

## **Crossing the Double Crosser**

### **Michigan Bar**

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## **CROSS-EXAMINATION**

Cross-examination of a cooperating prosecution accomplice witness poses special problems for the defense attorney. In addition to a working knowledge of the law generally applicable to the accused's Constitutional right to confront and cross-examine, this type of witness presents the practitioner with unique and often challenging opportunities to explore and attack the witness' credibility and expose his biases and motives for testifying, other than telling the truth.

In this regard, there must be a plausible explanation as to why the snitch would be willing to lie and more importantly, why he would single out your citizen in particular. i.e. What benefit might accrue to the Government's client for laying off some of the blame on yours.

Since the Government's burden of proof "beyond a reasonable doubt" is often defined in terms of "such a doubt as would cause you to hesitate before acting in matters of utmost importance to you or your loved ones," your aim should be to demonstrate that if after all the evidence is heard the jurors would not hesitate before acting on this slimeball's representations in matters of utmost importance to them or their loved ones, your citizen never had a chance in the first place.

First the basics:

### **THE DEFENDANT HAS AN EXPRESS CONSTITUTIONAL RIGHT TO "CONFRONT" AND "CROSS-EXAMINE" ADVERSE WITNESSES**

"In all criminal prosecutions, the accused shall enjoy the right to ...be confronted with the witness against him."

### **SIXTH AMENDMENT GUARANTEE OF CONFRONTATION INCLUDES RIGHT TO CROSS-EXAMINE**

"[A] major reason underlying the Constitutional Confrontation Rule is to give a defendant charged with crime an opportunity to cross-examine the witness against him."

*Pointer v. Texas*, 380 U.S. 400, 406-7 (1965).

*But see* *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)  
(applicability of harmless error rule).

However, jointly tried co-defendants do not have the right to cross-examine each other where each one's testimony does not inculcate the other. *U.S. v. Crockett*, 813 F.2d 1310 (4<sup>th</sup> Cir. 1987) (where judge found the co-defendant's testimony exculpatory as to each other).

## **YOU HAVE THE RIGHT TO SEE THE WITNESS AGAINST YOU**

However, the Supreme Court over Scalia's dissent, held: upon a demonstration that a child would suffer severe emotional distress by confronting the accused his or her testimony could be received by closed circuit television. *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 666 (1990).

*Maryland v. Craig* has been adopted in Texas. *Hightower v. State*, 822 S.W.2d 48 (Tex. Cr. App. 1991). The Court of Criminal Appeals held that the use of a closed-circuit system to enable an alleged child victim to testify in a sexual assault trial pursuant to TEX. CODE CRIM. PRO. Art. 38.071(3) does not offend the Confrontation clause if the proper findings are made by the trial court.

See also *Manoccio v. Moran*, 708 F.Supp 473 (D.R.I. 1989) (holding government can't admit an autopsy report without affording the defendant an opportunity to confront and cross-examine the medical examiner). Reversed as habeas, *Manoccio v. Moran*, 919 F.2d 770 (1<sup>st</sup> Cir. 1990) (those portions of the autopsy report which go beyond medical data and conclusions are not admissible without opportunity to cross exam).

## **APPLICABLE TO STATES THROUGH FOURTEENTH AMENDMENT**

See *Pointer v. Texas*, 380 U.S. 400 (1965) (error to admit testimony at preliminary hearing where defendant not represented by counsel);  
*Parker v. Gladden*, 385 U.S. 363 (1966) (right to confront Bailiff who made disparaging remarks while escorting jury).

## **STATE "VOUCHER RULE" DENIED DEFENDANT HIS SIXTH AMENDMENT RIGHT OF CROSS-EXAMINATION**

The common law notion of the "voucher rule" was that once a party called witness to testify on his behalf, the party "vouched" for the witness's credibility. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Therefore, he was not allowed to impeach his own witness on cross-examination even if he later found that the witness gave false testimony. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). The United States Supreme Court, however, stated that a 'voucher' rule denied a defendant "a trial in accord with traditional and fundamental standards of due process." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)

See *Chambers v. Mississippi*, 410 U.S. 284 (1973) (defense counsel entitled to cross-examine witness regarding statements against interest, even though hearsay).

## **RIGHT TO FULL AND UNFETTERED CROSS-EXAMINATION**

*See* *Smith v. Illinois*, 390 U.S. 337 (1970) (holding right to inquire as to witness' true identity and residence);  
*Chambers v. Mississippi*, 410 U.S. 284 (1973);  
*Davis v. Alaska*, 415 U.S. 308 (1974) (noting right to cross-examine key fact witness as to pending juvenile probation to show bias or motive);  
*U.S. v. Miranda*, 510 F.2d 385 (9<sup>th</sup> Cir. 1975)  
*Snyder v. Coiner*, 510 F.2d 224, 225 (4<sup>th</sup> Cir. 1975);  
*Mississippi v. Pancer*, 514 S.2d 767 (Miss.S.Ct. 1986) (stating right to use transcripts from prior trials and impeachment testimony of live witnesses);  
*Lawson v. Murray*, 837 F.2d 653 (4<sup>th</sup> Cir. 1988) (noting where a defense witness cut-off cross examination by invoking privilege against self-incrimination, trial court properly struck entire testimony of witness).

Accused's Sixth Amendment right of confrontation [as well as Rule 402(2), Tex.R.Ev., "evidence of district trait or character of victim of the crime offered by an accused" and Rule 405(b), Tex.R.Ev., where "character or a trait of character of a person is an essential element of a ...defense, proof may also be made of specific instances of his conduct"] entitled defendant to inquire as to rape complainant's subsequent sexual acts in order to demonstrate consent or acts consistent or "in keeping with a diagnosis of nymphomania."

*Chew v. State*, 804 SW2d 633, No. 04-89-00149 (C.A.—San Antonio, February 20, 1991).

## **WHAT'S GOOD FOR THE GOOSE IS GOOD FOR THE GANDER**

The Supreme Court recently held that a court had discretion to preclude defense counsel from speaking to his client during a fifteen minute recess, *Perry v. Leeke*, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989).

Defense counsel should be mindful to ask courts to exercise such discretion to preclude the prosecutor from "coaching" their witnesses during recesses such as the lunch break, which seemed to afford witnesses with the opposition to "catch their breath" and rehabilitate prior transactions. Such was the obvious intent of the rules [i.e. Rule 613's express provision that a cross-examiner need not show nor disclose contents of a prior inconsistent statement to the witness, even though same must be disclosed to opposing counsel on request. What good would such a rule do if opposing counsel were allowed, for example, to disclose the contents during a lunch recess?].

*But see* *Bovar v. Dugger*, 858 F.2d 1539 (11<sup>th</sup> Cir. 1988) (per curiam) (holding more rights afforded accused in the Eleventh Circuit where the court found a fifteen minute recess was sufficiently long to permit meaningful consultation between the defendant and his attorney and that denial of same was a denial of the rights to effective assistance of counsel).

The Houston 14<sup>th</sup> District has approved the holding and reasoning of *Perry v. Leeke. Schuldreich v. State*, 899 S.W.2d 253, (Tex. App. – Houston [14<sup>th</sup> Dist.] 1995). The court quoted Perry to say, “When a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying [although he has an absolute right beforehand].”

In *Hightower v. State*, 822 S.W.2d 48, 54 (Tex. Cr. App. 1991), the Court held that the Defendant’s right to effective assistance of counsel was not violated by his inability to sit with his lawyer during cross-examination of the child witness (closed-circuit television was used). The court, however, did point out that there was nothing in the record to show that the separation of counsel and his client impaired counsel’s ability to effectively cross examine the child witness. One of the cases the court cited was *Perry v. Leeke*.

### **RIGHT TO CONFRONTATION**

#### **HOW DOES ONE EFFECTIVELY CROSS-EXAMINE AN AMNESIAC?**

*See*            *U.S. v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988).

An accused’s right to confront adverse witnesses is not violated by the testimony of a witness identifying the defendant as the perpetrator, even though the witness had no independent recollection of the events and could not remember the basis for his testimony, because the defendant had “an opportunity for effective cross-examination.”

*Manocchio v. Moran*, 708 F. Supp. 473 (D.R.I. 1989) (Government can’t admit an autopsy report without affording the defendant an opportunity to confront and cross-examine the medical examiner).

*But see*        *Lawson v. Murray*, 837 F.2d 653 (4<sup>th</sup> Cir. 1988) (defense witness who repeatedly invokes his Fifth Amendment privilege against self-incrimination may have all his testimony stricken).

### **PRIOR TESTIMONY**

*See*            *Barker v. Page*, 390 U.S. 719 (1968) (testimony at preliminary hearing [where defendant represented by counsel] inadmissible unless the witness is unavailable at trial);

*Mancusi v. Stubb*, 408 U.S. 204 (1972) (testimony at former trial that was subject to cross-examination is admissible) Specifically where:

- (a) witness is unavailable, and
- (b) there is additional indicia of reliability.

*Mississippi v. Parker*, 514 F.2d 767 (Miss. 1986), cert. denied, 427 U.S. 911 (1988) (stating prior testimony exculpating defendant, although impeached at that prior trial, was admissible in the defendant’s trial).

*But see* *Thomas v. U.S.*, 530 A.2d 217 (D.C. App. 1987) (en banc) (“The common-law hearsay exception for former testimony requires four criteria: (1) unavailability of the declarant, (2) testimony was given under oath in a legal proceeding, (3) substantial similarity of the issues in the two proceedings, and (4) the party against whom the testimony is offered had the opportunity to cross-examine the declarant at the former proceeding.” The evidence that remained was not sufficient to convict after the prior testimony was held inadmissible as the same was not subjected to adequate cross-examination even though counsel for co-defendants had cross-examined witness).

*See also* *California v. Green*, 399 U.S. 149 (1970).

### **AS TO PRETRIAL MATTERS**

#### FED. R. EVID. R. 104(b)

As to preliminary questions of admissibility the court “...is not bound by the rules of evidence.”

*U.S. v. Matlock*, 415 U.S. 164 (1974) (at a suppression hearing hearsay may be considered by the court in determining probable cause or consent).

In Texas, however, the Court of Criminal Appeals has held that the rules of evidence expressly apply to suppression hearings pursuant to TEX. R. CRIM. EVID. 1101 (d)(4). *McVickers v. State*, 874 S.W.2d 662 (Tex. Cr. App. 1993). Therefore, in a suppression hearing in Texas, hearsay is inadmissible.

### **PRELIMINARY QUESTIONS** [FED. R. EVID. R. **RULE 104**]

#### **RULE 104(a)**

Both the Texas and Federal Rules provide that preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or, the admissibility of evidence, must be determined by the court. Rule 104(c).

Typically to be admissible, circumstantial evidence that is the only proof of an offense element must be only consistent with the theory of guilt and must not be reconcilable with the theory of innocence. However, at least one court has held that the rule just stated is not required by the Constitution. *York v. State*, 858 F.2d 322 (6<sup>th</sup> Cir. 1988)

Applying Rule 104(a) to the admissibility of co-conspirator's statements the Fifth Circuit had required the trial judge to employ a two-tiered test of "substantial independent" evidence sufficient to "support a jury verdict" for initial admissibility, and a "preponderance of the evidence" standard applied retrospectively when all the evidence is closed.

"We conclude that ...a declaration by one defendant is admissible against other defendants only when there is a 'sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declaration at issue were in furtherance of that conspiracy' ...and that as a preliminary matter, there must be *substantial, independent* evidence [to that effect]".

"At the End of the Trial ...on appropriate motion at the conclusion of all the evidence the court must determine as a factual matter whether the prosecution has shown by a preponderance of the evidence independent of the statement itself (1) that a conspiracy existed, (2) that the coconspirator and the defendant against whom the coconspirator's statement is offered were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy."

While the ultimate determination of this issue in the Fifth Circuit under James was made on a "preponderance of the evidence" standard, it must be remembered that the court expressly requires the latter reviewed *only* "on appropriate motion at the conclusion of all the evidence." *U.S. v. James*, 590 F.2d 575, 582-83 (5<sup>th</sup> Cir.) (en banc), cert. denied, 442 U.S. 917 (1979) (emphasis added). Failure to re-urge same has been held to result in a waiver of that issue on appeal.

*See* *U.S. v. Stroupe*, 538 F.2d 1063, 1065-1066 (4<sup>th</sup> Cir. 1976) ("substantial independent evidence of conspiracy, at least enough to take the question to the jury");  
*U.S. v. Jackson*, 327 F.2d 1198, 1219 (D.C. Cir. 1980) ("clear preponderance");  
*U.S. v. Towery*, 542 F.2d 623, 627 (3d Cir. 1976) ("more likely than not");  
*U.S. v. Stanchich*, 550 F.2d 1294, 1298 (2d Cir. 1977);  
*U.S. v. Petrozziello*, 548 F.2d 20, 23 (1<sup>st</sup> Cir. 1977);  
*U.S. v. Bell*, 573 F.2d 1040, 1044 (8<sup>th</sup> Cir. 1978) ("substantial independent evidence");  
*U.S. v. Avila-Macias*, 577 F.2d 1384 (9<sup>th</sup> Cir. 1978);  
*U.S. v. Gutierrez*, 576 F.2d 269, 275 (10<sup>th</sup> Cir. 1978), cert. denied, 439 U.S. 954 (a "prima-facia showing");  
*U.S. v. King*, 552 F.2d 833, 849 n.23 (9<sup>th</sup> Cir. 1976);  
*U.S. v. Rosales*, 584 F.2d 870 (9<sup>th</sup> Cir. 1978).

Some treatises had suggested an even more stringent test.

WEINSTEIN & BERGER, WEINSTEIN'S EVIDENCE ¶104[05] 105-44 (supporting a "beyond a reasonable doubt" standard).

This higher standard would appear more appropriate both because 104(a) requires the court in effect to "determine" that the requirements of 801(d)(2)(E) have been met (including the existence of a conspiracy), and because as the Advisory Committee Notes to Rule 801(d)(2)(E) point out "the agency theory of conspiracy (upon which the rule is premised) is at best a fiction and ought not to serve as a basis for admissibility beyond that already established."

However, the Supreme Court recently adopted a "preponderance of the evidence" standard rejecting any higher standard such as "clear and convincing or beyond a reasonable doubt."

"We find 'nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard.'" *Bourjaily v. U.S.*, 483 U.S. 171, 97 L.Ed.2d 144, 152-3, 107 S.Ct. 2775 (1987).

See also

*Williams v. State*, 815 S.W.2d 743 (Tex. App. – Waco 1991), reversed, 829 S.W.2d 216 (Tex. Cr. App. 1992) (summarizing of federal law on this point and its application. Neither the appellate court nor the Court of Criminal Appeals says anything that would indicate that Texas does not use the same preponderance of evidence standard for admissibility as set out in *Bourjaily v. U.S.*, 483 U.S. 171 (1987) for admissibility of co-conspirators' statements).

### **WHAT EVIDENCE MAY BE CONSIDERED?**

Previously courts had held that in making this determination, the trial court should look only to non-hearsay evidence "independent of the statement itself."

*U.S. v. James*, 590 F.2d 575, 582 (5<sup>th</sup> Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979) (emphasis added);

*U.S. v. Nixon*, 418 U.S. 683, 701 (1974);

*U.S. v. Ziegler*, 583 F.2d 77, 80 (2<sup>nd</sup> Cir. 1978);

*Glass v. U.S.*, 315 U.S. 60 (1942);

*U.S. v. Bell*, 573 F.2d 1040 (8<sup>th</sup> Cir. 1978);

*U.S. v. McPartlin*, 595 F.2d 1321 (7<sup>th</sup> Cir. 1979);

*U.S. v. Stroupe*, 538 F.2d 1063, 1065 (4<sup>th</sup> Cir. 1976) (stating "otherwise hearsay would lift itself by its own boot straps to the level of competent evidence").

"Although Rule 104(a) provides that the court 'is not bound by the Rules of Evidence except those with respect to privileges' we do not construe this language as permitting the court to rely upon the content of the very statement whose admissibility is at issue. We

adhere to our requirement ...that fulfillment of the condition of admissibility must be established by *evidence independent of the conspirator statement itself*. This construction of Rule 104(a) comports with earlier Supreme Court pronouncements that admissibility must depend upon independent evidence in order to prevent this statement from ‘lift[ing] itself by its own boot straps to the level of competent evidence’.” *U.S. v. James*, 590 F.2d at 581.

*Contra* *U.S. v. Martrano*, 561 F.2d 406 (1<sup>st</sup> Cir. 1977), *cert. denied*, 435 U.S. 922.

The Supreme Court has held that in making a preliminary factual determination of the existence of a conspiracy involving the declarant and the defendant, a court may examine the hearsay statements sought to be admitted. *Bourjaily v. U.S.*, 483 U.S. 171, 97 L.Ed.2d 144, 156, 107 S.Ct. 2775 (1987) (however, there was other corroborating evidence independent of the incriminating hearsay statement sufficient to establish the existence of the conspiracy).

The Fifth Circuit has also permitted the use of the hearsay statement, but it must “be considered along with the other evidence in determining whether the hearsay declarant was the defendant’s co-conspirator.”

*See* *U.S. v. Perez*, 823 F.2d 854, 855 (5<sup>th</sup> Cir. 1987).

*U.S. v. Valdez*, 561 F.2d 427, 432 (5<sup>th</sup> Cir. 1988), *reh’g denied en banc*.

Every court considering this issue had held that there must be other non-hearsay evidence to meet each of Rule 801(d)(2)(E)’s requirements “otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence.”

*U.S. v. Stroupe*, 538 F.2d 1063, 1065 (5<sup>th</sup> Cir. 1976);

*Glasser v. U.S.*, 315 U.S. 60, 74-5 (1942).

*See also* *U.S. v. Petrozziello*, 548 F.2d 20, 223 (1<sup>st</sup> Cir. 1977);

*U.S. v. James*, 590 F.2d 575, 578-80 (5<sup>th</sup> Cir.) (en banc), *cert. denied*, 442 U.S. 917 (1979);

*U.S. v. Santiago*, 582 F.2d 1128, 1133 (7<sup>th</sup> Cir. 1978);

*U.S. v. Bell*, 573 F.2d 1040, 1043-44 (8<sup>th</sup> Cir. 1978);

*U.S. v. Jackson*, 627 F.2d 1198, 1217-18 (D.C. Cir. 1980);

*U.S. v. Nixon*, 418 U.S. 683, 701 n.14 (1974).

Recently, the Supreme Court held that the trial court may consider the co-conspirator’s hearsay statement itself in deciding its admissibility. That is, the Court has sanctioned looking to what is by definition, unreliable evidence, to determine its reliability.

“Congress has decided that courts may consider hearsay in making these factual determinations... But petitioner nevertheless argues that the bootstrapping rule, as most Courts of Appeals have construed it, survived this apparently unequivocal charge in the

law unscathed and that Rule 104, as applied to the admission of co-conspirator's statements, does not mean what it says. We disagree." *Bourjaily v. U.S.*, 483 U.S. 171, 97 L.Ed.2d 144, 154, 107 S.Ct. 2775 (1987).

If the Rules of Evidence are not applicable to this determination, query, whether this would allow one coconspirator's hearsay statement to be considered for the purpose of establishing the admissibility of another. One would hope not, lest prosecutors will begin breaking down such testimony sentence by sentence, arguing that one boot can be pulled up by the straps of another.

Courts have as well held that any independent evidence of a conspiracy need not demonstrate, by itself, the illegal nature of the combination.

*U.S. v. Jackson*, 627 F.2d 1198 (D.C. Cir. 1980);

*Hitchman Coal and Coke Co. vs. Mitchell*, 245 U.S. 229 (1917).

"The element of illegality may be shown by the declarations themselves."

*U.S. v. Jackson*, 627 F.2d 1198, 1216 n.35 (D.C. Cir. 1980).

*Contra Romani v. State*, 542 So.2d 984 (Fl.S.Ct. 1989) (rejecting *Bourjaily* rule because it "would frequently lead to the admission of statements which are not reliable").

### **ACTUAL HEARING REQUIRED?**

While the *James en banc* court appeared to require only that the government "order their proof" wherever "reasonably practicable" in order to lay the predicate under Rule 801(d)(2)(E),

*See also U.S. v. Jackson*, 627 F.2d 1198, 1218 (D.C. Cir. 1980);

*U.S. v. Macklin*, 573 F.2d 1046, 1049 n.3 (8<sup>th</sup> Cir. 1978).

Two recent Fifth Circuit panels have given lip service to the fact that "[S]uch a *hearing* is mandated by *U.S. v. James*."

*U.S. v. Grassi*, 616 F.2d 1295, 1300 (5<sup>th</sup> Cir.), cert. denied, 449 U.S. 956 (1980);

*U.S. v. Perry*, 624 F.2d 29, 31 (5<sup>th</sup> Cir. 1980) (allowing the government an "interlocutory appeal" under 18 U.S.C. § 3731 from an unfavorable ruling).

*Contra U.S. v. Hawkins*, 661 F.2d 426 (5<sup>th</sup> Cir. 1981).

"Defendants challenge the trial court's decision not to hold a hearing pursuant to *U.S. v. James* to determine the admissibility of co-conspirator statements. Under *James*, decided by this Court sitting en banc, a co-conspirator's hearsay statement is not

admissible unless the trial court determines the Government has established by a preponderance of the evidence independent of the statement itself that a conspiracy existed, that the co-conspirator and the defendant against whom the statement is offered were members of the conspiracy, and that the statement was made during the course of the conspiracy. The Court in *James* held that a hearing on this issue was preferred but not required.” *U.S. v. Hawkins*, 661 F.2d at p. 449 (5<sup>th</sup> Cir. 1981).

The *James* court, however, took pains to note that a hearing is the “preferred” course, and that in any event, their opinion established only the “minimum standard for admissibility of co-conspirator statements” and that “[N]othing stated [in the opinion] shall prevent a trial judge from requiring more meticulous procedures.” *U.S. v. James*, 590 F.2d at 583.

With the abolition of the *James* constraints for determining the admissibility of co-conspirator’s statements, its effect on requiring an independent hearing is in doubt.

*Compare* *U.S. v. Perez*, 823 F.2d 854, 855 (5<sup>th</sup> Cir. 1987);  
*U.S. v. Valdez*, 861 F.2d 427, 432 (5<sup>th</sup> Cir. 1988) (acknowledging that requirements of *James*, other than the standard of proof requisite, remain viable).

*See also* *Williams v. State*, 815 S.W.2d 743 (Tex. App. –Waco 1991), *reversed on other grounds*, 829 S.W.2d 216 (Tex. Cr. App. 1992) (noting good demonstration and analysis of federal requirements for admissibility of co-conspirator’s statement, as well as the procedure used to determine its admissibility).

In *Williams*, the trial court held a hearing outside the presence of the jury to determine admissibility.

### **NOT ENOUGH TO PROVE CONSPIRACY OR THAT BOTH ACCUSED AND DECLARANT VOLUNTARILY PARTICIPATED IN SAME**

It must be borne in mind that the mere showing that a conspiracy in fact existed and that both the defendant and the declarant had voluntarily become members of that conspiracy does not meet the requisites of Rule 801(d)(2)(E). “In addition to requiring a showing that a conspiracy existed and the Defendant voluntarily participated, Rule 801(d)(2)(E) requires that the particular statement offered have been made both “during the course” and “in furtherance” of the conspiracy.

4 LOUISELL, FEDERAL EVIDENCE § 427 at 33;  
*U.S. v. Meacham*, 626 F.2d 503, 510-511 n.8 (5<sup>th</sup> Cir. 1980);  
*U.S. v. Postal*, 589 F.2d 862 (5<sup>th</sup> Cir. 1979), cert. denied, 444 U.S. 832;  
*U.S. v. Caro*, 569 F.2d 411 (5<sup>th</sup> Cir. 1978);  
*U.S. v. Wilkerson*, 469 F.2d 963, 968 (5<sup>th</sup> Cir. 1972), cert. denied, 410 U.S. 986 (1973);  
*U.S. v. Williamson*, 450 F.2d 585, 590-91 (5<sup>th</sup> Cir. 1971), cert. denied, 405 U.S. 1026;

*U.S. v. Green*, 600 F.2d 154 (8<sup>th</sup> Cir. 1979);  
*U.S. v. Eubanks*, 591 F.2d 513 (9<sup>th</sup> Cir. 1979);  
*U.S. v. Lang*, 589 F.2d 92 (2d Cir. 1978);  
*U.S. v. Holder*, 652 F.2d 449, 450 (5<sup>th</sup> Cir. 1981);  
*U.S. v. Portier*, 623 F.2d 1017, 1020 (5<sup>th</sup> Cir. 1980).

### **STATEMENTS MUST HAVE BEEN MADE “DURING COURSE” OF CONSPIRACY**

Thus, there is a “general rule that the arrest of the co-conspirator puts an end to the conspiracy” and a co-conspirator’s subsequent “statement incriminating the other defendants [is] not admissible at their trial.”

*U.S. v. Meacham*, 626 F.2d 503, 510-511 n.8 (5<sup>th</sup> Cir. 1980).

*See also U.S. vs. Palow*, 777 F.2d 52, 57 (1<sup>st</sup> Cir. 1985) (noting that co-conspirator statements made as to defendant, after the conspiracy objectives either failed or were completed, are inadmissible).

### **CO-CONSPIRATOR’S RULE DOESN’T MEAN WHAT IT SAYS**

Although Rule 801(d)(2)(E) expressly requires that a co-conspirator’s statement is only admissible if it was made “during the course” of a conspiracy, at least one court has held that a statement regarding the possibility of the defendant’s entry into a conspiracy (obviously made before the conspiracy was entered into) was nevertheless admissible under the rule.

*U.S. v. Baines*, 812 F.2d 41 (1<sup>st</sup> Cir. 1987) (co-conspirator’s rule does not mean what it says).

### **STATEMENTS MUST HAVE BEEN MADE “IN FURTHERANCE” OF THE CONSPIRACY**

Similarly, statements made by a fellow co-conspirator who is also a paid government informer to a known government agent are not admissible under the “co-conspirator’s exception” to the hearsay rule because, recognizing the “agency fiction” underlying this rule, such individual is at that time acting not as the agent of his co-conspirators, but as the agent of the government and the hearsay statements were not made “in furtherance of the conspiracy but rather to frustrate it.”

*U.S. v. Wilkerson*, 469 F.2d 963, 968 (5<sup>th</sup> Cir. 1972);  
*U.S. v. Williamson*, 450 F.2d 585, 590-1 (5<sup>th</sup> Cir. 1981), *cert. denied*, 405 U.S. 1026 (1972).

*See also U.S. v. Summers*, 598 F.2d 450 (5<sup>th</sup> Cir. 1979);

*U.S. v. Palow*, 777 F.2d at 57.

Mere puffing, bravado or braggadocio, even by one who has been shown to have become a member of the conspiracy, does not fit the requirements of Rule 801(d)(1)(E), where the statement could not be said to have been made to further some conspiratorial goal.

*U.S. v. Fielding*, 645 F.2d 719 (9<sup>th</sup> Cir. 1981).

However, puffing, boasts and braggadocio are admissible when the declarant uses them to obtain the confidence of one in the conspiracy.

*U.S. v. Santiago*, 837 F.2d 1545, 1549 (11<sup>th</sup> Cir. 1988);

*U.S. v. Miller*, 664 F.2d 94, 98 (5<sup>th</sup> Cir. Unit B, 1981), *cert. denied*, 549 U.S. 854 (1982).

### **CO-CONSPIRATOR’S EXCEPTION SHOULD NOT BE EXPANDED**

The drafters of the Federal Rules evinced concern that the co-conspirator’s exception not be expanded:

“The agency theory of conspiracy is at best a fiction and ought not serve as a basis for admissibility beyond that already established.” Adv. Comm. Notes, FED. R. EVID. R. 801(d)(2)(E).

The trial court “should refrain from advising the jury of his findings that the government has satisfactorily proved the conspiracy.” *U.S. v. Vinson*, 606 F.2d 149, 153 (6<sup>th</sup> Cir. 1979).

### **ADVISORY COMMITTEE OBSERVED DISTINCTION BETWEEN HEARSAY RULE AND CONFRONTATION CLAUSE**

In drafting the Federal Rules of Evidence the Advisory Committee noted the distinction between the Hearsay Rule and the Confrontation Clause:

“[T]he impact of the Clause clearly extends beyond the confines of the hearsay rule.... In recognition of the separateness of the Confrontation Clause and the Hearsay Rule and other exclusionary principles, the exception set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.” Adv. Comm. Notes, FED. R. EVID. Art. VIII.

### **IS APPROPRIATE OBJECTION “DENIAL OF SIXTH**

**AMENDMENT RIGHT OF CONFRONTATION”,**  
**NOT MERELY “HEARSAY”?**

While co-conspirator’s statements meeting the requirements of Rule 801(d)(2)(E), may not constitute “hearsay” under the Federal Rules of Evidence, at least one court had held they may still be inadmissible as denying the accused his Sixth Amendment right to confrontation and cross-examination, at least where there is no showing the witness is unavailable. *U.S. v. Gibbs*, 703 F.2d 683, 691-695 (3d Cir. 1983) (noting opinion withdrawn and district court affirmed on rehearing (739 F.2d 838) for failure of defense counsel to raise confrontation objection at trial) See also Rule 103(a)(1).

In *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), the Supreme Court recognized that the Confrontation Clause and the hearsay rule ‘stem from the same roots’, but declined to equate the two. *Id.* at 86, 91 S.Ct. at 218. We therefore believe that the Confrontation clause issue and the evidentiary question must be separately analyzed, and that the sixth amendment may require the exclusion of evidence even though admissible under FED. R. EVID. 801 (d)(2)(E).

Because the right of confrontation is so important in our adversarial system, it may only be denied in exceptional situations. The Government has not met its burden to show that the instant case is such an exceptional situation. The prosecution has failed to establish either that the declarant cannot be produced for trial, or that the hearsay is sufficiently reliable and insignificant to justify dispensing with a showing of unavailability.

“The admission into evidence of Quintiliano’s statements had the effect of sharply tipping the scales of justice against the defendant. Under these circumstances, the historic safeguard guaranteeing the accused the right to be confronted with the witnesses against him may not be disregarded. We therefore hold that where the Government has not demonstrated that the declarant is unavailable, and where the out-of-court statements are not sufficiently reliable and peripheral to justify dispensing with the unavailability requirement, the statements may not be admitted into evidence. The admission of the challenged evidence therefore constitutes reversible error.” *U.S. v. Gibbs*, 739 F.2d 838 (3d Cir. 1984).

*See also* *U.S. v. Palow*, (violation of confrontation clause where co-defendant makes post-conspiracy statement but does not testify at trial, precluding opportunity to cross-examine).

However, the Supreme Court has expressly rejected as a “radical proposition” the contention that co-conspirator declarations should not be admitted without demonstrating that the declarant is reasonably unavailable to testify and be cross-examined.

*U.S. v. Inadi*, 475 U.S. 387, 394 (1986).

For an example of Texas law on this point. See *Buckley v. State*, 786 S.W.2d 357, 359 (Tex.Cr.App. 1990).

The Confrontation Clause normally requires a showing of unavailability. The court noted, however, that the Supreme Court has “identified at least one exception to this norm.” *Buckley v. State*, 786 S.W.2d 357, 359 n.2 (Tex.Cr.App. 1990)(citing *Inadi*).

The courts of Texas adhere to the same proposition that the right of confrontation is not absolute. See, e.g., *Porter v. State*, 578 S.W.2d 742, 745 (Tex. Cr. App. 1979).

“If literally applied, the Confrontation Clause would abrogate virtually every hearsay exception ...” *Loven v. State*, 831 S.W.2d 387, 393 (Tex. App. – Amarillo 1992)(citing *Maryland v. Craig*, 110 S.Ct. 3157, 3166 (1990); *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

“Confrontation and cross-examination are not essential where indicia of reliability is sufficient to ensure the integrity of the fact-finding process.” *Huff v. State*, 897 S.W.2d 829, 1995 WL 42722 at \*8 (Tex. App. – Dallas, 1995)(citing *Porter*, 578 S.W.2d at 745). The Dallas Court of Appeals in *Huff* utilized the test from *Ohio v. Roberts*, stating that the reliability of an out-of-court statement may be inferred without more when the statement falls within a firmly rooted hearsay statement. Id.

### **IS THERE A CONFRONTATION OBJECTION BEYOND HEARSAY?**

The Supreme Court has held that at least with respect to the co-conspirator’s exception, which they found so “steeped in our jurisprudence,” the Sixth Amendment Confrontation Clause provides no greater protection than those found in Rule 801(d)(-2)(E) of the Federal Rules of Evidence:

“[T]here can be no separate Confrontation Clause challenge to the admission of a co-conspirator’s out-of-court statement.” *Bourjaily v. U.S.*, 483 U.S. 171, 97 L.Ed.2d 144, 15, 107 S.Ct. 2775 (1987).

### **SCOPE OF CROSS-EXAMINATION**

FED. R. EVID. Rule 611(b)

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witnesses [limiting the original draft which allowed cross-examination “...on any matter relevant to any issue in the case,” H.R. Rep. No. 93-650, 93<sup>rd</sup>, Cong. First Sess. 12.1973].

*U.S. v. Walker*, 613 F.2d 1349 (5<sup>th</sup> Cir. 1980);  
*U.S. v. Wolfson*, 573 F.2d 216 (5<sup>th</sup> Cir. 1978).

See also *U.S. v. Haili*, 443 F.2d 1295, 1299 (9<sup>th</sup> Cir. 1971);

*Casey v. U.S.*, 413 F.2d 1303 (5<sup>th</sup> Cir. 1969), *cert. denied*, 397 U.S. 1029 (1970);  
*U.S. v. Evanchik*, 413 F.2d 950 (2d Cir. 1969).

**LIMITATION ON CROSS-EXAMINATION HELD VIOLATIVE OF  
CONFRONTATION GUARANTEED BY SIXTH AMENDMENT**

*U.S. v. Lewis*, 447 F.2d 134 (2d Cir. 1971);  
*U.S. v. Wolf v. Wolfson*, 437 F.2d 862 (2d Cir. 1970);  
*U.S. v. Dickens*, 417 F.2d 958 (8<sup>th</sup> Cir. 1969);  
*U.S. v. Hitchmon*, 609 F.2d 1098 (5<sup>th</sup> Cir. 1979).

**BUT: CONFRONTATION CLAUSE VIOLATION NOW SUBJECT TO HARMLESS  
ERROR RULE**

In *Delaware v. Van Arsdall*, 475 U.S. 673, 89 L.Ed.2d 674 (1986), the defendant in a murder trial was barred by the trial judge from cross-examining a witness for the state concerning an agreement between the witness and the state in which the state agreed to drop a public drunkenness charge against the witness in exchange for testimony concerning the murder. The defendant was convicted, but the Delaware Supreme Court reversed the conviction noting that “the bias of a witness is subject to exploration at trial and is ‘always relevant as discrediting the witness and affecting the weight of his testimony.’” *Davis V. Alaska*, 415 U.S. 308, 316 (1974).

The Supreme Court held that “the trial judge’s ruling denied respondent his constitutional right to effective cross-examination ...the ruling kept from the jury facts concerning bias that were central to assessing [the witness’] reliability...’a blanket prohibition against exploring potential bias through cross-examination is “a per se error.” 89 L.Ed.2d at 682. The U.S. Supreme Court granted certiorari, and even though it agreed that the respondent had been denied his Sixth Amendment right to confrontation, it vacated the state court decision and remanded for a consideration of whether same was harmless error:

“Accordingly, we hold that the constitutionally improper denial of a defendant’s opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to Chapman harmless error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case. *Delaware v. Van Arsdall*, 475 U.S. 673, 89 L.Ed.2d 674 (1986).

*Cf.* *Harrington*, 395 U.S. 250, 254, 23 L. Ed. 2d 284, 89 S.Ct. 1726 (1969);  
*Schneble v. Florida*, 405 U.S. 427, 432, 31 L.Ed.2d 340, 92 S.Ct. 1056 (1972).  
89 L.Ed.2d at 686-87.

Texas has also adopted a “harmless error” rule for denial of confrontation rights.

*See, e.g.* *Young v. State*, 891 S.W.2d 945, 948 (Tex. Cr. App. 1994);  
*Clark v. State*, 881 S.W.2d 682, 695-96 (Tex. Cr. App. 1994)(citing *Delaware v. Van Arsdall*).

### **IMPEACHMENT**

“[T]he exposure of a witness’ motivation in testifying is a proper and important function of the Constitutionally protected right of cross-examination.” *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988).

The magnitude of the right permits inquiry into otherwise inaccessible matters; Record of offenses committed while still a juvenile to show motive to testify adversely, *Davis v. Alaska*, 415 U.S. 308, 315-316 (1974), an alleged rape victim’s present cohabitation to show her motive to fabricate story of rape, *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L.Ed.2d 513 (1988).

Also, use of a videotape interview with a child witness may be used to impeach the testimony of a social worker about what occurred during that interview. *Hall v. State*, 764 S.W.2d 19 (Tex.App. Amarillo, 1988).

### **FED. R. EVID. RULE 607 ALLOWS IMPEACHING ONE’S OWN WITNESS**

“The credibility of a witness may be attacked by any party, including the party calling him.”

*U.S. v. Hagenstab*, 575 F.2d 1035 (2d Cir. 1978);

*U.S. v. Craig*, 573 F.2d 513 (7<sup>th</sup> Cir. 1978).

However, the prosecution may not use a witness’ prior inconsistent statement under the guise of impeachment for the *primary* purpose of getting otherwise inadmissible evidence before the jury. *U.S. v. Miller*, 664 F.2d 94, 97 (5<sup>th</sup> Cir. 1981), *cert. denied*, 459 U.S. 854 (1982) (emphasis added).

And while the government may call a witness it knows may be hostile and impeach his credibility, it may not call a witness it knows to be hostile for the primary purpose of eliciting otherwise inadmissible impeachment testimony. *U.S. v. Hogan*, 763 F.2d 697, 702 (5<sup>th</sup> Cir. 1985), *reh’g denied in part*, 771 F.2d 82 (5<sup>th</sup> Cir. 1985).

Rule 611(c) restricts “leading questions” to cross-examination unless “necessary to develop” the witness’ testimony, “a hostile witness, an adverse party, or witness identified with an adverse party.”

### **WHO IS THE GOVERNMENT’S CLIENT?**

It is often helpful to expose the jury to whom the Government has chosen as its client in the case. Every witness places his character for truthfulness in issue and counsel should seek out witnesses who can assist the jury in determining whether the witness under oath is worthy of their belief. One may support a witness once that witness’ character has been attacked. *U.S. v. Cosentino*, 844 F.2d 30 (2d Cir. 1988) (noting door opened to admit cooperation agreement).

But one may not support his or her own witness’ character until it is attacked. *U.S. v. Fernandez*, 829 F.2d 363 (2<sup>nd</sup> Cir. 1987) (eliciting vacillating testimony from a witness on cross does not attack that witness’ credibility thus the same may not be supported on redirect).

### **FED. R. EVID. RULE 608, CHARACTER AND CONDUCT OF WITNESS FOR THE TRUTHFULNESS**

#### **(a) OPINION AND REPUTATION**

Testimony is admissible so long as the evidence:

- (1) relates only to character for truthfulness or untruthfulness, and
- (2) only after the character of the witness has been attacked by opinion or reputation evidence “or otherwise.”

#### **(b) SPECIFIC INSTANCES OF CONDUCT ARE NOT ADMISSIBLE:**

Other than conviction of a crime [set out in Rule 609]. But specific instances are admissible within court’s discretion on cross-examination if probative of truthfulness or untruthfulness and inquired into concerning:

- (1) the witness’ character for truthfulness, or
- (2) the character for truthfulness of another witness as to whose character the witness being cross-examined has testified [eg. “have-you-heards”].

*U.S. v. Morales-Quinones*, 812 F.2d 604 (10<sup>th</sup> Cir. 1987) (defendant may impeach government witness by cross-examining him about specific instances of conduct not resulting in conviction if probative of witness’ character for truthfulness or untruthfulness);

*U.S. v. Hit Hitchmon*, 609 F.2d 1098 (5<sup>th</sup> Cir. 1979) (reversible error to restrict cross-examination of assaulted officers in an effort to show they hpreviously had perjured themselves in the case);  
*U.S. v. Cluck*, 544 F.2d 195 (5<sup>th</sup> Cir. 1976) (reversible error to attack witness' credibility by extrinsic evidence of prior arrest that has not resulted in conviction);  
*U.S. v. Park*, 525 F.2d 1279 (5<sup>th</sup> Cir. 1976) (Rule 608(b) not permit cross-examination of defense witness, who testified defendant had not stolen item charged, regarding suspicious air conditioner shipments and pay-offs to the accused);  
*U.S. v. Alvarado*, 519 F.2d 1133 (5<sup>th</sup> Cir. 1975), *cert. denied*, 429 U.S. 1073 (1977) (trial court held to have properly precluded questions of prosecution witnesses in marijuana trial regarding their possible prostitution and homosexuality [even though offered to show bias and motive to testify for government] on grounds same was too speculative);  
*U.S. v. Banks*, 520 F.2d 627 (7<sup>th</sup> Cir. 1975);  
*U.S. v. Wood*, 550 F.2d 435 (9<sup>th</sup> Cir. 1977) (testimony by Mexican police officer that defendant wanted in Mexico for auto theft was inadmissible even though it was contrary to defendant's own testimony);  
*U.S. v. Dinitiz*, 538 F.2d 1214, 1224 (5<sup>th</sup> Cir. 1976) (en banc) (stating must articulate theory of admissibility);  
*U.S. v. Curry*, 512 F.2d 1299 (4<sup>th</sup> Cir. 1975), *cert. denied*, 423 U.S. 932 (1975) (addressing as to "have-you-heards");  
*Steele v. Perez*, 827 F.2d 190 (7<sup>th</sup> Cir. 1987) (court prohibited accused child molester from cross-examining two key child witnesses about prior specific instances of lying. Court held that defendant is entitled to probe deeply about witness' bias or motive, but not to impeach a witness' character as a truthful person).

#### **FED. R. EVID. RULE 803(21)**

An individual's character reputation among associates in the community is excluded from the hearsay rule, regardless if the declarant is available to testify.

#### **FED. R. EVID. RULE 405, CHARACTER GENERALLY**

Proof of character may be made by testimony as to reputation or by testimony in the form of an opinion.

Character of Witness [FED. R. EVID. RULE 404(a)(3)].

Evidence of the character of a witness may be proved where admissible pursuant to Rule 607, 608 and 609.

### **METHODS OF PROVING CHARACTER [FED. R. EVID. Rule 405]**

#### **Reputation or Opinion:**

In all cases in which evidence of character or a trait of character of a a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. FED. R. EVID. Rule 405(a); *U.S. v. Peterson*, 553 F.2d 324 (3d Cir. 1977) (evidence that the defendant belonged to a pacifist church is not admissible to show character trait of non-violence).

#### **Specific Instances of Conduct:**

In cases in which character or a trait of character of a person is an essential element of charge, claim, or defense, proof may also be made of specific instances of his conduct. FED. R. EVID. Rule 405(b); *U.S. v. Pantone*, 609 F.2d 675 (3d Cir. 1979) (Rule 405 forbids use of specific instances of conduct to prove character unless character is an essential element of the offense charged); *Posey v. State*, 738 S.W.2d 321 (Tex.App. 1987) (when defense was defendant resisted excessive force, inquiry into prior use of stun gun by witness was proper).

### **PROOF OF CHARACTER [RULES 405(a) AND 608(a)]**

Character may be proved either by reputation or opinion testimony. FED. R. EVID. Rules 405(a) (dealing with reputation or opinion as to character or trait of character generally); FED. R. EVID. 608(a) (dealing with reputation or opinion as to credibility).

The Courts have recognized a significant difference in the predicate required to prove character through opinion testimony as opposed to reputation.

#### **BY REPUTATION TESTIMONY**

Reputation testimony is, by definition, hearsay and a reputation witness “must have sufficient acquaintance with the principal witness and his community in order to ensure that the testimony adequately reflects the *community’s* assessment.” *U.S. v. Watson*, 669 F.2d 1374, 1381 (11<sup>th</sup> Cir. 1982) (noting some 2-3 month acquaintance with witness is insufficient even though the witness “lived in...the location ...thirty-three years” and “worked with the [witness] every day”); *Michelson v. U.S.*, 335 U.S. 469, 478 (1948); *U.S. v. Angello*, 452 F.2d 1135, 1139-40 (2d Cir. 1971), *cert. denied*, 406 U.S. 922 (1972); *U.S. v. Salazar*, 425 F.2d 1384, 1286 (9<sup>th</sup> Cir. 1970); *U.S. v. Oliver*, 492 F.2d 943 (8<sup>th</sup> Cir. 1974) (allowing reputation testimony based upon a short period of acquaintance).

“A proper foundation must be laid before the admission of reputation testimony. The reputation witness must be qualified through a showing of ‘such acquaintance with eh [person], the community in which he lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is regarded.” *Michelson v. U.S.*, 335 U.S. 469, 478 (1948).

And the trial court’s determination regarding the adequacy of the foundation for a reputation witness is ordinarily not overturned on appeal, *Michelson v. U.S.*, 335 U.S. 469, 480-81 (1948), without demonstrating an abuse of discretion. *U.S. v. Watson*, 669 F.2d 1374, 1381 (11<sup>th</sup> Cir. 1982).

### **BY OPINION TESTIMONY**

Historically, reputation evidence was the exclusive method for proving character. Opinion evidence was excluded. 3 Weinstein & Berger, *Weinstein’s Evidence*. ¶ 608 [04] (1988); McCormick, *Evidence*, § 4, at 95 (1954); Wigmore, *Evidence*, §§ 1981-86 (3d Ed. 1940).

However, the enactment of FED. R. EVID. Rule 608(a) in 1976 substantially enlarged the avenues by which one may prove character, by providing that the credibility of a witness may be attacked “by evidence in the form of *opinion* or *reputation*.” FED. R. EVID. Rule 608(a); *U.S. v. Lollar*, 606 F.2d 587, 589 (5<sup>th</sup> Cir. 1979).

Under Rule 608(a) no foundation regarding length of acquaintance or recent information such as that required for reputation testimony is required for opinion testimony, *U.S. v. Lollar*, 606 F.2d 587 (5<sup>th</sup> Cir. 1979); *U.S. v. Watson*, 669 F. 2d 1374, 1382 (11<sup>th</sup> Cir. 1982), and such “opinion” testimony may be based upon isolated instances of conduct, or personal feelings by the witness. *U.S. v. Watson*, 669 F. 2d 1374, 1382 (11<sup>th</sup> Cir. 1982).

“The Fifth Circuit determined that prior questioning of the opinion witness regarding his knowledge of the defendant’s reputation was unnecessary. ‘The rule imposes no prerequisite condition upon long acquaintance or recent information about the witness; cross-examination can be expected to expose defects in lack of familiarity and to reveal reliance on isolated or irrelevant instances of misconduct or the existence of feelings of personal hostility towards the principle witness.’”

*U.S. v. Watson*, 669 F.2d 1374, 1382 (11<sup>th</sup> Cir. 1982). See also *U.S. v. Lollar*, 606 F.2d 587, 589 (5<sup>th</sup> Cir. 1979).

This distinction between the foundation required for reputation as opposed to opinion testimony “follows from an analysis of the nature of the evidence involved.” *U.S. v. Watson*, 669 F.2d 1374, 1382 (11<sup>th</sup> Cir. 1982). Reputation testimony is based upon the community’s assessment of the witness’ character, whereas opinion testimony relates to “the witness’ own impression of an individual’s character.” Accordingly, opinion testimony relating to character

may be based upon even isolated instances which “cross-examination can be expected to expose.” *U.S. v. Lollar*, 606 F.2d 587, 589 (5<sup>th</sup> Cir. 1979).

“The reputation witness must have sufficient acquaintance with the principle witness and his community in order to ensure that the testimony adequately reflects the community’s assessment... In contrast, opinion testimony is a personal assessment of character. The opinion witness is not relating community feelings, the testimony is solely the impeachment witness’ own impression of an individual’s character for truthfulness. Hence, a foundation of long acquaintance is not required for opinion testimony. Of course, the opinion witness must testify from personal knowledge... But once that basis is established the witness should be allowed to state his opinion, cross-examination can be expected to expose defects.”

*U.S. v. Watson*, 669 F.2d 1574, 1582 (11<sup>th</sup> Cir. 1982).

In essence, the litany of arcane reputation questions mastered by almost every third year law student and lost by just as many jurors need not be asked with respect to proof of character by opinion testimony.

While it may be more desirable to have counsel first ask the impeaching witness about his knowledge of the defendant’s reputation for truth and veracity, and whether based on that knowledge he would believe the defendant under oath, Rule 608(a) imposes no such requirement.

Witnesses may now be asked directly to state their opinion of the principle witness’ character for truthfulness and they may answer for example, “I think X is a liar.” The rule imposes no prerequisite conditioned upon long acquaintance or recent information about the witness; cross-examination can be expected to expose defects of lack of familiarity and to reveal reliance on isolated or irrelevant instances of misconduct or the existence of feelings or personal hostility towards the principal witness. *U.S. v. Lollar*, 606 F.2d 587, 589 (5<sup>th</sup> Cir. 1979) [emphasis supplied].

### **POLYGRAPH EVIDENCE MAY NOW BE ADMISSIBLE**

In 1993 the United States Supreme Court overruled the so-called *Frye* test, which required proof of “general acceptance” within the scientific community as a predicate for admission of expert scientific testimony, holding same had been superseded by the adoption of the Federal Rules of Evidence. *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1993).

“Given the Rule’s permissible backdrop and their inclusion of a specific rule on expert testimony that does not mention “general acceptance,” the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made ‘general acceptance’ the exclusive test for admitting expert scientific testimony. That

austere standard, absent from and incompatible with the Federal Rules of Evidence, should not be applied in federal trials.”

Thereafter, courts have held that previously excluded “scientific testimony” such as polygraph results may be admissible under the relaxed standards of the Federal Rules of Evidence under *Daubert*. *U.S. v. Posado*, 57 F.2d 428, (5<sup>th</sup> Cir. 1995).

“Our precedent, with few variations, has unequivocally held that polygraph evidence is inadmissible in a federal court for any purpose. [citations omitted] However, we now conclude that the rationale underlying this circuit’s per se rule against admitting polygraph evidence did not survive *Duabert v. Merrell Dow Pharmaceuticals, Inc.*

It is with a high degree of caution that we have today opened the door to the possibility of polygraph evidence in certain circumstances. We may indeed be opening a legal Pandora’s box. However, that ithe task is full of uncertainty and risk does not excuse us from our mandate to follow the Supreme Court’s lead. Rather, ‘mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.’ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F. 3d 1311, 1316 (9<sup>th</sup> Cir. 1995).

Nor are we unaware that our opinion today may raise as many questions as it answers. We leave much unsaid precisely because we believe that the wisdom and experience of our federal district judges will be required to fashion the principles that will ultimately control the admissibility of polygraph evidence under *Daubert*.”

*See also* *U.S. v. Hart*, 344 F.Supp. 522 (E.D.N.Y. 1971) (noting where prosecution conducts polygraph then ignores the results same are admissible over the objection of the prosecutor).

### **LIMITATION ON CROSS-EXAMINATION OF CHARACTER WITNESS**

In *U.S. v. Candelaria-Gonzalez*, the Fifth Circuit Court held it was reversible error to permit a prosecutor to inquire of a defense character witness whether his opinion would be affected by the defendant’s “indictment.” *U.S. v. Candelaria-Gonzalez*, 547 F.2d 291, 293 (5<sup>th</sup> Cir. 1977); by the offense on trial, *Candelaria-Gonzalez*, 547 F.2d at 294; or by what “a DEA Agent testified” to , *Candelaria-Gonzalez*, 547 F.2d at 294; as same “struck at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of “fair trial.” *Candelaria-Gonzalez*, 547 F.2d at 294.

One cannot so elevate Government witness' testimony "to the status of accepted fact" as "the presumption of innocence [is] destroyed in the process." *U.S. v. Candelaria-Gonzalez*, 547 F.2d at 295.

*Contra* *U.S. v. Oshatz*, 704 F.Supp 511 (S.D.N.Y. 1989) (government could ask a fact witness, who had testified as to defendant's honesty, to assume that the defendant omitted the acts giving rise to tax fraud charges and to indicate whether such facts would alter her opinion. The District Court found not reason to distinguish questioning the witness about wrongdoing that never resulted in an arrest or conviction and wrongdoing that was currently at issue).

## ONCE A LIAR

### FED. R. EVID. RULE 613, PRIOR STATEMENTS OF WITNESS

(a) "Statement need not be shown nor its contents disclosed" to witness when examining him concerning a prior statement, but on request the same shall be shown to opposing counsel. [This applies to impeachment of witness with prior inconsistent statement.]

(b) Extrinsic evidence of prior inconsistent statement of witness is not admissible unless the witness is afforded the opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon.

*U.S. v. DiNapoli*, 557 F.2d 962 (2d Cir. 1977).

*Caveat* FED. R. EVID. Rule 613 deals with impeachment of a witness with a prior inconsistent statement.

The statement should be admissible as substantive evidence of the truth of the matter therein contained, where it satisfies either:

- (1) FED. R. EVID. Rule 801(d)(1) Prior statements by a witness, or
- (2) FED. R. EVID. Rule 801(d)(2) Admission by party opponent.

Also, the Second Circuit held that counsel cannot offer a prior consistent statement of his own witness where credibility is not attacked.

*U.S. v. Fernandez*, 829 F.2d 363 (2d Cir. 1987) (stating where counsel offered a cooperating witness' plea agreement);

*U.S. v. Graham*, 858 F.2d 986 (5<sup>th</sup> Cir. 1988) (noting officer could not be cross examined about whether co-defendant had made prior statements at all as co-defendant's position

that he had made such statements was not inconsistent with the prior inculpatory statements offered through the police officer). Note: the subsequent positions did not go to the issue of whether the prior statements were true.

## **THE NEED TO OBTAIN PRIOR STATEMENTS AT THE EARLIEST OPPORTUNITY**

### **JENCKS ACT WITNESS STATEMENT [FED. R. EVID. RULE 26.2]**

The Jencks Act [18 U.S.C. § 3500], now replaced by FED. R. EVID. Rule 26.2, provides that “no statement or report . . . made by a Government witness or prospective witness . . . shall be the subject of subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case. But then, after a witness has “testified on direct examination,” the Government must “produce any statement . . . of the witness in the possession of the United States “which relates to the subject matter as to which the witness has testified.” 18 U.S.C. § 3500(a).

While the statute would seem to preclude requiring the government to make pre-trial disclosure of such witness’ statements, subsection (b) of that Act provides that if the Government does wait until after the witness has testified at trial to provide his witness’ statement or report, the Court may recess the proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial, 18 U.S.C. § 3500(b). This is obviously a needlessly time consuming process which could be avoided by early disclosure.

Rule 26.2 is applicable at preliminary hearings, bond hearings, suppression hearings, sentencing revocation hearing, and hearings on writs of habeas corpus. See rules 5.1, 46i, 12i, 32, 32.1, of the Federal Rules of Criminal Procedure.

*Contra* *U.S. v. Algil*, 667 F.2d 569 (6<sup>th</sup> Cir. 1982) (approval of early release of Jencks material, but refusing to require same over prosecution’s objection).

“[W]e note that in most criminal cases, pretrial disclosure will resound to the benefit of all parties, counsel, and the court. Indeed, sound trial management would seem to dictate that Jencks Act material should be transmitted prior to trial, especially in complex cases, so that those abhorrent lengthy pauses at trial to examine documents can be avoided. . . . We suggest that the district judge may find the pretrial conference, FED. R. CRIM. P. 17.1, a useful forum for establishing a timetable for discovery and for reaching agreements about the scope of disclosure. Particularly in multiple defendant cases, the district judge may solicit broad disclosure to assist him in disposing of motions for severance or in detecting inadmissible confessions under *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Pretrial discovery should be approached with a spirit of cooperation among court and counsel in order to prevent those burdensome trial recesses and also, we should emphasize to protect the government against post-conviction claims of prejudicial surprise, see *U.S. v. Baum*, 482 F.2d 1325, 1331-1332 (2d Cir. 1973), or claims of suppression of

material and favorable evidence. See *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963); *U.S. v. Percevault*, 480 F. 2d at 132.

Furthermore, a continuance may be required to study Jencks material and adequately prepare cross-examination, even if same is provided prior to trial. *U.S. v. Holmes*, 722 F.2d 37, 40-41 (4<sup>th</sup> Cir. 1983) (“Here it is clear that defendants were not afforded a reasonable opportunity to examine and digest the mass of material furnished them on the Sunday before the Monday that he trial began... It was therefore an abuse of discretion on the part of the district court to deny a reasonable delay in the progress of the trial to permit counsel to complete their studies and preparation”).

See also *U.S. v. Wables*, 731 F.2d 440 (7<sup>th</sup> Cir. 1984).

In fact, 18 U.S.C. § 3500(c) [and see FED. R. CRIM. P. Rule 26.2] expressly provides that “[w]henver any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for some times as it may determine to be reasonably required for the examination of such statement by said defendants and his preparation for hits use in trial.”

An officer’s rough investigative notes may be Jencks material, particularly where they contain the substance of a witness’ statements to the officer.

*U.S. v. Paoli*, 603 F.2d 1029 (2d Cir. 1979);  
*U.S. v. Gaston*, 608 F.2d 607, 611-12 (5<sup>th</sup> Cir. 1979);  
*U.S. v. Rippy*, 606 F.2d 1150, 1153 (D.C. Cir. 1979);  
*U.S. v. Ammar*, 714 F.2d 238 (3d Cir. 1983) (that Jencks Act [now FED. R. CRIM. P. Rule 26.2] includes final reports, rough notes and any drafts used to prepare the final report).

*Contra* *U.S. v. Hinton*, 719 F.2d 711 (4<sup>th</sup> Cir. 1983) (where incorporated into agents reports);  
*U.S. v. Soto*, 711 F.2d 1558 (11<sup>th</sup> Cir. 1983) (reversing trial court ruling striking government witness’ testimony on grounds rough notes were not produced).

Government agent’s notes are not discoverable under the *Jenck’s* Act when the witness had neither signed, read, nor heard his entire statement. The adoption contemplated by the statute must be more formal. *U.S. v. Hogan*, 763 F.2d 697, 704 (5<sup>th</sup> Cir. 1985). In addition, the defense is not entitled to a pre-sentence report on a government witness as *Jencks* material. *U.S. v. Dingle*, 546 F.2d 1378 (10<sup>th</sup> Cir. 1976).

Accordingly, while some courts require preservation of such “notes,”

*U.S. v. Sanchez*, 635 F.2d 47, 65-66 (2d Cir. 1980);  
*U.S. v. Gantt*, 617 F.2d 831, 841 (D.C. Cir. 1980);  
*U.S. v. Walden*, 590 F.2d 85, 86 (3d Cir.) cert. denied, 444 U.S. 849 (1979);  
*U.S. v. Crowell*, 586 F.,2d 1247, 1248 (4<sup>th</sup> Cir. 1973,

Others hold that routine and good faith destruction of these notes which have been incorporated into formal reports does not violate the Jencks Act.

*U.S. v. Cole*, 634 F.2d 866, 867-68 (5<sup>th</sup> Cir. 1981);  
*U.S. v. Kuykendall*, 633 F.2d 118, 199 (8<sup>th</sup> Cir. 1980);  
*U.S. v. Fredrick*, 583 F.2d 273, 274 (6<sup>th</sup> Cir.), *cert. denied*, 444 U.S. 860 (1978);  
*U.S. v. Shovea*, 580 F.2d 1382, 1289-90 (10<sup>th</sup> Cir. 1978).

### **RULE 26.2 DOES NOT PRECLUDE PRETRIAL DISCLOSURE**

Since Rule 26.2 has no language limiting or precluding disclosure of witness statements prior to trial, production of statements used by a witness to refresh his or her recollection at a pretrial “hearing” should be permitted. *See U.S. v. Salsedo*, 477 F.Supp 1235 (E.D. Cal. 1979); *see also* FED. R. CRIM. P. Rule 12(i) (noting 1983 Amendment to expanding pretrial production of government witness’ statements to any law enforcement officer, even if called by the defendant).

“Although the situation is at best muddled, we prefer to believe that Rule 612 should now be interpreted as it would have been prior to the 1971 change- i.e., as if there was no reference to 18 U.S.C. § 3500 . . . . This interpretation will eliminate [the] problem which arose in federal courts prior to the effective date of Rule 26.2: whether the Jencks Act controlled in preliminary hearing or whether Rule 612 could be applied. If the Jencks Act applied on the theory that Rule 612 made it the exclusive vehicle for production in a criminal proceeding, then it was doubtful whether a court could order production of a statement of a witness testifying at the preliminary hearing. Rule 26.2 unlike section 3500, does not have the ‘in the trial’ limiting language.” Weinstein & Berger, Weinstein’s Evidence, § 612 [02] (1988).

The language of the Jencks Act was amended by Rule 26.2 “after long and careful consideration by the Advisory Committee, the Supreme Court and the Congress.” Weinstein & Berger, Weinstein’s Evidence, ¶612[02] (1988).

“As a general rule, the enactment of revisions and codes manifestly designed to embrace an entire subject of legislation operates to repeal former acts dealing with the same subject, although there is no repealing clause to that effect.” 73 Am.Jr.2d § 411. *See also* Weinstein & Berger, Weinstein’s Evidence, §612[02] (1988).

Here, according to the enabling statute “all laws in conflict with such rules [of criminal procedure] shall be of no further force or effect after such rules have taken effect.” 18 U.S.C. §3737. Accordingly, the Jencks Acts’ 1970 prohibition against pretrial disclosure of witnesses statements, being in conflict with the recent enactment of Rule 26.2, has no force or effect.

As one of the leading commentators has noted, while the Jencks Act was not repealed with the enactment of the all-encompassing Rule 26.2, “it should be deemed repealed.” Weinstein & Berger, Weinstein’s Evidence, ¶ 612[02] (1978).

Courts have applied Rule 26.2 to provide for pretrial discovery of even statements made by one other than the testifying witness. *U.S. v. Musgrave*, No. SA-80-CR-70 (W.D. Tex., July 22, 1985).

This Court believes that the reports read by Special Agent Allen at the preliminary hearing on June 17, 1985, qualify as ‘statements’ within the meaning of Rule 26.2. Although the reports were prepared by another case agent, Special Agent Allen relied upon those reports to provide various factual information. His reliance on the reports indicates his belief that the reports were accurate and thus this Court is of the opinion that his reliance on the reports manifests his adoption of the matters set forth therein. Consequently, this Court is of the opinion that Allen adopted the information contained in the reports as his own and thus that the reports constitute ‘statements’ within the meaning of Rule 26.2 and are discoverable by the Defendant to the extent that the reports are relevant to Special Agent Allen’s testimony.

The Government claims that FED. R. CRIM. P. Rule 12(i) limits the application of Rule 26.2 to suppression hearings. This Court does not agree. While Rule 12(i) provides that Rule 26.2 shall apply at suppression hearings, it contains no other language that would appear to limit the Rule’s application strictly to hearings arising in connection with a motion to suppress...

Rule 26.2 contains no indication that the rule is to apply only at suppression hearings or at trial.

*Compare* FED. R. CRIM. P. Rule 26.2;  
18 U.S.C. § 3500.

Consequently, this Court believes that Rule 26.2 applies to the proceeding at issue and thus believes that the statements read by Special Agent Allen should have been disclosed to the Defendant insofar as they were relevant to his testimony.”

*U.S. v. Musgrave, Supra.*

More recently in *U.S. v. Salinas*, SA-89-CR-77 (W.D. Tex. September 29, 1990) (noting the District Court ordered production of agents’ reports to the Magistrate for him to review and determine those which must be produced to the defense).

## **WITNESS STATEMENTS ARE DISCOVERABLE AT “DETENTION HEARING”**

In 1993, FED. R. CRIM. P. Rule 46 was amended to provide for the production of witness statements at a detention hearing, required to be held within days after an individual's arrest.

### **“Rule 46. Release From Custody....**

#### **(i) PRODUCTION OF STATEMENTS.**

(1) In General. Rule 26.2(a)-(d) and (f) applies at a detention hearing held under 18 U.S.C. § 3144, unless the court for good cause shown, rules otherwise in a particular case.”

## **WITNESS STATEMENTS ARE DISCOVERABLE AT SUPPRESSION HEARING**

FED. R. CRIM. P. Rule 12(i) makes Rule 26.2's requirement for production of witness statements applicable to pretrial suppression hearings, whether a “law enforcement” officer is called by the prosecution *or defense*.

### **“Rule 12**

#### **Pleadings and Motions Before Trial...**

##### **(i) Production of Statements at Suppression Hearing.**

Except as herein provided, Rule 26.2 shall apply at a hearing on a motion to suppress evidence under subdivision (b)(3) of this rule. For purposes of this subdivision, a law enforcement officer shall be deemed a witness called by the government, and upon a claim of privilege the court shall excise the portions of a statement containing privileged matter.”

## **THE NEED TO INTERVIEW THE GOVERNMENT CLIENT**

Where witnesses, particularly eye-witnesses, are known to the defense they should be made available to both sides.

*U.S. v. Brown*, 555 F.2d 407, 425 (5<sup>th</sup> Cir. 1977);  
*U.S. v. Scott*, 578 F.2d 261, 268 (6<sup>th</sup> Cir. 1975);  
*U.S. v. Murray*, 492 F.2d 178, 194 (9<sup>th</sup> Cir. 1973);  
*U.S. v. Long*, 449 F.2d 288, 295 (8<sup>th</sup> Cir. 1977);

*U.S. v. Gregory*, 369 F.2d 185 (D.C. Cir. 1966);  
*U.S. v. Walton*, 602 F.2d 1176, 1179-80 (4<sup>th</sup> Cir. 1979).

“Witnesses, particularly eye-witnesses to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity to interview them.” *Gregory v. U.S.*, 369 F.2d 185 (D.C. Cir. 1966).

### **EVEN IF THE GOVERNMENT’S CLIENT IS IN “PROTECTION” PROGRAM**

In *U.S. v. Walton*, 692 F.2d 1176 (4<sup>th</sup> Cir. 1979), the Fourth Circuit held that even where the government felt “...it necessary to place witnesses in protective custody,” it remains “the duty of the trial court to ensure that counsel for defense has access to the secluded witness under controlled arrangements,” noting:

“A witness is not the exclusive property of either the government or a defendant; a defendant is entitled to have access to any prospective witness, although in the end the witness may refuse to be interviewed.” *U.S. v. Walton*, 692 F.2d at 1177-78.

### **PRE-SENTENCE REPORTS OF CO-DEFENDANTS**

The Fifth Circuit in *U.S. v. Trevino*, 556 F.2d 2165 (5<sup>th</sup> Cir. 1977) has held these reports are not discoverable under Rule 16, Jencks Act, or *Brady*, unless actually in the possession of the United States Attorney. The Fourth Circuit, however, has held that if a report contains exculpatory material, that portion must be disclosed. However, if a report is only material to impeach the witness, reversal for failure to disclose is only required when there is a reasonable likelihood of the report affecting the trier of fact. *U.S. v. Figurski*, 545 F.2d 389 (4<sup>th</sup> Cir. 1976).

### **“IMPEACHMENT” EVIDENCE IS “EXCULPATORY” FOR BRADY PURPOSES**

Material discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963) includes evidence “favorable to the accused either direct or *impeaching*.”

*Williams v. Dutton*, 400 F.2d 797 (5<sup>th</sup> Cir. 1972);  
*Giles v. Maryland*, 386 U.S. 66, 76 (1967);  
*Giglio v. U.S.*, 405 U.S. 150 (1972);  
*U.S. v. Poole*, 379 F.2d 828 (7<sup>th</sup> Cir. 1967);  
*U.S. v. Miller*, 411 F.2d 825 (2d Cir. 1969).

In *Kyles, v. Whitley*, 115 S.Ct. 1555 (1995), the Supreme Court placed the onus on the prosecution to produce exculpatory evidence that was significant enough to result in a denial of defendant's right to a fair trial. The significance of such evidence is not evaluated in isolation but considered cumulatively with all the similarly exculpatory or impeachment information of which any member of the prosecution team is aware. *Kyles v. Whitley*, 115 S.Ct. 1555 (1995). The evidence found material was that: one out of four eye witnesses' description did not match Kyles; statements made by a witness of the state did not express concern that he might be a suspect; license plates from cars at the scene which might have revealed suspects the state did not pursue.

“The fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item. [T]he prosecution...must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of “reasonable probability” [that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kyles v. Whitley*, 115 S.Ct. 1555, 1558 (1995)] is reached. This in turn means that the individual prosecutor had a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is good faith or bad faith ... the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.” *Kyles v. Whitley*, 115 S.Ct. 1555, 1567, 1568 (1995).

Furthermore, the right to disclosure under *Brady* should include pre-trial discovery by the defendant.

*U.S. v. Gleason*, 265 F. Supp. 880, 884-85 (S.D.N.Y. 1967) (requiring *in-camera* inspection prior to trial);

*U.S. v. Morrison*, 43 F.R.D. 516, 520 (N.D. Ill. 1967);

*U.S. v. Ladd*, 48 F.R.D. 166 (D. Alaska, 1969);

*U.S. v. Ahmad*, 53 F.R.D. 186, 193-94 (M.D. Pa. 1971);

*U.S. v. Partin*, 320 F. Supp. 275, 284-85 (E.D. La. 1970);

*U.S. v. Leta*, 60 F.R.D. 127 (D.C. Pa. 1973);

*U.S. Ex rel Drw v. Myers*, 327 F.2d 174 (3d Cir. 1964);

ABA Standards, *Discovery and Procedure Before Trial*, (approved 1970), 2.1).

*See contra* *U.S. v. Leighton*, 265 F. Supp. 27, 35 (S.D.N.Y. 1967);

*Ashley v. Texas*, 399 F.2d 610, 615 (5<sup>th</sup> Cir. 1963);

*U.S. ex rel Butler v. Maroney*, 319 F.2d 622 (3d Cir. 1963);

*U.S. v. American Oil Co.*, 286 F. Supp. 742, 754 (D.N.S. 1963);

*U.S. v. More*, 439 F.2d 1107, 1108 (6<sup>th</sup> Cir. 1971).

Certainly pre-trial discovery of *Brady* materials should be allowed with respect to material which is “obviously exculpatory” or of “such a nature that delay in disclosure would prevent the defendant from effectively using it at trial.” *U.S. v. Cobb*, 271 F. Supp. 159, 164

(S.D.N.Y. 1967). After all, *Brady* itself involved a pre-trial request for a co-defendant's statement.

“[I]t is recognized that there are some categories of exculpatory evidence which would be of little use unless discovered before trial.” *U.S. v. Ladd*, 48 F.R.D. 266, 267 (D. Alaska).

Where exculpatory evidence is contained in a statement of a Government witness, discoverable under the *Jencks* Act only after the witness has testified, then the *Jencks* Act's "...statutory restrictions must accommodate the demands of due Process," and the relevant portions disclosed prior to trial. *U.S. v. Gleason*, 265 F. Supp 880, 887 (S.D.N.Y. 1967).

*Contra* *U.S. v. Eisenberg*, 469 F.2d 156 (8<sup>th</sup> Cir. 1972).

The obligation to disclose favorable evidence to the accused is that of the Government and failure to disclose such information is not excused merely because the prosecutor did not have actual knowledge of such favorable evidence.

*Barbee v. Warden*, 331 F.2d 842, 846 (4<sup>th</sup> Cir. 1964);  
*Rhinebart v. Rhay*, 440 F.2d 725 (9<sup>th</sup> Cir. 1971), cert. denied, 404 U.S. 825;  
*U.S. v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971);  
*U.S. v. Auten*, 632 F.2d 478 (5<sup>th</sup> Cir. 1980) (stating prosecutor cannot "compartmentalize" his information by not inquiring of the "prosecutorial team").

“The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies.” *U.S. v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971).

*Contra* *Luna v. Beto*, 395 F.2d 135 (5<sup>th</sup> Cir. 1968).

This is because the rationale which underlies the *Brady* rule is not only based upon the desire to proscribe prosecutorial misconduct but to insure that the defendant receives a fair trial. Consequently, the fact that a Government agency suppresses evidence from the prosecutor should not be controlling where such adversely affects the defendant's right to a fair trial.

However, it has been held the prosecutor need not go out and seek information favorable to an accused from non-governmental third parties. *U.S. v. Burns*, 668 F.2d 855 (5<sup>th</sup> Cir. 1982).

Certainly upon defense request a prosecutor has an obligation to exercise due diligence to determine if Government agencies have any information favorable to the defendant. MOORE'S FEDERAL PRACTICE – CRIMINAL RULES § 16.06[1]; *U.S. v. Robert*, 338 F.2d 640, 648 (2d Cir. 1968).

*Brady* motions should be as specific as possible with respect to the items sought (e.g. names, addresses, and statements of witnesses to the offense unable to identify the defendant);

however, the very nature of the *Brady* rule makes a particularized request in many instances a practical impossibility.

“If the defense does not know of the existence of the evidence, it may not be able to request its production. A murder trial—indeed any criminal proceeding—is not a sporting event.” *Giles v. Maryland*, 386 U.S. 66 (1967) (Fortas, J., concurring).

*Cf.* *U.S. v. Agurs*, 427 U.S. 97 (1976).

Materials and evidence which have been held to constitutionally require disclosure under *Brady v. Maryland* include:

extrajudicial statements of a co-defendant favorable to the accused (indicating that defendant was guilty of murder but not capital murder as he had not pulled the trigger), *Brady v. Maryland*, 373 U.S. (1963) (evidence impeaching Government witnesses [“...favorable to the accused either direct or impeaching”]); *Williams v. Dutton*, 400 F.2d 797 (5<sup>th</sup> Cir. 1968).

*See also*

*Giglio v. U.S.*, 405 U.S. 150 (1972);  
*Giles v. Maryland*, 386 U.S. 66, 76 (1976);  
*U.S. v. Poole*, 379 F.2d 828 (7<sup>th</sup> Cir. 1967);  
*U.S. v. Miller*, 411 F.2d 825 (2d Cir. 1969);

Prior sexual relations by a prosecutrix in a rape case,

*Giles v. Maryland*, 386 U.S. 66 (1967) (remanded for further proceedings; medical examination disclosing no evidence that kidnap victim had been sexually assaulted);

*See also*

*U.S. v. Poole*, 379 F.2d 648 (7<sup>th</sup> Cir. 1967) (eye witness’s oral statement that gave description which differed from defendant’s appearance [“defendant’s complexion was too dark for him to have been the man she saw”]);  
*Jackson v. Wainwright*, 390 F.2d 388 (5<sup>th</sup> Cir. 1968), *cert. denied*, 593 U.S. 180 (showing psychiatric reports indicating the defendant’s insanity);  
*Ashley v. Texas*, 319 F.2d 80 (5<sup>th</sup> Cir. 1963) (showing eyewitness report indicating self-defense);  
*Butler v. Maroney*, 319 F.2d 622 (3d Cir. 1963) (showing with paint, no blood);  
*Miller v. Pate*, 388 F.2d 737 (9<sup>th</sup> Cir. 1968) (fact that defendant appeared under influence of alcohol shortly after offense);  
*U.S. ex rel Thompson v. Dye*, 221 F.2d 1955 (3d Cir. 1955) (criminal record of prosecution witness);  
*In re Ferguson*, 489 F.2d 1234 (9<sup>th</sup> Cir. 1971) (unreliability of Government witness);

*Mesarosh v. U.S.*, 352 U.S. 1 (1956) (fact that Government witness had faulty recollection of facts later testified to at trial);  
*Levin v. Clark*, 408 F.2d 1209 (D.C. Cir. 1967) (instructions to Government witness not to speak with defense counsel, or to do so only in presence of Government counsel);  
*Gregory v. U.S.*, 369 F.2d 185, 187-89 (D.C. Cir. 1966);  
*Coppolinio v. Helporn*, 266 F. Supp. 930 (S.D.N.Y. 1967) (showing evidence of a witness's unstable mental condition);  
*Giles v. Maryland*, 386 U.S. 66, 75, n. 6 (1967) (Government witness was an informer);  
*U.S. v. Olt*, 489 F.2d 872 (7<sup>th</sup> Cir. 1973) (information that prosecution's key witness was the paramour of the defendant's murdered wife);  
*Alcorta v. Texas*, 355 U.S. 28 (1957) (information indicating Government witness' untruthfulness [e.g. witness' false testimony]);  
*Napue v. Illinois*, 360 U.S. 264 (1959) (scientific information regarding ballistics or fingerprint examinations indicating defendant did not fire weapon in questions);  
*Barbee v. Warden*, 331 F.2d 842 (4<sup>th</sup> Cir. 1964) (proving name of witness who had stated that the defendant was not at the scene of the crime);  
*U.S. ex rel Meers v. Wilkins*, 326 F.2d 135 (2d Cir. 1964) (identity of any witnesses who can give favorable testimony for accused);  
*U.S. v. Hinkle*, 307 F. Supp. 117 (D.D.C. 1969);  
*U.S. v. Cody*, 722 F.2d 1052, 1062 (2d Cir. 1983) (FBI Agents' threats inducing witness to continue recording conversations with RICO defendant);  
*Austin v. McKaskle*, 724 F.2d 1153, 1156 (5<sup>th</sup> Cir. 1984) (witness' perjured testimony of aggravating factors at sentencing hearing leading to life sentence).

A defendant's objection to the Government's use of undisclosed *Brady* testimony is not waived by the extensive cross-examination of the witness if the trial court, in overruling the objection, expressly sets direction of trial proof on the matter. See *U.S. v. Hogan*, 763 F.2d 697, 701 (5<sup>th</sup> Cir. 1985).

## **BRADY LIVES**

### **REGARDLESS WHETHER PROSECUTOR ACTUALLY AWARE OF EVIDENCE**

“On habeas review, we follow the established rule that the state's obligation under *Brady v. Maryland* [citation omitted], to disclose evidence favorable to the defense, turns on the cumulative effect of all such evidence suppressed by the government, and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence

to the prosecutor's attention" *Kyles v. Whitley*, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S.Ct. 1555 (1995).

### **WHETHER EVIDENCE IS EXCULPATORY OR ONLY "IMPEACHING"**

The Court made clear again that it matters not whether the withheld evidence is truly exculpatory or merely "impeaches" a prosecution witness.

"In the third prominent case on the way to current *Brady* law, *United States v. Bagley*, 473 U.S. 667 (1965), the Court *disavowed any difference between exculpatory and impeachment evidence for Brady purposes*, and it abandoned the distinction between the ...'specific request' and 'general-or-no-request' situations...*Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government." *Kyles v. Whitley*, 514 U.S. 419, 131 L.Ed.2d 490, 115 S.Ct.1555 (1995).

### **EVEN IF NEVER REQUESTED BY THE DEFENSE**

The Supreme Court "found a duty on the part of the Government even...where the Government failed to volunteer exculpatory evidence *never requested, or requested only in a general way.*"

### **NEED NOT UNDERCUT EVERY ITEM OF INCRIMINATING EVIDENCE**

The withheld exculpatory or impeaching matters need not undercut every item of incriminating evidence to require reversal under *Brady*.

"In assessing the significance of the evidence withheld, one must of course bear in mind that not every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed..." *Kyles v. Whitley* 514 U.S. 419, 131 L.Ed.2d 490, 115 S.Ct. 1555 (1995).

### **AS IF JUSTICE SOUTER LISTENED TO O.J.'s CLOSING ARGUMENT**

"[T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive

a recap of the suppressed evidence and its significance from the prosecution. The jury would have been entitled to find

- (a) that the investigation was limited by the police's uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent...;
- (b) that the lead police detective who testified was either less than wholly candid or less than fully informed;
- (c) that the informant's behavior raised suspicions that he had planted both the murder weapon and the victim's purse in the places they were found;
- (d) that one of the four eyewitnesses crucial to the State's case had given a description that did not match the defendant and better described the informant;
- (e) that another eyewitness had been coached, since he had first stated that he had not seen the killer outside the getaway car, or the killing itself, whereas at trial he claimed to have seen the shooting, described the murder weapon exactly, and omitted portions of his initial description that would have been troublesome for the case;
- (f) that there was no consistency to eyewitness descriptions of the killer's height, build, age, facial hair, or hair length.

Since all of these possible findings were precluded by the prosecutor's failure to disclose the evidence that would have supported them, 'fairness' cannot be stretched to the point of calling this a fair trial. Perhaps, confidence that the verdict would have been the same could survive the evidence impeaching even two eyewitnesses if the discoveries of gun and purse were above suspicion. Perhaps those suspicious circumstances would not defeat confidence in the verdict if the eyewitnesses had generally agreed on a description and were free of impeachment. But confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were

unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid.” *Kyles v. Whitley*, 514 U.S. 419, 131 L.Ed.2d 490, 115 S.Ct. 1555 (1995).

### **STUTTER-STEP BACKWARDS?**

While reaffirming their decision in *Kyles*, and not retreating from prior holdings that evidence need not necessarily be admissible to constitute *Brady* material, on October 10, 1995 the Supreme Court, in another five to four per curiam opinion, summarily reversed a Ninth Circuit decision that found the failure to disclose non-admissible polygraph examination indicating two key prosecution witnesses had been less than truthful, constituted a *Brady* violation. *Wood v. Bartholomew*, 516 U.S. 1, 133 L.Ed.2d 1, 116 S.Ct. 7(1995).

“In short, it is not ‘reasonably likely’ that disclosure of the polygraph results—inadmissible under state law—would have resulted in a different outcome at trial...

Whenever a federal court grants habeas relief to a state prisoner the issuance of the writ exact great cost to the State’s legitimate interest in finality. And where, as here, retrial would occur 13 years later, those costs and burdens are compounded many times. Those costs may be justified where serious doubts about the reliability of a trial infected with constitutional error exist. But where, as in this case, a federal appellate court, second –guessing a convict’s own trial counsel, grants habeas relief on the basis of little more than speculation with slight support, the proper delicate balance between the federal courts and the States is upset to a degree that requires correction.”

### ***FED. R. EVID. RULE 614, INTERROGATION BY THE COURT:***

*U.S. v. Robinson*, 635 F.2d 981 (2d Cir. 1980) (noting trial court’s conduct of trial left much to be desired).

**WHY WOULD THE WITNESS BE TELLING THIS STORY IF IT WASN’T THE TRUTH- SOME WITNESSES ARE PAID WITH MONEY, SOME WITH A COMMODITY MORE VALUABLE, THEIR LIFE OR THEIR LIBERTY**

### **BIAS, MOTIVE OR PREJUDICE**

A witness may be impeached by showing that his testimony may be motivated by reasons other than to tell the truth;

**A. Prior arrests or pending indictment against prosecution witness.**

*U.S. v. Musgrave*, 483 F.2d 327 (5<sup>th</sup> Cir. 1973);  
*U.S. v. Crouchier*, 532 F.2d 1042 (5<sup>th</sup> Cir. 1976);  
*U.S. v. Garrett*, 542 F.2d 23 (6<sup>th</sup> Cir. 1976);  
*U.S. v. Dehem*, 498 F.2d 1327 (7<sup>th</sup> Cir. 1974) (no indictment);  
*U.S. v. Garcia*, 531 F.2d 1303 (5<sup>th</sup> Cir. 1976);  
*Hart v. U.S.*, 585 F.2d 1280 (5<sup>th</sup> Cir. 1978) (“although the mere existence of an arrest is not admissible to impeach the credibility of a witness, this court has recognized that arrests may be admissible to show that an informer might falsely testify favorably to the Government in order to put his own cases in the best light possible”).

**B. Pending probation against prosecution witness.**

*Davis v. Alaska*, 415 U.S. 308 (1974).

Sixth Amendment right of confrontation and cross-examination violated by prohibiting cross-examination of prospective witness regarding pending juvenile probation.

**C. Plea agreements made with prosecution witnesses:**

**Any plea agreement or offer made by the prosecution to a witness is admissible, as the jury is entitled to consider same with respect to that witness’ motive for testifying for the prosecution.**

Prosecutor is required to take affirmative action to correct misleading testimony regarding any deal or offer of some in exchange for a witness’ testimony.

*Giglio v. U.S.*, 405 U.S. 150 (1972);  
*Napue v. Illinois*, 360 U.S. 264 (1959);  
*Blankenship v. Estelle*, 545 F.2d 510, 513 (5<sup>th</sup> Cir. 1977) (questions asked by prosecution regarding “pending indictments” “...undoubtedly created the clear impression that the two witnesses themselves faced trial possibility that they were cooperating with the prosecution in exchange for lenience”).

No “agreement” or “deal” for the witness’ testimony need be shown.

*U.S. v. Crumley*, 565 F.2d 945 (5<sup>th</sup> Cir. 1978);  
*Greene v. Wainwright*, 637 F.2d 272, 276 (5<sup>th</sup> Cir. 1981);  
*U.S. v. Mayer*, 556 F.2d 245, 249 (5<sup>th</sup> Cir. 1977);  
*Burr v. Sullivan*, 618 F.2d 583, 587 (9<sup>th</sup> Cir. 1980).

“Whether or not a deal existed is not crucial. What is important is whether the witness may be shading his testimony in an effort to please the prosecution. A desire to cooperate may be formed beneath the conscious level, in a manner not apparent even to the witness, but such a subtle desire to assist the state nevertheless may cloud perception.” *Greene v. Wainwright*, 637 F.2d at 276.

The Texas Court of Criminal Appeals likewise held that:

“*Alford* and *Harris* control our resolution of the instant case. See also *Coody v. State*, 812 S.W.2d 631 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1991). Appellant’s cross-examination was clearly an attempt to demonstrate that Russell held a possible motive, bias or interest in testifying for the State. Appellant’s inquiry into Russell’s incarceration, his pending charge and possible punishment as a habitual criminal, was appropriate to demonstrate Russell’s potential motive, bias or interest to testify for the State. A defendant is permitted to elicit any fact from a witness intended to demonstrate that witness’ vulnerable relationship with the State. *Alford*, 282 U.S. at 692, 51 S.Ct. at 219; *Harris*, 642 S.W.2d at 480.

The State contends appellant’s cross-examination was impermissible because no agreement existed between the State and Russell which might affect Russell’s motive to testify for the State. However, the existence of such an agreement is not determinative. *Carmona*, 698 S.W.2d at 103. What is determinative is whether appellant was allowed to demonstrate any possible bias or interest that Russell may hold to testify on the State’s behalf. In other words, it is possible, even absent an agreement, that Russell believed his testimony in this case would be of later benefit. As we held in *Spain v. State*,...an effective cross-examination encompasses more than just the opportunity to elicit testimony to establish the existence of certain facts. The cross-examiner should be allowed to expose the limits of the witness’ knowledge of relevant facts, place the witness in his proper setting, and test the credibility of the relevant facts. The failure to affirmatively establish the fact sought does not prevent the cross-examination from having probative value in regard to the witness’ credibility. 585 S.W.2d 705, 710 (Tex. Cr. App. 1979) (citing *Alford*, 282 U.S. at 692, 51 S.Ct. at 219); *Saunders v. State*, 572 S.W.2d 944, 948-49 (Tex. Cr. App. 1978).

Finally, the Court of Appeals’ holding that appellant was unable to impeach Russell under Rule 608(b) is erroneous for at least two reasons. First, appellant’s cross-examination concerning Russell’s incarceration was not an inquiry into a specific instance of

conduct. Instead, appellant's cross-examination focused on Russell's possible motive, bias or interest in testifying for State...

In the instant case, the Court of Appeals improperly relied upon Rule 608(b) because appellant did not try to cross-examine Russell about a specific instance of conduct. In other words, appellant did not seek to cross-examine Russell about the underlying facts which gave rise to the aggravated robbery charge. Rather, appellant attempted to inform the jury that Russell had a vulnerable relationship with the State at the time of his testimony. *Alford*, 282 U.S. at 692, 51 S.Ct. at 219; and, *Harris*, 642 S.W.2d at 480. Consequently, the Court of Appeals erred in relying on Rule 608(b) to uphold the trial judge's limitation on appellant's cross-examination of Russell..." *Carroll v. State of Texas*, No. 1368-94, 1996 WL 22736 (Tex.Cr.App, January 24, 1996).

This would include "deals" to benefit third parties. *U.S. v. Williams*, 592 F.2d 1277 (5<sup>th</sup> Cir. 1979). Or "deals" for special treatment. *Chavis v. North Carolina*, 637 F.2d 213 (4<sup>th</sup> Cir. 1980).

**D. Witness paid for their testimony.**

Presentation of testimony of a paid informant raised a question of credibility for the jury to determine.

*U.S. v. Santisteban*, 833 F.2d 513 (5<sup>th</sup> Cir. 1987);  
*U.S. v. Cervantes*, 826 F.2d 310 (5<sup>th</sup> Cir. 1987).

However, the same is not a per se violation of due process.

*U.S. v. Cervantes-Pacheco*, 826 F.2d 310 (5<sup>th</sup> Cir. 1987);  
*U.S. v. Santisteban*, 833 F.2d 513 (5<sup>th</sup> Cir. 1987);  
*U.S. v. Terrill*, 835 F.2d 716 (8<sup>th</sup> Cir. 1987).

*See also* *U.S. v. Rizk*, 833 F.2d 523 (5<sup>th</sup> Cir. 1987) (even where payments to witness not disclosed in pretrial discovery, testimony is admissible).

However, only when informant acts on general instructions and an individual is not targeted without probable cause, for investigation by the same are due process strictures met.

*See* *U.S. v. Terrill*, 835 F.2d 716 (8<sup>th</sup> Cir. 1987).

**E. Prior false testimony by prosecution witness against another defendant in a parallel prosecution.**

Johnson v. Brewer, 521 F.2d 556 (8<sup>th</sup> Cir. 1975);  
U.S. v. Hitchman, 609 F.2d 1098 (5<sup>th</sup> Cir. 1979).

**F. Extraneous offenses (uncharged misconduct):**

However, extraneous offenses (uncharged misconduct) may be admitted against a defendant on trial in order to show system, scheme, design, motive, intent, absence of mistake, identity, to rebut a defense theory, or as part of *res gestae*, where same is put in issue.

FED. R. EVID. Rule 4004(b) provides:

Other crimes, wrongs, or acts are not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of:

MOTIVE,  
OPPORTUNITY,  
INTENT,  
PREPARATION,  
PLAN,  
KNOWLEDGE,  
IDENTITY, OR  
ABSENCE OF MISTAKE OR ACCIDENT.

Even if extraneous offense fits within exception it may be excluded where trial court determines unfair prejudice from admission outweighs probative value. *U.S. v. Kasowis*, 503 F.2d Cir. 1987); *U.S. v. Santistaban*, 833 F.2d 513 (5<sup>th</sup> Cir. 1987).

**“OTHER CRIMES” EVIDENCE [RULE 404(b)]**

*Huddleston v. U.S.*, 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988).

A trial court need not decide for itself whether an accused committed an extraneous offense under Rule 404(b) before admitting such “other crimes” or misconduct evidence, instead that “such evidence should be admitted if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.”

The court held that unlike the required preliminary showing under Rule 104(a) for the admission of co-conspirator’s statements, see *Bourjaily v. U.S.*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987); no such Rule 104(a) preliminary determination need be made at all prior to admitting “other crimes” evidence under Rule 404(b).

“We conclude that a preliminary finding by the court that the Government has proved the act by a preponderance of the evidence is not called for under Rule 104(a). This is not to say, however, that the Government may parade past the jury a litany of potentially prejudicial similar acts that have been established or connected to the defendant only by unsubstantiated innuendo. Evidence is admissible under Rule 404(b) only if it is relevant.”

Procedurally, the Supreme Court placed its stamp of perimure upon an after-the-fact determination under Rule 104(b).

“In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ...by a preponderance of evidence...The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial, and we see nothing in the Rules of Evidence that would change this practice. Often the trial court may decide to allow the proponent to introduce evidence concerning a similar act, and at a later point in the trial assess whether sufficient evidence has been offered to permit the jury to make the requisite finding. If the proponent has failed to meet this minimal standard of proof, the trial court must instruct the jury to disregard the evidence.

As if this were not a sufficient exercise in sophistry, the Court went on to note [quoting from *Bourjaily*]:

“We emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all evidence presented to the jury. ‘[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.’”

To console the citizen’s understandable concern regarding such cavalier handling of such prejudicial evidence, the Court offered the following:

“We share petitioner’s concern that unduly prejudicial evidence might be introduced under Rule 404(b)... We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402- as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice... and fourth, from Federal Rule of Evidence 105,

which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.”

Note the operation of these protections from the admission of unfairly prejudicial evidence. *U.S. v. Simon*, 839 F.2d 1461 (11<sup>th</sup> Cir. 1988).

“[The defendants]... maintain that the district court committed reversible error in admitting testimony that each [defendant] worked at [an oil and gas company]. This testimony contains evidence suggesting that some of the [defendants] were instrumental in accomplishing a fraud on the customers of the former companies. The government however, did not argue that [those defendants] had the requisite intent to characterize their actions[at the oil company] as criminal. The government claims it sought to introduce evidence of the [defendants’] ‘prior acts,’ i.e. their mere participation, however innocent [sic], in the scheme at U.S. Oil.”

“Before a district court can admit evidence of [a defendants’] prior acts, the prosecution must convince the court that 1) there was a proper purpose for introducing the evidence, 2) the [defendants] actually did the prior acts and [sic], 3) the probative value of introducing the evidence outweighs any prejudicial effect the evidence might have. The propriety of the lower court in admitting this evidence turns on the purpose for which the ‘prior acts’ were introduced. The appellants contend that the government introduced their participation in the U.S. Oil scheme simply to show that they ‘acted in conformity therewith’ at Alaska Oil. Rule 404(b) of the Federal Rules of Evidence makes clear that a court cannot admit evidence of a prior act to show that the defendant acted similarly. The government, on the other hand, contends that the prior act evidence introduced at trial merely showed that the appellants knew of the government investigation of U.S. Oil and of the indictment of several employees at the company. Thus, the government argues, the Court properly admitted evidence of the [defendants] knew of the government’s investigation and subsequent indictment of employees for fraud at U.S. Oil is certainly relevant since the evidence helps to determine whether appellants had the requisite intent to defraud in the instant case.” *U.S. v. Simon*, 839 F.2d 1461 (11<sup>th</sup> Cir. 1988) (emphasis added) (citations omitted).

Therein lies the danger created by Huddleston regardless of remaining safeguards. A more practical and honest approach is suggested by the Court of Appeals for the District of Columbia. *Thompson v. U.S.*, 546 A.2d 414, (D.C.App.1988). The court found that an examination of four issues regarding the admissibility of ‘prior acts’ to show intent, as opposed to propensity to act in conformity therewith, “is helpful in resolving whether other crimes should be admitted.”

“These issues are:

- (1) whether, and to what degree, intent as an issue can be distinguished from predisposition to commit the crime;
- (2) whether intent is a genuine, material and important issue, rather than a merely formal one;
- (3) whether the trial judge made his decision whether or not to admit that evidence at an appropriate time, when information as to all pertinent factors was available, and
- (4) whether the trial judge's instructions to the jury could and did resolve any issue of prejudice." FED. R. EVID. Rule 40.. U.S. v. Kasowis, 503 F.2d 1096 (5<sup>th</sup> Cir. 1974).

Examples:

**(1) System, Scheme, Common Plan, Design.**

*U.S. v. McClure*, 546 F.2d 760 (5<sup>th</sup> Cir. 1977).

Defendant entitled to show Government witness had coerced others into selling drugs to show scheme and modus operandi of prosecution's witness.

*U.S. v. Thompson*, 503 F.2d 1096 (5<sup>th</sup> Cir. 1974).

*Cf* *U.S. v. Goodwin*, 492 F.2d 1142, 1153 (5<sup>th</sup> Cir. 1974) (stating, "When the prosecution seeks to prove design or plan by the doing of similar acts, more is required than mere similarity that may suffice for showing intent").

*U.S. v. Hall*, 653 F.2d 1002 (5<sup>th</sup> Cir. 1981).

**(2) Intent.**

*U.S. v. Polite*, 489 F.2d 679 (5<sup>th</sup> Cir. 1974).

Where evidence of "other crimes" ["extrinsic offense evidence"] is offered as "to the issue of intent" the strict requirements of *U.S. v. Broadway*, 477 F.2d 991, 995 (5<sup>th</sup> Cir. 1973) (requiring that the "elements" of the extraneous offense "include the essential elements of the offense charged") have been abandoned and replaced by a two-step test of admissibility.

In *U.S. v. Beechum*, 582 F.2d 898 (5<sup>th</sup> Cir. 1978), the en banc Fifth Circuit overruled *Broadway* holding that where "other crimes" evidence is offered on the issue of intent that there

is no longer any requirement that the “physical elements” of the offense be “identical,” but under Rule 404(b), there is now a two-step analysis, requiring that:

(1) RELEVANCY:

The evidence of the “extrinsic offense” is “relevant” to an issue other than the defendant’s character, and if offered as to the issue of “intent”, then all that need to be established is that the “extrinsic offense” requires the same “intent” as the crime charged. The reasoning being that such evidence makes it less likely the defendant engaged in the charged conduct with “lawful intent”. This would be in issue, however, only where the defense raises same, such as where the defendant alleges he committed such acts only in rebuttal, in order to insure such issue is in fact raised. *U.S. v. Halper*, 585 F.2d 1280 (2d Cir. 1978).

(2) BALANCING TEST:

Applying the balancing test of FED. R. EVID Rule 403, the probative value is not substantially outweighed by the danger of prejudice. The Beechum Court expressly recognizes that the “probative value” would be slight where intent could be established by:

- A. other evidence,
- B. stipulations,
- C. inferences, or is
- D. not contested by the defendant.

No prejudice that the defendant committed the act need be found before admitting 404(b) “other crimes.” *Huddleston v. U.S.*, 103 S.Ct. 1496 (1988).

Other circuits on the other hand, appear to retain the more stringent “pre-rule” test of admissibility requiring:

- A. That the conduct was “similar” and close in time,
- B. That this be shown by clear and convincing evidence, and
- C. That the probative value outweighs the prejudice impact [Rule 403 Balancing Test].

*U.S. v. Herrell*, 588 F.2d 711 (9<sup>th</sup> Cir. 1978).

(3) Motive.

*Cantrell v. U.S.*, 323 F.2d 613 (D.C. Cir. 1963).

(4) **Identity.**

*See* *U.S. v. Silvan*, 580 F.2d 144 (5<sup>th</sup> Cir. 1978) (reversible error to admit drug negotiations after sale in which defendant was charged, since defendant's sole defense was mistaken identity, intent was not a material issue, nor was the other crime so distinctive that it would be relevant to identity as the handiwork of defendant).

*Texas Law* In Texas state courts, both the initial decision as to admissibility of extraneous offense evidence and jury determination as to weight and credibility (via a charge) are conducted under the "beyond a reasonable doubt" standard.

*George v. State*, 890 S.W.2d 73, 76 (Tex. Cr. App. 1994) (jury determination);  
*Harrell v. State*, 884 S.W.2d 154, 160 (Tex. Cr. App. 1994) (admissibility).

The procedure for objecting to admission and for preserving error regarding extraneous offense evidence is outlined in *Montgomery v. State*, 810 S.W.2d 372 (Tex. Cr. App. 1991) (on rehearing). *Montgomery*, in particular, should be committed to memory.

**WOULD YOU BUY A USED CAR FROM THIS PERSON? PRIOR CRIMINAL CONVICTIONS**

Final convictions for felonies or misdemeanors involving moral turpitude, which are not too remote in time, may be admitted to impeach a testifying witness (including the criminal defendant).

FED. R. EVID Rule 608 provides that:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record" during cross-examination but only if the crime:

- (1) Was punishable by death or imprisonment in excess of one year ... and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or
- (2) Involved dishonesty or false statement, regardless of the punishment."

**A. Remoteness.**

FED. R. EVID Rule 609(b) provides that a conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction, or release from confinement whichever is later. However, the proponent of said evidence, upon notice and a fair opportunity to contest its admission, may proffer and the court may admit the same where it determines that its probative value outweighs its prejudicial effect.

## **B. Finality of Conviction.**

### **DISTINCTION BETWEEN STATE AND FEDERAL RULE**

(1) **State:** In Texas for example only final convictions, not on appeal, are admissible for impeachment purposes.

*Miller v. State*, 472 S.W.2d 261 (Tex.Cr.App. 1971).

*Cf* *Poore v. State*, 524 S.W.2d 294 (Tex.Cr.App. 1975) (burden on party offering the witness to show conviction not final.)

(2) **Federal:** FED. R. EVID Rule 609(e) provides that the “pendency of an appeal . . . does not render evidence of a conviction inadmissible” although “the pendency of [that] appeal is admissible.”

*U.S. v. Rose*, 526 F.2d 745 (8<sup>th</sup> Cir. 1975).

## **C. Details of Offense are Inadmissible.**

*Tucker v. U.S.*, 409 F.2d 1291 (5<sup>th</sup> Cir. 1969).  
*U.S. v. Bray*, 445 F.2d 178, 182 (5<sup>th</sup> Cir. 1971).

## **D. Pardon, Annulment or Certificate of Rehabilitation.**

### **DISTINCTION BETWEEN STATE AND FEDERAL**

(1) **State:** In Texas for example, if the sentence was suspended and then set aside or probation was granted and the term was successfully completed then the conviction is not admissible for impeachment purposes. Tex.Crim. R. Ev. 609.

However, a pardon does not render a prior conviction inadmissible for impeachment purposes.

*Sipanek v. State*, 272 S.W.2d 508 (Tex.Cr.App. 1925);  
*Jones v. State*, 147 S.W.2d 508 (Tex.Cr.App. 1941).

Unless such pardon is premised upon proof of innocence.

*Logan v. State*, 448 S.W.2d 462 (Tex.Cr.App. 1970).

(2) **Federal:** FED. R. EVID Rule 609(c) provides that a prior conviction is not admissible for impeachment purposes where:

“(1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure ... and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or

(2) The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

*U.S. v. Wiggins*, 566 F.2d 944 (5<sup>th</sup> Cir. 1978) (defendant apparently has obligation of showing that his release [e.g. from “half-way house” amounted to a finding of rehabilitation”]).

***COUNSEL MAY DESIRE TO PIN DOWN THE “COOPERATING WITNESS” ON PARTICULAR ISSUES AND THEN OFFER CONTRADICTORY EXTRINSIC EVIDENCE BY WAY OF OTHER WITNESSES OR EXHIBITS TO DEMONSTRATE BIAS***

*U.S. v. Harvey*, 547 F.2d 720 (2d Cir. 1976);  
*Wynn v. U.S.*, 397 F.2d 621 (D.C. Cir. 1967).

***THIS MAY INCLUDE SUCH AREAS AS WHETHER WITNESS’ WIFE WAS HAVING AN AFFAIR WITH DEFENDANT OR CO-DEFENDANT***

*U.S. v. Jones*, 320 F.Supp. 842 (E.D. Pa. 1981).

**OR DESIRE TO PROTECT OTHERS**

*U.S. v. Brady*, 561 F.2d 1319 (8<sup>th</sup> Cir. 1977) (name of prior drug source was relevant to question of whether witness may have implicated defendant in order to protect her true source).

### **“RULE OF COMPLETENESS”**

“FED. R. EVID RULE 106:

Remainders of or Related Writings or Recorded Statements  
 (“Rule of Completeness”).

When written or recorded statement or a portion thereof is introduced, the adverse party may “require at that item” any other part or any other writing or statement which ought in fairness be considered contemporaneously with it.

*In re Air Crash Disaster*, 635 F.2d 67 (2d Cir. 1980) (Rule requires playing of the entire tape and not just one channel);

*U.S. v. Bacon*, 602 F.2d 1248 (7<sup>th</sup> Cir. 1979) (remainder of witnesses statements supporting witnesses’ testimony on direct were admissible after statement used for impeachment on cross-examination by defense);

*U.S. v. Weisman*, 624 F.2d 1118 (2d Cir. 1980) (entitled to offer other portion of tapes only where same explain or rebut the matters contained in the offered portions or are “necessary to clarify or make not misleading that which in introduced”);

*U.S. v. Rubin*, 609 F.2d 51 (1980), cert. granted, 100 S.Ct. 1645 (1980).

*Purpose* To permit contemporaneous introduction of recorded statements that place in context other writings, which, viewed alone, may be misleading. *U.S. v. Jamar*, 561 F.2d 1103 (4<sup>th</sup> Cir. 1977).

The accused may be entitled to offer even otherwise inadmissible statements contained in related tape recordings under FED. R. EVID Rule 106; *U.S. v. Sutton*, 801 F.2d 134 (D.C.Cir. 1986) (error not to admit remainder of tape recorded conversations where in Defendant made self-serving statements which were otherwise inadmissible hearsay under R. 106, same found, although “harmless error”). See also *U.S. v. LeFons*, 798 F.2d 977 (7<sup>th</sup> Cir. 1986) (addressing dicta relating to recorded statement of government informant offered by defendant to supplement his recorded conversation offered in its entirety by the Government).