2017
Criminal Law Academy

Saturday, April 1, 2017
9 a.m. – 4:30 p.m.

Mohawk Valley Community College
1101 Sherman Drive
IT Building, Room 225

Program Coordinator
Frank J. Nebush, Jr., Esq.
Oneida County Public Defender
Criminal Division

Sponsored by:
Oneida County Bar Association

In Cooperation With:
Oneida County Supplemental Assigned Counsel Program
Oneida County Public Defender, Criminal Division
New York State Defenders Association, Inc.
New York State Office of Indigent Legal Services

PLEASE TO SURE TO TURN OFF YOUR CELLPHONE

AND

YOU MUST SIGN IN FOR THE MORNING SESSION AND AGAIN IN THE AFTERNOON

The Criminal Track Series

The Criminal Track Series is presented each Spring and Fall by the Oneida County Bar Association in cooperation with the Criminal Division of the Oneida County Public Defender's Office, the Oneida County Supplemental Assigned Counsel Program, the New York State Office of Indigent Legal Services and the New York State Defenders Association, Inc. as a regional effort to provide relevant, reduced cost training programs for public defenders and assigned counsel. The two major parts of the series are the annual ***Criminal Law Academy*** and ***Assigned Counsel School, Criminal Law***. The ***Criminal Law Academy*** was designed to provide more advanced criminal defense courses to practitioners of criminal defense law to newly-admitted attorneys, those attorneys who occasionally practice criminal law and more experienced criminal defense attorneys. ***The Oneida County Assigned Counsel School, Criminal Law*** is designed to provide more fundamental programs in the practice of criminal defense. The faculty for both programs is comprised of some of the most preeminent and experienced criminal law practitioners from across New York State. The courses provide continuing legal education credits in skills, professional practice and ethics.

UPCOMING CRIMINAL TRACK PROGRAMS

Saturday, April 22nd: "***Ancillary Services for Criminal Defense Lawyers***" chaired by First Assistant Public Defender Tina L. Hartwell the panel is comprised of experts who provide services to registered nurses, veterans, the mentally ill, alcohol and drug addicted clients. The panel will explore how to access these services and how to cooperate with the services providers to obtain the best possible disposition for our clients.

Saturday, May 6th: "***Digital Forensics for Attorneys***" featuring Lars Daniels, Principal Consultant for Guardian Digital Forensics, Raleigh, North Carolina. Lars is the co-author of *Digital Forensics for Legal Professionals: Understanding Digital Evidence from the Warrant to the Courtroom*. Lars has attended over 250 hours of forensic training and has worked on over 500 cases involving murder, child pornography, terrorism, rape, kidnapping, intellectual property, fraud, wrongful death, employee wrongdoing and large scale e-discovery collections among other case types.

These supplemental programs are available free to Oneida County Bar Association members who have purchased a Sempass. A $25 registration fee is charged to non-members who are public defenders, assigned counsel or government attorneys. This fee is available only for the Criminal Track Series. The Oneida County Public Defender, Criminal Division makes several of the materials from our Criminal Track Series and the Academy available at our website http://www.ocgov.net/pdcriminal

Oneida County Assigned Counsel School, Criminal Defense Friday, April 21st

This year the Assigned Counsel School is pleased to have Marvin Schechter speak on *Brady Material*, Prof. Gary Kelder from Syracuse Law who will lecture on *The Right of Confrontation and Hearsay – An Overview, NYSDA* Veteran's Defense Project Director Gary Horton will give a presentation entitled *Mitigation in Defending Veterans*, and Syracuse Law Prof. Todd Berger's presentation will be *Professional Responsibility of the Criminal Defense Lawyer Redux: The New Three Hardest Questions.*

We thank the New York State Office of Indigent Legal Services for its dedication and funding of these valuable training opportunities and the New York State Defenders Association, Inc. for there their continued support of our training programs and as always our special thanks to Mohawk Valley Community College for offering their first class facilities for our use. Welcome to today's program. I hope you find the presentation informative and valuable to your practice. As always, we welcome your comments and suggestions for future programs.

Frank J. Nebush, Jr., Esq., *Oneida County Public Defender, Criminal Division*

THE SPONSOR & OUR PARTNERS

The Oneida County Public Defender, Criminal Division is fortunate to work with the Oneida County Bar Association, the sponsors of the annual Criminal Law Academy and our Criminal Track Programs. We are grateful to the CLE Committee for granting us the latitude to develop meaningful and significant programs for the criminal defense bar. We are especially appreciative for the help given to us by the Bar Association's Executive Director, Diane Davis. Without her able assistance, the Academy and the Criminal Track Programs would not be possible.

The Oneida County Bar Association offers a wide range of CLE programs on other topics throughout the year. A full calendar of programs is available at their website *www.oneidacountybar.org*. Oneida County Bar members are eligible to purchase a Sempass which entitles the holder to attend any or all of the programs offered by the Association.

The Oneida County Public Defender, Criminal Division makes several of the materials from our Criminal Track Programs and the Criminal Law Academy available at our website: *http://www.ocgov.net/oneida/pdcriminal/training*.

The Criminal Law Academy especially takes a lot of time and effort to develop and produce. We would like to acknowledge the assistance of the New York State Defenders Association, Inc. and Managing Attorney Charles O'Brien whose advice has proved invaluable in developing our programs. NYSDA is also a valuable resource for criminal law practitioners through their website http://www.nysda.org/. Their two-day training conference in Saratoga in July is unsurpassed in the depth and experience of the faculty and the relevant topics presented every year. We encourage you to visit their website and become a member.

We would be remiss if we failed to mention the New York State Association of Criminal Defense Lawyers (NYSACDL). Many of their members have been featured faculty at both the Academy and the Criminal Track Programs and they sponsor many CLE training programs across the state each year. Their listserv provides critical assistance to criminal defense practitioners throughout the year. You can check out their website at http://www.nysacdl.org/.

Last but not least, we gratefully recognize the support and encouragement of the staff of the New York State Office of Indigent Services. Director Bill Leahy and his staff, especially Matt Alpern, Director of Quality Enhancement for Criminal Defense Trials; Joanne Macri, Director of Regional Initiatives and Patricia Warth, Chief Hurrell-Harring Implementation Attorney.

The members of the Criminal Track Program Committee and the faculty of the 2017 Criminal Law Academy welcome you and hope you find the Academy informative and valuable to your practice. As always, we welcome your comments and suggestions for future programs.

Oneida County Bar Association Presents
2017 Criminal Law Academy
Saturday, April 1, 2017
Mohawk Valley Community College, IT 225
9 a.m. – 4:30 p.m.

8:30 a.m. – 9:00 a.m. **REGISTRATION**

9:00 a.m. – 10:15 a.m. **"Present Arms!" A Primer on the *Gun Laws of New York***

Michael A. Arcuri, Esq., ***Ward Arcuri PLLC (former Congressman and Oneida County District Attorney)***

Daniel Patrick Sullivan, ***Assistant Pistol Licensing Officer, Oneida County Office of Pistol Licensing***

This presentation will cover firearms and their regulation, the definitions of the various firearms regulated by statute, persons prohibited from owning and possessing firearms, gun trusts, regulations governing firearm purchases, gun show purchases, private party transfers, the appeal process from the denial or suspension of permits, concealed carry privileges and revocation or suspension of permits.

10:15 a.m. – 10:30 a.m. **BREAK**

10:30 a.m. – 12:15 p.m. **Making the Most of Your Pre-Trial Hearings: Burdens of Proof and Practical Tips**

Jill Paperno, Esq., ***First Assistant Public Defender, Monroe County Public Defender's Office***

A frequent lecturer on trial practice for our Criminal Track Program, Ms. Paperno's presentation will encompass Preliminary, Wade, Huntley, Rodriquez and Fourth Amendment hearings.

12:15 p.m. – 1:00 p.m. **LUNCH**

1:00 p.m. – 2:40 p.m. **Voir Dire: Preparing to Meet Your Jury**

Matthew Alpern, Esq., ***Director of Quality Enhancement for Criminal Defense Trials, NYS Office of Indigent Legal Service, Adjunct Professor of Law, Albany Law School***

Matt is another favorite speaker who w*e welcome back to the Criminal Law Academy to discuss the preparation and pitfalls of jury selection. He will cover the do's and don'ts of questioning veniremen, using pre-emptory challenges, challenges for cause and the qualification of jurors.*

2:40 p.m. – 2:50 p.m. **BREAK**

2:50 p.m. – 4:30 p.m. **Cross-Examination: If Anything Can Go Wrong, It Will!**

Robert G. Wells, Esq., ***Attorney-at-Law, Syracuse and President-elect NYSACDL***

Rob has been another frequent guest speaker on trial practice at the Academy and the Oneida County Bar Association's Criminal Track Programs. His topic this time is the art of cross-examination and the dangers, difficulties and hazards inherent in an ill-prepared cross.

Fee: $65 including Continental breakfast and lunch, $50 if more than one person per office registers

To Register Contact:

Justin Lamberto, Oneida County Public Defender, Criminal Division: 315-798-5871 or jlamberto@ocgov.net

7.5 CLE Credits: 5 Skills, 2.5 Professional Practice

SPEAKERS

Matthew Alpern, Esq. is the Director of Quality Enhancement for Criminal Defense Trials for the New York State Office of Indigent Legal Services. He graduated with a B.A. degree from Emory University in 1985 and received his J.D. from the George Washington University National Law Center in 1989. Matt has dedicated his legal career to providing high quality legal representation to indigent persons accused of criminal offenses. After graduating from law school, Matt joined the Public Defender Service for the District of Columbia, an agency whose national reputation for excellence stems, in part, from its commitment to training, supervision and teamwork. At PDS, Matt worked for ten years in a variety of capacities including Deputy Chief of the Trial Division and Senior Litigation Attorney. During the majority of Matt's tenure at PDS, his caseload consisted of clients accused of high level felony offenses including homicides, sexual assaults, and other armed violent offenses. From 1999 to 2005, Matt served as a Deputy Capital Defender with the New York State Capital Defender Office. At CDO, Matt worked as a trial attorney representing indigent persons facing the death penalty. As part of a team consisting of attorneys, investigators and mitigation specialists, Matt's responsibilities included determining and implementing guilt and penalty phase trial strategies, conducting intensive factual investigation, developing mitigation evidence, and providing support, training and consultation for the capital defense bar. In 2005, after the elimination of the death penalty in New York State, Matt entered private practice with The Proskin Law Firm where he represented both indigent and retained clients accused of criminal offenses. In 2007, Matt returned to full time representation of indigent clients with the Albany County Office of the Alternate Public Defender. As an Assistant Alternate Public Defender, Matt's caseload consisted primarily of clients charged with serious felony offenses. Since 2009, Matt has also been an adjunct professor at Albany Law School, where he teaches Pre-trial Preparation and Trial Practice for criminal cases.

Michael A. Arcuri, Esq. was born in Utica New York and is a 1981 graduate of the State University of New York at Albany. He received his law degree from New York Law School in 1984 and thereafter began the practice of law in Central New York. In 1993, Mike was elected Oneida County District Attorney and was re-elected three times. While DA, Mr. Arcuri helped to create the Oneida County Child Advocacy Center, the first facility of its kind in New York State. He also created the Oneida County Drug Task Force and was instrumental in creating the first drug court in Oneida County as well as Victim Impact Panels and numerous other innovative crime prevention programs. He is a Past- President of the New York State District Attorneys Association and a Board Member of NYS Prosecutors Training Institute. Mike was elected to Congress in 2006 and served New York's 24th Congressional District from 2007 to 2010. While in Congress, he served as a member of the influential Rules Committee and was a member of the Transportation and Infrastructure Committee. Mr. Arcuri has served as an adjunct member of the faculty at Utica College where he taught *Constitutional Law in the Criminal Process*, *Congress in the Legislative Process* and *Politics and American Government*. At present Mr. Arcuri is a partner in the Ward Arcuri Law Firm and serves as the Panel Administrator for the Oneida County Assigned Counsel Program. He is also a founder and a principal in the Washington DC based Public Policy Firm of Cannae Policy Group. Mike also serves as a Member and Administrative Law Judge for the New York State Industrial Board of Appeals and was a

contributing author to *The Corr of the American Criminal Justice System: Lessons & the Anatomy of an American Tragedy - Prosecution: Reflections of a Prosecutor*.

Jill Paperno, Esq. is the second assistant public defender in the Monroe County Public Defender's Office. Jill graduated from the State University of New York at Albany in 1981, and Buffalo Law School in 1984. She has worked for the Monroe County Public Defender's Office since 1987. She trained and supervised attorneys in the City Court and Parole sections of the office for ten years as the City Court Supervisor, and since 2009 has supervised felony staff as the Second Assistant Public Defender. She has represented defendants in numerous felony jury trials, including homicides and sex offenses. Ms. Paperno assisted in developing the training program for Monroe County Public Defender's Office staff attorneys, and has presented CLEs on a variety of topics over the years. In 2010 she was awarded the Jeffrey A. Jacobs Memorial Award for outstanding trial work. In 2011 she was named a Rochester Daily Record Leader in Law and awarded the Rochester Daily Record Nathaniel Award. Jill contributed a chapter on handling sex offenses in Strategies for Handling Sex Crimes. She is a frequent blogger at http://newyorkcriminaldefense.blogspot.com. Her book, *Representing the Accused: A Practical Guide to Criminal Defense,* was published in July of 2012 by West Publishing.

Dan Patrick Sullivan has been the head of Oneida County's Pistol License Office since 2000. He was a Councilman, Deputy Supervisor and Police Commissioner for the Town of Whitestown from 1998 through 2012 and has served as Town Justice for the Town of Whitestown since 2012.

Robert G. Wells, **Esq.** is a federal criminal defense practitioner with over thirty-seven years of experience in the United States District Courts and Second Circuit Court of Appeals, as well as in all levels of State Courts. He was trained at Gerry Spence's *Trial Lawyers College*. He is President-elect of the New York State Association of Criminal Defense Lawyers. He is a member of the NYSACDL Board of Directors, Executive Committee, and the CLE Committee, Legislative Committee, Prosecutorial and Judicial Conduct Commission. He has acted as an instructor for the United States Courts teaching lawyers in San Francisco, Dallas, Los Angeles, Portland, Chicago and Atlanta. Rob has taught for the New York State Association of Criminal Defense Lawyers, and many other Bar Associations and groups on matters ranging from Sentencing, Direct Examination and Cross Examination, along with Electronic Evidence Presentation, and he has instructed for the FBI and the Board of Certified Fraud Examiners. Mr. Wells has delivered the only acquittal in the United States District Court for the Northern District of New York on an indicted environmental case in the last thirty years and was recently granted a Trial Order of Dismissal in a felony jury trial at the conclusion of the People's case, without having to present a single witness for the defense. Mr. Wells is also published in Atticus Magazine.

“Present Arms!”

A Primer on the Gun Laws of New York

Michael A. Arcuri, Esq.
Ward Arcuri Law Firm
Administrator, Oneida County Supplemental Assigned Counsel Program

Dan Patrick Sullivan
Assistant Pistol Licensing Officer
Oneida County Office of Pistol Licensing

I. TITLE 1 FIREARMS AND THEIR REGULATION
(Arcuri)

A. Modern firearms, curios, relics and antiques. NEW YORK

1. What is a Firearm (New York penal law to 265.00 (3))
   a. Pistol/revolver
   b. shotgun less than 16 inches in length (sawed off)
   c. rifle less than 16 inches in length
   d. modified long gun less than 26 inches
   e. assault weapon

2. What is not a firearm
   a. shotgun / rifle
   b. Non-operability. Must be operable or to not be convicted of CPW 4th. *People v. Roland 14 AD 3d 787 (2005*)
   c. Antique Firearm (265.00 (14))
      (1) muzzle loading pistol, Flintlock's handguns, those generally no longer available; not the kind of weapons you would see used in a shootout Exempt under 265.00(3);
      (2) A license is required to possess certain types of antique pistols you need to check with your local pistol permit officer.

3. Curios 265.00(23) Deals with large capacity ammunition feeding devices i.e. cartridges.
   a. Can hold more than 7 rounds (New York)
      (1) The 7 round provision of the SAFE Act held unconstitutional in *NYS Rifle and Pistol Association v. Cuomo*, (Nos. 14-36cv)
   b. Is more than 50 years old
   c. Can only be fired by a weapon more than 50 years old
   d. Must be registered with NYSP pursuant to PL section 400

B. Definition of Title I Firearms: 18 USC 921 et seq.

1. Title I weapons are the most commonly known classes of firearms they are:
   a. ordinary rifles shotguns, sometimes referred to as long guns.
   b. Handguns
   c. silencer
   d. firearm frames or receiver

2. Impact of a Criminal Record or Restraining Orders on the Purchase of Title 1 weapons under Federal Law;
   a. Federal law prohibits certain persons from purchasing or possessing firearms:
      (1) certain domestic abusers,
      (2) certain people with a history of mental illness.

(3) Has been convicted of a felony or "serious offense," defined to include:
   (a) Illegally using, carrying or possessing a handgun or other dangerous weapon;
   (b) Making or possessing burglar's instruments;
   (c) Buying or receiving stolen property;
   (d) Unlawful entry into a building;
   (e) Aiding escape from prison;
   (f) Certain kinds of disorderly conduct;
   (g) Certain drug offenses, crimes involving sodomy/rape;
   (h) Child endangerment;
   (i) Certain crimes permitting or promoting prostitution;
   (j) Certain kinds of stalking.

C. Persons Prohibited from Possessing a Firearm under New York Law
1. Person convicted of a felony or serious offense
   a. Serious Offense defined under 265.00(17)
   b. Includes certain misdemeanors
2. Persons under felony indictment
3. Adjudicated mentally unstable (Report 9.46Mental Hygiene Law)
4. Involuntarily Committed
5. User of Illegal drugs
6. Illegal Alien
7. et. seq.

II. TITLE 2 FIREARMS: UNIQUE AND MISUNDERSTOOD (ARCURI)

A. What is a Title 2 Firearm?

1. Guns, firearms & other items regulated by the National Firearms Act (NFA) of 1934
   a. These are the more dangerous devices
   b. Not illegal but heavily regulated
   c. Sometimes incorrectly referred to as Class 3 Weapons

2. NEW YORK / CALIFORNIA PROHIBIT OWNERSHIP OF TITLE 2 DEVICES

3. Examples:
   a. Machine Guns,
      (1) Defined as Any weapon that shoots, is designed to shoot, or can be readily be restored to shoot, automatically more than one shot without manually being reloaded by a single function of the trigger.
   b. Sound Suppressors,
   c. Short barreled Shotguns and Rifles

d. Destructive Devices
(1) Grenades
(2) Explosives
(3) Poisonous Gases

4. Additional Regulations on Title II Firearms
a. Extensive Background Check
b. Registration with NFA Registry
c. Filing ATF Form 5320
d. Strict Criminal Penalties (10 yrs. Jail/ $250,000 fines
e. $200 Tax on transfer and Manufacture

5. Transportation and Use Requirements with Title 2 Firearms
a. Federal Law does NOT restrict individuals from transporting legally acquired firearms across State lines for lawful purposes.
(1) Title 18Part 1 Ch. 44 s926A
(2) From any place you may lawfully possess to any other place you may lawfully possess
b. Under the (Federal) Firearms Owners Protection Act (FOPA) the following criteria is imposed on transportation across state lines.
(1) Firearm unloaded
(2) Firearm and ammunition kept in a storage area (like trunk) of the vehicle
(3) Not readily accessible to driver
(4) If no trunk a locked container not glove compartment
(5) For Target competition
c. Caution NYPD and NYSAP do not recognize FOPA and may detain an individual.
(1) In such a circumstance may be plead as an Affirmative Defense on Crim. Case

III. Purchasing Firearms In New York State

(Sullivan)

A. Purchasing Requirement.

1. Those wishing to purchase a firearm in New York must first have a license.
2. In order to obtain a license individual must:
a. Complete application to local pistol permit office;
b. Application must include photographs and fingerprints;
c. Submit to and pass background check;
d. Often includes requirement of PPO take gun safety course;
e. Restrictions on Conceal Permit.
(1) In *Kachalsky v. Werstchester, 701 F3d 88 (*2nd Cir. 2012) the 2nd Circuit upheld NY Law requiring gun owners who seek Conceal Permit to prove special need for Protection
f. Often in New York individuals given restricted license which does not include the right to carry concealed.
g. Pistol license valid anywhere in New York State except New York City unless law enforcement.

3. Purchase from a Dealer.
   a. Background Check performed.
   b. Waiting Period
   c. License must specify the weapon by caliber, make, model, manufacturer's name and serial number.
   d. Additional firearms may subsequently be purchased by providing particular firearm information to PPO.
   e. When a firearm is sold an individual must notify local PPO of the sale.
   f. Upon the death of the owner of a firearm individual in possession of a firearm is technically illegally in possession.
      (1) Use to do amnesty/gun buyback programs for elderly.

4. Private Purchase (Defacto Background Check)
   a. Outside NY & CA private sales of handguns do not require a background check.
   b. In NY, a defacto background check unless sold to:
      (1) Immediate Family defined as:
         (a) spouse
         (b) domestic partner
         (c) child or step child
   c. In NY when buying or selling in a private sale a licensed dealer must conduct a background check and provide documentation of the background check to the NYSP and keep a record of the transaction.

B. Form 4473

1. A form 4473 is an ATF form filled out when a person purchases a firearm from a Federally Firearms license (FFL) holder (such as a gun shop).
   a. The form contains the name, address, date of birth, government issued photo ID, national instant criminal background check system (NICS) background check traction number and short affidavit stating that the purchaser is eligible to purchase firearm under federal law.
   b. It contains description of the firearm being purchased.
   c. The dealer is required to record all information from form 4473 into a "bound book" called "Acquisition and Disposition Log"
   d. Acquisition and Disposition Log must be kept by the dealer for at least 20 years and this is subject to inspection by ATF and must be surrendered to ATF upon the dealer's retirement.

2. Except in New York and California if a person purchases a firearm from a private individual who is not a licensed dealer the purchaser is not required to complete a form 4473.

C. Multiple Handguns and Form 3310.4

1. It is a Class C felony in New York to **unlawfully** sell, exchange, give or dispose of 5 or more handguns, short-barreled shotguns, rifles, or assault weapons to another person or persons in a period of not more than 1 year
2. It is a Class B felony to **unlawfully** transfer ten or more such weapons to a person or persons in a period of not more than one year
   a. These provisions only apply to otherwise *unlawful* transfers
3. If an unlicensed individual possesses five or more handguns, short-barreled shotguns or rifles, or assault weapons, New York law presumes that the person intends to sell those weapons. N.Y. Penal Law § 265.15(6)
4. New York has no other laws limiting the number of firearms that may be sold to a single person in any given period of time.

D. Private Party Transfers and Gun Show Purchases

1. All private firearm sales, including those at a gun show, are required to be processed through a licensed dealer, who conducts a background check
2. Firearm dealers are required to obtain a state license

IV. Appeal Process for Denial or Suspension
(Sullivan)

A. Denial of Permit (License)
B. Denial of Conceal privilege
C. Suspension/Revocation of Permit
   1. Arrest for Crime
   2. Conviction of a Crime
      a. Certificate For Relief Against Disabilities
   3. Domestic Incident
   4. Mental Health Issue

V. Gun Trusts
(Arcuri)

A. Protecting and Transferring Title II Collections: The Future of NFA Gun Trusts

1. There is clearly a desire on the part of people to possess NFA guns Title 2 devices
   a. silencers, machine guns, short barreled rifles and machine guns destructive devices and AOW (Any Other Weapon) generally defined as any device capable of being concealed from which a shot can be discharged.
2. However because of the stiff penalties for violations of NFA (up to 10 yrs. In jail $250,000 fines) there is a greater concern to protect people from potential penalties
3. NFA Gun Trusts (Acts like ordinary trusts but strictly for NFA firearms)
   a. Purposes:
      (1) Allows for the transfer of NAF firearms at time of death outside of probate;
      (2) Puts clear parameters on how and when beneficiaries take
   b. Benefits:

(1) By law when you purchase a Title 2 (NFA) firearm only you and no one else has legal right to possess and fire the weapon. However with a trust you can designate others as users.

(2) Can change beneficiaries under the trust without changing ownership and paying $200 tax because the Trust still owns the weapon.

(3) There is a requirement to investigate and verify applicant but NO fingerprints or approval of CLEO.

c. Possible to get these benefits with a Corp or LLC BUT annual taxes associated with Corp & LLC. Always the possibility of piercing the corporate veil Not so with NFA Trust.

VI. Frequently Asked Questions of the Pistol Permit Officer

(Sullivan)

A. Client calls Father passed away and he had a gun that was not registered what does he do?
B. Husband has a permit, domestic issue police called, wife alleges H threatened her with gun?
C. Husband has a permit, police called for domestic issue, wife alleges H threatened her?
D. Allegation individual threatened to kill self, is this automatic suspension? Any discretion?
E. What is the Gun Show Loophole?

VII. Definitions

Modern Firearms (New York Penal Law §265.00(3))

- Any pistol or revolver; or
- A shotgun having one or more barrels less than eighteen inches in length; or
- A rifle having one or more barrels less than sixteen inches in length; or
- Any weapon made from a shotgun or rifle whether by alteration, modification, or otherwise if such weapon as altered, modified, or otherwise has an overall length of less than twenty-six inches; or
- An assault weapon.
    - The length of the barrel on a shotgun or rifle shall be determined by measuring the distance between the muzzle and the face of the bolt, breech, or breech lock when closed and when the shotgun or rifle is cocked;
    - The overall length of a weapon made from a shotgun or rifle is the distance between the extreme ends of the weapon measured along a line parallel to the centerline of the bore.
- Does not include antique firearms.

Curios and Relics (NY Penal Code §265.00(23))

A feeding device that:

- Was manufactured at least fifty years prior to the current date,
- Is only capable of being used exclusively in a firearm, rifle, or shotgun that was manufactured at least fifty years prior to the current date, but not including replicas thereof,
- Is possessed by an individual who is not prohibited by state or federal law from possessing a firearm and
- Is registered with the division of state police pursuant to subdivision sixteen-a of section 400.00 of this chapter, except such feeding devices transferred into the state may be registered at any time, provided they are registered within thirty days of their transfer into the state.
    - Notwithstanding paragraph (h) of subdivision twenty-two of this section, such feeding devices may be transferred provided that such transfer shall be subject to the provisions of section 400.03 of this chapter including the check required to be conducted pursuant to such section

Antique Firearms

NY Penal Code §265.00(14)

1. Any unloaded muzzle loading pistol or revolver with a matchlock, flintlock, percussion cap, or similar type of ignition system, or a pistol or revolver which uses fixed cartridges which are no longer available in the ordinary channels of commercial trade.

U.S. Code Title 18 Part I Chapter 44 Section 921; Definitions

(a) As used in this chapter—
(1) The term "person" and the term "whoever" include any individual, corporation, company, association, firm, partnership, society, or joint stock company.
(2) The term "interstate or foreign commerce" includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone).
(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.
(4) The term "destructive device" means—
(A) any explosive, incendiary, or poison gas—
(i) bomb,
(ii) grenade,
(iii) rocket having a propellant charge of more than four ounces,
(iv) missile having an explosive or incendiary charge of more than one-quarter ounce,
(v) mine, or
(vi) device similar to any of the devices described in the preceding clauses;
(B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; and
(C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.
The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10; or any other device which the Attorney General finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely

for sporting, recreational or cultural purposes.
(5) The term “shotgun” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.
(6) The term “short-barreled shotgun” means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun (whether by alteration, modification or otherwise) if such a weapon as modified has an overall length of less than twenty-six inches.
(7) The term “rifle” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger.
(8) The term “short-barreled rifle” means a rifle having one or more barrels less than sixteen inches in length and any weapon made from a rifle (whether by alteration, modification, or otherwise) if such weapon, as modified, has an overall length of less than twenty-six inches.
(9) The term “importer” means any person engaged in the business of importing or bringing firearms or ammunition into the United States for purposes of sale or distribution; and the term “licensed importer” means any such person licensed under the provisions of this chapter.
(10) The term “manufacturer” means any person engaged in the business of manufacturing firearms or ammunition for purposes of sale or distribution; and the term “licensed manufacturer” means any such person licensed under the provisions of this chapter.
(11) The term “dealer” means (A) any person engaged in the business of selling firearms at wholesale or retail, (B) any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms, or (C) any person who is a pawnbroker. The term “licensed dealer” means any dealer who is licensed under the provisions of this chapter.
(12) The term “pawnbroker” means any person whose business or occupation includes the taking or receiving, by way of pledge or pawn, of any firearm as security for the payment or repayment of money.
(13) The term “collector” means any person who acquires, holds, or disposes of firearms as curios or relics, as the Attorney General shall by regulation define, and the term “licensed collector” means any such person licensed under the provisions of this chapter.
(14) The term “indictment” includes an indictment or information in any court under which a crime punishable by imprisonment for a term exceeding one year may be prosecuted.
(15) The term “fugitive from justice” means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.
(16) The term “antique firearm” means—
(A) any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; or
(B) any replica of any firearm described in subparagraph (A) if such replica—
(i) is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition, or
(ii) uses rimfire or conventional centerfire fixed ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade; or
(C) any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. For

purposes of this subparagraph, the term “antique firearm” shall not include any weapon which incorporates a firearm frame or receiver, any firearm which is converted into a muzzle loading weapon, or any muzzle loading weapon which can be readily converted to fire fixed ammunition by replacing the barrel, bolt, breechblock, or any combination thereof.

(17)

(A) The term “ammunition” means ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm.

(B) The term “armor piercing ammunition” means—

(i) a projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium; or

(ii) a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile.

(C) The term “armor piercing ammunition” does not include shotgun shot required by Federal or State environmental or game regulations for hunting purposes, a frangible projectile designed for target shooting, a projectile which the Attorney General finds is primarily intended to be used for sporting purposes, or any other projectile or projectile core which the Attorney General finds is intended to be used for industrial purposes, including a charge used in an oil and gas well perforating device.

(18) The term “Attorney General” means the Attorney General of the United States [1]

(19) The term “published ordinance” means a published law of any political subdivision of a State which the Attorney General determines to be relevant to the enforcement of this chapter and which is contained on a list compiled by the Attorney General, which list shall be published in the Federal Register, revised annually, and furnished to each licensee under this chapter.

(20) The term “crime punishable by imprisonment for a term exceeding one year” does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(21) The term “engaged in the business” means—

(A) as applied to a manufacturer of firearms, a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured;

(B) as applied to a manufacturer of ammunition, a person who devotes time, attention, and labor to manufacturing ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the ammunition manufactured;

(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms,

but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms;
(D) as applied to a dealer in firearms, as defined in section 921(a)(11)(B), a person who devotes time, attention, and labor to engaging in such activity as a regular course of trade or business with the principal objective of livelihood and profit, but such term shall not include a person who makes occasional repairs of firearms, or who occasionally fits special barrels, stocks, or trigger mechanisms to firearms;
(E) as applied to an importer of firearms, a person who devotes time, attention, and labor to importing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms imported; and
(F) as applied to an importer of ammunition, a person who devotes time, attention, and labor to importing ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the ammunition imported.
(22) The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection: *Provided*, That proof of profit shall not be required as to a person who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism. For purposes of this paragraph, the term "terrorism" means activity, directed against United States persons, which—
(A) is committed by an individual who is not a national or permanent resident alien of the United States;
(B) involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and
(C) is intended—
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by assassination or kidnapping.
(23) The term "machinegun" has the meaning given such term in section 5845(b) of the National Firearms Act (26 U.S.C. 5845(b)).
(24) The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.
(25) The term "school zone" means—
(A) in, or on the grounds of, a public, parochial or private school; or
(B) within a distance of 1,000 feet from the grounds of a public, parochial or private school.
(26) The term "school" means a school which provides elementary or secondary education, as determined under State law.
(27) The term "motor vehicle" has the meaning given such term in section 13102 of title 49, United States Code.
(28) The term "semiautomatic rifle" means any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge.
(29) The term "handgun" means—

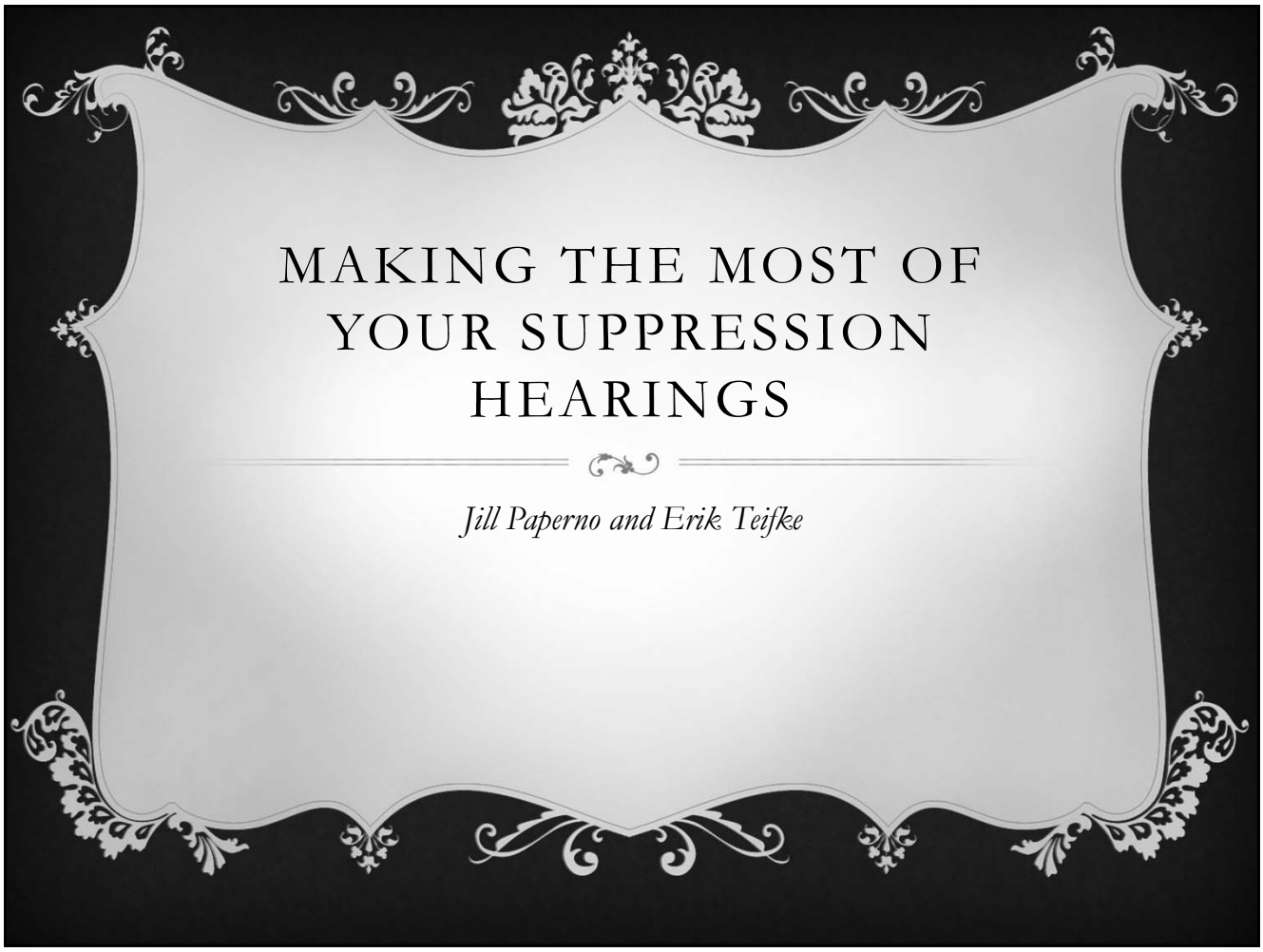
(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and
(B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.
[(30) , (31) Repealed. Pub. L. 103–322, title XI, § 110105(2), Sept. 13, 1994, 108 Stat. 2000.]
(32) The term "intimate partner" means, with respect to a person, the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.
(33)
(A) Except as provided in subparagraph (C),[2] the term "misdemeanor crime of domestic violence" means an offense that—
(i) is a misdemeanor under Federal, State, or Tribal [3] law; and
(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.
(B)
(i) A person shall not be considered to have been convicted of such an offense for purposes of this chapter, unless—
(I) the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case; and
(II) in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, either
(aa) the case was tried by a jury, or
(bb) the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.
(ii) A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.
(34) The term "secure gun storage or safety device" means—
(A) a device that, when installed on a firearm, is designed to prevent the firearm from being operated without first deactivating the device;
(B) a device incorporated into the design of the firearm that is designed to prevent the operation of the firearm by anyone not having access to the device; or
(C) a safe, gun safe, gun case, lock box, or other device that is designed to be or can be used to store a firearm and that is designed to be unlocked only by means of a key, a combination, or other similar means.
(35) The term "body armor" means any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire, regardless of whether the product is to be worn alone or is sold as a complement to another product or garment.
(b) For the purposes of this chapter, a member of the Armed Forces on active duty is a resident of the State in which his permanent duty station is located.

(Added Pub. L. 90–351, title IV, § 902, June 19, 1968, 82 Stat. 226; amended Pub. L. 90–618, title I, § 102, Oct. 22, 1968, 82 Stat. 1214; Pub. L. 93–639, § 102, Jan. 4, 1975, 88 Stat. 2217; Pub. L. 99–308, § 101, May 19, 1986, 100 Stat. 449; Pub. L. 99–360, § 1(b), July 8, 1986, 100 Stat. 766; Pub. L. 99–408, § 1, Aug. 28, 1986, 100 Stat. 920; Pub. L. 101–647, title XVII, § 1702(b)(2), title XXII, § 2204(a), Nov. 29, 1990, 104 Stat. 4845, 4857; Pub. L. 103–159, title I, § 102(a)(2), Nov. 30, 1993, 107 Stat. 1539; Pub. L. 103–322, title XI, §§ 110102(b), 110103(b), 110105(2), 110401(a), 110519, title XXXIII, § 330021(1), Sept. 13, 1994, 108 Stat. 1997, 1999, 2000, 2014, 2020, 2150; Pub. L. 104–88, title III, § 303(1), Dec. 29, 1995, 109 Stat. 943; Pub. L. 104–208, div. A, title I, § 101(f) [title VI, § 658(a)], Sept. 30, 1996, 110 Stat. 3009–314, 3009–371; Pub. L. 105–277, div. A, § 101(b) [title I, § 119(a)], (h) [title I, § 115], Oct. 21, 1998, 112 Stat. 2681–50, 2681–69, 2681–480, 2681–490; Pub. L. 107–273, div. C, title I, § 11009(e)(1), Nov. 2, 2002, 116 Stat. 1821; Pub. L. 107–296, title XI, § 1112(f)(1)–(3), (6), Nov. 25, 2002, 116 Stat. 2276; Pub. L. 109–162, title IX, § 908(a), Jan. 5, 2006, 119 Stat. 3083.)

Making the Most of Your Pre-Trial Hearings

Burdens of Proof and Practical Tips

Jill Paperno, Esq.
Second Assistant Monroe County Public Defender


MAKING THE MOST OF YOUR SUPPRESSION HEARINGS
Jill Paperno and Erik Teifke


PRACTICES APPLICABLE
TO ALL HEARINGS


PREPARATION
prep·a·ra·tion - ˌprepəˈrāSH(ə)n/
The action or process of making ready or being made ready for use or consideration. "The preparation of a draft contract"
synonyms: devising, putting together, drawing up, construction, composition, production, getting ready, development More
plural noun: preparations "she continued her preparations for the party
synonyms: arrangements, planning, plans, preparatory measures

PREPARATION

- Know your goals
- Know the burdens
- Anticipate the legal issues
- Prepare – Investigate, subpoena, talk to witnesses, review maps
- Review the law (if you didn't when you wrote the motions)
- Create a timeline of events, including arrest, Miranda, questioning

PREPARATION, CONT'D

- Prepare your cross, set up the files
- Disclose any discovery that may be required
- Subpoena records – video, 911, booking photo, medical or ambulance records showing client's injuries, personnel files of cops, client's school records and psychiatric records, map and aerial photos
- Will client or witnesses testify? If so, direct and cross them

PREPARATION, CONT'D

❖ Subpoena witnesses – (Does law permit you to subpoena police or civilian witnesses in this particular hearing)

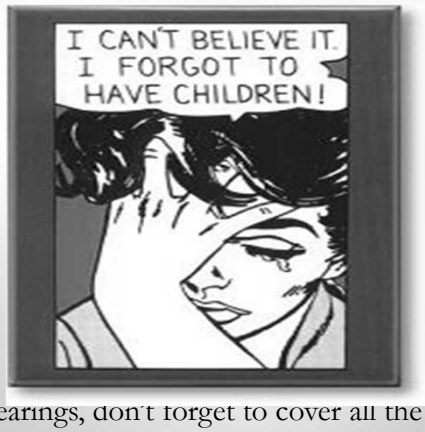
Witnesses may include – Witnesses who differ with police version,

PC – lack of consent

Huntley – client's limitations with language, processing

Foundation witnesses for videos or 911, other police officers

DON'T FORGET IMPORTANT THINGS



Doing multiple hearings, don't forget to cover all the issues.

LIMITATIONS ON RIGHT TO CALL WITNESS - *WADE*

"Indeed we have held in respect to pretrial hearings more directly addressing the guilt or innocence of an accused that a defendant's right to require the production of a witness with relevant testimony could be outweighed by countervailing policy considerations (*People v Petralia*, 62 NY2d 47, 52-53)…Similar policy considerations, as already noted, militate against a rule that would render the identifying witness subject to compulsory process at the behest of the defendant absent some indication that the pretrial identification procedure was suggestive.

CHIPP

This is not to say, however, that an identification witness's testimony may never be required. Such a witness's testimony might become necessary if the hearing evidence raises substantial issues as to the constitutionality of the lineup, the resolution of which could not be properly resolved without testimony from the identification witness. Thus, in *People v Ocasio* (134 AD2d 293, 294) the court held that testimony from the identifying witnesses was needed when a detective's testimony about showing a photo array to several witnesses left open the possibility that a witness who had already viewed the array influenced or suggested another witness's identification of defendant.

- *People v. Chipp*, 75 N.Y.2d 327, 337-338, 552 N.E.2d 608, 614-615, 553 N.Y.S.2d 72, 78-79, 1990 N.Y. LEXIS 230, 20-22 (N.Y. 1990)

LIMITATIONS ON RIGHT TO CALL WITNESS - *MAPP*

❖ The motion court providently exercised its discretion in denying defense counsel's request for an adjournment at the close of the People's case during the *Mapp* hearing, in order to subpoena a police officer for the defense case. Defendant failed to demonstrate a reasonable excuse for failing to subpoena that officer prior to the hearing, and also failed to demonstrate the materiality of that officer's testimony at the hearing (see, *People v Foy*, 32 NY2d 473, 476).

People v. Charlton, 1997 N.Y. App. Div. LEXIS 4494, 1, 239 A.D.2d 104, 657 N.Y.S.2d 552 (N.Y. App. Div. 1st Dep't 1997)


KNOW YOUR GOALS
❖ Win the hearing
❖ Obtain discovery – Rosario, testimony of witnesses
❖ Lock in testimony –
I don't knows
Contradictory
Favorable to the case
❖ Get subpoenaed material

KNOW YOUR GOALS CONT'D

- Develop theory (theories) of the case through eliminating bad evidence, developing helpful testimony
- Show client you know what you're doing (You do, right?)
- Show cops and prosecutor this will not be a walk in the park
- Remind the judge this will not be a walk in the park
- Set up appeal
- Create climate for better plea offer

AT THE HEARING

- Ask D.A. for *Rosario*
- Review *Rosario* with testifying witness on the stand – and *Consolazio*, and digital – emails, etc. – Ask if the *Rosario* included all important information in case (to reduce the credibility of later additions at trial)
- Know your foundations and have equipment ready for recordings, videos

AT THE HEARING CONT'D

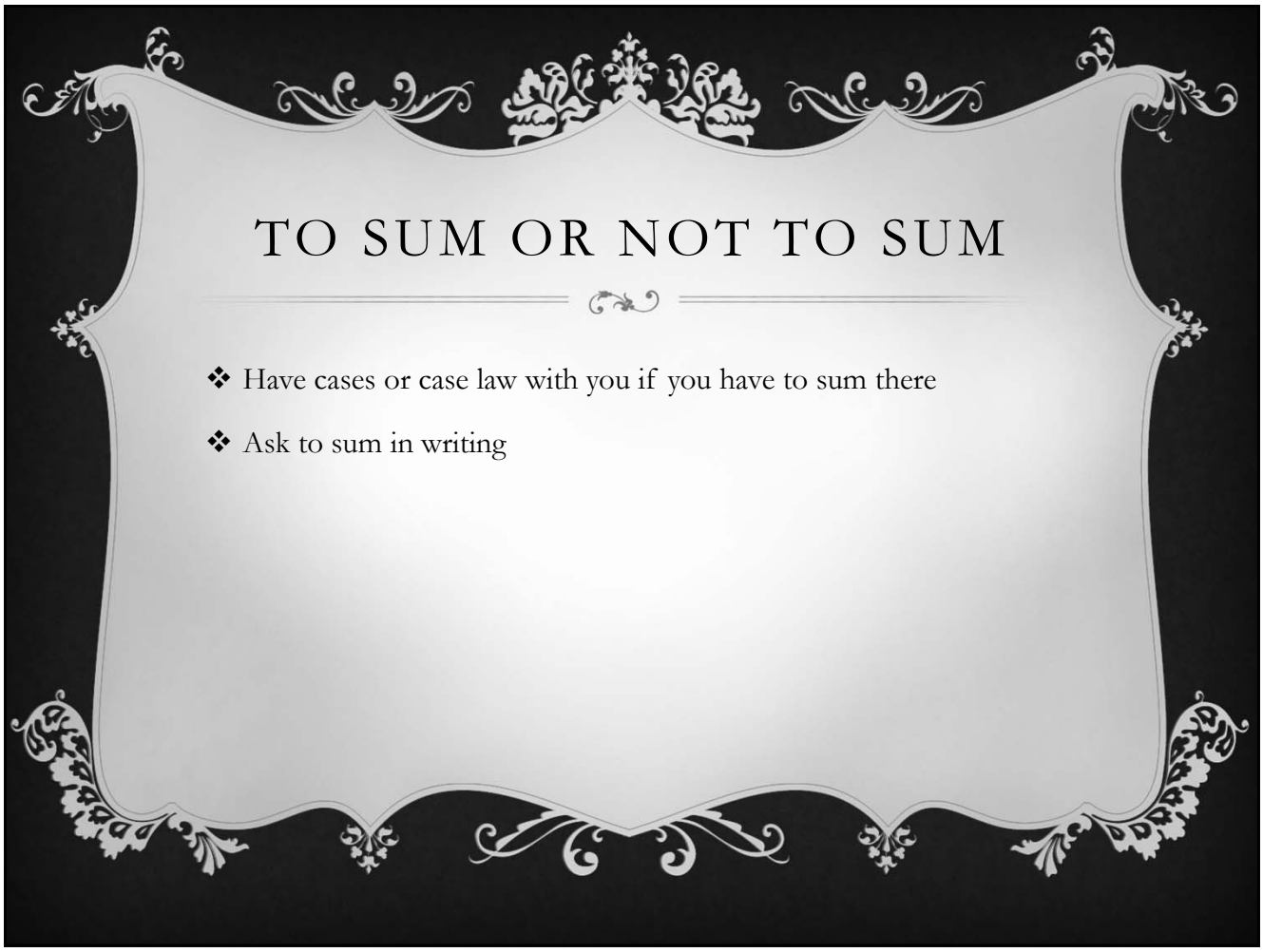
- Close the doors – ask witnesses if what they've testified to is all they recall seeing/hearing/doing so they don't come back at trial or later in the hearing with something else
- Consider whether the prosecution has failed to call necessary witnesses to meet the burden of going forward (*People v. Berrios)* – Gaps in the evidence, Fellow officer, *Lypka-Havelka,* arresting officer, officer who conducted lineup?

AT THE HEARING, CONT'D

❖ Did you get your grand jury testimony? Review it – consider whether there are new motions to make about sufficiency of the evidence and defectiveness of the proceedings. Renew your motions.

BEYOND THE SCOPE?

While an attorney is bound by the scope of a re-direct examination, he is not bound by the scope of the direct examination. *People v. Kennedy*, 70 A.D.2d 181 (2nd Dept. 1979)[" it is well settled that in a criminal case a party may prove through cross-examination any relevant proposition, regardless of the scope of the direct examination"]; *People v. Sanders*, 2 A.D.3d 1420 (4th Dept. 2003).


TO SUM OR NOT TO SUM
❖ Have cases or case law with you if you have to sum there
❖ Ask to sum in writing

TIPS ON QUESTIONING WITNESSES AT THE HEARINGS

- Don't let the officer drone on and muck up your record
- Picture the transcript while you are questioning
- If you don't get an answer, ask it again (Best tip I ever got)
- Clarify
- Don't fill in evidentiary gaps left by the prosecution – i.e., if they fail to establish probable cause, don't review facts and establish it yourself
- People don't want to look bad – use that to your advantage.

QUESTIONING WITNESSES CONT'D

- Get your "I don't knows"
- Did you get an answer to your question? If not, ask again. Don't be derailed.
- Get your inconsistencies
- Get the answers consistent with a theory of the case (or begin to rule it out)
- Decide whether questions should be open ended or leading – depends on theory of the case, goals at the hearing

  When to use open-ended, when to use leading

DOING THE CROSS

- How do you make it most useful for trial? Structure
- How do you take notes
- Do you impeach with prior inconsistencies the witnesses may n ot know of – reasons to impeach, reasons not to
- Getting the inconsistencies with witnesses you may bring in
- Don't stop because people are bored or angry


HUNTLEY HEARINGS

HUNTLEY HEARING GOALS

- Goals in addition to the usual ones:

1] Convince Judge to suppress the statement - [hey , it happens once in a while, really it does]

2] Generate support for your anticipated trial arguments [the statement was false, the statement was really that of the officer instead of your clients' etc.]

3] Limit the modification and impact of the statement

GROUNDS FOR SUPPRESSION

- 1] Miranda violation
  - a] Right to remain silent violation
  - b] Right to counsel violation
- 2] Traditional involuntariness
- 3] statement resulted from unlawful seizure of the defendant

BURDENS *HUNTLEY*

❖ The prosecutor opens the hearing with the burden of going forward that:

[1] *Miranda* warnings were not required because the suspect was either

[a] not in custody or

[b] not interrogated [the statement was spontaneous], or

BURDENS, CONT'D

[2] Miranda warnings were given and the suspect waived his rights.

This is usually accomplished by having the cop testify that the suspect was either not in custody, not interrogated, or was advised of his rights and proceeded to waive them and make a statement.

BURDENS, CONT'D

❖ If this can be accomplished, the burden then shifts to the suspect to prove that he :

> [1] was the subject of a custodial interrogation [and therefore should have been advised of his rights but was not] or
>
> [2] was advised but did not make a valid waiver of his Miranda rights.

The prosecutor has the burden of proving voluntariness of the statement and that a waiver has occurred beyond a reasonable doubt. *People v. Knapp, 124 AD3d 36*.

STRATEGIES

- Line by line - Your words or his
- Counting the lines and contrasting with time spent
- Who spoke first, what said, who spoke next
- Verbatim? How long between when statement made and when notes made? (May have to explain verbatim)
- Trauma, injured, last slept, ate, medication deprived, high or drunk?

AND SPEAKING OF STRATEGY

Know theirs:

Reid technique

Silences increase anxiety

Intentional error in the statement

Minimization

CONTENT CAN BE QUESTIONED

❖ The questions asked and the answers given *are* relevant at a Huntley hearing. *People v. Remaley*, 26 NY2d 427 (1970); *People v. David*, 44 AD2d 548 (1st Dept. 1974).


MAPP HEARINGS


Oh, the Places You'll Go!
Dr. Seuss

MAPP HEARING GOALS

- In addition to usual goals, trying to suppress the evidence
- Getting a picture of the entire case – often the *Mapp* hearing covers much of the trial.

GROUNDS FOR SUPPRESSION

Review your case – 4th Amendment cases are FACT SPECIFIC

Are there issues relating to:

Nature of stop on street

Traffic stop

Warrantless search of house

Consent to search

Level of intrusion – always create the highest level with the lowest basis

MAPP HEARING BURDENS

Standing - May not have to be proven at the hearing, but might

"One seeking standing to assert a violation of his Fourth Amendment rights must demonstrate a legitimate expectation of privacy. One may have an expectation of privacy in premises not one's own, e.g., an overnight guest (*Minnesota v Olson*, 495 US 91) or a familial or other socially recognized relationship (*People v Rodriguez*, 69 NY2d 159; *People v Ponder*, 54 NY2d 160)."

People v. Ortiz, 83 N.Y.2d 840, 842, 633 N.E.2d 1104, 1105, 611 N.Y.S.2d 500, 501, 1994 N.Y. LEXIS 325, 3 (N.Y. 1994)

BURDEN – GOING FORWARD

The People must, of course, always show that police conduct was reasonable. Thus, though a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to "the burden of going forward to show the legality of the police conduct in the first instance (*People v. Malinsky*, 15 N Y 2d 86, 91, n. 2)" (*People v. Whitehurst*, 25 N Y 2d 389, 391 [emphasis in original])…

GOING FORWARD, CONT'D

These considerations require that the People show that the search was made pursuant to a valid warrant, consent, incident to a lawful arrest or, in cases such as those here, that no search at all occurred because the evidence was dropped by the defendant in the presence of the police officer."

- *People v. Berrios*, 28 N.Y.2d 361, 367-368, (N.Y. 1971)

BURDEN OF ESTABLISHING A VIOLATION

"Thus far, we have made it clear that where a defendant challenges the admissibility of physical evidence or makes a motion to suppress, he bears the ultimate burden of proving that the evidence should not be used against him." (*Berrios*)

STRATEGIES AT *MAPP* HEARINGS

- Ask each officer about peripheral issues in detail – where was each police car, officer, civilian, timing of events not in reports – set up inconsistencies
- Go through minute by minute in DWI or traffic – Area covered, lanes, cars, traffic lights, speed at each location, traffic signs, establish driving wasn't bad enough for whatever happened next

OTHERS?

COMMON NONSENSE

Dealing with:

- "High crime area"
- "Furtive movements"
- "Bulge"
- "Open air drug market"
- Client known to the police
- "Gang member"


WADE HEARINGS

GOALS IN ADDITION TO THE USUAL

- Getting the in-court and out-of-court identification suppressed
- Locking in the details of descriptions and opportunities to view the perpetrator
- Getting to question the eyewitnesses
- Establishing police claims at hearing differ from witness's description of procedure (investigator talks to witness)

BURDENS AT THE WADE HEARING

"On a motion to suppress eyewitness identification testimony, the defense bears the over-all burden of proof to establish that a pretrial identification procedure was unduly suggestive (see, *People v Sutton*, 47 AD2d 455; *People v Carter*, 117 Misc 2d 4, 13; see also, *People v Berrios*, 28 NY2d 361, 367), once, as in the instant case, the People have met their initial burden of going forward to establish the reasonableness of the police conduct and the lack of suggestiveness of the pretrial identification procedures."

People v. Jackson, 108 A.D.2d 757, 757-758

BURDENS, CONT'D

- People have initial burden of going forward and establishing reasonableness of police conduct and lack of (undue) suggestiveness of the pretrial identification procedures – must be proof of procedure, reasonableness under circumstances;
- Defendant has burden to establish undue suggestiveness

BURDENS, CONT'D

- "It is only when the defense has established that a pretrial identification was so impermissibly suggestive as to deny the defendant due process of law that the burden of proof shifts to the People to demonstrate, by clear and convincing evidence that the eyewitness' in-court identification of defendant was based upon a source independent of the tainted procedure (see, *People v Rahming*, 26 NY2d 411, 417; *People v Sutton*, supra, p 460)." (*Jackson)*

RODRIGUEZ, INDEPENDENT BASIS

- If prosecution alleges identification confirmatory (so that there is no need for *Wade* hearing) and defense contests, *Rodriguez* hearing.
- If you do the *Wade* hearing and it is concluded that identification was product of suggestive procedure, prosecutor must now establish independent basis.

FOR ALL *WADE* HEARINGS

- Establish the initial description and lack of other identifying features;
- Get the 911;
- Establish how people in array/lineup/showup did not match the initial description (isn't that suggestive)

STRATEGIES AT HEARING

- Original description given and how varies from who was shown – review all possible identifying features whether or not they were mentioned:

Height

Weight

Build

Race/ethnicity

Skin tone

Hair – length, color, style

Face – unusual features, scars

MORE FEATURES

Facial hair – moustache, beard, goatee, other

Eyes – color, unusual features

Lips, Nose, Ears, Teeth, Tattoos

Clothing – shirt, pants, shoes, jacket, designs or logos

Age, Anything unusual about movement

Voice – anything unusual

Right handed, left handed

LOOK AT YOUR CLIENT

- Establish lack of any description of any identifying features your client has (scars, tattoos, skin disfigurement) WITHOUT HIGHLIGHTING TO THE WITNESS

STRATEGIES

- Showup – Lighting, location, time from incident, distance, weather, description dissimilarities, police around, cuffs, uniforms, police cars, more?
- Lineup – (Don't let them know you're a lawyer) Who said what to whom, differences in features, differences from description
- Photo array – How arranged, who said what to whom, how long viewed, percentage likely it was the perpetrator

ADVERSE INFERENCE

- The Fourth Department ruled in February that a hearing court is obligated under some circumstances to grant an adverse inference charge against the prosecution in considering the proof, where an arm of the State has failed to preserve evidence (*People v Manigualt*, 2015 N.Y. App. Div. LEXIS 1329 (N.Y. App. Div. 4th Dep't Feb. 13, 2015)). While obviously this will sometimes be less valuable than the same charge before a jury, it may also give a wavering judge a firm enough basis to rule in your favor in a close case.

DO YOU EVER WAIVE A HEARING?

Making the Most of Your Pre-trial Hearings:
Burdens of Proof and Practical Tips
(Jill Paperno 5/6/16)

Preliminary Hearing:

Standard of Proof

CPL 180.70 – Standard of proof – Whether there is reasonable cause to believe that the defendant committed a felony and therefore to warrant the Judge in holding the defendant for action of the Grand Jury.

CPL 70.10(2) – "Reasonable cause to believe that a person has committed an offense exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it." There is no requirement that a legally sufficient or prima facie case be presented (see, *People v. Haney*, 30 NY2d 328, 333; Preiser, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 11A, CPL 180.70 at 158) or that all the elements of the offense be established to the degree required either at trial or in the Grand Jury (see, *People v. Rice*, 148 Misc 2d 204). *People v. Evans*, 185 Misc. 2d 85

Burden:

"A preliminary hearing is basically a first screening of charges; its function is not to try defendants and it does not require the same degree of proof or quality of evidence as is necessary to support an indictment or conviction at trial; the court's initial duty at such a hearing is to determine whether the People have met the burden of demonstrating reasonable cause to believe that the felony for which the defendants are criminally responsible was committed by them." *People v. Rosa*, 169 Misc. 2d 350.

Wade Hearing

(To determine if the identification procedure was unduly suggestive. If so, was there an independent basis for the witness to select the defendant. If the parties knew each other, was the identification confirmatory? If that is disputed, then the defense may have a *Rodriguez* hearing. *People v. Rodriguez*, 79 N.Y.2d 445)

- Burden on prosecution to go forward to establish reasonableness of police conduct and lack of suggestiveness

- Burden on defense to establish undue suggestiveness

- If defense meets burden, then prosecution must show, by clear and convincing evidence, that there is independent basis for in-court identification.

  While the defendant bears the ultimate burden of proving that a showup procedure is unduly suggestive and subject to suppression, the burden is on the People first to produce evidence validating the admission of such evidence (*People v Chipp*, 75 NY2d 327, 335). Initially, the People must demonstrate that the showup was reasonable under the circumstances. Proof that the showup was conducted in close geographic and temporal proximity to the crime will generally satisfy this element of the People's burden (see, *People v Duuvon*, supra). This does not end the inquiry, however. The People also have the burden of producing some evidence relating to the showup itself, in order to demonstrate that the procedure was not unduly suggestive. As we noted in *People v Chipp* (supra), "the People have the initial burden of going forward to establish the reasonableness of the police conduct and the lack of any undue suggestiveness in a pretrial identification procedure" (75 NY2d, at 335 [emphasis added]; see also, *People v Riley*, 70 NY2d 523, 531; *People v Berrios*, 28 NY2d 361).

  People v. Ortiz, 90 N.Y.2d 533, 537 (N.Y. 1997)

  On a motion to suppress eyewitness identification testimony, the defense bears the over-all burden of proof to establish that a pretrial identification procedure was unduly suggestive (see, *People v Sutton*, 47 AD2d 455; *People v Carter*, 117 Misc 2d 4, 13; see also, *People v Berrios*, 28 NY2d 361, 367), once, as in the instant case, the People have met their initial burden of going forward to establish the reasonableness of the police conduct and the lack of suggestiveness of the pretrial identification procedures. In such a case, no reversible error is committed if the People fail to call the identifying witness at the *Wade* hearing (see, *People v Sutton*, supra, p 459; *People v Carter*, supra). It is only when the defense has established that a pretrial identification was so impermissibly suggestive as to deny the defendant due process of law that the burden of proof shifts to the People to demonstrate, by clear and convincing evidence that the eyewitness' in-court identification of defendant was based upon

a source independent of the tainted procedure (see, *People v Rahming*, 26 NY2d 411, 417; *People v Sutton*, supra, p 460).

People v. Jackson, 108 A.D.2d 757, 757-758, 484 N.Y.S.2d 913, 915, 1985 N.Y. App. Div. LEXIS 43089, 2-3 (N.Y. App. Div. 2d Dep't 1985)

Showups:

- People have the initial burden of going forward to establish the reasonableness of the police conduct and the lack of any undue suggestiveness in pretrial identification procedures.

  The prosecution must initially demonstrate the showup was reasonable under the circumstances. – close geographic and temporal proximity

- The People must also present proof relating to showup itself to demonstrate not unduly suggestive.

- Defense bears ultimate burden of proving showup is unduly suggestive and subject to suppression.

  While the defendant bears the ultimate burden of proving that a showup procedure is unduly suggestive and subject to suppression, the burden is on the People first to produce evidence validating the admission of such evidence (*People v Chipp*, 75 NY2d 327, 335). Initially, the People must demonstrate that the showup was reasonable under the circumstances. Proof that the showup was conducted in close geographic and temporal proximity to the crime will generally satisfy this element of the People's burden (see, *People v Duuvon*, supra). This does not end the inquiry, however. The People also have the burden of producing some evidence relating to the showup itself, in order to demonstrate that the procedure was not unduly suggestive. As we noted in *People v Chipp* (supra), "the People have the initial burden of going forward to establish the reasonableness of the police conduct and the lack of any undue suggestiveness in a pretrial identification procedure" (75 NY2d, at 335 [emphasis added]; see also, *People v Riley*, 70 NY2d 523, 531; *People v Berrios*, 28 NY2d 361).

People v. Ortiz, 90 N.Y.2d 533, 537, 686 N.E.2d 1337, 1339, 664 N.Y.S.2d 243, 245, 1997 N.Y. LEXIS 3212, 8-9 (N.Y. 1997)

Showup identifications are disfavored, since they are suggestive by their very nature (*People v Rivera*, 22 NY2d 453). Nevertheless, prompt showup identifications which are conducted in close geographic and temporal proximity to the crime are not "presumptively infirm," and in fact have generally been allowed (*People v Duuvon*, 77 NY2d 541, 543-544). This is not to say that showup identifications are routinely admissible. Indeed, while in *Duuvon* this Court upheld the admissibility of identification testimony resulting from a showup, we

> emphasized there that the proof "must be scrutinized very carefully for [evidence of] unacceptable suggestiveness and unreliability" (*People v Duuvon*, supra, 77 NY2d, at 543). Where there is "no effort to make the least provision for a reliable identification and the combined result of the procedures employed" establish that the showup was unduly suggestive, the identification must be suppressed (*People v Adams*, 53 NY2d 241, 249).

People v. Ortiz, 90 N.Y.2d 533, 537, 686 N.E.2d 1337, 1339, 664 N.Y.S.2d 243, 245, 1997 N.Y. LEXIS 3212, 7-8 (N.Y. 1997)

Lineup:

> A photo array will be found to be unduly suggestive and improper if it is so arranged as to "create a substantial likelihood that the defendant would be singled out for identification" (*People v Chipp*, 75 N.Y.2d 327, 336, 553 N.Y.S.2d 72, 552 N.E.2d 608 [1990], cert denied 498 U.S. 833, [697] 112 L. Ed. 2d 70, 111 S. Ct. 99 [1990]; *People v Jackson*, 282 A.D.2d 830, 832, 725 N.Y.S.2d 406 [2001], lv denied 96 N.Y.2d 902, 756 N.E.2d 88, 730 N.Y.S.2d 800 [2001]). The initial burden is on the prosecution to establish the absence of undue suggestiveness (see *People v Kirby*, 280 A.D.2d 775, 777, 721 N.Y.S.2d 130 [2001], lv denied 96 N.Y.2d 920, 758 N.E.2d 663, 732 N.Y.S.2d 637 [2001]). Our review in this matter establishes that the procedures used in preparing and submitting the photo array to the victim were reasonable and not unduly suggestive.

People v. McDonald, 306 A.D.2d 696, 696-697, 760 N.Y.S.2d 373, 374, 2003 N.Y. App. Div. LEXIS 7161, 2 (N.Y. App. Div. 3d Dep't 2003)

***Rodriguez* hearing:**

- Prosecution must establish parties known to one another or witness knows defendant well enough as to be impervious to police suggestion

> In any event, the prosecuting body bears the burden of proof in any case where it claims that a citizen identification procedure was "merely confirmatory" (id. at 452, 583 N.Y.S.2d 814, 593 N.E.2d 268). Thus, the prosecutor must establish that "the protagonists are known to one another, or where (as here) there is no mutual relationship, that the witness knows defendant so well as to be impervious to police suggestion" (id.). Whether an identification procedure is merely confirmatory is "a question of degree" (*People v Collins*, 60 N.Y.2d 214, 219, 469 N.Y.S.2d 65, 456 N.E.2d 1188 [1983]). Accordingly, a prosecutor would be expected to develop at the hearing sufficient details of the extent and degree of the witness's and the accused's prior relationship, their encounters, and how they knew one another, so as to provide the hearing court with a basis for ruling, as a matter of law, that the witness was impervious to suggestion [279]

(*Rodriguez,* 79 N.Y.2d at 451, 583 N.Y.S.2d 814, 593 N.E.2d 268). Thus, "[w]hen a crime has been committed by a family member, former friend or long-time acquaintance of a witness there is little or no risk that comments by the police, however suggestive, will lead the witness to identify the wrong person" (Collins, 60 N.Y.2d at 219, 469 N.Y.S.2d 65, 456 N.E.2d 1188). A confirmatory identification cannot be based on a prior relationship which is "fleeting or distant" (id.; see also *People v Newball*, 76 N.Y.2d 587, 591-592, 561 N.Y.S.2d 898, 563 N.E.2d 269 [1990]).

In re Duane F., 309 A.D.2d 265, 278-279, 764 N.Y.S.2d 434, 444, 2003 N.Y. App. Div. LEXIS 9912, 26-28 (N.Y. App. Div. 1st Dep't 2003)

Wade Hearing Strategy:

1. Preliminary questions and preparation

A. Preparation

There are generally three types of identification proceedings that are used by police. They include showups (common), photo arrays (common) and lineups (less common). For each proceeding, know the law and burdens at the hearing. In addition:

Showup:

- Become familiar with the location – visit, make copies of maps and photograph locations.

- Observe lighting

- Review weather conditions on the date of the incident and/or showup procedure

- Review legal standards for the hearing

- Have the witness(es) interviewed by an investigator – what was the description of the perpetrator, what did the police say prior to the viewing, did the police indicate they had a suspect, did the police tell them they were right afterwards, were they in proximity to others during or prior to the viewing, could they overhear radio communications, did the person they viewed differ in appearance in any way from the perpetrator, what was it that led them to pick out the defendant

- Consider issues particular to your case

Lineup or array:

- Find out names, ages, other details of individuals in array

- Try to establish through officer at hearing that information if it differs from client information

- Have the witness(es) interviewed by an investigator – what was the description of the perpetrator, what did the police say prior to the viewing, did the police indicate they had a suspect, did the police tell them they were right afterwards, were they in proximity to others during or prior to the viewing, did the person they viewed or selected differ in appearance in any way from the perpetrator, what was it that led them to pick out the defendant, how convinced were they that the person they selected was right – 50%, 70%? What were the words they used to tell the officer? Did the officer read instructions?

B.. What are your goals at the hearing?

Your goals at the hearing will be governed in nearly every case by your defense theory, or possible defense theory of the case.

Goals may include:

i. Getting the out-of-court and in-court identifications suppressed.

- Establish that the identification was unduly suggestive
- Undue suggestiveness may get an independent basis hearing in which the complainant has to testify. If there was insufficient independent basis, identification may be suppressed.

Reasonableness and suggestiveness

Reasonableness:

Were there less suggestive alternatives available
Was identification in presence of other identification witnesses
Were witnesses talking to each other or police in each other's presence
What words were used to get witness there?
What words used during instructions?
Was proceeding recorded?
What words did witness use? Were those words recorded?

For showups:

Was the distance too great, the detention too long? (When did call come in, when was defendant apprehended, when was showup, where was showup?)
Was the conduct in detaining the defendant unreasonable

Were witnesses in proximity to radios with police conveying information to each other

Suggestiveness:

For lineups and arrays:

Did the defendant appear to be a significantly different age, different appearance, stand out in another way? Was the photo lighter, darker, defendant's head different angle, facial expression, teeth or no teeth, head larger, something else?
How was witness told of lineup?
Double blind? Sequential?
Was witness told attorney would be there?
Do fillers or defendant match description given?

For showups:

Defendant in handcuffs, how many police surrounding, taken from police car in front of witness
How was witness told would be viewing showup?
Investigation – see if witness will discuss what was said prior to viewing – "We have a suspect we'd like you to see?"
Did officer record questions and answers, viewing of showups?
Photos taken of individuals in showups prior to and during showup
Was clothing placed on or taken off defendant? Anything rearranged?
What was said afterwards?
Location of parties, anything going on at the time that witnesses could hear?

If the prosecution claims that the parties knew each other, and the defense is in a position to deny this, defense may get a *Rodriguez* hearing, in which the complainant has to testify.

ii. Making a record of the inadequacy of the identification (Setting up the case for trial)

At the hearing, you can question whether the individuals in the photo array or lineup appeared similar to the description given by the complainant or witness. In that way you can get the officer to describe the appearance of the witness. Establish all of the details given and not given, including:

Height
Weight
Build
Race/ethnicity
Skin tone
Hair – length, color, style

Face – unusual features, scars
Facial hair – moustache, beard, goatee, other
Eyes – color, unusual features
Lips
Nose
Ears
Tattoos
Clothing – shirt, pants, shoes, jacket, designs or logos
Age
Anything unusual about movement
Voice – anything unusual
Right handed, left handed

Look at your client and notice if your client has any unusual features. Do not call attention to the specific feature, but instead question about it in the course of the other features (i.e. – A defendant with a scar on his cheek - Did the complainant state that there was anything unusual about his nose? His lips? His eyes? His face?)

iii Establishing inconsistencies of the complaining witness (Setting up the case for trial)

If the complainant gave a detailed description but it differs from the individuals in the array, question the officer about the description, ostensibly to establish suggestiveness – that the officer was suggesting someone other than an individual who matched the description. So list the details of the description and the way in which each individual varies from the description. This can be used at trial both to cross-examine the witness about the discrepancies between the description and your client, and to establish any inconsistencies between trial testimony of the witness and the initial description.

iv. Getting the complainant on the stand either through an independent basis hearing or a *Rodriguez* hearing

a. Waive the client's appearance so that the witness is not looking at your client while describing the perpetrator

b. Go through the entire history of the incident –second by second, including:

Length of time
When the witness first became aware of the perpetrator
Angle viewed, for how long at each angle
Distance from the perpetrator, how long for each distance
Focus, including gun focus
If ordered not to look, what the witness did
Lighting (get photos of area to see what lighting really was)
Time of day

Shadows – trees, buildings
Clothing covering parts of face or shadowing face
Others around – what they were doing
No gaps in events – from start to finish everything that happened

If it is a *Rodriguez* hearing, or if the complainant claims prior contact, go through every prior contact between the parties, including date, time, location, how viewed, distance, what perpetrator was wearing, what was going on, how long viewed, etc.

v. Other goals – getting a plea offer, getting subpoenaed material, setting up an appeal, more.

Fourth Amendment hearings:

Dunaway:

> We decide in this case the question reserved 10 years ago in *Morales v. New York*, 396 U.S. 102 (1969), namely, "the question of the legality of custodial questioning on less than probable cause for a full-fledged arrest." Id., at 106.

Dunaway v. New York, 442 U.S. 200, 202, 99 S. Ct. 2248, 2251, 60 L. Ed. 2d 824, 829, 1979 U.S. LEXIS 126, 7 (U.S. 1979)

Mapp

> Today we once again examine *Wolf*'s constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only [655] courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that HN6 all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

Mapp v. Ohio, 367 U.S. 643, 654-655, 81 S. Ct. 1684, 1691, 6 L. Ed. 2d 1081, 1089-1090, 1961 U.S. LEXIS 812, 20, 86 Ohio L. Abs. 513, 16 Ohio Op. 2d 384, 84 A.L.R.2d 933 (U.S. 1961)

Ingle

> The issue is whether a police officer may stop an automobile, arbitrarily chosen from the stream of traffic on a public highway only because of the unusual but irrelevant appearance of the vehicle, solely to examine the motorist's license and registration, or to inspect the vehicle for possible equipment violations.

People v. Ingle, 36 N.Y.2d 413, 414, 330 N.E.2d 39, 40, 369 N.Y.S.2d 67, 69, 1975 N.Y. LEXIS 1821, 4 (N.Y. 1975)

Payton

> We now reverse the New York Court of Appeals and hold that the Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, Mapp v. Ohio, 367 U.S. 643; Wolf v. Colorado, 338 U.S. 25, prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.

Payton v. New York, 445 U.S. 573, 576, 100 S. Ct. 1371, 1374-1375, 63 L. Ed. 2d 639, 644, 1980 U.S. LEXIS 13, 7 (U.S. 1980)

Burdens in Fourth Amendment Hearings

Standing

> One seeking standing to assert a violation of his Fourth Amendment rights must demonstrate a legitimate expectation of privacy. One may have an expectation of privacy in premises not one's own, e.g., an overnight guest (*Minnesota v Olson*, 495 US 91) or a familial or other socially recognized relationship (*People v Rodriguez*, 69 NY2d 159; *People v Ponder*, 54 NY2d 160).

People v. Ortiz, 83 N.Y.2d 840, 842, 633 N.E.2d 1104, 1105, 611 N.Y.S.2d 500, 501, 1994 N.Y. LEXIS 325, 3 (N.Y. 1994)

Going forward

> The People must, of course, always show that police conduct was reasonable. Thus, though a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to "the burden of going forward to show the legality of the police conduct in the first instance (*People v. Malinsky*, 15 N Y 2d 86, 91, n. 2)" (*People v. Whitehurst*, 25 N Y 2d 389, 391 [emphasis in original]). [368] These considerations require that the People show that the search was made pursuant to a valid warrant, consent, incident to a lawful arrest or, in cases such as those here, that no search at all occurred because the evidence was dropped by the defendant in the presence of the police officer.

People v. Berrios, 28 N.Y.2d 361, 367-368, 270 N.E.2d 709, 713, 321 N.Y.S.2d 884, 888-889, 1971 N.Y. LEXIS 1321, 15-16 (N.Y. 1971)

Violation

> Thus far, we have made it clear that where a defendant challenges the admissibility of physical evidence or makes a motion to suppress, he bears the ultimate burden of proving that the evidence should not be used against him (see, e.g., *People v. Baldwin*, 25 N Y 2d 66, 70; *People v. Whitehurst*, 25 N Y 2d 389, 391; *People v. Malinsky*, 15 N Y 2d 86; see, also, *Nardone v. United States*, 308 U.S. 338, 341-342). Indeed, the very words employed by the Legislature in fashioning the motion to suppress suggest no other rational conclusion.

People v. Berrios, 28 N.Y.2d 361, 367, 270 N.E.2d 709, 712, 321 N.Y.S.2d 884, 888, 1971 N.Y. LEXIS 1321, 14-15 (N.Y. 1971)

Preparing for the Hearing:

Predict the likely issues:

- Sufficient basis for car stop or street encounter
- Consent to search
- Inventory search
- Search exceeded permissible scope
- Other

Investigate:

- Subpoena materials – 911, video, police reports, other (police personnel?) (Videos may reveal location not as described, events not as described in reports)
- View maps
- View location
- Take photos
- Talk to witnesses with an investigator
- Take measurements? (DWI or car search case when stop for traffic violation – (distances, signs, traffic control devices, number lanes, etc.)

Prepare Timeline

Decide what the goals are of the hearing –

- Suppress evidence
- Create testimony for trial
- Get better offer
- Show client how you work
- Show cops how you work
- Obtain *Rosario* and other evidence
- Develop theory of the case
- Obtain subpoenaed material

- Make a record for appeal

Have necessary materials available – copies for impeachment, introduction, photos for use at the hearing (photos of location showing inconsistent with officers' claims, lighting, etc.)

Prepare Cross – You can never over-prepare – review and sort materials.
Consider – if you are seeking to get information at the hearing, do you use non-leading or leading?
If you are seeking to lock in testimony, limit the officers' claims of client's wrongdoing to try to win the case, leading or non-leading?
Can you set up objections – object when the prosecution questions on an area that you want to question on – if you expect the judge to overrule, use that as opportunity to explore on cross

Always try to make out the highest level of intrusion, and the lowest level of *Debour.*

At the hearing:

In general

Go through the *Rosario*
Lock in testimony - don't let them drone on
Ask the question again if you don't get an answer the first time
If you get too expansive an answer, break it down – picture the transcript and how to use it at trial
Do not fill in gaps if the prosecution has failed to establish lawfulness of the search

Specific types:

DWI

Minute by minute, foot by foot, the distance the client traveled and the lack of violations along the route
How the client stopped, opened the window, got the license, insurance card, etc., stepped out of the car

Traffic stop:

Minute by minute, lack of violations, supporting argument that the minimal traffic violation that was observed did not warrant actions of officer (see *People v. Marsh*, 20 N.Y.2d 98, 100, 228 N.E.2d 783, 785, 281 N.Y.S.2d 789, 791, 1967 N.Y. LEXIS 1386, 5 [N.Y. 1967])

Dealing with:

“High crime area”
“Furtive movements”
“Bulge”
“Open air drug market”
Client known to the police
“Gang member”

THE HUNTLEY HEARING

The Right to a Hearing
Defense Goals
Grounds for Suppression
Waiving the Hearing
Preparation
- **The Client Interview**
- **Discovery Materials**
- **Other Records**
- **Cop Rules + Regulations**
- **Cop Interrogation Methods**
- **Jury Instructions**

Rosario Material
- **Rosario Violation**

Construct a Time-line
Interrogation Environment
Miranda Warnings
- **When Required?**

- **When is one in Custody?**
- **What is Interrogation?**
- **The Right to Remain Silent**
  - **Invoking the Right to Remain Silent**
  - **Waiving the Right to Remain Silent**
- **The Right to Counsel**
  - **When is it attached?**
  - **Invoking the Right to Counsel**
  - **Interrogation on Other Matters**
- **Adequacy of Miranda Warnings**
- **When have these Rights been Waived?**

Burden of Proof at the hearing
Hearsay
The "Spontaneous" Statement
- **Burden of Proof**
- **After the Statement**

Theories of Suppression when there has been Illegal Interrogation
- **"Cat out of the Bag"**
- **Continuos Interrogation**

Pedigree Questions Traditional Involuntariness
Witherspoon - must the prosecutor call all cops?
Defense Evidence
Statements to Private People
Pinning Down Witnesses
Handling the Judge
Objections
Content of the Statement is Relevant
Refreshing a Witness's Recollection

Failure to Record the Interrogation
Memorandum of Law
Reopening the Hearing

Burden of Proof Flow Charts
- **Miranda Violation**
- **Traditional Involuntariness**
- **Agency**
- **"Cat out of the Bag"**
- **Continuous Interrogation**

The Right to a Hearing

Recognizing the strong correlation between the admission of a defendant's inculpatory statement and a verdict of guilt, the United States Supreme Court held that due process entitles a defendant to a *pre-trial* determination of whether or not his alleged statement to law enforcement was voluntary. Jackson v. Denno, 378 U.S. 368 (1964).
The New York Court of Appeals responded to this decision by holding that not only was a defendant entitled to this pre-trial determination of voluntariness, but that any such statement must be proven to be voluntary by the prosecutor *beyond a reasonable doubt*. People v. Huntley, 15 N.Y.2d 72 (1965).

The Defense Goals at the Huntley Hearing:

1] Convince Judge to suppress the statement - [hey , it happens once in a while, really it does]
2] Get prosecution witnesses committed and pinned down
3] Get discovery / Rosario materials
4] Show client you are a strong advocate - This hearing is likely the first chance the client has to see you in action.
5] Expose flaws in the prosecution's case that could result in a revised plea offer.
6] Generate support for your anticipated trial arguments [the statement was false, the statement was really that of the officer instead of your clients' etc]

Grounds for Suppression

1] Miranda violation
    a] Right to remain silent violation
    b] Right to counsel violation
2] Traditional involuntariness
3] statement resulted from unlawful seizure of the defendant

Waiving the hearing

Never waive hearing …. unless you get something you consider to be of greater value in return, such as:
    [1] Rosario material beyond what you would have received at hearing anyway [all GJ testimony?]
    [2] Better offer
    [3] A promise that an offer will remain open.
    Etc.

Preparation

The Client Interview

You should also conduct a thorough interview with your client regarding the circumstances of the interrogation. The client was there and may tell you something you can use.
The client interview should be done as early on in the case as possible while his memory is fresh. To effectively interview your client you will need to have a good grasp of the issues involved in statement suppression litigation. Otherwise, you may erroneously treat a detail as insignificant when it could have been used to obtain suppression.

A non-exhaustive list of topics and questions you should pose to your client include:

[1] Cop-client interactions :

Cop contact

- Describe each cop. [race, gender, age etc.]
-Tell me everything the cops asked you.
-Tell me everything the cops told you.
-Tell me everything the cops said to each other. [clients will often tell you that they heard two cops disagree over whether or not to make an arrest, whether or not to arrest everyone, etc.]
-Tell me how the cops were dressed. [uniforms? Plain clothes? Badges? Weapons?]
-How many cop were there at each point? [at scene of arrest? In cop on the way to the station? In the interrogation room? Etc.]
-Did any cop handle w weapon?
Which one?
Where?
When?

- Restraints

Were you handcuffed or otherwise restrained?
When?
By which cop [or security guard?]
Where?
Were the cuff removed?
Where were they removed?
By which cop?
Did that cop say anything when he removed the cuffs?

- Bathroom / Food + Drink

Were you taken to the bathroom?
When?
By which cop?
Was anything said to you during this bathroom trip?
Was anything asked of you?
How many trips there?
Etc.
Were you given food or drink?
When?
Did they ask you if you wanted this or did you ask?

- Communication

Did you communicate with anyone other than police [guardian, parent, friend, co-defendant, witness etc.]

At scene?
While in cop car?
While at station?

If so:
What was said to you?
By you?
Who was present? *3*
Etc.

- Promises

Were any made to you
What were they?
Who made the promise?
What was the promise?
What did you do or say after the promise?
Etc.

- Sentencing

Was this discussed?
Who brought it up?
What was said?
Etc.

- Co-defendant

Did you see the co-defendant at the station?
Did the cops tell you anything about him?
Did they show you a statement they said was from the co-defendant?

- Evidence

Did the cops tell you about the evidence they say they had? [DNA, prints etc.]
What did they tell you?
Did they show you any evidence?
What was shown to you?
What was your reaction? [verbally, physically]
Did they show you any photographs?

- Polygraph

Did the cops mention this at all?
What was said?
Did you agree to take the test?
Was the test done?
Where?
Who was present?
What was asked?

Did the cops talk to you afterwards about the results?

- Denials

Did you ever deny involvement?
What exactly did you say?
How did the cops react?
Did they say they thought you were guilty?
What was your reaction?
How many times did you deny involvement?

- Breaks

Did the cops stop questioning you at any point and then resume the questioning?
When was this?
Did they say why they were taking a break?
How long was the break?
Where were you during this period?
What did they say or do when they returned?
Did you say anything after the break?
What did you say?

[2] Miranda

- Where you advised of your rights? [go through the "rights" so the client knows what exactly you are talking about]
- Where was this done? [cop car, station etc.]
- When was this done?
- Which cop read them?
- Did they read from a card?
- Did they ask you about your educational back-round at any point?
What point?
What did they ask?
What did you say?
- When did this take place relative to:
Your arrival at the station?
The bathroom break?
The discussion of sentencing?
The call to your mom?
Etc.
- Right to remain silent
Did you ever say you did not want to talk to them or did not want to continue talking to them?
When?
Where were you at that point?
What cop did you say this to?
What were your exact words?
What response, if any, did you get from the cops?
Did they try to talk you into continuing?
Did they leave?

After you said you did not wish to talk, did you end up ever talking anyway?

Why?

What was said to or done to you first?

- Right to Counsel

Did you ever say anything about a lawyer?

What exactly did you say?

How many times did you mention this?

Where were you?

At what point in the interrogation?

What was the police reaction?

What did they do? Say?

Did they continue to talk to you?

Did you continue to talk?

If so, what did you say after you asked for the lawyer?

Did they say they would get you a lawyer?

Did they try to talk you out of having a lawyer?

How so?

Did they offer you a way to get a lawyer?

Did you ask to call a lawyer?

[3] Written Statement

-Was one created?

- Who wrote it?

- What exactly did this statement say?

- At what point was it created?

- Was it created in your presence?

- Did you sign it?

- Did you sign anything? [fingerprint card, deposition, PDR etc.]

- Did you read it before signing? [aloud, to yourself?]

- Was it read to you?

- Did you understand what was written?

- Did you recognize errors?

- Were you asked you make any corrections you desored?

- Did you?

- Did you ask to write your own statement?

[4] Educational back-round

Do you suffer from any learning disabilities?

Were you in special education classes?

Can you read?

How well?

Can you write?

[5] Arrest History [adult + juvenile]

Have you been arrested before?

When ? Where?

Have you ever been read your rights in the past?

When?

[6] Physical / Mental Health

Do you suffer from any illnesses?
Injuries?
Are you on any medications?

Discovery Materials

Read and become familiar with all documents provided in discovery, not only reports from cops that you expect to testify. You need to know when the testifying cop has contradicted himself. You will also need to know what others said so you know when the testifying cop has contradicted them.

If the statement your client allegedly made was made somewhere other than in a cop car or the police station, you may want to visit the scene.

Other Records

Aside from the materials traditionally provided to you by the prosecutor, you should seek other evidence that may prove useful at the hearing. These include the following:

[1] You may want to look at the **booking photo** of your client to determine you how he looked when he was interrogated. The photo may contradict the cop's claim that your client was completely coherent and sober when he was interrogated.
You can demand the photo from the prosecutor or have the Judge sign a subpoena for it.

[2] You may also want to acquire and review all **OEC [911] records** prior to the hearing. These records will often help you contradict a cop's claim that an event took place at a certain time.
For example, In a DWI case a cop swore he did not make the decision to arrest the defendant for DWI until he made numerous observation and the defendant failed several FSTs. He swore that only after this thorough investigation did he arrest him and order his car to be towed. The OEC records, however, clearly showed the cop was lying because they recorded the call for the tow truck as occurring before the cop even approached the car and engaged the driver. Without those records the Judge surely would have fallen for the cop's perjury and upheld the arrest.

[3] **Ambulance + Hospital records** generated after the arrest may support your argument that your client was ill, injured, or intoxicated when she was interrogated.

[4] The **medical/ mental health history** of your client may support your argument that your client was too limited mentally to appreciate and waive her constitutional rights. But then again, the chances of your client being the stupidest person in the interrogation room are pretty slim .

[5] **School records** may support your argument that your client cannot read or write well enough to have understood what she was signing.

[6] **Phone records [or a witness]** could be used to support your argument that your client's family tried to call the police and tell them she was represented by counsel and were ignored.

[7] **Maps + Aerial Photographs** may support your argument that the cops should not have stopped and interrogated your client in the first place because the address they were responding to was far away from the location where your client was stopped.

Police Interrogation Methods

The truth or falsity of your client's statement is not the primary issue at the Huntley hearing. However, these hearings should always be conducted, from the defense perspective, with an eye toward the trial. At the trial, if the police claim your client confessed, you will definitely want to convince the jury that the confession is false. If you cannot do so, a conviction is almost certain.

You need look no further than the many high-profile DNA exoneration cases to find instances where innocent people have confessed to crimes, including murder. These false confessions often resulted directly from dangerously faulty police interrogation techniques.

You should become familiar with the prevalent cop interrogation techniques, the most prevalent of which is the Reid Method. Knowledge of these techniques is invaluable when cross-examining the cop at the hearing. If familiar with these techniques, you will recognize when the cops have used them in your case.

Not only will your familiarity with these techniques allow you to recognize when the technique has been used on your client but it will also allow you to recognize when the technique has been used improperly. The cop will likely admit that for the techniques to work, it must be correctly and carefully employed. If you can then identify a failure on the part of the cop to follow the technique, you can use that failure to support your argument that the statement which resulted was involuntary [at the hearing] or false [at trial].

To acquire information about the interrogation training your cop has had, you can begin by issuing a discovery demand to the prosecutor. If unable to get this information prior to the hearing, you could ask the cops during cross-examination what training they have had specifically on interrogation techniques. If you learn the name of the training agency and the date of the training, you could also generate a subpoena for these materials. You can then educate yourself on these specific techniques in preparation for cross-examination at trial.

Among the common police techniques are the use of minimization. The police will often suggest to your client ways the client can minimize his conduct. This is done in an effort to make the client more comfortable admitting involvement. It is common for the police to suggest to our clients that perhaps they committed the act but did so while they were "blacked out", that they genuinely did not know the girl was 14, that they only had the gun for a few days after finding it, or that they only kept the gun because they feared for their lives, etc. The police know full well that these claims either hint at seldom if ever successful defenses ["balcked out"] or do not amount to a legal defense at all [possessing a gun out of a fear for safety].

Another police tactic is the inclusion in your client's written statement of corrections purportedly made by the client before the statement was signed. The police claim that corrections made to the statement after it was drafted but before it was signed is evidence that your client must have carefully read the statement. This is done to counter defense efforts to portray the statement as that of the officer and not of the client. The officer will tell your client to place his initials above each correction. In these cases, you can cross examine the officer at the hearing in an effort to reveal that the corrections were not the result of your client's careful examination of the statement but instead resulted from the investigator having drawn your otherwise inattentive client's attention to the error they planted in the statement.

> Q: There are two places in the three page statement where a word is crossed out and another is inserted right?
> A: Yes.
> Q: You wrote the original word?

A: Yes.
Q: You wrote all three pages?
A: Yes.
Q: And the words that were crossed out and replaced, you asked my client if that part was correct or needed to be changed?
A: I asked him but he told me what the change should be.
Q: And then you made the change and told him to initial what you had just changed?
A: Yes.
Q: You have been trained to interrogate people?
A: Yes.
Q: And you were specifically trained to draft statements for people that included information that was not correct right?
A: Yes.
Q: You were also trained to make sure the person's attention is drawn to the intentionally false portion and then to have them suggest a correction and initial the correction?
A: Yes.

Jury Instructions

Issues such as the voluntariness of a statement can be relitigated at trial. There are jury instructions specifically designed for these situations.
You should be familiar with these instructions and conduct the suppression hearings with them in mind.
* These jury instructions are attached.

Rosario material

The first thing you should do at a hearing is place a formal request for Rosario material on the record. Without a request you are not entitled to Rosario material. CPL § 240.44.
Even if you were just handed a packet of documents, make the request. You should also list, on the record, which documents you have been given as well as any documents you think may exist but have not been provided.
Be prepared to address the argument from the prosecution team [prosecutor, Judge etc] that a certain document is not Rosario material.
Rosario material includes documents, records or recordings made by or in the possession of the police or prosecutor. You are only entitled [provided you make a request] to the Rosario material for the witnesses that testify, not all potential witnesses.
A witness need not draft a document for that document to qualify as Rosario material for that witness. If the testifying cop told another cop something that the other cop then wrote down, that written document is Rosario material for both cops. Even a slight notation renders that document Rosario material.
You should also ask each witness about what documents they created or contributed to. Prosecutors often either do not know what is and what is not Rosario material or they fail to ask the cop for everything. More often than not the cop will admit he created or contributed to a document that he never gave the prosecutor. You should always ask each cop if he took notes. You should also ask him about certain documents you know are likely to exist because cops often forget what paperwork they completed until you ask them.

The Rosario Violation

If you learn during the hearing that there is Rosario material that has not been disclosed, you should demand immediate disclosure. If the prosecutor cannot produce the document immediately you should request that the witness's entire testimony be stricken. If the Court seems reluctant to compel the prosecutor to follow the law and disclose the Rosario material, you should remind the Judge that your client has a 6th Amendment right under the U.S. Constitution to confront and cross examine the witness and that this right will be violated if the prosecutor is allowed to get away with withholding the material in question. This will surely result in a request by the prosecutor to suspend or adjourn the hearing until the item is produced. This will also tick off the Judge.

If the item in question was previously requested, you should make a statement to that effect on the record: "Judge, the record should reflect that I requested all notes generated by the police in this case 60 days ago. Had the prosecutor complied with this request we could have concluded this hearing without interruption". This is yet another reason to make a comprehensive discovery demand early on in the case demanding all documents in the possession of the police.

If you receive Rosario material at the outset of a hearing or even during a hearing, make sure to take all the time you need to review it. There is no point in getting it if you are not prepared to use it. Simply tell the Judge you need time to review the material. If the Judge complains tell him that this delay could have been avoided had the prosecutor disclosed the material earlier.

If a Rosario violation is revealed at the hearing but the document you are entitled to is, in your estimation, not something you feel the need to have in order to complete your cross-examination of the cop, you may elect to proceed without it. If you do so, be sure to extract a promise from the prosecutor *on the record* that he will provide that material within X days.

The following is a partial list of documents that could exist in your case:

Simplified vehicle and traffic information
supporting depositions
supporting deposition for breath test administration
report of refusal to submit
alcohol influence report
hand written notes (People v. Buster, 69 NY2d 56); People v. Serrando, 184 A.D.2d1094, (1 Dept. 1992)
audio/visual recordings
crime reports
Miranda warnings card
police accident report
prisoner data report
interview log
search warrant affidavit *
inventory of property taken *
disposition of seized property form *
daily activity summary (People v. Goins, 73 NY2d 989)
investigative action report
tow report
seized vehicle report *
subject resistance report
property custody report
evidence bag labels (People v. Geathers, 172 AD2d 134)

prior testimony: PH, GJ, pre-trial hearing, etc…
911 tapes [People v. Ronald Morris, 647 NYS2d 893 (4th Dept. 1996)]
grand jury referral form
prosecution notes containing summary of witness testimony (People v. Barrigar, 233 AD2d 845)
prosecution notes of witness interviews (People v. Bell, 140 AD2d 937)
hospital records containing witness statements, if possessed by DA (People v. Campbell, 186 AD2d 212)
laboratory notes which form basis for laboratory report (People v. Christopher, 101 AD2d 504; People v. DeGata, 86 NY2d 40- FBI DNA lab notes)
parole, probation, medical examiner and prison records, if possessed by DA
ballistics report
fingerprint analysis report
testimony at CPL 60.20 hearing (People v. LaSalle, 1997 N.Y. Slip Op. 08121)
technicians evidence and photo reports
consent to search forms
domestic violence incident report
teletype request form *
post pursuit form *
mental hygiene information form *
eyewitness identification report *
query viewing report *
lineup report *
cooperating individual working agreement *
confidential informant personal history report *
suspected sexual assault report form *
sexual offense evidence collection kit label *
computer hard drive? Probably not : People v. Giraldo, 270 AD2d 97.
parole notes of prosecution witness People v. Fields , 146 A.D.2d 505, 537 N.Y.S.2d 157medical examiners autopsy report People v. Solomon, 160 Misc.2d 945
victim's application for crime victim compensation - People v. King, 241AD2d329.
Etc.

Construct a timeline

Through your cross-examination, you should attempt to develop a detailed time-line of events starting with the first contact with police until the end of contact with the police.
Break it into chunks: Contact on street, contact in cop car at scene, contact in car on way to station, contact between cop car and interrogation room, contact in interrogation room etc.
For each chunk: who was present? what environment?, condition of defendant? What was said to defendant? by whom? what did suspect say?
For each statement made to and by the suspect: who was present? was that statement recorded anywhere? Etc.
You want to learn the time-line of events but you do not necessarily want to make the cop comfortable by proceeding in chronological order. There is no need to cross-examine the cop about the initial encounter before cross-examining him about the alleged administration of the Miranda warnings for example. A chronological cross examination just makes it easier for the cop to keep his story straight. Feel free to jump around from one portion of the cop-client encounter to another during your cross examination.

The Interrogation Environment

Learn details about each location where the police had contact with your client.

What type of car was he in?
Who was in that car when he was there?
Was he locked inside?
How long was he in there?
Were the windows up or down?
Which interrogation room?
    [You could then ask to inspect this room at some point, even photograph it.]
Was client locked in room?
Dimensions?
Windows?
Was he ever removed ?
    Why?
    How many times?
    When?
    By who?
Etc.

Miranda Warnings

While there are five Miranda warnings, in the end, these warnings are designed to address two basic rights: [1] the right to remain silent and [2] the right to counsel.
* A copy of a typical warnings card has been attached

When are Miranda Warnings Required?

There is no need for the police to advise a suspect of his Miranda rights unless two factors are present: [1] the suspect is in **custody** and [2] the police intend to **interrogate** him.

When is Someone in Custody?

Test: whether a reasonable person, innocent of any crime, would believe that he was not free to leave the company of the police. People v. Yukl, 25 NY2d 585 (1969).

If the person is not in custody, there is no need to provide Miranda warnings.

The Court must consider the totality of the circumstances when deciding whether or not a person was in custody.
"Neither formal arrest nor mere investigatory focus is the hallmark of whether interrogation is custodial. " People v. Turkanich, 137 AD2d (2nd Dept. 1988).

A non-exhaustive list of factors to be considered include:
[1] The degree of cooperation shown by the suspect
[2] Did the cops display a weapon?
[3] Where the encounter took place
[4] How much or little freedom did the suspect have during the encounter
[5] Did the cops advise the suspect of his rights? [if they did, he was not necessarily in custody]
[6] Did the cops say anything about whether or not suspect was free to leave?
[7] Was the questioning investigatory or more accusatory?
[8] Was the suspect confined to a hospital bed and incapable of moving? People v. Tanner, 31 AD2d 148 (1st dDpt. 1968).[9] how was the suspect transported to the location of the interrogation?

[10] Was the suspect accompanied by a relative or friend [note that if the suspect is an adult he has no right to be accompanied by a friend or relative] ?
[11] Was the suspect hand cuffed or otherwise restrained at any point?
[12] Was the suspect frisked?
[13]Did the police appear to be focusing the investigation on the suspect?
[14] Was the suspect confined involuntarily to a psychiatric hospital? People v. Turkanich, 137 AD2d (2nd Dept. 1988)
[15] Was the suspect a recent immigrant from a country with a very different and perhaps oppressive political structure who could not understand English? People v. Turkanich, 137 AD2d (2nd Dept. 1988)
Etc.

The presence of one or more of these factors will not necessarily result in a finding of custody.

Your questioning should focus on these factors and anything else that may elicit responses from which you can make an argument that your client was in custody when the statements were made.

The condition of the suspect [age, education, mental illness etc] is not really a factor in this custody analysis. It is , of course, relevant when the issue is the voluntariness of a statement or the validity of an alleged Miranda rights waiver. This is because custody is based not upon what your client felt, but instead, upon what a reasonable innocent person would feel when subjected to the influences that exist in your case.

What Constitutes Interrogation?

[1] Any express questioning or its functional equivalent.
[2] Any words or actions that the police should know is likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291 (1980).

The following have not been found to constitute interrogation:

[1] A cop's questions that appeared to leave open the possibility that the suspect was not involved in the crime under investigation and therefore not designed to elicit an incriminating answer? People v. Cerrato, 24 NY2d 1 (1969).
[2] A cop accusing a suspect on the street of being a liar, to which he replied that he was involved. People v. Huffman, 61 NY2d 795 (1984).
[3] Questions designed to clarify a situation. People v. Rifkin, 289 AD2d 262 (1st Dept. 2001).
[4] Questions designed to protect the public safety such as "Where is the gun?" People v. Quarles, 63 NY2d 923 (1984).
[5] A cop, prior to any Miranda warnings, tells a suspect that he thinks the suspect is involved and should rat on other perpetrators. People v. Vasquez, 90 NY2d 972 (1997).
Etc.

The Right to Remain Silent

The right to remain silent is one of the two basic rights a person has when being interrogated in custody. If this right is invoked, the interrogation must cease.

We have covered the circumstances under which a person must be advised that he in fact has this right [custodial interrogation]. But you must also be familiar which the circumstances under which he has effectively invoked this right.

Invoking the Right to Remain Silent

According to the U.S Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966), "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease..".
This is definitely the case you want to refer the Judge to when the invocation of this right is in issue because subsequent case law has apparently undermined this sweeping holding.

Practically speaking, there must be an *unequivocal* invocation of this right. Anything less may not be effective.
The following do not constitute an unequivocal invocation of the right :

[1] A denial of wrongdoing. People v. Otero, 217 AD2d 796 (3rd Dept. 1995).
[2] The expression of an intention to think about whether or not to remain silent. People v. Jandreau, 277 AD2d 998 (4th Dept. 2000).
[3] The expression of the intention to wait and talk with the Judge. People v. Pierre, 309 AD2d 570 (1st Dept. 2003).
[4] A suspect's refusal to answer the questions of a particular cop. People v. Jones, 277 AD2d 329 (2nd Dept. 2001).
[5] A refusal to sign a statement. People v. Hendricks, 90 NY2d 956 (1997). People v. Curry, 287 AD2d 252 (1st Dept. 2001);
[6] A suspect's momentary silence upon being advised of his rights. People v. Brand, 13 AD3d 820 (3rd Dept. 2004).
[7] A suspect's periodic silence during interrogation. People v. Cohen, 226 AD2d 903 (3rd Dept. 1996).
[8] A suspect's refusal to answer some questions while answering others. People v. Morton, 231 AD2d 927 (4th Dept. 1996); People v. Lewis, 152 AD2d 600 (2nd Dept. 1989).
[9] The statement : " Ain't nothing I got to tell you". People v. Allen, 147 AD2d968 (4th Dept. 1989).
[10] A statement to the effect that the suspect he will not answer questions unless certain conditions are met. People v. Contini, 283 AD2d 323 (1st Dept. 2000). Etc.

The following have been considered unequivocal invocations of the right to remain silent:

[1] A statement to the effect that the person does not want to say anything. People v. Antonio, 86 AD2d 614 (2nd Dept. 1982).
[2] "I have nothing further to say." People v. Douglass, 8 AD3d 980 (4th Dept. 2004).
[3] " I do not want to talk about it". People v. Brown, 266 AD2d 838 (4th dept. 1999).
[4] A suspect's actual long-term silence upon being advised of his rights. People v. Breland, 145 AD2d 639 (2nd Dept. 1988).

The right to remain silent may not be invoked by anyone other then the suspect or his attorney, unless done by the parent or guardian of a suspect under 16 years of age.

Waiving the Right to Remain Silent

Recall that the admissibility of the statement will turn on the ability of the prosecutor to prove not only that the cops [1] advised the suspect of his rights but that the [2] suspect then waived the rights. The prosecutor has the burden of proving that the suspect waived his rights.

This waiver may be :
[1] express [a statement from the suspect that he is willing to waive his rights] or
[2] implied [for example: where a suspect makes no such statement but then responds to post-Miranda questions]. People v. Davis, 55 NY2d 731 (1981).

A waiver may also be either:
[1] oral [for example : where a suspect states that he does waive his rights but then refuses to sign a statement to that effect] or
[2] written.
You should first identify the variety of waiver that is being alleged [oral + express, oral + implied, written + express]. In each case you should demand all documents that contain a recording of this alleged waiver. These could include: notes, Miranda card, IAR, your client's written and/or signed statement etc.

An alleged **written and express** waiver is the easiest for the prosecutor to prove. You can expect the prosecutor to have the cop testify that Miranda warnings were given, that the suspect appeared to understand them, and that he then stated that he would waive his rights and agree to talk. The cop may then testify that he recorded the suspect's words on the warnings card or on the suspect's alleged written and/or signed statement. The prosecutor will then seek to introduce the writing, a Miranda warnings card for example, into evidence. The cop may also testify that the suspect himself wrote the waiver on some document.

* In this jurisdiction the cops almost always read the warnings from a two-sided card. One side of that card contains the five warnings followed by two "waiver questions". These questions are posed to the suspect after the five warnings are given. The card contains spaces after each of the two questions where the cop is to record any response from the suspect. Be sure to read the law enforcement agency's rules and regulations regarding the administration of the Miranda warnings so you will know when the cop has failed to follow them.

* If the prosecutor has the cop testify that he recorded your client's response to the waiver questions on the card and then recites the responses on the record, a subsequent attempt by the prosecutor to move the card into evidence could be met with a bolstering objection.

The failure of a cop to follow the rules and regulations or his failure to read the written warnings from the card verbatim will not necessarily render a subsequent waiver invalid. People v. Anderson, 146 AD2d 638 (2nd Dept. 1989). However, such a failure can be used at trial to undermine a jury's confidence in the cop's competence or the thoroughness of the investigation. It could also help you advance a theory that the cop may have violated other departmental rules in the case.

An alleged **implied** waiver will be more difficult to prove. The prosecutor might have the cop testify that the Miranda warnings were given, that the suspect appeared to understand them, that he refused to answer when asked whether or not he would waive his rights, and then he began to talk anyway.

The issue in implied waiver cases will be whether or not the words or actions of the suspect in the post-Miranda period constituted a waiver. The cop should be questioned about exactly what the suspect said that led him to conclude there was a waiver. The actions of the cop or cops, as well as those of the suspect, must be carefully explored.

For example: A cop claims your client never did say he was waiving his rights but that after the rights were read he began to answer their questions. Unchallenged, this will be considered an implied waiver. People v. Gonzalez, 288 AD2d 883 (4th dept. 2001). You should focus your cross-examination on just what the circumstances were at that time. For example, was the suspect sobbing uncontrollably such that he may not have heard or grasped the warnings?

The Right to Counsel

The right to counsel is the other of the two basic rights a person has when being interrogated in custody. If this right is invoked, the interrogation must cease.

When has the Right to Counsel Attached ?

[1] When an accusatory instrument has been filed against the person.

If you believe the statement was made after an accusatory instrument was filed you should be prepared to prove this either through cross-examination or through defense evidence such as documents or witnesses. People v. Rosa, 65 N.Y.2d 380 (1985). A review of the records at the court clerk's office will reveal the date and time the accusatory instrument was filed.

[2] By the actual entry of counsel in the case.

This can be proven either through cross-examination or through the testimony of defense witnesses, which may include the attorney herself.

[3] By the suspect's invocation of the right to counsel.

Invoking the Right to Counsel

Once the request for counsel is made, the police must cease all questioning until counsel is present. If a person is in custody and she invokes her right to counsel , she cannot waive this right unless and until counsel is actually present. People v. Rogers, 48 Ny2d 167 (1979); People v. Cunningham, 49 NY2d 203 (1980).

Even if, after invoking the right to counsel, a person starts talking to the police, the right to counsel has still not been waived.

For the right to counsel to attach, the request must be ***unequivocal*** and requires a statement that can be "reasonable construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police". McNeil v. Wisconsin, 501 US 171 (1991).

The suspect has not invoked the right to counsel where the suspect:

[1] The suspect states she is *considering* getting counsel. People v. Lattanzio, 156 AD2d 757 (3rd Dept. 1989).
[2] The suspect asks the cop if he needs counsel. People v. D'Eredita, 302 AD2d 925 (4th Dept. 2003).
[3] The suspect asks the cops if he *should* have a lawyer or tells them he should have a lawyer. People v. Manzi, 292 AD2d 849 (4th Dept. 2002); People v. Thompson, 271 AD2d 555 (2nd Dept. 2000).
[4] The suspect states that he *might* want to talk to a lawyer. People v. Fridman, 71 NY2d 845 (1988).
[5] The suspect states that he does not want a lawyer now but asks if he can ask for one later. People v. Snickles, 206 AD2d 675 (3rd Dept. 1994).
[6]The suspect states that he *intends* to talk to his lawyer. People v. Carrier, 270 AD2d 800 (4th Dept. 2000).
[7]The suspect states that his *family will be getting* him a lawyer. People v. Raco, 168 AD2d 806 (3rd Dept. 1990).
[8] A parent of the suspect tells the cops an attorney for their adult child was en route to the station. People v. Grice, 100 N.Y.2d 318 (2003).

The following have been found to constitute an actual invocation of the right to counsel:

[1] A response of "No" when asked if he will talk to the cops without counsel. People v. Glover, 87 NY2d 838 (1995).
[2] A suspect asking a third party, while in the presence of the police, to call his lawyer . People v. Buxton, 44 NY2d 33 (1978).
[3] A suspect stating he wants a lawyer.
[4] Where an attorney or the attorney's professional associate informs police that the suspect is represented by counsel. People v. Grice, 100 N.Y.2d 318 (2003).
[5] Where a parent of a juvenile suspect tells police he wants a lawyer. People v. Mitchell, 2 N.Y.2d 272 (2004).
Etc.

Cross-examination in this area should focus on:

What did he say?
What was your response?
Did you record his exact words?
Did anyone record his words?
Etc.

If the police claim he made a statement after he requested counsel, then you will need to question on the circumstances:

What time was the request?
What time are you claiming he made the statement?
What was done in the interim to get him counsel?
Did the interrogation cease immediately?
Or did you linger in the room?
What was said to him after the request?
What was said in his presence?
Who had contact with him between the request and the statement?
What was done in his presence during this period?
** Even acts could be enough to provoke a statement and constitute a right to counsel violation*

Interrogation on Other Matters

If a suspect is in custody on one case and either [1] has counsel or [2] requests counsel, any custodial interrogation on any subject, whether related or unrelated must cease. People v. Burdo, 91 N.Y.2d 146 (1997).
You should therefore determine at the outset, whether or not your client had counsel on another matter at the time she was interrogated. If she did, you should be prepared to prove this at the hearing. This can be done through the testimony of the defendant, the testimony of the attorney on the other matter, perhaps court records etc.

Adequacy of the Miranda Warnings

The cops need not use any particular language when advising a suspect of his rights. They are merely required to communicate the basic thrust of the warnings. People v. Anderson, 146 AD2d (2nd Dept. 1989).

When has a Suspect Waived his Rights?

For a waiver to be valid it must be [1] voluntary and [2] knowing / intelligent.

[1] **Voluntary**. To be considered voluntary, the waiver must be the "product of free and deliberate choice". Colorado v. Spring, 479 US 564 (1987)
[2] **Knowing / Intelligent**. To be considered knowing / intelligent, it must be " made with full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it". Colorado v. Spring, 479 US 564 (1987). A waiver need not be intelligent in the sense it was a good idea.

At the hearing, the prosecutor will attempt to establish a valid waiver through the testimony of the cops. The cop will surely testify that he explained the rights to your client. He will also testify that before doing so he questioned your client in an effort to judge his understanding, his physical condition, and his sobriety, or lack thereof. The cop will then testify that no pressure, force, threats, or promises were made to your client in an effort to obtain the waiver.
This testimony, standing alone, will be enough to prove a valid waiver. You should cross-examine the cops in an effort to show that the waiver may not have been as valid as claimed.

Among the standard areas of inquiry are the following:

[1] **Education**. The cop will testify that he asked your client questions about his educational backround and perhaps his ability to read and write.
While the prosecutor will not inquire further, you should. Ask not only about what efforts were made to determine his educational backround, but more importantly, what efforts could have been made but were not.

Did you ask him what grade he last completed?
Did you ask him when he was last in school?
Did you ask him if he was in special education classes while in school?
Did you ask him if he suffered from a learning disability?
Did you ask him if he suffered from dyslexia?
Did you have him read something aloud to make sure he could read well?
Etc.

[2] **Sobriety / Lack Thereof**. The prosecutor will merely ask the cop if he is trained to recognize when someone is intoxicated and whether or not your client was, in his opinion, intoxicated, at the time of the interview. An objection may be appropriate if the prosecutor has failed to lay an adequate foundation for the cop's opinion that your client was intoxicated.
You should ask the cop as many questions as you can on this topic.

Did you ask him if he drank anything that day?
Did you ask him how much?
Did you ask him what he drank [beer, liquor, etc]
Did you ask him the size of the drinks?
Did you ask him what time he drank them?
Did you ask him if he is on any medication ?
Did you ask him to take any FSTs?
Breathalyzer?
Even an Alco-Sensor test?
Etc.

[3] **Mental / Physical health**. The cop will merely testify that your client did not appear ill or injured. You should again question the cop about all of the steps he could have taken to determine your client's condition but failed to take.

Did you ask him if he was ill?
Did you ask him if he was injured?
Did you ask him if he was taking medication?
Did you ask him if he had been prescribed meds. but had not been taking them?
Did you ask him when he last slept?
Did you ask him if he suffered from any mental illness?
Etc.

What is the Burden of Proof at a Huntley Hearing and Which Party has it?

The prosecutor opens the hearing with the ***burden of going forward***. Depending upon the particulars of the case, the prosecution can meet this burden by proving by a that :
[1] Miranda warnings were not required because the suspect was either
[a] not in custody or
[b] not interrogated [the statement was spontaneous], or
[2] Miranda warnings were given and the suspect waived his rights.

This is usually accomplished by having the cop testify that the suspect was either not in custody, not interrogated, or was advised of his rights and proceeded to waive them and make a statement.

If this can be accomplished, the burden then shifts to the suspect to prove that he :
[1] was the subject of a custodial interrogation [and therefore should have been advised of his rights but was not] or
[2] was advised but did not make a valid waiver of his Miranda rights.

The prosecutor has the burden of proving beyond a reasonable doubt that the defendant has waived his *Miranda* rights. 124 AD3d 36

Hearsay

Hearsay is admissible at a Huntley Hearing to establish any material fact. CPL§ 710.60(4). However, hearsay alone will not be sufficient. People v. Gonzalez, 80 N.Y.2d 883 (1992). Therefore, at a hearing you will occasionally see a cop testify about what another cop said.

The "Spontaeous" Statement

Recognizing that suppression may otherwise result, cops will often claim your client's statement was "spontaneous" and therefore not the product of interrogation in two situations:

[1] **Miranda:** Often, the cops claim your client's statement was made while in custody and before any Miranda warnings were administered. Realizing that suppression could result, the cops will often claim that the statement was "spontaneous".
In a Miranda setting, the spontaneity of a statement will depend upon whether or not it was the product of "express questioning or its functional equivalent". People v. Bryant, 59 NY2d 786 (1989).

[2] **Right to counsel**: Cops will occasionally concede that the statement was indeed made after your client requested an attorney. They will then claim that they honored his request and that the statement was made by your client spontaneously.
In a right to counsel setting, spontaneity is found where the statement was not the result of "inducement , provocation, encouragement or acquiescence, no matter how subtly employed".
People v. Maerling, 46 NY2d 289 (1978). The test is whether or not the statement was made "without apparent external cause, i.e., self-generating". People v. Stoesser, 53 NY2d648 (1981). In fact, just because " a statement was volunteered or not made in direct response to questioning, however does not render it spontaneous. Rather, it must satisfy the test for a blurted out admission, a statement which is in effect forced upon the officer." People v. Grimaldi, 52 NY2d 611 (1981).

It will clearly be more difficult to sustain a "spontaneous" statement claim in a right to counsel case than it will be in a Miranda case. Police activity that does not rise to the level of "express questioning or its functional equivalent" may very well be considered "inducement , provocation, encouragement or acquiescence, no matter how subtly employed".

You should therefore identify which situation you are dealing with and proceed accordingly.

In both situations, but especially in right to counsel situations, you should question the cops very thoroughly about everything they said and did in your client's presence between the time he invoked his right to counsel and the time the statement was allegedly made.

The following cop activity *after the invocation of the right to counsel* could undermine a claim that your client's statement was "spontaneous":
[1] Arranging for the suspect to make a telephone call and them hiding nearby while eavesdropping on the conversation. People v. Moss, 179 AD2d 271 (4th Dept. 1992).
[2] Showing the suspect his co-defendant's alleged confession. People v. Lucus, 53 NY2d 678 (1981).
[3] Advising the suspect of Miranda warnings a second time after he invoked his right to counsel. People v. Huyler, 110 AD2d 1064 (4th Dept. 1985).
[4] Questioning a suspect about other crimes after his lawyer called and told them to cease all questioning on one charge. People v. Rogers, 48 NY2d 167 (1979).

Who has the Burden of Proof when a Statement is Alleged to be Spontaneous ?

The prosecutor has the burden of proof when she claims the defendant's statement was not the product of interrogation, but instead was spontaneous. People v. Roberts, 12 AD3d 835 (3rd Dept. 2004).
This is often accomplished by having the cop testify that there was no police activity or statement that they could have reasonably believed would have provoked an incriminating response.
When the spontaneity of a statement is in issue, you should cross-examine the cop in an effort to reveal some police question, statement, or action which they should have known would have caused the defendant to utter the statement in question. Even talk between two cops within earshot of the defendant may qualify. You should therefore, during cross-examination, painstakingly elicit every last detail of the entire cop-client encounter, not merely the period immediately before the statement was allegedly made.

Example:

What did you [Cop A] say to my client?
What did Cop B say to him?
What did Cop B say to you while in the interrogation room?
What did you say to Cop B while in the interrogation room?
Were there any other cops in the area?
Where were they?
Were they working on this case?
Did anyone communicate with them while my client was present?
What was said?
Was the door to the interrogation room open during the interrogation?
Was he taken to the bathroom?
By you or some other cop?
Was that other cop working this case?
What was said to my client by the other cop during the escort to the bathroom?
Did my client ask him questions?
What were the answers given to him?
Where was the co-defendant during this time?
Was he on the same floor?
Was he ever escorted by the interrogation room where my client was?
Was the co-defendant's statement in the room where my client was?
As it shown to him?
Were any photographs in the room?
Were they visible?
Etc..

After the "Spontaneous" Statement

If a statement is actually "spontaneous" , a cop's requests for clarification or repetition is not considered interrogation. People v. Scotchmer, 285 AD2d 834 (3rd Dept. 2000).
If, instead, the cop responds with questions about the investigation, an interrogation may be found to have occurred. People v. Ackerman, 162 AD2d 793 (3rd Dept. 1990).

** Cops throw around the word "spontaneous" during Huntley hearings much like they throw around the phrase "in plain view" during Mapp hearings. These are phrases that cops and prosecutors know the Judge will fall for every time. And in fact, without regard to the ridiculousness of the claim, Judges dutifully deny suppression motions for no other reason than the fact some cop took the stand and aped these words.*
However, you should always object to the use of these phrases by cops on the stand. These are legal conclusions that cops are not competent to advance.

Two Theories of Suppression in cases where there has been an Illegal Intgerrogation

'Cat out of the bag"

When the police elicit a statement in violation of Miranda and later elicit one in compliance with Miranda, the defendant could argue that the second statement was compelled by the first.
Here, the defendant has the burden of proof. He must prove that he was so committed to the first that he felt compelled to make the second. People v. Tanner, 30 NY2d 102 (1972).This may require the defendant to testify because his state of mind will be in issue. People v. O'Hanlon, 252 AD2d 670 (3rd Dept. 1998).

Example:
D is approached by the cops on the street. He is told to walk over to the cop car. He is then asked about his possible involvement in a burglary. He says he only entered the building because he was hungry and wanted food. The police did not read him his rights before this statement is made. The suspect is removed to the PSB where later he is read his rights and formally questioned about the burglary. He then repeats what he said before . He states that he would not have entered if he had enough food to eat and that he was sorry for breaking in to the building.
The court agrees the first statement was the result of a custodial interrogation and that statement, absent Miranda, is not admissible.
However, the Court could still find that the second statement, given after the Miranda warnings, was admissible.
To obtain suppression of the second statement the defendant may need to testify that he only made that statement because he already committed to the first one. He could testify perhaps that he already committed to the admission and was simply repeating the prior statement or expanding on it. He could add that he felt the damage was already done and that he saw no point in now making a denial.
In a nut shell - the cat was already out of the bag and there was no way to get it back in there. Basically, the defendant felt he might as well keep talking.

Continuous Interrogation

Not to be confused with the "Cat out of the bag" theory is the "continuous interrogation" theory.
This theory holds that once a statement is illegally obtained by police through a custodial interrogation all subsequent statements are tainted and must be suppressed as well. People v. Chapple, 38 NY2d 112 (1975).

Example:
D is interrogated about a crime and makes a statement without having been advised of his Miranda warnings. The police later advise him of his of his warnings and again interrogate him and he makes another statement.
The first statement is not admissible, but what of the second?
What effect did the break between the first and second interrogation have on the admissibility of the second statement?
In this situation, the burden is on the prosecutor to prove that the second portion of the interrogation was not merely a continuation of the first interrogation, but a distinct interrogation. The prosecutor must prove that the two periods of interrogation were separated by a "pronounced break".
The defense will argue that the whole affair was instead, one continuous interrogation.

Therefore, the defense will want to question the cops in such a way that any break was minimal as opposed to "pronounced".

Did the cops even leave the room?
Was D ever alone during this time ?
How long was the break? People v. White, 10 NY3d 286 (2008).
When exactly was the first statement made? [if they cannot prove this how can they prove a long break?]
What happened with D during this time?
Was the suspect asleep during this time? People v. Moyer, 292 AD2d 793 (4th Dept. 2002).
What was said in D's presence during this time?
What was made visible to D?
Were both parts of the interrogation done in the same location? People v. Mallaussena, 10 NY3d 904 (2008); People v. Moyer, 292 AD2d 793 (4th Dept. 2002); People v. Segarra, 9 Mics. 3d 1115 (NY Sup 2005)[changing room does not, alone, constitute a break].
Were the same police personnel involved? People v. White, 10 NY3d 286 (2008); People v. Moyer, 292 AD2d 793 (4th Dept. 2002)
Etc…

"Pedigree Questions"

Just what is and is not a "pedigree question" is not well understood and will vary with the facts of the case. Often you will see a statement that your client is alleged to have made in response to booking type questions but the prosecutor will not have served any CPL § 710.30 notice for that statement. If you move to preclude the prosecutor will argue that such statements fall under the "pedigree exception" to the notice requirement.

The test for whether or not a statement falls into the "pedigree exception" to the notice requirement is whether or not the question was "reasonable likely to elicit an incriminating response". People Rodney, 85 NY2d 289 (1995). Or, should the cop have known, under the circumstances of the case, that the question was likely to invoke an incriminating response.

Pedigree questions are those that directed solely to administrative concerns such as:

What is your date of birth?
What is your address?
Weight? Height?
Do you have any illnesses? Tattoos?
Etc.
People v. Antonio, 86 AD2d 614 (2nd dept. 1982); People v. Hester, 161 AD2d 665 (2nd dept. 1990).

Whether or not a statement falls under the pedigree exception depends upon the facts of the case. For example, in a drug case where a home was searched and contraband was discovered, a question to a suspect about where she lives may very well result in an incriminating answer.

If you do not move to preclude [because you not were given notice] or your motion to preclude is denied, you are entitled to argue that these statements should be suppressed. At the Huntley hearing, the prosecutor must still prove that these statements were made only after the defendant was advised of and waived his constitutional rights. If the court agrees with the prosecutor that the statements fall under the pedigree exception, you are entitled to fully explore the circumstances under which these statements were made, just as you would do with any other statements.

Keep in mind that by moving to suppress you may be waiving the right to appeal the court's decision denying preclusion. People v. Kirkland, 89 NY2d 903 (1996).

Suppression because of Traditional Involuntariness [as opposed to a Miranda violation]

A statement is considered involuntary in two situations:

[1] When it is the product of a Miranda violation [right to remain silent or right to counsel] or
[2] "When it is obtained from him:

(a) By any person by the use or threatened use of actual ***physical force*** upon the defendant or another person, or by means of any other ***improper conduct*** or ***undue pressure*** which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement; or
(b) By a public servant engaged in law enforcement activity or by a person then acting under his direction or in cooperation with him:
(i) by means of any ***promise*** or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself; or
(ii) in violation of such rights as the defendant may derive from the constitution of this state or of the United States." CPL § 60.45.

Unlike when a defendant claims a Miranda violation, when a defendant alleges that the cops obtained a statement from him that was involuntary in the traditional sense, the prosecutor must disprove such a claim ***beyond a reasonable doubt***. In these situations the defendant never has any burden of proof.

Witherspoon - When Must Prosecutor call other Cops?

The more cops that are forced to testify at the hearing, the better for the defense because you will have the chance to cross-examine them prior to the trial.

However, the prosecutor need not call all cops involved unless the defense can identify a "bona fide factual predicate" which shows that uncalled cops possess material evidence on the issue of voluntariness. People v. Witherspoon, 66 NY2d 973 (1985).

You should therefore try to generate some evidence in the record that you can point to in support of your claim that the prosecutor has not sustained his burden of proof because he failed to call additional witnesses.

For example: Cop A testifies that he met your client at 3:00 at which time he administered Miranda warnings and then elicited a statement.. Cop A testifies that he believes that prior to 3:00 your client was questioned by Cop B but that he does not know what was said.
In this circumstance you would argue that the prosecutor cannot sustain his burden without calling Cop B because Cop B may very well have engaged in a pre-Miranda interrogation that calls into question the voluntariness of the post-Miranda statements.

Even if you cannot identify a "bona fide factual predicate" , the prosecutor may still be unable to meet his burden without calling all cops that had contact with the defendant where:

> [1] the defendant testifies that he was physically abused by a cop other than the ones that testified for the prosecutor. People v. Valeius, 31 NY2d 51 (1972).
> [2] the defense introduces evidence that the D was physically injured while in police custody. People v. Yarter, 51 AD2d 835 (3rd Dept. 1976).
> [3] the defendant testifies that he did ask a cop, other than the ones that testified for the prosecutor, for an attorney and none was provided. People v. Anderson, 69 NY2d 651 (1986).
> [4] the defendant testifies that a cop, other than those that testified, said or did something to him which made him feel he had no choice but to accompany them to the police station. People v. Travis, 162 AD2d 807 (3rd Dept. 1990).

In these circumstances, and perhaps others, the prosecutor cannot meet his burden without offering the testimony of the cops in question.

Defense Witnesses [including the defendant]

A defendant's testimony generally cannot be used against him at trial in the prosecutor's case in chief. Simmons, V. United States, 390 US 377 (1968). However, a defendant's testimony at a suppression hearing may be admissible at his trial if it was not related to his constitutional claim.

For example:
In a murder case, the suspected murder weapon is allegedly found in the defendant's car after a traffic stop. The defendant moves to suppress because the stop was unlawful in that he had not been speeding. The defendant's testimony about the basis for the stop cannot be used against him at trial. However, any testimony he choose to offer about the murder may be. So if he testifies: " I was not speeding , that cop is a lying sack of shit! And another thing, I shot that guy because he called me an asshole!", he runs the risk the second part could be admissible at his trial.
You should therefore counsel your client about these dangers before he testifies and you should structure your direct examination accordingly.

Likewise, the prosecutor may not question a testifying defendant about whether or not he is guilty. People v. Blackwell, 128 Misc.2d 599. Any such questions should be met with an immediate objection followed by a motion to strike.

A defendant has a limited right to call witnesses at a suppression hearing. People v. Chipp, 75 N.Y.2d 327 (1990).

The Suppression of Statements to Private People

You can move to suppress but not preclude these.
CPL 710.30 only applies to statements to cops.
However, some statements , even those allegedly made to private citizens, may be inadmissible. CPL§ 60.45(2)(a) ; People v. Pagan, 211 AD2d 532 (1st Dept. 1995).

Private citizens include:

[1] security guards
[2] a jailhouse snitch. People v. Cardona, 41 NY2d 333 (1977).
[3] a witness or complainant.
Etc..

There are two grounds upon which such statements can be suppressed:
[1] **Agency**. The private citizen was really acting at the behest of the cops and therefore an agent of the cops. Therefore, the defendant was entitled to Miranda warnings just as he would have been had the cops elicited the statement.
If a statement was made to these types of witnesses the prosecutor has the burden of proving the witness was not acting at the behest of the cops. This is true if the issue is raised in the defense notice of motion. People v. Mendoza, 211 AD2d 493 (1st Dept. 1995).

[2] **Involuntary**. You could allege that the statement was involuntarily [in the traditional sense because Miranda does not apply] made. If you do so, the prosecutor may be required to prove otherwise and may be forced to offer the testimony of that person at a hearing.

Obviously, given that there are no notice requirements for the intention to offer the statements to private people, you may not ever learn of these statements until trial [a discovery demand for any such statements may be a good idea]. However, if you do learn that someone is claiming your client made a statement to some non-cop you may want to move to suppress it as involuntary.

Pinning down witnesses

Unless this is your first day on the job, you are aware that police officers, often with a push from the prosecutor, will try to tailor their testimony so as to avoid constitutional objections.
However, they often do not appreciate the issues in these cases at the hearing stage. This is especially true of street cops. The seasoned investigators often know what they want to accomplish and adjust their testimony accordingly. In any event, prosecutors often do not prepare officers as thoroughly for hearings as they do for trials. You should therefore take advantage of this by committing the officer as much as possible at the hearing. If properly done, no amount of trial adjustments to that testimony can undo the damage. But if you leave them an opening they will try squeeze through it at trial..

Ex: At the hearing you ask the cop "What did he say then?" and the cop says "Nothing". This is a seemingly good answer. However, the cop can now claim at the trial when you try to impeach him, that he was not sure what point in the encounter you were talking about when you asked that question at the hearing. Although it is very tedious, be sure to orient the witness to the exact point during the encounter you are talking about as often as possible.

Ex: Immediately after you placed him in the rear of your cop car in front of 123 Fake Street, did he say anything?

At the conclusion of the hearing you should know exactly what this witness will say at trial. That is a comforting thought because there will be no surprises. The witness will either testify at trial consistent with their hearing testimony or will testify differently and be impeached with their hearing testimony.

Handling the Judge

The primary concern of course is not upsetting the judge by asking too many questions during the hearing. Ha! Just kidding. This should never be a concern. It is always better to do a thorough job and tick the Judge off than abandon a line of questioning because the Judge appears annoyed.
And do not abandon a line of inquiry just because an objection has been sustained. Just ask your next question.
If the Judge would rather be doing something else rather than listening to testimony then he or she is in the wrong line of work. Or the judge could grant your motion to dismiss, summarily grant your motion to suppress, or even make you a reasonable plea offer. But if the judge does not want to take these steps, there is no reason for you to reward the judge by failing to thoroughly cross-examine the witnesses.
Abandoning your line of questioning serves only to positively reinforce the Judge's behavior. If, instead, you are prepared enough to meet every sustained objection with a demand for a basis and a counter argument the Judge may relent and allow your questions in the first place because she will eventually identify that as the path of least resistance .

Objections

Anticipate the objections you will get and have counter arguments prepared. You should be prepared to cite case law and even offer the Judge a copy of a decision that supports your position.
Judges will often back down when you push back like this. Again, their natural inclinations often appear to be to defer to the prosecutor's position. If it becomes clear to the judge that assisting the prosecutor will prolong the hearing or result in questionable rulings that will be the subject of appellate review, they may very well choose to serve their self- interest rather the interests of the prosecutor.

Ex: What are you claiming he said after you returned from the bathroom?
DA: objection!
Judge: Sustained.
Defense: What was the basis for the objection?
Judge: I said sustained!
Defense: Judge, the record must reflect the reason for the objection otherwise the appellate court will have difficulty determining whether or not your decision to sustain is correct.
Judge: prosecutor, I assume you objected because this hearing deals merely with the voluntariness of the statement and therefore the specific content of the statement is not relevant.
DA: er, uh… exactly!
Judge: Sustained on that basis. Ask your next question counselor.
Defense: Judge, I have a decision from the NYS Court of Appeals which supports my position that the questions asked and the answers given are very relevant at such a hearing. I will cite People v. Remaley, 26 NY2d 427 (1970). I even have a copy for the Court's review.
Judge: Proceed counselor but keep it brief.

If the Court begins to realize that each sustained objection will lead to a lengthy exchange it may very well stop interfering and just let you ask your questions.

BTW - Content *is* relevant

The questions asked and the answers given *are* relevant at a Huntley hearing. People v. Remaley, 26 NY2d 427 (1970); People v. David, 44 AD2d 548 (1st Dept. 1974). You may want to have copies of these decisions with you for hearings.
Therefore ask the cops which questions they asked and which answers they received. Ask them what order the questions were in as well. Make sure to ask them exactly what was said to the defendant immediately prior to each alleged statement.

And there is really no such thing as a "beyond the scope" objection to a question asked on cross examination

Prosecutors will often try to derail an effective cross examination by objecting to a question as "beyond the scope of direct". And puzzlingly, Judges will entertain this objection when they should not. While an attorney is bound by the scope of a *re-direct* examination, he is not bound by the scope of the direct examination. People v. Kennedy, 70 A.D.2d 181 (2nd Dept. 1979)[" it is well settled that in a criminal case a party may prove through cross-examination any relevant proposition, regardless of the scope of the direct examination"]; People v. Sanders, 2 A.D.3d 1420 (4th Dept. 2003).

You are therefore free to ask an officer called as a witness on another suppression issue (4th Amendment, Wade etc) about anything related to the admissibility of the statement. This can be very revealing because the prosecutor will not have prepared that officer to testify about another subject and therefore the officer will not have been prepared in advance for how to make the police activities appear lawful. And this is yet another reason that you should try to convince the court that hearing are needed on as many issues as possible [Remember, we do not move for hearings, we move to suppress and judges respond by granting hearing so they can learn enough to decide the motion].

For the Huntley part of a multi-issue hearing, the prosecutor will surely call the Investigator who interrogated your client at the police station in an effort to prove the statements made there were lawfully obtained. For the 4th Amendment part of the hearing, the prosecutor will surely call the officers who stopped, searched, or arrested your client. You are not precluded from cross examining the officers who stopped your client about matters that the prosecutor chose not to cover. You can question those officers in an effort to elicit information that supports your motion to suppress the statement as well.

> Example: [at a Huntley, 4th Amendment Hearing, an officer testifies on direct examination about just the stop and search of your client]
> Q: Officer, you were present at the scene where my client was arrested?
> A: Yes.
> Q: And you have just testified about how you and your partner stopped my client?
> A: Yes
> A: And you testified about the search of his backpack and person?
> Q: He was then cuffed and placed in your patrol car?
> A: Yes.
> Q: That was at 3:00?
> A: Yes.
> Q: There were other police officers that arrived to assist you?
> A: Yes.
> Q: You alerted your partner and all other officers at the scene or on their way to the scene that you found a gun?
> A: Yes.
> Q: You did this by using your radio?
> A: Yes.
> Q: And you were also receiving information over your radio while at the scene?
> A: Yes.
> Q: Do you know where your partner was when you were searching the car?
> A: Not the entire time, no.
> Q: Your partner was in the patrol car during at least part of that time right?

A: Yes, I think he was.
Q: Aware what all the other officers were doing while you were busy searching the car?
A: No.
Q: And my client was driven from the scene at 3:24?
A: Yes.
Q: So for the 24 minutes he was in your patrol car, you were not dealing with him?
A: Right.
Q: But because you were searching his car, you do not know what other officers had contact with him right?
A: Right.
Q: And you therefore do not know what they said to my client right?
A: Right.
Q: Did you provide him with Miranda warnings before he was driven away?
A: No.
Q: Did anyone?
A: Not that I am aware of.
Q: Who drove him to the station?
A: We transferred him to another car and they drove him?
Q: Do you know if those officers provided Miranda?
A: I don't know.
Q: Do you know what those officers said to him during that ride?
A: No.

What began as a direct examination about the stop and search has now yielded information that could be used to support your motion to suppress the statements your client is alleged to have made for a 5th or 6th Amendment [Miranda] violation. Because you did not restrict your cross examination, as the prosecutor did, to the police stop and search, you now have support for an argument that any number of officers could have posed your client a question [interrogation] while he was in the police car [custody] without first providing Miranda warnings and that your client could have heard transmissions between officers.

> Example: [The investigator testifies that when he questioned your client at the station about a gun that was found in the car, your client said "I have never even looked in the trunk!" And that he said this *before* the Investigator ever mentioned where the gun had been located. This is a seemingly damaging statement in a case where your client denies knowledge of the presence of the gun]
>
> Q: After his arrest he was placed in your patrol car?
> A: Yes.
> Q: Your patrol car was parked behind the car my client was riding in by about 10 feet?
> A: Yes.
> Q: And it was then that you searched his car?
> A: Yes
> Q: You located a gun in the trunk?
> A: Yes.
> Q: And you also called a technician who then photographed and removed the gun?
> A: Yes.

With this testimony of events that took place *after* the stop and arrest [and is beyond the scope of the direct], you are in a position to now argue that your client's subsequent statement to the Investigator is not as damaging as it appears because your client's knowledge about the location of the gun could have been derived from his observations while in the police car.

Refreshing a witness's recollection

Cops will often ask to look at a report before they answer a question. Do not automatically permit them to do so. You are in control of whether or not they handle any exhibit when you are examining them.

Instead , make them admit they cannot possibly recall the event without looking at the document. Make them admit that they have no independent memory of the event and that without looking at the document that memory is lost for ever. Make them admit that they created the document specifically because they often forget events [given the passage of time, subsequent investigations, etc]. Make them admit that the document represents the only source of information in the possession of the police regarding that event. Make them admit that without that recording, the specifics of the event would have been lost.

Even after these concessions, do not feel you must permit the cop to read the document. You may want to see how many other things he is not able to recall. If you simply give him the document he will read the entire report and then be prepared to answer your next questions instead of giving you more "I do not know" answers.

In fact you need not ever permit him to read the document.

Impeachment

One reason for perhaps declining to permit the witness to refresh his recollection with a document is because you will only rarely impeach a cop with a prior inconsistent statement at a hearing. Unless you think the impeachment will contribute to suppression you should probably defer the impeachment until trial.

Impeachment of a cop with a prior inconsistent statement at a hearing will serve to (1) make that cop hostile and therefore less likely to give you the answers you want and (2) alert him and the prosecutor to the impeachment they can expect at trial.

If you expect before a hearing that you will be impeaching the witness, you may want to wait until the later part of your cross examination to do so. Impeachment often results in hostility, defensiveness, and less cooperation. You should consider grabbing the low hanging fruit early while the witness is as cooperative as they are likely to get and then exploring areas where the witness is likely to resist giving you the answers you want.

However, if the witness is reluctant to testify truthfully from the outset, you may want to impeach immediately to teach them a lesson. A witness who thought they could get away with not bring truthful or with saying "I don't recall" in response to every question needs to be taught a lesson early. A precise and forceful impeachment [with prior inconsistent statement, a rules violation etc] will communicate to the witness that you know how to make them pay for such behavior [behavior that presumably has worked on other defense attorneys]. Being impeached is embarrassing and painful. The impeached witness may very well fall into line and just tell the truth instead of advancing an agenda if they realize you are prepared, competent, and unafraid to push back.

POLICE GENERAL ORDERS

These are solid gold. No hearing cross examination should be done without knowledge of the police rules governing the subject [interrogations, searches etc]. These rules can often be obtained through Freedom of Information Law requests. If your request is denied, you can seek a subpoena. Ideally you would prefer not to have to seek a subpoena for fear that the prosecutor will learn what you are up to.

Officers are rarely prepared to be confronted with their own departmental rules. Prosecutors are often unfamiliar with these rules.

Violating police rules will not, in and of itself, render a statement inadmissible, but rules violations do impact the credibility of the witness, the thoroughness of the investigation, etc. And while judges are often unmoved by even dozens of rules violations, you will often get traction from a jury at the trial. And all hearings should be done with the trial in mind. Judges know that the police regularly violate police rules and they never consider it the least bit troublesome. Juries are often aghast when they learn that the police violated 15 different rules in the scope of a single investigation.

So how do you make the most of the rules violations?
You will know from your review of the police reports whether or not some rules have been violated. You can read what the police claim they did and compare that to what the rules require them to do. Outside of the failures you detect from your review of the police reports, you will learn of many more rules violations *during* your cross examination. If you are not familiar with the rules you will not know whether or not they were violated. If you are familiar, you can ask the officer whether or not they did or did not perform a certain act. Each time they did something they were told not to do you impeach them. Each time they failed to do something they are required to do you impeach them.
As with other forms of impeachment, you first commit the officer to the act or omission and then get them to concede the existence of the rule before extracting the concession that they violated the rule.

When exposed as rules violators, officers will often dig themselves a hole trying to avoid embarrassment instead of simply acknowledging their failure. This response just compounds the prosecution's problem by revealing the witness to be not only a rule breaker but a rule breaker who refuses to accept responsibility for the violation.

> Example: [Investigator has testified that she elicited a written statement from your client after an interview]
> Q: Investigator, who wrote this statement?
> A: That is your client's statement.
> Q: Who took out a pen and wrote these words?
> A: I did.
> Q: Ok, and you wrote these words after questioning my client for over an hour?
> A: Yes
> Q: Did you write any notes during the questioning?
> A: No. I did complete the Miranda card.
> Q: Right – but outside of the notations you placed on the card, did you write anything anywhere at all during the questioning?
> A: No.
> Q: You obviously could have but chose not to right?
> A: Right.
> Q: You spoke for over an hour and then after that you began to wrote?

A: Yes.
Q: And you wrote the statement you then had him sign?
A: Yes.
Q: And when you decided to write the statement you did that from memory?
A: Yes.
Q: You tried to remember what was said during that hour?
A: Yes.
Q: You had no notes to refer to, you were forced to use only your memory of that hour's worth of talking?
A: Yes.
Q: This 2 page statement you wrote does not contain everything my client said does it?
A: It is the sum and substance of what he said.
Q: It is a summary then of what he said during that hour?
A: Yes.
Q: So some of what he said made it into the statement and some did not?
A: Everything important is in there?
Q: Do you know everything he said that is not in there?
A: No.
Q: Well, who got to choose what made it into the statement and what was left out?
A: Me.
Q: Who chose the punctuation?
A: I did.
Q: Who chose the sentence structure?
A: I did.
Q: These are not precise word for word quotes because you were doing your best to summon what you heard from your memory right?
A: Like I said, it is sum and substance of what he said.
Q: Ok, so you are telling us that he said these things but you summarized what he said using your own terminology?
A: Yes.
Q: So you wrote it and then handed it to him to review?
A: Yes.
Q: And he sat there and read it to himself and then signed it?
A: Yes.
Q: So he read it himself, so you didn't have to read it to him then?
A: Yes.
Q: So he was never given the option of writing his own statement?
A: We write the statements, that is how it is done.
Q: But you could have handed him the pen and paper and asked him to write down his account right?
A: I don't do that because of a concern for safety.
Q: What would be unsafe about that?
A: We don't want suspects to have the pen in their hand because it could be used against us as a weapon.
Q: Ok, so you had that fear with my client?
A: I always have that concern.
Q: Interesting. Then tell us whose signature appears at the bottom of the statement?
A: His.
Q: And tell us how he accomplished that without having a pen in his hand?
OBJECTION…

Q: Anyway, upon arrival at the station you placed my client into an interrogation room?
A: It was an interview room.
Q: Not an interrogation room?
A: We call them interview room.
Q: Did you record the interrogation?
A: I did not record the interview, no.
Q: Really? Well once inside you did interrogate him right?
A: I conducted an interview, yes.
Q: Ok. So the police department considers these interview rooms not interrogation rooms you are saying?
A: Yes.
Q: So interrogation would not be the most accurate term to describe what took place in this room.
A: Correct, we conduct interviews.
Q: You are aware of course that you have rules for your job right?
A: Yes.
Q: Rules you are duty-bound and required to follow?
A: Yes.
Q: These rules are called General Orders and are distributed to every member of the department?
A: Yes.
Q: They are mandatory reading?
A: Yes.
Q: You have surely read the rules right?
A: At some point yes.
Q: There are rules on various subjects?
A: Yes.
Q: There is a rule specifically for questioning citizens in custody?
A: Yes.
Q: And if you ever had the slightest uncertainty about what the department requires of you on this subject, you can simply reread that rule right?
A: Yes.
Q: And these rules are job requirements for you?
A: Yes.
Q: They are in no way optional right?
A: Yes.
Q: The department went to the trouble of explaining to you exactly what you must and must not do when it comes to questioning right?
A: Yes.
Q: General Order 123 is the order explaining the rules for questioning people?
A: I do not know the number.
Q: You admit there is a rule for that subject right?
A: Yes.
Q: As an Investigator, questioning people is a significant part of your responsibilities right?
A: Yes.
Q: You do it very often right?
A: Yes.
Q: So the rule governing how you must do that task is a rule that you absolutely need to know on a daily basis right?
A: Yes.
Q: Because if you do not understand that rules very well, you could be breaking the rules you

swore to follow right?
A: Yes.

Q: The General Order we talked about a moment ago related to questioning people in custody has a title right?
A: Yes
Q: They all do right?
A: Yes
Q: And the title of that General Order is INTERROGATION PROCEDURES correct?
A: I have not seen it in a while.
Q: Would reading that now help you remember what the title is?
A: Yes.
Q: Having read the G.O., can you now remember?
A: Yes.
Q: And what does your department call that General Order?
A: Interrogation procedures.
Q: So your department does not use the word interview in that title, they use the word INTERROGATION don't they?
A: Yes.
[TAKING EXHIBIT BACK]
Q: Ok. That G.O. contains mandatory requirements for how you MUST do INTERROGATIONS, right?
A: Yes.
Q: You are required to follow these rules right?
A: Yes.
Q: You are required to take statements in a specific way right?
A: Yes.
Q: You are required to do things according to the rules to make sure that statements you take are accurate?
A: Yes.
Q: And complete?
A: Yes.
Q: And to make sure that a statement you say someone made is really their statement, not yours?
A: Yes.
Q: Because the statements you say people make are used in court?
A: Yes.
Q: Ok – now because of that concern, that rule absolutely requires the officer taking a written statement to use the citizen's own words in that statement right?
A: If that is what it says.
Q: Do you agree now that the rule s does say that or would you like to read it again?
A: That is the rule.
Q: And again, this rule is something that has been in place for many years right?
A: Yes.
Q: And you have been required to follow it for the 14 years you have been in the department?
A: Yes.
Q: So what I am reading you cannot possibly be news to you right?
A: Right.
Q: The rule goes even further to say that you are never ever to summarize a citizen's statement through use of your own terminology right?
A: Right.

Q: In fact, the rule says that EXTREME CAUTION should be used NOT to do this right?
A: Yes.
Q: You violated that rule didn't you?
A: Yes.
Q: In addition, the rules say you MUST, in other words you ARE REQUIRED TO, read any written statement OUT LOUD where you do not have the citizen do so, right?
A: Yes.
Q: And you violated that rule too didn't you?
A: Yes.

As you can see, this can be very fun. And that is using just one section of just one general order. Once you create this type of hearing record, you will know before trial that you have some great impeachment at your disposal when the time comes.

* Consideration should also be given to establishing all of the police activities at the hearing [with knowledge of the rules in mind] and then waiting until trial to confront the cops with all of the errors they made.

Failure to Record the Interrogation

Be sure to ask the cops about whether or not they recorded the statements. Ask them whether or not the could have done so but chose not to.
It is important to make a record or the failure to record at the hearing.

* Two motions you should be making in cases where the cops claim your client made a custodial statement are:
[1] A motion to suppress the statement simply because the police intentionally failed to record it.
[2]A motion to suppress that statement as involuntary. You should contend that the failure to record should be considered along with other factors in the Court's decision regarding whether or not the statement was voluntary. Given the failure to record, the prosecutor can only offer an inherently less reliable, oral account of the interrogation and therefore cannot sustain his burden of proof.

Just making the motion is not good enough. You need to preserve the issue by establishing at the hearing that the cop could have recorded the statement yet failed to do so.

Memorandum of Law

After the hearing, the attorneys will be given an opportunity to make statement in support of their respective positions. Then the Judge must make a finding of fact on the record or in a written decision. CPL§ 710.60(6).

We have all witnessed this pathetically predictable display. The Judge basically says he has fallen hook, line, and sinker for every morsel of cop perjury that was presented and he therefore has no choice but to deny your motion.

Feel free to demand specific conclusions of law from the Judge.

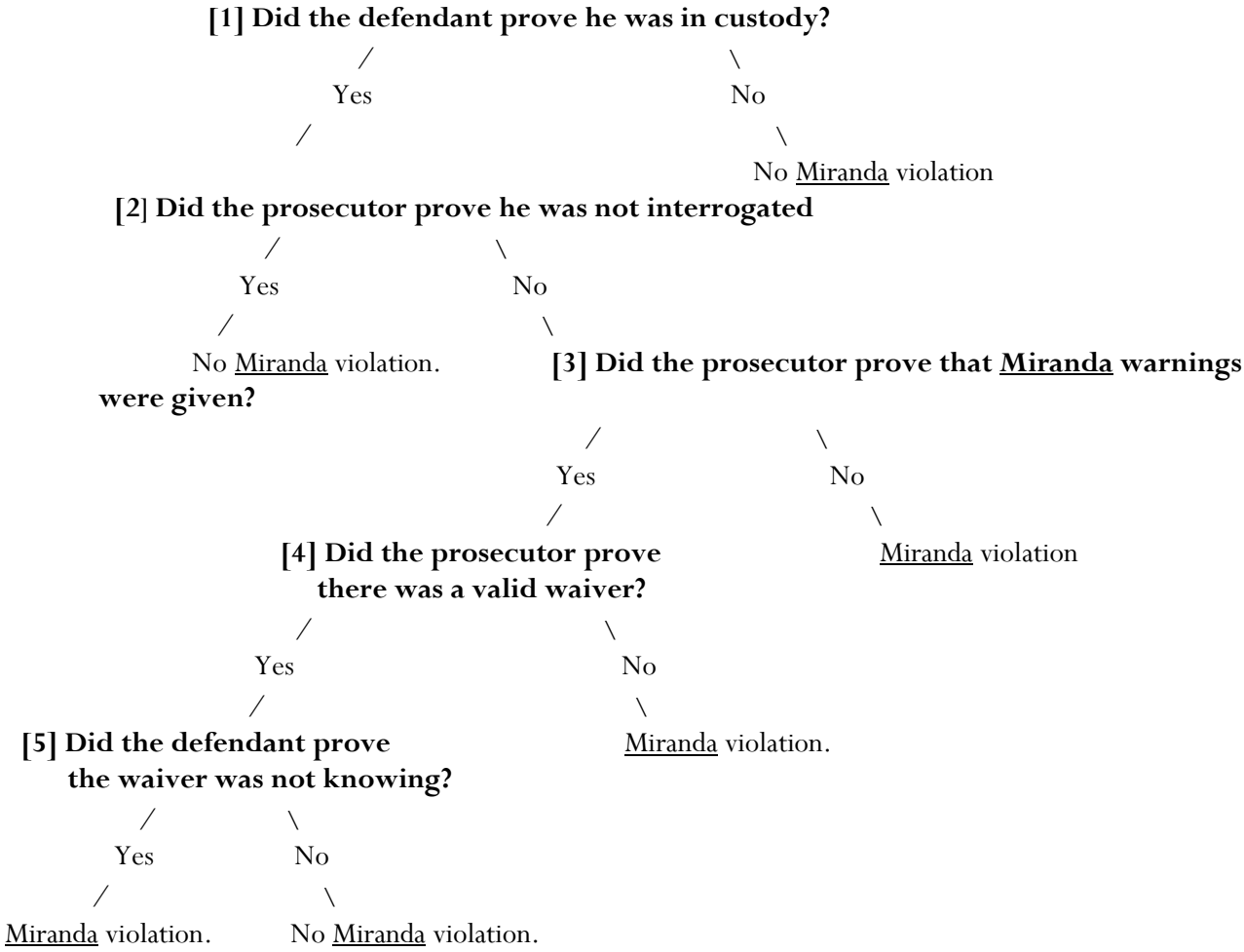
If you want time to organize your arguments, review the transcript, or research issues you should request that the Court reserve decision until after you have submitted a memorandum of law. Most Judges will give you this opportunity.
* It is a good idea to write the name of the hearing stenographer on your file in case you chose to order the transcript.

Re-opening the Hearing

A motion by the prosecutor to re-open the hearing so he can offer additional evidence should always be opposed. You will see these motions when , after the conclusion of the hearing, the defense makes a seemingly meritorious argument that the evidence was insufficient for one reason or another and suppression is therefore required.
In this jurisdiction, realizing that the suppression of a statement could cost them their job, terrified prosecutors will nervously implore the Judge [who was likely a co-worker months earlier..] for another chance to prove their case.
The prosecutor, having had a full and fair opportunity to present evidence should not be given this second chance. People v. Havelka, 45 NY2d 636 (1978). These hearings take place months after arraignment and the prosecutor presumably could have used that time to prepare for the hearing and research the relevant issues.

Burden of Proof Flow Charts

Miranda Violation



If you claim a statement was **Involuntary** in the Traditional Sense:

Did **Prosecutor Prove** Voluntariness BRD?

Yes → Statement may be admissible

No → Statement inadmissible

If you claim your client's statement was made to a private person acting as an **agent** of the police

Did the prosecutor prove the person was not a police agent?

Yes → Statement may be admissible

No → Statement inadmissible

If you claim statement inadmissible under the "Cat -out-of -the-bag" theory:

Question: Has the **defendant offered** proof that the second statement was tainted by the first

Yes → Did the **prosecutor offer** sufficient rebuttal testimony?

- Yes → Statement not inadmissible
- No → Statement inadmissible on these grounds

No → Statement not inadmissible on these grounds.

<u>If you claim a post-Miranda statement is inadmissible because it was made during a continuous interrogation that followed an inadmissible pre-Miranda statement</u>:

<u>Question: Has the **prosecutor proven** that there was a "pronounced break" in the interrogation between the two statements?</u>

/ \

Yes No

/ \

Statement may be admissible Statement inadmissible

CJI JURY INSTRUCTIONS

STATEMENTS (ADMISSIONS, CONFESSIONS)

NOTE: When properly raised at trial, the voluntariness of a defendant's statement to law enforcement must be submitted to the jury upon the defendant's request.[i] *The question of whether a defendant's statement was voluntary will turn on such factors as whether the defendant was in custody, if so, whether he/she was given and waived his/her Miranda rights*[ii]*, and whether the statement was voluntary in the traditional Fifth Amendment sense. The question of whether the defendant's expanded right to counsel under the New York State Constitution was violated need not be submitted.*[iii]

No one jury instruction can apply to all situations given the varied circumstances surrounding the giving of statements, and the different instructions requested. What follows is a series of instructions on the most common issues from which the trial court can fashion a charge tailored to the facts and issues of an individual case.

TABLE OF CONTENTS

Introduction

I will now discuss the law as it relates to testimony concerning [a] statement(s) of the defendant made to a police officer [or assistant district attorney].

Our law does not require that a statement by a defendant be in any particular form. It may be oral, or written, or electronically recorded.

[A statement in written form need not have been (written or) signed by the defendant provided that the defendant adopted the statement. A defendant adopts a statement when he/she knowingly acknowledges the contents of the statement as his/her own. In deciding whether the statement was adopted, the presence or absence of the defendant's signature may be considered.]

There is no requirement that a statement be made under oath.

Pedigree Statements

There is testimony that, while the defendant was in custody, the police asked him/her "pedigree" questions relating to: (*specify, e.g., his/her name, address, date of birth, type and place of employment)*.

Under our law, a police officer may ask those questions of a person who is in custody, and the officer is not required to advise the defendant of his/her rights before doing so.[iv] Thus, if you find the defendant made such statements, you may consider them in your evaluation of the evidence. In determining whether the statement was made, you can apply the tests of truthfulness and accuracy that we have already discussed.[v]

Custodial Statements

There is testimony that, while the defendant was in custody, he/she was questioned by the police and made certain [oral and/or written] statement(s). [There is (also) testimony that the defendant made a videotaped statement to an assistant district attorney.]

Under our law, before you may consider any such statement as evidence in the case, you must first be convinced that the statement attributed to the defendant was in fact made [or adopted] by him/her. In determining whether the defendant made [or adopted] the statement, you may apply the tests of believability and accuracy that we have already discussed.

Also, under our law, even if you find that the defendant made a statement, you still may not consider it as evidence in the case unless the People have proven beyond a reasonable doubt that the defendant made the statement voluntarily.[vi]

How do you determine whether the People have proven beyond a reasonable doubt that the defendant made a statement voluntarily?

Miranda Rights[vii]

Initially, under our law, before a person in custody may be questioned by the police [or an assistant district attorney], that person first, must be advised of his/her rights; second, must understand those rights; and third, must voluntarily waive those rights and agree to speak to the police [or an assistant district attorney]. If any one of those three conditions is not met, a statement made in response to questioning is not voluntary and, therefore, you must not consider it.

[There is no particular point in time that the police [or assistant district attorney] are required to advise a defendant in custody of his/her rights, so long as they do so before questioning begins. A defendant in custody need be advised only once of the rights, regardless of how many times, or to whom, the defendant speaks after having been so advised; (provided the defendant is in continuous custody from the time he/she was advised of his/her rights to the time he/she was questioned and there was no reason to believe that the defendant had forgotten or no longer understood his/her rights. [viii])]

While there are no particular words that the police [or assistant district attorney] are required to use in advising a defendant, in sum and substance, the defendant must be advised:

1. That he/she has the right to remain silent;

2. That anything he/she says may be used against him/her in a court of law;

3. That he/she has the right to consult with a lawyer before answering any questions; and the right to the presence of a lawyer during any questioning; and

4. That if he/she cannot afford a lawyer, one will be provided for him/her prior to any questioning if he/she so desires.

Before you may consider as evidence a statement made by the defendant in response to questioning, you must find beyond a reasonable doubt that the defendant was advised of his/her rights, understood those rights, and voluntarily waived those rights and agreed to speak to the police [or an assistant district attorney]. If you do not make those findings, then you must disregard the statement and not consider it.

[NOTE: *Add if the defendant's mental capacity to understand the warnings is in issue*:

A person may validly waive [his/her] rights, regardless of whether or not [he/she] had a full understanding of the criminal law or procedures or, in particular, how what [he/she] says on waiving [his/her] rights may be used later in the criminal process.

What must be shown for a valid waiver is that the individual grasped the plain meaning of the warnings that [he/she] did not have to speak to the interrogator; that any statement might be used to [his/her] disadvantage; and that an attorney's assistance would be provided upon request, at any time, and before questioning is continued.[ix]]

Traditional Involuntariness [x]

Under our law, a statement is not voluntary if it is obtained from the defendant by the use or threatened use of physical force [upon the defendant or another person].

In addition, a statement is not voluntary if it is obtained by means of any other improper conduct or undue pressure which impairs the defendant's physical or mental condition to the extent of undermining his/her ability to make a choice of whether or not to make a statement.[xi]

Expanded Charge on Traditional Voluntariness

In addition to the foregoing charge on "Traditional Voluntariness," the following expanded charge may be appropriate:

In considering whether a statement was obtained by means of any improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his/her ability to make a choice of whether or not to make a statement, you may consider such factors as:

The defendant's age, intelligence, and physical and mental condition; and

The conduct of the police during their contact with the defendant, including, for example, the number of officers who questioned the defendant, the manner in which the defendant was questioned, the defendant's treatment during the period of detention and questioning, and the length of time the defendant was questioned.

It is for you to evaluate and weigh the various factors to determine whether in the end a statement was obtained by means of any improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his/her ability to make a choice of whether or not to make a statement.

Promise by the Police

Under our law, a statement of a defendant is not voluntarily made when it is obtained from the defendant by a public servant engaged in law enforcement activity [or by a person then acting under his/her direction or in cooperation with him] by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate himself/herself.[xii]

Under that law, a promise or statement of fact made to a defendant does not by itself render the defendant's subsequent statement involuntary. A defendant's statement would be involuntary only if the promise or statement made to him/her created a substantial risk that he/she might falsely incriminate himself/herself.

Delay in Arraignment [xiii]

Under our law, when a person is arrested, the police must bring him or her to court for arraignment without unnecessary delay. Before bringing an arrested defendant to court, the police [may conduct a lineup], may complete the paperwork associated with the processing of the arrest, may question witnesses or conduct other investigation relevant to the case, and may question the defendant.

It is not for the jury to determine precisely when the defendant should have been arraigned; however, you may consider whether the police unnecessarily delayed the defendant's arraignment; and, if so, whether that delay, along with other relevant factors, affected the defendant's ability to make a choice about whether to make a statement.

A statement is not involuntary solely because of the length of time before a defendant is arraigned. That length of time is only one of the factors that you may consider in determining whether a statement was voluntary.

Conclusion

If the People have not proven beyond a reasonable doubt that a statement of the defendant was voluntarily made, then you must disregard that statement and not consider it.

If the People have proven beyond a reasonable doubt that a statement of the defendant was voluntarily made, then you may consider that statement as evidence and evaluate it as you would any other evidence.

ADDITIONAL CHARGES

I. Custodial but Spontaneous Statement

Under our law, before a person in custody may be questioned by the police [or an assistant district attorney], that person first, must be advised of his/her rights; second, must understand those rights; and third, must voluntarily waive those rights and agree to speak to the police [or an assistant district attorney].

If, however, a defendant in custody spontaneously volunteers a statement, that statement may be considered by the jury, regardless of whether or not the defendant was advised of his/her rights or waived them.

[In this case, the People concede that at the time of the statement, the defendant was in police custody (and had not been advised of his/her rights). The People, however, contend that the defendant spontaneously volunteered a statement.]

For a statement to be spontaneously volunteered, the spontaneity must be genuine and not the result of any questioning, inducement, provocation, or encouragement by the police.[xiv]

Under our law, questioning includes words or actions by the police [or assistant district attorneys], which they should know are reasonably likely to elicit an incriminating statement.

If you find that the People have proven beyond a reasonable doubt that the statement was spontaneously volunteered, you may then consider that statement as evidence and evaluate it as you would any other evidence.

If you find that the People have not proven beyond a reasonable doubt that the statement was spontaneously volunteered, then you must disregard the statement and not consider it.

II. Issue As To Custody of Defendant

Under our law, before a person in custody may be questioned by the police [or an assistant district attorney], that person first, must be advised of his/her rights; second, must understand those rights; and third, must voluntarily waive those rights and agree to speak to the police [or an assistant district attorney].

On the other hand, a defendant who is not in custody when questioned by the police [or assistant district attorney], need not be advised of his/her rights, and any voluntary statement may be considered by the jury.

Under our law, a person is in custody when he/she is physically deprived of his/her freedom of action in any significant way.[xv]

The fact that the defendant was being questioned by police [or that the questioning took place inside a police station] does not necessarily mean the defendant was in custody.

Whether the defendant was in custody at the time of the questioning is not determined by what the defendant himself/herself believed or what the police believed[xvi]. In other words, the test is not whether the defendant believed he/she was in custody or the police believed he/she was in custody. The test is what a reasonable person, innocent of any crime, in the defendant's position, would have believed. If that reasonable person would have believed that he/she was in custody, then the defendant was in custody. If that reasonable person would have believed that he/she was not in custody, then the defendant was not in custody.[xvii]

To decide whether a reasonable person, innocent of any crime, in the defendant's position, would have believed

that he/she was in custody, you must examine all the surrounding circumstances, including but not limited to:

Select as appropriate: [xviii]

the reason the defendant was speaking to the police or being questioned by the police;

where the questioning took place; [whether the defendant appeared at the police station voluntarily;]

how many police officers took part in the questioning;

whether the questioning was investigative or accusatory;

whether the questioning took place in a coercive atmosphere;

whether the defendant was handcuffed or physically restrained;

whether the police treated the defendant as if he/she were in custody;

whether the defendant was offered food or drink;

whether the defendant had been allowed to leave after the questioning.

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i. *People v. Huntley*, 15 N.Y.2d 72 (1965); *People v Cefaro*, 23 NY2d 283, 286-287 (1968); *People v. Sanchez*, 293 A.D.2d 499 (2nd Dep't. 2002).

ii. *People v. Graham*, 55 N.Y.2d 144 (1982).

iii. *People v. Medina*, 146 A.D.2d 344 (1st Dep't 1989) *aff'd. People v. Bing [Medina]*, 76

N.Y.2d 331 (1990); *People v. Daniels*, 159 A.D.2d 513 (2nd Dep't 1990); *People v. Dawson*,166 A.D.2d 808 (3rd Dep't. 1990).

iv. *People v. Rodney,* 85 N.Y.2d 289 (1995); *People v Berkowitz,* 50 N.Y.2d 333, n. 1 (1980); *People v Rodriquez,* 39 N.Y.2d 976 (1976); *People v Ryff*, 27 N.Y.2d 707 (1970) (identification questions); *People v Rivera,* 26 N.Y.2d 304 (1970) (defendant's address).

v. Such statements also need to have been voluntarily made, but it is unlikely that the voluntariness of such statements will be in issue.

vi. CPL 60.45(1). *People v. Huntley, supra*, 15 N.Y.2d 72.

vii. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *People v. Graham, supra,,* 55 N.Y.2d 144.

viii. *People v. Hotchkiss*, 260 A.D.2d 241 (1st Dep't. 1999); *People v Crosby*, 91 A.D.2d 20, 29 (2d Dep't. 1983).

ix. *See People v. Williams*, 62 N.Y.2d 285, 288-89, 476 N.Y.S.2d 788, 465 N.E.2d 327 (1984)(An "individual may validly waive Miranda rights so long as the immediate import of those warnings is comprehended, regardless of his or her ignorance of the mechanics by which the fruits of that waiver may be used later in the criminal process." Thus, a "functionally illiterate, borderline mentally retarded man who also suffered from organic brain damage...[and] had previously been hospitalized for psychotic episodes" who "would not have understood [the] rationale [of the Miranda warnings] or the full legal implications of confessing" but who understood the "immediate meaning" of the pre-interrogation warnings, could and here did waive his Miranda rights.). *See also People v. Love*, 57 N.Y.2d 998, 457 N.Y.S.2d 238, 443 N.E.2d 486 (1982) (although the defendant was in a psychiatric hospital at the time of interrogation, his waiver of his pre-interrogation warnings was valid); *People v. Thasa*, 32 N.Y.2d 712, 344 N.Y.S.2d 2, 296 N.E.2d 804 (1973) (the defendant was found mentally incapable of waiving his pre-interrogation rights). *But see Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), decided after the foregoing cases, in which the United States Supreme Court held that a waiver of *Miranda* rights is effective in the absence of government coercion, irrespective of the defendant's mental state.

x. *See People v. Anderson*, 42 N.Y.2d 35 (1977).

xi. CPL 60.45(2)(a).

xii. CPL 60.45(2)(b).

xiii. *See People v. Ramos*, 99 N.Y.2d 27 (2002).

xiv. *People v. Maerling*, 46 N.Y.2d 289, 302 (1978).

xv. *People v. Rodney*, 21 N.Y.2d 1, 9 (1967).

xvi. *See Stansbury v. California,* 114 S.Ct. 1526 (1994).

xvii. *See People v. Yukl,* 25 N.Y.2d 585 (1969).

xviii. *See People v. Centano*, 76 N.Y.2d 837 (1990) ("The Appellate Division correctly applied the standard established in *People v Yukl* (25 NY2d 585, 589) and concluded that a reasonable person, innocent of any crime would not have believed he was in custody under the circumstances. It based its conclusion on evidence in the record that (1) defendant appeared at the precinct voluntarily and presented himself to the police as a friend of Ivory eager to assist in investigating his death, (2) the atmosphere at the precinct was not coercive, (3) the questioning was investigative, not accusatory, (4) the police did not treat defendant as if he were in custody but rather informed him expressly that he was not a suspect, (5) defendant was never handcuffed or physically restrained, (6) the questioning was not continuous but was interrupted frequently, (7) defendant never protested the questioning, (8) defendant was fed and allowed to relax in the station house by watching a baseball game, (9) the police advised defendant that he was not required to take a polygraph test, (10) defendant was asked, not ordered, to return to the precinct after his first polygraph, (11) defendant was allowed to sleep alone in an unlocked room in the station house, and (12) defendant was permitted to go unescorted into a store the following morning. Taken together, these facts are sufficient to establish that the interrogation was noncustodial.")

Voir Dire

Preparing to Meet Your Jury

Matthew Alpern, Esq.
Director of Quality Enhancement for Criminal Defense Trials
New York State Office of Indigent Legal Services

FINDING YOUR DREAM JURORS AND AVOIDING THOSE WHO GIVE YOU NIGHTMARES

The Ten Scariest Criminal Issues to Voir Dire

Randi McGinn
MCCML, P.A.
420 Central, SW, Suite 200
Albuquerque, New Mexico 87102
(505) 843-6161
randi@mcginnlaw.com

National Association of Criminal Defense Lawyers
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In the early days of my law practice, the general wisdom about jury selection was that you never asked the jury to express any bad opinions or attitudes which might be unfavorable to your case. The thinking in those days was that if one panel member expressed a bad opinion, it would somehow "taint" the rest of the panel. If a bad opinion was stated in open court, a young lawyer was advised to request a mistrial and start over, trying not to tread into that dangerous territory again. After 25 years of practice, I have found this was some of the worst advice I ever got about how to do jury selection. This approach didn't work then and doesn't work now.

Jury panels today are more educated about the judicial process, the rules of evidence and the conduct of trials than ever before. They come to the courtroom with strong attitudes and opinions about criminal trials, lawyers and the accused person sitting in the chair next to you. Some have the same kind of beliefs you may have expressed about problems with the legal system. Some of them come to the courtroom with an agenda, i.e., that they are not going to be like those other "crazy juries" that let someone off on a technicality. Fortunately, there are some who really want to be fair.

Your job, if you decide to accept it, is to identify and eliminate those "agenda" jurors who are there to wreak havoc in the jury room, who will disregard the presumption of innocence and, regardless of whether there is proof beyond a reasonable doubt, will lead to charge to convict. The only way to do that is to ask them the things that scare you most.

If you do not bring the attitudes of those jurors out in voir dire, unknown to you they will take those attitudes back to the jury room and do everything they can to prevent an acquittal, even when that is the right thing to do.

I. GETTING THE PANEL TO TALK TO YOU

There you are standing in front of a group of 30-70 complete strangers and you want them to open up to you about their secret, innermost fears and feelings about crime, lawyers and the legal system. How do you get them talking? In this age of Oprah Winfrey-style talk shows and self-confessions, it is easier than you might think. The key is to focus on what should be the three goals of jury selection:

Gather Information
Educate the jury about your case and the legal process
Rapport

A. Gather Information

The more you know about a potential juror, the better off you are. If you are given enough time for a thorough voir dire, you must get sufficient information from a panel member to help you decide whether they are "one of yours," "a disciple of the prosecution" or somewhere in the mushy middle. Without that information you will not be able to challenge for cause or intelligently exercise a peremptory challenge. Here is how you get them talking:

1) Ask Open-Ended Questions

If you want jurors to talk to you, then you must ask them questions that cannot be answered merely with a yes or no. Start your questions with the journalist's five W's or an H – Who?, What?, When?, Where?, Why?, and How?. To that list, you can add open-ended questions that ask them to "describe" or that start with "**How many of you...**think feel or believe. . . ." This last question gives those answering some comfort that there may be other people who feel the way they do and makes them believe they won't be the only one raising their hand in answer to your question.

2) Let Them Talk More Than You

The voir dire process is a terrifying one for most lawyers, who are typically control freaks. It's not like direct or cross-examination where you know what the witnesses will say and can thoroughly prepare to deal with the witness. In jury selection, no matter how much you prepare, you have no idea what may come out of the mouths of some of these prospective jurors. Jury selection is like walking across a tightrope without a net.

Many lawyers cope with their fear of jury selection by doing all the talking. This keeps you from having to deal with any unexpected juror answers, but also prevents you from really gaining any information from the panel. Ask your question, then be quiet and listen to the answers. Don't you explain things to them, let them explain things to you. That is the best way to gather the most information possible.

3) No Lawyer Words

A former client once postulated (a lawyer word) that attorneys deliberately use Latin phrases and big words so they could justify their high fees. Although some people think big words work for fee setting, speaking in a foreign lawyer language does nothing to aid communications with your prospective jury panel.

If they don't understand the words you are using, they will not let you know. It is embarrassing to admit in public that you have no idea what somebody is talking about. Rather than question your phrasing, most jurors will just nod as if they know what you're talking about and you will not get an accurate answer to the things you are concerned about.

Contrary to the belief of some attorneys, jurors are not impressed by ten-dollar words. They tend to gravitate toward the lawyer in the courtroom that speaks in their language. Some examples of words to use, rather than the words on the right:

- - The accused/name	**not**	the defendant
- - The prosecutor	**not**	the State, the People's lawyer
- - Before/after	**not**	prior/subsequent
- - car/truck	**not**	vehicle
- - jury selection	**not**	voir dire

4) Don't be Judgmental

Nothing will stop the flow of information like a well placed "tsk, tsk," even if it is under your breath. Even worse is asking that the juror be excused for cause in front of the other panel members. No one else will talk to you about their true feelings and risk public humiliation.

No matter how abhorrent the opinion being given, thank the prospective juror for their honesty. If you have made a decision to try and strike them for cause, keep gathering sufficient information for your challenge. Once you have enough information, move on.

5) No Note Taking

How would you feel if someone you were having a conversation with began writing down everything that you said. Chances are you would stop talking to the person who was writing down your comments. The prospective jurors feel the same way.

No matter how small your office, you cannot afford to do voir dire alone and try to keep track of the information being provided by the jurors. If you do not have the resources to hire a jury consultant, then have a friend, a secretary, an associate or some intuitive person from off the street be responsible for writing down the information

provided by the jurors. This will free you to maintain eye contact with each juror and to carry on a conversation that encourages them to provide more information.

B. Educate the Jury About Your Case and the Court System

Modern jurors now come to the courtroom with some information and a great deal of mis-information about how the court system works. Although they may have watched all of the Scott Peterson trial, they still may not understand some of the simpler concepts like the difference between a criminal and civil case and which side is the plaintiff and which side is the defendant. They look for someone in the courtroom to help them understand all these things. Although voir dire is not the time to explain all of your case or all of the intricacies of the civil justice system, if you are doing your job, a jury's education begins at that time.

1) No Lecturing. Make Them Think

How much information do you remember from all of those classroom lectures you heard in high school and college? Unless the speaker was unusually dynamic, you probably don't remember much. Most learning comes not from someone telling you what to think, but from thinking things out yourself. The same is true for your prospective jurors.

You will get nowhere by telling them what to think. Avoid the standard lawyer questions you hear in voir dire that begin with the following:

> -- I'm sure we can all agree that _____.
> -- Do you all agree that everyone deserves a fair trial (before you send them off to prison)?
> -- By your silence, I assume all of you can be fair and impartial to my client.

None of these lecturing-type statements get you anywhere with the jury. They are unlikely to challenge you on a statement of a legal principle, even if they disagree. Some will nod their heads, most will do nothing, and you will have no idea about their true feelings.

Instead, educate them through questions about some of the unique challenges they may be facing as jurors in your case. You remember the Socratic method? That is how we learned to think like lawyers and how the jurors can learn to do their jobs in this case. Remember, many of the things they will be asked to do are new to them. They may never have thought about how they will accomplish these tasks. Asking them questions about how they will judge credibility will tell you much about their thinking process and will educate both you and them along the way. Let me give you an example:

Q. How many of you have ever had to decide between two people (your kids, your employees) who was telling the truth?

Q. How did you go about determining who was telling the truth between those two people?

Q. What factors were important to you in making that determination?

Q. Can you think of some reasons why a person (or your children) might lie? [You might go to several jurors for the answers to these questions. They will probably come up with the reasons pertinent to your case – for money, to get out of trouble, for revenge. If not, then ask whether they have ever seen people lie for those reasons]

Q. Can you think of some reasons why a person, even an "eyewitness," might be mistaken? [Again, go to several jurors to elicit the factors that apply to your case – had lighting, distance, fear, etc.]

Q. Are there some things you shouldn't use in deciding whether one person is telling the truth and another is not?

- - How about the race of the person? Why shouldn't that be used?
- - How about a person's occupation? Why shouldn't that be used?
- - How about the sex of the person? Why shouldn't that be used?

2) Intersperse Facts with Questions

In Texas you can give your opening statement in voir dire. In Arizona, you can give a brief opening before jury selection begins. For those of you who practice in those jurisdictions, have at it. Every where else, you have to intersperse your facts and questions.

Although most judges feel voir dire is not a time to give your complete opening statement, you have to give the jury some idea of what your case is about in order for them to intelligently evaluate their own biases and give you honest answers to your questions. Recognizing this fact, some judges in Arizona have the attorneys give their opening statements to the jury <u>before</u> voir dire, to make the jury selection process more meaningful for the prospective panel. Once prospective jurors have an understanding of the facts of the case, they are more easily able to identify and tell you about their own personal biases.

In truth, lawyers don't eliminate jurors as much as jurors eliminate themselves by an honest recitation of their potential prejudices. That works best when they know more facts about the case. Even the most restrictive judges should understand that the jury as to know something about the case to (a) respond to your questions and (b) not get angry that you are asking these personal questions or no reasons. For example, it would be rude to ask for a show of hands of all those women who have been raped or had family members raped, without first explaining that your case involves a sexual assault.

The best and probably the most interesting way to let the jury know about the important facts of your case in voir dire, is to intersperse the facts with your questions. For example, does your case involve self-defense? Tell the jury that before you ask them whether they have ever been in a situation where they were afraid they might be hurt or killed.

3) Questions should be related to your Theme/Theories of the Case

Why wait until opening to try out the themes in your case? For example, if one of the theories of the case is police misconduct, you have to run that up the flagpole in jury selection and see how your jurors respond. Some of the panel will still be unable to believe that law enforcement officers could ever act improperly or fail to tell the truth. If they are unwilling to even consider what may be a central theory of your case, you want to find them and hopefully, exclude them.

4) Use Current Events to Elicit True Feelings

Although many prospective jurors are reluctant to admit that they are biased or prejudiced in any way, their views of cases in the news may give you their true feelings about some of the issues in your case. For example, a panel member's reaction to either the Kobe Bryant or Scott Peterson cases may reveal something about his/her true feelings about allegations of sexual assault or homicide. Find a case with controversial issues that have been already debated in the press and ask your jurors about it. The things they reveal in their discussions of the case may help you see inside their deepest prejudices.

5) Bounce Juror Opinions Off Each Other

The best jury selections in which I have participated, came when one or two jurors took extreme positions on issues. Realizing that I would never talk them out of their positions, I asked the other jurors what they thought about these extreme positions. What ensued was a rousing debate over the issue in question, with the vast majority of jurors standing up against these extreme opinions and explaining why our criminal justice system, with all its flaws, was the best in the world because it erred on the side of letting a questionably guilty person free, to protect the innocent. Those ideas came from the jurors not me.

When one juror espouses an extreme position, explore that briefly (unless you want to lay the foundation for a cause challenge through leading questions), then ask whether any other jurors disagree with that position. Talk to those on the opposite side of the issue.

6) Put Them in the Shoes of Your Client

You understand a person's position best by being asked to argue for it. If a juror states a negative opinion towards your client's case, test the strength of their convictions

by asking them how they would go about convincing someone else of the position they have just rejected. Those who are unable to do so may be so thoroughly entrenched that you wish to seek a cause challenge. Those who are able to see the other side, may make good jurors.

C. Establishing Rapport

The best way to establish rapport with a jury is to be honest with them. That means being honest about some of your concerns, your own fears about their views and your views about the judicial system.

Most importantly, you must **ask the things that scare you the most**. Some of the ten things that should scare you the most in a criminal case are listed in the next section.

II. THE TEN SCARIEST JURY ISSUES IN A CRIMINAL CASE

The advent of Court TV and in-court cameras means that your jurors are more educated that ever before about the criminal justice system. As we know from the hazards of eyewitness testimony, a group of people can all witness the same thing and come away with very different views. So it is with the media watching public. Most of the panel will have a great fear of crime (despite the fact that crime statistics are down, the latest brutal murder is beamed instantly into our living room). Some will mistrust the government and its ability to catch and prosecute the right person. Some will believe that juries can't be trusted. All will believe that they, personally, can be trusted to do the right thing. The good news is that the average American citizen still wants to do what is fair and right. Those citizens want the system to work correctly and believe their presence on the jury will make that happen. In talking with them about the things that concern them, you need to be looking for people who have no pre-set agenda but can be fair.

Here are the top ten areas you may need to talk to them about:

1) Fear of Crime/Victim Rage

We are all afraid of crime. On every jury panel you will find that the majority of jurors or their family members have been victims of some kind of crime, whether burglary, sexual assault or even homicide. No one wants to be soft on crime or to be perceived by their neighbors as being soft on crime. How do you help people set that aside so they can fairly hear the case before them? You must match the fear of crime with something that should be a greater fear - - the fear of wrongfully convicting an innocent accused.

If you have time, first find out what each juror's experience is with being a crime victim. How did they feel after the crime? Did they catch the person who did it? What happened to that person? How did they feel about how the criminal justice system handled the case? Remember, the most important information is not what happened to

them, but how it affected them. Then explore some of the things you are most concerned about.

Q. How many of you think that criminals have too many rights or that the courts have made it too difficult to prosecute and convict criminals?

Q. What kind of rights do you think we should give to criminals? Should we change the criminal justice system to make it easier to convict people? How should we change it?

Q. Now let me change the question a little bit. Rather than use the word "criminal," let me ask how many of you think that American citizens, including those who might be accused of a crime, have too many rights?

Q. What rights would you want if you were falsely accused of a crime?

Q. How many of you at any time in your life, including your childhood, have ever been falsely accused of something you didn't do?

Q. What happened when you were falsely accused?

Q. Did people believe you, just on your word when you said you didn't do it?

Q. Were you able to prove that you didn't do it?

Q. How did you go about proving you were innocent?

Q. Were you able to prove your innocence? Are there still people who don't believe you?

Q. You think there would have been a fairer result if your accusers had to prove you were guilty, rather than you proving you didn't do it?

Q. When you hear that a guilty person went free or an innocent person was convicted, which seems worse to you? Why?

Q. Have you thought about what kind of proof you are going to require before you convict a person? What things will be important to you in making that decision?

Q. You have probably heard the phrase "proof beyond a reasonable doubt" in criminal cases. What do you think about the state having that burden?

Q. What would you do if you thought the accused person was probably guilty, but the state had not convinced you of his/her guilt beyond a reasonable doubt?

2) The Accused's Previous Record

Q. What do you think about someone who has admitted breaking the law in the past?

Q. Once a person has admitted breaking the law, can they ever be trusted again?

Q. How many of you have ever known someone that made a mistake in the past and then straightened out his/her life?

Q. Tell me about that person. How do you feel about him/her now? Would you trust him/her?

Q. If something turned up missing at your house and that person was there, would you suspect him/her? Why or why not?

Q. The reason I'm asking you about these things, is because (client's name) is someone who made a mistake (or some mistakes) in the past. When he/she was younger, he/she stole some money, was caught, admitted his/her guilt and went to prison. Since then he/she has worked very hard to overcome that mistake. That past mistake is one of the reasons the police suspected him/her in this case . . . but he/she did not commit this crime. I am concerned that because of that past mistake, you may not listen to what he/she has to say. How do you think this past mistake will affect you in listening to the evidence in this case?

Q. Have you ever heard of an innocent person being picked up and falsely accused by the police because of a past criminal record? Why do you think that happens?

Q. How are you going to keep the kind of biases the police have against ex-felons from affecting your decision in this case?

3) Race

Q. How many of you have ever had family, friends or have yourself ever been discriminated against or witnessed discrimination against another person?

Q. Tell me about your experience. How did it make you feel when it happened? What did you do when it happened?

Q. What do you think about affirmative action programs in the workplace or for college admission? Have you ever felt discriminated against because

of those programs? What did you do about it? Who do you blame for that discrimination?

Q. Have you ever felt that any minority groups have been getting ahead too quickly in the last ten years?

Q. How do you feel about inter-racial dating? How about in your own family?

Q. Would you say this is a good place or a bad place for a (Hispanic, African-American, Asian, etc.) to stand trial? (**This question courtesy of Michael Stout, who always accuses me of stealing his best stuff without giving him credit). Why? (**I'm sure Michael would come up with that "Why" question too).

Q. I've heard some stereotypes about (African-Americans, Hispanics, Asians, etc.). Give some examples. What kind of stereotypical comments have you heard? What do you think about those comments? How should you deal with those kinds of comments in the jury room?

Q. What effect should the race of Mr./Ms. _____ have on your decision in this case?

Q. How would you feel if you were on trial in a foreign country and the judge, all the lawyers, the bailiff and all the jurors were (African-American, Hispanic, Asian, etc.)? What concerns would you have under those circumstances about getting a fair trial?

Q. Since Mr./Ms. _____ is in that exact situation, how can he/she get a fair trial?

4) Eyewitness Identification

Q. Have you ever thought you saw someone you knew and then realized you were mistaken? Tell me about that experience.

Q. Why do you think you were mistaken?

Q. What kinds of things can make a person believe they saw someone or something they didn't really see? [Bounce off several panel members to elicit all of the elements that may be in your case]

-- Bad lighting
-- Distance
-- People look alike
-- Bad vision/no glasses

-- Expecting to see a particular person there
-- Similar clothing
-- Corner of your eye
-- Only a short time to see them
-- Stress of the moment
-- Someone suggests it is them

Q. Have you ever heard of people who are eyewitnesses to a crime being mistaken about the identity of the person there? Have you ever heard of an innocent person being convicted and sent to prison based on mistaken eyewitness testimony? What did you hear?

Q. How can that happen?

Q. What things will be important to you in deciding whether the eyewitnesses may be mistaken in this case?

5) Accused May Not Testify

Q. How many of you are aware of the constitutional right that says an accused person can never be called as a witness against himself or herself at trial?

What do you think of that rule? Why do you think that rule exists?

Q. If someone were falsely accused of a crime, can you think of a situation where he/she might not want to testify at the trial? *[Again, bounce off as many jurors as possible to flesh out this answer].*

-- Not a very good witness
-- Not very smart or educated
-- Easily misled by the prosecutor
-- Fear
-- Too much pressure
-- Embarrassed about his/her past
-- The state hasn't proven its case

When you get the inevitable answer, "Because he/she is guilty," try the following response:

Q. You know, that may be the reason in some cases and that is the very thing I'm concerned you may think in this case if I make the decision that Mr./Ms. _____ should not testify. Unfortunately, if I decide he/she should not testify, the law does not allow us to tell you why that decision has been made. That means you won't get to know if it was because he/she was afraid, or wouldn't make a very good witness or any other

reason. How will you feel if you can't know the reason I've decided he/she shouldn't testify?

Q. What will you think about Mr./Ms. _____ if I make the decision he/she shouldn't take the stand?

Q. Since the law doesn't let me tell you the reason, how will you deal with your curiosity about that?

Q. Would it be fair to guess or speculate about the reason I've decided he/she shouldn't testify, if you are not allowed to know?

6) War on Drugs/Terrorism

Q. Have you had any personal experiences, either yourself or with your family members or friends, regarding the abuse of alcohol or drugs? Tell me about your experiences.

Q. How was the person's drug or alcohol abuse problem handled?

Q. Was the person ever arrested or put in jail? How did that affect his/her problem?

Q. Did he/she ever receive any treatment or counseling? How did that work?

Q. How do you think we should deal with the drug problem? What is most effective?

Q. What do you think about the government's War on Drugs? Are we winning or losing? Why?

Q. Have you ever heard of any government abuses that have occurred in the name of the War on Drugs? Please tell me about them.

7) Police Misconduct

I usually discuss the police in the context of my previous credibility questions, i.e., should you believe or dis-believe a person just because of their occupation? Why or why not?

Probably the best discussions about police misconduct come from those who are on the police force or who know people on the police force. Identify those people and explore how well they know the police officer, whether they have ever discussed cases, crime and the criminal justice system, then ask them the following:

Q. From your own experience or your discussions with your friend/relative on the police force, have you ever heard about bad cops who are willing to lie or plant evidence? Tell me about that.

Q. Why would a police officer ever do such a thing? [*You may wish to explore this with several jurors*]

-- To make a case
-- To get a criminal they have not be able to catch
-- For a promotion
-- For revenge
-- To make a quota

Q. Have you ever heard of a police officer who did not deliberately lie, but who may have been mistaken – either about the evidence or about arresting the wrong person? Tell me about your experience. How can that happen?

-- In a hurry
-- Gets bad info from the witnesses
-- A snitch lies
-- Bad or incomplete investigation

Q. What things will be important to you in deciding whether the police officers who may testify in this case are lying or mistaken?

Q. Is there anyone who thinks there has been too much criticism of the police recently? Why? Are there ever any circumstances in which the police should be criticized? Tell me about those circumstances.

8) Fragile Witness – Child/Crying

If you are going to have to cross-examine a fragile witness during the course of the case, don't wait until they are on the stand to tell the jury about him/her. You must bring it up in jury selection. Again, the most effective way to do that is during your discussion of how the jury should determine credibility.

(a) The Child Witness

Q. In judging the credibility of a person, should you use a person's age to determine whether or not they are telling the truth? Why or why not?

Q. Have you ever known children to tell lies? Perhaps I should ask the opposite question – have you ever known a child who has **never** told a lie?

Q. Why do children lie? [*Use several jurors for this answer*].

-- To keep from getting in trouble
-- To get someone else in trouble
-- For attention
-- For a reward
-- To get even
-- To keep from having to do something they don't want to do
-- Because they are led to lie
-- Because the adults around them ask them to
-- To please a parent
-- To protect someone else

Q. What will be important to you in determining whether the child in this case is telling the truth, is lying or is mistaken?

(b) The Crying Witness

Q. In judging the credibility of a witness, should you consider whether or not the witness cries or shows emotion when he/she testifies? Why or why not.

Q. Are there other reasons a person might cry when they tell you a story, other than that they are telling you the truth? What reasons are those?

-- Acting
-- Upset about being in court
-- Covering up their own wrongdoing
-- Fear

Q. Have you ever been fooled by someone who cried when they told you a false story?

Q. How many of you saw Susan Smith crying on television before she was arrested for the drowning deaths of her two sons? How many of you believed that her sons had been kidnapped before the real story came out?

Q. I am asking you these questions because, even though this event occurred over one year ago, I expect one government witness will come in and cry for you as she testifies. We intend to show you that she is lying, but I am concerned about how her crying may affect you. How many of you think you may be affected in your decision about credibility based on someone's tears?

Q. How are you going to determine whether the witness is crying because of remorse, guilt or just acting? If you can't make that determination, how many of you are willing to exclude the crying factor all together in trying to determine credibility?

9) Psychological Testimony/Defenses

** Many of these suggested questions come from an insanity defense case defended by Louisiana lawyer J. Michael Small, who suggests analogizing mental illness to something that is out of our control, like sleepwalking.

Q. Have you or anyone you've ever known suffered from a mental illness? Would you mind telling us about that?

Q. What kind of effects did the mental illness have on this person? Was it as debilitating for this person as a physical disability is for some people?

Q. Did this person have any control over their behavior when they were under the influence of this disease? Did they ever get in trouble because of this illness?

Q. Who was to blame for the trouble they go into?

Q. What happened to the person? Ever go to jail? Receive treatment? Medication? Did anything help?

Q. How do you think we should deal with the mentally ill?

Q. Some people don't believe mental illness exists. How do you feel about that?

Q. Have you ever known anyone who consulted with a psychologist or psychiatrist?

Q. What do you think about psychologists or psychiatrists?

Q. What concerns will you have if you are asked to find the accused not guilty by reason of insanity?

10) Homicide/Self-Defense

Q. Mr./Ms. _____ is charged by the state with killing Joe Randall. In fact, he/she did kill Joe Randall. [*Pick someone who looks shocked or distressed by this revelation*]. Juror X, you looked surprised when I just told you that. What do you feel about someone who took the life of another human being?

Q. Is there ever any time when you believe one human being is justified in killing another human being? What are those circumstances?

Q. Under what circumstances is a person justified in acting in self-defense?

Q. You talked about acting in self-defense when a person is afraid. How many of you have ever been in a situation where you were afraid and thought you might have to act in self-defense? Please tell me about those situations.

Q. Why were you afraid? What did you do? Did you have a weapon? If you had one in your possession, what did you do or what would you have done? What were you thinking about at the time you were attacked or threatened?

Q. Should you have been punished if you had been pushed to use deadly force to protect yourself? Why not?

Q. How many of you think a person should be punished by a conviction or jail time if they kill someone else, even if they were acting in self-defense? What should happen to someone in that situation?

Q. How do you think a person feels after killing someone in self-defense?

Q. If that person isn't convicted or doesn't go to jail after that kind of killing, do you think most people still suffer for what they did . . . even if it was justified at the time?

III. The Fifteen Minute Voir Dire

As our jury pool becomes more opinionated and agenda-driven than ever, there is a need for **more** time to question jurors rather than less time. Unfortunately, the response of many judges to the advent of volatile opinions in the jury box is to limit, rather than increase the amount of time lawyers spend talking to the panel. Abandoning all pretext of trying to really find fair jurors, some judges are of the "don't let them ask, don't let them tell" school, where they believe that, if lawyers don't have time to discover poisonous opinions in voir dire, they won't be reversed. Just the opposite is true. Allowing poisonous, agenda-driven jurors into the box increases the issues on appeal and the chances of reversal.

Some judges, often in federal court, limit voir dire to 15 minutes per side. Of course, there is no way you can thoroughly question a panel of 30 or more individuals and pick an impartial jury in 15 minutes. The first approach to dealing with 15 minutes of voir dire, is to fight like the devil to get a juror questionnaire and to get more time to

examine the panel. If those approaches fail, remember that 15 minutes is better than nothing.

A. The Jury Questionnaire

If your jurisdiction is like most states, the questionnaire filled out by prospective jurors gives very limited information about names, education, marital status and occupation. Lawyers in my home state of New Mexico, complained about this for years until one of them, Michael Stout joined with trial consultant Lin Lilley [phone # (512) 899-2858], to create a new, more useful questionnaire. After three years of lobbying the judges and re-drafting the questionnaire, it was approved by our district judges and is now in use around the state. You or someone you know can promote the use of a similar questionnaire in your state or federal court.

If you don't have a decent juror questionnaire, then you need to file a motion to submit a juror questionnaire. In arguing your motion for a juror questionnaire to the court, here are the top seven reasons the judge should grant your motion, in descending order of persuasiveness:

Reason 7 - Less threatening way to question the jurors

Reason 6 - Best way to deal with confidential or sensitive issues

Reason 5 – Focuses upon areas of concern/helps challenges

Reason 4 – Can identify pre-trial publicity without tainting the panel

Reason 3 - The defense will pay for and handle the distribution

Reason 2 - The defense will work and play well with the prosecution on formulating the questionnaire

Reason 1 - IT WILL SHORTEN THE VOIR DIRE PROCESS

B. Getting More Time for Voir Dire

If you know the judge you are dealing with limits voir dire, then you need to file an early motion to extend the time for jury selection. Judges who have been conducting voir dire the same way for years, will not entertain such a motion the day before jury selection. You need to give them time to think about your proposals and consider a change. It may be helpful to include in your motion an affidavit from a jury consultant or citations from jury studies, showing that a shortened voir dire may violate due process or fail to reveal juror bias.

Again, here are the top 7 arguments for attorney-conducted voir dire and extended voir dire:

Reason 7 - Federal Rule of Criminal Procedure 24 Allows Attorney Voir Dire -

Some federal judges have become so set in their limitation of attorney-conducted voir dire, that they forget what is provided by Rule 24:

> **Examination.** The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court **shall** permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Reason 6 - Case Law Recommends Attorney Voir Dire

Here is a useful quote if you are arguing for attorney conducted voir dire in federal court:

> [W]hile federal rules of criminal procedure 24(a) give wide discretion to the trial court, voir dire may have little meaning if it is not conducted at least in part by counsel. The "federal" practice of almost exclusive voir dire examination by the court does not take into account the fact that it is the parties, rather than the court, who have a full grasp of the nuances and the strength and weakness of the case. Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to case such strikes. . . . Experience indicates that a majority of situations questioning by counsel to be more likely to fulfill the need than exclusive examination in general terms by the trial court. United States vs. Ible, 630 F.2d 389, 395 (5th Cir. 1980)

Reason 5 - A Prospective Juror is more likely to respond accurately to an Attorney rather than a Judge -

The jury research indicates that jurors are more likely to respond accurately to the questions of an attorney rather than the judge, who they perceive as an authority figure. Jones, S. "Judge vs. Attorney-conducted voir dire: An empirical investigation of juror candor." Law and Human Behavior, 1987, p.11. Most jurors are highly sensitive to "social comparison information" and therefore are reluctant to deviate from the socially acceptable response. Arkin, J. "Social Anxiety, Self Presentation and Self-Serving Bias and Casual Attribution." Journal of Personality and Social Psychology, 1980, p.38. The higher the4 status of the questioner (i.e., judge vs. attorney), the more likely jurors are to give the answers they believe the judge wants to hear. See "judge vs. attorney-conducted voir dire...", supra, p.11.

Reason 4 - Lawyers know issues/problems in the case better than the judge

Reason 3 - Lawyers better able to deal with open-ended questions

Reason 2 - Need for follow-up questions. Jurors can't be instructed out of bias -

Additional time for follow-up questions is particularly important when a juror admits a prejudice. Once a juror acknowledges a bias, he/she cannot merely be instructed out of that bias. Research shows that jurors place more emphasis on items which they are specifically instructed to ignore, than on the same item when not instructed. Sue, S.R.E. Smith and C. Caldwell. "Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma." Journal of Applied Social Psychology, 1973, p.3. Time must be permitted to ascertain the nature and extent of the juror's bias through follow-up questions.

Reason 1 - AVOID REVERSAL BECAUSE OF A CRAZED JUROR

C. What to do if you're stuck with 15 minutes

If you find yourself in a position where you do only get 15 minutes for voir dire, then all of the advice in this article and talk is heightened. You must selectively choose questions about the topics that are most important to your case, including the things that scare you the very most. Start with the most important items first and leave the more mundane topics for the judge to ask.

When the judge cuts you off, approach the bench and make your record about all the areas of bias you intended to cover, but were not allowed the opportunity to finish. Put on the record that you have not yet obtained enough information in order to intelligently exercise your peremptory and cause challenges and express your concern about the information you have not been allowed to discover.

JUROR-CENTERED VOIR DIRE

By: Andrea D. Lyon
Associate Clinical Professor of Law
DePaul University College of Law
25 E. Jackson Blvd.
Chicago, Illinois 60604
(312) 362-8402
alyon1@depaul.edu

It's not the facts that count, it's what people feel about the facts that counts. Needless to say, what they feel about the facts is profoundly affected by who they are. Hence the importance of jury selection. The process of jury selection is nearly as important as the results of that selection. First impressions last.

"Jury selection has three main goals: 1) to elicit information from jurors, 2) to educate jurors on the defense case and defuse the prosecutor's case, and 3) to establish a relationship between the jurors and the defense attorney and his [her] client."[1]

Probably the single most important thing a lawyer can do in furtherance of these goals is to listen. Some psychologists refer to this skill as attending behavior, including a relaxed attentive posture, eye contact and verbal following.[2]

But listen to what? What questions should you ask, and how should you ask them? This depends on a number of factors, the most central of which is the theory of the case. You must know what your theory is and everything, from the words you chose, to the clothes your client wears, must fit in with that theory. How many times have you talked to another lawyer who is on his/her way to court

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[1]Bennett, Cathy E.."Psychological Methods of Jury Selection in the Typical Criminal Case" Selected Materials on Trial Practice. National Criminal Defense
College: Houston Texas, page 55

[2]Ivey, Allen E.. Micro counseling: Innovations in Interview Training.

to select a jury who is asking you on the walk over, what kind of jurors am I looking for? I'm sorry to say, I've done it myself.

You are looking for jurors to whom you will be able to give permission to feel what they need in order to adopt your theory of the case. A person who believes it is always wrong to kill, would be a great juror on a capital case where your theory is just don't kill him, but lousy on a self-defense murder case where your theory is the guy had it coming.

However, jury selection is not the time to lecture. It is the time to learn and hopefully gently educate your jury, but the jurors are the center of the process, not you.

If you have the opportunity to address all the jurors before starting (or if you can talk the judge into doing it) tell the venire that the only good juror is an open and honest one, and that they might be a great juror for one case but not for another simply because they are the product of their life experiences as is everyone. What you want to do is to establish respect for the juror. In essence you are saying "I see your world."

You want to communicate empathy, respect and congruence. There are

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four ways to do this.[3] The first is self-disclosure. A juror will feel more comfortable telling you what he or she feels if you give them permission to by talking about how you feel (briefly, or you'll get stopped by the judge and/or prosecutor). For instance, if you see that a juror is extremely nervous you might say "Mr. Adams, I feel pretty nervous standing here asking you all these questions when I don't even know you. This a pretty uncomfortable process for me. Are you feeling a little nervous too?" Now don't say anything like this if it's not true, one thing jurors can really sense is insincerity.

The second method of effective juror-centered voir dire is the use of open-ended questions accompanied by open body language. A juror has no trouble hearing what the "right" answer is if you ask close-ended questions, or ask them with your opinion in your voice or manner.

The third method is reflection. This means reflecting back to the juror what you perceive that juror is feeling, thus giving the juror the assurance that you are listening, and giving him/her permission to continue to speak. For example, suppose a juror says "I don't want to sit in judgement on someone." It would be paraphrasing to say "it's an awesome responsibility." It also would not give the juror any way to respond. However, if you reflect back the feeling, you might say

[3]Bennett op. cit. at pages 60 and 61

"are you feeling uncomfortable or a little afraid of this responsibility?" A response like this might make the juror feel comfortable in opening up more.

If you are not sure what it is the juror is feeling and/or thinking, you should use the fourth method which is clarification. "Mrs. Smith, I think I noticed some hesitation in your last answer. Was my question unclear, or is there something else you wanted to say?"

Four more commonly seen techniques which have a closing affect are 1) close-ended questions, 2) false reassurance (telling the juror not to feel what he or she does feel i.e. "You look nervous. Well there's nothing to be nervous about."), 3) advice (which makes the juror feel belittled, or condescended to), and 4) interpretation (this is labeling people which creates resentment and is often inaccurate anyway.)[4]

Carl Rogers in his book Client-Centered Therapy[5] tells us that each person has worth and dignity in his or her own right. This is an important attitude to have in voir dire so that your responses are empathic, not judgmental. For instance, say your case involves the use of a handgun (an issue that has enormous emotional response from the citizenry). You have asked a juror about his feelings

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[4] Ibid.

[5] Rogers, Carl R. Client-Centered Therapy. Houghton Mifflin Company:

about handguns and he has told you that "Handguns are why there is so much crime." If your response is "so you're against handguns.", you have labeled the juror and judged him. Whether the judgement is good or bad is irrelevant because the other jurors have seen that this is a way you have of judging them and this makes them uncomfortable, and also because there is no room for the juror to respond. If you said something like "I get the feeling that handguns make you feel afraid, am I right?" you will get information and you have not judged and cut off this man. Of course, sometime you want to cut off a juror he or she poisons the venire or before the prosecutor hears what a great juror he or she is for the defense.

Good manners are important also. Don't be too familiar. "The interviewer should try to build an atmosphere of mutual trust and respect, or risk ruptured communication.[6]

Also try to avoid stereotypes. To some extent we must rely on the demographic data we have, knowledge of the juror's neighborhood, etc.. But stereotypes are dangerous. "Perhaps because of the pressure of having to see a number of people in too short a time, many interviewers rely upon so-called

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Boston, Massachusetts. 1951.

[6]Brady, John. The Craft of Interviewing. Writer's Digest Books: Cincinnati, Ohio. 1976, page 49.

"hunches," jumping to conclusion which have little or no basis in fact. Many of us, for example, have a temptation to classify people according to physical appearance. We may jump to the conclusion that the man with the square jaw is a person with great determination, or that the person with red hair has a hot temper, or that the individual with eyes set rather close together is not to be trusted. Many studies, or course, have shown that such conclusions have not the slightest validity."[7]

Also, don't ignore the client in this process. He or she is exhibit A throughout all the proceedings. Can the juror look at your client? Also, often many times the client may have a very strong reaction to one or another prospective juror. Ask him or her. Be careful not to let the venire see what it is he or she thinks in the event that you don't follow the client's advice, but especially when you are running out of peremptory challenges and there are two jurors you'd like to strike, your client's input can really help.

Listen to the jurors, ask questions about those matters most important to your theory of the case, and remember that the juror is the important person in voir dire, not you.

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[7]Fear, Richard A. The Evaluation Interview. McGraw-Hill Inc. New York, New York. 1973, page 35.

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NEW YORK STATE DEFENDERS ASSOCIATION
DEFENDER INSTITUE

VOIR DIRE:
FOUNDATION OF THE DEFENSE CASE

by

MARVIN E. SCHECHTER
475 Park Avenue South
Suite 3300
New York, New York 10016
(212) 683-8000

I. Goals of Voir Dire

a. Elimination (De-selection) of jurors who will not behave, think or be receptive to the defense.

b. Selection of jurors who will behave, think and be receptive to defense.

c. To obtain information about the jurors and their attitudes.

d. To give information about the defense theory of the case, problems in the defense case, problems and weaknesses in the prosecution case.

e. To swear eternal fealty to the use of OPEN ENDED QUESTIONS.

(1) Use CLOSE ENDED QUESTIONS for cause challenges.

f. To LISTEN, LISTEN AND LISTEN some more.

(1) Use your eyes as well as your ears.

(2) Listen = hearing, absorbing, retaining.

g. Develop a rapport with the jury.

(1) Gain trust, establish credibility.

(2) Establish a command position.

h. Humanize the client.

(1) There is no statutory provision in New York preventing a defense attorney from touching the client in full view of the jury. Moreover you can even incorporate the client

into the voir dire discussion.

I. Humanize the attorney.

(1) Self-revelation is okay. There is nothing wrong with the jury learning in the course of discussion that you are a parent or that your father also worked in the Post Office.

II. Techniques of Voir Dire

a. The "You" of Jury De-selection

(1) Embrace the jurors - The jurors are not the enemy. The jurors are your allies who will defeat the prosecutor.

(a) Avoid setting up the lawyer v. juror relationship (e.g., "Now is the time of the trial when we evaluate you as jurors").

(b) Avoid arguing with jurors. You are not going to change a juror's opinion. You want to discover their opinions. Arguing is a barrier to obtaining information.

(2) Reserve your adversary relationship for the prosecutor and anyone who is trying to convict your client. This requires that your feelings be separated.

(3) Be confident, earnest, genuine, interested, sincere, caring, energetic, comfortable, friendly.

(4) Speak in an clear, modulated voice.

(5) Questions should be asked with pace and cadence.

(6) Move about (either a little or a lot).

(7) Gesture, if it is natural for you to do so, and do not get crazed about your hands.

b. Preparation

(1) Investigate to determine issues of case and problem areas.

(2) Know the law for jury selection in your jurisdiction.

(a) Know the grounds for cause challenges.

(3) Learn how your judge conducts voir dire.

(a) This will influence whether you resort to jury questionnaires and pre-trial motions to obtain more time for questioning.

(4) Organize the topics which you will ask the jurors.

(a) Topics break into two categories: the specific issues of the case (this includes the defense, problem areas, prosecution weaknesses, etc.) and general generic issues (meaning of an arrest, what is an indictment, the order of a trial, etc.) TOPICS DO NOT INCLUDE DEMOGRAPHICS.

(b) Use notes but aim for an outline format.

1. The notes are to remind. Do not write out every question, follow up questions, etc.

(5) Practice by asking ten open ended questions about an issue (can do alone or with a colleague).

c. Asking Questions

(1) The key open ended questions are: who, what, where, when, why and sometimes how.

(2) Why is the best of these because you can always use it, especially when you are stuck.

(3) There are at least two types of open ended questions: the pure and the suggestive.

(a) A pure question is "Why do you believe that?" or "What caused you to reach that conclusion?" or "Why do you feel nervous?"

(b) A suggestive open ended question moves the juror in a particular direction but is flexible enough to let the juror explain. Examples: "What could be the reasons police officers lie?" or Why would a well meaning person mistakenly identify someone?"

(4) Open ended questions can be used standing alone but more often than not, are used in conjunction with the suggestive open ended question.

(a) "What would cause a police officer not to get all the facts?" followed by "What do you mean by that?"

and "Tell me some more."

(b) "Have you heard the term alibi?"

"When did you hear it?"

"Where did you hear it?"

"What does it mean to you?"

"When you hear the word alibi, do you get a certain feeling?" "What is it?" "Tell me more."

The defense in this case is alibi. "Does that bother you?" "How does it bother you?"

(5) The Closed Ended Question, The Challenge for Cause Dealing with Bad News

(a) When a juror gives a "bad" answer, accept it, roll with it, use it. Do not run away, do not argue, do not ignore and do not skip to the next juror. "Bad" answers are useful. They can be used to educate the jury by way of contrast, or to challenge for cause or to explore an issue. In voir dire, BAD IS GOOD.

(b) To get a challenge for cause, take the bad answer and explore its basis further with more questions. Then affirm and reward. This encourages juror and others to speak and sends the message that it is okay to speak one's mind.

1. If a juror states that "the criminal justice system is just one big game where lawyers, like you bend the rules and twist the truth so you can get guilty people off through technicalities," your question is "I appreciate your candor in speaking up. This is a view shared by many and, is honestly, strongly held by you, isn't it?" Followed by "Others may disagree with you but as for you this is your belief which you have come to after thinking about it, reading and watching television and personal experiences and observations. correct?"
2. Having rewarded and affirmed it is time to to move to the next stage which encourages the juror to admit that this view could affect their interpretation of the evidence. "Your view could affect how you deliberate in this case and even affect your feeling toward my client?" "It could influence your arguments with the other jurors in this case?"
3. Could is not enough for a cause challenge. Now the juror must solidify their admission

of bias. "Since this is a case in the criminal justice system and my client is a defendant and I am a lawyer trying to defend him, I think you would have to say that, given the genuineness of your belief, that this will affect you in deciding this case?" "It would be very difficult, if not impossible, to forget this belief if you serve on this jury?" "Would it not be for the best in our system of justice for you to sit on another jury?"

4. You are not yet finished. The juror must now be prepared for the inevitable rehabilitation. "You've heard all the judges instructions so far, about being open minded, fair, listening to all the evidence?" "This opinion is not going to change in the next few days?"
5. When questioning a juror for cause, go directly to the issue bothering you the first opportunity you have to question the individual.
6. The challenge for cause questioning is done smoothly, slowly, without force. A good mind set for this questioning is to become one with

the juror, adopting the juror's opinion as your own, almost believing in the validity of the opinion.

(6) Types of Questions

(a) Attitude and Empowerment

(b) Attitude explores the jurors beliefs about an issue.

(c) Empowerment questions let the jury know and state their rights. The empowerment question causes the juror to think and invest themselves. As such, it is a powerful communication and bonding tool with the attorney. It is very useful in setting forth the theory of the case.

(1) "Can there be lots of evidence against someone and yet they are innocent?" or "Can leadership in the jury room be shared?' or "Can there be different things which cause a mistaken identification?"

(d) Scale questions are designed to test how strongly a belief is held or where on the spectrum the juror really is with respect to a view. "On a scale of 1 to 5, with 1 being I could care less and five being I would go to war, where would you be Ms. Smith?"

(7) Individual and Group Questions

(a) Questions should be addressed to individuals as opposed to the entire venire. Jurors are intimidated and uneasy, so the group question allows them to hide. Individual questioning loosens everyone up. Does this mean that group questions should never be asked? A question addressed to two or three jurors, a sub group, is very good, especially since what can follow is a discussion among the jurors.

(8) The Language of Questions

(a) No legalese. "Why do you feel that a grand jury would return a true bill?" is a bad question for it assumes that a lay juror knows a legal term.

(b) Language in general should be kept simple. Do not assume that jurors know rudimentary words (like "rudimentary").

(d) Miscellaneous

(1) Beginning the Voir Dire

(a) Time is of the essence. We want to get on the table the opinions, etc. A formal introduction of yourself and the client cuts into that time. Better to incorporate who you and the client are into the quest-

ions.

(b) Seizing on The Prosecutor's Error - You get up and ask the juror about an issue where the prosecutor has left an opening. If, for example, the prosecutor says in the opening round "Mr. Jones, the human eye is like a camera - when you see a face you record it in your memory, right?" then you can ask the very first juror "What is the biggest difference between the human eye and a camera?" or "What does a camera produce that the human eye cannot?" "Can the human eye recall an image with detail the same way as a photographic print?"

1. This approach allows you to raise an issue important to the defense theory of mistaken identification. It also puts the D.A. on the defense and encourages other jurors to speak about this topic. It can even lead into a series of empowerment questions which allow for self-education on the defense theory.

(c) Stating the Theory of the Case - You get up and begin with questions about the theory of the case, e.g., "What does the word alibi mean?"

(d) There are other ways to commence the opening of voir dire but these tend to be complicated or require experience coupled with supreme confidence. If you are an inexperienced trial counsel, it is best to keep your opening confined to a simple but effective technique.

(2) Ending the Round, Ending the Voir Dire

(a) Ending the round should involve something positive that benefits the theory of the case or aids in getting an opinion on the table that is favorable to the defense. You can end a round with jurors finishing a discussion among themselves (never interrupt a juror discussion). A simple "Thank you, ladies and gentleman for your patience" can be quite effective.

(b) Ending the voir dire should be planned in advance. It should be dramatic, it should convey to the jury that YOU ARE THE DEFENSE and we are ready ALONG WITH THE JURORS to put the prosecutor to the test. Finally it must involve the client. This is a good time to stand by the client and pose a close ended question which incoporates the above concepts. "Ms. Stevens, are you

ready along with myself and Bill (the client) to see if the prosecutor can prove this case and to do so with absolute fairness to Bill?" and the follow up group question "Are all of you ready with us to listen for mistaken identification while the prosecutor try's to prove the accusation?

3. Jurors Names

   (a) When the jurors names are first called I start trying to memorize as many as I can because people like to be addressed by name, and it shows you care. If you can do this without looking at notes each time you ask a question, it is very effective as an opener. This does not mean you have to memorize every name. Some is better than none.

   There are many ways to remember the names. Grouping two or three jurors together is one way or jurors 1 and 5 might be Burns and Allen.

4. Body Language and Stereotypes

   (a) Avoid both. Stereotyping prejudges a juror without having obtained any information but, worse, it inhibits both consciously and unconsciously what

questions you will ask the juror. Decide on de-selection based upon information gained in voir dire.

(b) Body language may in some situations be useful but interpretations vary widely and should only be made by professionals. Just because Juror 4 is sitting there with legs and arms crossed may mean many things, none of which may warrant de-selection.

5. Arguments with Prosecutor and Court

(a) The business at hand is getting information. Provoking an argument cannot aid this process. However, faced with hostility or constant interruption from the court or an adversary requires some response. Pick your spot. Better, pick a spot which enhances an issue you want or which makes you appear as the one person in the court who is interested in the jurors' opinions. Yelling or screaming is unnecesssary and contributes to a possible perception that you are not credible or not in command of the court. Firmness marked by logic is good where, in this post O.J.era much is occurring in front of the jury as courts cut back on side

bars.

(1) Try not to ask for sidebars during your voir dire and avoid confrontations, if possible, where the D.A. and/or the court draw counsel into a sidebar - the time spent is often deducted from your round.

(2) If there is a sidebar and you lose the issue, return to the jury with a facial expression that conveys confidence or the image that you have won.

6. "In your face" Questions

(a) Never invade a juror's privacy. "Have you ever seen a psychiatrist?" or "Do you attend A.A. meetings?" is disconcerting, disrespectful and embarrassing.

(b) Better: "What do you think about psychiatry?" "What is the basis for your opinion?" This non-personal approach often leads to a juror telling you about their experience or that of "someone they know."

7. Speeches and Lectures to Jurors

(a) Don't. Enough said.

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ISSUES TO DEVELOP AT TRIAL

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Happy New Year! This month we address a recent Batson decision out of the Court of Appeals, People v. Bridgeforth, that recognized "color" as a category distinct from race for purposes of mounting a Batson challenge. To prepare for a potential Batson challenge, trial practitioners should take note of the prospective jurors' race, gender, ethnicity, skin color, etc., as voir dire progresses. Your identification of the cognizable group being excluded must be clear and specific. It is further worth noting that Bridgeforth also implicitly endorsed "hybrid" groups, as the successful challenge there was to "dark-colored women." e.g., the cognizable class included both color and gender.

Background: In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court held that the Equal Protection Clause forbids a prosecutor from challenging potential jurors solely on account of their race. Id. at 89. Batson has been extended by the Supreme Court to apply to gender, J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994), and ethnicity, Hernandez v. New York, 500 U.S. 352, 359 (1991). New York adopted Batson under the State Constitution and prohibits discrimination against prospective jurors by either the People or the defense "on the basis of race, gender, or any other status that implicates equal protection concerns." People v. Luciano, 10 N.Y.3d 499, 502-03 (2008).

Batson sets forth the three-step procedure to assess claims of discrimination during the jury selection process. Assuming, for our purposes, that it is the defense who is alleging discrimination by the prosecutor: at step one, the defendant bears the burden of establishing a prima facie case that the prosecutor has intentionally used its peremptory challenges to discriminate against a cognizable group. The prima facie case has two components: the cognizable class and facts and circumstances giving rise to an inference of discrimination. At step two, the burden shifts to the prosecutor to articulate a facially non-discriminatory ("race-neutral") reason for striking the juror. At step 3, the trial court must determine, based on the arguments presented by the parties, whether the proffered reason for the peremptory strike was pretextual and whether the movant has shown purposeful discrimination.

The parties as well as the court often conflate and confuse (ie., generally mess up), these steps! We provide handy practice tips below to assist you going forward.

Bridgeforth: In Bridgeforth, the defense brought a Batson challenge, specifying that the prosecutor was striking "'[t]he black or dark-colored [women].'" Although the prosecutor objected that "'we are either going to do Guyanese or African-American, can't do black or skin color,'" the prosecutor plowed ahead and gave reasons for all the strikes, with the exception of one of the challenged jurors, where the prosecutor could not "remember" the reason for getting

"rid of her." That juror was ultimately not seated. The lower court never actually made a step one finding, nor a step 3 finding, essentially granting the challenge because the prosecutor had met its step two burden.

Revisiting the issue of the prima facie case[1], the Court of Appeals held that **"under this State's Constitution and Civil Rights Law, color is a classification upon which a Batson challenge may be lodged."** As the Court explained, race and color are separate classifications, under the specific terms of the Equal Protection Clause of the State Constitution and section 13 of the Civil Rights Law, and pursuant to scholarly research in the field. **Thus, under Bridgeforth, skin color is now a cognizable classification upon which a challenge to a prosecutor's use of peremptory strikes under Batson may be based.**

The Court then went on to find that the prosecutor failed to provide any reason, let alone a race-neutral one, for the excluded juror. Since the prosecutor did not meet its burden at step 2, the trial court's failure to seat the juror was reversible error.

"Step-by-Step" Practice Tips:

- **STEP ONE**: As noted above, a Batson challenge begins with making a step one showing of a prima facie case of intentional discrimination. This showing has two components: identifying the cognizable class and setting forth "facts and other relevant circumstances" to support an inference of discrimination. See Batson; People v. Hecker, 15 N.Y.3d 625, 651 (2010).

    - Cognizable class: Race, gender, ethnicity, color (or a hybrid group: dark-skinned women, Hispanic men). As our high court has shown an interest in an expansive view of Batson, don't hesitate to make the challenge if you see it and can support it! However, note that the Court has already rejected "minorities" as a cognizable group. Skin color, the Court distinguishes, is generally "an immutable characteristic."

    - "Facts and other inferences": The Court of Appeals has said there are "no fixed rules," but some relevant facts (though no single one is required) include: "group identity" between the defendant and the excused prospective jurors; a pattern of strikes or questions or statements made during the voir dire; a showing that

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[1] **For appeal geeks (mostly)**: Under principles of mootness that apply in this area, the defense had argued that the Court could not revisit whether the defense met its burden at step one because the prosecutor had gone on to give step two race-neutral reasons, thus mooting the step one issue. However, the majority found that the step one question would only be moot if the lower court had made a step 3 ruling. Judge Garcia, in concurrence, criticized the majority for "reformulat[ing] the court's mootness doctrine." While of particular importance on appeal, trial practitioners, on receiving a favorable step one ruling, should insist that the court make a step 3 ruling in order to "moot out" the step one "prima facie" issue on appeal.

members of the cognizable group were excluded while others with the same relevant characteristics were not stricken (similarly situated jurors treated differently); where the stricken jurors might be expect to be favorably disposed to the prosecution (e.g., ties to law enforcement, crime victim).

- in the midst of voir dire, defense attorneys naturally turn first to the numbers of strikes the prosecutor has exercised against the protected class in making a Batson challenge. When doing this, it is vital that you clearly identify not only the class of jurors who were struck, but their makeup on the venire and the prosecutor's allocation of its strikes. E.g., "Of the five peremptory challenges used by the People, they struck four of the five potential African-American women on the 18-member venire." Otherwise, short of a wholesale exclusion, there is an insufficient record for assessing whether the prosecutor has disproportionately struck members of the protected class. Of course, always augment your numbers argument with other facts and circumstances, as noted above. Short of wholesale exclusion, numbers alone will rarely be enough to make out a prima facie case.

- Remember your future audience. You are making a record for the appellate lawyer in the unfortunate event of a conviction. Name the jurors who were struck, or clearly identify them by number.

- **STEP TWO**: At step two, again assuming you are the movant and have made out a prima facie case, the prosecutor has the burden of proffering race/gender/ethnicity/color-neutral reasons for the strike or strikes. The burden here is slight: the reasons need only be "facially permissible." That means they must not implicate race, gender, etc. Their believability is not the issue at step two. That is a matter for step three.

- **STEP THREE**: If the explanations proffered by the prosecutor are facially race neutral, the burden shifts back, at step three, to the moving party to "persuade the court that reasons are merely a pretext for intentional discrimination." Hecker, 15 N.Y.3d at 656. The trial court must make its ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented. Id.

  - The trial court has discretion in this area to believe or disbelieve the reason. It is a question of fact, not law. "Credibility can be measured by among other factors, the demeanor of the opposing party, by how reasonable or how improbable, the explanations are, and by whether the proffered rationale has some basis in accepted strategy." Miller-El v. Cockrell, 537 U.S. 332, 339 (2003).

  - Also, the strength of the step one showing is a factor you can cite to support the step 3 showing. A strong showing of "facts and other circumstances" can inform whether the prosecutor has engaged in intentional discrimination despite his or her purportedly race-neutral explanations.

  - **Do not forget step 3! Unless the court rules on the issue of intentional**

discrimination, the prima facie case you worked hard to establish can be revisited on appeal under Bridgeforth. Nor can an appellate lawyer argue that the race-neutral reasons were silly and not believable if you do not make arguments below saying so, and do not insist on a ruling by the court.

See past issues at http://appellate-litigation.org/issues-to-develop-at-trial/

Contact us with ideas for future issues at: info@cfal.org

* * *

Cross-Examination

If Anything Can Go Wrong, It Will!

Robert G. Wells, Esq.
Attorney and Counselor-at-Law
The University Building
120 East Washington Street
Syracuse, New York 13202-4171

CROSS-EXAMINATION

IF ANYTHING CAN GO WRONG…IT WILL!

ROBERT G. WELLS

ATTORNEY AND COUNSELOR AT LAW

THE UNIVERSITY BUILDING

120 EAST WASHINGTON STREET

SYRACUSE, NEW YORK 13202-4171

TELEPHONE: (315) 472-4489

FACSIMILE: (315) 472-1456

www.robwellslaw.com

INTRODUCTION

Cross-examination

I am going to give you some ideas.

I'm going to give you a system for cross-examination.

MacCarthy's System.

It is a turnkey operation that will allow you to cross with systematic style.

You can use it on all witnesses, even experts.

I have learned more about cross-examination from Terence F. MacCarthy, than from anyone else…except my Mom.

Terry has served as the Executive Director of the Federal Defender Program in the United States District Court for the Northern District of Illinois for more than 40 years. His trial experience is vast. He has argued before the United States Supreme Court. He is a sought-after speaker at CLE programs. He has lectured in all 50 states and in more than a dozen foreign countries. He has taught at the National Criminal Defense College since its inception. He has literally taught this system of cross-examination to thousands of lawyers.

Terry has received numerous awards including special awards from his undergraduate and law schools. He received the University of Virginia School of Law, William J. Brennan, Jr. Award, they Harrison and Tweed Special Merit Award from the ABA, and the Reginald Herber Smith Award from the National Legal Aid and Defender Association. In 2000, he received the Defender of the Century Award from the Federal Defenders Association and the Inns of Court Professionalism Award from the Seventh Circuit Court of Appeals. He chaired the Criminal Justice Section of the ABA and also served on its council for more than 20 years.

He is as down to earth a guy as you're ever going to meet, and I'm proud to say he's my friend.

I learned quickly from Terry and it changed the way I approach, and the results I obtain from, cross-examination.

His ways are called "contrarian", which if you look it up only means different. Yet he is constantly and repeatedly requested to give his presentation on cross-examination…everywhere. The Litigation Section of the American Bar Association has asked him to produce both audio and video recordings of his system nonetheless.

If you follow this method, you will be a better cross-examiner.

I have done this a long time. I have watched lawyers in the courtroom for 30 years now, and when they cross-examine, it seems that many of them do not know what to do.

When I began, I certainly did not. I continue to learn.

Cross-examination is what lawyers are least adept at.

They do not seem to know the purpose of cross-examination.

Too often we believe that a witness has hurt our case. Therefore, we must hurt the witness. Close Cross-examination Of The Hurting Kind.

THE GOAL OF CROSS-EXAMINATION

The traditional beliefs:

1. Control
2. Extract admissions
3. Discredit by challenging the witness's recollection

Bu,t do we really want to be seen by the jury as controlling, extracting, and insulting?

We want to look good in front of the jury because to look good is more persuasive than to seem to be controlling, extracting, and insulting.

The broader question is what is the goal of the trial lawyer with respect to the jury?

Persuasion is the answer, of course.

In trial, we seek to persuade the jury to accept our client's version of the facts as told by the lawyer.

It is our primary goal in cross-examination as well.

It is difficult to simultaneously aggravate and persuade.

The three themes that will emerge are:

1. Look good.
2. Tell the story.
3. Use short statements.

Dean Wigmore called cross-examination the greatest engine ever invented for the discovery of truth. So, you picture a large steam locomotive that you are firing up to demolish the witness standing on the tracks right in front of you. You will then back up over him again and grind him into dust.

Or, we mistakenly picture cross-examination as a back-and-forth dialogue usually involving argument, bickering and quibbling.

"Dialogue Cross" is where the lawyer usually loses the battle.

Cross-examination is not time for a food fight.

With all the good tools available, why would you trade them for looking like an overbearing bully; or even worse, losing an argument in a court of law to a layman?

We need to know how to handle this power; this engine.

A great Irishman once said that the true mark of character is how you handle power when you have it.

We want **"Monologue Cross-Examination".**

Cross-examination is far too important to waste on argument.

Think of it as **"Soliloquy Cross Examination."**

It will be a preliminary closing argument.

John Mortimer's famed English Barrister, Horace Rumpole, observed that: "Cross-examination is not the art of examining crossly."

A method used in teaching cross, is with instructor standing between the witness and the examiner. The questions become less hostile; the story is told better and becomes less "cross".

What are we going to say?

We're going to tell a story.

Every great trial lawyer is a consummate storyteller.

Content comes from the facts of your case.

Theory of the case is less important than the theme.

Intertwine the theme into your story.

Tip: Begin your question looking at the witness and end it looking at the jury.

Conduct the answer **to** the jury.

Example:

Q. You saw (to the witness) a green car (to the jury)?

On direct exam, do exactly the opposite.

EYE CONTACT

The most important requirement for good communication is to look at those with whom you communicate.

We even know of United States v. Zambrana, 428 F.3d 670, where the Circuit Court agreed with law enforcement that a driver who did not make eye contact with the officer provided reason to justify a stop.

THE GOOD NEWS, THE BAD NEWS AND THE UGLY NEWS

The Bad News

Three reasons cross-examination is difficult:

First, the most obvious reason cross is difficult, is because of the witness. The witness is there to hurt you.

Second, the Perry Mason Syndrome: Cross-examination that breaks down a witness on the stand to admit that witness himself actually committed the crime. Rarely, if ever happens.

Third, the long accepted conventional wisdom of old-school cross-examination.

What we are taught. We were taught by people who tried few cases, or have been law professors for long time.

The Bibles of Cross-Examination

The Art of Cross-Examination, by Francis L. Wellman (Collier books) written at the turn of the last century. Historically interesting.

The 10 Commandments of Cross-Examination, by Irving Younger. Probably the greatest speaker in the history Continuing Legal Education, told us "**It is an art**". You must have tried 25 cases before you're even ready to learn how to cross. He said they are only 10 great cross examiners in the United States. Younger was primarily an evidence teacher, not a trial lawyer.

THIS IS NOT AN ART!!

YOU CAN DO THIS!!

The Ugly News

Most cross-examination today are presently broken down into three parts

1. The Salutation.

2. The Begging.

3. The Attack.

The Salutation

The rituals which get us started.

Assume the facts for our talk here today, of a mugging of an old lady leaving Murphy's bar, late at night.

Example:

Good morning, Ms. Jones. I hope you had a good trip to the courtroom this morning. You did not get rained on, I hope. Now, can you hear everything I say? If you cannot hear everything I say, you let me know; I'll speak louder. I only have a few questions for you. This won't take much time. Can we agree that all of the questions I ask you will be answered with a yes or no?

Also we like to start out with "Now, on direct you testified…."

We love that stupid phrase. Lose it from now on.

If the witness said something on direct, it wasn't to help you. Why repeat it to the jury?

Furthermore, the other side's witnesses don't "testify".

They "complain" or they "give their version", they "claim". Better yet, they tell their stories. But, they never "testify."

Only **our** witnesses "testify."

Testify carries or imports credibility and implied truth-telling.

The Begging

The second stage of cross-examination.

This is roughly 20% of the total examination.

It goes like this:

Q. So, you're not sure who was mugged you, are you?

A. Yes, I'm sure.

Q. Okay, maybe you are, but you can't be absolutely sure it was Johnny, my client?

A. Yes, I can be. It was Johnny, your client.

Q. But you're not absolutely, 100% positively, beyond all reasonable doubt, sure was Johnny, are you?

A. Yes, I am. I never forget a face, and I'll certainly never forget his face.

The more you beg, the more powerful the witness becomes.

Begging is seldom if ever successful…. anywhere.

The Attack

When begging fails, the examiner usually enters the third phase of cross-examination.

This is about 70% of almost every cross-examination.

By this stage, you are frustrated. You don't mind that the witness is hurting your client anymore. Now, it's personal!

You enter the "attack, pillage, and plunder" phase of cross-examination. You will take no prisoners.

The cross goes like this:

Q. Mrs. Wiggins, you're 63 years old, isn't that correct?

A. Yes.

Q. That's pretty old, isn't it?

A. Well, I don't know. I...

Q. (Interrupting) Are you trying to tell us you're not old?

A. Well, I guess I am older than most.

Q. You don't see as well as you used to, do you?

A. No, not as good as I used to.

Q. That's for sure. In fact, you have to wear glasses, don't you?

A. Yes, as a matter of fact, I do.

Q. But you weren't wearing your glasses that night, were you?

A. No, I wasn't.

Q. So you're old, you can't see very well, and you need your glasses. Without those glasses you can't see a damn thing, and you didn't have your glasses with you that night, isn't that correct?

You return to your table. You sit down by your client. He greets you with a smile and tells you: “Great job, Counselor! You ripped the hell out of her!”

This phase of cross-examination is very popular with your clients and their relatives.

It is not very popular with jurors.

If you're letting your client evaluate and validate your cross-examination, give it up!

The Good News

Hereafter, you are done with incantations. You are done with begging.

Cross-examination is not an art.

It is a science. And, as a science, it can be taught.

That is what the system undertakes to do.

You do not have to be born with a talent for it.

Do not try to emulate the geniuses. That is doomed to failure. Be yourself.

You can be an able cross-examiner without being one of the gifted few.

You can learn.

The Purposes of Cross-Examination

Three primary objectives of cross-examination (National Institute of Trial Advocacy):

1. Obtain helpful information.

2. Discredit witnesses or their testimony.

3. Bolster the credibility of persons who will subsequently discredit the witness or his or her testimony.

See also: Scott Baldwin, Cross-Examination of Lay Witnesses, in Master Advocate's Handbook (D. Lake Rumsey ed., 1986).

But, the true objective of cross-examination is to look good. You want the jury to like you.

The **form** of cross-examination is more important than the **substantive** point you seek to make.

To some extent, we live in an age of TV and even advertisements that do not show the product. We elect judges based on their surnames, and people are subject to the likes of the Home Shopping Network.

Attention spans are at all-time low.

People do not ordinarily have to assimilate and process hours of oral information. Ordinary people don't just change by becoming jurors. They continue to listen with their eyes and think with their emotions.

"It is in the power over emotions that the life and soul of oratory is to be found." Aristotle, 350 B.C.

Consider, Presumed Innocent, the movie based on the Scott Turow book. The defense lawyer won through cross-examination of the pathologist. Terry tells me he has taught cross-examination almost everywhere, and asked lawyer after lawyer to recall the substantive point made in the cross there. They cannot.

It was actually about how the lawyer looked during the cross.

Moreover, it was how the witness looked during the cross.

If trial lawyers can't recall the substantive points made, the jury probably never understood it in the first place.

What they saw, and remembered, was the form. During the cross-examination the lawyer "looked good", and the witness "look bad."

Rent the movie. Watch the scene of the pathologist being crossed with the sound turned down. You'll see what Terry means.

Terry also likes to remind me that it is not about the "facts." "The facts are what put our heroes in jail!"

We will avoid meaningless pleasantries, no begging, no vicious attacks on witnesses.

Begging and beating up on witnesses looks bad, even if you may occasionally get something substantive out of them.

It is not worth making the witness look bad if the price you pay that you look even worse.

Three Housekeeping Rules:

Rule One: Almost all courts have lecterns.

A cross-examiner should not stand behind a lectern when cross-examining. It obstructs communication.

Move to one side or the other.

Audiences feel closer to a speaker without barriers.

See: Mandel, Technical Presentation Skills-A Practical Guide for Better Speaking, page 55.

Remember the importance of body language. Two thirds of your body is hidden by the lectern.

Watch other speakers; whether it's on Sunday TV or otherwise. Whether we agree or not, some preachers are outstanding communicators. You will notice for some years they've gone to a glass lectern. They may read to you from behind a lectern, but when the main message comes, they leave it. When asking you for money, they do not hide behind a lectern. They understand how to communicate.

Use the "touch rule." Stand very close, resting your hand on the lectern, but not behind it.

Rule Two: Notes Can Be a Problem If Not Treated Properly.

Paramount to effective communication is eye contact. A person reading from notes cannot have the required eye contact.

You also cannot watch the witness if you are looking at your notes.

There is no problem with having notes, but you do not read from them.

Refer to your notes: names, dates or phrases.

Refer to them *briefly*. Then, with eye contact, make your point to the jury.

Rule Three: When Communicating, Do Not Hold a Writing Instrument in Your Hand.

It is a distraction from communication.

Some people argue they need to write down important things that are said.

If it is so important, write it down for everyone (especially for the jury to see). Write it on a whiteboard or a blackboard.

I do this to great effect, for instance, where I was eliciting from the snitch witness all the drug dealers' names who used the witness's house in order to show that there was reasonable doubt as to whether the drugs belonged to my hero or to others. I had a list of 13 or 14 names written on the paper on the easel in front of the jury before my cross-examination was done.

No rule of evidence says you can't do this.

"No permission or foundation is needed for a lawyer to write on a blackboard as the examination proceeds, so long as it is drawn from either a proper question or proper answer." Siemer, Tangible Evidence: How to Use Exhibits at Trial (Second Edition, 1989).

Also, without a doubt, you will drop your pen or you lose your pen in your papers and you'll be looking around, as if in the dark, for a pen you don't need. Don't ask me how I know.

Primacy and Recency

These apply just as in opening and closing.

Always start with a positive and important theme, and end with one, as well.

Use what good facts you have to present a primacy theme.

Do not begin with language like: "It is fair to say", "We can agree", "The fact is", "The truth is".

This may bring an objection. You will look bad.

Don't trade your theme for an objection based upon prefixes to the question.

Use descriptive labels rather than names. The *tall* police officer, or the *short* police officer, the officer *with the mustache*. This helps their ability to communicate descriptive labels rather than name which people get confused about or forget.

Do not call witnesses by names or use any honorifics.

It empowers the witness and makes them less subject to control.

You call them nothing. There is no need for their name when cross-examining.

Recency

End on a high note.

Jurors will remember the last of what they heard.

You cannot end on a high note with an open-ended question.

MacCarthy's Formula:

SHORT + STATEMENTS = CONTROL

THE SYSTEM, PART ONE: "SHORT"

Control is not our primary objective. Our primary objective is to look good or even better than that, to make the witness's credibility look bad.

Also, witnesses CAN deny us control.

By properly using **short** statements, you will either get control of the witness, or when the witness decides to deny you control, they, of necessity, look bad. Either result is to be desired.

If the witness looks bad, you as the cross-examiner, are profiting more than you would if you had merely kept control.

A. Three Reasons to Be Short

1. The length of the question (statement) usually determines the length of the answer.

2. The long question is stupid and confusing.

Example:

Q. Now, Mr. Smith, is it not a fact that you exited Murphy's bar at or about three o'clock in the afternoon, and when you exited the bar there was a light rain, and you observed a vehicle, and the vehicle was a green Pontiac convertible being driven by a man you knew to be Tom Clancy, and he had a passenger in the front seat, a blonde woman whom you did not know, and this vehicle was going west on Adams Street, isn't that correct?

A. No.

The attorney doesn't know which question was answered. He had to go back and carve up the question (which he should've done in the first place).

3. When you go short you will be less likely look bad.

You are less likely to make a mistake.

You minimize the opportunity for the witness to hurt you.

You will communicate better and be in better control of your story using small pieces.

B. How short can you make your cross-examination question?

How a few words? The answer is one. **One-word cross.**

Thomas Jefferson: "The most valuable of all talents is that of never using two words when one will do."

George Orwell told us: "If it is possible to cut a word out, always cut it out." Politics and the English Language, Collected Essays, Journalism and Letters of George Orwell, Volume 4 (1968), at 127, 139.

Example:

Q. You were driving on Sacramento Avenue?

A. Yes.

Q. Going South?

A. Yes.

Q. Near Diversey Avenue?

A. Yes.

Q. You were watching the traffic?

A. Yes.

Q. You saw a car?

A. Yes.

A. A Chevy Nova?

A. Yes.

Q. Green?

A. Yes.

C. How to Make Your Cross-Examination Short

1. Eliminate the prefixes.

2. Eliminate the suffixes.

3. Use transitions.

D. Transitions

This is a simple, necessary and helpful tool.

It is used in all parts of a trial.

Traditional transition:

"Mr. Witness, calling your attention to June 10, 2004, at about 3:00 PM, while you are in Murphy's bar, what if anything, unusual occurred?" (Chesterfieldian formalism)

Current transition:

I want to ask you some questions about what you saw when you left Murphy's bar about three in the afternoon, you understand?

McCarthy's Rule 11 of Trial Advocacy: You speak in a courtroom the way you speak in a bar.

Plain Saxon English is the best route. It worked for Darrow. It still works today.

McCarthy's Rule 37 of Trial Advocacy: Move Your Head Up and Down.

This is powerful body language. The person to whom you're talking (a witness, or even the judge), moves their head up and down with you and sends a strong message of agreement.

It is far more difficult for a person to respond with a negative when nodding.

Try it when checking into a hotel: “You have a good room for me?”, while you are nodding your head. Try it with restaurant host or hostess. “You have a good table for us?”

McCarthy doesn't mention it, but it is as close as you will get to Jedi mind tricks.

The final two words in the transition are “you understand”.

The phrase sounds fair and helps protect against an objection.

Objections to Transitions

Deal with them as follows:

Q: I want to ask you what you saw when you left Murphy's Bar at three o’clock in the afternoon, you understand?

Objection: Your Honor, I object. There is no foundation for the question; more specifically, there's no evidence the witness was ever in Murphy's bar.

Judge: Sustained.

Q: You have been in Murphy's bar?

A: Yes.

Q: You were there on June 10?

A: Yes.

Q: You left Murphy's Bar about three o'clock in the afternoon?

A: Yes.

Q: I want to ask you what you saw when you left Murphy's Bar at three o’clock in the afternoon.

E. First Example of Cross Examination Using the System

Q: I want to ask you some questions about what you saw when you left Murphy's Bar at 3:00 PM, you understand?

A. Yes.

Q: You walked outside?

A. Yes.

Q: Toward Adams Street?

A. Yes.

Q: You looked around? (Plausibility statement to be explained later)

A. Yes.

Q: There was a light rain falling?

A. Yes.

Q. You saw car?

A. Yes.

Q. A Pontiac?

A. Yes.

Q. Convertible?

A. Yes.

Q. Green?

A. Yes.

Q. You knew the driver?

A. Yes.

Q. Clancy was driving?

A. Yes.

Q. Tom Clancy?

A. Yes.

Q. There was a passenger in the car?

A. Yes.

Q. A woman?

A. Yes.

Q. A blonde woman?

A. Yes.

Q. You did not know her?

A. No.

Q. The car was going west?

A. Yes.

Q. On Adams Street?

A. Yes.

Here's where you add a transition (probably long overdue).

Q. I want to ask you some questions about the next time you saw the car, two hours later, about five o'clock, you understand?

A. Yes.

Q. Clancy was still driving?

A. Yes.

Q. You did not see a passenger in a car?

A. No.

Q. You did not see the blonde woman?

A. No.

Q. The car was now going east?

A. Yes.

(Continue with another transition to your next set of questions.)

F. Looping

We want "short", right down to one word. There is an exception for proper storytelling purpose.

We envy the Barristers in the British system in the revered Old Bailey. They could stop after a question and answer, turn to the jury and explain to them why a particular answer was important.

You'll find a similar repetition in the cross examination in My Cousin Vinny; "Leaves, these are leaves."

For looping purposes let's use the Murphy's Bar facts. Let us assume that it's important that the car is green. We want the jury to remember it. Loop it.

Q. You saw car?

A. Yes.

Q. A Pontiac?

A. Yes.

Q. Convertible?

A. Yes.

Q. Green?

A. Yes.

Q. You knew the driver of *the green car*?

A. Yes.

Q. Tom Clancy was driving *the green car*?

A. Yes.

Q. *The green car* was going west?

A. Yes.

You have looped a green car three times. You can even write it on the blackboard.

You can also loop a ***theme***. The Murphy's Bar theme is "in the dark"

Q. *It was dark*?

A. Yes.

Q. Someone came up behind you *in the dark*?

A. Yes.

Q. Someone took your purse *in the dark*?

A. Yes.

Q. And that someone ran away *in the dark*?

A. Yes.

Most looping should involve three repetitions. Watch for overkill and too much of a good thing.

THE SYSTEM, PART II: "STATEMENT"

A. The three ways you can do cross examination:

1. Ask the witness questions, either regular or open-ended.

2. Ask the witness traditional leading questions.

3. Cross-examine the witness by using statements.

1. Ask the witness questions, either regular or open-ended.

Open-ended question: Why did you go to the store?

A. This invites the witness to participate in cross examination. We do not want them to participate, or proceed in the narrative mode, which enhances their credibility. We want disjunctive, monosyllabic responses.

B. We will lose control the witness, and the answer.

C. We will have abdicated our role as storyteller.

D. Our cadence will have been interrupted.

2. Ask the witness traditional leading questions.

"You went to the store, isn't that correct?"

You will never be able to use one-word cross.

You are committing the sin of "legalspeak." You sound like a lawyer; which is not good.

You went to the store, *isn't that correct*?

You bought some tomatoes, *isn't that correct*?

You bought some potatoes, *isn't that correct*?

You left the store, *isn't that correct*?

This does not enhance storytelling.

Repetitious adding of prefixes or suffixes to your questions attenuates your story and is not conducive to storytelling.

Terry noticed that when experienced trial lawyers talk about their cross-examinations, they tended to omit the traditional taglines from their story.

3. Cross-Examine the Witness by Using Statements.

"You went to the store?"

The question mark is how the transcript and will show this question.

How you make the statement is important.

Put emphasis on the first few words, and not on the ending works.

With a statement, you can go shorter.

You will eliminate "legalspeak."

You will be better positioned to tell your story well.

Do not fear the statement. It makes sense legally and practically.

See: e.g., Ohio v. Roberts, 448 U.S. 56, 71 n.11 (1980), emphasizing that the principal tool and hallmark of cross-examination is the use of leading questions which counsel phrased as "You never gave..."; "This wasn't then in the pack..."; and "You never gave them...")

Terry reports that judges like it when examiners move along with purpose, so they tend to support the system.

Statements in the form of leading question are proper in cross-examination.

Terry has used this across the country in trial and also has demonstrated the system before the judges of the Seventh Circuit Court of Appeals. None had any difficulty with what he was doing and, in fact, commended it.

See also: H.L. v. Matheson, 450 U.S. 398, 401-02, 101 S. Ct. 1164, 1167 (1981).

Justice Jackson used cross-examination statements at the Nuremberg Trials.

You can find the system was used in set out in trial transcripts in the following book: The Law and Literature, by Edgar Lustgarten. Look at the chapter covering the trial of Lizzie Borden in New Bedford, Massachusetts, in June of 1893. The lead defense attorney was George P. Robinson, former Congressman and former Governor. In his cross-examination of the maid, Bridget Sullivan, he actually employed the system.

Q. A pleasant place to live?

A. Yes, Sir.

Q. A pleasant family to be in?

A. I don't know how the family was... I got along all right

Q. You never saw anything out of the way?

A. No, Sir.

Q. Never saw any quarreling, or anything of that kind?

A. No, Sir, I did not.

Q. A pleasant place to live?

A. Yes.

Q. You never saw anything out of the way?

A. No, Sir.

Q. You never saw any conflict in the family?

A. No.

Q. Never saw any quarreling or anything of that kind?

A. No, Sir.

B. The Law

I refer you to pages 83 through 87 of McCarthy's cross book

C. The System Has a Philosophy

In cross-examination it is your job to "train the puppy", meaning the witness.

Get the puppy into “Yes mode.”

Soon, the puppy will stop thinking about the content of the questions.

If everything is answered yes, your credibility will be greatly enhanced.

You will be telling a story.

Having explained the system’s philosophy and purpose, this is the time to consider what many friends, good trial lawyers all, have suggested.

Why not, when you know the answer, simply ask the witness to question?

They say this is a good change of pace.

They believe it makes us look less demanding.

That is true, but you pay a high price.

Consider the following example where the doctor you are cross-examining as to the blood-alcohol reading of Mr. O'Brien (who is charged with assault) resulted in 0.25. O'Brien was legally drunk.

Under our system, you would do the following:

Q. I want to ask you some questions about the blood-alcohol test you did on Mr. O'Brien, you understand?

A. Yes.

Q. That test gave you a reading?

A. Yes.

Q. That reading was 0.25?

A. Yes.

Q. Mr. O'Brien was legally drunk?

A. Yes.

Instead, our friend would have us then do the following:

Q. That test gave you a reading?

A. Yes.

Q. What was that reading?

A. Well, the first reading was.0.25, but that number can be misleading. First off, this was taken three hours after the fight. The reading would have been much lower then. Also, Mr. O'Brien is an exceptionally big man. He weighed about 300 pounds. A 150 pound man would probably be drunk with a 0.25 reading but a man twice that size may not have been drunk.

Murphy's Law happened again!

You worked hard to get the puppy trained and get into the "Yes mode."

This one question destroys your approach and accomplishments.

Suddenly, you let the puppy off the leash and allowed it to tinkle all over your examination.

The credibility points are given to the witness and not you. You are, in effect, sponsoring the witness. You are crediting your opponent witness.

You have abdicated your role as storyteller. By letting the witness use the narrative form, you have made the witness the storyteller.

Do not be tempted to take the easy path to ask questions (More Jedi stuff?).

D. Crafting Your Statements

Leave extraneous details out of your statement.

They encourage a witness to deny or offer some narrative.

State facts, and not opinion.

Frame in the positive, rather than the negative.

Easier to understand.

Leads to a yes answer, rather than a no answer.

If you desire a no answer, only run a short series of questions.

Group your "No" answers together.

The "No Mode"

Historically, see Clarence Darrow's cross-examination of Police Inspector Norton Schuknecht in the Detroit Sweet trial. It showed the officer **did not do** a series of things that a good and competent police officer would have done. (See: Kevin Boyle, Arc of Justice, page 274.)

Avoid conclusive statements.

This invites unwanted witness participation.

Terms like: "Yet", "Still", "So" and "Therefore" signal a conclusion, or possibly a contradiction.

Avoid arguments

Do not use statements containing values and judgments.

In **Trying Cases to Win**, Herbert Stern Dissects Justice Jackson's Attempted Cross Examination of Herman Goering at Nuremberg. Instead of confronting the witness with facts and dates, he used inexplicably long questions loaded with values, judgments, and philosophy. He received long answers disputing assumptions and philosophy. This is a sure way to lose control.

E. Details

Preparation. Know your facts. Use only accurate facts and details.

Muhammad Ali said: "The fight is won or lost far away from witnesses – before the lines, in the gym and out there on the road, long before I dance under these lights."

Dwight D. Eisenhower said: "In preparing for battle I have always found that plans are useless, but planning is indispensable.

Sun Tzu stated: "All battles are won or lost before they are actually fought."

Don't let the witness' direct (meaning the prosecutor) decide what your cross will be, or where it will start.

Before a witness speaks a word on direct, you will have your cross prepared or outlined.

F. Terms

List the good facts and list bad facts.

List the terms you want to use.

Motion in limine, if necessary.

1. No Leglaese

United States v. Marshall, 488 F2d. 1169 (9th Cir. 1973) Judge Dunaway - fun reading at 1171 n. 1-2, 1176 n.3. – (See: page 96 MacCarthy on Cross-Examination)

2. Use Power Language

Avoid hedges, fillers, deferential expressions and intensifiers. See: William M. O'Barr, Linguistic Evidence: Language, Power, and Strategy in the Courtroom (Academic Press 1982).

"Maybe", "Possibly", "Probably", "I think", "I believe".

Avoid: "So", "Very" and "Really".

Eliminate unnecessary beginnings to our questions: "And" "Okay", "Like" and "Well".

See: United States v. Levine, 180 F.3d 868 (7th Cir. 1999).

The term "forged" was used by prosecutor. Defendant objected to it as a legal conclusion.

Court overruled the objection. Real objection is that the term was used by prosecutor as a "word freighted with connotations of wrongdoing". The Court stated: "Putting one's own spin on events is a principal use of cross-examination. Witnesses can't insist that the prosecutor use euphemisms."

It has also been said that: "The difference between the almost right word and the right word is really a large matter----'tis the difference between the lightning bug and the lightning. Mark Twain in George Ainton, The Art of Authorship (1890), pp. 87-88.

G. Organization – Source materials

1. Witness Statements

2. Verisimilitude Material

Getting into "Yes mode" with true, indisputable facts.

The way things were or are.

Then proceed to impactive facts

See: Cross-Examination, Dean Deryl D. Dantzler, Why Johnny Can't Lead and Some other Observations (National Criminal Defense College)

3. Plausibility

Facts you know have to be true, although not in a statement of witness.

You do not what to go to jail?

You do not want your employer to lose this case?

They locked you in a cell. You did not like being there?

When the witness denies these he loses credibility.

THE SYSTEM, PART III: "CONTROL"

Control is not our primary goal. The goal is to look good and gain credibility while the witness does not look good and loses credibility.

We are making a Preliminary Closing Argument.

We do not let the witness tell a story.

A. Pace

Keep pace crisp.

Comes with experience.

Promptly follow the answer with another question (hopefully a yes or no question).

Witness views any pauses as an invitation to talk more.

Witness may take time to reconsider and think.

B. Listen

You should be getting just yes and no, but loop what is heard outside the system.

Example:

Q. I want to ask you some questions about what happened when you pulled over the car on October 14, you understand?

A. Yes.

Q. You were on duty?

A. Yes.

Q. In the 11th District?

A. Yes.

Q. You are in your squad car?

A. Yes.

Q. You were driving on Sacramento Avenue?

A. Yes.

Q. Going South?

A. Yes.

Q. Near Diversey Avenue?

A. Yes.

Q. You were watching the traffic?

A. Yes.

Q. You saw a car?

A. Yes.

Q. A Chevy nova?

A. Yes.

Q. Green?

A. Yes.

Q. The Nova was stopped at a stoplight?

A. Yes.

Q. And it is your story that the taillight was broken?

A. Yes.

Q. You pulled up behind a car?

A. Yes.

Q. And you told the driver to pull over?

A. Yes.

Q. And he did?

A. Yes.

Q. You got out of your squad car?

A. Yes.

Q. And you walked to the green Nova?

A. Yes.

Q. You told driver to get out of the car?

A. Yes.

Q. You had never seen a driver before?

A. No.

Q. You had never arrested him before?

A. No.

Q. You had no knowledge of him being in any gang?

A. No.

Q. And you had no knowledge that he had a criminal record?

A. No, Counselor, I didn't. Look, you're telling a pretty nice story here. Let me explain how I knew to search this guy. I've been working this district for a lot of years. I know the streets. I have a sense for how *these people* operate.

TWEAK HIM AND THEN LOOP HIM.

Q. You had no knowledge of him being in any gang?

A. Actually, no.

Q. But you did know he was one of *these people*?

A. Yes.

Q. And you know how *these people* operate?

A. Yes.

Q. You can sense what *these people* are up to?

A. Yes.

Q. You can sense how one of *these people* operate even if you've never met this particular person?

A. Yes.

Q. And that's because *these people* are members of gangs?

A. Yes.

Q. But you did not know if Johnny was a member of a gang?

A. That’s right.

Q. But you knew that he was one of *these people*?

A. Yes.

Q. And *these people* are members of gangs?

A. Yes.

Q. You know *these people* commit crimes?

A. Yes.

Q. Your sense told you Johnny was committing a crime?

A. Yes.

Q. And it was your sense that caused you to stop the Nova?

A. Yes.

Q. Because he, whom you've never met and knew nothing about, was one of *these people*?

A. Yes.

Q. *These people* are different than you?

A. Of course.

Impeachment

McCarthy is coming out with a book covering **The 13 Ways to Impeach and How to Use Them.**

D. The Intractable Witness

Q. You saw a car?

A. Well, it was raining. I had a bag of groceries. I was trying to get my umbrella open and I was concerned the eggs might spill.

Here is what does **not** work to correct that:

"Answer all my questions with a yes or no."

You don't want to give up primacy for this! It creates a bad impression. The Duke study concluded that lawyers, who interrupt witnesses, even their own witness, lose points with jurors.

"Your Honor, would you instruct the witness to simply answer yes or no?"

"Your Honor, please strike the witness's answer as being non-responsive."

"Your Honor, I request a cautionary instruction directing the jury to disregard the last answer."

YIKES!

What you may want to do is this:

"I am sorry I confused you. Let me try again."

The original question, which is anything but confusing, is stated exactly as before.

Gerry Spence method: "Can you try to answer my question?"

Garvin Isaacs method: "You came to tell us the truth. The simple truth is "yes". Can't you just tell us "yes"?

R. Eugene Pincham method: "What did I ask you?"

Jurors don't like you to interrupt, but jurors also do not like long-winded answers that are boring.

To stop a run-on witness:

First, no longer look at them. Then, turn your back while he continues to talk. Pick up a piece of paper and give the appearance of reading it. You are actually listening for things to loop.

Slowly re-engage the witness, restating the original question. This is called "tweaking" and you are stopping this puppy and training it to stop tinkling all over your cross-examination.

We need to roll up a newspaper and gently tweak, or hit, the puppy across the nose.

To tweak, simply repeat the question word for word.

This time, you will repeat it **slower** than the pace you were using.

Use a **rising inflection on the last word** in your repeat statement, and overemphasize the last word **louder**.

If he is still out of control, repeat the tweak. But, this time, **use the witness's name** as an exception to the system, and then tweak as you did before.

Bob Hersh, a lawyer from Arizona, not only invokes the first and last name, but uses the middle name as well!

Here, you may gain more than if the witness simply answered your first question!

If the puppy still tinkled after the third tweak, probably the witness looks evasive to the jury.

Example:

Q. You saw car?

A. Well it was rainy out and I had a bag of groceries. I was trying to get my umbrella open and I was concerned that the eggs might spill.

Q. You…saw…a…CAR?

A. Well, it was rainy out and I had a bag of groceries. I was trying to get my umbrella open and I was concerned that the eggs might spill.

Q. **Mr. Smith**... you... saw... a... CAR?

A. Well, the rain made it a bit difficult to see.

Q. (Loop) But, you did see something?

A. Yes.

A. You saw Tom Clancy?

A. Yes.

Q. He was driving a *car*?

A. Yes.

("You saw the car" was your cross goal here)

A. Yes.

Q. You did *see a car*?

A. Yes.

Q. The *car you saw* was green?

A. Yes.

Q. The *car you saw* was a convertible?

A. Yes.

Q. The *car you saw* was a Pontiac?

A. Yes.

The jurors now know that the puppy saw a car.

The jurors know the puppy resisted giving this answer.

NEVER LET THE PUPPY TINKLE ON YOUR CROSS!

E. Exceptions to the System

When YOU make a mistake.

When the puppy has tinkled on a one-word cross question.

THE ASKED AND ANSWERED OBJECTION

Usually, in fact, the question has **not** been answered.

If the puppy tinkles by saying “I don't know” or “I don't remember” you have the opportunity to refresh the witness’s recollection or to impeach the witness.

Refreshing allows you to do more than tweak the puppy. Now, we get to hit the puppy with a fist.

If there was an answer buried in a long narrative answer (witness saw the car), but the puppy tinkled, loop the buried answer.

Q. The *car you saw* was going west?

A. Yes.

Q. You knew the driver of *the car you saw*?

A. Yes.

Q. Tom Clancy was driving *the car you saw*?

A. Yes.

F. Safe Haven - What to Do When You Get Hurt

Maintain your composure.

Show no reaction to the jury (they may not be paying attention anyway).

Do not make things worse by wilting.

The story of The General's Red Shirt.

Get to a safe haven immediately.

Move seamlessly into an area of cross examination that is a safe haven.

SUMMARY AND CONCLUSION

Why the System Works

It works for three reasons:

1. Allows cross-examiner to tell a story and present detail which will be remembered.

2. It allows the cross-examiner to make a good impression. The message may be lost, substance may be missed, but the good impression (or bad impression) of the speaker is remembered.

3. It allows cross-examiner to reasonably control the witness without the asperity of traditional cross examination.

System uses head nods, short statements, and the invoking a minor punishment to get to short monosyllabic answers.

Multiple transcripts and examples are set forth in MacCarthy's book.

Get MacCarthy's Book!!! You need it. These materials are not a substitute.

Go Forth.

Look good.

Tell your story.

Use short statements.

SHORT + STATEMENTS = CONTROL