuing any of these objectives, counsel should make heavy use of "closed" questions – that is, forms of questioning which demand specific answers and leave the witness with the smallest possible range of choice about what to say or what words to say it in. ("At the moment when you first saw the two people standing in the doorway, how many feet were you from the closer of those two people?" "Well, when why you say 'a couple of feet,' do you mean that it was closer to two feet or closer to ten feet?" "Closer to six feet or closer to ten feet?") Questions calling for yes-or-no answers will often constitute a substantial part of this sort of cross-examination. ("You told the police officers at the scene that those two people came running at you, didn't you?" "'Running' was the word you used to describe how they came toward you, isn't that right?") An effective way to lock a witness in to unambiguous answers is to take full advantage of the cross-examiner's right to use leading questions, stating the exact factual proposition that counsel wants to extract from the witness and asking the witness only whether or not that proposition is correct. ("It is true, is it not, that as soon as you saw the two persons start running toward you, you began to run away from them?" "And when you were grabbed, you were grabbed around the neck from behind, isn't that correct?" "You had turned your face away from them by that time, right?" "As soon as you started running, you turned to look where you were running, didn't you?") Particularly when the objective of the cross-examination is to circumscribe damaging testimony, it is important to "bottom out" the witness's story by establishing that what s/he has described as the things s/he saw or heard or did that fall within any significant category of information constitute *all* s/he heard or saw or did within that category. This is best achieved by "nothing else" questions. ("So, the period between the first moment when you saw two people standing in the doorway and the moment when you turned to run away was the only time before the lineup when you were able to observe the features of either of those two people, was it not?" "There was no other time when you were facing them, right?" "Apart from what you told the police at the scene, you didn't observe anything else about the facial features of either of the two persons, did you?" "Except for the one word 'Hey!' that was shouted at you, you heard nothing else said by either of the two persons prior to the lineup, did you?")

Counsel should be prepared to adjust the order of subjects covered to fit the demeanor of the witness. Frequently, civilian witnesses will be fairly pliant at the beginning of a cross-examination (either because the witness is nervous and cowed or because the witness does not have any reason yet to distrust or dislike the defense attorney) and will become progressively more difficult to handle (as the nervousness wears off or as the witness comes to realize that the defense attorney is succeeding in extracting statements that are helpful to the defense). Thus it often will prove useful to lead off the cross-examination with the factual propositions that counsel is most concerned with proving or anticipates having the most difficulty extracting from the witness. On the other hand, if there are a few points that can be tied down without pushing the witness hard and without the witness perceiving that s/he is conceding anything significant or embarrassing, these points should usually be taken up before the first point on which counsel expects to have to dominate the witness perceptibly, since that will mark the end of the honeymoon period with most witnesses.

In attempting to extract concessions from hostile witnesses who are trying to out-maneuver counsel by saying the opposite of whatever counsel is seeking, it will often be productive to use false leads. This technique consists of getting the witness to believe that counsel wants the converse of what s/he really wants or of getting the witness so concerned to avoid falling into an apparent trap that s/he will back away from it and thereby fall into counsel's real trap. For example, in an identification suppression hearing at which counsel is trying to show that an eyewitness's fingering of the respondent in a lineup resulted from the witness's having selected the respondent's picture from a photo array the week before (rather than from having seen the respondent commit the crime), counsel might ask questions which appear to be aimed at disparaging the witness's perceptual abilities by showing that the photo is not a good likeness of the respondent in person. In response, the witness is likely to deny any significant dissimilarities between the respondent's picture and the respondent's appearance at the lineup, and to exaggerate the degree of confidence with which s/he recognized the respondent when s/he saw the respondent's photo in the array.

False leads can be used in four different ways in a suppression hearing:

(i) To establish propositions that will be useful solely in attempting to win the suppression hearing (for example, that the respondent did not give consent to the search of his room that led to the recovery of the contraband);

(ii) To establish propositions that will be useful both in the suppression hearing and at trial (for example, in an identification suppression hearing: that it was dark at the time of the incident – a fact tending to establish the unreliability of the identification as a basis for suppression and also bolstering the defense of misidentification that counsel intends to present at trial);

(iii) To establish propositions that will be neither useful nor harmful at the suppression hearing but will be useful at trial (for example, at a confession suppression

hearing: that the respondent was arrested less than fifteen minutes after the robbery complainant emerged from a dark alley at midnight and borrowed a cell phone to call the police – a fact irrelevant to the respondent's claim of coercion but one that bolsters the misidentification defense at trial); and

(iv) To establish propositions that will be harmful to the respondent at the suppression hearing but useful to his or her defense at trial.

Statements in the last of these categories can often be drawn out of an unfriendly witness, such as a police officer, precisely *because* of their evident harmfulness to the respondent's claim for suppression. Consider the following two illustrations:

(A) Assume that the charge is possession of drugs and that the police claim they obtained consent to search the respondent's bedroom and bureau from his brother, who shared the bedroom and the bureau. If defense counsel contests the brother's authority to consent (see § 23.18(b) *infra*) and behaves during cross-examination as if s/he is trying to get the police officer to say that the bureau was used exclusively by the respondent, the officer will probably react by strengthening his or her testimony that the brother had equal, if not greater, access to the bureau. By the end of the cross-examination, counsel will probably have gotten the officer to say that most, if not all, of the clothing in the bureau at the time of the search belonged to the brother; that most of the clothing in the drawer with the drugs belonged to the brother; that the bureau was closer to the brother's bed; and that the brother acted as if he had free and constant access to the bureau. Counsel will thereupon have lost the battle by helping the prosecution to justify the search on consent grounds. However, counsel will have won the war by acquiring material to use in impeaching the officer at trial if the officer tries to change stories when counsel springs the respondent's true defense: that the drugs belonged to the brother and were placed by the brother in his drawer of his bureau.

(B) Suppose that the charge is assault with a firearm and that the respondent has made a statement to the police admitting the commission of the shooting but explaining it on self-defense grounds. Counsel has a good-faith basis for challenging the voluntariness of the statement and proceeds to do so. Inevitably, when counsel begins to cross-examine police officers on the subject of voluntariness and tries to get them to agree that the respondent resisted the coercive efforts of the police, the officers will insist that the respondent willingly came forward and was absolutely cooperative. Once again, the defense will have lost the suppression hearing. But, at trial, defense counsel will be able to force the officers to admit that the respondent's actions were not those of a guilty person who has something to hide.

§ 22.04(d) Examination Techniques When Counsel Has a Mixture of Goals at the Suppression Hearing

The foregoing three sections focused on cases in which counsel had a single overriding objective at the suppression hearing. In many cases, however, counsel might wish to pursue more than one goal. For example, there may be a realistic chance of winning the suppression hearing, yet counsel may be insufficiently sanguine about the probability of victory to be wholly comfortable about forgoing opportunities for discovery and creation of impeachment material. As the previous sections have suggested, pursuing multiple goals may jeopardize them all. For example, cross-examining for discovery or to create impeachment material may unavoidably elicit facts that will destroy any chance of winning the hearing. In many cases counsel is realistically required to choose one strategy and follow it single-mindedly – unless, of course, during the hearing that strategy is proving unworkable.

There are other cases, however, in which counsel can, with careful advance planning, pursue a range of goals. For example, if counsel is litigating several different suppression claims or theories, it may be possible to seek victory on one claim or theory, while using others to obtain discovery and create impeachment material. For example, in an identification suppression hearing, counsel might seek discovery through a claim that the police lacked probable cause to arrest the respondent (see §§ 23.07 and 25.07 *infra*), might seek to pin down impeachment material by cross-examination predicated on the claim that a show-up on the scene was impermissibly suggestive (see § 25.03(a) *infra*), and might seek to win yet a third claim – that a subsequent lineup was unconstitutionally held without the presence of counsel (see § 25.06 *infra*).

In deciding whether to mix strategies, counsel will need to be completely familiar with the facts of the case and all possible legal issues that could be litigated at the suppression hearing, and s/he will need to conduct a cost-benefit analysis that considers (i) the likelihood and value of succeeding on each strategy if pursued alone, (ii) the extent to which potentially winning strategies will be impaired by mixing them with other strategies, and (iii) whether the predictable impairment is outweighed by the probable gains to be achieved from pursuing a mixture of strategies.

§ 22.04(e) Using Diagrams and Vidcam Recordings in Cross-Examination

In litigating Fourth Amendment claims, counsel will often find it helpful to ask each officer to draw a diagram of the scene of the arrest, search, or seizure in issue, describing the events in detail in relation to the diagram. Diagrams drawn by each officer should be removed from view before the entry of the next police witness, and counsel should ask the court not only for leave to remove the diagram after the testimony of the first witness but also for a ruling precluding the use of that diagram by the prosecutor in examining subsequent prosecution witnesses. The policy underlying the rule on witnesses (see § 27.11 *infra*) supports such a request, and by keeping from each police witness the diagrams drawn by the others, visibly inconsistent versions of the affair can sometimes be elicited that will persuade the judge or an appellate court to discredit the officers.

In strategizing and preparing for suppression hearings, counsel should always ascertain whether any police officers or vehicles involved in relevant events were equipped with vidcams, and should request the vidcam recordings through informal and, if necessary, formal discovery proceedings. If a recording supports the defense version of the police activity at issue in the suppression hearing or appears likely to be useful in cross-examining an officer, counsel should take the necessary steps to authenticate the recording so as to assure its admissibility. See § 29.10.3 *infra*. In the latter case, counsel's cross-examination of the officer may be designed in either of two ways. (A) If the officer's direct testimony is inconsistent with events captured in the recording in ways that are directly material to the legality of the officer's conduct which produced the evidence that counsel is seeking to suppress, counsel should ordinary confine cross-examination to (1) asking the officer to reaffirm on cross his or her direct testimony; (2) introducing the recording and playing it; and (3) asking the officer whether *X* or *Y* event shown by the recording is not inconsistent with his or her current version of the episode. *Caveat*: Questioning of type (3) should be pursued only if counsel is reasonably confident that the officer cannot come up with a credible tale that reconciles his or her direct testimony with the recording. (B) If the officer's direct testimony is inconsistent with the events captured in the recording only in ways that do not bear directly on the legality of the officer's conduct, counsel can use the inconsistencies to discredit the officer's testimony generally by developing as many detailed discrepancies as possible and arguing that the officer's current version of material events is untrustworthy as a whole.

§ 22.05 DETERMINING WHETHER TO PRESENT THE TESTIMONY OF THE RESPONDENT AND OTHER DEFENSE WITNESSES

Frequently, the defense will need to subpoena and present testimony from defense witnesses in order to win a suppression hearing. For example, if the respondent's claim is that the police unlawfully coerced the respondent's mother into agreeing to a police search of the respondent's bedroom, the mother probably will need to testify about the nature and effects of the coercion. If a confession suppression claim is that the respondent did not understand the *Miranda* warnings, it will probably be necessary to present testimony both by the respondent (about his or her lack of comprehension) and by a psychologist who tested the respondent's reading and comprehension levels (see § 24.10(b) *infra*).

There are several strategic factors that must be considered in deciding whether to present the respondent or other defense witnesses in a suppression hearing. The decisions will have to be made at least tentatively at an early stage of counsel's preparation, in order to leave sufficient time to rehearse the respondent's testimony and to subpoena the other witnesses and prepare them to testify. See §§ 10.09-10.10 *supra*. (Even when a witness is loyal to the respondent, a subpoena is advisable, to make the necessary record for a continuance in the event of the witness's failure to appear. See § 10.02 *supra*.) On the other hand, counsel should not allow himself or herself to feel locked in to the tentatively chosen strategy; s/he must constantly re-evaluate goals and strategies and adapt them to unanticipated developments at the hearing.

§ 22.05(a) Testimony by the Respondent

In deciding whether to put the respondent on the witness stand in a suppression hearing, counsel should consider that whatever testimony the respondent gives at the hearing can probably be used to impeach the respondent if s/he testifies at trial. See §§ 33.06(G), 33.09(a) *infra*. Although a respondent's testimony in a suppression hearing cannot be used against him or her in the prosecutor's case-in-chief at trial on the issue of guilt, *Simmons v. United States,* 390 U.S. 377 (1968); *Brown v. United States,* 411 U.S. 223, 228 (1973) (dictum); *United States v. Salvucci,* 448 U.S. 83, 89-90 (1980) (dictum), the prosecution is usually free to use it for impeachment of the respondent's trial testimony to the extent that the two are inconsistent. See §§ 33.06(G), 33.09(a) *infra*; *and cf. Harris v. New York,* 401 U.S. 222 (1971) (a confession suppressed on *Miranda* grounds can be used as a prior inconsistent statement to impeach the accused at trial). (Counsel can, however, argue that this kind of impeachment should be barred by *New Jersey v. Portash,* 440 U.S. 450 (1979), which holds that an accused cannot be impeached with prior testimony which s/he was compelled to give in violation of the Fifth Amendment privilege against self-incrimination. Arguably a respondent's testimony in a suppression hearing is "compelled" and involuntary in the sense that the respondent is confronted with the "Hobson's choice" (*Simmons v. United States,* 390 U.S. at 391) "either to give up what he believed, with advice of counsel, to be a valid . . . [constitutional] claim [to have evidence suppressed] or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Id.* at 394. *Cf. Harrison v. United States,* 392 U.S. 219 (1968); *McDaniel v. North Carolina,* 392 U.S. 665 (1968) (per curiam).) Counsel may be able to limit cross-examination at the suppression hearing so as to avoid incriminating admissions, *see*, *e.g.*, *People v. Lacy*, 25 A.D.2d 788, 788, 270 N.Y.S.2d 1014, 1015-16 (N.Y. App. Div., 3d Dep't 1966) (at a hearing on a motion to suppress incriminating statements, "the defendant . . . may take the stand and testify as to his request for counsel at the time of the arrest and as to all facts relevant to the proceedings . . . leading to and including the signing of the alleged confession and waiver and by so testifying, the defendant does not subject himself 'to cross-examination upon the [circumstances of the crime]'"), but often this will not be easy to do if the cross-examining prosecutor is at all capable.

If the respondent's testimony would probably be instrumental in winning the suppression hearing and if a victory at the hearing would probably necessitate the prosecutor's dismissal of the case, these prospects usually justify accepting the risks of impeachment. Even if the chances of victory at the suppression hearing are not overwhelming, testimony by the respondent at the hearing may be justified if there is little chance that the respondent will testify at trial or if the respondent's testimony at the hearing will be limited to matters such as the respondent's comprehension of *Miranda* warnings, which do not overlap any of the subjects about which the respondent may testify at trial. *See, e.g.*, *People v. Lacy*, 25 A.D.2d at 788, 270 N.Y.S.2d at 1015-16.

Apart from the risk of impeachment at trial, there may be tactical reasons to forgo presenting the respondent's testimony at a suppression hearing. It is often possible to establish a marginal case of unconstitutional police conduct on the basis of police testimony alone, whereas

the respondent's version of the relevant events portrays the officers' behavior as considerably more egregious and blatantly unlawful. The question whether to put the respondent on the stand in this situation is particularly difficult. Many judges believe that respondents are prone to exaggerate police misconduct; these judges are slow to credit any respondent's testimony, particularly when it consists of horror stories. Therefore, calling the respondent to testify entails the risk of irritating the judge to such an extent that s/he will strain the facts and the law to uphold the police.

On the other hand, if the respondent's description of atrocious police conduct is strongly credible, and particularly if it is corroborated by independent witnesses or evidence, proof of flagrant police abuse can spell the difference between victory and defeat in a suppression hearing. The Supreme Court has held – in a decision of uncertain breadth – that the scope of taint attending an unconstitutional search and seizure may depend in part on the flagrancy of the unconstitutionality. *Brown v. Illinois,* 422 U.S. 590, 603-05 (1975); *cf. United States v. Leon,* 468 U.S. 897, 911 (1984); see § 23.39 *infra.* And, as a practical matter, trial and appellate judges who can be persuaded that the police have behaved abominably are more likely to rule in the respondent's favor on any close questions in the case.

Several collateral dangers bear upon the decision whether to put the respondent on the stand in a suppression hearing. The respondent's testimony may give the prosecutor discovery of the defenses planned for trial and thereby improve the prosecutor's presentation on the issue of guilt. In cross-examining the respondent at the suppression hearing, the prosecutor can develop a sense of the respondent's personality and susceptibility to certain cross-examination tactics and may consequently do a better job of cross-examination at trial. Finally, if the judge at the suppression hearing is the same judge who will preside at a bench trial and at sentencing, unpersuasive testimony by the respondent at the hearing could prove detrimental in later stages of the case: The judge's discrediting of this testimony could lead the judge also to discredit the respondent's testimony at trial, and the judge's belief that the respondent has perjured himself or herself could lead to a harsher sentence.

Notwithstanding all these risks, there will be many cases in which the chances of victory at the suppression hearing are sufficiently strong, and the contribution that the respondent's testimony can make is sufficiently important, that defense counsel will opt in favor of having the respondent testify. The final decision must be made by the respondent personally (see § 33.07 *infra*); counsel should explain the potential benefits and risks and advise the respondent about the best course.

When the respondent does testify at the suppression hearing, it is usually best that s/he testify last. Having heard all of the prior evidence, s/he will be in a position to rebut police testimony effectively and to explain any apparent inconsistencies in the accounts of defense witnesses. See § 33.02(a) *infra.*

§ 22.05(b) Testimony by Defense Witnesses Other Than the Respondent

Calling defense witnesses other than the respondent to testify at a suppression hearing involves significant dangers and complications. The bottom line is that defense counsel should not do so unless (1) counsel's purpose in conducting the hearing is to win suppression (see §§ 22.02, 22.04(a) *supra*); and (2) the evidence that counsel is seeking to suppress is likely to make the difference between conviction and acquittal at trial; and (3) counsel's chances of winning the suppression of this evidence are strong if counsel calls the defense witnesses and considerably weaker if s/he does not; and (4) the hearing judge insists that the defense lead off the hearing by presenting evidence sufficient to meet an applicable burden of production; and (5) defense counsel cannot get around the judge's sequence-of-proof requirement in one of the ways suggested in § 22.03(d) *supra*; and (6) counsel cannot meet the production burden with documentary evidence (like police reports and records). In this situation, counsel obviously has no choice but call at least *some* witnesses. But s/he should (a) call as few witnesses as possible, and limit the examination of each witness to material that is indispensable for satisfying the defense's production burden; (b) announce at the outset that s/he is presenting the testimony of these witnesses only under the compulsion of the judge's sequence-of-testimony ruling; (c) announce that s/he is limiting his or her examination of the witnesses to matters that bear directly on the issues of law-enforcement illegality that are the basis of the motion to suppress; and (d) scrupulously observe that limitation.

The problems – in order of complexity – are these:

(A) When counsel introduces the testimony of any witnesses, s/he risks perpetuating testimony that the prosecution can introduce in its case-in-chief at trial, within the prior-recorded-testimony exception to the hearsay rule, if the witnesses become unavailable at the time of trial. The law on this subject is vexed.

(1) Many jurisdictions have codified the prior-testimony exception in the form in which it appears in FED. RULE EVID. 804(b)(1) (2022), allowing the admission of the former testimony of a presently unavailable witness "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Defense counsel's obvious objection to the application of this exception is that s/he did not have a "similar motive" for questioning the witness at the suppression hearing as s/he would have for cross-examining the witness at trial, inasmuch as the sole focus of the suppression hearing was the legality of the manner in which the prosecution obtained its evidence, not the reliability and probative force of the evidence in proving the respondent's guilt. But this distinction is less than clear in the case of some defense theories for suppression, like a Due Process challenge to identification testimony as unreliable (see §§ 25.02-25.04 *infra*) or a Due Process challenge to incriminating statements as involuntary when the defense claim of involuntariness relies in part on the idea that an impressionable respondent was coached to make the statements by police questioning that was "leading or suggestive" (*Fikes v. Alabama*, 352 U.S. 191, 195 (1957); *see, e.g.*, *Jurek v. Estelle*, 623 F.2d 929, 941 (5th Cir. 1980)). And some judges might well be persuaded to find a "similar motive" in any case in which defense counsel

at the suppression hearing uses some of the techniques advised in §§ 22.04(b)-22.04(c) as means for developing discovery and impeachment material.

(2) Federal constitutional Confrontation-Clause analysis would proceed along much the same track to an equally uncertain conclusion. See § 30.04 *infra*. The principal pertinent cases are *Crawford v. Washington*, 541 U.S. 36 (2004), and *Lee v. Illinois*, 476 U.S. 530, 546 n.6 (1986). *Crawford* permits a prosecutor's use at trial of the pretrial testimony of a witness "where the . . . [witness] is unavailable [at the time of trial], and . . . where the defendant has had a prior opportunity to cross-examine" (541 U.S. at 59). *Lee* holds that the kind of "opportunity to cross-examine" contemplated by *Crawford* would not be satisfied by a respondent's cross-examination of a *prosecution* witness at a suppression hearing (*see* 476 U.S. at 546 n.6). Logically, the rationale of *Lee* – that defense counsel at a suppression hearing has no reason to go beyond matters bearing on the lawfulness of the prosecution's evidence-gathering methods and to cross-examine on subjects relating to the respondent's guilt or innocence – seems as applicable to defense suppression-hearing witnesses as to those for the prosecution. But because, as a practical matter, defense counsel takes the initiative in developing the scope of examination of a witness whom s/he calls to the stand and questions on direct, some judges might distinguish *Lee* and find *Crawford*'s "prior opportunity" test satisfied in the case of a *defense* suppression-hearing witness.

(3) As a back-up argument for precluding the prosecutor's use at trial of the testimony of such a witness who has become unavailable since the suppression hearing, counsel could invoke the rationale of *Simmons v. United States*, 390 U.S. 377 (1968). This would require extending *Simmons*'s holding – that a respondent's testimony admitting a possessory interest in property for the purpose of acquiring standing to challenge the legality of its warrantless seizure may not be used in the prosecution's case-in-chief at trial to show the respondent's possession of the instruments and proceeds of a crime because "[t]he need to choose between waiving the Fifth Amendment privilege and asserting an incriminating interest in evidence sought to be suppressed, or invoking the privilege but thereby forsaking the claim for exclusion, creates what the [*Simmons*] Court characterized as an 'intolerable' need to surrender one constitutional right in order to assert another" (*United States v. Kahan*, 415 U.S. 239, 242 (1974) (per curiam)) – to encompass any sort of evidence that the defense is compelled to present in court (*cf. Harrison v. United States,* 392 U.S. 219 (1968)) in order to assert the respondent's rights against the governmental illegality that necessitated the motion to suppress. *Cf. Fisher v. United States,* 425 U.S. 391, 399-400 n.5 (1976) (dictum); *Andresen v. Maryland,* 427 U.S. 463, 472 & n.6 (1976) (dictum). Such an extension is not predictable (*see United States v. Kahan*, 415 U.S. at 243, *cf. United States v. Nobles,* 422 U.S. 225, 233-34 (1975)), and counsel cannot afford to rely on it in the present state of the law.

(4) The upshot, then, is that the risk of perpetuating potential prosecution trial evidence by calling defense witnesses at a suppression hearing is considerable in some circumstances and difficult to calculate in others.

(B) Even if the prosecution were forbidden to use a defense witness's suppression-hearing testimony in its case-in-chief at trial, it could almost certainly use that testimony to impeach the witness if his or her trial testimony deviates at all from what s/he said at the hearing. *See* § 7.07 *supra*; § 27.12(b) *infra*. The defense might argue that the logic of *New Jersey v. Portash,* 440 U.S. 450 (1979), § 22.05(a) *supra,* prohibits this use of the prior testimony because the respondent was "compelled" to present it in order to vindicate the constitutional rights at issue in the suppression hearing; but the argument requires extensions of both *Portash* and *Simmons* in the teeth of *United States v. Nobles*, 422 U.S. at 233-34 (see §§ 9.12-9.13 *supra*), and *Kansas v. Cheever*, 571 U.S. 87, 93-95 (2014) (see § 12.15(a) *supra*); and the chances of winning all of these uphill battles under current constitutional doctrine are slim.

(C) Finally, apart from the dangers of prosecutorial use of the testimony at trial, counsel who calls defense witnesses at a suppression hearing may give the prosecutor discovery of the version of the facts that the defense intends to present at trial, together with "batting practice" in cross-examining potential defense trial witnesses.

So defense counsel's wisest practice is to present defense testimony only under the circumstances described in the first paragraph of this section and, even when those circumstances exist, to take the precautions advised there. Any witness whom counsel is obliged to call should be painstakingly prepared to testify, by rehearsals that teach the witness to give the shortest practicable responsive answers to all questions asked on either direct or cross-examination. See §§ 10.09-10.10 *supra*. Direct examination questions should be tightly framed to avoid opening the door to wide-ranging cross-examination by the prosecutor. And when defense counsel later prepares the same witness to testify at trial, counsel will need to take the witness through a detailed review of the transcript of his or her suppression-hearing testimony, to minimize the likelihood that the witness will inadvertently diverge from it and expose himself or herself to avoidable impeachment.

§ 22.06 ARGUING THE MOTION AND OBTAINING THE FORMAL JUDICIAL FINDINGS NECESSARY FOR EFFECTIVE APPELLATE REVIEW

§ 22.06(a) Timing of the Argument; Reasons for Seeking a Continuance

After the conclusion of the evidence-taking at a suppression hearing, counsel for both parties will ordinarily be expected to proceed immediately to make their legal arguments for and against the motion. Defense counsel needs to be ready to present his or her position succinctly, integrating the applicable legal principles with the facts adduced at the hearing. For this purpose, counsel will find it useful to have taken notes, during the testimony of the principal witnesses, of key points made by each of them. Motions judges are often impatient with extended argument, and counsel will want to zero in promptly on crucial details.

In rare cases counsel may have to request a continuance of oral argument because the evidence has generated new legal issues that counsel had not anticipated and now needs to

research or because counsel's notes and memory of the evidence are not sufficient and counsel wants to review a transcript of the hearing in preparation for argument. Since judges will usually be resistant to continuing the arguments (particularly when trial is scheduled to begin shortly after the suppression hearing), counsel may be required to explain precisely why the additional research or transcript is essential to his or her ability to represent the respondent competently in arguing the motion. If the court nevertheless denies the request for a continuance, counsel will have to proceed with the oral argument. In this situation counsel should consider requesting leave to submit a supplementary written memorandum based upon counsel's additional research and review of the transcript. If the court denies even that request and immediately rules on the motion, counsel should thereafter conduct the contemplated legal research, acquire the transcript, or both, and should incorporate any favorable new legal authorities or transcript references in a motion for reconsideration of the ruling.

If trial begins immediately on the heels of the suppression hearing and if it is a jury trial, counsel should inform the judge of his or her intention to submit a memorandum in support of reconsideration and should ask the judge to instruct the prosecutor not to mention during jury-selection *voir dire* or in an opening statement the evidence which counsel is continuing to contend should be suppressed. Counsel will have to promise the court to produce the memorandum promptly, so that the judge can consider it before the trial progresses to a point at which the prosecution's presentation of the challenged evidence cannot practicably be further delayed.

§ 22.06(b) Order of the Parties' Arguments

In oral arguments on suppression motions, it is customary in most jurisdictions for the defense to proceed first because the respondent is the moving party. On issues on which the prosecution bears the burden of persuasion (see § 22.03(d) *supra*), defense counsel could perhaps insist that the prosecutor argue first. However, it is usually in defense counsel's interest to argue first, so as to gain the advantage of framing the issues and also – in jurisdictions where rebuttal argument is conventional – to get the last word.

§ 22.06(c) Using Burdens of Production and Persuasion

When arguing the motion, defense counsel should make aggressive use of the applicable burdens of production and persuasion. (See § 22.03(d) *supra*.) If the evidentiary record is bare or insufficient on an issue on which the prosecution bears the burden of production or persuasion, it will usually reward counsel's effort to remind the judge that the prosecutor had an obligation to establish the missing facts and that, therefore, any deficiency of evidence on the issue is fatal to the prosecution.

§ 22.06(d) Factors to Consider in Constructing Legal and Factual Arguments

The essence of a good suppression argument is to highlight the facts adduced at the

evidentiary hearing that bring the case within the legal principles on which counsel is relying. Those principles – established by precedent, by constitutional or statutory text, or by logical extrapolation from the extant caselaw – are background. Facts are foreground. Having just heard the evidence, the judge wants to know what to make of it. Ordinarily, having just heard at least as much unimportant evidence as important evidence, the judge wants to be told exactly what counsel is asserting is important. Zeroing in on key details is the way to persuade the judge to rule in counsel's favor. It is also the way to obtain specific findings of fact that will insulate a favorable ruling from appellate reversal in jurisdictions where the prosecutor can appeal from a suppression order or get the order reviewed by prerogative writ proceedings.

Because form optimally mirrors function, it will usually be most effective for counsel to shape his or her argument by presenting the applicable legal principles not in the manner of a doctrinal primer but rather as a framework for identifying and emphasizing critical, favorable facts. Thus, for example, in a case in which a police officer stopped the respondent on the street and then frisked him or her (as a result of which the officer found a gun), counsel might structure the argument in the following manner:

(i) Begin the argument by explaining that the respondent is moving for suppression on two separate and independent grounds: on the ground that the officer's stop of the respondent amounted to an unconstitutional seizure, and the gun therefore must be suppressed as a fruit of the seizure; and on the alternative ground that even if the officer had a lawful basis to stop the respondent, s/he did not have a lawful basis to frisk the respondent, and the gun therefore must be suppressed as a fruit of this unlawful search of the respondent's person.

(ii) In arguing the first claim (that the stop was unconstitutional), begin by stating that there is no dispute about the fact that the officer did indeed stop the respondent; then tersely state the applicable legal standard for gauging whether a stop constitutes a "seizure" within the meaning of the Fourth Amendment (and/or the state constitution) and move on quickly to a detailed recitation of facts adduced at the hearing which demonstrate that the officer's actions did indeed constitute such a "seizure" – beginning with the most dramatic or legally crucial such facts; then tersely state the applicable standard for assessing whether the officer had an adequate basis for stopping the respondent, and similarly promptly move on to the facts demonstrating that s/he did not – mustering the evidence in the same way, strongest first; and conclude by stating the legal principle that the unconstitutionality of the stop requires suppression of the gun as a fruit of an unlawful seizure.

(iii) In arguing the second claim (that the frisk was unconstitutional), begin by stating that there is no dispute about the fact that a frisk amounting to a "search of the person" took place; then tersely state the applicable legal standard for determining the constitutionality of a frisk and get rapidly into the evidence showing that the

officer did not have the requisite information to meet that standard; and conclude by stating the legal principle that the gun must be suppressed as a fruit of the unlawful frisk even if it is not suppressed as a fruit of the unlawful stop.

When the relevant legal principles are well settled (like the federal constitutional standards for determining the validity of a stop or frisk), counsel should ordinarily keep the discussion of the law quite brief. As a general rule, counsel should state the legal principles simply and concisely, and then devote most of the argument to fitting facts into the legal framework. Even when the law is not so well settled and the issues in the case make it necessary for counsel to argue law, counsel is well advised to refrain from reciting strings of citations of court decisions or engaging in complex legal analysis in oral argument. See § 16.06 *supra*. If counsel's legal position does require intricate reasoning or reference to authorities that are not the staple stuff of suppression motions in counsel's jurisdiction, s/he does best by handing up a concise written memorandum of law or highlighted photocopies of purportedly controlling judicial opinions. See §§ 16.06-16.07 *supra*.

In arguing facts, counsel should consider the availability and strategic advisability of various grounds for urging the court to find that the testimony of the other side's witness(es) is incredible. Since judges are often loth to disbelieve witnesses – particularly police officers and others who make a respectable appearance – counsel should ordinarily (a) include in his or her argument any legally sustainable theories that do *not* require the judge to reject the testimony of an opposing witness; (b) argue that opposing witnesses are mistaken rather than lying, to the extent that s/he is obliged to contest their testimony and can plausibly assert that it is innocently erroneous; and (c) contest the testimony of as few opposing witnesses – and as little of the testimony of each – as s/he needs to contest in order to win. However, when counsel's position does demand that s/he ask the judge to discredit an opposing witness, s/he should be prepared to argue, for example, that a police officer's testimony should be found to be incredible and rejected because:

(1) The officer's account of actions or events defies "common sense" or "common knowledge." *See, e.g.*, *People v. Lastorino*, 185 A.D.2d 284, 285, 586 N.Y.S.2d 26, 27 (N.Y. App. Div., 2d Dep't 1992) (rejecting, as incredible, a police officer's testimony "that the defendant, who was aware he was under surveillance for at least several minutes, exited his vehicle and left the driver's door open and a loaded gun visible on the seat, virtually inviting the police to discover the gun"); *People v. Void*, 170 A.D.2d 239, 241, 567 N.Y.S.2d 216, 217 (N.Y. App. Div., 1st Dep't 1991) (rejecting, as incredible, a police officer's testimony "that the defendant consented to a police search of the apartment, where a substantial amount of cocaine was stored in plain view in the kitchen sink – a location where the drugs could be readily discovered"); *People v. Addison*, 116 A.D.2d 472, 474, 496 N.Y.S.2d 742, 744 (N.Y. App. Div., 1st Dep't 1986) (in rejecting a police officer's testimony that he had reasonable grounds to believe that the defendant was armed and dangerous because the defendant "reach[ed] for his waistband as the . . . officer approached," the court observes that there were five police cars and several officers on the scene, and "we find it incredible that defendant, in the face of such a show

of force, would . . . reach for his waistband").

(2) At the hearing, counsel impeached the officer with a prior inconsistent statement or statements. *See, e.g.*, *People v. Miret-Gonzalez*, 159 A.D.2d 647, 552 N.Y.S.2d 958 (N.Y. App. Div., 2d Dep't 1990), *app*. *denied*, 76 N.Y.2d 739, 558 N.Y.S.2d 901 (1990) (the court finds a police officer's testimony incredible, in part because the officer's account of the car stop and search was contradicted by his incident report); *People v. Lebron*, 184 A.D.2d 784, 785-87, 585 N.Y.S.2d 498, 550-02 (N.Y. App. Div., 2d Dep't 1992) (the police officer's testimony was contradicted by statements and omissions in prior police reports).

(3) The officer has a motive to present perjurious testimony. *See, e.g.*, *People v. Berrios*, 28 N.Y.2d 361, 368, 270 N.E.2d 709, 713, 321 N.Y.S.2d 884, 889 (1971) (acknowledging that "[s]ome police officers . . . may be tempted to tamper with the truth" at a suppression hearing in order to justify their actions in conducting a search or seizure).

(4) The officer's "demeanor" on the witness stand or the witness's "mode of telling his [or her] story" indicates that s/he is not telling the truth. *People v. Perry*, 128 Misc.2d 430, 432, 488 N.Y.S.2d 977, 979 (N.Y. Sup. Ct., N.Y. Cty. 1985). *See also People v. Carmona*, 233 A.D.2d 142, 144-45, 649 N.Y.S.2d 432, 434 (N.Y. App. Div., 1st Dep't 1996) (in an opinion rejecting the officer's testimony as incredible, the appellate court refers disparagingly to the officer's testimony "that he approached the defendant merely to exercise a common law right of inquiry" as a "well-rehearsed claim").

(5) The officer's account was refuted, in whole or in part, by a defense witness's testimony. *See, e.g.*, *People v. Torres*, 54 Misc.3d 1220(A), 54 N.Y.S.3d 612 (Table), 2017 WL 740983, at *3 (N.Y. County Court, Monroe Cty, January 15, 2017) (rejecting the police officer's testimony that he observed that the defendant's "vehicle's taillights were not working" and stopped the car for that reason, and instead crediting the "directly contradict[ory] ... testimony of the defendant's girlfriend," who "testified with no obvious contradiction, nervousness or hesitation").

Finally, counsel should anticipate the judge's reactions to the legal and factual issues in the case and should frame arguments so as to meet the judge's likely concerns. For example, as suggested in § 16.07 *supra*, counsel can foresee the reluctance of a trial judge to announce any broad legal rules which go beyond the boundaries of settled precedent, and counsel can forestall that concern by taking pains to explicitly, narrowly delineate the limits of the ruling s/he is advocating.

§ 22.06(e) Obtaining or Avoiding Findings by the Motions Judge in Order to Improve the Respondent's Chances on Appeal

In some jurisdictions the judge is required to record specific findings of fact and conclusions of law in ruling on suppression motions. In other jurisdictions the judge is permitted

to announce a yea-or-nay ruling on the motion, without explaining it. Depending upon the nature of the judge's decision and the lay of the evidence, defense counsel may wish to ask the judge to make or clarify particular findings of fact or legal rulings, in order to improve the respondent's posture in appellate review proceedings.

If the judge has ruled in the respondent's favor and counsel anticipates that the prosecutor will appeal, counsel obviously has an incentive to aid the judge in insulating the ruling from reversal. Counsel should consider requesting that the judge amend or revise any troublesome or ambiguous findings of fact or legal conclusions. It is particularly in the respondent's interest for counsel to urge the judge to rest his or her decision explicitly on record-specific factual grounds, both because appellate review of *nisi prius* fact-finding is more limited than appellate review of *nisi prius* legal reasoning and because appellate judges will be more inclined to upset a motions judge's pro-defense rulings in proportion to the breadth of their potential precedential impact.

If the judge has ruled against the respondent on a ground which counsel suspects is legally erroneous but which the judge did not spell out clearly on the record, counsel may wish to request elaboration of the judge's reasoning. Absent an overt articulation of incorrect legal reasoning, many appellate courts will uphold a trial court's ruling if the appellate judges can conjecture any possible permissible rationale for it. However, if a request for clarification will likely lead a judge to seek out more unassailable bases for the denial of a suppression motion or to bolster the denial by making additional findings of fact contrary to the defense, counsel will be wiser to leave ambiguities in the record and decide later what possible use to make of them in appellate arguments. As in most other matters, it is important for counsel to know as much about the judge's predilections, temperament, opinion-writing habits and intelligence as counsel can learn from discussing these subjects with experienced local defense attorneys.

§ 22.07 AFTER THE SUPPRESSION HEARING: PROTECTING THE RESPONDENT'S RIGHTS AT TRIAL AND PRESERVING APPELLATE REMEDIES

If the motion to suppress is denied, the defense typically cannot take an interlocutory appeal but can obtain appellate review only after conviction and sentencing. If the motion to suppress is granted, the prosecution in some jurisdictions has a statutory or common-law right to pursue an interlocutory appeal; when the prosecutor chooses to forgo that appeal and proceeds to trial without the benefit of the suppressed evidence, an acquittal at trial will forever insulate the suppression ruling from appellate review. In cases in which the motion was granted in part and denied in part, an interlocutory appeal by the prosecutor may activate a defense right to cross-appeal on rulings that were adverse to the respondent. *See, e.g., People v. Fenelon,* 88 Ill. App. 3d 191, 410 N.E.2d 451, 43 Ill. Dec. 451 (1980); *Commonwealth v. Mottola,* 10 Mass. App. Ct. 775, 412 N.E.2d 1280 (1980), *review denied,* 383 Mass. 890, 441 N.E.2d 1042 (1981).

When an interlocutory appeal is taken, an attorney with a client in detention should request the trial court to release the client pending appeal. Counsel can argue that the trial court's suppression ruling provides the best basis for predicting the outcome of the appeal and that it is

highly unfair to subject the respondent to protracted incarceration for a crime for which s/he will probably never be convicted. If the trial court does not release the respondent pending appeal, counsel should ask the appellate court to do so (by a motion filed in the appeal, by a separate appeal of the trial court's refusal to grant release, or by a petition for a writ of habeas corpus, as local practice makes appropriate) and should request in the alternative that the appellate court hear the appeal of the suppression ruling on an expedited basis.

If the defense loses the suppression motion or if the defense wins and the prosecutor elects to forgo interlocutory appeal, many judges will insist upon proceeding immediately to trial. Often, the defense will want a continuance in order to obtain the transcript of the suppression hearing for use in impeaching prosecution trial witnesses. If, without revealing the defensive strategy imprudently, counsel can articulate specific ways in which the transcript would assist the defense at trial, counsel should advert to them as supporting a motion for a continuance for the purpose of effectuating the respondent's constitutional rights to effective assistance of counsel, confrontation, and a fair trial. See § 15.02 *supra.* When the respondent is indigent, counsel should move that a transcript be made and furnished to him or her at state expense, under the Sixth and Fourteenth Amendment doctrines noted in §§ 4.31(d) and 9.09(b)(1) *supra.*

Frequently, the judge who presides at the suppression hearing will hear testimony, such as hearsay evidence, that would be inadmissible under the more stringent rules of evidence applicable at trial. If the same judge then presides at a bench trial of the respondent's guilt or innocence, the result is a finder of fact jaundiced by exposure to inadmissible evidence. The result is even more unfair when a judge suppresses evidence (such as a confession or an identification) and, having heard it at the suppression hearing, is expected to put it completely out of mind in deciding the respondent's guilt or innocence at trial. Some jurisdictions have dealt with these problems by requiring that the trial be conducted by a different judge from the one who presided at the suppression hearing. In other jurisdictions, assuming that there is more than one juvenile court judge, counsel may wish to seek recusal of the judge who presided at the suppression hearing on the ground that s/he has heard prejudicial information inadmissible at trial. For the standards governing recusal, tactical considerations in deciding whether to seek recusal, and suggestions for the framing of recusal requests, see §§ 20.04-20.07 *supra.*

Counsel litigating suppression motions must familiarize themselves with the idiosyncratic local requirements for obtaining appellate review of suppression rulings. In some jurisdictions the pretrial denial of a motion to suppress evidence can be reviewed on appeal only if defense counsel renews the motion or objects to the admission of the evidence at trial. In some jurisdictions a suppression ruling unfavorable to the defense can be appealed even after a guilty plea (or a conditional guilty plea); in other jurisdictions the right to appeal can be preserved only by going through the motions of a "stipulated trial" (see § 14.10 *supra;* § 30.02(c) *infra*); in still others the respondent must plead not guilty and go through a full-fledged trial in order to obtain appellate review of the suppression ruling.

Occasionally, in cases in which the defense has lost a suppression motion, new facts

emerge at trial that would have significantly strengthened the original motion or provided an independent basis for suppression. Under these circumstances counsel should move to re-open the suppression hearing. *See Gouled v. United States,* 255 U.S. 298, 305, 312-13 (1921) ("where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial"); *United States v. Raddatz,* 447 U.S. 667, 678 n.6 (1980) (dictum) (recognizing that a federal "district court's authority to consider anew a suppression motion previously denied is within its sound judicial discretion"); *cf. Murray v. Carrier,* 477 U.S. 478, 488 (1986) (holding, in the context of collateral challenges to a criminal conviction, that defense counsel's reasonable lack of knowledge of the facts giving rise to a legal claim constitutes sufficient cause to excuse counsel's failure to pursue the claim in timely fashion). *See also*, *e.g.*, *Commonwealth v. Haskell*, 438 Mass. 790, 792, 784 N.E.2d 625, 627-28 (2003) ("renewal [of a suppression motion] 'is appropriate where new or additional grounds are alleged which could not reasonably have been known when the motion was originally filed,' . . . but the remedy is not restricted to those circumstances" since "[a] judge's power to reconsider his own decisions during the pendency of a case is firmly rooted in the common law"). And in cases in which the defense learns for the first time at trial that prosecution evidence may have been obtained by unlawful means warranting suppression, a motion for a mistrial and for a suppression hearing in support of that motion are in order. *See*, *e.g.*, *United States v. Shelton*, 997 F.3d 749 (7th Cir. 2021).