

CROSS EXAMINATION & IMPEACHMENT SUPPLEMENT

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31st ANNUAL ADVANCED CRIMINAL LAW COURSE

July 18-21, 2005

Corpus Christi

CHAPTER 43

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CROSS EXAMINATION & IMPEACHMENT SUPPLEMENT

I. INTRODUCTION

Immediately following this supplement is the excellent article written by Michael Bernard and Enrico Valdez and titled *Cross Examination & Impeachment*. This article was prepared for and presented at last year's Advanced Criminal Law Course. This supplemental article contains some additional material concerning the scope of cross-examination and a witness' bias or motive. Although the article prepared by Mr. Bernard and Mr. Valdez does an excellent job at addressing these areas, the supplemental material addresses some additional points that I thought might be helpful. Further, this supplement contains a discussion of the recent Supreme Court decision of *Crawford v. Washington* and how it impacts the practice of cross-examination. Last, I have provided a compilation of Texas cases that address *Crawford* and its application to testimonial hearsay in Texas criminal proceedings.

II. SCOPE OF CROSS-EXAMINATION

The constitutional scope of cross-examination has been described as follows:

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject to the broad discretion of the trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness.

Davis v. Alaska, 415 U.S. 308, 316 (1974).

As noted, the trial court retains the power of reasonable regulation of the cross-examination, to prevent confusion, *U.S. v. Ackal*, 706 F.2d 523 (5th Cir. 1983); or to prevent inquiry into matters having little relevance or probative value, *U.S. v. Young*, 655 F.2d 624 (5th Cir. 1981).

Recognizing the important role that cross-examination plays in the truth finding process, Texas has historically allowed wide latitude in the cross-examination of witnesses: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Tex. R. Evid. 611(b).

This rule endorses the Texas practice of wide open cross-examination, "unlike the examination permitted in federal courts which limits cross-examination to the scope of direct examination." 33 S. Goode, O. Wellborn & M. Sharlot, Guide to the Texas Rules of Evidence: Civil and Criminal, Sec. 611.4 (Texas Practice 1988); see *Wiggins v. State*, 778 S.W.2d 877, 895 (Tex. App.—Dallas 1989, pet. ref'd); *Arnold v. State*, 679 S.W.2d 156, 159 (Tex. App.—Dallas 1984, pet. ref'd).

Adoption of this rule indicates a specific intent by the Court of Criminal Appeals to follow longstanding precedent in Texas and to refuse to adopt the related federal rule that limits the scope of cross-examination to the subject matter of the direct examination and to the credibility of the witness. Therefore, in state court, counsel can inquire into other relevant areas outside the direct testimony and often obtain favorable evidence from the opponent's witness.

Texas permits cross-examination of any matter relevant to the issues. On the other hand, cross-examination cannot extend to irrelevant, collateral and immaterial matters. A matter is "collateral" if the cross-examining party would not be entitled to prove such matter as part of his case-in-chief. *Posey v. State*, 738 S.W.2d 321, 325 (Tex. App.—Dallas 1987, no pet.).

Compare the Texas rule with the following Federal Rule 611(b), Scope of Cross-Examination:

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

"Federal Rule of Evidence 611 makes clear that a trial judge is not required to permit cross-examination that exceeds the scope of the direct examination." *U.S. v. Carlock*, 806 F.2d 535, 553 (5th Cir. 1986) cert. denied, 107 S.Ct. 1611 (1987); see also *Lowenberg v. U.S.*, 853 F.2d 295, 300 (5th Cir. 1988). The strict effect of this rule would require that the witness be called back to the stand during the examiner's portion of the case to adduce testimony outside the scope of direct. However, the rule grants the trial court discretion to prevent this inefficiency by allowing the examiner to proceed as if on direct. This usually means that once counsel strays beyond the scope of cross, he or she may no longer ask leading questions. However, the wording of the rule appears to allow leading questions of adverse witnesses since leading is permissible on direct. Fed. R. Evid. 611(c).

III. IMPEACHMENT WITH BIAS OR MOTIVE TO TESTIFY

One of the most fertile areas of cross-examination is bias of the witness. It is here that lawyers are permitted to probe the witness' state of mind.

Bias is defined in *U.S. v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 468 (1984) as "a term used in the `common law of evidence' to describe the relationship between a party and witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self interest." The State also has the right of thorough cross-examination on the issues of bias, interest, prejudice, motive or any other mental state affecting credibility. *Duncantell v. State*, 563 S.W.2d 252 (Tex.Crim.App. 1978). This right flows from the common law and not the Constitution.

The trial court should generally allow the defendant great latitude to show any relevant fact that may affect a witness' credibility. *Virts v. State*, 739 S.W.2d 25 (Tex.Crim.App. 1982). Even though Texas law is clear that great latitude should be permitted in impeachment, counsel must be careful to establish the proper predicate during cross-examination for collateral impeachment. In *Willingham v. State*, 897 S.W.2d 351 (Tex.Crim.App. 1995), the State presented a witness who testified that the Defendant admitted to him that he committed the murders. The Defendant cross-examined the witness but never asked him if he had any kind of interest in the resolution of the case. When the Defendant sought to impeach the witness by calling another witness to explain the first witness' interest in the case (the witness was allegedly to receive preferential treatment in prison), the trial court sustained the State's objection. The Court of Criminal Appeals held that in order to lay a proper predicate for impeachment, the witness should be asked about any possible interest or bias he may have before there is an attempt to prove interest or bias otherwise. Because the Defendant did not establish a "nexus" between the witness and his alleged interest, the Defendant did not establish the proper predicate and no error was preserved.

A.. Informers and Accomplices

We all know that the defense is entitled to know the terms of any agreement or "deal" with the prosecution. However, the inquiry does not stop there because it is the witness' state of mind or possible expectations that are the crucial issue, not the formal terms of the agreement or "deal". In fact, cross-examination is allowed in this area even when the witness and the prosecutor claim

there is no "deal". *Spain v. State*, 585 S.W.2d 705 (Tex.Crim.App. 1979). Therefore such things as juvenile probations which might otherwise be undiscoverable or inadmissible must give way to the right to expose possible motives to prevaricate before the jury. This is true even in the face of statutory constraints. See *Davis*, supra.

In *Davis*, the Defendant sought to cross-examine the State's witness about a pending juvenile probation. Alaska state law made juvenile probations confidential and the prosecutor was successful in preventing this disclosure before the jury. The Supreme Court ruled that the State's interest in the confidentiality of juvenile court proceedings must give way to the Defendant's right to cross-examine the witness and bring before the jury the argument that the witness might be motivated to testify on behalf of the State in order to shift the blame from him since he was in the vulnerable position of being on probation. It is important to note that there was no affirmative evidence of any pressure being applied to the witness by the State because of his probation. However, the Court held that the Defendant was entitled to expose this possible motive to the jury so that they might give it what weight they desired. The court also recognized that this was not an attempt to impeach the witness' character with a prior conviction but to show his possible state of mind and motivation to testify.

A number of Texas courts have found harm where cross-examination was restricted in violation of *Davis*. Appellant had an unqualified right to ask the State's primary witness whether she had also been accused of the offense on trial, because the jury was entitled to understand the witness' vulnerable status in juvenile court and to observe her testimony. *Harris v. State*, 642 S.W.2d 471 (Tex.Crim.App. 1982). The trial court erred in not allowing Appellant to prove that the complaining witness had three arrests -- for possession of marihuana, unlawfully carrying a weapon and burglary -- and that all three charges had been dismissed. It is not important that the charges had been dismissed, since there is the possibility they could be refiled. *Simmons v. State*, 548 S.W.2d 386 (Tex.Crim.App. 1977). The trial court erred in not permitting Appellant to prove that the principal witness against her had been charged with a felony drug offense and the State had not filed a Motion to Revoke Probation, even though the witness testified that "no one has offered me anything." *Coody v. State*, 812 S.W.2d 631 (Tex. App. - Houston [14th Dist.] 1991). The Defendant was entitled to demonstrate to the jury the bias or motive of the State's rebuttal witness by proving that he was under indictment for possession of methamphetamine. This fact was admissible to show a basis for an inference of undue pressure due to his status

as an indictee. This is true even though the prosecutor denied there was a deal for his testimony. *Randle v. State*, 565 S.W.2d 927 (Tex.Crim.App. 1978). The trial court erred in prohibiting Appellant from showing that the State had filed and then withdrawn a Motion to Revoke Probation against its eyewitness where this tended to show the witness' potential bias and motive for testifying favorably for the state. Even though the motion had been withdrawn, it could have been refiled. *Morgan v. State*, 740 S.W.2d 57 (Tex.App. --Dallas 1987).

The Court of Criminal Appeals endorsed *Davis* in *Carroll v. State*, 916 S.W.2d 494 (Tex.Crim.App. 1996) when the trial court refused to permit impeachment of the state's witness with evidence that he was awaiting trial on an aggravated robbery charge. The broad scope of cross-examination permitted by the constitution "necessarily includes cross-examination concerning criminal charges pending against a witness and over which those in need of the witness' testimony might be empowered to exercise control." Such evidence is *always* admissible to prove bias. It is not determinative that there is no agreement between the state and the witness. "What is determinative is whether appellant was allowed to demonstrate any possible bias or interest that the witness may hold to testify on the State's behalf. In other words, it is possible, even absent an agreement, that the witness believed his testimony in this case would be of later benefit." *Carroll* also held that the confrontation clause will prevail in any conflict with Rule 608(b) which prohibits the inquiry into specific instances of conduct for purposes of attacking credibility.

However, a number of Texas courts have found no error from restrictions placed on cross-examination in violation of *Davis*. The trial court did not err in prohibiting Appellant from impeaching the State's witness where appellant did not show that the witness testified against him as a result of bias, motive or ill will emanating from his status of deferred adjudication. *Callins v. State*, 780 S.W.2d 176 (Tex.Crim.App. 1989). *Davis* is not offended when a defendant is prohibited from asking a witness about an unrelated pending charge, provided that the defendant has otherwise been afforded a thorough and effective cross-examination and where the bias and prejudice of the witness is patently obvious. *Carmona v. State*, 698 S.W.2d 100, 104 (Tex.Crim.App. 1985). The trial court did not err in refusing impeachment with a pending worthless check case having no connection with the instant case, where the witness is a rebuttal and not a material or accomplice witness, and where there was nothing to show that the prosecutor was using the charge to pressure favorable

testimony. *Green v. State*, 676 S.W.2d 359, 363 (Tex.Crim.App. 1984).

As noted, an inquiry to show bias or motive is not subject to the same standard as impeachment with prior convictions and is therefore not subject to the rigid requirements set out in Rule 609, F.R.C.E. and T.R.C.E. See *Massengale v. State*, 653 S.W.2d 20 (Tex.Crim.App. 1983) "Great latitude should be allowed the accused in showing any fact which would tend to establish ill feeling, bias, motive or animus on the part of any witness testifying against him." *Evans v. State*, 519 S.W.2d 868, 871 (Tex.Crim.App. 1975); *Steve v. State*, 614 S.W.2d 137 (Tex.Crim.App. 1981). In *Evans* the Court ruled that it was reversible error to prohibit evidence of a pending sodomy charge against the witness. See also, *Parker v. State*, 657 S.W.2d 137 (Tex.Crim.App. 1983). The trial court may have discretion to disallow such evidence if there is a basis to find that the pending charges are minor or unrelated and prejudice outweighs probative value. *Gutierrez v. State*, 681 S.W.2d 698 (Tex.App. -Houston [14 Dist.] 1984). However, the trial court is entertaining the risk of fundamental error because if wrong:

The erroneous denial of this right to confrontation is constitutional error of the first magnitude and no amount of showing of want of prejudice will cure it.

Spain, supra, citing *Davis*, supra, 415 at 318 and *Evans*, supra.

The harm is done when a proper cross-examination is restricted by the trial judge. It is not necessary for the defendant to show that answers to proper questions would be favorable. The defendant should, however, proffer the questions by an informal bill of exception for the reviewing court. *Hurd v. State*, 725 S.W.2d 249 (Tex.Crim.App. 1987), *Koehler v. State*, 679 S.W.2d 6 (Tex.Crim.App. 1984) and *Spain*, supra. Defense counsel retains an absolute right to make a bill of exception in question and answer form. *Kipp v. State*, 876 S.W.2d 330 (Tex.Crim.App. 1994).

The consistent theme in the cases cited above in both state and federal decisions is that the jury is entitled to know the true status of the accomplice or informant witness in the criminal justice process. Then the jury can weigh for themselves what pressures or expectations, either real or imagined by the witness, might color the testimony.

The scope of inquiry into bias is not unlimited, however, and the following excerpt from *Hurd*, is a good summation of the law in this area:

This right to confront witnesses does not prevent a trial court from imposing some limits on the cross-examination into the bias of a witness. Trial courts retain some discretion in deciding how and when bias may be proved, and what collateral evidence is material for that purpose. *Spriggs v. State*, 652 S.W.2d 405 (Tex.Crim.App. 1983) and *Green v. State*, 676 S.W.2d 359 (Tex.Crim.App. 1984). In exercising this discretion, the trial courts have the latitude to impose reasonable restrictions on such cross-examination. These restrictions may be based on concerns such as harassment, prejudice, confusion of issues, the witness' safety, or interrogation that is repetitive or marginally relevant.

725 S.W.2d 249, 252 (Tex.Crim.App. 1987).

The trial court's discretion in this area has limits. For example, a trial court may not restrict a defendant to any one method in showing any fact which would tend to establish bias. *Harris v. State*, 642 S.W.2d 471 (Tex.Crim.App. 1982). Also, it is not within a trial court's discretion to prohibit a defendant from engaging in "otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness". *Delaware v. Van Arsdall*, supra at 679. But see *Gutierrez v. State*, 764 S.W.2d 796 (Tex.Crim.App. 1989) for an example of limitation of impeachment on collateral issues.

In a significant departure from established Texas jurisprudence, the Texas Court of Criminal Appeals delivered *Carpenter v. State*, 979 S.W.2d 633 (Tex.Crim.App. 1998). In *Carpenter*, the Court addressed an issue of the defendant seeking to cross-examine the state's cooperating witness concerning the existence of pending federal conspiracy charges. The Court held that the existence of such charges may be relevant to establish bias or motive but that the trial court retains discretion and that the proponent of the evidence must establish that the evidence is relevant. The Court went on to hold that in order for the evidence to be relevant and admissible, the proponent must establish some causal connection or logical relationship between the pending charges and the witness' "vulnerable relationship" or potential bias or prejudice for the state or testimony at trial.

In *Dixon v. State*, 2 S.W.3d 263 (Tex.Crim.App. 1998) the Court of Criminal Appeals clarified the admissibility of a pending indictment. The defendant called a witness in trial who had an indictment pending. The state sought to cross-examine the witness on the pending indictment over the defendant's objection. The Court of Criminal Appeals (Judge Baird) originally held in December of 1998 that Rule 608(b) prohibits inquiring into a non conviction of a witness to attack their credibility. Rule 608 specifically provides for impeachment by evidence of a criminal conviction. Since the state never sought to question the witness regarding a possible bias or motive, the cross-examination was prohibited by Rules 608 and 609. The Court even held that Rule 612 (which permits cross-examination with regard to bias and interest) does not overrule the specific purposes of 608 and 609.

Judge McCormick straightened this out on September 15, 1999 in holding that Texas Rules of Criminal Evidence 608(b) and 612(b) are distinct rules that serve different purposes (this was prior to the merge of the rules to become the Texas Rules of Evidence). The Court went on to state that Rule 608(a) says how to impeach a witness' general character for truthfulness and that Rule 608(b) bars impeaching a witness's general character for truthfulness with specific acts of conduct other than conviction of crime as provided in Rule 609. Rule 612(b) permits impeaching a witness by proof of circumstances or statements showing the witness's bias. Unlike Rule 608(b), Rule 612(b) does not expressly bar the use of specific instances of conduct to show bias. Rule 612(b) is different from Rule 608. Rule 608 addresses a witness's general character for truthfulness. Rule 612(b) addresses a witness's trustworthiness in the particular case because of some bias or interest.

In *Lopez v. State*, 86 S.W.3d 228 (Tex.Crim.App. 2002) the Court of Criminal Appeals held that the Rule Tex. R. Evid. 608(b) proscription against admitting specific instances of conduct (i.e. prior false allegations of abuse against a person) overrides the 6th Amendment right to confrontation.

Even the Fifth Circuit follows the principles set forth in *Davis*. In *United States v. Alexius*, 76 F.3d 642 (5th Cir. 1996), the Court held that the district court erred in limiting cross-examination of the government's primary witness concerning pending drug charges. The witness, who was in federal custody, had pending drug charges in federal and state court. Alexius sought to ask the witness about the pending cases in an effort to demonstrate his motive for testifying for the government. The trial court refused to allow this impeachment.

Outside the jury's presence, the witness stated that he had not been promised anything for his testimony, and he did not know if it might aid him in his pending cases. The Fifth Circuit held that because Alexius' defense hinged on the witness' credibility, and because the restriction on cross-examination removed Alexius' only impeachment evidence, the trial court abused its discretion in refusing to permit the questioning.

The Fifth Circuit also found an abuse of discretion in limiting cross-examination in *U.S. v. Landerman*, 109 F.3d 1053 (5th Cir. 1997). The Court found error in the trial court restricting cross-examination of a cooperating witness by holding that Defendant should be allowed great latitude in cross examining a witness regarding his motivation or incentive to falsify testimony. This is especially so when cross examining an accomplice or a person cooperating with the Government. The court went on to state:

...it is so important that the defendant is allowed to "search" for a deal between the government and the witness, even if there is no hard evidence that such a deal exists. What tells, of course, is not the actual existence of a deal but the witness' belief or disbelief that a deal exists.

Id. at 1063.

B. Other Forms of Bias

Favor: whether or not the witness is a friend, relative, employee, member of the same organization or otherwise aligned with one side.

Hostility: previous trouble with the adverse party, including litigation. This might also include prior hostile acts of the witness which would otherwise be inadmissible as extraneous misconduct.

Financial Stake: also includes litigation, either pending or contemplated. *Zuniga v. State*, 664 S.W.2d 366 (Tex.App. –Corpus Christi 1983) and *Shelby v. State*, 819 S.W.2d 544 (Tex.Crim.App. 1991). Victim's assistance claims should be considered, especially if they require or would be enhanced by close cooperation with law enforcement. See Art. 56.03(g), C.C.P., Victim Impact Statements. Also, counsel must be familiar with Articles 56.31 through 56.61 C.C.P. which now contain the Crime Victims Compensation Act and provide a wealth of information including a verified application form pursuant to Article 56.36 C.C.P.

In *Hoyos v. State*, 982 S.W.2d 419 (Tex.Crim.App. 1998), the Court of Criminal Appeals addressed the scope of cross-examination where a witness has

instituted civil litigation in connection with circumstances being litigated in a criminal trial. The defendant was charged with aggravated robbery and the complaining witness had filed a civil suit against her apartment complex alleging a failure to maintain effective security. The Court of Criminal Appeals found that since the defendant was not a party to the civil litigation that the defendant failed to demonstrate relevance. *Shelby*, 819 S.W.2d 544 and *Blake v. State*, 365 S.W.2d 795 (Tex.Crim.App. 1963) previously held that any civil suit by a victim based on the same occurrence is relevant to show bias. The Court of Criminal Appeals distinguished *Hoyos* because (1) the defendant was not a party to the civil suit, (2) there was not fact issue as to whether the crime occurred and (3) there was no other reason to believe the lawsuit might cause the complainant to be biased in her testimony at the criminal trial.

The application requires a description of the offense, a complete financial statement, information concerning indemnification from other sources and a statement describing the injuries.

C. Procedure For Examining a Witness as to Bias

Under Tex. R. Evid. 613(b), the witness must be confronted with the circumstances of the claim of bias and first be given a chance to explain or deny the bias. If the witness admits the bias then no further extrinsic evidence is allowed. Corresponding Fed. R. Evid. 613 deals with prior statements of a witness but contains no specific rule as to bias of the witness.

IV. CRAWFORD V. WASHINGTON

On March 8, 2004, the Supreme Court rendered what was perhaps the most impactful decision on criminal jurisprudence in more than two decades. In *Crawford v. Washington*, the Court held that the only indicum of reliability sufficient to satisfy constitutional demands is that of confrontation. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004). *Crawford* involved an assault and attempted murder where the prosecution introduced a recorded statement that Crawford's wife made during a police interrogation to refute a claim of self defense. The trial court admitted the statement pursuant to a declaration against penal interest hearsay exception.

The opinion in *Crawford* began with a historical analysis of the Confrontation Clause and labeled "ex parte examinations as evidence against an accused" as a "principal evil." The Court wrote that the authors of the Constitution would not have allowed admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify and the

defendant had had a prior opportunity for cross-examination. The Court condemned the practice of admitting ex parte testimony upon a finding of reliability. The Court held that the Constitution prescribes the procedure for the reliability of testimony in criminal trials and no court has authority to replace it with one of its own devising.

The opinion goes on to hold that the right of confrontation is a “bedrock procedural guarantee” applicable to both federal and state prosecutions. The Court rejected the view that the Confrontation Clause applies only to in-court testimony and that its application to out of court statements introduced at trial depends upon “the law of evidence for the time being.” The Court further condemned exceptions to the hearsay rule when it wrote that where testimonial statements are involved, “the framers of the Constitution did not mean to leave the Sixth Amendment protection to the vagaries of the Rules of Evidence, much less the amorphous notions of reliability” and “admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.” The Court found the practice of courts admitting untested testimonial statements with reliability in the very factors that make the statements testimonial to be insulting. The opinion concludes by holding that where testimonial statements are at issue, the only reliability sufficient to satisfy constitutional demands is one that the Constitution actually prescribes: confrontation.

A. *Crawford* in Texas

Since the opinion in *Crawford*, several Texas decisions addressing its import have been issued. As of the writing of this paper, those opinions are as follows:

Brooks v. State, 132 S.W.3d 702 (Tex. App.–Dallas 2004).

At trial, the written statement of a non-testifying co-defendant was admitted over objection. This statement implicated the defendant in an aggravated robbery and was given pursuant to a custodial interrogation. The defendant’s objection was that he was not afforded the opportunity to cross-examine the co-defendant. The defendant then testified in his own defense and was extensively cross-examined by the state on the contents of the co-defendant’s statement. The defendant was convicted and ultimately appealed.

The court held that the objection to the co-defendant’s statement was sufficient to preserve a confrontation complaint even though the term “Confrontation Clause” was not used in the actual trial objection. The reference to “cross-examine” was

sufficient. The court easily found error in the admission of the statement based on *Crawford* and proceeded with a harm analysis. The court determined that the co-defendant’s statement constituted unchallenged substantive evidence to prove the defendant’s guilt and contradictory evidence to impeach the defendant’s defense. The court held that this case was not one in which cross-examination would be of only “marginal utility”. The trial court’s judgment was reversed.

Bunton v. State, 136 S.W.3d 355 (Tex. App.–Austin 2004).

At trial, a police officer was cross examined over discrepancies between his offense report and his testimony on direct. On redirect, the prosecutor sought to rehabilitate the officer by inquiring about his offense report. The officer testified, over hearsay objection, as to what a witness told him at the scene of the alleged assault. The court held that hearsay evidence is admissible when it goes to clarify other hearsay evidence elicited by the opposition. This evidence is admissible under the Rule of Optional Completeness. Tex. R. Evid. 107.

The defendant appealed on the contention that he was deprived of his rights to confront and cross-examine the non-testifying witness mentioned in the offense report. The court noted that although the defendant objected as to hearsay, this did not preserve error as to a confrontation claim. The court stated that “although the right of confrontation is vital to an ordered criminal justice system and of constitutional magnitude, it is none the less a trial right”, quoting *Mallory v. State*, 752 S.W.2d 566, 569 (Tex. Crim. App. 1988). The court stated that they found nothing in *Crawford* that would excuse the defendant for failing to make a confrontation claim at trial. The court acknowledged that *Crawford* substantially altered the law with respect to the Sixth Amendment’s Confrontation Clause and the relationship of that clause to the rules of evidence. However, they rejected the defendant’s argument that *Crawford* represents a new and novel constitutional rule and an objection on that basis would have been futile because *Crawford* had not been decided at the time of the defendant’s trial.

Cassidy v. State, 149 S.W.3d 712 (Tex. App.–Austin 2004).

Defendant was tried for aggravated assault. The alleged victim spoke only Pakistani. A police officer interviewed the alleged victim in the hospital. A fellow employee who happened to be in the room served as an interpreter. At trial, the officer testified, over objection, that the alleged victim gave him a description that matched that of the defendant.

The court held that the officer's interview of the alleged victim here did not constitute an "interrogation" as contemplated in *Crawford*. Therefore, the hearsay complained of in this case was not testimonial. The court further stated that *Crawford* strongly suggests that the admissibility of nontestimonial hearsay is outside the scope of the Sixth Amendment.

Hale v. State, 139 S.W.3d 418 (Tex. App.– Fort Worth 2004).

The trial court denied the defendant's motion to exclude a written testimonial statement by a nontestifying co-defendant. This statement detailed the defendant's involvement in an aggravated sexual assault. Additionally, the co-defendant refused to testify in court by asserting his right against self-incrimination. The defendant then entered negotiated guilty pleas subject to his right to appeal the pretrial ruling.

Citing *Crawford*, the court held that, without exception, testimonial statements of witnesses absent from trial are admissible over Sixth Amendment Confrontation Clause objection only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine. Because the statement in question was testimonial and the declarant asserted his right not to testify, the defendant had no prior opportunity to cross-examine. The trial court's judgments were reversed.

B. Confrontation versus Cross-Examination

The meaning of *Crawford* is important to the practice of cross-examination not because it impacts the actual procedure of cross-examination, but because it reestablishes why cross-examination exists: to confront one's accusers and to explore any biases or motives which might color one's testimony. In the opinion, Justice Scalia stated: "[T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." The decision in *Crawford* should not alter the way cross-examination is conducted; rather, it should alter counsel's approach to evidence that cannot be cross-examined.

V. CONCLUSION

As previously stated, the article written by Michael Bernard and Enrico Valdez immediately follows this supplement. The material printed above was intended merely to address some additional points that the reader might find useful in preparing for and conducting their cross-examination. Additionally, the discussion regarding

Crawford v. Washington was meant to provide some meaningful insight and update the reader as to its effects here in Texas.

CROSS EXAMINATION & IMPEACHMENT

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CROSS-EXAMINATION & IMPEACHMENT¹

I. INTRODUCTION

One can well discern a trial lawyer's devotion to his craft by his manner of witness examination. Some lawyers conduct cross-examination through what can best be described as the "stream of consciousness" method; asking a series of meandering questions without premeditation or apparent purpose, with little regard for possible answers, with no specific theme or goal in mind, relying on only the slimmest hope of scoring some random semblance of victory over the witness. Cross-examination should be an organized, goal oriented process. It is to be approached from an analytical perspective, much like any other endeavor in law. It is not for the mentally lazy or the ill prepared. It is capable of being mastered by those who are devoted enough to their craft to care to be the very best.

All those reading this work have chosen to be trial lawyers. The only innate skill required is the willingness and ability to speak publicly. Assuming you have this (or you would have long ago chosen some other field of law), then the art and science of witness examination can be acquired to the point of being intuitive. You know you can on a moments notice—based on a witness' word, manner, tone or affect—mentally arrange the words and order of questions to execute an examination that perfectly paints the picture you desire for the fact-finder. It is a skill at your command, and there is no greater feeling of professional accomplishment when it is done.

It has been said to the point of being axiomatic that cross-examination is "*the greatest legal engine ever invented for the discovery of the truth.*" To the extent that this is true, preparation and investigation fuels that engine. Investigation is uncovering and having total command of all relevant facts. Preparation is determining which witnesses will convey those facts. It is planning not only what you can and cannot ask but what you *should* and *should not* ask and *how* to ask it. Cross-examination is the process of getting the answer for which you are looking. Impeachment is what you do if you get the wrong answer. It is hard work. That's why you get paid the big bucks.

The process begins with knowing the relevant law. This paper is about the law. This paper does not teach

how to cross examine, which is what we all want to know. But knowing how begins here.

We can recommend two books designed to help you with *how* to effectively examine witnesses. The first is by Larry S. Pozner and Roger J. Dodd entitled *Cross-Examination: Science and Techniques*, (hereinafter referred to as POZNER), and is published by Michie. This is a textbook sized work, containing over 700 pages. It is thorough and contains numerous styles of cross examination. It is well worth the effort. The other is by Michael E. Tigar entitled *Examining Witnesses* and is published by the American Bar Association, (hereinafter referred to as TIGAR). It is, in our opinion, the best work written on the subject. It is short and can be read in just a few sittings. To the practiced lawyer, it tells us what we already intuitively know but places witness examination into a framework that makes analysis possible. To the novice, it teaches how to think and approach examinations in useful ways. It should be reread often.

As lawyers, the knowing begins with the law. So, here it is—

II. CROSS-EXAMINATION

A. The right to be confronted by one's accusers

1. Constitutional & Statutory Provisions and Confrontation

a. Federal

The United States Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him... ." U.S. CONST. amend. VI.

The right to confront one's accusers means the right to have witnesses give their testimony under oath and be subjected to cross-examination. *See Coy v. Iowa*, 487 U.S. 1012, 1016 (1988); *see also*, Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998). This right is based on the belief that cross-examination is the "greatest legal engine ever invented for the discovery of the truth." *California v. Green*, 399 U.S. 149, 158 (1970). The Sixth Amendment is applicable to the States through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

b. Texas

In Texas, the right to confront one's accusers is assured both constitutionally and statutorily. The Texas Constitution states: "In all criminal prosecutions the accused... shall be confronted by the witnesses against him... ." TEX. CONST. art. I, § 10. Similarly, the Code of Criminal Procedure provides that "[I]n all criminal

¹ The authors would like to thank Bexar County District Attorney Susan D. Reed for providing the time and resources to complete this work.

prosecutions the accused... shall be confronted by the witnesses against him... ." TEX. CRIM. PROC. CODE ANN. art. 1.05 (Vernon 1977).

Generally, Texas courts address questions under the art. I, § 10 under the Federal framework. *Robertson v. State*, 142 S.W. 533, 546 (Tex. Crim. App. 1912). The statutory language is identical to the Texas Constitution and is interpreted the same way. *Murdock v. State*, 840 S.W.2d 558, 564 (Texarkana 1992), *remanded on other grounds*, 845 S.W.2d 915 (Tex. Crim. App. 1993).

2. The Purpose of Cross-examination

Confrontation promotes reliability in a criminal trial by subjecting the evidence against the accused to "rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 846 (1990); *see also, Lee v. Illinois*, 476 U.S. 530, 540 (1986). As the United States Supreme Court explained: "Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." *California v. Green*, 399 U.S. at 156.

Similarly, the Texas Court of Criminal Appeals has stated that cross-examination tests the truth and veracity of the witness's testimony on direct-examination by: (1) allowing the jury to determine the credibility of the witness; (2) eliciting facts that can discredit the witness by showing that the testimony was untrue or biased; and, (3) provoking independent testimony concerning the witness's reputation for veracity. *Carroll v. State*, 916 S.W.2d 494, 497 (Tex. Crim. App. 1996).

B. Effective Cross-examination

"An effective cross-examination encompasses more than just the opportunity to elicit testimony to establish the existence of certain facts. The cross-examiner should be allowed to expose the limits of the witness' knowledge of relevant facts, place the witness in his proper setting, and test the credibility of the witness. The failure to affirmatively establish the fact sought does not prevent the cross-examination from having probative value in regard to the witness' credibility. An unbelievable denial of the existence of a fact can be even more probative as to lack of credibility than an affirmative admission of the

fact." *Spain v. State*, 585 S.W.2d 705, 710 (Tex. Crim. App. 1979).

The rules of evidence provide the framework under which all cross-examinations must be made. They also provide tools with which to effectively do the job.

1. Writing used to Refresh Memory

a. Texas Rules of Evidence 612

Rule of Evidence 612 allows the jury to review a written matter used to refresh the memory of a witness, either before or during testimony. TEX. R. EVID. 612. The opposing party is entitled, upon request, to inspect and use for cross-examination a document used by the witness to refresh his memory. *Robertson v. State*, 871 S.W.2d 701, 708 (Tex. Crim. App. 1993).

When the witness uses a writing to refresh memory either during or before testifying, the adverse party is entitled to have the document, and the relevant portions of the document can be admitted into evidence. *Id.* If the writing used to refresh a witness' memory contains matters not related to the witness' testimony, a party can request an in-camera inspection of the document to redact unrelated portions prior to delivery to the opposing party. Such review is mandatory. *Yates v. State*, 941 S.W.2d 357, 363 (Tex. App.—Waco 1997, pet. ref'd); *see also, Robertson v. State*, 871 S.W.2d at 708.

Obviously in a criminal case this rule is most applicable to police reports. *Johnson v. State*, 846 S.W.2d 373, 376 (Tex. App.—Houston [14th Dist.] 1992, pet. granted), *remanded in part* 853 S.W.2d 574, *on remand* 857 S.W.2d 812 ("The offense report was produced for the Appellant, and he had ample opportunity to inspect it, cross examine the officer about it, and introduce into evidence any relevant portions."). In certain circumstances, a trial court can strike a police officer's testimony if the State refuses to turn over the offense report. *State v. Williams*, 846 S.W.2d 408, 411 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd).

If the document is admitted into evidence, it is not admitted for the truth of its content but rather for the jury's use in comparing the document to the witness' testimony. *Robertson v. State*, 871 S.W.2d at 708. Therefore, it is not subject to the hearsay objection. It is important to note, however, that exclusion of such writings will not necessarily call for reversal. *de la Rosa v. State*, 961 S.W.2d 495, 499-500 (Tex. App.—San Antonio 1997, no pet.).

Not all writings made by a witness, however, are subject to this rule. The rule is only applicable to writings used to refresh memory before or while the witness is testifying. For example, absent a showing that a prosecutor reviewed his voir dire notes to refresh his

memory before explaining his use of peremptory challenges of minority veniremembers, the trial court properly denied the defense's request to produce a copy of the notes. *Pondexter v. State*, 942 S.W.2d 577, 582 (Tex. Crim. App. 1996). This case is important not only to highlight the necessity of proving the witness reviewed the writings for the purpose of testifying, but also to show the broad meaning attached to the word "testifying."

b. Federal Rule of Evidence 612

The Federal Rules of Evidence also provide that when a witness uses a writing to refresh memory while testifying the adverse party is entitled to have the writing produced for inspection and cross-examination, and the relevant portions can be admitted into evidence. FED. R. EVID. 612. If the writing is used before testifying, it will be made available if the judge determines it is necessary in the interest of justice. *Id.*

Although the trial judge has some discretion, the rule does not permit the opposing party access to the documents prior to the witness taking the stand. *See Goldman v. United States*, 316 U.S. 129 (1942); *Needelman v. United States*, 261 F.2d 802 (5th Cir. 1958). Although a writing used to refresh memory is not normally admissible, it is properly admissible when offered by the opposing party. *United States v. Smith*, 521 F.2d 957, 969 (D.C. Cir. 1975).

It is worth noting that a petitioner in a habeas proceeding is permitted under this rule to examine any portion of a former attorney's files used to refresh his memory. *Spivey v. Zant*, 683 F.2d 881, 885 n.5 (5th Cir. 1982).

2. Production of Statements of Witnesses in Criminal Cases

a. Texas Rule of Evidence 615

Another rule relating to the writings of witnesses is Rule 615, the production of statements. After a witness testifies in a criminal case, the party who did not call the witness can move to have any statement of that witness, relating to their testimony in the party's possession, produced for examination and use. TEX. R. EVID. 615. Unlike Rule 612, the witness need not have reviewed the statement for the purpose of testifying. *Compare* TEX. R. EVID. 615 & TEX. R. EVID. 612. Although the statement must be turned over for inspection, the trial court has discretion as to whether to grant a recess for the party to examine the statement. *Camacho v. State*, 864 S.W.2d 524, 531 (Tex. Crim. App. 1993).

A "statement" is defined as "either a written statement made by the witness and signed or otherwise adopted; or a substantially verbatim recital of an oral

statement made by the witness contained in a stenographic, mechanical, electrical, or other recording or other transcription; or is a transcription of a statement made to a grand jury, however recorded." *Id.* An attorney's witness interview notes will usually not constitute witness statements under this rule. *See Smith v. State*, 65 S.W.3d 332, 343 (Tex. App.—Waco 2001, no pet.).

A party has possession of a statement if the statement is within the party's control or is readily available. *Brooks v. State*, 901 S.W.2d 742, 746 (Tex. App.—Fort Worth 1995, pet. ref'd). Thus, if the statement is lost or destroyed they cannot be required to produce the document. *See Amunson v. State*, 928 S.W.2d 601, 608 (Tex. App.—San Antonio 1996, pet. ref'd)(State not required to produce lost police report); *Cross v. State*, 877 S.W.2d 25, 27 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd)(State not required to produce written inventory of the defendant's car made by arresting officer because the inventories were regularly destroyed).

b. Federal Rule of Criminal Procedure 26.2

The federal counterpart to the Texas Rule is found in Rule 26.2 of the Federal Rule of Criminal Procedure, which is a codification of the Jenks Act, 18 U.S.C. 3500.

3. Leading Questions

Texas Rule of Evidence 610(c) & Federal Rule of Evidence 611(c)

Both the Texas and Federal Rules of evidence permit the use of leading questions during cross-examination. Federal Rule of Evidence 611(c) and Texas Rule of Evidence 610(c) provide that: "leading questions should be permitted on cross-examination." FED. R. EVID. 611(c); TEX. R. EVID. 610(c).

"A leading question phrases a question so that it either suggests the answer desired or assumes the truth of a disputed fact." *Callahan v. State*, 937 S.W.2d 553, 557 (Tex. App.—Texarkana 1996, no pet); *see also*, *Newsome v. State*, 829 S.W.2d 260, 269 (Tex. App.—Dallas 1992, no pet.); *Myers v. State*, 781 S.W.2d 730, 733 (Tex. App.—Fort Worth 1989, pet. ref'd). The use of leading questions on cross-examination, even if especially pointed and leading, does not normally violate due process. *United States v. Cunan*, 152 F.3d 29, 35 (7th Cir. 1998).

This may well be the most important tool in cross examination. As stated by Pozner: "This is the *fundamental* distinguishing factor of cross-examination." POZNER, at 298. Pozner further states that a "skillful lawyer must never forfeit the enormous advantage

offered by the use of leading questions. The ‘leading question only’ rule means that, in trial, never, never, ever, no matter how well-intentioned the reason, use a question that is not strictly leading.” *Id.*

Pozner and Tigar both advocate the use of *statements* or *declarations* as a method of leading. POZNER, at 298-99; TIGAR, at 160-161.

You were on x street?

It was late?

The only light was across the street?

Thus, the witness is required to give the desired answer or suffer the penalty of impeachment. It is a “question” only because, like above, it is transcribed with the required punctuation. It does not require such an inflection. If you want to make it sound like a question, you can add the word “Right?” to then end of each statement. As in all leading questions by the examiner, the witness is merely a spectator obligated to certain answers. “On cross-examination, the witness should not be permitted to generate the action. The focus of the courtroom must be on the examining lawyer.” POZNER, at 300.

These and other truisms, such as Irving Younger’s ten commandments, give us the basics. It is perhaps too restrictive on effective cross-examination to say the truisms should *never* be violated. Nonetheless, they should not be violated carelessly. Effective and practiced cross-examination tells us that at some time these truisms are violated. What is important is that in your craft you *know* that you are doing it and *why* you are doing it. And you are ready with the impeachment if things go wrong.

C. Scope of Cross-examination

While the right to cross-examination is constitutional, it is not absolute. *See Porter v. State*, 578 S.W.2d 742, 745 (Tex. Crim. App. 1979)(“the rights of confrontation and cross-examination are not absolute.”)(citing *Chambers v. Mississippi*, 410 U.S. 284 (1973)); *Garcia v. State*, 210 S.W.2d 574, 579 (Tex. Crim. App. 1948)(the right to confrontation “is not fixed or immovable; it may be waived.”). “Each Confrontation Clause issue must be weighed on a case-by-case basis, carefully taking into account the defendant’s right to cross-examine and the risk factors associated with admission of the evidence.” *Lopez v. State*, 18 S.W.3d 220, 222 (Tex. Crim. App. 2000).

1. Control of the Mode and Order of Interrogation of Witnesses

a. Texas and Federal Rule of Evidence 611(a)

The Court has considerable discretion to control the interrogation of witnesses. Texas and Federal Rule of Evidence 611(a) provide that: “The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment of undue embarrassment.” FED. R. EVID. 611(a); *see also*, TEX. R. EVID. 611(a).

Federal judges have considerable authority to control the mode and order of the interrogation of witnesses and are permitted to question witnesses and comment on the evidence. *See United States v. James*, 510 F.2d 546, 550 (5th Cir. 1975); *United States v. Perez*, 651 F.2d 268, 271 (5th Cir. 1981). Whether federal or state court, it is the trial judge’s responsibility to ensure that the parties have a fair opportunity to present their case without the interjection of prejudicial and/or confusing extraneous material. T. BLACK & C. HERASIMCHUCK, ARTICLE VI: WITNESSES, TEXAS RULES OF EVIDENCE HANDBOOK 752 (2d ed. 1993). Therefore, the trial court retains wide latitude to impose reasonable limits on the examination of witnesses. *Virtis v. State*, 739 S.W.2d 25, 28 (Tex. Crim. App. 1987); *Gutierrez v. State*, 764 S.W.2d 796 (Tex. Crim. App. 1989); *Castle v. State*, 748 S.W.2d 230 (Tex. Crim. App. 1988); *see also*, *Saenz v. State*, 879 S.W.2d 301, 307 (Tex. App.—Corpus Christi 1994, no pet.)(court shall exercise reasonable control over the mode and interrogation of witnesses so as to avoid needless consumption of time).

2. Scope of Cross-examination

It is in the scope of cross-examination that federal and state court differ. Federal courts operate under the limited cross rule while Texas courts allow wide open cross-examination.

a. Federal Rule of Evidence 611(b)

“Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.” FED. R. EVID. 611(b).

Generally, cross-examination is within the scope of direct when it is reasonably related to the issues put in dispute by the direct-examination. *United States v. Arias-Villanueva*, 988 F.2d 1491, 1508 (9th Cir. 1993), *cert. denied*, 114 U.S. 359 (1994). “Implicit in [Rule 611(b)] is that all evidence relevant to the subject matter

of direct examination is within the cope of the cross-examination.” *United States v. Beechum*, 582 F.2d 898, 907 (5th Cir. 1978). “[T]he right of cross-examination is of constitutional dimension and may not be denied. ...Therefore, if a matter has been raised on direct examination, generally cross-examination must be permitted. Moreover, questioning of the witness which tests his perception, memory or otherwise tends to discredit him is proper.” *United States v. Segal*, 534 F.2d 578, 582 (3rd Cir. 1976).

b. Texas Rule of Evidence 611(b)

The Federal rule contrasts with Texas Rule of Evidence 611(b), which provides: “A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” TEX. R. EVID. 611(b).

Through this rule, Texas has rejected the concept of limited cross. *See* STEVEN GOODE ET. AL., GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 611.4 (1988)(“Texas has long rejected the notion that cross-examination should be restricted to the scope of direct examination.”).

While the Texas rule permits cross-examination on any matter relevant to the issues in the case, the “cross-examination cannot extend to irrelevant, collateral and immaterial matters.” *Posey v. State*, 738 S.W.2d 321, 325 (Tex. App.—Dallas 1987, no pet.); *see also*, *Fagbemi v. State*, 778 S.W.2d 119, 121 (Tex. App.—Texarkana 1989, pet. ref’d); *Ogier v. State*, 730 S.W.2d 189, 191 (Tex. App.—Dallas 1987, no pet.); *Gonzalez v. State*, 730 S.W.2d 196, 198 (Tex. App.—San Antonio 1987, no pet.). “A matter is ‘collateral’ if the cross-examining party would not be entitled to prove such a matter as part of his case-in-chief.” *Id.*

There are three main functions of wide-open cross examination: (1) the elicitation of any facts relevant to a material issue in the case; (2) the elicitation of any further facts that would shed light upon the evidence presented during the direct examination; and, (3) the presentation of any evidence that bears upon the credibility of the witness of his direct testimony. C. MCCORMICK, MCCORMICK ON EVIDENCE § 29 (2d ed. 1984).

3. Evidence of Previous Sexual Conduct in Criminal Cases

While Texas allows a wide-open cross-examination, other rules impose some restrictions on lines of inquiry. Both Texas and Federal Rule of Evidence 412 restrict inquiries into past sexual conduct.

- a. Texas Rule of Evidence 412
- i. Texas Rule of Evidence 412(a) & (b)

Texas Rule of Evidence 412 provides, in part:

- (a) Reputation or Opinion Evidence. In a sexual offense prosecution, reputation or opinion testimony of the past sexual behavior of the victim is not admissible. TEX. R. EVID. 412(a).
- (b) Evidence of Specific Instances. Evidence of specific instances of the victim’s sexual behavior are not admissible unless: it is more probative than prejudicial and it is necessary to explain or rebut scientific evidence offered by the State; it concerns past sexual behavior with the accused and is offered to show consent; it relates to the motive or bias of the victim; it is admissible under Rule 609; it is constitutionally required. TEX. R. EVID. 412(b).

The rules limiting evidence of victim’s prior sexual behavior do not violate a defendant’s right to confront his accuser. *Allen v. State*, 700 S.W.2d 924, 932 (Tex. Crim. App. 1985)(addressing § 21.13 of the Texas Penal Code, now Rule 412). The burden is on the proponent of the evidence to show that it is more probative than prejudicial. Balancing of unfair prejudice includes prejudice to the victim who may be stigmatized by the evidence of past sexual behavior. *Stephens v. State*, 978 S.W.2d 728, 733 (Tex. App.—Austin 1998, pet. ref’d). Because Rule 412 only applies to the victims of the offense, it cannot be used to show that the “outcry witness” has a motive to fabricate the allegations. *Lomax v. State*, 16 S.W.3d 448, 451 (Tex. App.—Waco 2000, no pet.).

- ii. Texas Rule of Evidence 412(c)
- (c) Procedure for Offering Evidence. Before offering evidence under this rule, the defense must inform the court outside the presence of the jury and the judge must determine what portions of the proffered evidence are admissible and limit the scope of questioning accordingly. TEX. R. EVID. 412(c).
- iii. Texas Rules of Evidence 412(d)

- (d) Record Sealed. The record of the court's determination under Rule 412(c) must be sealed. TEX. R. EVID. 412(d).

iv. Texas Rule of Evidence 412(e)

- (e) Sexual Conduct of Child as Defense. Nothing in Rule 412 prevents an accused from presenting evidence of promiscuous sexual conduct of a child 14 and older as a defense. The admission of this type of evidence requires an appropriate limiting instruction be given. TEX. R. EVID. 412(e).

Formerly, the Texas Penal Code provided a defense to the offenses of sexual assault of child and indecency with a child if the child was fourteen or older and there was evidence that the child had promiscuously engaged in sexual behavior. See, e.g., TEX. PEN. CODE §§ 21.11(B) & 22.011(d)(1)(West 1992). The Code has since been amended and the defense has been eliminated. As a result, section (e) is obsolete. See *Lawrence v. State*, No. 01-02-00579, 2003 Tex. App. LEXIS 3148, *2 (Tex. App.—Houston [1st Dist.] 2003, no pet.)(not designated for publication)(Rule 412(e) has been disapproved by the legislature).

b. Federal Rule of Evidence 412—Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

- (a) Evidence generally inadmissible.—The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
 - (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
 - (2) Evidence offered to prove any alleged victim's sexual disposition. FED. R. EVID. 412(a).

Like Texas, under the federal rules, reputation and opinion evidence of the victim's past sexual conduct is never admissible. *United States v. Saunders*, 943 F.2d 388, 391 (4th Cir. 1991). Excluding this type of evidence is constitutionally justifiable because the constitution does

not require the admission of irrelevant evidence and reputation and opinion concerning a victim's past sexual conduct is not a relevant indicator of the likelihood of consent to a specific act or to the victim's veracity generally. *Doe v. United States* 666 F.2d 43, 47 (4th Cir. 1981). The federal rules provide for certain self-explanatory exceptions and procedures that must be followed when seeking to invoke one of those exceptions See FED. R. EVID. 412(b).

4. The Accused's Right to Confrontation and the Testimony of children

Another limit to cross-examination in state court is in the area of the child witness and the right of confrontation. If the state can make an adequate showing of necessity, the state's interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of special procedures permitting the child to testify without actually confronting the defendant face to face. *Craig v. Maryland*, 110 S.Ct. 3157, 3170 (1990). In *Craig*, the Supreme Court stated the admission of testimony in this way does not violate the right to confrontation if:

- (1) the reliability of the testimony be assured through rigorous adversarial testing; and
- (2) the exception is necessary to further an important public policy. *Craig*, 110 S.Ct. at 3166-67.

Similarly, the Texas Court of Criminal Appeals has reasoned that a child may testify through the use of a closed circuit television without violating the right to confrontation under the Texas Constitution. See *Lively v. State*, 968 S.W.2d 363, 366-67 (Tex. Crim. App. 1998); *Gonzalez v. State*, 818 S.W.2d 756, 764-766 (Tex. Crim. App. 1991). According to the Court: "[While] face-to-face confrontation furnishes the greatest assurance of compliance with the Constitution, we have never determined that such is the only method of guaranteeing the confrontation rights afforded by Article I, Section 10 of the Texas Constitution." *Gonzales*, 818 S.W.2d at 764. The exception applies when the child is the victim of the offense. See *Lively*, 968 S.W.2d at 366-67. It can also apply when the child is only a witness to the offense. See *Id.* at 764-66.

Article 38.071 of the Texas Code of Criminal Procedure—Testimony of child who is victim of offense

The Texas Code of Criminal Procedure allows videotaped and closed circuit testimony to be used in certain cases. TEX. CRIM. PROC. CODE ANN. art.

38.071 (Vernon Supp. 2003). Article 38.071 is fairly detailed in the procedures, but basically sets out the circumstances under which the introduction of a child's testimony through videotaped and closed circuit television will be appropriate. *Id.*

5. Witness' Religious Affiliation

Texas Rule of Evidence 610 and Federal Rule of Evidence 610

Another rule limiting the scope of cross-examination is the proscription against inquiry into religious beliefs to support or attack credibility. Both Federal and Texas Rule of Evidence 610 provide: "A witness' beliefs or opinions on religion is not admissible for the purpose of showing that their credibility is impaired or enhanced as a result of those beliefs." FED. R. EVID. 610; *see also*, TEX. R. EVID. 610.

The purpose behind this rule is to guard against the prejudice which may result from disclosure of the witness' faith. The rule extends to unconventional and unusual religions. *United States v. Sampol*, 636 F.2d 621, 666 (D.C. Cir. 1980). The Texas rule is not cited in a published opinion. Nonetheless, it is an evidentiary rule that lawyers should know.

III. IMPEACHMENT

A. Introduction

Q: It was dark outside, right?

A: No, it was light.

You followed all the truisms about cross-examination. You asked short, concise, single-thought, leading questions but did not get the answer you wanted. You now impeach the witness and/or his answer. You are prepared for this. You review all the tools in your impeachment arsenal. Do you impeach his character generally? Or do you show this witness as honestly mistaken, unable to discern the light from the dark? This is what impeachment is all about. It is the penalty you exact from the witness for harming your cause or your client.

It is the law that defines the bounds of your impeachment. It mandates whether you must meet the witness head-on with the damning evidence or whether you can lie-in-wait. You must know the rules instinctively, or it will be you who appear the bumbling fool, and not the witness. (A most undesirable circumstance that awaits us all!). With this in mind, here is the law—

B. Who can be Impeached

1. Any witness can be impeached (including party's own witness)
 - a. Texas Rule of Evidence 607 and Federal Rule of Evidence 607

The credibility of a witness may be attacked by any party, including the party calling the witness. FED. R. EVID. 607; *see also*, TEX. R. EVID. 607.

The rules of evidence do away with the "voucher rule" that prohibited a party calling a witness from impeaching the witness unless there was a showing of surprise or injury. *See Hughes v. State*, 4 S.W.3d 1, 4-5 (Tex. Crim. App. 1999), *on remand*, 12 S.W.3d 166; *see also*, *Chambers v. Mississippi*, 410 U.S. at 297 ("Whatever validity the 'voucher' rule may have once enjoyed,... it bears little present relationship to the realities of the criminal process. It might have been logical for the early common law to require a party to vouch for the credibility of witnesses he brought before the jury to affirm his veracity. Having selected them especially for that purpose the party might reasonably be expected to stand firmly behind their testimony. But in modern criminal trials, defendants are rarely able to select their witnesses: they must take them where they find them.").

The demise of the "voucher rule" does not mean that you can call a witness solely for the purpose of impeachment. Both Federal and Texas courts prohibit calling a witness solely for this purpose—this is called the "strawman" theory. Although the "voucher rule" is no longer applicable, a party's knowledge that a witness will testify unfavorably should be considered by the trial court under Rule 403 and the testimony prohibited thereunder. *Hughes*, 4 S.W.3d at 4-5. It is impermissible for a prosecutor to call a witness he knows will testify unfavorably so that he can introduce hearsay evidence. *United States v. Johnson*, 802 F.2d 1459, 1466 (D.C. Cir. 1986). The prosecution may not call a witness it knows to be hostile "for the primary purpose of eliciting otherwise inadmissible impeachment testimony, for which such a scheme merely serves as a subterfuge to avoid the hearsay rule". *United States v. Hogan*, 763 F.2d 697, 701-03 (5th Cir. 1985). Neither the defendant, nor the State, may use Rule 607 as a "strawman" to get impeachment evidence before the jury as substantive evidence. *Miranda v. State*, 813 S.W.2d 724, 734-38 (Tex. App.—San Antonio 1991, *pet. ref'd*). However, there are no "strawman" problems when the witness' testimony is both favorable and unfavorable. *See United States v. Webster*, 734 F.2d 1191, 1193 (7th Cir. 1984);

United States v. DeLillo, 620 F.2d 939, 946-47 (2nd Cir. 1980).

- b. Non-testifying Declarants
 - i. Texas Rule of Evidence 806—Attacking and Supporting Credibility of Declarant

When a hearsay statement... has been admitted in evidence, the credibility of the declarant may be attacked... by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, offered to impeach the declarant, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination. TEX. R. EVID. 806.

As Rule 806 makes clear, a party is entitled to a non-testifying declarant whose hearsay statements are admitted into evidence as if the declarant had actually testified during the trial. See *Griffith v. State*, 983 S.W.2d 282, 290 (Tex. Crim. App. 1998).

Of some note to the criminal practitioner is the Court of Criminal Appeals' recent opinion *Arroyo v. State*, ___ S.W.3d ___, No. 1670-01 (Tex. Crim. App. March 19, 2003)(the opinion can be found online at <http://www.cca.courts.state.tx.us/opinions/167001.htm>). During the defendant's trial, the trial court excluded Arroyo's attempted impeachment of a non-testifying declarant with the records of prior convictions under Rule 806. Slip op. at *2. Arroyo had been made aware of the potential impeachment evidence when the State provided the complainant's rap sheet pursuant to *Brady*. *Id.* When the defendant attempted to introduce the impeachment evidence, however, the State objected to the records arguing that the defendant had failed to properly link the convictions to the non-testifying declarant—the complainant in the case. *Id.*

In reviewing the judgment of the Court of Appeals, the Court of Criminal Appeals reasoned that when the State responded to the defendant's *Brady* motion by giving him the complainant's rap sheet without qualification, the State had, in effect represented that the rap sheet was correct. *Id.* at *3. The defendant then reasonably relied on this information in acquiring the defense exhibits in question. According to the Court, once the State tendered the complainant's rap sheet to

the defendant without qualification, the State was estopped from thereafter claiming that the defense exhibits were inadmissible on the ground of identity. *Id.*

2. Collateral v. Non-collateral

It is generally improper to impeach a witness on an immaterial or collateral matter. See *Flannery v. State*, 676 S.W.2d 369, 370 (Tex. Crim. App. 1984). That is, a party cannot bring in extrinsic evidence to impeach on a collateral matter. *Bates v. State*, 587 S.W.2d 121, 141-43 (Tex. Crim. App. 1979); *Aguirre v. State*, 948 S.W.2d 377, 381 (Tex. App.—Houston [14th Dist.] 1977, pet. ref'd).

“Extrinsic evidence is material, not collateral, if it contradicts ‘any part of the witness’ account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his were true’” *United States v. Lopez*, 979 F.2d 1024, 1034 (5th Cir. 1992)(quoting *United States v. Carter*, 953 F.2d 1449, 1458 n.3 (5th Cir. 1992)). While it is normally improper to impeach on a collateral matter, the evidence may be admissible to rebut evidence offered by a defendant on a defensive theory. *Arce v. State*, 720 S.W.2d 147, 149 (Tex. App.—San Antonio 1986, pet. ref'd)(the trial court erred in allowing State to impeach defense witness concerning when the defendant was employed at hotel as it was a collateral matter and it did not rebut a defensive theory). And a defendant can, however, open the door for impeachment on a collateral matter by leaving a false impression with the jury. See *Wheeler v. State*, 67 S.W.3d 879, 885 (Tex. Crim. App. 2002).

The Fourth Court of Appeals has recently held that this applies equally when a State's witness leaves a false impression. See *Saglimbeni v. State*, 100 S.W.3d 429 (Tex. App.—San Antonio 2002, pet. ref'd).

Saglimbeni was tried for the offense of indecency with a child. *Id.* at 432. During the trial, the State presented evidence that the complainant had suffered emotional problems as a result of the abuse. *Id.* at 433. The defense wanted to inquire about the a sexual assault incident involving the complainant's sister that occurred during the same time period because it could have been the cause of the problems the complainant was experiencing. *Id.* The trial court would not allow the cross-examination. See *Id.*

Although the court of appeals was unable to find any Texas cases involving a State witness leaving a false impression, the court concluded that there was “no reason the false impression rule should work both ways.” *Id.* at 434. According to the court, the right of cross-examination necessarily includes the right to impeach

with any question “‘which might have a tendency to show the witness’[s] credibility.’” *Id.* at 435 (citing *Koehler*, 679 S.W.2d at 9). Since the complainant experienced another traumatic event during the same time frame that could have been the cause of his problems, the defense should have been permitted to question the State’s witnesses about the incident. *Id.* at 435.

Some have proposed doing away with collateral/non-collateral distinctions contending that Rule 403 sufficiently protects the parties. *See generally*, Kevin C. McMunigal & Calvin William Sharpe, *Reforming Extrinsic Impeachment*, 33 CONN. L. REV. 363 (2001). Others believe that the Rule 607 “maintains the viability of this general rule and exception and provides the vehicle for such impeachment.” *Ramirez v. State*, 802 S.W.2d 674, 677 (Tex. Crim. App. 1990)(Miller, J. concurring). Ultimately, we believe that Rule 403 will control the question of collateral impeachment.

C. Types of impeachment evidence—Five types falling into two categories

The witness has given the wrong answer. Your cause has been hurt. You need to strike back. Impeach! To make analysis easier, we have divided impeachment into two general categories—internal and external.² “Internal” refers to those areas that are specific to the witness, without regard to the facts being testified about; the witness is unworthy of belief generally and, therefore, should not be relied upon in this case. This type of impeachment includes bias/interest/motive for testifying, prior convictions, and opinion/reputation for truthfulness. “External” refers to the specific testimony given—facts about the case and not necessarily the witness generally; they are external to the witness personally. These include prior statements of the events by the witness and others and, loosely, the capacity of the witness to testify accurately about the facts given.

1. Internal to Witness—Attack on the general credibility of the witness

a. Bias/Interest/Motive

i. Federal Rule

There is no specific Federal Rule of Evidence permitting impeachment evidence of this kind. Nonetheless, the Sixth Amendment right to confrontation

requires that a defendant be given great latitude to show any fact that would tend to establish ill feelings, bias, motive, or animus on the part of a witness testifying against him. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986); *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974). “Bias is a term used in the ‘common law of evidence’ to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness’ like, dislike, or fear of a party, or by the self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weight of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” *United States v. Abel*, 469 U.S. 45, 52 (1984). There is no need to lay a specific predicate before introducing evidence of bias, but the witness must still be given the opportunity to explain or deny the bias at some point during the trial. *United States v. Betts*, 16 F.3d 748, 764 (7th Cir. 1994).

ii. Texas Rule of Evidence 613(b)

- (b) Examining Witness Concerning Bias or Interest. In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where the contents and where, when and to whom made, must be made known to the witness, and the witness must be given an opportunity to explain or deny such circumstances or statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence rebutting any evidence impeaching on of said party’s witnesses on grounds of bias or interest. TEX. R. EVID. 613(b).

Unlike the Federal Rules of Evidence, Texas has a rule that specifically permits a party to impeach with this type of evidence. TEX. R. EVID. 613(b). As with Rule 613(a)[relating to prior inconsistent statements discussed below], before the party can question the witness or

² This nomenclature is nowhere in the rules. It is simply a division of ideas to assist in thinking, in analytical terms, about the rules of impeachment.

introduce evidence of the bias, the party must be made aware of the circumstances supporting the claim or the details of the statement and be given the opportunity to explain or deny it. *Id.*

While the cross-examiner does not have to specifically ask the witness if he is biased or prejudiced, he must establish “a specific connection between the witness’ testimony and the cause, disclosing an actual bias or motive.” *Willingham v. State*, 897 S.W.2d 351, 358 (Tex. Crim. App. 1995). The trial court has considerable discretion to determine how bias is proven. *See Staley v. State*, 888 S.W.2d 45, 50 (Tex. App.—Tyler 1994, no pet.). The Court of Criminal Appeals has explained: “To lay the proper predicate for impeachment, the witness should be asked about any possible interest or bias he may have before there is an attempt to prove interest or bias otherwise [citation omitted]. The witness must first be informed as to the circumstances supporting a claim of bias or interest and must be given an opportunity to explain or deny such circumstances.” *Willingham v. State*, 897 S.W.2d at 358. If the witness unequivocally admits the bias or interest, no extrinsic evidence may be offered to prove it. TEX. R. EVID. 613(b).

Unlike other impeachment evidence, evidence of bias or motive which operates on the mind of a witness are always material and, therefore, non-collateral. *See Koehler v. State*, 679 S.W.2d 6, 10 (Tex. Crim. App. 1984). As such, this rule permits the introduction of evidence that might otherwise be inadmissible impeachment evidence. *See Dixon v. State*, 2 S.W.3d 263, 271 (Tex. Crim. App. 1999)(Rule 608(b) prohibition against evidence of specific instances of misconduct for impeachment purposes, does not prohibit the introduction of such evidence pursuant to Rule 612(b) [now Rule 613(b)], as they are distinct rules that serve different purposes); *Paley v. State*, 811 S.W.2d 226, 229 (Tex. App.—Houston [1st Dist.] 1991, pet. ref’d)(for the purpose of measuring eyewitness’ credibility and the extent to which the State might have influenced his testimony, the jury was entitled to know about his deferred adjudication status and any conversations he might have had with the prosecution, police, or his probation agent about ending his probation).

Even evidence of unadjudicated crimes can be admissible to show the bias or interest of a State’s witness. *Moreno v. State*, 22 S.W.3d 482, 485-86 (Tex. Crim. App. 1999). The Court of Criminal Appeals has decided that evidence that a State’s witness is on deferred adjudication is admissible to show bias or interest. *Maxwell v. State*, 48 S.W.3d 196, 200 (Tex. Crim. App. 2001). In so doing, the Court disavowed any

language in *Jones v. State*, 843 S.W.2d 487 (Tex. Crim. App. 1992), that could have been understood to hold that a defendant was required to show something beyond a witness’ deferred adjudication status before using the evidence for impeachment. *Id.*

The number of ways in which a witness can harbor a bias is without limit. Examples include:

- Racial prejudice. *Hurd v. State*, 725 S.W.2d 249, 252 (Tex. Crim. App. 1987).
 - Familial relationships. *United States v. Canales*, 744 F.2d 413, 425 (5th Cir. 1984).
 - Business relationships. *United States v. Robinson*, 530 F.2d 1076, 1079-81 (D.C. Cir. 1976).
 - Personal friendship or enmity. *Wood v. State*, 486 S.W.2d 359, 361-62 (Tex. Crim. App. 1972).
 - Prior “bad blood.” *Koehler v. State*, 679 S.W.2d at 10.
 - Threats made by or against the witness. *See Rodgers v. State*, 486 S.W.2d 794, 796 (Tex. Crim. App. 1972)(defendant’s mother made threats against the prosecutor); *Carter v. State*, 668 S.W.2d 851, 853 (Tex. App.—San Antonio 1984, pet. ref’d)(prosecution allowed to ask witness if she was afraid of the defendant).
 - Fear. *United States v. Bratton*, 875 F.2d 439, 442-43 (5th Cir. 1989).
 - Pending litigation. *Cox v. State*, 523 S.W.2d 695, 700 (Tex. Crim. App. 1975).
 - Bribes. *Campbell v. State*, 320 S.W.2d 361, 362 (Tex. Crim. App. 1959).
 - Currying favor with the State. *See Carroll v. State*, 916 S.W.2d at 499-500.
 - Gang affiliation. *United States v. Abel*, 469 U.S. at 50.
 - Diverting suspicion from oneself. *Davis v. Alaska*, 415 U.S. at 311; *Steve v. State*, 614 S.W.2d 137, 139-40 (Tex. Crim. App. 1981).
- b. Untruthful Person—The Rules Concerning Opinion and Reputation Evidence of Character
- i. Texas Rule of Evidence 608—Evidence of Character and Conduct of a Witness

- (a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations:

- (1) the evidence may refer only to character for truthfulness or untruthfulness; and
- (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. TEX. R. EVID. 608(a).

“Rule 608 limits the ability of a party to introduce evidence regarding the character of a witness.” *Martinez v. State*, 17 S.W.3d 677, 688 (Tex. Crim. App. 2000). Rule 608(a) controls the admission of evidence aimed at impeaching a witness’ credibility. *Felan v. State*, 44 S.W.3d 249, 254 (Tex. App.—Fort Worth 2001, pet. ref’d)(citing *Dixon v. State*, 2 S.W.3d 263, 272 (Tex. Crim. App. 1999)). While Rule 608(a) permits evidence of the witness’ general character for truthfulness, it does not permit the introduction of evidence of the witness’ general moral character. See *Shannon v. State*, 567 S.W.2d 510, 515 (Tex. Crim. App. 1978). A witness can testify regarding another witness’ reputation for truthfulness, but the testimony must be based on a synthesis of observations and discussions and not a one time statement from a third party to a witness. *Garza v. State*, 18 S.W.3d 813, 824 (Tex. App.—Fort Worth 2000, pet. ref’d). Conversely, testimony of the witness’ truthful character is not admissible unless the witness’ character has been attacked. See *Crank v. State*, 761 S.W.2d 328, 344 (Tex. Crim. App. 1988); *Kirven v. State*, 751 S.W.2d 212, 215-16 (Tex. App.—Dallas 1998, no pet.).

ii. Texas Rule of Evidence 405—Methods of Proving Character

- (a) Reputation of Opinion. In all cases in which evidence of a person’s character or character trait is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. In a criminal case, to be qualified to testify at the guilt stage of trial concerning the character or character trait of an accused, a witness must have been familiar

with the reputation or with the underlying facts or information upon which the opinion is based, prior to the day of the offense. In all cases where the testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct. TEX. R. EVID. 405(a).

When a witness is called to testify about the defendant’s character for truthfulness, the witness must demonstrate that he was familiar with the defendant’s reputation or the facts underlying his opinion before the date of the offense. See *Adanandus v. State*, 866 S.W.2d 210, 225-26 (Tex. Crim. App. 1993). The witness’ reputation testimony must be based on discussion with others or hearing others discuss reputation, and not just on personal knowledge. *Adanandus*, 866 S.W.2d at 226; but see, *Hollingsworth v. State*, 15 S.W.3d 586, 598 (Tex. App.—Austin 2000, no pet.)(Prosecutor’s statement about defendant’s character did not have to be based upon community observations, where statement was opinion and was based on facts prosecutor, while an attorney for Child Protective Services, became familiar with during two separate investigations of the defendant).

Thus, a witness’ knowledge of character is not sufficient if the witness’ opinion is based solely on knowledge of specific acts. *House v. State*, 909 S.W.2d 214, 218 (Tex. App.—Houston [14th Dist.] 1995, pet. granted), *aff’d* 947 S.W.2d 251. The opposing party is entitled to challenge the qualifications of the reputation witness outside the presence of the jury. *Lopez v. State*, 860 S.W.2d 938, 944-45 (Tex. App.—San Antonio 1993, no pet.).

iii. Federal Rule of Evidence 608(a)

Similarly, the Federal Rules of Evidence provide:

- (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. FED. R. EVID. 608(a).

iv. Texas Rule of Evidence 608(b)—Use of Specific

Instances of Conduct for Proving Character

- (b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor provided by extrinsic evidence." TEX. R. EVID. 608(b).

"Rule 608(b) mandates that 'specific acts not resulting in conviction may not be used to demonstrate the untrustworthy nature.'" *Lopez v. State*, 18 S.W.3d 220, 225 (Tex. Crim. App. 2000)(quoting 1 CODE, WELLBORN & SHARLOT, TEXAS PRACTICE: GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL & CRIMINAL § 608.1 (1993)). Thus, the rule limits the use of specific instances of conduct for impeachment of credibility except to expose his bias or interest, rebut affirmative representations made on direct exam, or to demonstrate a lack of capacity. *See Lagrone v. State*, 942 S.W.2d 602, 612-13 (Tex. Crim. App. 1997); *see also, Dixon v. State*, 2 S.W.3d at 271 (Rule 608(b) prohibition against evidence of specific instances of misconduct for impeachment purposes, does not prohibit the introduction of such evidence pursuant to Rule 612(b) [now Rule 613(b)], as they are distinct rules that serve different purposes); *King v. State*, 773 S.W.2d 302, 303 (Tex. Crim. App. 1989)(State was permitted to introduce evidence that defendant delivered drugs to a police officer two days after his committing the charged offense, after the defendant testified that he would not engage in future criminal acts). The rebuttal evidence cannot exceed the scope of (1) the question posed, and (2) the witness' answer. *Rodriguez v. State*, 974 S.W.2d 364, 368 (Tex. App.—Amarillo 1998, pet. ref'd).

A party cannot elicit a blanket statement of good conduct through an artful cross-examination and then use evidence of specific conduct to contradict it. *See Hammett v. State*, 713 S.W.2d 102, 105 n.4 (Tex. Crim. App. 1986). A gratuitously made blanket statement, however, permits the introduction of such evidence. *Martinez v. State*, 728 S.W.2d 360, 362 (Tex. Crim. App. 1987).

Specific instance conduct can also be admissible in "cases in which a person's character or character trait is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct." TEX. R. EVID. 405(b).

v. Federal Rule of Evidence 608(b)—Opinion and

Reputation Evidence of Character

- (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." FED. R. EVID. 608(b).

Giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility. *See United States v. Blankenship*, 746 F.2d 233, 238 n.1 (5th Cir. 1984). Rule 608(b), however, does not prevent "the admission of evidence introduced to contradict, and which the jury might find disproves, a witness's testimony as to a material issue to the case." *United States v. Opager*, 589 F.2d 799, 803 (5th Cir. 1979); *see also United States v. Blake*, 941 F.2d 334, 338 (5th Cir. 1991).

Unlike the Texas Rule, Federal Rule 608(b) gives the trial court discretion to permit a party to impeach a witness' general credibility by questioning him about specific instances which show a lack of credibility. FED. R. EVID. 806(b). Extrinsic evidence, however, is not permitted. While Rule 608(b) permits questioning about a witness' prior bad acts during cross-examination that have a bearing on the witness' character for truthfulness, if the witness denies the conduct the acts cannot be proved through extrinsic evidence unless the evidence is otherwise admissible. *United States v. Mathews*, 168 F.3d 1234, 1244 (11th Cir. 1999).

c. Prior Convictions

i. Texas Rule of Evidence 609

(1) Texas Rule of Evidence 609(a)

- (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by

public record but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party. TEX. R. EVID. 609(a).

The burden is on the proponent of the Rule 609 evidence to demonstrate its admissibility. *Theus v. State*, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992). The trial court has the discretion to refuse to permit the introduction of the impeachment evidence if the proponent fails to sufficiently link the convictions to the witness. *Davis v. State*, 791 S.W.2d 308, 310 (Tex. App.—Corpus Christi 1990, pet. ref'd). Underlying this rule is the belief that the sworn testimony of a convicted felon is suspect. See, e.g., *Carson v. Gomez*, 14 S.W.3d 778, 780 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (“A felon's sworn word is suspect in Texas and everywhere.”)(citing TEX. R. EVID. 609; FED R. EVID. 609).

While a prior conviction can be used to impeach a witness' credibility, the details of the offense are not admissible. See *Mays v. State*, 726 S.W.2d 937, 953 (Tex. Crim. App. 1986); *Stevens v. State*, 671 S.W.2d 517, 522 (Tex. Crim. App. 1984). It is only when the witness denies the prior conviction that the opposing party is permitted to introduce a certified copy of the judgment of conviction. See *Poore v. State*, 524 S.W.2d 294, 297 (Tex. Crim. App. 1975); *Aleman v. State*, 795 S.W.2d 332, 334 (Tex. App.—Amarillo, no. pet.).

Courts have explained that crimes of moral turpitude include acts which are base, vile, or depraved. See *Polk v. State*, 865 S.W.2d 627, 630 (Tex. App.—Fort Worth 1993, pet. ref'd). The following crimes have been found to be crimes of moral turpitude:

- Theft. *Bensaw v. State*, 88 S.W.2d 495 (1935).
- Lying to a police officer or officer of the court. *Lape v. State*, 893 S.W.2d 949, 958 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).
- Misdemeanor assault by a man on a woman. *Hardeman v. State*, 868 S.W.2d 404, 407 (Tex. App.—Austin 1993, pet. dismissed).
- Indecent exposure. *Polk v. State*, 865 S.W.2d at 630.
- Prostitution. *Holgin v. State*, 480 S.W.2d 286 (Tex. Crim. App. 1967).

Income tax evasion. *Matter of Humphreys*, 880 S.W.2d 402, 407-08 (Tex. 1994).

Violation of protective order that involves violence and threats of violence against a woman. *Ludwig v. State*, 969 S.W.2d 22, 30 (Tex. App.—Fort. Worth 1998, pet. ref'd).

The following crimes are not crimes of moral turpitude:

Misdemeanor possession of marijuana. *Bell v. State*, 620 S.W.2d 116, 121 (Tex. Crim. App. 1981).

Unlawfully carrying a weapon. *Trippell v. State*, 535 S.W.2d 178, 180 (Tex. Crim. App. 1976).

Disturbing the peace. *Garza v. State*, 532 S.W.2d 624, 625 (Tex. Crim. App. 1976).

Criminal Trespass. *Hutson v. State*, 843 S.W.2d 106, 107 (Tex. App.—Texarkana 1992, no pet.).

Misdemeanor driving while intoxicated. *Stephens v. State*, 417 S.W.2d 286 (Tex. Crim. App. 1967).

Simple assault. *Kemper v. State*, 138 S.W. 1025 (1911).

Public intoxication. *Garrison v. State*, 252 S.W.511 (1923).

Gambling. *Miller v. State*, 150 S.W. 635 (1912).

(2) Texas Rule of Evidence 609(b)

- (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. TEX. R. EVID. 609(b).

Normally, convictions more than ten years old have very little probative value on the issue of character, thus the Rule's ten year period of limitation. See *Hernandez*

v. State, 980 S.W.2d 652, 652 (Tex. Crim. App. 1998)(discussing Advisory Committee Note, Federal Rule of Evidence 609). While there is a presumption of rehabilitation, thus the ten year time limit on use of prior convictions, the “revitalization doctrine” rebuts this presumption if there is an intervening felony conviction or other evidence that show lack of character reformation. See *Hustling v. State*, 790 S.W.2d 121, 126 (Tex. App.—San Antonio 1990, no pet.); *Williams v. State*, 449 S.W.2d 264, 265 (Tex. Crim. App. 1970). In determining whether a conviction is too remote, courts have traditionally looked to evidence of lack of reformation or an intervening conviction for a felony offense or a misdemeanor involving moral turpitude as a circumstance which removes the remoteness objection to a conviction more than 10 years old. See *Sinegal v. State*, 789 S.W.2d 383, 388 (Tex. App.—Houston [1st Dist.] 1990, pet. ref’d).

In order to calculate the ten years under the rule, the date the witness is testifying is compared to the date of release or sentence, whichever is later. *Buffington v. State*, 801 S.W.2d 151, 154 (Tex. App.—San Antonio 1990, pet. ref’d). The trial court has discretion to extend the ten year limitation if the delay is caused by witness’ own dilatory tactics. See *Guerra v. State*, 648 S.W.2d 715, 718 (Tex. App.—Corpus Christi 1982, pet. ref’d).

(3) Texas Rule of Evidence 609(c)

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this rule if:

- (1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment;
- (2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was

classified as a felony or involved moral turpitude, regardless of punishment; or

- (3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure. TEX. R. EVID. 609(c).

Expiration of probationary term equals “satisfactorily completed” under the rule. *Ex Parte Menchaca*, 854 S.W.2d 128, 130-31 (Tex. Crim. App. 1993). Deferred adjudication is not a prior conviction under Rule 609. *Jones v. State*, 843 S.W.2d at 496.

(4) Texas Rule of Evidence 609(d)

- (d) Juvenile Adjudications. Evidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, under this rule unless required to be admissible by the Constitution of the United States or Texas. TEX. R. EVID. 609(d).

While the Constitutional right to cross-examination may allow a defendant to impeach with prior juvenile adjudications, it is not permissible to use such evidence for general character impeachment. *Foster v. State*, 25 S.W.3d 792, 795-96 (Tex. App.—Waco 2000, pet. ref’d); see also *Medina v. State*, 986 S.W.2d 733, 737 (Tex. App.—Amarillo 1999, pet. ref’d).

(5) Texas Rule of Evidence 609(e)

- (e) Pendency of Appeal. Pendency of an appeal renders evidence of a conviction inadmissible. TEX. R. EVID. 609(e).

A case on appeal is not a final conviction under Rule 609. See *Prescott v. State*, 744 S.W.2d 128, 131 (Tex. Crim. App. 1988).

(6) Texas Rule of Evidence 609(f)

- (f) Notice. Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use

such evidence to provide the adverse party with fair opportunity to contest the use of such evidence. TEX. R. EVID. 609(f).

“Rule 609(f) requires both the prosecution and defense to give advance notice of their intent to use prior convictions to impeach a witness.” *Jaubert v. State*, 71 S.W.3d 1, 5 n.5 (Tex. Crim. App. 2002)(Cochran, J. concurring). The notice requirement does not prevent the State from asking open ended questions concerning the defendant’s prior convictions when the State did not know about the convictions prior to trial. *Cream v. State*, 768 S.W.2d 323, 325-26 (Tex. App.—Houston [14th Dist.] 1989, no pet.).

(7) Probative Value v. Prejudicial Effect Under Texas Rule 609

The Court of Criminal Appeals has articulated a non-exclusive list of factors for evaluating the probative value and unfair prejudicial effect of prior convictions under Rule 609. *Theus v. State*, 845 S.W.2d at 880. The factors are: (1) the impeachment value of the prior crime; (2) the temporal proximity of the past crime (relative to the charged offense) and the witness’ subsequent history; (3) the similarity between the past crime and the offense being prosecuted; (4) the importance of the defendant’s testimony; and (5) the importance of the credibility issue. *Id.* A crime of violence is less probative of truth telling than a crime of deception. *See Cuba v. State*, 905 S.W.2d 729, 733 (Tex. App.—Texarkana 1995, no pet.).

If the past crime was recently committed and the witness has demonstrated a propensity for breaking the law, the factors favor admission of the conviction. *Simpson v. State*, 886 S.W.2d 449, 452 (Tex. App.—Houston [1st Dist.] 1994, pet. ref’d). A crime that is too similar to the charged offense will weigh against admissibility because the prejudice is too strong. *White v. State*, 21 S.W.3d 642, 646-47 (Tex. App.—Texarkana 2000, pet. ref’d). When a case involves only the testimony of the defendant and the State’s witnesses, the importance of the defendant’s credibility and testimony escalates, as does the State’s need for an opportunity to impeach the defendant’s credibility. *Theus*, 845 S.W.2d at 881. The trial court has great discretion in balancing these factors. *Theus*, 845 S.W.2d at 885.

(8) Preservation of Error

In order to complain on appeal that the trial court erroneously permitted the introduction of a prior conviction, the defendant must actually take the stand,

testify, and be impeached with the prior conviction. *Johnson v. State*, 981 S.W.2d 759, 761 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Texas courts are not required to make specific findings of fact and conclusions of law when admitting impeachment evidence under Rule 609. *Theus*, 845 S.W.2d at 880 n.6.

ii. Federal Rule of Evidence 609

(1) Federal Rule of Evidence 609(a)

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. FED. R. EVID. 609(a).

“Because this rule is quite inflexible, allowing no leeway for consideration of mitigating circumstances, it was inevitable that Congress would define narrowly the words “dishonesty or false statement,” which, taken at their broadest, involve activities that are part of nearly all crimes. Hence Congress emphasized that the second prong was meant to refer to convictions ‘peculiarly probative of credibility,’ such as those for ‘perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*,... the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused’s propensity to testify truthfully.’” *United States v. Hayes*, 553 F.2d 824, 827 (2nd Cir.), *cert denied*, 434 U.S. 867 (1977)(citing Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 9, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7098, 7103).

Here is a list of crimes that federal courts have held involve dishonesty or false statement:

Theft by deception or forgery. *United States*

v. Newman, 849 F.2d 156, 163 (5th Cir. 1988).
 Insufficient check funds. *United States v. Livingston*, 816 F.2d 184, 190 (5th Cir. 1987).
 Mail fraud. *United States v. Toney*, 615 F.2d 277, 279 (5th Cir.), *cert. denied*, 449 U.S. 985 (1980).

And crimes that courts have held do not involve dishonesty or false statement:

Petty shoplifting. *United States v. Owens*, 145 F.3d 923, 927 (7th Cir. 1988).
 Prostitution. *United States v. Walker*, 613 F.2d 1349, 1354 (5th Cir.), *cert. denied*, 446 U.S. 944 (1978).
 Bank robbery. *United States v. Preston*, 608 F.2d 626, 638 n. 15 (5th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980).
 Military violations. *United States v. Cathey*, 591 F.2d 268, 274 n. 12 (5th Cir. 1979).
 Assisting illegal entry of aliens. *United States v. Gloria*, 494 F.2d 477, 481 (5th Cir.), *cert. denied*, 419 U.S. 995 (1974).

A party is allowed to introduce the number of convictions and their dates and times. *United States v. Gordon*, 780 F.2d 1165, 1176 (5th Cir. 1986). Like Texas, the details of the offense are inadmissible. *Id.* However, even though details of a prior conviction are not normally admissible, a defendant can open the door for this type of testimony by giving his own version of the events. Such testimony, however, must be tailored to the statements made by the defendant. *United States v. White*, 222 F.3d 363, 370 (7th Cir. 2000). Additionally, a trial court abuses its discretion in permitting impeachment with a prior conviction arising from the same transaction as the current charge. *United States v. Martinez*, 555 F.2d 1273, 1277 (5th Cir. 1977).

(2) Federal Rule of Evidence 609(b)

- (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially

outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence. FED. R. EVID. 609(b).

The time begins running from the date of release from confinement and not the termination of probation. *United States v. Daniel*, 957 F.2d 162, 168 (5th Cir. 1992); *United States v. McClintok*, 748 F.2d 1278, 1288 (9th Cir. 1984), *cert. denied*, 474 U.S. 822 (1985). Also, like Texas, the trial court has discretion to extend the ten year limitation if the delay is caused by witness' own dilatory tactics. See *United States v. Mullins*, 562 F.2d 999, 1000 (5th Cir. 1977)(per curium). The court may allow the admission of conviction more than ten years old if the court articulates specific facts which show that the probative value of the prior conviction substantially outweighs its prejudicial effect. See *United States v. Portillo*, 633 F.2d 1313, 1323 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043 (1981).

(3) Federal Rule of Evidence 609(c)

- (c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which is punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. FED. R. EVID. 609(c).

“Rule 609(c) and the accompanying commentary draw a distinction between pardons based on actual innocence or a finding of rehabilitation (which make the underlying conviction inadmissible for impeachment) and pardons granted solely to restore civil rights (which have no relevance to character and do not impair the admissibility of the underlying conviction).” *United States v. Hamilton*, 48 F.3d 149, 154 (5th Cir. 1995)(citations omitted). A Certificate of Relief of from Disabilities does not qualify under this rule. *United*

States v. DiNapoli, 557 F.2d 962, 966 (2nd Cir.), *cert. denied*, 434 U.S. 858 (1977).

(4) Federal Rule of Evidence 609(d)

- (d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied the admission in evidence is necessary for a fair determination of the issue of guilt or innocence. FED. R. EVID. 609(d).

Rule 609(d) simply creates a presumption that evidence of juvenile adjudications is generally not admissible. *United States v. Patt*, 963 F.2d 1337, 1341 (10th Cir. 1992). The rule only operates to exclude evidence introduced to attack a witness' credibility; this type of evidence may be admissible for other purposes such as for rebutting a defensive theory. *United States v. Rogers*, 918 F.2d 207, 211 (D.C. Cir. 1990).

(5) Federal Rule of Evidence 609(e)

- (e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. FED. R. EVID. 609(e).

Unlike Texas, the Federal rule allows the conviction to be used for impeachment even if an appeal is pending. *Id.* If the conviction is ultimately reversed, it cannot be used to impeach. *United States v. Russell*, 221 F.3d 615, 620 (4th Cir. 2000).

(6) Probative Value v. Prejudicial Effect Under Federal Rule 609

When determining if evidence of a defendant's prior convictions is more probative than prejudicial the following factors apply: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and, (5) the centrality of the defendant's credibility. *United States v. Hursh*, 217 F.3d 761, 768 (9th Cir. 2000). In determining whether the

evidence of the prior conviction is more prejudicial than probative under Rule 403, the judge should ensure that the record adequately reflects the factors balanced and the weight the judge has given to each factor. *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.), *cert. denied*, 429 U.S. 1025 (1976). Unlike Texas, the federal rule does not give the trial court discretion to exclude convictions involving dishonesty or false statement without regard to Rule 403. FED. R. EVID. 609(a)(2).

(7) Preservation of Error

In order to complain on appeal that the trial court erroneously permitted the introduction of a prior conviction, the defendant must actually take the stand and testify because in order to weigh the probative value against the prejudicial effect, the reviewing court must know the precise nature of the defendant's testimony to assess the potential harm. *Luce v. United States*, 469 U.S. 38, 43 (1984); *see also Ohler v. United States*, 529 U.S. 753, 830-31 (2000) ("The defendant must choose whether to introduce the conviction on direct examination and remove the sting or to take her chances with the prosecutor's possible elicitation of the conviction on cross-examination.").

2. External to Witness—The Witness is wrong about X
 a. Prior Statements of Witnesses
 i. Texas Rule 613(a)

- (a) Examining Witness Concerning Prior Inconsistent Statement. In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2). TEX. R. EVID. 613(a).

Rule 613(a) allows either party to impeach a witness with a prior inconsistent statement. *Lopez v. State*, 18 S.W.3d at 230 (citation omitted). “In order to qualify for admission under Rule 613(a), the court must be persuaded that the statements are indeed inconsistent.” *Id.* Before extrinsic evidence of a prior inconsistent statement or further cross-examination on same can be made, the witness must be told the contents of the statement, when and to whom it was made, and must be given the opportunity to explain or deny the statement. TEX. R. EVID. 613(a); *see also*, *Allen v. State*, 788 S.W.2d 637, 639-640 (Tex. App.—Houston [14th Dist.] 1990, pet. ref’d). If the party cannot effectively establish the predicate, the trial court has complete discretion to disallow extrinsic evidence of the prior inconsistent statement. *See Fields v. State*, 966 S.W.2d 736, 740 (Tex. App.—San Antonio 1998), *remanded on other grounds* 1 S.W.3d 687 (1999). Obviously, this predicate requirement is not applicable to the statements of the defendant in a criminal case. TEX. R. EVID. 613(a); *see also*, *Bondurant v. State*, 956 S.W.2d 762, 767 (Tex. App.—Fort Worth 1997, pet. ref’d).

Anything less than an unequivocal admission of the statement will allow the introduction of the extrinsic evidence. *See Lafoon v. State*, 543 S.W.2d 617, 621 (Tex. Crim. App. 1976); *see also*, *Staley v. State*, 888 S.W.2d 45, 49 (Tex. App.—Tyler 1994, no pet.); *Andrews v. State*, 794 S.W.2d 46, 49 (Tex. App.—Texarkana 1990, pet. ref’d). Nonetheless, if a witness admits some parts and not others, the witness can only be impeached on the statements that are denied. *McGary v. State*, 750 S.W.2d 782, 786 n.3 (Tex. Crim. App. 1988).

A prior inconsistent statement is hearsay and is not substantive evidence. *See Lawson v. State*, 284 S.W.2d 730, 730 (Tex. Crim. App. 1955). In fact, the opposing party is entitled to an instruction, both orally at the time the statement is offered and in the jury charge, that the statement can only be considered for its impeachment value. *See Goodman v. State*, 665 S.W.2d 788, 792 (Tex. Crim. App. 1984); *Contreras v. State*, 766 S.W.2d 891, 892-93 (Tex. App.—San Antonio 1989, no pet.).

ii. Federal Rule 613(a) & (b)

- (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

FED. R. EVID. 613(a).

- (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2). FED. R. EVID. 613(b).

Federal Rule 613(a) permits a party to question a witness about a prior inconsistent statement, either written or oral. FED. R. EVID. 613(a). Federal Rule 613(b) permits extrinsic proof of the statement, if it is in the interest of justice to do so. FED. R. EVID. 613(b).

The Federal Rule does away with any predicate for cross-examining the witness about the prior inconsistent statement. *See* FED. R. EVID. 613(a). Hence, the federal rule leans toward impeaching the witness, while Texas’ rule leans toward protecting the witness. *See United States v. Bibbs*, 564 F.2d 1165, 1169 (5th Cir. 1977). However, the witness must still be given an opportunity to admit or deny the statement and given an opportunity to explain. FED. R. EVID. 613(b).

Since there is no predicate requiring the witness to be shown the prior inconsistency, if a witness is being impeached after testifying, it is up to the party that originally called the witness to recall them and let them explain or deny the statement. *Bibbs*, 564 F.2d at 1169.

A statement does not have to be in direct contradiction—any overt variance or circumstantial inconsistency may be sufficient to give the prior statement a reasonable relation to the witness’ credibility. *See United States v. Agajanian*, 852 F.2d 56, 58 (2d Cir. 1988). A faulty memory is not inconsistent with a prior statement. *United States v. Grubbs*, 776 F.2d 1281, 1287 (5th Cir. 1985). If the memory loss is feigned, however, the court can allow the impeachment. *United States v. Causey*, 834 F.2d 1277, 1282-83 (6th Cir. 1987).

In both Federal and state court, the collateral/non-collateral rule applies. *Harrison v. State*, 686 S.W.2d 220, 223 (Tex. App.—Houston [1st Dist.] 1984, pet. ref’d). Therefore, a party cannot impeach by contradiction regarding collateral or irrelevant matters. *United States v. Payne*, 102 F.3d 289, 294 (7th Cir. 1997)(“one may not contradict for the sake of contradiction; the evidence must have an independent purpose and an independent ground for admission.”).

The test for collateral is whether the fact to which the issue relates could have been shown in evidence for any purpose independently of the contradiction. *Payne*, 102 F.3d at 294; *Harrison*, 686 S.W.2d at 223. Of course, if a witness gratuitously testifies in a manner that leaves a false impression, a party is permitted to impeach on a collateral matter. See *Cunningham v. State*, 815 S.W.2d 313, 319-20 (Tex. App.—Dallas 1991, no pet.).

b. Testimonial Defect—Impeachment of Testimonial Capacities

Sometime a witness' capacity to observe is compromised to such a degree that the witness' ability to accurately relate the event is impaired. This compromise may be due to either mental or physical impairment. Certainly, if a witness suffers from a physical condition that could interfere with the ability to observe, i.e. requires glasses that were not being worn at the time in question, then the witness may be impeached on this point. It is the same if the witness is intoxicated or under the influence of controlled substances. *Carroll v. State*, 916 S.W.2d 494, 498 (Tex. Crim. App. 1996); see *Generally*, STEVEN GOODE ET. AL., GUIDE TO THE TEXAS RULES OF EVIDENCE: CIVIL AND CRIMINAL § 611.4. However, it is essential that the attacking party show a nexus between the impairment and the events about which the witness is testifying. *Lagrone v. State*, 942 S.W.2d at 613 (trial court did not err in excluding evidence of drug use absent evidence of impairment at the time of the observation). The same applies in Federal Court. *United States v. Partin*, 493 F.2d 750 (5th Cir. 1974).