

**Cross-Examination of Cooperating Co-Defendants**

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Brian Steel, Esq., The Steel Law Firm, Atlanta, GA

# **Cross-Examination of Cooperating Co-Defendants**

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**Brian Steel  
The Steel Law Firm, P.C.  
Atlanta, Georgia**

## **I. Introduction**

One common element in federal criminal cases is the use of trial testimony from cooperating co-defendants. Prosecutors place value on such testimony because it provides direct evidence concerning facts which are frequently difficult to prove otherwise. Likewise, defendants understand that offering up their testimony to prosecutors can curry favor with the very people who are manipulating their sentencing. Additionally, the structure of federal criminal statutes, many of which contain mandatory minimum sentences, creates an incentive for defendants' cooperation with governmental agents to get relief from mandatory minimums under 5K1.1 of the Federal Sentencing Guidelines and Fed. R. Crim. P. 35. Recognizing that testimony from cooperating co-defendants is an integral ingredient in criminal prosecutions, defense counsel must prepare for cross-examination of the cooperating defendant by investigating all possible sources of information and understanding the law which will enable us to push the envelope and discredit the snitch.

**The Steel Law Firm, P.C. 1800 Peachtree Street, N.W., Suite 300, Atlanta, Georgia 30309 (404) 605-0023**

## II. Preparing for the Credibility Attack

It goes without saying that the most effective cross-examinations are those conducted by counsel with a full arsenal. Conducting a full investigation of the case enables you to uncover materials for use in cross, such as conflicting statements by the cooperating co-defendant, reports of law enforcement which contradict the witness, prior criminal records (including transcripts of prior plea hearings, or trials and Presentence Reports), telephone records, bank records, job applications, leases and credit information. Utilize pretrial subpoena power, seeking Rule 17© subpoenas filed under seal, to build your arsenal. Also, explore non-traditional sources of impeachment, such as pursuing leads of the family members of the cooperating co-defendant. In United States v. Botes, (Indictment No 1:04-CR-568 USDC, ND.GA), defense counsel called the father of the cooperating co-defendant whose testimony impeached that of his own son.

Another successful strategy, one that can be used when there are multiple cooperating co-defendants, is pitting cooperating co-defendants against each other. Culling out conflicting statements, and methodically cross-examining the witness as to facts which disprove the veracity of another cooperator's statement can be very effective. This strategy provides the jury with the understand of the desperation and motivation of not only the cooperator whom you are impeaching, but also have an understanding that a "cooperator's" testimony is inherently unreliable.

## III. Understanding the legal basis for pushing the envelope

Prosecutors regularly seek to limit cross-examination, especially when defense counsel is

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effective. It is imperative to have a full understanding of the rules under which cross-examination can be conducted, so that you are able to delve into all the areas on which you seek to examine the witness. Below is a summary of relevant rules and principles to enable successful discrediting of the cooperating co-defendant.

- Pursuant to Fed. R. Crim. P. 607, the credibility of any witness may be attacked by the party calling that witness or the party confronting said witness.
- Pursuant to Fed. R. Crim. P. 608, the credibility of any witness may be attacked or even supported by evidence in the form of opinion or reputation but is subject to the following limitations:
  - a) the evidence may refer only to the character for truthfulness or untruthfulness of the witness; and
  - b) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- Please note that specific instances of conduct of a witness for the purpose of attacking or supporting the witness' character for truthfulness, and a conviction for a crime as provided in Fed. R. Crim. P. 609, may not be proved by extrinsic evidence. However, in the discretion of the trial court, if the probative value of the truthfulness or untruthfulness may be inquired at the cross-examination of the witness concerning the witness' character for truthfulness or untruthfulness and concerning the truthfulness or untruthfulness of another witness as which the character of that witness being cross-examined has testified.

An accused or any other witness still maintains the right to assert the privilege against self-incrimination when examined with respect to matters that relate solely to character for truthfulness.

- Pursuant to Fed. R. Crim. P. 609, the credibility of any witness may be attacked with evidence that the witness, other than the accused, has been convicted of a crime if the crime was punishable by death or imprisonment in excess of one (1) year under which the witness was convicted and evidence that the accused that has been convicted of such crime shall be admitted if the court determines that the probative value of admitting this evidence outweigh the prejudicial effect and evidence that any witness that has been convicted of a crime shall be admitted if it involves dishonesty or any false statement, regardless of punishment. Please note that evidence of conviction under this rule is not admissible if a period of ten (10) years has elapsed since the date of the conviction or the release of the witness from confinement imposed for that conviction whichever is later unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweigh its prejudicial effect. Evidence of a conviction more than ten (10) years old as calculated above, is not admissible unless the opposing party gives the adverse party sufficient advance written notice of intent to use such evidence to provide an adverse party with a fair opportunity to contest the use of this evidence.
- Evidence of any conviction is not admissible if the conviction has been subject to pardon, annulment, certificate of rehabilitation or other equivalent procedure based upon a finding

of the rehabilitation of the person convicted and if the person has not been convicted of a subsequent crime which is punishable by death or imprisonment in excess of more than one (1) year or the conviction has been subject to a pardon, annulment, or any other procedure concerning a finding of innocence.

- Evidence of juvenile adjudications is generally not admissible however, the trial court may allow a juvenile adjudication of a witness other than the accused if the conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that the admission in evidence is necessary for a fair determination of guilt or innocence of the accused on trial.
- The pendency of an appeal from many convictions does not render evidence of conviction inadmissible however, the evidence of the fact that the case is on appeal is admissible.
- Fed. R. Crim. P. 610 mandates that beliefs or opinions of a witness or matters of religion are not admissible for the purpose of showing that by this religious reason, the nature of the witness' credibility is impaired or enhanced.
- Pursuant to Fed. R. Crim. P. 611, the trial court shall exercise reasonable control over the mode and order of cross-examining witnesses and presenting evidence so as to permit the interrogation and presentation of the witness' testimony effective to ascertain the truth, avoid time delay and protect the witnesses from harassment or undue embarrassment. The scope of cross-examination is limited to the subject matter as a direct examination and matters affecting the credibility of a witness however, the court may permit inquiry into additional matters beyond what was discussed on direct examination. Leading

questions must not be used on direct examination of the witness however, in the discretion of the trial court may be used to develop the witness' testimony. The questions must be permitted on cross-examination. When a party calls a hostile witness, an adverse party or a witness who identifies with the adverse party, leading questions may be posed.

- Fed. R. Crim. P. 613 mandates that when examining a witness concerning a prior statement made by the witness whether written or oral, this statement need not be shown nor its contents disclosed to the witness at the time of questioning. However, on request of the other party, this statement, if possible, shall be shown or disclosed to opposing counsel.
- Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless a witness is afforded an opportunity to explain or deny the prior inconsistent statement and the opposite parties afford an opportunity to cross-examine the witness thereon.
- Fed. R. Crim. P. 614 permits the trial court, on its own motion or at the suggestion of any party to call any witness and all parties are entitled to cross-examine the witness that the trial court call. The trial court may interrogate that witness or the call by itself or any party. Objections to calling of the witness by the trial court or the trial court's inquisition as a witness must be made at the time or the next available opportune time when the jury is not present.
- Fed. R. Crim. P. 615 allows that at the request of any party, the court shall order witnesses excluded so if they can not hear the testimony of any other witness and the court may do so on its own motion. The rule of sequestration does not authorize the

exclusion of a party who is natural person or an officer or employee of the party which is not a natural person designated to be represented by its attorney or a person whose presence is shown by a party to be essential to the presentation. Presentation of parties caused or a person authorized by statute to be present.

- The trial court may, in its discretion, limit the scope of cross-examination however, same is subject to the requirements of the Sixth Amendment. The confrontation clause guarantees criminal defendants an opportunity to impeach, through cross-examination, the testimony of all witnesses presented against them. Further, the exposure of a witness' motivation to testify is proper and an important function of cross-examination. See Davis v. Alaska, 415 U.S. 308 (1974), United States v. Baptiste-Rodriguez, 17 F.3d 1354 (11<sup>th</sup> Cir. 1994); Wasko v. Singletary, 966 F.2d 1377 (11<sup>th</sup> Cir. 1992). Bias of a witness gives a subjective fact that is influenced by the witness' belief about the benefit the witness will receive if he or she testifies in a particular way and the value to that particular witness which is measured by what the witness thinks will happen if he does not receive said benefit. Hence, probing a witness' motivation, interest, bias, or expectation of benefit goes to the subconscious of the witness and not what the actual benefit the witness will receive. See United States v. Oliveros, 275 F.3d 1299, 1307 (11<sup>th</sup> Cir. 2001); United States v. Taylor, 17 F.3d 333 (11<sup>th</sup> Cir. 1994).
- An accused has the right to re-cross-examine a witness where a new matter is brought up and redirect. If the trial court forbids cross-examination when new matters are brought up on redirect, this violates the confrontation clause. See United States v. Ross, 33 F.3d

1507 (11<sup>th</sup> Cir. 1994).

- Motive, bias and interest are always fertile field for cross-examination and cases have been reversed by courts improperly restricting said cross-examination. See United States v. Lankford, 955 F.2d 1545 (11<sup>th</sup> Cir. 1992); United States v. Baptiste-Rodriguez, supra; Olden v. Kentucky, 488 U. S. 227 (1988); United States v. Williams, 954 F.2d 668 (11<sup>th</sup> Cir. 1992).
- All defendants have a right to confront all witnesses against them and hence, the court can not deem it appropriate to allow one defendant's lawyer to cross-examine a witness when it is a multiple defendant case. See United States v. Mills, 138 F.3d 928 (11<sup>th</sup> Cir. 1998).
- Fed. R. Crim. P. 404(b) can be used by a defendant during cross-examination of a witness as a powerful tool. See United States v. Cohen, 888 F.2d 770 (11<sup>th</sup> Cir. 1989).
- In Crawford v. Washington, 541 U. S. 36 (2004), the Supreme Court held that testimonial hearsay is barred by the confrontation clause even if the evidence is supported by a particular guarantee of trustworthiness. The Crawford court held that "testimonial" hearsay includes statements made by people to police officers, or other investigators under circumstances that would leave the declarant to know that the statement is being used to establish some fact in the investigation of the accused. That is, if the statement being offered by the prosecution was made by the out-of-court declarant in the context of an investigation of the accused, the statement cannot be introduced at the defendant's trial if the declarant is unavailable, notwithstanding any indicia of reliability or particularized

guarantees of trustworthiness. Only the opportunity to cross-examine the witness satisfies this requirement of the confrontation clause.

Crawford was clarified by the Supreme Court in the combined opinions of Davis v. Washington and Hammon v. Indiana, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The Court held that a 911 recording which contained the description of the alleged perpetrator was not testimonial, but that a statement and affidavit signed in the presence of law enforcement, with no emergency situation present were testimonial in nature.

“...[S]tatements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution.”