VOLUME 51 / NUMBER 2 • APRIL 2018

A PUBLICATION OF THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION

The PROSECUTOR

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Wayne A. Jordon & Judge Sandra Grisham
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ABOUT THE COVER
The Orange County Courthouse, Orange, Virginia was built in 1858–1859 in an Italianate style of architecture. The front facade features a three-part arcade consisting of a semi-elliptical arch flanked by small semicircular arches. Above the arcade is a three-stage tower consisting of the main entrance as the first stage; a clock, installed within existing round windows in 1949, as the second stage; and arched openings with louvres covered by a shallow hip roof and topped by a finial complete the tower. The Orange County Courthouse is listed on the National Register of Historic Places.

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View *From the Hill*

By Nelson O. Bunn, Jr.
NDAA Executive Director

Nelson O. Bunn, Jr.

Given the upcoming midterm election in the Fall, substantive work on the Hill will start to wind down in the next month or so as Members head back to their districts to campaign. Appropriations work, some judicial nominations and the Russia investigation have dominated a lot of the discussions.

As always, NDAA members are encouraged to contact Nelson Bunn on any policy or legislative issues that arise. He can be reached at nbunn@ndaajustice.org or at 703-519-1666.

Below is a snapshot of issues acted on since the last update to NDAA members:

Drug Policy

- NDAA recently provided its support to the Substance Abuse Prevention Act of 2018, introduced by Senator Cornyn (R-TX) and Senator Feinstein (D-CA). To review a summary of the legislation, check out the one-pager outlining key provisions.

- NDAA's Opioids Working Group, chaired by State Attorney Dave Aronberg, hopes to release its final position paper with recommendations to address the opioid crisis by the end of May.

Electronic Evidence Issues

- NDAA continues to work with Congressional and Administration staff on ways to update the Electronic Communications Privacy Act (ECPA) statute to balance privacy and public safety concerns.

Forensic Science

- NDAA continues to push congressional offices to cosponsor legislation crafted by NDAA to authorize a carve-out of 5-7 percent of funding from a portion of the Debbie Smith DNA Backlog Elimination Act to enhance the capacity of State and local prosecution offices to address the backlog of violent crime cases in which suspects have been identified through DNA evidence. The legislation has garnered support from numerous stakeholder groups. To learn more, check out the one-pager for the legislation. The bill is

Questions or feedback: Please contact Nelson Bunn at nbunn@ndaajustice.org or at 703-519-1666.

potentially scheduled to be marked up in the House Judiciary Committee as early as next week.

- As a follow-up to a Rapid DNA Symposium hosted by the FBI in Washington, DC several weeks ago, NDAA has been invited to participate in two working groups to address issues arising from the use of Rapid DNA. One group will focus on Non-CODIS Rapid DNA Best Practices/ Outreach and Courtroom Considerations, while the other group will focus on Crime Scene Rapid DNA Technology Development.

Miscellaneous

- In the coming weeks, members of the Senate plan to introduce reauthorization language for the Victims of Child Abuse Act. NDAA has been asked to review the legislation and will be providing staff with feedback.

- NDAA staff continues to be consulted on issues arising as part of the effort to reauthorize the Violence Against Women Act (VAWA).

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The Prosecutor

Is George Soros a Threat to Apolitical Prosecutors and Politics-free Prosecution?

Joshua Marquis

By Joshua Marquis

Tip O'Neill, the late great Speaker of the House, famously said "all politics is local." Combine that truth with the fact that only in America are chief trial prosecutors elected, and you find a unique marriage of democracy and justice — the election of the chief prosecutor.

Incumbency was considered for decades to be the ultimate vaccination against successful opposition. Political experts tell candidates that if their state allows the use of the term "incumbent" on the ballot, it is likely worth at least 20 points.

In many parts of America, the average prosecutor's office is the District Attorney, one assistant District Attorney, and five support staff. The jobs pay modestly in comparison to other practices of law, and there is relatively little interest in dislodging those willing to toil in the fields of justice as a prosecutor.

But hands have changed frequently in many of the nation's largest District Attorney offices when the incumbent was challenged. One of the best examples is in the largest District Attorney's office on the planet, Los Angeles County, California, with more than 1000 lawyers, where, between 1984 and 2000, Bob Phillibosian was defeated by Ira Reiner, who was defeated by Gil Garcetti, who was defeated by Steve Cooley. Cooley managed to stay in power for 12 years, until he resigned and the County's first African-American and woman District Attorney, career prosecutor Jackie Lacey, took over.

America's prosecutors represent a diverse group of Democrats, Republicans, and Independents, and hold widely varying opinions on criminal justice controversies. There are more women in top spots than in any other practice of law. Diversity in race and ethnicity is widely sought.

Jason Carlile, long-time District Attorney in Albany, Oregon, noted in a speech to his Oregon colleagues that they probably kept more people out of jail than all the defense attorneys in the state. It's true throughout America. But self-described "progressive" political activists whose success at grass-roots campaigning almost won Bernie Sanders the nomination for President, and the same groups' anger and frustration over the election of Donald Trump as President, are calling for the replacement of "old-fashioned, tough-on-crime, lock-em-all-up" prosecutors. Their demand is strengthened on the left by the ACLU and billionaires like George Soros; and on the right by the Koch

Joshua Marquis is the District Attorney for Clatsop County, Oregon and an NDAA Board member since 1997.

Brothers, sponsors of the "criminal justice reform" group, Right on Crime. Over $10 million has been dumped into the last two election cycles, specifically to unseat existing prosecutors and replace them with others who rush to prove that convicting felons is a low priority, in response to headlines like the one in the March 27, 2018 issue of *New York* magazine: "What if Prosecutors Wanted to Keep People Out of Prison?"

Results have been mixed. Sometimes it's hard to tell whether the incumbent was defeated because she or he had made too many missteps or over-stayed their welcome, or because their opponent had 50 times as much money to spend on the campaign.

Soros' Open Society Institute used pop-up Political Action Committees, almost always entitled "Safety and Justice for YOUR STATE HERE" in the 2016 elections. Sometimes the money went directly to fund the candidate. More often it went through what in federal election parlance is a "527 group" or "dark money," meaning that the money is independently collected and spent. This gives the candidate who benefits total plausible deniability, being able to say they "have never met Soros" and "never saw any of these terrible ads."

Soros pumped $1.4 million into the Orlando-based Florida State's Attorney race. Jeff Ashton, the incumbent, had won just four years earlier by defeating his long-time boss. Ashton himself gained notoriety after losing the murder case against Casey Anthony. Ashton's run wasn't made any easier by an anonymous hack of the adultery/dating website AshleyMadison.com. Soros money supported Aramis Ayala in the Florida race, who had spent a decade as a public defender and who had worked less than two years, before and after her longer stint as a defense lawyer, in two different prosecutors' offices. She used her husband's eight years in prison as evidence that she understood the problems of the incarcerated.

More recently, Soros dumped almost $2 million into the Democratic primary in Philadelphia, PA to replace the now-imprisoned DA, Seth Williams. In Philadelphia as in many cities, the Democratic nomination is tantamount to election. So, although only 16 percent of registered Democrats turned out to vote in November 2017, they overwhelmingly elected Larry Krasner, a long-time defense attorney with absolutely no prosecution experience. Krasner took his election as a mandate. He purged dozens of long-time prosecutors within weeks of election, announced his office would never seek a death sentence, and put himself on a collision course with the city's police rank and file.

Soros is not always successful. In Jefferson County, a large suburban area that surrounds Denver, CO, Soros and affiliated groups (like the Democracy Alliance) in 2016 put over $3 million into play against one-term incumbent DA Peter Weir who raised barely $90,000. Despite the changing demographics of Colorado, Weir kept his office. Even media not generally friendly to Weir were alarmed by the sudden flood of huge amounts of out-of-state special interest money.

Although politics and money may influence who gets elected prosecutor, how a prosecutor fulfills his or her responsibility to the community should never be influenced by politics or money. Prosecutors are ministers of justice. Their job, simply put, is to do the right thing. Sometimes that means supporting diversion programs for offenders, sometimes that requires seeking lengthy prison sentences or even the death penalty. The influx of money and political pressure into prosecution races appears to have influenced how some prosecutors are doing their job.

What goes unanswered is: What is "criminal justice reform"? Does it necessarily mean finding ways to never send a felon to prison? Most DAs of all stripes work with alternative programs, recognizing the reality that few felons actually go to prison. Or does it involve elevating the rights of victims? Does having a Drug Court mean you aren't interested in finally making sure repeat wife beaters do hard time?

Ultimately the question is the same as it is at the national level: Does democracy benefit when amounts of money 10 to 50 times what any ordinary candidate could possibly raise are poured into campaigns — of any sort — to buy TV and radio time, and fund direct mailers? Is democracy advanced when one side has such a large megaphone that it effectively drowns out all possible debate?

The Prosecutor

Redefining Wins and Losses: Further Enhancing the Prosecutor Playbook

Amanda Jacinto

By Amanda Jacinto

At the Maricopa County Attorney's Office, prosecution led diversion is not a new concept. Prosecutors have years of experience developing and implementing diversion programs to achieve justice outside of the traditional courtroom prosecution model. Thinking outside the box allows prosecutors to go beyond thinking in terms of convictions and instead truly focusing on ensuring justice in a given case.

To underscore the role diversion programs can play in achieving positive outcomes in criminal cases, County Attorney Bill Montgomery recently established a Diversion Program Bureau that exclusively focuses on the development, performance and sustainability of prosecution-led diversion programs.

Prosecutors are able to divert certain cases into education and treatment programs that address the offender's thinking patterns and decisions as well as issues associated with substance abuse that led to their criminal behavior. These programs will hold the individual accountable and will provide strategies and community supports for positive change. If the offender successfully completes the diversion program, charges will not be filed, or if they were already filed, they will be dismissed. If the offender is unsuccessful, they will return to traditional prosecution through the courts.

For the County Attorney's Office, diversion programs offer prosecutors another option to help seek justice and reduce recidivism. Success is measured by seeking justice for victims and the community and reducing recidivism. Diversion or deferred prosecution programs provide eligible offenders with an opportunity to stay in their communities while learning the necessary skills or getting the help they need to stop the cycle that may cause them to reoffend in the future.

This approach toward a different winning outcome is highlighted by the Bureau Chief selected to lead the new Diversion Program Bureau. Instead of a prosecutor, Montgomery chose Patricia Cordova for her extensive professional background in human services, specializing in serving the justice-involved population.

In founding the new bureau, Cordova concentrated her efforts in three main areas: developing evidenced-based programs, establishing service provider contracts with specific program standards, and setting program

Amanda Jacinto is the Communications & Public Information Director, Maricopa County Attorney's Office, Phoenix, Arizona.

performance measures. Each of these identified areas centers on reducing recidivism — the primary goal for diversion programs. Contracted service providers must apply researched-informed practices in the delivery of each diversion program to achieve favorable outcomes for offenders and the public. Monitoring and measuring these outcomes is essential in determining impact.

As a complement to the above undertakings, Cordova has also been working to ensure deputy county attorneys have a better understanding of when and how to use a specific diversion program. Cordova is communicating with deputy county attorneys daily via phone calls, emails, through a diversion resource intranet webpage, and agency-wide trainings.

For the County Attorney's Office, diversion programs offer prosecutors another option to help seek justice and reduce recidivism. Success is measured by seeking justice for victims and the community and reducing recidivism.

Through these interactions, Cordova stresses the benefits of prosecution-led diversion programs. Those benefits are: administrative efficiency; engaging victims to decide offender accountability; achieving safer communities with reoriented offenders; reducing offender collateral consequences such as loss of employment and family instability; and for the deputy county attorney, utilizing a diversion program is also a practical response to heightened expectations among the public we serve that we are making distinctions among the types of offenders we prosecute.

Cordova stresses the importance of realizing a paradigm shift in how prosecutors do their jobs and protect their communities. To emphasize that point, Cordova uses a quote from the August 2017 Center for Court Innovation Report entitled, "NIJ's Multistate Evaluation of Prosecutor-led Diversion Programs-Strategies, Impacts and Cost-Effectiveness, which states, "…reimaging the meaning of prosecutorial success as having less to do with obtaining convictions and more with smartly reducing crimes and recidivism in the future".

Currently, the office offers several diversion programs: felony drug possession; class 4, 5 and 6 felonies other than drug possession; justice court misdemeanors, specific first-time child abuse offenders in need of parenting classes for excessive discipline, bad check writers, and in collaboration with the Maricopa County Juvenile Probation Department, several juvenile diversion programs.

While Cordova works closely with prosecutors in pursuing diversion options, she also works with agency analysts to evaluate the diversion programs themselves. The bureau will assess program outcomes, engage in continuous program improvement and evaluate the need for future diversion program types.

At this time, new diversion programs are also being explored. If a prosecutor has an idea for a future diversion program, the process for obtaining County Attorney authorization is now set forth in policy.

Overall, the Maricopa County Diversion Program Bureau is an investment in crime reduction. This venture, if executed strategically, will result in widespread benefits for the citizens of Maricopa County.

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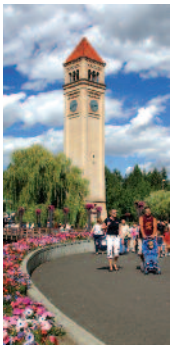

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The PROSECUTOR

PART 2

Witness Intimidation: What You Can Do To Protect Your Witness

By Kristine Hamann and Jessica Trauner

Editor's Note: Part I of this article can be found in Volume 50 Number 1, March 2018 issue of this magazine.

Witness intimidation and witness tampering can occur in any case, from simple misdemeanors to homicides. It has a variety of consequences from the silencing of an entire community, to the murder of a witness, to the recantation of truthful testimony. Though witness intimidation is an insidious problem, there are strategies throughout the investigation and prosecution of a case that can help to keep a witness safe and reduce the impact of intimidation.

This outline focuses on victims and witnesses of violent crime; it does not address specific issues that are raised in family violence cases or sexual assaults. Additionally, although legal references are provided in the footnotes, this is not intended to be a comprehensive legal analysis. For the sake of convenience, victims and witnesses will be referred to collectively as "witnesses."*

* The authors of this article are Kristine Hamann, the Executive Director of Prosecutors' Center for Excellence (PCE), and Jessica Trauner, a contract attorney with PCE. Specific thanks go to New York County Assistant District Attorneys Armand Durastanti, Linda Ford, Evan Krutoy and Michelle Warren for their insights and wisdom based on decades of experience with violent crime cases. Thanks also to Georgetown Law School students Laura Donnelly, Noel Ejaz, Sandra Ghobriel and Elizabeth Paukstis who assisted with the research. Ms. Hamann's work was supported by the New York County District Attorney's Office and Ms. Trauner's work was supported by Grant No. 2013-DB-BX-K005 awarded by the Bureau of Justice Assistance/Department of Justice to the New York Prosecutors Training Institute (NYPTI). The Bureau of Justice Assistance is a component of the Department of Justice's Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the SMART Office. Points of view or opinions in these materials are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Hearings and Trial

The greatest risk of intimidation for a witness may occur during or immediately before hearings and trial, when the consequences for the defendant are most apparent and looming. This is also a time when the witness and the defendant and his family are all in the same place — the courthouse. Keeping witnesses safe at this stage of the proceeding requires careful, advanced planning. Below is a list of strategies that should be considered as the hearings and trial approach.

Preparing for Hearing and Trial

■ **Re-Evaluate Witness Safety:** Assess the witness's current situation at home and at work to determine if the witness is safe. Make sure that the witness has support from the office victim advocate, social services or other community groups, where needed. Keeping in touch with the witness during the pendency of the case, which in some instances could be months or years, will provide valuable insights about the witness's safety needs and his or her willingness to cooperate. Be particularly vigilant if the witness stops returning phone calls or emails or is unresponsive to other methods of communication.

■ **Information Disclosed to the Defense:** Do a thorough review of any paperwork or recordings that will be disclosed to the defense prior to trial to make sure they are properly redacted. If there is new information about witness intimidation, seek additional protective orders to limit, delay or prevent disclosure of information that may jeopardize a witness' safety.

■ **Monitor Jail Calls and Jail Visits:** As the hearings and trial approach, the defendant may be more focused on preventing the witness from testifying. Even if earlier jail calls were not monitored, it may be prudent to monitor jail calls and jail visits at this stage.

• ***Note:*** While most jail and prison facilities monitor inmate phone calls for institutional security, there may be limits on the ability of a prosecutor to use these statements at trial if the inmate was previously unaware that the phone conversations could be disclosed to the prosecutor.[32]

■ **Transportation To and From the Courthouse:** Assess in advance how the witness will arrive in the prosecutor's office and how the witness will get to court. Be mindful of the dangers associated with sending law enforcement to a witness's house and consider sending a car service for the witness instead, so as not to alert people in the neighborhood of the witness's cooperation. Also make sure to have the witness use safe, non- public entrances to the courthouse at all times when possible, such as using the judges' entrances.

• ***Disguising the Witness:*** If the witness can only get to court through public spaces, consider having the witness cover up in some way so as not to be recognizable.

•***Incarcerated Witness:*** Witnesses in custody are at high risk for intimidation and assault.[33] The incarcerated witness cannot simply be produced to court at the same time as the defendant using regular procedures. Instead, arrangements can be made for a police officer or investigator to take the witness directly out of the jail facility. In some instances an order to produce the witness for an unrelated matter can be used, though

32 New York: *See, e.g., People v. Johnson*, No. 37, 4/5/16, N.Y. Ct. of Appeals. Though the claim was unpreserved, the Court of Appeals noted that if the defendant was not notified that his jail calls would be introduced in a prosecution, then they may have been inadmissible. The court suggested that the concern could be cured if there was an express notification to the defendant that the calls could be turned over to the District Attorney.

33 Robert Faturechi, *Inmate Killed Weeks After Judge Asked That Sheriff's Officials Review his Safety,* L.A. TIMES (Mar. 26, 2011), http://articles.latimes.com/2011/mar/26/local/la-me-jail-strangling-20110327

Make sure that the witness has support from the office victim advocate, social services or other community groups, where needed.

steps must be taken to separate the witness from the defendant.

■ **Preparing the Witness About Concerns in the Courtroom:** Let the witness know that if the witness is concerned about possible intimidation in the courtroom while he is testifying, he should ask the court for a recess to discuss the matter with the court.

■ **Emergency Witness Relocation:** If the witness is at high risk, consider relocating the witness during the pendency of the trial. Relocating a witness is complex and time consuming. Often other members of the witness's family must also be relocated. Other considerations such as the witness's job or medical condition can make relocation even more difficult. Typically, relocation means moving the witness to a hotel before and during the time when the witness is required to testify. In other instances, the witness might need to be moved permanently. Public housing has some provisions to move a witness from one apartment to another in an emergency.

■ **Documentation of Possible Witness Intimidation:** Continue documenting any event that may indicate intimidation of a witness. This could form the basis for seeking to introduce the witness's testimony if the witness becomes uncooperative.

■ **Subpoena the Witness to Testify in Court:** Subpoenas must be served on the witness in person. Though not a foolproof means of securing a witness's testimony, a subpoena serves a number of purposes:

- It can be used to compel the witness to testify. It demonstrates to the witness that testifying is required and not optional.
- It is documentation that the witness can use to explain absence from work or school.
- If the witness does not appear, the service of a subpoena demonstrates to the court that efforts were made to secure the witness's attendance. The refusal can also be part of the factual basis for obtaining a Material Witness Order or seeking to admit the prior statements of a witness.

Hearings

■ **Protective Orders:** Undercover police officers, confidential informants and other vulnerable witnesses may have to testify at a pre-trial hearing. Some will not have to testify at trial but are only needed for the hearing. Various types of protective orders can be requested at the hearing stage to protect these witnesses. When considering a protective order application, a judge must decide upon a solution that is least restrictive of the defendant's rights. A full and detailed outline of the facts must be placed on the record to support the issuance of a protective order.

• ***Closing the Courtroom to the General Public:*** The standard for closing the courtroom to the public usually requires:

- The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
- The closure must be no broader than necessary to protect that interest;
- The trial court must consider reasonable alternatives to closing the proceeding; and

• The court must make findings adequate to support the closure."[34]

• ***Undercover Police Officer:*** If an undercover police officer testifies at a hearing or trial, an application can be made to close the courtroom to the public or to provide other methods of security. The closing of the courtroom can be based on concerns for the officer's safety as well as the need for confidentiality of ongoing or future investigations[35]. The officer may also be allowed to testify using an undercover number, rather than a real name.

• ***Partial Closing of the Courtroom:*** The court can decide whether to close the courtroom to everyone but the parties, including the defendant's family and friends, or the court can partially close the courtroom only to certain designated people, such as those who live in the neighborhood where the undercover conducts his investigations.[36] This will require court personnel to screen those seeking to enter the courtroom.

—*Ex Parte or In Camera Suppression Hearings:* In some instances, there can be an ex parte hearing without the defendant. The defense counsel usually appears, but in rare circumstances defense counsel may decide not to attend the hearing.[37]

• ***Anonymous Witness:*** An application can be made to allow the witnesses to use a fictitious name or a

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[34] Federal law: Under federal law, closing the courtroom will violate the defendant's 6th Amendment rights unless the court advances an overriding interest that is "no broader than necessary to protect that interest." *Waller v. Georgia*, 467 U.S. 39, 48 (1984). Most state jurisdictions have upheld partial courtroom closures, and, in some cases, a total closure depending on the situation. In reaching these decisions, courts typically apply the *Waller* standard: "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id*. at 45.
New York: New York has ruled that a trial court may exclude the public from the courtroom in a criminal case, including both where an undercover police officer testifies and where a civilian witness fears for his life. P*eople v. Hinton*, 31 N.Y.2d 71, 75-6 (1972). (Note that Hinton dealt with an undercover police officer's testimony, but the Hinton court also referred to an earlier decision by the court where they sanctioned closing the courtroom during a civilian witness's testimony where the witness "feared for his life if he testified publicly." *Id*. at 75, *quoting People v. Hagan*, 24 N.Y.2d 395 (1969). The Hinton court reaffirmed the "inherent discretionary power of the trial court to close the courtroom," and stated, "we need only point out that the discretion be sparingly exercised and then, only when unusual circumstances necessitate it." *Id*.) For a more recent case concerning the closing of the courtroom, *see People v. Jones*, 96 N.Y.2d 213, 216, 219 (2001) (the Court of Appeals upheld a trial court's total closure of the courtroom where the court posted an officer outside the courtroom when an undercover was testifying and inquired of all spectators, except for defendant's family and attorneys, their identity and interest in entering the courtroom). *See also People v. Floyd*, 45 A.D.3d 1457, 1458 (4th Dept 2007) (the court held a Hinton hearing ex parte and determined that closing the courtroom was appropriate during a civilian witness's testimony where the witness was threatened twice by strangers asking him not to testify and where the witness earlier failed to comply with a Grand Jury subpoena because he feared for his safety.)

[35] New York: *See, e.g., Castillo*, 80 N.Y.2d at 586; *Frost*, 100 N.Y.2d at 134.

[36] New York: in *People v. Nieves*, the Court of Appeals discussed the Waller standard and stated that where the trial court is aware that defendant's family members are present, they can only be excluded if it is necessary to protect the interest advanced by the prosecutor in support of closure. The court found that while the trial court was justified in closing the courtroom to the general public, excluding the defendant's wife and child as well when the undercover testified was broader than necessary where the undercover expressed no fear of defendant's family. Further, defendant's residence in proximity to undercover officer's area of operations was never discussed or raised at the Hinton hearing, so it could not be relied on as a basis for exclusion. 90 N.Y.2d 426, 430-1 (1997).
California: the California Court of Appeals discussed the *Waller* standard in deciding whether excluding two friends of defendant's during a seven-year-old's testimony was justified in *People v. Esquibel* (2008) 166 Cal.App.4th 539, 552 [82 Cal.Rptr.3d 803], *modified on other grounds by* 2008 Cal. App. LEXIS 1471 (Cal. App. 2d Dist. Sept. 29, 2008). The court noted that the identity of the person to be excluded is "highly relevant." *Id*. at 553. The basis alleged by the prosecution for exclusion was that the mother of the witness was concerned that the friends of defendant were gang members and they would recognize the child from the neighborhood. *Id*. at 554. Despite there not being any evidence of threats or intimidation, the court found that the trial court's exclusion of two of these friends of defendants was not a violation of defendant's 6th amendment rights as it was only these two individuals who were excluded and defendant's family remained in the courtroom. *Id*.

[37] New York: In New York, there are typically two situations where suppression hearings can be held ex parte: (1) when the defendant is challenging a search based on information provided by a confidential informant, and (2) when the prosecutor can articulate a safety concern for a witness testifying. For the first scenario, *see People v. Darden*, 34 N.Y.2d 177, 181 (1974) (the Court of Appeals sanctioned an in camera hearing to examine a confidential informant, outside the presence of both defendant and defense attorney, where there is insufficient evidence to establish probable cause aside from the arresting officer's testimony about communications from the informant); *Castillo*, 80 N.Y.2d at 586 (the Court of Appeals upheld the trial court's in camera hearings outside the presence of defendant and his attorney to examine the informant and determine whether informant's life would be in danger if the warrant and affidavit were disclosed and to examine informant's credibility). Note that hearings excluding both defendant and defense counsel are rare. For the first scenario, *see People v. Moise*, 110 A.D.3d 49, 51-2, 54 (1st Dept 2013). Here, the Appellate Division found that, based on a prosecutor's motion that the safety of an undercover would be compromised if he testified at the hearing in front of the defendant, the trial court's subsequent exclusion of defendant during a Wade hearing was justified and appropriate. The court stated: "The People showed that defendant's presence would compromise the safety of an undercover officer and others, and undermine legitimate law enforcement objectives." (Note that ultimately the First Department reversed the case because they found error with the court's exclusion of defense counsel's colleague during the hearing, particularly when defense counsel had previously alerted the court that his colleague would be coming.)

The court can decide whether to close the courtroom to everyone but the parties, including the defendant's family and friends…

number during testimony at a hearing. This application is typically made in hearings on search warrants, where the probable cause was based on the testimony of a confidential informant. Some information about the witness will have to be turned over the defense so they have an opportunity to cross-examine.

• ***Police and Other Witnesses:*** If the court issues a protective order to restrict the disclosure of the witness's name and pedigree, the protective order should also include a provision that similarly restricts the testimony of others from revealing the witness's identity. Even if the witness does not testify personally, a request can be made for other witnesses, such as police officers, to only refer to the witness using a fictitious name.[38] This restriction would limit the defense cross-examination regarding the pedigree or gender of the endangered witness.

• ***Sealing of Hearing Transcript:*** Request sealing of the hearing transcript as necessary, or, alternatively, request that the transcript be only reviewed by the attorney, not defendant or other third parties.[39]

—*Note:* A request can be made after trial for the release of a witness's transcript, including Freedom of Information requests. This may make it more urgent to take steps to protect the witness's identity in the transcript.

Trial

■ **Motions in Limine**: Pursuant to discovery rules, prosecutors must disclose witness lists, as well as other relevant documents about the witness, to defense counsel. The timing of the disclosure differs depending on statutes and tradition. If there are concerns about witness intimidation, however, various in limine motions can be made to protect the witness.

• ***Protective Orders:*** Motions for protective orders can be made at the trial stage to protect a witness. Some of these may have been made at earlier points in the case but may have to be re-litigated at the trial stage. In ruling on the motion, the court will have to balance the concerns for witness safety against the defendant's right to prepare a defense and cross examine the witness. These motions can be heard ex parte excluding the defendant.[40] In very rare instances where the defense attorney may be implicated in the intimidation, then the court may entertain the motion out of the presence of the defendant or the defense counsel.

—*Delayed or Limited Disclosure:* See Discovery section for motions to delay or limit the disclosure

[38] Federal law: Federal courts have allowed a witness to testify anonymously at hearings. *See, e.g., Siegfriedt v. Fair*, 982 F.2d 14, 17 (1st Cir. 1992) (the First Circuit did not find any violation of the defendant's right to confrontation where the prosecution witness testified under a pseudonym at a probable cause hearing, but the true identity of the witness was known to the defendant prior to trial, allowing the defendant "effectively to investigate and impeach the declarant").
New York: *See, e.g., Frost*, 100 N.Y.2d at 136 (stating that fictitious names may be used at a suppression hearing and at trial).

[39] New York: *See Matter of Crain Communications v. Hughes*, 74 N.Y.2d 626, 628 (1989) (the Court of Appeals upheld the lower court's denial of petitioner access to public documents filed in a separate action and sealed by a court order. As the court remarked, courts "… have the inherent power to control the records of their own proceedings…" and the decision to seal or disclose later must "involve the balancing of competing interests…")

[40] New York: *See Frost*, 100 N.Y.2d at 133 (the Court of Appeals upheld the trial court's conducting ex parte hearings on four occasions throughout the trial to determine if the courtroom should be closed during certain witnesses' testimony).
California: *See Valdez*, 55 Cal.4th at 102 (the initial trial court held an in camera hearing on the protective order for certain witnesses and nondisclosure of their identities).

of witness statements, pedigree or gender.

—*Testifying Anonymously at Trial:* As previously stated, the prosecutor can move to have witnesses testify anonymously, by using a number or a fictitious name, assuming the prosecutor has met the legal and constitutional standards. A detailed record must be made to support these applications and steps must be taken to give defense counsel information to evaluate the credibility of the witness. Some courts have allowed witnesses to testify while wearing a disguise, although it is not common.[41] Other courts have even allowed complete witness anonymity, though this is also very uncommon.[42]

—*Limiting Defense Questioning:* A motion to limit the scope of defense questioning regarding personal, identifying information of the witness can also be requested.[43] However, if the witness testifies anonymously, the court may still require that the defense attorney (and not the defendant) be provided with the witness's name and date of birth, so the attorney can do his own investigation of the witness. Prior to turning over this information, the prosecutor must also do a thorough review of the witness's background.

—*Substituting a Number in the Trial Transcript Even if the Witness's Name is Used at Trial:* Even if the witness has to testify by name in the courtroom, the prosecutor can move to have a number substituted in the trial transcript so that the witness's identity is protected if the trial transcript is released to others.[44]

• ***Admissibility of Witness Intimidation as a Prior Bad Act:*** Consider an application to admit evidence of defendant's prior acts of intimidation in the direct case to show defendant's intent or motive, to explain background evidence about the case, to establish a relationship between defendant and the witness, or to explain a witness's recantation. Typically an in limine motion to admit prior bad acts in the direct case includes:

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41 Federal law: *See United States v. Martinez*, No. 06 CR. 0591 (RPP), 2007 U.S. Dist. Lexis 68400, at 213 (S.D.N.Y. Sept. 14, 2007) (the district court judge allowed an officer to testify in disguise where the officer was in danger of being recognized by defendant's family and friends. Despite there being no evidence that the anyone in the courtroom would take this action, the court found that there was still a risk.)
New York: *See People v. Smith*, No. 7063/01, 2006 WL 1132409, at 3 (N.Y. Sup. Ct. Mar. 14, 2006), aff'd, 869 N.Y.S.2d 88 (1st Dept 2008)(upholding a trial court's decision to allow a witness to testify in a closed courtroom disguised by a fake beard, mustache, and wig because of danger to that witness in a case where another prosecution witness had been killed and there was evidence that the defendant would recognize this witness on sight).

42 Complete anonymity has been authorized in cases concerning national security, important governmental interests and danger to a witness's life. Lisa I. Karsai, *You Can't Give My Name: Rethinking Witness Anonymity in Light of the United States and British Experience*, 79 TENN. L. REV. 29, 38-39 (Fall 2011).
Federal law: *See, e.g., United States v. Zelaya*, 336 F.App'x 355, 358 (4th Cir. 2009) (the 4th Circuit upheld the complete anonymity of Salvadoran police officers who testified in support of the government's theory that there were connections between the defendants and the MS-13 gang in El Salvador).
New York: in New York, *People v. Frost* is an example of complete witness anonymity. Here, the Court of Appeals found the trial court lawfully concluded that "the witness's concerns for safety outweighed defendant's interest in obtaining information concerning Knight's true identity for purely collateral impeachment purposes." 100 N.Y.2d at 137.

43 New York: *See Stanard,* 42 N.Y.2d at 83-4 (holding that, while questions about background and identity must generally be permitted, the right to cross-examine is not entirely unlimited. In order to allow a witness to testify anonymously, the steps outlined in *Stanard* here must be followed. The witness may be excused from answering a question with a "showing that the question will harass, annoy, humiliate or endanger the witness." *Id*. Factors to be considered include: "(1) the extent to which the right to cross-examine is infringed, (2) the relevance of the testimony to the question of guilt or innocence, (3) the nature of the crime charged and the quantum of proof established aside from the testimony of the witness, (4) the nature and significance of the interest or the right asserted by the witness, and (5) the nature of and extent to which the proposed cross-examination would produce evidence favorable to that party and, of course, whether such evidence would be merely cumulative." *Id*. After a hearing on the issue, the court must "… engage in a balancing process which compares the rights of the defendant to cross-examination, considering the extent to which this right is infringed, with the interest of the witness in retaining some degree of anonymity." *Id*.) As an example, *see Frost*, 100 N.Y.2d at 136 (the Court of Appeals upheld the trial court's protective order of a certain witness's address and occupation following an ex parte examination of that witness citing the *Stanard* case); *cf. People v. Waver*, 3 N.Y.3d 748 (2004) (the court of appeals reversed a lower court's ruling allowing undercover police officers to testify anonymously without having followed the procedures and test outlined in *Stanard*).
Illinois: *See People v. Kliner*, 185 Ill.2d 81 (1998) (upholding a trial court's limiting defense questioning of a witness about her personal information, even though the witness and defendant were known to each other, where safety was a concern and the witness had been placed in a witness protection program).

44 California: *See Valdez*, 55 Cal.4th at 104 (the trial court permitted the witness's to be identified by name in court but by number in the transcript).

—*A description of the evidence sought to be admitted*

—*Reasons why the evidence is probative, including:*

- It proves an element of the crime.
- It demonstrates the relationship between the defendant and witness.
- It explains the witness's behavior, including a recantation.
- The prior bad acts are inextricably interwoven with the facts of the current case.[45]

Though typically evidence of a witness's fear of testifying is not admissible, evidence of threats of intimidation may be admissible…

• ***Admissibility of the Witness's Fear of Testifying:*** Though typically evidence of a witness's fear of testifying is not admissible, evidence of threats of intimidation may be admissible to either (i) explain a witness's behavior on the witness stand and to aid jurors in evaluating the witness's credibility, or (ii) as evidence of defendant's guilt.[46] Additionally, events may occur during the trial that could open the door to such testimony. For example, if the defense seeks to introduce recanted testimony of the witness, evidence of threats may be admissible to rebut the credibility of the recantation.[47]

• ***Admissibility of Prior Trial Testimony when a Witness Refuses to Testify:*** A witness's prior trial testimony may be admissible at a subsequent trial when the witness refuses to testify, even though the witness is available. This most often occurs in re-trials following a mistrial or reversal on appeal when a witness is going to have to testify again.[48]

• ***Closure of the Courtroom:*** An in limine motion can be made to restrict public access to the courtroom in various ways.

Compelling the Witness to Testify:

• ***Material Witness Order:*** If a prosecutor has

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[45] This type of motion is codified in the Federal Rules of Evidence under F.R.E. § 404(b)(2) (2009) and all states have either case law and/or statutes supporting this to some degree.
New York: *See People v. Molineux*, 168 N.Y.2d 264 (1901); *People v. Ventimiglia*, 52 N.Y.2d 350 (1981).
California: CAL. EVID. CODE § 1101(b) (West 1967).
Illinois: 725 ILL. COMP. STAT./115/7.4 (West Supp. 2007); *People v. Dabbs*, 239 Ill. 2d 277, 283 (2010).
Pennsylvania: PA. CODE § 404(b)(2) (West 2013).

[46] California: *See Valdez*, 55 Cal.4th at 135 ("An explanation of the basis for the witness's fear is likewise relevant to the jury's assessment of his or her credibility and is well within the discretion of the trial court. For such evidence to be admissible, there is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant"). *See also People v. Scott*, No. B191227, 2007 WL 2793357 (the court allowed the prosecutor to offer evidence of intimidation to explain why witnesses were reluctant to identify appellants. Evidence of intimidation included the presence of a gang member in court wearing a threatening t-shirt, as well as graffiti saying "Snitch Blocc" in the area after witnesses were persuaded to go to the police.).
Florida: *See Jones v. State*, 385 So.2d 1042 (Fla. Dist. Ct. App. 1st Dist. 1980) (the court allowed evidence of the defendant personally threatening the witness as it was evidence of defendant's guilt); *Koon v. State*, 513 So.2d 1253, 1256 (1987) (although there was no evidence directly tying the defendant to the threats made against the witness, the court allowed evidence of the threats as it beared on the witness's credibility).

[47] Massachusetts: *See, e.g., Commonwealth v. Watkins*, 473 Mass. 222 (2015) (defense counsel at trial did not offer evidence of the witness's recantation, and the defendant raised an ineffective assistance of counsel claim on appeal. The appellate court ruled, however, that had the defense attorney attempted to offer the witness's recantation, then the trial court would have permitted the prosecution to offer evidence that the recantation was based on threats the witness received from the defendant's brother.).

[48] New York: *See People v. Mejia*, the 4th Department Appellate Division upheld the trial court's admission of a witness's (co-defendant's) prior testimony on the prosecution's direct case, even when that witness was still available, when the witness/co-defendant refused to testify against the defendant at the retrial because the witness/co-defendant did not believe that his plea agreement with the prosecution required him to have to testify twice. The court held the witness/co-defendant in contempt for his refusal to testify and found his refusal to testify constituted "incapacity." Thereafter, the prior testimony was admitted. 126 A.D.3d 1364, 1365 (4th Dept 2015). *See also People v. Knowles*, 79 A.D.3d 16 (3d Dept 2010) (the Appellate Division upheld a lower court's admission of prior testimony of a witness who briefly testified at a second trial but then recanted and stated that the witness's recantation and subsequent refusal to testify constituted incapacity).

exhausted all means of securing a witness's attendance, including issuing subpoenas without success, a material witness order can be used to compel a witness's testimony.[49] If the witness continues to refuse to cooperate, such an order can lead to the witness's incarceration.[50] This is usually reserved for the most extreme situations. Though such an order can force a witness to testify, it can irreparably damage the relationship between law enforcement and the witness. It can also be used by the defense to argue that any testimony was coerced and is, therefore, unreliable. Thus, a prosecutor should evaluate the case carefully before deciding to go this direction.

—*Alternatives to the Issuance of a Material Witness Order:* Obtaining a material witness order should be a last resort. If a witness is becoming reluctant, the prosecutor, the detective or the judge can explain the consequences of refusing to comply with a subpoena to the witness, if the witness can be found. This may encourage the witness to testify without having to issue a material witness order.

—*Note:* A material witness order in most states requires that the witness be brought before the court and not to the prosecutor's office.[51] The application for a material witness order and its subsequent execution is usually considered part of the investigative stage of the case. Thus, a prosecutor may only have qualified immunity for these actions, which will not fully protect a prosecutor if the material witness order is executed improperly and its validity later challenged by a witness.[52]

Jurors may also be at risk of intimidation or tampering often in high profile gang cases, drug cases, and organized crime cases.

■ Jury Safety: Jurors may also be at risk of intimidation or tampering often in high profile gang cases, drug cases, and organized crime cases. Thus, prosecutors can consider a number of options to manage the threat. These steps are taken very rarely, so a supervisor should always be consulted prior to making these requests:

• ***Sequestration of the Jury:*** A request to sequester the jury if there is a fear of jury tampering or intimidation will keep the jury together and under guard during deliberations.[53]

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[49] Federal law and New York: A material witness is a person who has material information concerning a criminal proceeding. The federal government and most states have statutes authorizing law enforcement to detain a material witness. *See, e.g.*, 18 U.S.C. § 3144 (1986); N.Y. CRIM. PROC. LAW § 620.20 (McKinney 1970).

[50] New York: *See, e.g., id.* § 620.40(2) ("The court may further fix bail to secure [the material witness's] appearance upon such date or until the proceeding is completed and, upon default thereof, may commit him to the custody of the sheriff for such period.")

[51] New York: *See, e.g., id.* § 620.30(2).

[52] New York: If a prosecutor obtains a material witness order and the witness is not brought to the court forthwith and is instead held for the purposes of an investigative interrogation, only qualified immunity will apply to the prosecutor, not absolute immunity. *Simon v. City of New York*, 727 F.3d 167 (2d Cir. N.Y. 2013).

[53] All states appear to allow sequestration of jurors at certain times. For example: New York: N.Y. CRIM. PROC. LAW § 310.10(1) (McKinney 2001) provides that jurors must be "continuously kept together" during deliberations, but § 310.10(2) states that, at any time after the jury has been charged and began deliberations, and "… after notice to the parties and affording such parties an opportunity to be heard on the record outside of the presence of the jury," the judge may order the jury to suspend its deliberations and separate for a reasonable period of time (thus allowing the jury not to be sequestered). Thus, whether a jury is going to be sequestered in New York is in the discretion of the trial judge but the prosecution and defense may make arguments either for or against sequestration. Sequestration is very rarely ordered.
Arizona: here, sequestration of a jury lies "within the discretion of the trial court." *State v. Cruz*, 181 P.3d 196, 205 (Az. Sup. Ct., 2008), 218 Ariz. 149, 158 (2008). The Arizona Supreme Court has stated, "When publicity is not sensational [or] inflammatory, there is no need to sequester the jury[,] particularly when the jury has been cautioned not to read the newspapers, listen to the radio or watch television during the trial and there is no indication that the court's instructions were violated." *Id.*
Georgia: in Georgia, the highest court ruled that the trial court did not abuse its discretion in failing to order jury sequestration in a capital case because it instructed the jury not to discuss the case among themselves or with any third parties. *Morgan v. State*, 575 S.E.2d 468, 472 (Ga. Sup. Ct., 2003), 276 Ga. 72, 75 (2003).

• ***Anonymous Jury:*** A motion to empanel an anonymous jury is rare and typically reserved for extraordinary circumstances only.[54]

• ***Other Safety Precautions:*** Assess how the jury gets to the courtroom and where they assemble during a break in the proceedings. If these areas are shared with the defendant or his family and friends, then there might be a possibility of jury tampering. If there is no separate area for the jury to assemble, the prosecutor can request that court personnel or other law enforcement remain with the jury during times when they are in public areas. If tampering is suspected, consider obtaining surveillance videos from in and around the courthouse. This could reveal whether any jurors have been inappropriately approached.

■ **Courthouse and Courtroom Security:** A witness is at greatest danger as the trial approaches. On the day of the trial, the witness and the defendant, or the defendant's family and friends, will all be in the same place. This is a very volatile time and great caution should be taken. Various strategies can help to protect the witness in the courthouse and in the courtroom.

• ***Accompany the Witness:*** The witness must be accompanied at all times by an office advocate, a law enforcement official or a prosecutor who can focus on the witness's safety. This includes coming and going to the courtroom, in the courtroom, and in areas immediately outside the courtroom. Arrangements can be made to enter the courthouse through non-public entrances. Consider having the witness take extra security precautions when walking through the courthouse, such as having the witness wearing a hat and keeping his head down to avoid eye contact.

—*Witness Rooms:* Some courtrooms have a witness room where witnesses can be kept separate from those waiting outside the courtroom. If there is a witness room, the witness should be brought to the room through the most secure route. If there is no witness room, then a prosecutor must seek out a secure space in advance of trial where the witness can wait away from the public. Even if cameras and phones are banned from a courtroom, there will be people in the hallways that can take pictures of the witness.

• ***General Security from Court Personnel:***

—*Brief Court Personnel:* Brief court officers and other courtroom staff about the possibility of intimidation or tampering from the defendant or his family and friends both inside and outside the courtroom during the witness's testimony. The court should have specially trained personnel that

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[54] Federal law: Federal circuit courts have allowed the use of anonymous juries, most frequently in organized crime prosecutions. *See, e.g., U.S. v. Barnes*, 604 F.2d 121 (2d Cir. 1979). *See also U.S. v. Shryock*, 342 F.3d 948, 971 (9th Cir. 2003) (articulating five standards in determining whether to empanel an anonymous jury).
New York: There does not appear to be higher court case law on anonymous juries. In Richmond County, a Supreme Court judge denied the request for an anonymous jury, stating that N.Y. CRIM. PROC. LAW § 270.15(1)(a) (McKinney 1997), which requires that juror names be read in open court, forbids the use of anonymous juries. *People v. Watts*, 173 Misc.2d 373, 376, 378 (Sup Ct, Richmond County 1997). The court stated, however, that a defendant *may* forfeit his right to learn the jurors' names and addresses under Section 270.15 when the prosecution presents sufficient evidence to predict that jury tampering will occur. *Id*. at 377-8. New York's two relevant statutes dealing with juror personal information seem to conflict with one another: N.Y. CRIM. PROC. LAW § 270.15(1)(a) (McKinney 1997) (requiring juror names to be read in open court and authorizing, in the court's discretion, jurors to complete questionnaires with personal information, with disclosure to the attorneys) *and* N.Y. JUD. LAW §509(a) (1998) (providing that juror information must be kept confidential and those seeking access must apply to the Appellate Division). (Note: one court has cited the Judiciary Law as the basis for denying the press, who petitioned for juror names and addresses after the close of a trial, the right to that information. *See Matter of Newsday, Inc. v. Sise*, 71 N.Y.2d 146 (1987), *affirming 2nd Dept. decision*; while another court has stated that the Judiciary Law is overly burdensome, and it authorized a defense counsel the right to secure the names and addresses of potential jurors several weeks before trial to enable counsel to investigate the jurors and advance his clients' right to an impartial jury. *People v. Perkins*, 125 A.D.2d 816, 818 (3d Dept 1986). Thus, whether a prosecutor can empanel an anonymous jury in New York may very much depend on the court hearing the case.)
California: Courts in California apply federal law in recognizing that anonymous juries may be constitutional when "warranted by the facts." *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1092 [69 Cal.Rptr.2d 576], *citing U.S. v. Salvatore*, 110 F.3d 1131, 1143-1144 (5th Cir. 1997).
Michigan: In Michigan, the Court of Appeals upheld a trial court's referral to jurors by number during voir dire to "protect jurors given defendant's violent criminal history," and that, in doing so, "jurors might benefit from measures to assure that they would not be harassed by the media and others." *People v. Good*, 2013 Mich. App. Lexis 1608 (2014).

can deal with volatile situations.

—*Extra Staff:* Extra staff may be needed both inside and outside the courtroom. Undercover security inside and outside of the courtroom may also be useful.

—*Surveillance Video Outside the Courthouse:* If the courthouse has video surveillance of the perimeter around the courthouse or inside the courthouse and intimidation is suspected, obtain the recordings to review them for possible evidence of intimidation. These recordings can also reveal jury tampering if the jury is approached while waiting outside the courtroom. The court may require a subpoena to produce the recordings.[55]

• ***Security at the Courtroom Door:*** Make a request to the court or court personnel for enhanced security for the courtroom. Various measures can be taken, including:

—*Check Identification:* Court officers can ask for a valid form of identification for all individuals seeking to enter the courtroom.[56] The officers can also record the names of the people entering the courtroom.

—*Check for Metal Objects:* Court officers can use magnetometers or wands to search for metal objects on those individuals entering the courtroom.[57] Though the public may go through a magnetometer in the courthouse lobby, phones are usually returned. Additional screening at the courtroom door may be used to detect any unauthorized recording devices.

—*Exclude Cell Phones and Electronic Recording Devices from the Courtroom:* A motion to preclude cell phones and electronic recording devices inside the courtroom can be made. [58] This motion can be made even without a specific threat if there is general evidence that the defendant or the defendant's associates may want to intimidate witnesses. Simply holding up a phone and taking a photograph can easily convey a threat from someone in the courtroom. If possible, these devices should be checked in with court personnel before entry into the courtroom is allowed. Note that with evolving technology, photographs and videos can be taken with a variety of devices that do not look like cameras, so court officers and law enforcement should be extra vigilant.

• ***Security Inside the Courtroom:***

—*Indicia of Intimidation in the Courtroom:* In the courtroom, intimidation and threats can be con-

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55 A number of courts around the country have installed video camera surveillance due to violence in and around the courthouse.
New York: *See, e.g., Security Camera Network Monitors Courthouses*, UCS BENCHMARKS, JOURNAL OF THE NYS UNIFIED COURT SYSTEM (Spring/Summer 2005), https://www.nycourts.gov/publications/benchmarks/issue1/cameras.shtml
Arkansas: *See, e.g., Arkansas Courthouses to Increase Video Surveillance, Access Control*, SECURITY SALES & INTEGRATION (Jun. 24, 2015), http://www.securitysales.com/article/arkansas_courthouses_to_increase_video_surveillance_access_control/access.
Maryland: *See, e.g., Courthouse Security,* Sheriff's Office, Howard Co., M.D., http://www.co.ho.md.us/displayprimary.aspx?id=4294968029 (last visited Mar. 16, 2016).

56 Massachusetts: In *Commonwealth v. Maldonado*, 466 Mass. 742 (2014), the Massachusetts Supreme Judicial Court upheld a trial court's order requiring that persons entering the courtroom provide identification to the court officers and sign in, as a permissible, partial closure of the courtroom. The court only made checking IDs a condition of entry and did not make any inquiry about the purpose for entering the courtroom (aside from seeing if they were on the witness list, in which case they were barred.)
Indiana: *See Williams v. State*, 690 N.E.2d 162, 170 (1997) (upholding court officer's right to check IDs and require a sign-in for those he did not know. This was not deemed unfairness or impinging on the defendant's 6th Amendment rights).

57 Most courts in the US have adopted security measures to scan for metal objects on persons entering the courthouse. *See* Mark Waite, *The Case for Metal Detectors*, PAHRUMP VALLEY TIMES (Oct. 24, 2003), http://archive.pahrumpvalleytimes.com/2003/10/24/news/metaldetectors.html. In jurisdictions that do not have magnetometers, court officers can use wands to look for metal objects on persons entering a courtroom on an "as needed basis." Kevin Grasha, *What Happened After Testimony Proved Deadly*, CINCINNATI.COM (May 18, 2015), http://www.cincinnati.com/story/news/2015/05/16/unprecedented-violence-leads-courthouse-security/27378409/.

58 Some courthouses have banned cell phones, laptops and other electronic communication devices.
Example of state courthouse ban:
Illinois: *See "Frequently Asked Questions," Cell Phone and Electronic Communication Device Ban*, STATE OF ILLINOIS, CIRCUIT COURT OF COOK COUNTY, http://www.cookcountycourt.org/HOME/CellPhoneElectronicDeviceBan.aspx (banning phones and electronic communication devices at the Hon. George N. Leighton Criminal Court Building at 2600 South California Avenue in Chicago) (last visited Mar. 16, 2016).
Example of federal courthouse ban:
Federal, S.D.N.Y.: See "*Hours," Daniel Patrick Moynihan United States Courthouse New York*, New York, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, http://www.nysd.uscourts.gov/site_manhattan.php (prohibiting cell phones, tape recorders and cameras) (last visited Mar. 16, 2016).

If the courthouse has video surveillance of the perimeter around the courthouse or inside the courthouse and intimidation is suspected, obtain the recordings to review them for possible evidence of intimidation.

veyed in many ways, including the gathering of an unusually large group of individuals from a rival group, passing of notes, hand gestures, face making, and word mouthing in the direction of a witness. A clear threat can be communicated when an associate of the defendant brings a family member of the witness into the courtroom while the witness is testifying.

—*Prohibit the Use of Cell Phones and Recording Devices in the Courtroom:* If the court will not authorize the exclusion of cell phones and recording devices from the courtroom, a prosecutor can request that the court instruct members of the public in the courtroom that they cannot use cell phones in any way in the courtroom and that no photographs or recordings may be taken. The court should repeat the admonition at the beginning of every court session.

—*Law Enforcement Presence in the Courtroom:* Consider having extra law enforcement presence inside the courtroom, including Gang Intelligence officers or District Attorney's investigators.[59] With the permission of the court, law enforcement may want to take photographs of the people in the audience or outside the courtroom.

—*Closure of the Courtroom During the Witness's Testimony:* Upon motion by the prosecutor, the court can order the courtroom closed to the public to protect the safety of the witness. The court can close the courtroom to everyone but the parties, or the court could order a partial closing of the courtroom that restricts only certain people from the courtroom.

—*Press in the Courtroom:* If there are concerns about witness safety, the prosecutor can oppose any recording in the courtroom. If, however, the press is allowed in the courtroom, the prosecutor can request that the court order the press not to photograph a witness, name a witness, give the witness's gender or describe a witness who may be at risk of intimidation.[60] The prosecutor's press officer can also prepare the press for these restrictions.

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[59] New Jersey: The presence of increased police security has been held not to violate the defendant's right to a fair trial by an impartial jury. *See State v. Zhu*, 165 N.J. 544 (2000) (finding no unfair bias in the presence of uniformed officers to increase courtroom security during a murder trial, and granting wide discretion to the trial judge in determining the appropriateness of security measures within the courtroom).

[60] While courtrooms are presumptively public, most states have statutes or case law allowing the general public, which includes the press, to be precluded from either photographing or videotaping in the courtroom, when certain conditions are met.
New York: in New York, the rules of the Chief Judge preclude photographs, films or videotapes, or audiotaping, broadcasting or telecasting in a courtroom and courthouse unless the Chief Administrator of Courts or his/her designee gives permission. ADMIN. RULES OF UNIFIED COURT SYSTEM AND UNIF. RULES OF TRIAL COURTS, Part 29, § 29.1(a) (1996). Permission may be granted for several reasons, including, "there will be no compromise of the safety of persons having business in the courtroom or courthouse." *Id.* at § 29.1(a)(2).
Pennsylvania: here, judges should prohibit broadcasting, televising, recording or taking photographs in the courtroom, except that the judge may authorize the photographic or electronic recording and reproduction of appropriate court proceedings when certain conditions are met, including, when "the parties have consented; and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproductions." 201 PA. CODE RULE 1910(C)(2) (Supp. 2016).
Mississippi: in Mississippi, court rules preclude the photographing and videotaping of certain types of persons, including "police informants, minors, undercover agents, relocated witnesses, victims and families of victims of sex crimes, and victims of domestic abuse." MISS. RULES FOR ELECTRONIC AND PHOTOGRAPHIC COVERAGE OF JUD. PROCEEDINGS Rule 3(d) (2003).

Incarcerated Witnessess

Incarcerated witnesses pose particular challenges for prosecutors and law enforcement. Whether a prosecutor seeks to have the incarcerated witness testify about first hand knowledge of the defendant's commission of the crime itself or to describe defendant's incriminating statements made to the witness in an institutional setting,[61] incarcerated witnesses are at great risk of intimidation since they are housed with other defendants. Thus, a prosecutor must carefully plan and coordinate with police and correction officers to ensure that the witness is protected from intimidation and violence while in jail, during transportation to the courthouse and while testifying. Protecting an incarcerated witness can be difficult, however, as it is very hard to know who in the institutional setting may pose a threat to the witness. Simply notifying authorities in the institution about the need for security can reveal the witness' status as someone who will be testifying. That alone can put the witness at risk. In order to protect an incarcerated witness, prosecutors and law enforcement should consider:

■ **Separation Orders:** The prosecutor can obtain a "Separation Order"[62] so the incarcerated witness is always kept separate from the defendant against whom he is testifying. The existence of such an order, however, may pose a threat to the testifying witness as it reveals that he will be testifying and against whom. Greater precautions may need to be taken, as necessary.

• ***Different Jail System:*** To provide greater safety, Separation Orders can require that the incarcerated witness be housed in a different facility in the same jail complex, or that the incarcerated witness be moved to a jail in a different county.[63] There are limited slots in jails from neighboring counties where incarcerated witnesses can be housed.

• ***Transportation to Court and Lodging in Court:*** The separation order should include keeping the defendant and witness from going to court on the same bus. Similarly, arrangements must be made to keep the defendant and the incarcerated witness separate as they are being held in the courthouse.

■ **Monitor Jail Calls, Mail and Visitor Logs:** Threats against the incarcerated witness may be uncovered by monitoring the incarcerated defendant and his associates. To uncover efforts to intimidate the witness, prosecutors can review the defendant's outgoing jail phone calls[64], request to set up a "mail watch" or a "mail cover" to review the defendant's incoming

61 Federal: Note that before admitting testimony of an incarcerated witness/informant about incriminating statements defendant made to him/her in a jailhouse setting, the court will do an analysis to decide whether the informant/witness was acting as an agent for the prosecution. *See Massiah v. U.S.*, 377 U.S. 201 (1964). If informant was acting on his own volition and provided statements about defendant's confession voluntarily to law enforcement, these statements are generally admissible. *Id*.
New York: "If the government is more than a passive auditor, such as where it actively inveigles a codefendant or fellow prisoner to inform … , the statements made to the informer should be suppressed ..." *People v. Cardona*, 41 N.Y.2d 333, 335 (1977). Courts have allowed testimony from known and previously used prosecution jailhouse informants where the record supported that the prosecution "passively received" the information the day before the trial began. *People v. Young*, 100 A.D.3d 1427, 1428 (4th Dept 2012).

62 Anderson, *supra note* 7 at 6.

63 New York: The New York State Correction Law Section 504 provides for an inmate transfer to another facility under a Substitute Jail Order ("SJO"). *See* N.Y.S. CORR. LAW § 504 (2013) The New York City Code Rules and Regulations states that the parameters for which an SJO may be obtained include overcrowding, inability to maintain proper classification, natural or civil emergency, inmate disturbance, transfer to provide medical or mental health services, and safety, security and essential service delivery concerns for an individual or group of inmates. 9 N.Y.C.R.R. § 7300.5(a) (2016).

64 There is ample case law supporting rules for jails and prisons that permit the recording and review of an inmate's outgoing phone calls (non-privileged).
Federal law: *See, e.g., U.S. v. Willoughby,* 860 F.2d 15, 22 (2nd Cir. 1988).
California: *See People v. Kelley* (2002) 103 Cal.App.4th 853, 858 [127 Cal.Rptr.2d 203] ("So long as a prisoner is given meaningful notice that his telephone calls over prison phones are subject to monitoring, his decision to engage in conversations over those phones constitutes implied consent".).
New York: *See Jordan v. Schriro*, 96 A.D.3d 574 (1st Dept. 2012) (upholding DOC's recording of inmate telephone conversations under the regulatory authority of 40 R.C.N.Y. § 1-10(h) (2015), which expressly authorizes it to "listen to" or "monitor" inmate telephone conversations, as permitting (also the) record[ing] such conversations).

or outgoing correspondence,[65] and subpoena records of defendant's visitor logs.

• ***Note:*** While most jail and prison facilities monitor inmate phone calls for institutional security, there may be limits on the ability of a prosecutor to use these statements at trial if the inmate was previously unaware that the phone conversations could be disclosed to the prosecutor.[66]

■ **Get Information from the Incarcerated Witness:** Ask the incarcerated witness if he knows of people in the institution that may pose a risk. Since people cycle in and out of a jail, the risks can change from day to day.

Ask the incarcerated witness if he knows of people in the institution that may pose a risk.

■ **Protective Custody:** Consider requesting that the witness be placed in protective custody. This has pros and cons. Though the witness will be separated from the regular jail population, the witness could be isolated and alone, which can be a psychological burden for the witness. Protective custody can also be a flag to other inmates that the witness is cooperating and will be testifying.[67]

■ **Housing the Incarcerated Witness Under a Different Name:** Consider having the witness incarcerated under a different name. Prosecutors should contact their local corrections department for advice and procedures on how this can be done.

■ **Commissary:** It may be helpful to provide some commissary funds for the incarcerated witness. This will provide the witness with some autonomy and he will be less susceptible to pressure from others. The amount of funds deposited in the commissary account must be revealed to the defense.

■ **Moving Incarcerated Witness to Another County or to Federal Custody:** It may be possible

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65 Federal law: Reading non-privileged inmate mail, whether incoming or outgoing, is generally permitted if it furthers a legitimate penological purpose. *See Turner v. Safley*, 482 U.S. 78, 89 (1987). Some jails and prisons allow for the creation of a "mail cover" or a "mail watch" so that prosecutors can directly read an inmate's non-privileged correspondence.
California: *See, e.g.*, INMATE MAIL POLICY, CONTRA COSTA CO. § 10(a) (policy allowing a mail watch to read non-privileged outgoing inmate mail). Nearly every jail and prison, at a minimum, has policies and procedures clearly permitting the opening, inspection and reading of outgoing inmate mail pursuant to a search warrant or order by a warden of the facility.
New York: *See, e.g.*, the New York City Department of Correction's Directive 4001R-B, titled "Inmate Correspondence," states that non-privileged incoming and outgoing correspondence may not be opened or read except under certain circumstances, pursuant to a lawful search warrant or order by a warden "articulating a reasonable basis to believe that the correspondence threatens the safety or security of the facility, another person, or the public." N.Y.C. DEPT. OF CORR. DIR. 4001R-B §§ (IV)(C) and (E)(1) (June 16, 2008). They also provide that privileged incoming or outgoing mail may be read only following a search warrant or court order. *Id.* 4001R-B §§ (IV)(D) and (E)(5).

66 New York: *See, e.g., People v. Johnson*, No. 37, 4/5/16, N.Y. Ct. of Appeals. Though the claim was unpreserved, the Court of Appeals noted that if the defendant was not notified that his jail calls would be introduced in a prosecution, then they may have been inadmissible. The court suggested that the concern could be cured if there was an express notification to the defendant that the calls could be turned over to the District Attorney.

67 Every local jail and state prison provides protections for inmates who are at risk, often called "Protective Custody" (also known as "PC").
New York: In New York City, for example, the Department of Correction enacted Dir. 6007R-A, which codifies the policies and procedures for having an inmate placed into PC, including the creation of housing for PC inmates who cannot be safely housed in less restrictive setting. *See* N.Y.C. DEPT. OF CORR. DIR. 6007R-A § II(A) (May 24, 2010). It is important to consider, prior to placing an incarcerated witness in PC, that PC generally results in the inmate/witness being kept in a more restrictive type of housing. Thus, prosecutors are advised to be familiar with the internal rules and procedures for placement in PC in jails and prisons in their respective jurisdictions and to communicate clearly the realities of being in PC with a witness.

to move an incarcerated witness to a jail in a nearby county. Some jails have space designated for this purpose. In rare instances, the witness may be moved to federal custody, particularly once the incarcerated witness has testified. The federal government has some facilities that are kept secret from even the prosecutor.

Uncooperative Witnesses and Evidentiary Considerations

If a witness becomes uncooperative or disappears, there are strategies for compelling the witness to testify or for introducing prior sworn statements of the witness.

■ **Subpoena the Witness:** A reluctant witness should always be subpoenaed. As previously stated, this may encourage the witness to appear and, if not, the failure to comply with the subpoena can be the basis for seeking a material witness order.

■ **Admissibility of a Witness's Prior Statement:** When a witness has become completely uncooperative or unavailable due to the actions of the defendant or his associates, the prosecutor can move to admit the witness's prior sworn statements in certain circumstances. In some jurisdictions this is called the doctrine of "Forfeiture by Wrongdoing."[68] Generally, in order to use a witness's prior sworn statement, a prosecutor must make a motion to admit the statement. Typically, the prosecutor will have to prove at an evidentiary hearing outside the presence of the jury by either a preponderance of evidence or clear and convincing evidence (depending on the state) that the defendant caused the witness to be unavailable to testify.[69]

• ***Motion on Notice:*** The prosecutor must advise the court and defense counsel of the intention to offer the

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[68] Federal law: Testimonial, out-of-court statements by witnesses are generally barred, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36 (2003). (Crawford lays out examples of what statements are considered "testimonial," which includes, but is not limited to, affidavits, custodial examinations, prior testimony that defendant did *not* cross-examine, statements taken by police officers during interrogations. *Id.* at 51 – 53.) However, when the witness is unavailable specifically due to the actions of the defendant or the defendant's associates, such as having the witness threatened or murdered, this rule does not apply and the defendant has waived his 6th Amendment right of confrontation. *See Davis v. Washington*, 547 U.S. 813, 833 (2006) (in recognizing the doctrine of forfeiture by wrongdoing, "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the [confrontation clause] does not require courts to acquiesce. While defendants have no duty to assist the [s]tate in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system").

[69] New York: In New York, the prosecutor must establish at a Sirois hearing by clear and convincing evidence that the witness is unavailable through defendant's intentional misconduct. *Holtzman v. Hellenbrand and Sirois*, 92 A.D.2d 405, 415 (2nd Dept. 1983). *See also People v. Geraci*, 85 N.Y.2d 359, 366-368 (1995) (affirming clear and convincing evidence standard, but also stating that the standard of proof imposed on the prosecutor has to be "high enough to assure a great degree of accuracy in the determination of whether the defendant was, in fact, involved in procuring the witness's unavailability for live testimony"). Note: Recently the New York Court of Appeals effectively raised the prosecutor's burden at a Sirois hearing, although that was not specifically stated. *People v. Dubarry,* 25 N.Y.3d 161 (2015). In *People v. Dubarry*, a day before the witness was called to testify, members of the defendant's religious institution approached the witness's brother who accused the witness of snitching, and the sister of the witness stated she heard through a third party that the religious group suspected the witness of snitching. *Id.* at 166. The court held that this evidence was insufficient to support an inference that the defendant had personally "planned or engineered" the threats or otherwise engaged in "misconduct." Id. at 171. According to the Court, even if it could be inferred that a communication concerning the eyewitness's prospective appearance had occurred, the inference that the communication was "intended and structured to procure the witness's unavailability" was "pure speculation." *Id.* at 172.
California: California has codified a clear and convincing standard under §1350 of the California Evidence Code; yet the California Supreme Court has repeatedly stated that the standard of proof for forfeiture by wrongdoing is a preponderance of the evidence. *The Prosecutors' Resource: Forfeiture by Wrongdoing*, AEQUITAS, 4 (Oct. 2012), http://www.aequitasresource.org/The_Prosecutors_Resource_Forfeiture_by_Wrongdoing.pdf, *referencing People v. Giles*, (2007) 40 Cal.4th 833, 838 n.8 [55 Cal.Rptr.3d 133], *vacated on other grounds*, 554 U.S. 353 (2008). *See also People v. Zambrano*, 163 P.3d 4, 50 n.21 (2007), *overruled in part by People v. Doolin*, (2009) 45 Cal.4th 390, 421 [87 Cal.Rptr.3d 209] (overruled regarding conflict of interest law standards); *People v. Banos* (2009) 178 Cal.App.4th 483, 492 n.12 [100 Cal.Rptr.3d 476] (declining to resolve apparent conflict, but observing that preponderance of the evidence appears to be the standard under California law), cert. denied 560 U.S. __ (2010).

prior sworn statements so the defendant has a fair opportunity to respond.[70] The motion must provide facts that show a "distinct possibility"[71] that the defendant caused the witness to become unavailable.

• ***Hearing:*** A hearing may be ordered to determine whether the prior statement is admissible. The hearing will address the witness's unavailability to testify and the connection of the defendant to that unavailability.[72]

—*Proving Unavailability to Testify:*

• *The Witness Testifies at the Hearing:* If the witness is physically available, the witness can be called to say that he refuses to testify or no longer remembers the event in question. This will establish "unavailability."[73] Additional evidence will be needed to establish that the defendant caused the witness's refusal to cooperate.

• *The Witness Does Not Testify at the Hearing:* If the witness has disappeared entirely, evidence must be presented to show that reasonable efforts were made to locate the witness.[74]

—*Evidence of the Defendant's Involvement in the Unavailability:* Whether the witness testifies or not, the prosecutor must establish by either a preponderance of the evidence or clear and convincing evidence (depending on the law in the requisite state) that that the defendant caused the unavailability of the witness. In addition to evidence regarding the current witness, the judge may allow evidence of prior acts of intimidation by the defendant or intimidation occurring during the trial.[75]

Post-trial Issues

A trial conviction does not end the possibility of witness intimidation. After conviction, a defendant or the defendant's associates may seek retaliation or attempt to have a witness recant their incriminating testimony. These efforts can occur decades after a conviction. Some strategies to prevent post-conviction intimidation and tampering include:

■ **Post-Trial Preparation of the Witness:** After obtaining a conviction, the prosecutor should alert the witness to the possibility that the witness might be contacted by the defendant, the defendant's associates or defense counsel and that they have a right not to speak with them, if they wish. Request that the witness notify the prosecutor of such contacts.

■ **Continuing Contact with the Witness:** Where intimidation is a possibility, the prosecutor or the office

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70 *The Prosecutors' Resource: Forfeiture by Wrongdoing, supra* note 70 at 4.

71 Federal law: *U.S. v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982).
New York: *See Holtzman*, 92 A.D.2d at 415 (requiring the People to allege facts demonstrating only a "distinct possibility" that defendant's misconduct caused a witness not to testify to obtain a hearing, and permitting admission of grand jury testimony upon proof of misconduct and the absence of the witness in a manner suggestive of causation).

72 New York: *See Geraci*, 85 N.Y.2d at 363-364 and 370-371 (the Court of Appeals upheld the trial court's finding that a witness's prior grand jury testimony was admissible on the prosecution's direct case where the defendant was "responsible for or had acquiesced in the conduct that rendered [the witness] unavailable for trial." The Court of Appeals discussed the trial court's conclusion, based on "concrete facts from which its conclusions naturally and reasonably could be drawn," namely, where prosecution investigators testified at the hearing that they were told that the defendant approached the witness after the indictment and asked him to come with defendant and speak to his lawyer, where the witness complained to investigators that "they" had a copy of his testimony and that he had been ratted out, and where the witness had received money from the defense and was told he would received more money when the trial was over. At the hearing, the witness denied nearly everything the prosecution investigators told the court and also denied having witnessed the crime).

73 "Unavailability" in this context means that the witness persists in refusing to testify despite court orders to do.
New Jersey: *See, e.g., State v. Byrd*, 198 N.J. 219 (2009). This testimony will be relevant in conjunction with other evidence of threats and intimidation to prove the defendant caused the witness to become, essentially, uncooperative. Other evidence may include law enforcement witnesses, third- party witnesses, such as, family members or advocates who could testify about prior conversations about defendant with witness or prior interactions, phone logs showing defendant phone calls, and letters from defendant to witness.

74 Typically, a state investigator would testify as to the efforts made to locate the witness and procure testimony.

75 Michael James, *Witness Says Death Threat Made in Court, "I'm Going to Kill Your Family,"* BALTIMORE SUN (Oct. 16, 1997), http://articles.baltimoresun.com/1997-10-16/news/1997289120_1_darnell- jones-anthony-jones-ross. Here a defendant threatened the witness in court during a break while he was testifying, which was overheard by U.S. Marshalls and other attorneys, and the court allowed the witness to tell the jury that the defendant had threatened him.

advocate can maintain contact with the witness to make sure they are safe after the trial. Though the trial is over, the witness may still need services or assistance with relocation.

■ **Document Any Efforts to Intimidate the Witness:** Any efforts to intimidate the witness should be documented. Consider whether witness intimidation charges can be brought against the defendant, or whether the defendant's action could be the basis for a parole or probation violation. Additionally, a prosecutor should consider the need to offer further help to protect a witness, such as relocation, counseling, and other assistance offered earlier in the case.

■ **Recantations:** If the witness recants after a conviction, the matter should be immediately investigated. Determining whether the defendant's actions led to the recantation should be part of the investigation. Phone records, jail calls, correction visitor logs and social media can all be fruitful avenues for the investigation. Recantations will likely trigger post-conviction litigation, such as a motion by defendant for a new trial,[76] and should be immediately conferenced with a supervisor to discuss the disclosure obligations to the defense.

■ **Relocating the Witness:**

• ***Local Relocation:*** If there is continuing concern about retaliation against the witness and his family, the witness may be moved to another housing development or another part of the city. Unfortunately, it is hard to quickly orchestrate such a move, so planning and involvement of multiple agencies may be necessary.

• ***Federal Witness Protection Program:*** The Federal program is rare in state cases and is used in only the most extreme circumstances. The program will provide the witness with a completely new identity, relocate him in a new jurisdiction, and requires severing all ties with friends and family members. In order to enter the relocation program, the witness must pass a polygraph and take a psychological test to make sure that they are able to make such a break with their past. Note that incarcerated cooperating witnesses could serve their time out in a federal facility if they meet the criteria for the Federal program. This may be a good solution for protecting incarcerated cooperating witnesses who testify in state cases.

[76] States will consider evidence of threats of intimidation against a witness when considering a defendant's motion for a new trial based on the witness's post trial recantation to evaluate the veracity of the recantation.
New York: Courts consider a defendant's motion for a new trial under N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1983), which includes the discovery of "new evidence."
New Mexico: *See State v. Sena*, 105 N.M. 686 (1987) (after trial, a witness recanted and stated that she committed perjury in her trial testimony and that defendant never confessed to her. The court denied defendant's motion for a new trial, however, and found that there was evidence that defendant's family threatened violence against the witness and coerced her recantation, thus the recantation was deemed not credible).

The PROSECUTOR

A Brief Refresher: Impeachment for a Conviction Involving a Dishonest Act or False Statement

BY BRETT WESSELS

"Mr. Blagojevich, you are a convicted liar, correct?"[1]

— Government prosecutor Reid Schar's opening question during cross examination of impeached Illinois Governor Rod Blagojevich.

NO PUN INTENDED, but Rod Blagojevich has been impeached twice: As the Governor of Illinois in 2009 and on the witness stand in his 2011 corruption retrial. The jarring, opening question on cross examination by the federal prosecutor was objected to several times by Blagojevich's defense team, but ultimately the court made Blagojevich answer. Among other items, this article reminds us why the question was permissible and perhaps why the question wasn't asked on direct examination.

Under the common law, a witness was not allowed to testify if the person had been convicted of an 'infamous crime.' Such a person was considered unfit to testify because the witness lacked credibility. While that rule is now antiquated, there still remains testimonial and evidentiary untrustworthiness associated with a prior conviction. A prior conviction impeaching a witness is governed by Federal Rule of Evidence 609, "Impeachment by Evidence of a Criminal Conviction."[2]

This article focuses on 609(a)(2). This rule states a witness must be impeached for a conviction involving a dishonest act or false statement-crimes commonly referred to by the judiciary, the legislature, and for the purposes of this article, as *crimen falsi* crimes. This article examines the 2006 amendment, examines the test to determine *crimen falsi* crime, discusses the advantages of a *crimen falsi* conviction for impeachment, and provides an overview of practical considerations surrounding the impeachment.

THE 2006 AMENDMENT TO 609(A)(2)

Prior to 2006, 609(a)(2) mandated admission of convictions "*involving* dishonesty or false statement."[3] Understandably, *involvement* was interpreted differently and a circuit split was formed. The majority test was a fact intensive examination made on a case-to-case basis,

[1] https://www.cbsnews.com/news/prosecutors-grill-convicted-liar-blagojevich/

[2] Fed. R. Evid. 609.

[3] Prior to December 1, 2006 Rule 609(a)(2) stated:

(a) General Rule. For the purposes of attacking the credibility of a witness…(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

Fed. R. Evid. 609(a)(2) (prior to the amendment of December 1, 2006).

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while a minority of jurisdictions examined the elements of the crime to see whether falsity or deceit was explicitly stated.

The Conference Committee initially favored the elements test, but there were concerns that this would sometimes exclude highly probative acts.[4] For example, a conviction of a witness making a false claim to a federal agent could be charged as "Material Misrepresentation to the Federal Government"[5] or "Obstruction of Justice."[6] While the former expressly references deceit, the latter does not. Under a strict elements test, "Obstruction of Justice" would therefore not be mandatorily admissible as *crimen falsi*.

In 2006, the Conference Committee formally amended 609(a)(2) and adopted a modified version of the elements test. The test for *crimen falsi* became "where it can be readily determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement."[7] This amendment narrowed the number of crimes receiving mandatory admission by reducing the previous tests' inherent subjectivity. Establishing the elements of the crime, not involvement, was the key inquiry.

What is a *Crimen Falsi* Crime?

The critical question is whether the crime required proving a dishonest act or false statement, not how the crime was committed. Unless it is a requisite for a conviction, dishonesty perpetrated during the crime is now analytically irrelevant. For example, murder, even if carried out deceitfully, doesn't require dishonesty or a false statement. This deviates from the pre-2006 test, which would likely find that a deceitful act during a murder was *crimen falsi*.[8]

Beyond examining the elements, only a limited inquiry into the conviction is permissible. If the elements do not explicitly list dishonesty or a false statement, a proponent can still offer the indictment, a statement of the admitted facts, or the jury instructions to show some falsity must have been proven for the witness to be convicted of the crime.

There is not complete judicial unanimity, but the following are generally considered *crimen falsi*: Perjury, false statements, criminal fraud, embezzlement, false pretense, bribery,[9] land fraud, mail fraud, Medicare fraud, issuing a false prescription, securities fraud, and concealing stolen property. However, disorderly conduct, resisting arrest, prostitution, unauthorized acquisition of food stamps, carrying a gun without a license, and attempted escape are generally not *crimen falsi* crimes. There is disagreement about whether crimes of theft (robbery, shoplifting, misdemeanor theft, burglary) are *crimen falsi*. The majority holds crimes of theft as not being *crimen falsi*,[10] however there are some federal courts that do.[11]

The language of a state statute may differ. Iowa's 609(a)(2) language reflects the pre-2006 federal rule, encompassing crimes "*involving* dishonesty or false statement."[12] Iowa courts have determined this language includes armed robbery, robbery,[13] shoplifting and extortion as *crimen falsi* crimes.

The Avantages of a *Crimen Falsi* Conviction

From an impeachment perspective, a *crimen falsi* conviction has several advantages:

- Felony or misdemeanor charges can be used.
- Any witness can be impeached.
- The ten-year lookback period can likely be overcome.
- Prejudicial effect is irrelevant.

609(b) states that after ten years, evidence of a conviction is only admissible if the probative value substantially outweighs the prejudicial effect.[14] Is this a potential road-

4 George Edward Spencer, Interpreting the New Rule 609(A)(2), 57 Cas. W. Res. L. Rev. 717, 720 (2007).
5 18 U.S.C. § 1001
6 18 U.S.C. § 1503
7 Fed. R. Evid. 609(a)(2).
8 For example, a murder might be considered a crime of dishonesty or false statement if the murderer lied about the crime either before or after the crime. Advisory Committee on Evidence Rules, Minutes of the Meeting 17 (Apr. 29-30, 2004).
9 *U.S. v. Williams*, 642 F.2d 136, 140 (5th Cir. 1981).
10 Crimes Involving a Dishonest Act or False Statement, 28 Fed. Prac. & Proc. Evid. § 6135 (2d ed.)(Stating that the majority of courts accept that crimes of theft are not considered crimen falsi crimes).
11 *U.S. v. Kinslow*, 860 F.2d 963, 968 (9th Cir. 1988); *U.S. v. Del Toro Soto*, 676 F.2d 13, 18 (1st Cir. 1982); *U.S. v. Brown*, 603 F.2d 1022, 1029 (1st Cir. 1979)
12 Iowa R. Civ. P. 5.609
13 *State v. Griffin*, 1982, 323 N.W.2d 198.

block for a *crimen falsi* impeachment? Probably not, as the analysis then turns on whether the conviction is more probative than prejudicial. Cutting to the heart of credibility, a *crimen falsi* conviction of a testifying witness is likely more probative. However, note that some state jurisdictions may interpret the ten year rule as being a hard cap on admissibility.

Beyond a ten year issue, a *crimen falsi* conviction must be admitted regardless of prejudicial effect. The circumvention of the near universal balancing test has received vehement criticism in some scholarly circles. There is one quasi-exception. If the previous conviction is exactly the same as the current charge, a judge may prevent the jury from learning the name of the previous charge. Instead, the judge will only allow the jury to know that the defendant was previously convicted of a crime involving dishonesty or false statement.

Procedural and Practical Application

Practically speaking, an impeachment *crimen falsi* conviction is relatively straightforward. A conviction is considered a guilty verdict, a plea of guilty, or a plea of nolo contendere. The admissibility of a *crimen falsi* conviction is appropriate matter for a motion in limine, however, the court is not obligated to make a definitive ruling.

Generally, a *crimen falsi* impeachment during trial cannot include collateral details surrounding the conviction. The information is limited to the date, jurisdiction, the name of the crime imposed, and the punishment given. For example, asking about the length of time served is improper.[15] Once established, an open admission of the conviction by the testifying party completes the impeachment. However, if the witness completely denies the conviction, the impeaching party must introduce a certified copy of the conviction and independent evidence tending to support its trustworthiness.[16]

There is more nuance of admission by a defendant on direct examination. A defendant might anticipate being impeached on cross-examination and choose to testify to the previous conviction on direct exam ("anticipatory disclosure"), possibly without notifying the court. Why didn't Blagojevich's attorneys just ask Blagojevich about his prior conviction on direct exam? This is a tactical decision holding appellate ramifications, as anticipatory disclosure on direct exam can potentially be a waiver to appeal the adverse evidentiary ruling.[17]

There is conflicting authority on whether a witness may make general statements of explanation regarding the conviction on direct.[18] If at all, the trial judge has discretion on the scope of the statements. If the witness does explain or minimizes guilt on direct exam, a prosecutor is presented with a small opportunity. The prosecution can question the statements made by the witness. Additional details that would otherwise be barred are allowed,[19] but the focus must remain on the current charge. The witness opened the door, but just a crack. Furthermore, any denial does not unequivocally open this door. A witness's testimony of the conviction, followed by a statement that the decision is being appealed, and then a denial, will likely *not* open the door on cross examination.[20]

Conclusion

Impeachment by criminal conviction can be effective for attacking credibility but is one of the most controversial trial practices in American Criminal Law. A looming impeachment might deter a witness from testifying or, when brought out in court, plant a subconscious seed of guilt in the jury's mind. A previous *crimen falsi* conviction held by the defendant can be devastating. If the defendant testifies, prior criminal conduct is exposed while simultaneously undermining credibility. However, if the defendant chooses not to testify, the silence might raise an inference of guilty among jurors.[21] While the equities of 609(a)(2) will continue to receive scholarly attention, this article merely wanted to serve as a refresher of the 609(a)(2)'s nuance.

14 Fed. R. Evid. 609(b)
15 *U.S. v. Robinson*, 8 F.3d 398, 409 (7th Cir. 1993)
16 *United States v. Kilburn*, 596 F.2d 928, 935 (10th Cir.1978)
17 *Ohler v. United States*, 529 U.S. 753, 760 (2000)
18 *U.S. v. Plante*, 472 F.2d 829, 832 (1st Cir. 1973),
19 *Sanchez v. McCray*, 349 F. App'x 479, 483 (11th Cir. 2009)
20 *U.S. v. Robinson*, 8 F.3d 398, 39 Fed. R. Evid. Serv. 843 (7th Cir. 1993)
21 *Introduction: Taking the Stand,* 35 Wm. & Mary L. Rev. 1, 13 (1993)

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