Chapter 31

Handling Prosecution Witnesses

§ 31.01 CROSS-EXAMINING PROSECUTION WITNESSES – GENERALLY

§ 31.01(a) The Right to Cross-Examine; Bases for Objecting to Judicial Curtailment of Cross-examination

The right to a "searching and wide-ranging cross-examination" is commonly guaranteed by state law (*State v. Thaden*, 210 Neb. 622, 627, 316 N.W.2d 317, 321 (1982)). *See*, *e.g.*, *Ex Parte Willis*, 455 So.2d 917, 919 (Ala. 1984); *Wooten v. State*, 464 So.2d 640, 641 (Fla. App. 1985); *State v. DeCristofaro,* 102 R.I. 193, 197, 229 A.2d 613, 615 (1967). In addition, "[t]he Confrontation Clause [of the Sixth Amendment to the federal Constitution] . . . has long been read as securing an adequate opportunity to cross-examine adverse witnesses" (*United States v. Owens,* 484 U.S. 554, 557 (1988) (dictum)). *See, e.g., Douglas v. Alabama,* 380 U.S. 415, 418 (1965); *Lee v. Illinois,* 476 U.S. 530, 539-43 (1986); *United States v. Arias*, 936 F.3d 793 (8th Cir. 2019). *See also Crawford v. Washington*, 541 U.S. 36, 61 (2004) (the Confrontation "Clause's ultimate goal is to ensure reliability of [prosecution] evidence . . . [by] command[ing] . . . that reliability be assessed in a particular manner: by testing in the crucible of cross-examination"). *And see State v. Garner*, 232 W. Va. 8, 750 S.E.2d 123 (2013) ("During the course of defense counsel's cross-examination, the circuit court interrupted and directed counsel to meet with prosecutors and the witness to prepare questions for the continuation of defense counsel's cross-examination . . . ." *Id*. at 11, 750 S.E.2d at 126. "The State . . . [argues] that the circuit court was simply frustrated with defense counsel's somewhat rambling cross-examination . . . ." *Id*. at 11-12, 750 S.E.2d at 126-27. "[T]he circuit court's bizarre demand, that defense counsel meet privately with two prosecutors and the State's witness in order to prepare the witness for questions that would be asked when cross-examination resumed, deprived . . . [the defendant] of his right to effectively cross-examine a key witness for the State. Cross-examination is an adversarial undertaking. An important part of an adversarial cross-examination is the demeanor of the witness. An uncooperative witness may be viewed by the jury as less than honest. Similarly, a spontaneous reaction by the witness to an unexpected question could be quite revealing as to the veracity of the witness' answer." *Id*. at 12, 750 S.E.2d at 127. "By requiring defense counsel to prepare . . . [the witness] in advance for the continuation of cross examination [sic], the circuit court eliminated the purpose of cross-examination and rendered it utterly ineffective. This conduct by the circuit court, without question, deprived . . . [the defendant] of his constitutional right to an effective cross-examination of a key witness. Accordingly, . . . [the defendant's] convictions must be reversed and this case remanded for a new trial." *Id*.).

Accordingly, "restrictions imposed by . . . the trial court on the scope of cross-examination" are constitutionally assailable (*Delaware v. Fensterer,* 474 U.S. 15, 18 (1985) (per curiam) (dictum)). *See, e.g., Smith v. Illinois,* 390 U.S. 129 (1968); *Davis v. Alaska*, 415 U.S. 308, 315-20 (1974); *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam); *Alvarez v. Ercole*, 763

F.3d 223, 231-32 (2d Cir. 2014); *Sussman v. Jenkins*, 636 F.3d 329, 358 (7th Cir. 2011); *State v. Johnson*, 255 Neb. 865, 587 N.W.2d 546 (1998). *See also Blackston v. Rapelje*, 780 F.3d 340, 348-57 (6th Cir. 2015). Counsel should object to any attempt by the court to "'protect a witness from being discredited'" (*Davis v. Alaska,* 415 U.S. at 320). "The 'denial or significant diminution' of cross-examination 'requires that the competing interest be closely examined' because it 'calls into question the ultimate "integrity of the fact-finding process."'" *Rhodes v. Dittmann*, 903 F.3d 646, 659 (7th Cir. 2018). See also § 30.04(c) *supra.*

Specifically, "a criminal defendant [or juvenile respondent] states a violation of the Confrontation Clause by showing that he [or she] was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury [or the judge in a bench trial] the facts from which jurors [or a judicial trier of fact] . . . could appropriately draw inferences relating to the reliability of the witness'" (*Delaware v. Van Arsdall,* 475 U.S. 673, 680 (1986) (dictum), quoting *Davis v. Alaska,* 415 U.S. at 318). *See, e.g.*, *Ortiz v. Yates*, 704 F.3d 1026, 1034-40 (9th Cir. 2012). "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor or against a party [*sic*]. Bias may be induced by a witness' [*sic*] like, dislike, or fear of a party, or by the witness' [*sic*] self-interest. Proof of bias is almost always relevant because the jury [or the judge in a bench trial], as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' [*sic*] testimony." *United States v. Abel,* 469 U.S. 45, 52 (1984). *See, e.g.*, *Nappi v. Yelich*, 793 F.3d 246, 248, 253 (2d Cir. 2015) (the trial court violated the Confrontation Clause by precluding defense counsel from cross-examining the accused's wife about her romantic relationship with another man to show that the wife had "a motive to implicate Nappi in the illegal possession of a weapon – which she knew was a violation of his parole"); *Henry v. State*, 123 So.3d 1167 (Fla App. 2013) ("In a proffer, the defense sought to cross-examine the victim to establish that (1) he was charged with aggravated stalking; (2) the charge was a third-degree felony; (3) the maximum penalty for a third-degree felony is five years in prison; (4) the victim received 18 months on probation pursuant to his plea bargain; (5) the victim was arrested on December 6, 2005; and (6) the victim remained in jail from the time of his arrest until he entered his plea in mid-January of 2006. The prosecutor objected to the proposed cross-examination on the grounds that it was 'improper impeachment,' and that the victim's crime was 'not a conviction' or a 'crime of dishonesty.' The trial court sustained the objection and prohibited the testimony." *Id*. at 1168. "'A well recognized area of cross examination is how pending criminal charges may have influenced a witness' [*sic*] cooperation with the state and the content of in-court statements.'" *Id*. at 1170. "Here, the victim testified that he had pending, unrelated charges which were resolved without any deal to testify in this case. However, the jury was not required to accept the victim's characterization of the resolution of his pending case. The defendant was entitled to ask the victim about the six areas of cross-examination identified above to evaluate the victim's credibility." *Id*.); *State v. Carballo*, 17 Wash. App. 2d 337, 346-47, 486 P.3d 142,147 (2021) (reversing a conviction because the trial judge did not permit the defendant to cross-examine the prosecution's prime witness about her immigration status; "Although . . . [the defendant] was allowed to impeach . . . [the witness] with

various inconsistencies in her police interview and trial testimony, he was prevented from exploring her possible motive to lie. . . . The court, prosecution, and defense were all aware that . . . [the witness] was not a United States citizen and therefore was subject to removal under federal immigration law. However, the trial court did not allow . . . [the defendant] to cross-examine her about her immigration status as it related to a possible deportation threat by law enforcement that was uttered during her interrogation."); *In re J.W.*, 258 A.3d 195 (D.C. 2021) ("On one hand, the Sixth Amendment guarantees a criminal defendant's right to cross-examine adverse witnesses. . . . On the other hand, the Fifth Amendment protects a witness's right against compelled self-incrimination. . . . When the prosecution calls a witness who asserts a valid Fifth Amendment privilege to refuse to answer questions posed during cross-examination, the witness cannot be compelled to answer. . . . Rather, the options are: (1) the prosecution can provide the witness with immunity, so that the witness can answer the questions; (2) if the witness's refusal to answer does not impermissibly intrude on the defendant's the Sixth Amendment right to cross-examine, the witness can testify and decline to answer; or (3) if the witness's refusal to answer does impermissibly intrude on the defendant's Sixth Amendment right to cross-examine, the witness's entire testimony is inadmissible. *Id*. at 201. . . . ¶ . . . When defense counsel attempted to cross-examine Mg. J. to show that the pending armed-robbery charges gave her a motive to curry favor with the prosecution, Mg. J. denied having such a motive, because she was innocent. Defense counsel was precluded from further cross-examination to test the credibility of Mg. J.'s response, despite the proffer that the evidence against Mg. J. was 'really bad,' and the evidence that Mg. J. had been arrested with two stolen cellphones on her person. We hold that the Sixth Amendment would ordinarily have entitled J.W. to cross-examine Mg. J. further about her flat denial that she had a motive to curry favor and her related claim of innocence. . . . [B]ias is not 'a matter on which an examiner is required to take a witness's answer. Bias may be proved even after a witness's disavowal of partiality.'" *Id*. at 203-04. The trial court's refusal to strike Mg. J's testimony when she claimed the Fifth Amendment in response to this line of cross-examination was therefore reversible error. *Id*. at 206.); *Howard v. Walker*, 406 F.3d 114, 129 (2d Cir. 2005) ("Here, the trial court's ruling that, if the defense challenged the basis of . . . [a prosecution expert witness's] opinion, the State would be permitted to admit . . . [the] statement [of a purported co-conspirator, upon which the expert partly based his opinion] in its entirety, offered Howard a constitutionally-impermissible choice. The court required Howard to choose between his Sixth Amendment right to cross-examine . . . [a prosecution expert witness], and his Sixth Amendment right to exclude the unreliable hearsay confession of a co-conspirator. The Supreme Court has recognized that a court may not subject a defendant to such a sacrifice."); *cf. Miller v. Genovese*, 994 F.3d 734 (6th Cir. 2021). And the Sixth Amendment right of cross-examination extends not only to questions calling for answers that directly show bias but also to questions that could open up a line of further examination ultimately showing bias. *Smith v. Illinois*, 390 U.S. at 750-51.

§ 31.01(b) Deciding Whether to Cross-Examine; The Possible Goals of Cross-examination

Cross-examination should not be undertaken without good reason. Most of what most

witnesses testify is both unimportant and unassailable. Cross-examination on this material can only undermine the first point and underline the second in the eyes of the judge or jury. Unless counsel has a specific, affirmative goal that can realistically be achieved by cross-examination, the better course is to forego cross-examining.

Depending on the nature of the case and what was elicited on direct examination, counsel might pursue one or more of the following goals in cross-examining a prosecution witness:

(1) *To demonstrate the possibility of error or inaccuracy in*:

(a) perception by the witness;

(b) interpretation by the witness of what s/he perceived;

(c) memory of the witness;

(d) judgment, estimation, or opinion by the witness;

(e) articulation by the witness, in his or her testimony on direct examination.

Cross-examination may undertake to establish the existence of one or more of these factors (*e.g.*, limited opportunity to observe, or poor conditions for observation, by the witness; inattentiveness by the witness; "set" or bias on the part of the witness; prior or subsequent experiences by the witness which s/he may have confused with the occasion that s/he is purporting to narrate) by:

(i) getting the witness to admit the relevant facts (*e.g.*, to state that s/he was paying attention to something else at the time when s/he purports to have observed certain details), or

(ii) getting the witness to admit other facts from which the relevant facts can be inferred (*e.g.*, to state that something else was going on to which an ordinary person in the witness's situation would have been paying attention instead of attending to the details which the witness purports to have observed), or

(iii) getting the witness to deny the relevant facts incredibly (*e.g.*, to state that s/he was *not* attending to something else, when this statement is likely to be disbelieved by the trier of fact because, *inter alia*, it is belied by his or her demeanor in uttering the denial on the witness stand; *or* it is belied by his or her earlier statements or behavior which the cross-examiner can prove through or independently of the witness; *or* it is belied by the level of detail with which the witness is presently able to recount aspects of the

situation that s/he denies were the focus of his or her attention; *or* it is belied by the trier's conceptions that, in common human experience, no one situated like the witness could fail to focus attention on those aspects), or

(iv) getting the witness to demonstrate the relevant facts by his or her present performance (*e.g.*, to describe in microscopic detail the "something else" to which s/he therefore must have been closely attending), or

(v) more than one of these means.

Errors or inaccuracies may also be suggested indirectly, without pinpointing any specific factor that may have caused them, or even the specific area (*e.g.*, perception *versus* memory) in which they are operating. Take for example a prosecution witness who testifies on direct examination that at a particular time and place (which happen to have been five minutes before the commission of a crime, and in its near vicinity), s/he saw a youth whom s/he identifies as the respondent walking down the street wearing tan trousers (which, as it happens, the perpetrator of the crime was wearing, according to the victim's account). On cross-examination, this witness might be asked whether the youth s/he saw was wearing a jacket, what kind, what color; whether he was wearing a shirt, what kind, what color; what sort of footgear did he have; how was he wearing his hair, etc. – details which, from the perspective of an observer in the witness's situation, would occupy equal prominence with the tan pants that the witness purports to have seen and to recall. If s/he cannot recount other details of equal prominence, the trier of fact may well become skeptical of the tan-pants story; if s/he can, the cumulation of such details may enable counsel to argue to the jury or judge the incredibility of a witness who professes to have made and memorized a minute inspection of a passing stranger that s/he had no particular reason to scrutinize so closely. (The argument would not be viable, and the line of cross could be quite dangerous, in the case of a witness who *did* have a reason to scrutinize the stranger – for example, s/he saw him running from the crime scene after a hue and cry had been raised.)

(2) *To demonstrate that the witness's testimony on direct examination was unfair or misleading.*

If cross-examination elicits facts omitted on direct which manifestly qualify or alter the significance of the facts to which the witness testified on direct, the result may be more than a mere neutralization of the direct. By portraying the direct as misleading, counsel has acquired grounds to argue in closing that the witness or the prosecutor (or both) were "telling a half-truth," or "covering up awkward facts," or "trying to conceal whatever didn't fit their version of the story." The credibility gap thus created may spread to other features of the witness's testimony or of the prosecutor's case. Improper coaching of witnesses by police and prosecutors (*see* Daniel S. Medwed, *Coaxing, Coaching, and Coercing: Witness Preparation by Prosecutors Revisited*, 16 OHIO STATE J. CRIM. LAW 379 (2019)) is one of the symptoms of a generally weak and unreliable prosecution case, and opens the door to defense argument that "'the . . . methods

employed in assembling the case'" cast into reasonable doubt "the reliability of the investigation" as a whole (*Kyles v. Whitley*, 514 U.S. 419, 446 (1995); *and see Silva v. Brown*, 416 F.3d 980, 990 (9th Cir. 2005)). *Cf.* the Covey article cited in § 31.09 *infra*.

(3) *To demonstrate the possibility that the witness is lying*.

In the case of the ordinary witness, this is exceedingly difficult. Particularly if the witness is at all personable, it will be easier to persuade the jury or judge that the witness is honestly and reasonably mistaken than that s/he is indefensibly reckless or unconsciously biased, and it will be easier to persuade the jury or judge of either of these latter things than that the witness is intentionally lying. However, some witnesses (*e.g.*, an accomplice who testifies for the prosecution, admitting the crime and saying that the respondent participated in planning and committing it) cannot plausibly be mistaken if they are truthful: They must be challenged as liars or not at all. Usually, the challenge can succeed only if both motivation to lie and some other indication of untruthfulness (*e.g.*, a prior inconsistent statement of the witness; discrepancies between the witness's story and other evidence; shiftless demeanor) are shown; and cross-examination must be directed to making these showings. Because an unsuccessful attempt to brand a witness as a liar can alienate the jury or judge – in direct proportion to the likeability of the witness – the effort should not be made without strong ammunition that promises a reasonable prospect of success.

(4) *To make the witness unattractive*.

This is often easier than making the witness out to be a liar. The jury or judge may discredit a witness whom it perceives as having bad judgment, and it may identify bad judgment with cockiness, pig-headedness, self-righteousness, egotism, inconsiderateness, meanness, pettiness, snoopiness, gossipiness, and a host of other major and minor vices, including simply acting, talking or thinking like someone whom the jurors would not want their son or daughter to marry. Unattractive traits of a witness may be brought out on cross either by enticing the witness to display them on the stand or by eliciting from the witness facts about what s/he did or said in connection with the subject matter of his or her testimony that manifests the traits.

(5) *To confine the reach of the witness's testimony on direct*.

This goal includes both (a) establishing explicitly the limits of assertions made by the witness on direct, so that s/he will not appear to be saying more than s/he has said, and (b) establishing facts that impede the drawing of inferences unfavorable to counsel's case from what the witness has said on direct.

(a) Q. "You testified on direct examination that you arrived at approximately 8:00 p.m., is that correct?
A. "Yes.
Q. "You did not testify that it was exactly 8:00 p.m., right?

A. "It was about 8:00 p.m.

(b) Q. "You did not consult your watch at the time you arrived?

A. "No.

Q. "You had no reason to attend to the exact time of your arrival, did you?

A. "Not really.

Q. "The first occasion on which you had a reason to focus on the question of the time of your arrival is when the detective asked you about it, correct?

A. "Well, you mean specifically? I guess that's right."

(6) *To elicit information that (a) affirmatively supports the defense's case, or (b) is inconsistent with, and thereby discredits, other evidence presented in the prosecutor's case.*

Subspecies (a) is particularly useful when counsel can get it. To be able to argue to the jury or judge that "even the prosecution's witnesses admit that [a fact favorable to the defense] is true" can add considerable persuasiveness to the defense case. Subspecies (b) plays the prosecutor's witnesses off against one another: "They can't both be right," counsel can argue in closing.

§ 31.01(c) Avoiding the Most Common Pitfalls of Cross-examination

Before beginning cross-examination, counsel should give careful thought to the *areas that s/he had best stay out of* as well as to the areas that s/he wants to go into. S/he should review the elements of the offense and the overall state of the prosecutor's record on those elements, so as to avoid the cardinal sin of helping the prosecution by filling in the missing links in its case. Counsel should keep in mind that by touching any particular subject on cross, s/he will open the door to redirect examination by the prosecutor on that subject, with the danger that the prosecution will improve its case. Conversely, subjects "beyond the scope of cross" may not ordinarily be taken up on redirect; and although trial judges have discretion to relieve a party of the rigor of this rule, most judges are more inclined to enforce the rule strictly than to relax it.

§ 31.01(d) Framing Cross-examination Questions for Maximum Effectiveness

Leading questions are permitted on cross-examination and are a particularly useful tool: Not only can they be used to pin a witness down to specifics and to keep the witness from straying into areas that counsel does not want to open up, but they can also be used to obtain admissions of facts stated in the terms most favorable to the respondent's theory of the case. The standard form of cross-examination question for these purposes is a declarative statement followed by "isn't that true?" or an equivalent phrase. For example:

"The man who robbed you approached you from the direction of the gas station, isn't that true?"

"When you first saw him, he was between you and the gas station, right?"

"In reporting the robbery to the police, you said that you could not tell whether the man had come out of the gas station parking area or out of the vacant lot next door, didn't you?"

"At the time you first saw him, he was far enough from the gas station so that you could not tell whether he had been on the station's property, is that correct?"

"From your location, all of the gas station lights were behind him, weren't they?"

"And looking at him come toward you, you were facing directly into the lights at the gas station, weren't you?"

The aim in fashioning questions of this sort is to phrase the facts as strongly in favor of the defense as is possible without running a serious risk that the witness will give a credible "no" answer. Thus the final question in the preceding series is preferable to "Looking at him come toward you, you were facing the lights at the gas station, weren't you?" because the latter formulation is unnecessarily weak. On the other hand, "the lights of the gas station were in your eyes, weren't they?" would be overly risky; and even "you were *looking* directly into the lights" is not as safe as "you were *facing* directly into the lights."

The preceding series also exemplifies the often profitable technique of using "probe" questions to lock the witness into a position in which s/he must give the desired answer to a "payload" question or, alternatively, to forewarn counsel that the payload question should not be asked. A negative answer to any of the questions before the last one would have permitted and advised the cross-examiner to drop the entire line without embarrassment or risk of a damaging backfire, whereas affirmative answers to all of them made it almost impossible for the witness to avoid giving an affirmative answer to the final question.

§ 31.02 POLICE WITNESSES

Counsel should keep in mind that policing is a highly rule-bound profession. Departmental regulations flourish, governing many aspects of police work and surrounding them with detailed codes of *shall*'s and *shall not*'s that are often utterly impractical for the officer in the field to obey. At the police academy and in police manuals, officers are taught "the way" to do this or that. The approved procedure remains in their minds as "the way" to do it, even though in practice they soon develop shortcuts that deviate dramatically from that procedure. As a result, police officers frequently fail to do all of the things that it is possible for defense counsel to show on cross-examination were required or expected of them. They are constantly neglecting to file prescribed reports, leaving items uncompleted in the filling out of reports, departing from specified investigative procedures, and so forth. (For example, it seems virtually impossible to train police not to pick up a gun found at the scene of a crime to check whether it is loaded,

although the gun may have latent fingerprints on it.)

Thus a relatively productive way to impeach the testimony of a police officer is to set the officer up as an expert in criminal investigation by eliciting the officer's testimony that s/he is one; then to lead the officer into agreeing that certain specified methods described by counsel are proper (or, better still, required by local police regulations) in gathering evidence to be used at trial or in recording observations or the progress of an investigation; then to retrace the officer's direct-examination testimony in detail to demonstrate that s/he deviated substantially from the specified methods, that s/he failed to take various steps which they call for, and that much of the officer's testimony was not written into his or her report at the time of the incident, despite the fact that s/he handles hundreds of cases and intends to use his or her notes to refresh his or her recollection for trial. Counsel will find it helpful to peruse local police instructional manuals, teaching materials used at the local police academy or training center, and standard police texts on criminal investigation to help identify points of error in police techniques.

Police investigation ordinarily proceeds through a sequence of stages that represent a commonplace form of inductive reasoning. Beginning with the first pieces of information they receive, the police begin to generate hypotheses – more or less consciously – about what happened, how, and who did what. As additional information is received, it is used to modify or reaffirm the initial hypothesis, and at some point the police decide that they know enough to reach a conclusion about the facts of the case. They embody this conclusion in whatever charge or charges they lodge, and – unless they are subsequently asked by a prosecutor to do additional investigation, or unless they are subsequently told additional "facts" by a prosecutor or another prosecution investigator – the facts that they have charged become The Truth in their view. This process is susceptible to distortion through the human propensity for tunnel vision (a/k/a confirmation bias): An initial, premature hypothesis solidifies too soon and colors all information subsequently received, so that any information which confirms the hypothesis is uncritically believed, while any information that would disconfirm the hypothesis is ignored or discredited. *See, e.g.,* Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises,* 2 REV. OF GEN. PSYCHOL. 175 (1998); DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS (2012); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291; D. Kim Rossmo & Joycelyn M. Pollock, *Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*, 11 NORTHEASTERN U. L. REV. 790 (2019); Belén Lowrey-Kinberg, Jon B. Gould, Katie Hail-Jares & Samantha L. Senn, *Pathways to Suspicion: Causes and Consequences of Innocent Suspects' Origin of Implication*, 54 CAL. WEST. L. REV. 1 (2017); Lisa Kern Griffin, *Honesty without Truth: Lies, Accuracy, and the Criminal Justice Process*, 104 CORNELL L. REV. ONLINE 101, 104-05 (2018); Huang Shiyuan, *Cognitive Biases that Lead to Wrongful Convictions: Illustrated by Twenty-Three Erroneous Chinese Cases,* 54 CAL. WEST. L. REV. 103 (2017). Police investigation is peculiarly susceptible to this kind of warping for two basic reasons. First, a police investigator does not merely *receive* successive increments of information; s/he actively seeks it out; and the kinds of information that s/he seeks, the sources to which s/he goes for it, and the questions by which s/he elicits it are all products of his or her

initial hypothesis. *See*, *e.g.*, *Humbert v. Mayor and City Council of Baltimore City*, 866 F.3d 546 (4th Cir. 2017); *DeLoach v. Bevers*, 922 F.2d 618 (10th Cir. 1990). Second, police are almost always overworked and always feel they are; so the temptation to follow the mental line of least resistance and to reach a speedy conclusion is peculiarly difficult to resist. *See*, *e.g.*, MARK GODSEY, BLIND INJUSTICE: A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS 5-6, 54-58, 76, 98-112, 143-151, 170-212 (2017). Defense counsel can sometimes use a three-step cross-examination process to convince a judge or jury that this warped process underlies the prosecution's case:

> *Step one*. Counsel asks the primary police witness to describe in detail the first pieces of information s/he received about the case. Counsel continues to elicit the successive pieces of information that the officer received, in the sequence in which s/he received them, by asking "What was the next piece of information you received?" or an equivalent question. At the point at which counsel believes that the police officer initially zeroed in on [a theory of what happened] *or* [an identification of the perp], counsel asks: "At this point in time, it did not appear to you that [*e.g.*, "the burglar had entered through the window"] *or* ["this defendant was the shooter"], isn't that correct?" Because the question seems to be aimed at discrediting the officer's eventual conclusion (incriminating the defendant) as a bit of latter-day speculation unsupported by the information acquired while the criminal events were still fresh, the officer will frequently insist that s/he *did* believe at this early investigative stage that [the crime was committed in the way in which the prosecution's trial theory portrays it] *or* [the defendant was the perp], *or* [whatever self-fulfilling prophesy defense counsel has chosen to establish]. *See* § 24.4.3, discussing the use of false leads in cross-examination. Counsel appears to accept this answer and continues to ask a series of "What was the next piece of information you received" and "When did you receive that information" questions – stopping just short of the point at which the police information would probably appear to the trier of fact to make out a pretty convincing prosecution case.
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> *Step two*. Counsel returns to the beginning of the police investigation and asks about every piece of information that the officer received which was *not* followed up and which might have led to developing a different theory of what happened or a different conclusion about who was the perp. Counsel establishes in detail what each piece of information was and exactly when it was received. Counsel stops this line of examination at the same chronological point as the step-one line.
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> *Step three*. Counsel then goes back and asks an identical triad of questions about each piece of information that the officer has mentioned at step two: "You said that you received [information item *X*] at [date/time], right?" "Did you conduct any investigation following up on [information item *X*]?" "Did you ask any other investigator to follow up on [information item *X*]?" This line of questions avoids asking any "why" questions that would enable the officer to explain his or her investigative decisions. It simply lays the factual foundation for counsel to argue in closing that this is a case in which tunnel-

vision/confirmation-bias processes led to a misguided prosecution.

To conduct this line of cross-examination safely and effectively, defense counsel needs to have collected and analyzed all of the police reports in the case (see, *e.g.*, §§ 9.17-9.18, 9.20, 18.5,18.7.3 subdivision (2) *supra*) and also to have used any available pretrial procedures or hearings to obtain a detailed preview of how the officer will respond to counsel's planned questions regarding the contents and timing of each piece of information (see, *e.g.*, §§ 11.8.2-11.8.4, 11.8.6-11.8.7, 24.2, 24.4.2-24.4.4 *supra*).

It is sometimes tempting to try to show that the police have it in for the respondent or are picking on the respondent, but the effort to do so out of the mouths of the police almost never succeeds. *In no event* should counsel ask a police officer "What attracted your attention to the respondent?" or similar questions. The reply is guaranteed to elicit the police officer's experience with the respondent's prior criminal acts and may also elicit damaging rumor. (If police witnesses volunteer prejudicial prior-crime or prior-arrest evidence, as they will frequently seek some pretext to do, a motion for a mistrial is in order. *See State v. Acker*, 133 Hawai'i 253, 279, 327 P.3d 931, 957 (2014) (dictum) ("'the deliberate and unresponsive injection by prosecution witnesses of irrelevant references to prior arrests, convictions, or imprisonment may generate insurmountable prejudice to the cause of an accused' . . . [and] constitute an 'evidential harpoon' requiring a mistrial" (quoting *State v. Kahinu,* 53 Hawai'i 536, 549, 498 P.2d 635, 643 (1972))); *see id*. at 548-49, 498 P.2d at 643-44 and cases cited; *State v. Herbert*, 457 N.J. Super. 490, 201 A.3d 691 (2019) (holding that a mistrial was required primarily because a detective who was the prosecution's key witness twice volunteered the information that the defendant was a member of a gang); *cf*. *Bowen v. Eyman,* 324 F. Supp. 339 (D. Ariz. 1970).)

In general, cross-examination of police witnesses should be very specific, calling for short *factual* answers and giving the witness no leeway to stray. Counsel should ask: "When you first caught sight of the man, what clothing did you observe that he was wearing?" not "What was the man you saw wearing?" (because the latter question will elicit a minute description of everything that the officer observed about the man's clothing during his first sighting or at any later time); "What specifically did you see Pat do next?" not "What happened next?"; "What words did Susan use in telling you about the shooter's statement?" not "What did Susan tell you the shooter said?" If a police officer begins to describe what Pat did next by saying "Pat appeared to be . . ." – or begins to describe Susan's communication by saying "She indicated that . . . " – counsel should immediately interrupt and ask the judge to instruct the witness to answer the question, not to state his or her opinion. And counsel should never ask *why* a police officer did something. Counsel should ask only what the police officer did and the factual circumstances under which s/he did it. Counsel can argue in closing argument that the police officer did it for the wrong reasons if that is a permissible inference from the officer's actions in the circumstances. But trying to elicit a police officer's reasons from the officer's own mouth will get counsel nothing except self-serving protestations of angelic good faith, coupled with everything damning to the respondent that the officer can think of.

The alternative strategies suggested in § 22.04(e) for cross-examining a police witness whose testimony is inconsistent with a vidcam recording are applicable *mutatis mutandi* at trial.

Prosecutors frequently attempt to elicit opinion testimony from police witnesses on matters such as the paraphernalia and indicia of gang-related activity, the meaning of certain words in drug-trade jargon, and the association between possession of certain objects and the commission of crimes (for example, that particular kinds of tools are commonly used by chop shop operators). Objections that can be made to testimony of this kind are discussed in Fareed Nassor Hayat, *Preserving Due Process: Requiring Frye and Daubert in Gang Cases*, 51 NEW MEXICO L. REV. 197 (2021), *and* Joëlle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TUL. L. REV. 1, 30 (2004); *and see, e.g.*, *United States v. Hampton*, 718 F.3d 978 (D.C. Cir. 2013); *cf. United States v. Garcia*, 919 F.3d 489 (7th Cir. 2019). Because it is ordinarily the case that police officers who will testify at trial have also appeared as prosecution witnesses in earlier proceedings (at the preliminary examination or at suppression hearings) or in earlier trials arising out of the same incident or similar incidents – or that they have executed affidavits (as the basis for warrants or for a *Gerstein* probable-cause determination (see §§ 11.2 – 11.3 *supra*)) – defense counsel can often anticipate what objectionable testimony to expect from particular police witnesses. Counsel should review available transcript material and affidavits and should ordinarily use the techniques discussed in § 17.5.3 *supra* and § 40.4 *infra* to prevent the prosecutor from starting down lines of examination that are likely to elicit inadmissible and damaging testimony of this sort.

Regarding steps to be taken when counsel anticipates that police witnesses who interrogated the defendant may testify that his or her exculpatory statements are incredible, see § 33.09(a) concluding paragraph *infra.* Regarding the seating of police witnesses at the prosecution table, see § 27.11 *supra*.

§ 31.03 ACCOMPLICES TURNED STATE'S EVIDENCE

When accomplices turn state's evidence and testify for the prosecution, their testimony is usually damning. Ordinarily, the surest way to undermine an accomplice's testimony is to show that s/he has some motive for fabricating. Standard techniques are to demonstrate (a) the consideration s/he is getting or expecting to get from the prosecution for testifying (*see Moore v. Secretary Pennsylvania Department of Corrections,* 640 Fed. Appx. 159 (3d Cir. 2016); Ani Oganesian, *Note, The Confrontation Clause: Employing the "Greatest Legal Engine Ever Invented for the Discovery of Truth" to Promote Justice in Criminal Courts*, 51 LOYOLA L.A. L. REV. 681 (2018); and see the following paragraph); (b) his or her prior criminal record or bad character for truthfulness or both, within the limits allowed by local law and constitutional doctrines (see § 30.07(c) *supra;* §§ 31.12-31.13 *infra*); (c) the inconsistent story that s/he told (accomplices almost always do) when first taken into custody, denying any complicity in these crimes (see § 31.11 *supra*); and/or (d) any reasons s/he has for "harbor[ing] animosity towards the [respondent]" (*cf. Lloyd v. State*, 909 So.2d 580, 581 (Fla. App. 2005); *State v. Ofield*, 635

S.W.2d 73, 75 (Mo. App. 1982)).

An accomplice should ordinarily be asked whether charges against him or her have been filed; if so, whether they have been dropped or reduced and whether s/he is aware of any discussions that have been had regarding the possible dropping or reduction of those charges or regarding the sentence s/he might receive. *See*, *e.g.*, *Cook v. Foster*, 948 F.3d 896 (7th Cir. 2020) (counsel was ineffective in failing to elicit testimony from an accomplice testifying for the prosecution that she had given her statements to law enforcement with the understanding that she would not be charged, and in failing to elicit more than cursory admissions of a similar understanding on the part of a second turncoat accomplice); *State v. Summers*, 506 S.W.2d 67, 71 (Mo. App. 1974) (defense counsel should have been permitted to ask an accomplice, testifying as a prosecution witness, "'how many burglaries have you participated in?'" because this question "constituted a foundation to subsequently show that the witness had been promised consideration or leniency by the state concerning other burglaries in return for his cooperation in the instant case, likewise bearing on the witness' [*sic*] credibility"); *Parker v.State*, 657 S.W.2d 137 (Tex. Crim App. 1983). (If the accomplice lies, the prosecutor is constitutionally obliged to disclose the truth or suffer the invalidation of the respondent's conviction when the deal with the accomplice is kept and the truth is discovered. *Napue v. Illinois,* 360 U.S. 264 (1959); *Giglio v. United States,* 405 U.S. 150 (1972); *DeMarco v. United States,* 415 U.S. 449 (1974) (per curiam); *Jenkins v. Artuz*, 294 F.3d 284 (2d Cir. 2002); *Hawkins v. United States,* 324 F.2d 873 (5th Cir. 1963); *see Ring v. United States,* 419 U.S. 18 (1974) (per curiam). If a respondent is convicted at a trial at which an accomplice has testified for the prosecution and has denied making any deal with the authorities in exchange for his or her testimony, counsel should keep a close eye on the disposition of the charges against the accomplice – which are usually left pending until after s/he has testified and then fairly promptly disposed of – so that counsel can make a new trial motion on *Napue* grounds as soon as evidence of a *Napue* violation appears.) Stressing the maximum penalties to which the accomplice could have been sentenced had there been no deal is one way to impress upon a jury (or a judge in a bench trial) why someone in the accomplice's predicament would lie. *See*, *e.g.*, *Henry v. State*, 123 So.3d 1167 (Fla App. 2013), summarized in § 31.01(a) third paragraph *supra*. Even in the absence of a provable testimonial agreement between the turncoat accomplice and the prosecutor, defense counsel may ask the accomplice whether it is not true that s/he has been charged with designated offenses and that those charges have not yet been resolved (*see Washington v. United States,* 461 A.2d 1037 (D.C. 1983)), so as to lay the foundation for arguing in closing that the witness "harbor[ed] a hope of better treatment if he testified as he did" (*id*. at 1038)). *See also*, *e.g.*, *State v. Clark*, 364 S.W.3d 540, 544-45 (Mo. 2012) (defense counsel was entitled to cross-examine a prosecution witness about having pleaded guilty to unrelated charges and his hope that "he would reap a benefit" from testifying for the state even though there was no plea agreement to that effect; the witness's "belief that his testimony would have a favorable effect on future sentencing may have been mistaken or speculative, but what is important is what he believed.").

One caution should be observed in exploring the background of relations between an accomplice and the respondent in an effort to show personal animosity. If counsel's interview of

the client reveals that the client and the accomplice know each other primarily through their commission together of crimes in addition to the one for which the respondent is presently being tried, counsel should ordinarily refrain from cross-examining the accomplice about his or her feelings toward the respondent, in order to avoid the risk of eliciting otherwise inadmissible "other crimes" evidence (see § 30.07(a) *supra*). Sometimes it will be sufficient to phrase questions carefully and to instruct the witness to answer certain of them yes or no. But this is risky and should not be undertaken unless counsel has first requested and obtained from the court (a) an admonition to the witness not to go beyond yes-or-no answers to these questions on cross, and (b) a ruling *in limine* precluding the prosecution from asking the witness on redirect any questions that will bring out the respondent's participation in other crimes (*see* §§ 7.03(c), 30.02(a)(1), 30.02(a)(2) *supra*).

And see Robert M. Bloom, *What Jurors Should Know About Informants: The Need for Expert Testimony*, 2019 MICH. ST. L. REV. 345.

§ 31.04 COMPLAINANTS IN THEFT CASES

Many complainants who are victims of theft have no personal knowledge of the accused. Their only function is to identify the stolen items as those that were taken from them. If the item is unique, no cross-examination is ordinarily warranted. See § 31.01(b) *supra*. Indeed, if the complainant is particularly vulnerable or personable, a stipulation is usually advisable. See § 30.02(b) *supra*. If the item is a standard model, the complainant should be examined cordially about the basis for his or her claim that s/he recognizes this particular item as the one stolen. Were there others like it at the source from which s/he purchased it? Has s/he seen others like it for sale or in the possession of family members or friends? This is all the cross-examination that is needed to lay the foundation for counsel's closing argument that the object in question is no different than those that can be found anywhere, by the hundreds.

§ 31.05 COMPLAINANTS WHO IDENTIFY THE RESPONDENT, AND OTHER IDENTIFICATION WITNESSES

Frequently an identification of the respondent as the perpetrator is made by a complainant or eyewitness who did not know the perpetrator and viewed him or her only momentarily. The in-court identification usually follows an out-of-court identification in a pretrial show-up, lineup, or photographic identification procedure. Chapter 25 *supra* describes the various constitutional and state-law challenges that can be made to testimony concerning out-of-court identifications as well as to in-court identifications that are tainted by an earlier, improper out-of-court identification process or that are otherwise unreliable. As explained in Chapters 22 and 25, many jurisdictions provide for a pretrial evidentiary hearing on a motion to suppress identification testimony, at which counsel can cross-examine the police officer who conducted the identification procedure and often the complainant or eyewitness who identified the respondent. And where a tendered identification witness has made no pretrial identification of the defendant, counsel can request a screening hearing to determine the admissibility of a first-time in-court identification. See

§ 25.05(a) *supra*. Thus, by the time of the trial, counsel will frequently have had a prior opportunity to cross-examine the identifying witness and will know which cross-examination questions work and which do not. See §§ 22.02, 22.04(b), 22.04(c) *supra*.

Complainants who were victimized while confronting their assailant and who identify the respondent are best examined with an emphasis on the speed of the transaction, any bad lighting and obstructions to vision, the lack of opportunity to observe carefully under the circumstances, and the fear that they were feeling at the time and that impeded detached and accurate appreciation of events or attention to the features of the assailant. See § 31.01(b), subdivision (1) *supra*. *See, e.g.*, *People v. Bailey*, 102 A.D.3d 701, 702, 958 N.Y.S.2d 173, 175 (N.Y. App. Div., 2d Dep't 2013). It should be brought out that the complainant never saw the assailant before the few seconds or minutes in question and (if this is so) has not seen the assailant since. The complainant may be portrayed as one who is willing to risk an innocent person's conviction on false self-confidence in a stressful spur-of-the-moment impression.

Any discrepancies between the respondent's appearance at trial and the description of the assailant given to the police by the complainant should be brought out. This can best be done by (a) asking whether the complainant described the assailant to the police; (b) asking on how many occasions descriptions were given; (c) asking what those descriptions were; (d) reading the description in the police report, unless the complainant relates it accurately, and asking whether that is not more like it; (e) exploring all details of discrepancy; and (f) asking whether the complainant's recollection was not better immediately after the offense than it is now. *Omission* in the original description of salient characteristics of the respondent is significant. *See, e.g.*, *People v. Greene*, 110 A.D.3d 827, 828-29, 973 N.Y.S.2d 239, 241 (N.Y. App. Div., 2d Dep't 2013) (dictum) (defense counsel should have been permitted to cross-examine an eyewitness about the omission of a physical characteristic in his initial description of the perpetrator: the witness, who testified at trial that the defendant's "'squinting,' 'partly closed' left eye" was "a significant factor in his identifying the defendant as the assailant," could properly be impeached on the ground of the "omission of this observation of the assailant's appearance when he described the assailant to the police.").

Even if a motion to suppress identification testimony has been litigated and denied, counsel is entitled to present a misidentification defense at trial and, in support of that defense, to explore at trial any suggestive police behavior that might have contributed to a misidentification. *Sales v. Harris,* 675 F.2d 532, 539-40 (2d Cir. 1982) (the trial judge erred by instructing the jury, on the basis of a pretrial suppression ruling, that photographic identification procedures were nonsuggestive as a matter of law); *cf. Crane v. Kentucky,* 476 U.S. 683 (1986) (an accused's constitutional right to present a defense entitles the accused to adduce evidence at trial that his or her confession was coerced even though that issue was resolved against the accused in a pretrial suppression hearing); *and see People v. Santiago*, 17 N.Y.3d 661, 672-73, 958 N.E.2d 874, 883-84, 934 N.Y.S.2d 746, 754-55 (2011) (the trial court abused its discretion and committed reversible error by denying a defense request to call an expert witness to testify at a jury trial regarding the reliability of eyewitness identifications). If the complainant identified the

respondent in a lineup or other police-staged confrontation, emphasis should be placed on (1) any circumstances in the identification situation that tended to single out, or "finger," the respondent (Was the respondent exhibited to the complainant alone? If in a lineup, was s/he dressed unlike the others? How much did the others resemble the respondent in gross characteristics?); and (2) any circumstances pointing to police persuasion or suggestion. It is fruitful to explore everything said by the police to the complainant prior to, or at the time of, the identification. But this can be safely done *only* if counsel knows from the pretrial suppression hearing or a *voir dire* hearing that questions on this subject will not elicit damaging answers (*e.g.*, that the respondent had been convicted for earlier similar offenses).

Authorities and sources of information useful in challenging the reliability of eyewitness identifications are collected in §§ 25.03, 11.01(a) subdivision 13, 11.01(b) third paragraph *supra* and in *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 314-45 (3d Cir. 2016) (en banc) (McKee, C.J., concurring); see also § 6.02(b) fourth and fifth paragraphs *supra*; Jed S. Rakoff & Elizabeth F. Loftus, *The Intractability of Inaccurate Eyewitness Identification*, 147 (No. 4) DAEDALUS 90 (Fall 2018). Concerning voice identifications, *see* Mark W. Bennett, *"Earwitnesses": Dangerous Misidentification Lurks in Fed. R. Evid. 901(B)(5) and Supreme Court Precedent in Light of Empirical Social Science*, 44 LAW & PSYCHOLOGY REV. 1 (2020).

If the prosecution introduces into evidence a video recording of the crime or some other relevant event, the prosecution may attempt to present a witness who identifies an individual in the video as the respondent. Defense counsel can object to such testimony as inadmissible lay opinion testimony under FED. RULE EVID. 701 or a state analogue and argue that the prosecution must establish that the witness is in a better position than the jurors to make such an identification and thus that the opinion would be sufficiently "helpful" to the jury to satisfy Rule 701(b). *See, e.g.*, *United States v. Fulton*, 837 F.3d 281, 299 (3d Cir. 2016) (the district court violated Rule 701(b) by allowing the prosecution to present testimony from an FBI agent and another investigating officer that the defendant's height, build, and other physical characteristics were a closer match than another suspect to that of a masked robber in a surveillance video of a bank robbery: "Neither . . . [officer] had sufficient familiarity with the appearances of . . . Fulton [or the other suspect] to assist the jury here. Neither testified to any familiarity with . . . Fulton [or the other suspect] apart from this case. . . . Accordingly, their opinion testimony was not helpful within the meaning of Rule 701(b). These agents were no better equipped than the jurors to compare the . . . appearance [of the robber in the video] with that of . . . Fulton [and the other suspect]. . . . They assumed the role of juror in comparing photographs of . . . Fulton [and the other suspect] to the surveillance footage and concluding Fulton looked more like the robber than [did the other suspect]."); *State v. Gore*, 342 Conn. 129, 159, 269 A.3d 1, 18-19 (2022) (construing the state analogue to FED. RULE EVID. 701 to require that "the proponent of the testimony [of a "lay witness['s] identification[ ] of [a] person[ ] depicted in video surveillance footage"] demonstrate that the witness possesses more than a minimal degree of familiarity with the defendant. . . . In making that determination, courts should consider the particular, relevant circumstances, including, but not limited to, the frequency, number and duration of any

individual prior contacts; the duration of the entire course of contacts and the length of time since the contacts; the relevant viewing conditions; and the nature of the relationship between the witness and the defendant, if any."); *People v. Challenger*, 200 A.D.3d 500, 500-02, 157 N.Y.S.3d 461, 462-63 (N.Y. App. Div. 1st Dep't 2021) ("The court should not have permitted the arresting detective to give lay opinion testimony that defendant was the person depicted in two surveillance videos."; "[T]here is a significant probability that the arresting officer's testimony influenced the jury in its task, which was to view the security camera footage and determine if the attacker visible in that footage was defendant."). *See generally* Annot., Brent G. Filbert, *Admissibility of Lay Witness Interpretation of Surveillance Photograph or Videotape*, 74 A.L.R.5th 643 (1999). *Compare State v. Bruny*, 342 Conn. 169, 186, 189, 191, 193, 194, 269 A.3d 38, 50-55 (2022) (the trial court did not abuse its discretion by "allowing the state's expert, Imel, a forensic examiner, to testify regarding an enhanced video he compiled from the raw video surveillance footage, tracking the movement of certain individuals through the club": the expert's "experience and training in the area of forensic video and image analysis were extensive," and "[t]he trial court correctly concluded that Imel's testimony met the standards of § 7-2 of the Code of Evidence" and that it "would assist the jury in its task of interpreting the surveillance footage"; the appellate court "emphasize[s] . . . that Imel never identified the defendant as the shooter and was never asked to do so": "At no point during Imel's testimony did he state that he believed that [the individual labeled] MS-4 ["who stood behind the victim and appeared to be holding an object in his right hand"] was the defendant. Although Imel's testimony, understood in conjunction with the video, constituted persuasive proof that MS-4 shot the victim, the state was still required to prove that MS-4 was the defendant. Moreover, the tracking information depicted in the enhanced video, and Imel's expert testimony explaining it, could not have been developed by the average juror. That information thus assisted the jury in carrying out its task, without allowing the expert to identify the shooter. Accordingly, Imel's testimony did not invade the province of the jury."). Defense counsel also should be familiar with the objections that can be made to the prosecution's introduction of the video itself. See § 10.14(c) *supra*. There may be cases in which defense counsel should consider presenting a relative or friend of the respondent to testify that an unclear image of an individual in a video is *not* the respondent. In such cases, defense counsel must be ready to satisfy the applicable rule of admissibility of lay opinion testimony – and presumably will be able to do so, precisely because the witness is a relative or friend of the respondent's.

§ 31.06 THE COMPLAINANT IN A RAPE OR OTHER SEXUAL OFFENSE

When cross-examining a complainant in a sex-offense prosecution, counsel should ordinarily adopt as solicitous and kindly a manner as possible. This is not merely a matter of showing consideration for an individual who has been traumatized; the factfinder (whether judge or jury) is likely to feel sympathy for the complainant, so that a belligerent or bantering tone on counsel's part will probably arouse the judge's or jury's ire. This is especially true when the complainant is a child. See § 31.08 *infra.*

The traditional defense technique of showing the victim's prior sexual history and lack of

chastity has been prohibited or limited in numerous jurisdictions by statutes, court rules, and appellate decisions usually called generically "rape shield laws." *See, e.g.*, *Michigan v. Lucas*, 500 U.S. 145, 146-47 (1991); I. Bennett Capers, *Real Women, Real Rape*, 60 U.C.L.A. L. REV. 826 (2013), and sources cited). Even where the technique remains available, it is likely to backfire with judges and jurors who subscribe to the now-largely-accepted view that prior sexual history has nothing to do with whether one has or has not been raped. *See, e.g., McLean v. United States,* 377 A.2d 74 (D.C. 1977) (upholding a trial judge's exclusion of evidence of the complainant's reputation for unchastity and prior sexual relations with persons other than the accused because this evidence was insufficiently probative of consent). Some uses of evidence of a rape complainant's sexual behavior on occasions other than the one at issue are permissible and may be persuasive. *Compare State v. Lavalleur*, 289 Neb. 102, 108, 111, 853 N.W.2d 203, 210, 212 (2014) ("Nebraska's rape shield statute," which "bars '[e]vidence offered to prove that any victim engaged in other sexual behavior' and '[e]vidence offered to prove any victim's sexual predisposition,'" did not apply to defense counsel's intended cross-examination of the complainant about her "romantic relationship . . . with another woman" in order to "establish that [complainant] M.J. had a motive to falsify her accounting of the events"); *State v. Montoya*, 2014-NMSC-032, 333 P.3d 935, 937, 944 (N.M. 2014) (the rape shield law did not bar defense counsel's intended cross-examination of the complainant about her past sexual relationship with the defendant: "Defendant does not argue that because of 'make-up sex' in that past, Victim must have intended consensual 'make-up sex' on this occasion. Defendant's theory goes not to Victim's propensity or her state of mind; it goes solely to his own thinking (specific intent) in light of an alleged pattern of conduct and understanding between the two parties in the context of allegedly similar circumstances. Defendant was free to point out that once he realized that the facts and circumstances were not similar to a pattern of 'make-up sex,' his sexual advances ceased." *Id*. at 944. "The rape shield law should not serve to protect the prosecution and its characterization of a case, especially when . . . concerns regarding Victim's embarrassment and harassment are minimal." *Id*.). Local precedents and practice should be consulted.

There are essentially three defenses in rape cases: (i) misidentification; (ii) fabrication; and (iii) consent.

In cases in which the defense is misidentification, counsel should cross-examine the complainant on the factors that prevented the complainant from getting a good look at the assailant: it was dark out; the complainant's face was covered; the assailant's face was covered; the complainant was so terrified as to be unable to focus meaningfully on the perpetrator's face; and so forth. See § 31.05 *supra* and the cross-references there. Whenever a misidentification defense is presented, it is extremely important that counsel speak with the prosecution's DNA and serology experts (see §§ 6.02(b), last two paragraphs, 11.02 *supra*) and consider retaining defense experts as consultants and potential expert witnesses (see Chapter 11).

In cases in which the defense is fabrication (either that there was no sexual act at all or that the complainant is deliberately blaming the respondent for a sexual act committed by someone else), counsel will have to establish that the complainant bears a severe enough bias or

grudge against the respondent to motivate a false charge of this magnitude. *See Sussman v. Jenkins*, 636 F.3d 329, 358-59 (7th Cir. 2011).

In cases in which the defense is consent (or, more precisely, in which counsel plans to argue that the prosecution has not proved the element of lack of consent beyond a reasonable doubt), counsel should stress any objective manifestations of consent – words spoken by the complainant or acts committed by the complainant that are consistent with consent. Unused opportunities for escape or outcry should also be brought out.

If the respondent is charged with a sexual offense against a minor, the applicable statute or caselaw usually specifies that consent is not a defense. Accordingly, the cross-examination will need to pursue any available evidence of fabrication or misidentification. See also § 31.08 *infra*.

§ 31.07 THE MUTUAL ASSAULT COMPLAINANT

In assault cases arising out of fights, cross-examination should emphasize the aggressiveness of the complainant. If the complainant can be made, while being cross-examined, to express hostility to the respondent or counsel, that sort of display is useful. Sometimes it can be elicited by a slightly abrasive or sarcastic manner of examination.

When favorable, the comparative size of the complainant and respondent, any disparity in their weapons, and any disproportion in the numbers of their allies should be developed. The complainant's ability to avoid the affray should also be developed, especially in cases involving charges of assault and battery on police officers. A police officer with a nearby radio to call for assistance, a partner to help quiet a situation, and training in handling arrests and disturbances should rarely have to resort to much physical force to control a juvenile. This can be pointed out in closing argument if the underlying facts are elicited on cross-examination. Counsel should remember that juries seldom apply the technical rules of self-defense in mutual assault cases and are rather prone to balance the equities and vote for the underdog.

§ 31.08 THE CHILD COMPLAINANT OR WITNESS

The subject of children's competency to testify is covered in § 30.05 *supra.*

In cross-examining child witnesses, counsel must treat them with the consideration that counsel would want to have extended to his or her own child, since the factfinder (whether jury or judge) will resent any treatment harsher than that which they would want extended to their children. Moreover, gentle methods and a considerate tone are most likely to win the confidence of the child and to establish that counsel is not the child's enemy. If the child witness responds to counsel's solicitous manner with recalcitrance or belligerence, then the factfinder will tolerate counsel's employment of a somewhat more aggressive manner.

Any young child's testimony can be attacked in one of two ways. If it is detailed, it smacks of something "pat" or "rehearsed," and counsel should stress the extent of the child's pretrial discussions of the case with parents, police, social workers, therapists, and the prosecutor. If it is sketchy, *that* should be emphasized in order to depict the child as one whose vagueness demonstrates a general unreliability arising from a failure to appreciate the significance of the whole matter. There is a considerable body of empirical literature examining factors that may affect the accuracy and reliability of children's testimony, including various forms of investigative interrogation, pretrial coaching and in-court question construction. Cross-examiners can benefit from consulting this literature. *See*, *e.g.*, Stacia N. Stolzenberg, K. McWilliams & T. D. Lyon, *Ask Versus Tell: Potential Confusion When Child Witnesses Are Questioned About Conversations*, 23 (No. 4) JOURNAL OF EXPERIMENTAL PSYCHOLOGY: APPLIED 447-59 (2017), and sources cited.

§ 31.09 PROSECUTION EXPERTS

Cross-examining an expert witness is ordinarily a difficult and risky business. Most experts who testify are also expert testifiers, and counsel who attacks them needlessly does so at the peril of being made to look like a knave or a fool. In a jury trial especially, these appearances can prove far more harmful to the respondent's case than is the substance of the expert's testimony.

The general procedure for qualifying a witness as an expert is discussed in § 33.12 *infra*. *And see* Lauren McLane, *Confronting the Twenty-First-Century Marian Examination*, 82 ALBANY L. REV. 949 (2018-2019). When the prosecution calls a witness whom defense counsel anticipates that the prosecutor will attempt to qualify as an expert, counsel should consider whether to stipulate to the witness's qualifications. See § 30.02(b) *supra*. A stipulation will render unnecessary the standard qualifying routine (see § 33.12(a)) which – in addition to serving its technical function of bringing the rules of expert testimony into play – may make the witness come across as impressive and thereby enhance his or her persuasiveness to the trier of fact. If counsel's appraisal of the witness's credentials and demeanor suggest that this is the case, a stipulation is usually wise. If the witness's technical qualifications are doubtful or if his or her exposition of them is likely to appear self-touting, pompous, or otherwise unattractive, counsel should usually let the prosecutor proceed with the qualifying routine. In a jury trial, counsel should come to the bench (see § 30.02(a)(2) *supra*) to make whatever objections and arguments s/he may have regarding a prosecution expert's qualifications; and if counsel chooses to cross-examine the witness as a basis for those objections, s/he should ask that the jury be sent out during this examination (see §§ 30.02(a)(2), 30.02(a)(3) *supra*, 34.05 *infra*). With the jury excluded, counsel can contest any deficiencies in the proposed expert's personal qualifications or any failure of the expert's purported field of expertise to meet the applicable standards of professional acceptability. *See*, *e.g.*, *United States v. Valencia-Lopez,* 971 F.3d 891, 898-900 (9th Cir. 2020) (reversing a conviction because the trial judge refused to conduct a *Daubert* inquiry before overruling the defendant's objection to allowing an ICE agent to testify as an expert regarding the probability that a drug cartel would entrust a large quantity of illegal drugs to the

driver of a commercial vehicle who has been forced or threatened to comply: "Agent Hall had sufficient experience and knowledge to qualify as an expert. But the record contains no evidence as to why that experience, by itself, equals reliability for his testimony that there was '[a]lmost nil, almost no[ ]' likelihood drug cartels would do what Valencia-Lopez testified happened here – coerce him, at gunpoint, to carry illegal drugs across the border."; "*Daubert* . . . may be harder to apply when the expert testimony is 'experience-based' rather than 'science-based.' But any such difficulty cannot simply lead to a 'that goes to weight, not admissibility' default . . . . Indeed, we see a strong argument that reliability becomes more, not less, important when the 'experience-based' expert opinion is perhaps not subject to routine testing, error rate, or peer review type analysis, like science-based expert testimony."; "[T]he district court appeared to rely on Agent Hall's general qualifications to qualify him as an expert . . . . [T]he record does not establish the method Agent Hall employed to arrive at his 'almost nil' opinion. . . . [I]t is the government's burden to 'establish the reliability of the principles and methods employed "to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant*."'"); *and see United States v. Starks*, 34 F.4th 1142 (10th Cir. 2022). Defense experts can be called to support these challenges. *See*, *e.g.*, *Commonwealth v. Hopkins*, 2020 PA Super 88, 231 A.3d 855, 873 (Pa. Super. 2020) (holding trial counsel ineffective for failing to contest the *Frye* qualifications of a purported expert in "topographical distribution" of DNA material: the prosecution expert "failed to cite any tests or studies demonstrating that 'topographical distribution' is a valid forensic tool for identifying the time DNA is deposited. In fact, he admitted that he could not date the deposit of DNA based upon locations where it was identified, and acknowledged that no test exists for dating DNA deposits. During . . . [postconviction proceedings, two defense experts] gave unrebutted testimony that 'topographical distribution' is not generally accepted in the field of forensic pathology. They stated unequivocally that there are no standards, studies, tests or generally accepted methodology in the field of forensic science to determine the date of a seminal DNA deposit.") In addition, counsel may be able to challenge traditional standards for qualifying experts in any particular field – contending, for example that qualification must be based upon demonstrated proficiency rather than mere credentials (*see* Brandon L. Garrett & Gregory Mitchell, *The Proficiency of Experts*, 166 U. PA. L. REV. 901 (2018)) – in the light of the sea change worked by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (discussed in § 39.15 *infra*) and of the legal community's increasing skepticism regarding the reliability of many sorts of conventional forensic-science evidence (see the next-to-last paragraph of this section). In the event that the witness is permitted to testify as an expert, counsel may later want to point out any weaknesses in the expert's credentials or experience as grounds for disparaging his or her observations and conclusions; and counsel will not want the jury to hear this aspect of closing argument as a rehash of a mid-trial open-court colloquy in which counsel made similar points to which the judge responded by ruling the witness a qualified expert. (Jurors are unlikely to understand that the credentials for expert qualification are minimal and that the judge's ruling does not constitute an endorsement of an expert's worth.) When defense investigation has disclosed potentially fatal defects in a prosecution expert's qualifications, a pretrial motion *in limine* to preclude his or her testimony may be in order. See §§ 7.03(c), 30.02(a)(1), 30.02(a)(2) *supra*. However, counsel should keep in mind that it is often a better defense strategy to permit the prosecution to go to trial with a

dubiously qualified expert – and to use the expert's lack of qualifications as a ground (among others) for asking the trier of fact to discredit his or her opinions – than to unhorse a prosecution expert before trial and alert the prosecutor to the need to retain a more persuasive one.

Counsel should ask that the prosecution state specifically *in what field* it seeks to have a witness qualified as an expert, and should ask the judge to include a specification of the field of expertise in any ruling qualifying an expert. Whether through carelessness or craftiness, prosecution experts often offer opinions that exceed the bounds of their field of qualification. Counsel wants to be in a position to object to these. *See*, *e.g.*, *Commonwealth v. Montavo*, 439 Pa. Super. 216, 223, 653 A.2d 700, 703-04 (1995) ("Trooper Bozich should not have been allowed to testify concerning a matter which was beyond the scope of his qualification as an expert and which was not beyond the ken of lay jurors. Accordingly, we reverse and remand for a new trial because of the severely prejudicial effect of permitting the arresting officer to state expressly that he was convinced that appellant was involved in narcotics trafficking."); *Gabaree v. Steele*, 792 F.3d 991, 998, 1000 (8th Cir. 2015) ("we do not think it reasonable not to object when an expert witness tells the jury he believed the girls were truthful when speaking with a different doctor. Dr. Kelly's testimony, in fact, was inadmissible bolstering of other witnesses (the girls) and, as the state court recognized, should have been excluded after a proper objection. . . . ¶ Dr. Sisk testified that Gabaree, if he was following the beliefs he expressed to Dr. Sisk, was 'probably abusing or neglecting the children,' including by using them to meet his sexual needs. Like Dr. Kelly's testimony, Dr. Sisk's opinion improperly concluded for the jury that Gabaree had acted on his expressed beliefs and sexually abused his children. His testimony, with proper objection, would have been excluded. ¶ This testimony improperly drew a conclusion about Gabaree's actions that was the jury's to make."); *Commonwealth v. Horne*, 476 Mass. 222, 222-30, 66 N.E.3d 633, 634-40 (2017) (a Boston police officer, who was certified as an expert on "'several aspects of street-level narcotics activity,'" improperly testified about "the typical physical characteristics of crack cocaine addicts" – in support of the prosecution's strategy of "prov[ing] that since the defendant did not match the physical characteristics of a drug *addict*, he must be a drug dealer" – which constituted impermissible "'negative profiling' testimony," giving "rise to a substantial risk of a miscarriage of justice" and requiring reversal of the conviction); *cf. Venalonzo v. People*, 2017 CO 9, 388 P.3d 868, 881 (Colo. 2017) (allowing a forensic interviewer in a child abuse case to testify as a lay witness that the complainant's behavior was similar to that of other abused children was reversible error, both because it bolstered the complainant's testimony and because it constituted inadmissible opinion evidence in the absence of qualification of the interviewer as an expert; "the prosecution's failure to disclose the interviewer as an expert witness prejudiced Venalonzo because the interviewer's specialized experience, combined with her use of technical terms, imbued her testimony with an air of expertise and may have led the jury to credit her assessment of the children's credibility over other evidence in the case. If Venalonzo had had the benefit of pretrial disclosure of the interviewer's expert testimony and the bases for her opinions, then he would have had 'the opportunity to evaluate the testimony in advance of trial or to obtain his own expert witness.'"); *United States v. Natal*, 849 F.3d 530, 533-34, 536-37 (2d Cir. 2017) (per curiam) (the district court erred in allowing the prosecution to present lay testimony by "an employee of the Sprint

Nextel wireless communication company" on "how cell phone towers operate"; the aspects of cell tower operations about which the Sprint Nextel employee testified "constitute[d] . . . expert testimony" and therefore could not "be introduced through a lay witness").

In general, an expert should not be cross-examined at any length unless s/he has substantially contributed to the prosecution's case or hurt the defense. Experts whose testimony supports minor or technical prosecution points may be passed without cross-examination or asked a few questions designed to demonstrate the narrow scope of their testimony (see § 31.01(b) *supra*).

An expert whose testimony is significantly damaging must usually be cross-examined, but it is often wiser to attack him or her on some narrow point on which s/he is particularly vulnerable – and subsequently to urge in closing argument that the expert's failure on this point demonstrates ineptitude or carelessness that makes the expert's other views unworthy of credence – than to attack the expert broadside in the cross-examination itself. *Cf.* John T. Philipsborn, *Feature: When Fine Print Matters; Reviewing Mental Health Assessment and Testing-Related Literature and Test Manuals is a Key to Effectively Preparing and Examining Mental Health Experts*, 37-FEB THE CHAMPION 40 (2013). When there are no demonstrable flaws in the expert's methodology or reasoning, cross-examination should ordinarily be limited to asking whether the expert's conclusions are not simply his or her opinions and whether they do not depend on fact *A* or fact *B,* which the expert has been told by others in the course of his or her investigations or which s/he has been asked to assume hypothetically in court. Rebuttal evidence can then be addressed to specifics – to showing that fact *A* or *B* may not be true or that the witness's expert opinion differs from that of equally reputable experts.

An expert is frequently best cross-examined by confronting him or her with the fact that s/he differs from another expert and asking for an explanation of the disagreement. S/he will tend to do one of three things, all helpful to the cross-examiner: (a) display dogmatism by asserting that s/he is right; (b) display indecisiveness by admitting that it is a matter of a reasonable difference of opinion; or (c) attempt a technical resolution of the conflict and so lose the understanding of the factfinder (whether jury or judge).

Preparation for cross-examination of an expert imperatively requires that counsel (a) obtain the expert's report or the substance of the expert's testimony by pretrial investigation or discovery (*see* §§ 9.07(c) subdivision 3, 11.02 *supra*); (b) obtain the original materials which the expert examined or analyzed (*see* §§ 9.07(c) subdivision 1); (c) obtain the expert's c.v. (*see* § 11.02); and (d) consult with a defense expert who can help counsel to (i) understand what the prosecution expert is saying, (ii) find holes in it, and (iii) identify recognized standard texts containing assertions of opinion inconsistent with those of the prosecution expert (see §§ 11.01(b), 12.08 *supra*). *See Rogers v. Dzurenda*, 25 F.4th 1171, 1188 (9th Cir. 2022) (finding capital defense counsel ineffective for failing, *inter alia*, to discuss with defense experts the reports of a predictable prosecution expert witness in order to prepare a defense expert witness "to explain the basis not only for his disagreement with . . . [the prosecution expert's] diagnosis,

but also to explain that . . . [the prosecution expert] did not have a sufficient basis for his conclusions"). Relevant texts include those focused on the particular scientific field in which the prosecution expert is purportedly qualified and also texts relating to general standards for forensic testimony (*see*, *e.g.*, David H. Kaye, *Hypothesis Testing in Law and Forensic Science: A Memorandum*, 130 HARV. L. REV. FORUM 127 (2017); David H. Kaye, *The Ultimate Opinion Rule and Forensic Science Identification*, 60 (No. 2) JURIMETRICS: THE JOURNAL OF LAW, SCIENCE AND TECHNOLOGY 175 (2020); David H. Kaye, *Forensic Statistics in the Courtroom*, in DAVID L. BANKS, KAREN KAFADAR, DAVID H. KAYE & MARIA TACKETT, eds., HANDBOOK OF FORENSIC STATISTICS (2019); Michael J. Saks, *The Disregarded Necessity: Validity Testing of Forensic Feature-Comparison Techniques*, 48 SETON HALL L. REV. 733 (2018); Keith A. Findley, *The Absence or Misuse of Statistics in Forensic Science as a Contributor to Wrongful Convictions: From Pattern Matching to Medical Opinions About Child Abuse*, 125 DICKINSON L. REV. 615 (2021); Nina Sunde & Itiel E. Dror, *A Hierarchy of Expert Performance (HEP) Applied to Digital Forensics: Reliability and Biasability in Digital Forensics Decision Making*, FORENSIC SCIENCE INTERNATIONAL: DIGITAL INVESTIGATION, Vol. 37, Article 301175 (2021), *available at* https://www.sciencedirect.com/science/article/pii/S2666281721000834; Itiel E. Dror & Nicholas Scurich, *(Mis)use of Scientific Measurements in Forensic Science*, 2 FORENSIC SCIENCE INTERNATIONAL: SYNERGY 333 (2020), *available at* https://www.sciencedirect.com/science/article/pii/S2589871X20300553; Jessica Gabel Cino, *Roadblocks: Cultural and Structural Impediments to Forensic Science Reform*, 57 HOUSTON L. REV. 533 (2020); Brandon L. Garrett, *The Costs and Benefits of Forensics*, 57 HOUSTON L. REV. 593, 606-16 (2020); Hillel J. Bavli, *A Framework for Credibility in Empirical Legal Analysis*, 87 BROOK. L. REV. 501 (2022); William C. Thompson, *How Should Forensic Scientists Present Source Conclusions?*, 48 SETON HALL L. REV. 773 (2018); Simon A. Cole & Alex Biedermann, *How Can a Forensic Result Be a Decision? A Critical Analysis of Ongoing Reforms of Forensic Reporting Formats for Federal Examiners*, 57 HOUSTON L. REV. 551 (2020); Alex Biedermann & Tacha Hicks, *The Importance of Critically Examining the Level of Propositions When Evaluating Forensic DNA Results*, in SUE POPE & ALEX BIEDERMANN, eds., THE DIALOGUE BETWEEN FORENSIC SCIENTISTS, STATISTICIANS AND LAWYERS ABOUT COMPLEX ISSUES FOR COURT (2016), page 6 (Frontiers in Genetics, October 2020), *available at* https://www.frontiersin.org/articles/10.3389/fgene.2020.00704/full; Andrew Sulner, *Critical Issues Affecting the Reliability and Admissibility of Handwriting Identification Opinion Evidence – How They Have Been Addressed (or Not) Since the 2009 NAS Report, and How They Should Be Addressed Going Forward: A Document Examiner Tells All*, 48 SETON HALL L. REV. 631 (2018); Greg Mitchell & Brandon L. Garrett, *The Impact of Proficiency Testing Information and Error Aversions on the Weight Given to Fingerprint Evidence*, 37 BEHAVIORAL SCIENCES & THE LAW 195 (2019); Dan Simon, *Minimizing Error and Bias in Death Investigations*, 49 SETON HALL L. REV. 255 (2018); Samuel D. Hodge, Jr., *An Attorney's Guide to An Autopsy: A Medical-Legal Overview*, 59 U. LOUISVILLE L. REV. 23 (2020); R. Austin Hicklin, Kevin R. Winer, Paul E. Kish, Connie L. Parks, William Chapman, Kensley Dunagan, Nicole Richetelli, Eric G. Epstein, Madeline A. Ausdemore & Thomas A. Busey, *Accuracy and Reproducibility of Conclusions by Forensic Bloodstain Pattern Analysts*, FORENSIC SCIENCE INTERNATIONAL, Vol. 325, Article 110856 (2021), *available at* https://www.sciencedirect.com/science/article/pii/

S0379073821001766?via%3Dihub; Keith A. Findley & Dean A. Strang, *Ending Manner-of-Death Testimony and Other Opinion Determinations of Crime*, *available at* https://ssrn.com/abstract=4019606; M. CHRIS FABRICANT, JUNK SCIENCE AND THE AMERICAN CRIMINAL JUSTICE SYSTEM (2022) (regarding bitemark evidence); Tess M. S. Neal, Christopher Slobogin, Michael J. Saks, David L. Faigman & Kurt F. Geisinger, *Psychological Assessments in Legal Contexts: Are Courts Keeping "Junk Science" Out of the Courtroom?*, 20 (No. 3) PSYCHOLOGY IN THE PUBLIC INTEREST 135 (2019).)

Armed with an inconsistent statement in a reputable textbook, counsel should ask the prosecution expert: (1) whether s/he recognizes the text as a reputable standard work; (2) whether s/he has read it; and (3) whether s/he consulted it in preparing his or her testimony for trial. [If s/he has read, or if s/he has used, the book, s/he should be asked: (4) whether it supports the opinion that s/he has given.] S/he should then be read specific passages from the text and asked to answer, with a yes or no: (5) whether s/he agrees with the statement just read; (6) whether it supports the opinion to which s/he has testified; and (7) whether it is not, in fact, inconsistent with the opinion to which s/he has testified. (In jury trials, it is especially important to press for a yes-or-no concession of inconsistency, since the jury will understand this response but may not understand the expert's direct examination. If the prosecutor objects to the forcing of the witness to answer yes or no, counsel should remind the court that the prosecutor will have an ample opportunity to let the witness explain on redirect.)

If no standard texts can be found on which to base this sort of examination, conflicting opinions can be brought in by asking whether, if another reputable expert had made a study of the matter and concluded that . . . [*describing the conclusion of the defense expert*], the witness would think that such a conclusion was beyond the range of reasonable expert judgment. If the prosecutor objects that the question lacks foundation, counsel should offer to connect it up or, alternatively, ask for leave to recall the prosecution's expert for cross-examination following testimony by the defense expert.

Counsel should have the defense expert in court throughout the testimony of the prosecution expert (see §§ 11.01(b), 12.08(b), 27.11 second paragraph *supra*) and, at the conclusion of the latter's direct examination, should request a recess to confer with the defense expert in order to prepare for cross. (In jury trials this request should be made at the bench so that if the defense expert is unable to discern any openings for productive cross-examination, it will not appear to the jury that the defense expert has been consulted and has given the prosecution's expert a clean bill of health.) After conferring with the defense expert, counsel should decide whether points of vulnerability in the testimony of the prosecution expert are best assailed by (1) cross-examining the prosecution expert or (2) having the defense expert do a book review of the prosecution expert's testimony when the defense expert testifies (*see* Edward J. Imwinkelried, *Defense Attacks on Prosecution Scientific Evidence: The Standard for Defense Rebuttal Evidence Is* Already *Lower than the Standard for Prosecution Evidence*, 93 TEMPLE L. REV. 55 (2020)) or (3) arguing in closing argument that the conclusions of the prosecution expert rest upon incorrect or unproved factual assumptions or upon illogical reasoning or (4) arguing in

closing that the expert's basic methodology – or his or her entire field of purported expertise – is too untested or too unreliable for credence or (5) more than one of these methods.

Much forensic-science evidence is less trustworthy than has been traditionally assumed. There is a burgeoning academic and popular literature criticizing junk science. *See*, *e.g.*, EXECUTIVE OFFICE OF THE PRESIDENT, REPORT TO THE PRESIDENT: FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016) (report of the President's Council of Advisors on Science and Technology, issued in Sept. 2016, *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf), and thereafter supplemented by a January 16, 2017 Addendum, *available at* https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensics_addendum_finalv2.pdf); COMMITTEE ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009); ERIN E. MURPHY, INSIDE THE CELL: THE DARK SIDE OF FORENSIC DNA (2015); Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163 (2007); Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051 (2013); Simon A. Cole, *Response: Forensic Science Reform: Out of the Laboratory and into the Crime Scene*, 91 TEX. L. REV. SEE ALSO 123 (2013); Michael Shermer, *Can We Trust Crime Forensics?*, SCIENTIFIC AMERICAN, September 1, 2015, *available at* http://www.scientificamerican.com/article/can-we-trust-crime-forensics/; *2016 Flawed Forensics and Innocence Symposium*, 119 W. VA. L. REV. 519 (2016); Adam B. Shniderman, *Prosecutors Respond to Calls for Forensic Science Reform: More Sharks in Dirty Water*, 126 YALE L. J. FORUM 348 (2017); Maneka Sinha, *Radically Reimagining Forensic Science*, 73 ALA. L. REV. 879 (2022); Paul C. Giannelli, *Forensic Science: Daubert's Failure*, 68 CASE WESTERN RESERVE L. REV. 869 (2018); Aliza B. Kaplan & Janis C. Puracal, *It's Not a Match: Why the Law Can't Let Go of Junk Science*, 81 ALBANY L. REV. 895 (2017-18); Jennifer Friedman, *Another Opportunity for Forensic Reform: A Call to the Courts*, 41-JUL THE CHAMPION 40 (2017); Itiel Dror, Judy Melinek, Jonathan L. Arden, Jeff Kukucka, Sarah Hawkins, Joye Carter & Daniel S. Atherton, *Cognitive Bias in Forensic Pathology Decisions*, 66 JOURNAL OF FORENSIC SCIENCES 1751 (2021), *available at* https://doi.org/10.1111/1556-4029.14 697; Jane Campbell Moriarty, *Deceptively Simple: Framing, Intuition and Judicial Gatekeeping of Forensic Feature-Comparison Methods Evidence*, 86 FORDHAM L. REV. 1687 (2018); Brandon L. Garrett, *The Reliable Application of Fingerprint Evidence*, 66 U.C.L.A. L. REV. DISC. 64 (2018); Joseph B. Kadane & Jonathan J. Koehler, *Certainty & Uncertainty in Reporting Fingerprint Evidence*, 147 (No. 4) DAEDALUS 119 (Fall 2018); Meghan J. Ryan, *Escaping the Fingerprint Crisis: A Blueprint for Essential Research*, 2020 U. ILL. L. REV. 101; Jonathan J. Koehler & Shiquan Liu, *Fingerprint Error Rate on Close Non-Matches,* 66 JOURNAL OF FORENSIC SCIENCES 129 (2021), *available at* https://onlinelibrary.wiley.com/doi/full/10.1111/1556-4029.14580; Brandon L. Garrett, *The Genetic Panopticon*, BOSTON REVIEW, March 17, 2016, *available at* http://bostonreview.net/us/brandon-garrett-dna-crime-lab-forensics?utm_content=buffer0e77e&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer; Radley Balko, "Two FBI officials say the state of forensics is fine. Here's why they're wrong,"

Washington Post, June 6, 2018, *available at* https://www.washingtonpost.com/news/the-watch/wp/2018/06/06/two-fbi-officials-say-the-state-of-forensics-is-fine-heres-why-theyre-wrong/?utm_term=.50bbd9bd9da5. Studies evaluating forensic-science techniques can be located through, *e.g.*, The Wrongful Convictions Blog, *available at* http://wrongfulconvictionsblog.org/category/ junk-science/, and The Innocence Project Website, *available at* https://www.innocenceproject.org/overturning-wrongful-convictions-involving-flawed-forensics/. Media exposés of crime-lab scandals and anecdotes about erroneous convictions based on specious scientific evidence have made judges and juries increasingly skeptical about the validity of prosecution expert testimony. Conversely, the glamorous high-tech CSI shows that dominate TV drama have set a high standard for forensic-science performers. These development can favor the defense in either of two ways. Defense expert testimony book-reviewing the prosecution's scientific case (questioning the performance of the prosecution experts in the particular case at bar or more generally debunking the sub-field of forensic scientific involved) may play well with triers of fact. And even without presenting defense evidence, counsel may be able to shake a trier's confidence in the prosecution's scientific proof by adverting in argument to well-advertised miscarriages of justice based on similar sorts of proof, or by suggesting that the prosecution's experts fell far short of the exacting standards that the trier is entitled to demand in these days of scientific sophistication. A prosecutor's resort to junk-science evidence tends to be correlated with a general willingness to employ shoddy practices to bolster an evidentially weak case (*see* Russell D. Covey, *Suspect Evidence and Coalmine Canaries*, 55 AMERICAN CRIM. L. REV. 537 (2018)), and defense counsel can argue that resort to such evidence casts reasonable doubt on "the reliability of the investigation" as a whole (*Kyles v. Whitley*, 514 U.S. 419, 446 (1995)).

Counsel should *not* routinely cross-examine on every point of a prosecution expert's testimony that counsel intends to dispute. Often, a critical review of the prosecution expert's reasoning by the defense expert, or even a critical review by defense counsel in closing argument, invoking the common sense of the factfinder to reveal the shortcomings of the prosecution expert's reasoning, will be more effective than attempting to obtain concessions of error from a hostile expert witness on cross.

§ 31.10 SNITCHES

Instances of perjury by jailhouse informants testifying that the accused made damaging confessions or admissions to them while the two were confined together have been notorious for years. The dangers inherent in snitch testimony have recently gained considerable public attention. *See, e.g.*, Pamela Colloff, *How This Con Man's Wild Testimony Sent Dozens to Jail, and 4 to Death Row*, NEW YORK TIMES MAGAZINE, December 8, 2019, page 22, *available at* https://www.nytimes.com/2019/12/04/magazine/jailhouseinformant.html?searchResultPosition=1. Effective August 1, 2021, Minnesota became the eighth State to enact legislation regulating the use of snitches and including provisions that require prosecutorial disclosure of potential impeachment material to defense counsel in every case in which the prosecutor intends to call a snitch as a prosecution witness. *See* MINN. STAT. ANN. § 634.045 ("Jailhouse witnesses"). The

2019 Illinois statute, codified as SMITH-HURD ILL. COMP. STAT. ANN. ch. 725, § 5/115-21, is particularly comprehensive; it (a) requires extensive prosecution disclosure of any proposed snitch testimony, its circumstances, the snitch's background and deals with law enforcement, and (b) renders snitch testimony inadmissible unless, in a pretrial hearing, the prosecution convinces the presiding judge by a preponderance of the evidence that it is reliable. This Illinois legislation warrants quotation in full because it represents state-of-the-art thinking about the snitch problem and can be cited by defense counsel in other jurisdictions as a model for submissions (a) seeking pretrial discovery of snitch-related materials; (b) requesting pretrial judicial screening of the reliability of proposed snitch testimony (see § 30.03(c) *supra*); and, more generally (c) justifying the right to rigorous cross-examination of the prosecution's snitches; (d) justifying defense closing argument to the effect that snitch testimony is peculiarly unreliable and has resulted in numerous erroneous convictions; and (e) requesting jury instructions that the testimony of jailhouse informants is to be received with caution and scrutinized with care because such testimony is often unreliable:

> "§ 115-21. Informant testimony.
>
> "(a) For the purposes of this Section, "informant" means someone who is purporting to testify about admissions made to him or her by the accused while detained or incarcerated in a penal institution contemporaneously.
>
> "(b) This Section applies to any criminal proceeding brought under . . . [designated sections of the criminal code], in which the prosecution attempts to introduce evidence of incriminating statements made by the accused to or overheard by an informant.
>
> "(c) Except as provided in subsection (d-5), in any case under this Section, the prosecution shall disclose at least 30 days prior to a relevant evidentiary hearing or trial :
>
> "(1) the complete criminal history of the informant;
>
> "(2) any deal, promise, inducement, or benefit that the offering party has made or will make in the future to the informant;
>
> "(3) the statements made by the accused;
>
> "(4) the time and place of the statements, the time and place of their disclosure to law enforcement officials, and the names of all persons who were present when the statements were made;
>
> "(5) whether at any time the informant recanted that testimony or statement and, if so, the time and place of the recantation, the nature of the

recantation, and the names of the persons who were present at the recantation;

"(6) other cases in which the informant testified, provided that the existence of such testimony can be ascertained through reasonable inquiry and whether the informant received any promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; and

"(7) any other information relevant to the informant's credibility.

"(d) Except as provided in subsection (d-5), in any case under this Section, the prosecution shall timely disclose at least 30 days prior to any relevant evidentiary hearing or trial its intent to introduce the testimony of an informant. The court shall conduct a hearing to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing. If the prosecution fails to show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial. At this hearing, the court shall consider the factors enumerated in subsection (c) as well as any other factors relating to reliability.

"(d-5) The court may permit the prosecution to disclose its intent to introduce the testimony of an informant with less notice than the 30-day notice required under subsections (c) and (d) of this Section if the court finds that the informant was not known prior to the 30-day notice period and could not have been discovered or obtained by the exercise of due diligence by the prosecution prior to the 30-day notice period. . . .

"(e) If a lawful recording of an incriminating statement is made of an accused to an informant or made of a statement of an informant to law enforcement or the prosecution, including any deal, promise, inducement, or other benefit offered to the informant, the accused may request a reliability hearing under subsection (d) of this Section and the prosecution shall be subject to the disclosure requirements of subsection (c) of this Section."

See also Robert M. Bloom, *What Jurors Should Know About Informants: The Need for Expert Testimony*, 2019 MICH. ST. L. REV. 345; Jeffrey Neuschatz, Brian Cutler & Stacy Wetmore, *Jailhouse Informants*, 45-MAY THE CHAMPION 14 (2021).

§ 31.11 IMPEACHING PROSECUTION WITNESSES WITH THEIR PRIOR INCONSISTENT STATEMENTS

One of the most convincing ways of impeaching any witness is by confronting him or her with a prior inconsistent statement. This is permissible in all jurisdictions. *See, e.g.*, *United States*

v. Mergen, 764 F.3d 199, 206-07 (2d Cir. 2014); *Mendenhall v. State*, 18 So.3d 915 (Miss. App. 2009). *See also United States v. Stewart*, 907 F.3d 677, 687 (2d Cir. 2018) (explaining that, "'to determine inconsistency'" for purposes of impeachment of a hearsay declarant with a prior inconsistent statement under Fed. Rule Evid. 806, the court "ask[s] whether there is 'any variance between' the impeachment material and the hearsay statement 'that has a reasonable bearing on credibility' or whether a jury could 'reasonably find that a witness who believed the truth of the facts' asserted in the hearsay statement 'would have been unlikely to make a statement' of the impeachment material's 'tenor.'"). In many cases counsel will have prior statements by a prosecution witness – either because a written or an oral statement was taken by the police or prosecuting authorities and has been turned over to defense counsel by the prosecution (see §§ 9.07(c), 27.12(a)(1) *supra*) or because a defense investigator has interviewed the witness and obtained either a written or an oral statement (see § 8.12 *supra*). A prosecution witness can be impeached with a prior inconsistent statement by asking the following series of questions:

(1) "Now, on direct examination, you stated that . . . [repeating the statement verbatim]?"
(2) "Have you ever given [*or* told] anyone a different version of that event [*or* "those facts" *or* "that description of the mugger" *or* "who spoke first" *or whatever*]?"
(3) "You did discuss the matter with Officer *X* [*or* "You did testify at the preliminary hearing in this case" . . . *or whatever*], did you not?"
(4) "That was on . . . [date] at . . . [place]?"
(5) "Was anyone else present, do you remember?"
(6) "Do you remember that *Y* was there at that time?"
(7) "Did you make a statement at that time relating to the event [*or* "the facts" *or whatever*] that was the subject of your testimony on direct examination in which you said . . . [repeating the statement verbatim]?"
(8) "Was the statement you made on . . . [date] honest and truthful, so far as you know?"
(9) "Your memory would have been fresher then than it is now, would it not?"

[In the case of an oral statement]:

(10a) "And at that time, did you not say . . . [reciting the inconsistent statement]?"

[In the case of a written statement]:

(10b) "Was that statement written down, do you know?"
(11) "Who wrote it down?"
(12) "And did you read the statement that *Z* wrote down?"
(13) "Did it accurately record what you said at that time?"

[If the statement is signed]:

(14) "Did you sign the statement?"

Counsel should now have the statement marked as an exhibit for identification.

(15) "I show you the document marked defense exhibit number 1 for identification. What is that document, if you know?"
(16) "Is that the statement which you made on . . . [date] and which *Z* wrote down?"
(17) [If the statement is signed]: "Directing your attention to page 2 of defense exhibit number 1 for identification, at the bottom of the page: Is that your signature?"
(18) "Directing your attention to page 2, line 7, did you not state at that time, quote . . . [reading inconsistent statement], end quote?"

The following questions should be asked *only if* it is clear that the witness will not be able to reconcile the two statements or to explain the earlier one away persuasively:

(19) "The statement I have just read, which you made on . . . [date], was not the same as your testimony on direct examination here in court today, was it?"
(20) "Was the statement that you made on . . . [date] a lie?"
(21) "Were you hiding something or trying to cover something up when you made it?"
(22) "Then your testimony on direct examination has changed from your earlier truthful statement on this subject, hasn't it?"

[If counsel wants to take up additional inconsistencies]:

(23) "Now was there anything else in your testimony on direct examination that was not accurate?"
(24) "Was there anything else that was inconsistent with your statement on . . . [date]?"

Counsel should now repeat questions (18)-(22) for each inconsistency, omitting questions (19)-(21) if the witness is personable or if the inconsistency is subtle.

In the federal courts (*see* FED. RULE EVID. 613(a)) and in some state jurisdictions, it is permissible to cross-examine a witness concerning prior inconsistent statements without showing or disclosing the statement to the witness. Where this is allowed, it may be more effective for counsel to paraphrase than to quote the prior statement, particularly when a quick-minded witness assisted by the exact text could seize upon details to reconcile it with his or her present testimony.

Counsel should ordinarily not impeach a witness with prior statements unless the statements clearly contradict points of some importance in the witness's testimony. Confronting a witness with hypertechnical or trivial inconsistencies appears to be mere carping and usually does more harm to counsel's credibility than to the witness's. The principal exception to this rule is the case in which there are numerous minor inconsistencies in the prior statement or statements

of a witness who could not be honestly mistaken (such as an accomplice turned state's evidence) and whom counsel is therefore attempting to portray as a deliberate liar.

If a prosecution witness admits having made a prior inconsistent statement, no additional ("extrinsic") evidence on the subject is permitted. *See*, *e.g.*, *Aikins v. State*, 256 Ind. 671, 271 N.E.2d 418 (1971). Traditionally, if a witness *denies* having made a prior statement and if the statement is "non-collateral" (or, in some jurisdictions, "material"), counsel is permitted to present extrinsic evidence in the defense case to prove that the witness did make the statement. *Compare State v. Valentine*, 240 Conn. 395, 397-405, 692 A.2d 727, 730-34 (1997), *and Pearce v. State*, 880 So.2d 561, 568-70 (Fla. 2004) (dictum), *and People v. Collins*, 145 A.D.3d 1479, 1480, 44 N.Y.S.3d 830, 832 (N.Y. App. Div., 4th Dep't 2016)*, with State v. Walsh*, 731 A.2d 696, 698 (R.I. 1999). The Federal Evidence Rules and the rules in many States that have followed the lead of the Federal Rules eliminate the requirement that the prior statement be "non-collateral." FED. RULE EVID. 613(b) provides: "Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." A prior oral statement may be proved by the testimony of anyone who heard it. *See*, *e.g.*, *Elmer v. State*, 114 So.3d 198 (Fla. App. 2012); *State v. Fossick*, 333 S.C. 66, 508 S.E.2d 32 (1998) (dictum). A prior written statement may be admitted as an exhibit upon proper authentication by anyone who wrote it or saw it written or heard the witness acknowledge it as his or her statement.

If a witness professes not to remember having made a prior statement (rather than expressly denying the statement), the jurisdictions differ on whether the statement can be proved extrinsically. Ordinarily, counsel should respond to protestations of lack of memory by questioning the witness in detail about the circumstances surrounding the witness's making of the statement: "Do you remember that *X* was there at the time?" "This was down in the jail, in the second floor cellblock, do you remember?" "Do you remember that you said . . . [repeating the statement in detail]?" Some jurisdictions permit counsel to hand the witness a prior written statement and ask the witness if that refreshes his or her recollection, even though the document itself is not technically admissible.

§ 31.12 IMPEACHING PROSECUTION WITNESSES WITH THEIR PRIOR CONVICTIONS AND PRIOR [BAD] ACTS

As explained in § 27.12(a)(2) *supra*, some jurisdictions require that the prosecution turn over to defense counsel the judgments of conviction of each prosecution witness who has a prior criminal record, or at least inform defense counsel about the prior convictions so that counsel can obtain a certified copy of the judgments from the convicting court. Counsel should request discovery of such criminal records – and of information regarding any pending charges or investigations implicating every prosecution witness – even in jurisdictions that do not expressly require this disclosure. Because *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974), and cognate cases cited in § 30.07(c) *supra* entitle the respondent to use these materials for impeachment, they

come within the Due Process disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). *See*, *e.g.*, *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (per curiam) ("the rule stated in *Brady* applies to evidence undermining witness credibility"); section 9.09(a) *supra*. To the extent described in § 30.07(c) *supra*, the defense is also entitled to obtain from the prosecutor, and to use for impeachment, information regarding any prior juvenile adjudications of prosecution witnesses, and any [bad] acts bearing on bias (*see*, *e.g.*, *Lobato v. State*, 120 Nev. 512, 96 P.3d 765 (2004)), or lack of veracity that the witness committed as an adult or as a juvenile (*see*, *e.g.*, *Bennett v. United States*, 763 A.2d 1117 (D.C. 2000); *Thomas v. State*, 422 Md. 67, 29 A.3d 286 (2011)). *And see Taylor v. State*, 407 Md. 137, 963 A.2d 197 (2009) (holding that where the prosecution had presented hearsay testimony of the complainant in a prosecution for sexual assault of a 15-year old, the defendant had the right to present extrinsic evidence of the boy's lying to his father about his sexual experiences on earlier occasions, to impeach the admissible hearsay).

To impeach a witness with a prior conviction, counsel should ask:

> "Are you the Joseph B. Smith who was convicted of the crime of burglary on May 14, 2020, in the Circuit Court for *X* County in the State of *Y*?"

If the witness admits the prior conviction, it neither needs to be nor may be proved extrinsically as well. If s/he denies the conviction, it may be proved by extrinsic evidence. A conviction is ordinarily proved by a certified record of the judgment and through identification of the witness as the convicted person by the testimony of a participant in his or her trial. (Some jurisdictions accept identity of names as sufficient.)

If the witness does not deny the prior conviction but merely professes not to remember it, the jurisdictions differ on whether the defense is entitled to present extrinsic proof. In any event, counsel can and should question the witness in detail about the circumstances surrounding the conviction and – unless the facts of the crime were less damning than its name – about the underlying events on which the conviction was based. Although these underlying events are ordinarily not admissible if the witness either admits or denies the prior conviction, they are a proper subject of cross-examination of a witness who claims not to remember a prior conviction, provided that counsel frames the cross-examination as an effort to jog the witness's memory. (For example, "Would it refresh your recollection to know that the conviction I am asking you about was for beating John Doe with a tire iron?") Some courts will also permit counsel to hand the witness a certified copy of the judgment of conviction and to ask the witness if it refreshes his or her recollection, even though the document itself cannot be offered into evidence unless the witness denies the conviction. (When handing the document to the witness, counsel can ask, "Would it refresh your memory of this particular conviction if I show you a certified copy of the judgment of the Circuit Court for *X* County in the State of *Y,* convicting Joseph B. Smith of the crime of burglary on May 14, 2019?") Where the factual details of the witness's conduct underlying a prior conviction or the specifics of a "bad" act admissible for impeachment are significantly more probative of bias or of lack of veracity than the name of the crime or generic

description of the "bad act" alone, the constitutional right to confrontation would seem to entitle the respondent to elicit the minutiae. *See Longus v. United States*, 52 A.3d 836, 853-54 (D.C. 2012) ("[T]he trial court's ruling was based on the erroneous belief that cross-examination about the fact of a pending investigation, without allowing defense counsel to probe into and present extrinsic evidence of the underlying facts, satisfied appellant's right under the Sixth Amendment to expose all of Detective Brown's potential biases relevant to his testimony in appellant's trial. This cross-examination was probative. It would have permitted the jury reasonably to infer not only that Detective Brown was motivated to curry favor with the government because he was under criminal investigation, but also that he was not a trustworthy witness as shown by his prior corrupt behavior in the Club U homicide investigation. . . . [D]efense counsel 'was entitled to impeach [the detective's] credibility with both the fact and the subject matter of the investigation.'").

Of course, it is impermissible to engage in this kind of examination unless the questions have a basis in fact, and counsel should be prepared to explain that basis to the court on request. However, the facts relied upon to supply the basis for cross-examining do not need to be provable by legally admissible evidence. *See*, *e.g.*, *Thomas v. State*, 422 Md. at 76-79, 29 A.3d at 290-92.

§ 31.13 IMPEACHING WITNESSES WITH THEIR REPUTATION FOR DISHONESTY

Extrinsic evidence of a witness's general lack of veracity – commonly in the form of "testimony about the witness's reputation for having a character for . . . untruthfulness, or by testimony in the form of an opinion about that character" – is ordinarily admissible for impeachment (*see, e.g.*, FED. RULE EVID. 608(a); *People v. Fernandez*, 17 N.Y.3d 70, 76-78, 950 N.E.2d 126, 130-32, 926 N.Y.S.2d 390, 394-96 (2011)), although local rules relating to this sort of evidence differ and should be consulted. Usually, it is profitless to attack a prosecution witness by this route unless (1) the prosecution witness is critical to the prosecution's case and is uncorroborated on essential points and (2) the defense can present several witnesses – themselves reasonably attractive – to testify to the bad character of the prosecution witness.

§ 31.14 THE PROSECUTOR'S TENDER OF A WITNESS TO AVOID A MISSING WITNESS INFERENCE

Some prosecutors guard against a missing witness inference or instruction (see § 10.08 *supra*) by tendering to defense counsel at trial witnesses whom the prosecution is not going to call. If counsel has not previously interviewed the witness and unless it is clear that what the witness knows is insignificant, counsel should request a continuance that is adequate to interview the witness privately. Thereafter, counsel may call the witness as a defense witness or may ask leave of court to call him or her as a hostile witness or may request that the court call him or her as a court witness. (See § 33.25 *infra.*)

The latter two procedures are particularly important in jurisdictions that follow the

common-law rule forbidding a party to lead or impeach the party's own witnesses. A witness who is found by the court to be "hostile" to the party wishing to present the witness's testimony may be called for questioning as though s/he were on cross-examination and may be impeached by the calling party; and a court witness is called for cross-examination and is subject to impeachment by both parties.

Hostility (that is, adversity to the calling party's interests) must be demonstrated in order to support a request that a witness be called as hostile. Jurisdictions and individual judges vary considerably regarding the kind of showing of hostility that they require. But defense counsel can often obtain some relaxation of the respondent's burden by citing *Chambers v. Mississippi,* 410 U.S. 284 (1973), which holds that the federal Constitution forbids a State to couple rigorous "hostility" requirements with rigid prohibitions against impeaching one's own witness, so as to deprive the accused of any fair opportunity to present vital defensive evidence. See § 33.04 *infra; and cf. Green v. Georgia,* 442 U.S. 95 (1979) (per curiam).

Sometimes prosecutors tender a witness in open court, announcing that they are not calling him or her because the witness's testimony would be "cumulative." Counsel may want to respond by moving for a mistrial on the ground that the prosecutor is seeking to bolster the prosecution's case unfairly by asserting that s/he has unpresented evidence which confirms the testimony of the witnesses whom s/he did present. (By analogy, a prosecutor's assertion that "information not presented to the jury supports . . . [a prosecution] witness's testimony" has consistently been held improper (*United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir. 2002) (dictum); *State v. Ish*, 170 Wash. 2d 189, 196, 241 P.3d 389, 392-93 (2010) (dictum); *see also Commonwealth v. Brooks*, 362 Pa. Super. 236, 238, 523 A.2d 1169, 1170 (1987) ("The prosecutor may not argue facts outside the record 'unless such facts are matter of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice.'"); § 36.11 *infra*).) In this situation, a refusal by the court to designate the witness as a court witness and allow the defense to question him or her in cross-examination mode, at the least, is an apparent denial of the right to confrontation. See § 31.01(a) *supra.*

In a jury trial, if the prosecutor tenders a witness in front of the jury, counsel should approach the bench and request that the jury go out. If counsel wants a recess to interview the witness, counsel should ask that the jury be excused without being told the purpose of the recess, so that the defense will not be prejudiced if counsel decides not to call the witness. After counsel has spoken with the witness and if counsel is not going to call the witness, counsel may want to move for a mistrial on the grounds mentioned in the preceding paragraph. Alternatively, it may be sufficient (depending on the witness's relation to the case as shown in other testimony) to ask the court to charge the jury when it returns that:

> Just before the recess there was mention of a possible witness, a [Mr.] [Ms.] _____. The Court and counsel have discussed the matter, and it appears that neither the prosecution nor the defense sees any need for this witness's testimony. I instruct you that you should not infer anything from the fact that the witness was not called and you should not hold

that fact against either party or consider it in your deliberations because both sides are agreed that this witness has no information which would be helpful to the jurors' understanding of the case.

Or counsel may prefer simply to announce to the court on the jury's return that if the prosecutor is not going to vouch for the credibility of this witness, the defense certainly does not want to hear the witness.

§ 31.15 PROSECUTION CLAIM OF SURPRISE

Sometimes a prosecutor will elicit nothing incriminating from a witness and will claim "surprise" in order to impeach the witness with a prior statement that *is* incriminating. *Cf.* § 33.24 *infra.* The prior statement is theoretically being used to "neutralize" or discredit the witness's present testimony but is, in fact, the prosecutor's method of introducing inadmissible hearsay.

If the witness in his or her direct testimony has simply refused to answer or has said s/he does not remember, or if the witness has given no testimony affirmatively damaging to the prosecution's case, counsel should resist any attempt to impeach the witness with a prior statement on the grounds (a) that there is nothing to neutralize or to impeach (*see*, *e.g.*, *United States v. Coppola*, 479 F.2d 1153, 1158-59 (10th Cir. 1973) ("[I]n the case at bar the government knew from the beginning that . . . [a witness it called] was going to deny the truth of his prior statement, for he persisted in this position from the start. . . . [The witness] did give some information as to heroin traffic, but declined to answer any question concerning the alleged contract to commit the homicide. As to this, he said that he lacked knowledge. Thus, his failure to testify favorably to the government is negative presentation and did not constitute damage. . . . ¶ A careful reading of the entire testimony of . . . [this witness] convinces the reader that the impeachment of . . . [him] was not to undo affirmative damage. Instead, one is impressed that an effort of the government was to bring about damage in order to justify the introduction of prior statements. ¶ The court's cautionary instruction attempting to distinguish between impeachment and substantive use of statements is of no value because, as has been shown, whether . . . [the witness] was lying is not relevant. There is obviously no value in calling a witness and proving that he is a liar. On the other hand, the introduction of prior unsworn statements which have not been subjected to cross-examination in this indirect manner is unquestionably prejudicial."); *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984) (dictum) ("Rule 607 of the Federal Rules of Evidence provides: 'The credibility of a witness may be attacked by any party, including the party calling him.' But it would be an abuse of the rule, in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence – or, if it didn't miss it, would ignore it. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant, which Rule 607 does not contemplate or authorize. We thus agree that 'impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get

before the jury evidence not otherwise admissible.'"); *State v. Little Long,* 2021 S.D. 38, 962 N.W.2d 237 (2021) (holding that the trial court erred in admitting pre-court statements of a witness for the purported purpose of impeachment when the prosecution called the witness with forewarning that she would disclaim any memory of the subject of the statement; the South Dakota Supreme Court emphasizes that "we caution prosecutors to refrain from attempting to admit so-called impeachment evidence, which is nothing more than a subterfuge for hearsay" (962 N.W.2d at 253) but eschews an inquiry into the prosecutor's motivation and instead rests its holding on a probative-value/prejudice-risk analysis (see § 30.03(c) *supra*); and it ultimately finds the error harmless on the evidentiary record of the case at bar.); *People v. Villegas*, 222 Ill.App.3d 546, 552-54, 584 N.E.2d 248, 253-54, 165 Ill. Dec. 69, 74-75 (1991) (dictum)), and (b) that the admission of the prior statement will violate the respondent's constitutional right of confrontation (*see Douglas v. Alabama*, 380 U.S. 415 (1965)).

If the witness has damaged the prosecution, counsel should request leave to *voir dire* the witness (in a jury trial, out of the presence of the jury), before the claim of "surprise" is allowed. Counsel should then attempt to establish that the witness has indicated in some way to the prosecutor, before being called, either that s/he did not wish to testify for the prosecution or that s/he would not testify consistently with his or her prior statement or that s/he was going to give testimony of the sort which s/he did, in fact, give. Unless the prosecutor was, in reality, surprised, the prosecutor should not be permitted to claim surprise. *See, e.g.*, *King v. State*, 994 So.2d 890, 896-98 (Miss. App. 2008); *State v. Cope,* 309 N.C. 47, 305 S.E.2d 676 (1983). If the prosecution is given inconsistent stories by a witness prior to trial, it has a way of getting every legitimate benefit of the witness's possibly favorable testimony, without calling the witness in such a manner as to deprive the respondent of a fair trial and of the Sixth Amendment right of confrontation (see § 31.01(a) *supra*). The prosecution can call the witness out of the presence of the jury and examine him or her. If the witness testifies favorably to the prosecution, there will be no problem; the prosecutor can then proceed to take the witness's testimony in open court. If the witness does not give the testimony the prosecutor wants, the prosecutor should not put the witness on the stand in the jury's presence, and there will be no occasion of "surprise" or for impeachment. Counsel should insist that this is the proper method of proceeding for a prosecutor who has any inkling that a witness will not give favorable testimony (*see State v. Guido*, 40 N.J. 191, 199-200, 191 A.2d 45, 50 (1963); *cf. State v. McDonald*, 312 N.C. 264, 269-70, 321 S.E.2d 849, 852 (1984)), and that a prosecutor who fails to follow it is not entitled to claim "surprise."