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CROSS-EXAMINATION OF DEFENDANT'S CHARACTER WITNESSES: IN FAVOR OF THE PROSECUTOR'S INQUIRY INTO THE CHARGES AT BAR

INTRODUCTION

Consider the fictitious case of *United States v. Delta*.¹ Douglas Delta is on trial for allegedly engaging in tax evasion. At the trial, Delta's attorney, Alex Arnold, calls a character witness, Carla Winter, to the stand. Winter is a long-time business associate of Delta's. During direct examination Winter testifies that, in her opinion, Delta is an honest and truthful citizen. On cross-examination, Prosecuting Attorney Pamela Parker examines Winter as follows: "Ms. Winter, you have testified to Mr. Delta's character for truth and veracity. If you were to learn, hypothetically, that Mr. Delta was found to have failed to declare his true income on his annual tax return, would that change your opinion of him?" Arnold immediately jumps to his feet to object, asserting that it was improper for Parker to pose a question predicated upon the very charge for which Delta is on trial.

There is considerable debate whether it is permissible for a prosecutor, on cross-examination of the defendant's character witness, to pose questions that are based upon the charges at bar.² This Note analyzes issues raised by the prosecutor's use of such questions.³ Part I discusses the use of character testimony and the applicable Federal Rules of Evidence. It explains the distinction between character witnesses who testify as to the defendant's reputation in his community and opinion witnesses who give their personal opinion about the defendant's character. Finally, Part I defines the two types of questions used by prosecutors to inquire into the charges at bar (the more general "have you heard. . .?" inquiry as compared to the more probing guilt-assuming hypothetical). Part II explores the competing views regarding the "have you heard. . .?" inquiry into the charges at bar. This part also argues that the "have you heard. . .?" question may be asked of certain reputation witnesses, and suggests the proper approach for posing these questions. Part III explores the more intense debate regarding the guilt-assuming hypothetical. Part III advocates the use of the guilt-assuming hypothetical for all opinion witnesses and sets forth guidelines to be followed when posing such questions. Part IV suggests safeguards to prevent the jury's misuse of this evidence. This Note concludes that a prosecutor's inquiry into the charges at bar must

1. The fictitious case *United States v. Delta* will be referred to throughout this Note. The characters and the scenario are entirely fictional; the fact pattern is presented to facilitate the presentation of the issues addressed throughout this Note.

2. See *infra* notes 41-46, 66-71 and accompanying text. The Supreme Court has not addressed this issue.

3. This Note relies largely on federal appellate cases. Wherever helpful, however, reference is made to applicable state cases and federal district court opinions.

be different for reputation and opinion witnesses and posits that these questions can be highly probative in testing a witness' credibility.

I. BACKGROUND: CHARACTER EVIDENCE AND THE TRIAL PROCESS

A. *Character Evidence Under the Federal Rules*

The Federal Rules of Evidence permit an accused to offer his good character into evidence to show, by inference, that the act with which he is charged is inconsistent with his overall character.⁴ It is feasible that this testimony will provide the jury with enough information to find the reasonable doubt necessary for acquittal.⁵ While character evidence is admissible and potentially probative, the Federal Rules of Evidence limit its use.⁶

The admissibility test of Rule 404(a)(1) permits an accused, or the prosecution in rebuttal,⁷ to introduce evidence of a pertinent trait of character⁸ to prove action in conformity with it on a given occa-

4. See Fed. R. Evid. 404(a)(1); 1A J. Wigmore, Evidence § 56, at 1161 (Tillers rev. 1983).

5. See *Michelson v. United States*, 335 U.S. 469, 476 (1948); 1 S. Saltzburg & M. Martin, Federal Rules of Evidence Manual 214 (5th ed. 1990).

Testimony about defendant's good character may be probative in and of itself, and the jury should be so charged. See *Michelson*, 335 U.S. at 476; see also *Pattern Criminal Jury Instructions, Report of the Subcommittee on Pattern Jury Instructions*, Committee on the Operation of the Jury System, Judicial Conference of the United States, Charge 51 at 63 (1987).

6. The two Federal Rules of Evidence that are most pertinent to this Note are Rules 404 and 405. Rule 404 is an admissibility test that dictates when character evidence can be used. See Fed. R. Evid. 404. Rule 405, which comes into play only after the criteria of Rule 404 have been met, delineates the methods by which character evidence may be introduced. See Fed. R. Evid. 405.

Rule 403 is also important to an understanding of the issues contained in this Note. Rule 403 excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. One element that factors into the 403 balancing test is the effectiveness of a limiting instruction. See Fed. R. Evid. 403 advisory committee's note; *infra* notes 107-108 and accompanying text. Another factor is the ability of the party opposing the introduction of the evidence to respond (and thereby attempt to undo any damage to his case made by his adversary) in summation or in rebuttal. See *infra* note 34.

7. While the defendant may always offer evidence of good character, the prosecution may not offer evidence of bad character in its case-in-chief. See *Michelson*, 335 U.S. at 475-76. Yet once the defendant elects to "[put] his character in issue," the prosecution may rebut this evidence with analogous evidence of bad character. Fed. R. Evid. 404 advisory committee's note subdivision (a). By testing the credibility of the defendant's proof, the prosecutor seeks to "prevent him from profiting by a mere parade of partisans." *Michelson*, 335 U.S. at 479.

8. A pertinent trait of character is one that directly relates to the action or actions in which the defendant is alleged to have participated. For example, in the fictitious *Delta* case, Delta is being tried for tax evasion. Because tax evasion is a fraudulent and furtive crime involving dishonesty, the pertinent character trait to which character witness Winter might testify is Delta's propensity to be honest and truthful. Character traits such as peaceableness or non-aggressiveness, however, would not be pertinent to the tax evasion trial and would therefore not be permitted under Rule 404(a)(1). They would be highly

sion.⁹ Once Rule 404's admissibility test has been satisfied, Rule 405 describes the methods that may be used to prove character.¹⁰ Specifically, Rule 405(a) permits proof by testimony as to reputation or in the form of an opinion¹¹ in all cases where evidence of character or of a character trait is admissible.¹² On direct examination, proof may not be given in the form of specific instances of conduct.¹³ An inquiry into relevant specific instances of conduct is permitted only on cross-examination of the

pertinent, however, if Delta were accused of homicide or assault, or if he claimed self defense. The more general trait of being law-abiding is sometimes deemed a pertinent character trait for all defendants because arguably, whenever a defendant is charged with a crime, he is alleged to have broken the law. See C. McCormick, McCormick on Evidence § 191, at 566-67 (E. Cleary 3d ed. 1984); see, e.g., *Michelson v. United States*, 335 U.S. 469, 471 (1946) (witness asked about defendant's reputation for being a law-abiding citizen).

9. See Fed. R. Evid. 404(a)(1). Rule 404(a)(1) is an exception to the general rule embodied in Rule 404(a), which prohibits introducing evidence of a person's character or character traits at trial to prove "action in conformity therewith on a particular occasion." Fed. R. Evid. 404(a); see C. McCormick, *supra* note 8, § 191 at 566. When character in general or a specific character trait in particular is introduced to prove that the defendant acted in a manner consistent with his character on the occasion in question, character is said to be "circumstantial." Circumstantial use of character suggests an impermissible propensity inference, in which the jury may infer that "the person acted on the occasion in question consistently with his character." Fed. R. Evid. 404 advisory committee's note subdivision (a). See 1 S. Saltzburg & M. Martin, *supra* note 5, at 214. In an attempt to eliminate the propensity inference, Rule 404(a) explicitly prohibits this particular use of character evidence. Nonetheless, Rule 404 recognizes that certain circumstances warrant the use of character evidence, even though the propensity inference may follow. Accordingly, Rule 404(a)(1) permits the character of the accused to be used for the purpose of proving action in conformity with his character on a specific occasion. See Fed. R. Evid. 404(a)(1). It is thought that character evidence tending to prejudice the jury *in favor of* the accused carries fewer social costs than does evidence tending to prejudice the jury *against* the defendant. See C. McCormick, *supra* note 8, § 191, at 566. Consequently, the rule permits the defendant to benefit from any and all potential reasonable doubts. See 1 S. Saltzburg & M. Martin, *supra* note 5, at 214.

10. See Fed. R. Evid. 405.

11. Generally, this proof is offered by a character witness whom the defense calls to the stand to testify on the defendant's behalf. See C. McCormick, *supra* note 8, § 191, at 568.

By permitting testimony in the form of opinion *and* reputation, the Rule settled what had previously been an uncertain area of the law. Just prior to the advent of the Federal Rules of Evidence, courts had customarily permitted character evidence only in the form of reputation testimony. See 5 J. Wigmore, *supra* note 4, § 1610, at 582. By contrast, earlier practice frowned upon reputation evidence, which was considered "the second-hand, irresponsible product of multiplied guesses and gossip." 7 J. Wigmore, *supra* note 4, § 1986, at 244. Instead, this earlier jurisprudence advocated the use of testimony based upon personal knowledge and belief, which was termed opinion testimony. See 5 J. Wigmore, *supra* note 4, § 1610, at 581-82. Nonetheless, prior to the Rules, juridical practice favored the use of reputation testimony instead of opinion testimony, perhaps because reputation evidence can be considered "opinion in disguise." Fed. R. Evid. 405 advisory committee's note. By permitting testimony as to opinion, Rule 405(a) "departs from usual contemporary practice in favor of that of an earlier day." *Id.*

12. See Fed. R. Evid. 405(a).

13. For example, if the hypothetical character witness Winter gives her opinion that Delta is an honest and truthful person on direct examination, which is permitted under Rule 405(a), Delta's attorney may not ask Winter to tell the jury the facts upon which her

defendant's character witnesses.¹⁴

The prosecutor's inquiry into relevant specific instances of conduct, permitted by Rule 405(a), may be helpful in convincing the jury that the evidence presented by the defendant's good character witnesses paints an incomplete picture. By pointing to instances of defendant's misconduct, the prosecutor can discredit the defendant's character witnesses by implying that they are too biased or too uninformed to portray the defendant accurately.¹⁵ On cross-examination, courts have customarily

opinion is based. Thus, Winter cannot offer testimony that, in February 1990, Delta alerted the telephone company that he was undercharged on his previous phone bill.

Specific instances of conduct tend to be the most probative type of proof because they give the jury something tangible to evaluate. Rule 405(a), however, does not allow proof of specific instances to be prompted on direct examination because it would take too much time to elucidate all the specific instances in which the defendant acted in a manner consistent with good character. See Note, *Impeaching and Rehabilitating a Witness with Character Evidence: Reputation, Opinion, Specific Acts and Prior Convictions*, 9 U.C. Davis L. Rev. 319, 329 (1976) [hereinafter Note, *Impeaching and Rehabilitating A Witness*]. The jury might be "sidetracked by the sheer number of collateral issues." *Id.*; see 1A J. Wigmore, *supra* note 4, § 56.1, at 1175-76. Additionally, the defense cannot elicit proof of the defendant's good character by offering testimony in the form of specific instances of conduct on direct examination, because this could potentially be too probative. *Cf.* *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (prosecution may not offer evidence of specific instances of defendant's bad conduct in its case-in-chief because "it is said to weigh too much with the jury and to so overpersuade them").

14. See Fed. R. Evid. 405(a). Thus, while the defense could not prompt its character witnesses to delve into specific instances of defendant's good character on *direct* examination, the prosecutor is free to *cross-examine* the defendant's character witnesses by using specific instances of conduct. Thus, in the *Delta* hypothetical, while Winter could not speak about Delta's honesty in his payment of his phone bill, see *supra* note 13, Prosecutor Parker can attempt to discredit Winter by asking her whether she was aware that in June 1983, Delta was fired from his post as branch manager of the bank in which he was employed for allegedly embezzling funds.

In contrast to Rule 405(a), Rule 405(b) permits the reference to specific instances of conduct, even on direct examination, in those limited circumstances "in which character or a trait of character of a person is an essential element of a charge, claim, or defense." Fed. R. Evid. 405(b). In practice, this category is far narrower than a reading of Rule 405(b) would suggest. See Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. Pa. L. Rev. 845, 878 (1982). For example, on direct examination, the prosecution can elicit specific instances of "the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction." Fed. R. Evid. 404 advisory committee's note subdivision (a). On direct examination, the defense can present specific instances that tend to establish the "competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver." *Id.*

15. See 1 S. Saltzburg & M. Martin, *supra* note 5, at 301.

At this juncture, it is helpful to distinguish Rule 405(a) from Rules 608(b) and 609(a). The latter portion of Rule 405(a) permits the prosecution, on cross-examination of a good character witness, to inquire into specific instances of the defendant's bad conduct to convince the jury that the evidence presented by the defendant's character witnesses provides inaccurate testimony. By elucidating instances of *defendant's* misconduct, the prosecutor can discredit the defendant's character witnesses indirectly by implying that the witness' perceptions are distorted by bias or lack of information.

Rule 608(b) allows the admission of specific instances of the conduct of a *witness* on cross-examination, if such specific instances are probative of the witness' character for truthfulness or untruthfulness. See Fed. R. Evid. 608(b). Similarly, Rule 609(a) permits the admission of evidence that the *witness* has been convicted of certain crimes. See Fed.

permitted the prosecutor to ask the defendant's character witness if she has heard about, or if her opinion would be affected by, certain past instances of defendant's misconduct, so long as the prosecutor has a good faith basis for her information.¹⁶

Yet while the Rules allow the prosecution to delve into specific instances of conduct on cross-examination, they fail to define the limits of such an inquiry. Specifically, the Rules do not address whether it would be permissible to inquire into the charges at bar.

R. Evid. 609(a). The six hundred series, then, discredits the character witness herself while the four hundred series discredits the character witness' testimony; the latter uses the *defendant's* prior misconduct to discredit the character witness' testimony while the former uses instances of the *witness's* own misconduct to attack her general credibility.

16. See *United States v. Williams*, 738 F.2d 172, 176-77 n.6 (7th Cir. 1984); *United States v. McCollom*, 664 F.2d 56, 58 (5th Cir. 1981), *cert. denied*, 456 U.S. 934 (1982); C. McCormick, *supra* note 8, § 191, at 569; Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 Emory L.J. 135, 145 (1989); see also Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 Iowa L. Rev. 777, 808 (1981) (prior to cross-examination, prosecutor must establish, through clear and convincing evidence, defendant's involvement in and culpability for the prior acts). Additionally, the prosecutor must demonstrate the basis for her questioning outside the hearing of the jury. See C. McCormick, *supra* note 8, § 191, at 569.

Courts have been relatively lenient regarding the sort of evidence that will be admitted to test a character witness' knowledge of the defendant and the witness' standards for good reputation or favorable opinion. See *United States v. McGuire*, 744 F.2d 1197, 1204 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); see also *Michelson v. United States*, 335 U.S. 469, 479-80 (1948) (the law permits defendant's character witnesses to be exposed to various "tests of credibility" and in this regard courts are afforded "[w]ide discretion").

On cross-examination, courts are likely to admit evidence of other crimes in which the defendant was involved, even if the prosecutor's theory of relevance is tenuous. See 1 S. Saltzburg & M. Martin, *supra* note 5, at 215. Evidence of arrest is admissible even if it did not culminate in conviction. See *Michelson*, 335 U.S. at 482; *United States v. Grady*, 665 F.2d 831, 834-35 (8th Cir. 1981); *United States v. Evans*, 542 F.2d 805, 817 (10th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977); *United States v. Bermudez*, 526 F.2d 89, 95 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Dawson*, 556 F. Supp. 418, 425 (E.D. Pa. 1982), *aff'd*, 727 F.2d 1101 (3d Cir. 1984). Similarly, evidence of misconduct is admissible even if it did not culminate in arrest. See *United States v. Birney*, 686 F.2d 102, 108 (2d Cir. 1982); *United States v. Bynum*, 566 F.2d 914, 919 (5th Cir.), *cert. denied*, 439 U.S. 840 (1978).

It should be emphasized that the prosecution introduces this type of evidence on cross-examination *for the purpose of testing the character witness' credibility* and not as proof of the defendant's bad character.

Thus, in the fictional *United States v. Delta* scenario, it would be appropriate for the prosecutor to bring up the incident of Delta's arrest for embezzlement in 1983 (see *supra* note 14), even if Delta was subsequently acquitted of the embezzlement charge (evidence of arrest that did not culminate in conviction). Similarly, the prosecutor could bring up the incident of Delta's discharge from his position as bank manager in 1983, even if no arrest followed (evidence of misconduct that did not culminate in arrest).

B. *Subtle Yet Critical Distinctions: The Differences Between the Cross-Examination of Reputation Witnesses and of Opinion Witnesses, and Between the Two Types of Inquiry Into the Charges at Bar*

The distinction between the reputation witness and the opinion witness, as well as the acceptable manner in which each must be cross-examined, is central to an understanding of the controversy over the proper scope of an inquiry into the charges at bar.¹⁷

1. The Reputation Witness

Traditionally, witnesses who testify as to the defendant's reputation offer evidence regarding the degree to which the community¹⁸ regards the defendant as a person who is honest and truthful.¹⁹ Generally, the cross-examination of a reputation witness includes questions of the "have you heard. . .?" variety²⁰ because the basis of the reputation witness' testimony is what she has heard about the defendant in the community.²¹

17. See *United States v. Furst*, 886 F.2d 558, 577 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 878 (1990); *United States v. Curtis*, 644 F.2d 263, 269 (3d Cir. 1981), *cert. denied*, 459 U.S. 1018 (1982).

For the future, we remind trial judges, prosecutors and defense attorneys that Evidence Rule 405(a) has not effected a merger between reputation and opinion evidence. The reference in the rule's second sentence to cross examination on "relevant specific instances of conduct" is to instances of conduct relevant to the type of testimony [(i.e., reputation testimony or opinion testimony)] offered on direct examination.

Curtis, 644 F.2d at 269.

18. The community is described as the one in which the defendant resides, but some courts have broadened this to include "where he works or commonly associates." 1 S. Saltzburg & M. Martin, *supra* note 5, at 299; see 5 J. Wigmore, *supra* note 4, § 1615, at 589-90; C. McCormick, *supra* note 8, § 191, at 568.

19. The use of the words "honest and truthful" assumes that honesty and truthfulness are the pertinent traits of character that the defendant seeks to establish. In the hypothetical *Delta* trial, these would be the traits that Delta would expect Winter to establish, given that dishonesty and untruthfulness are relevant to the charge of tax evasion.

20. "Have you heard. . .?" questions elicit whether the witness has become aware of the existence of certain facts or matters by way of the community grapevine. This type of question merely determines whether the information has come to the witness' attention, and has no bearing on whether the facts contained in the questions are true.

For example, in the fictitious case of *United States v. Delta*, if Carla Winter testifies as a reputation witness, the prosecutor is free to ask her whether she has heard through the community grapevine that, in June 1983, Delta was arrested on charges of embezzling funds from the bank in which he had been employed as branch manager.

21. See *United States v. McGuire*, 744 F.2d 1197, 1205 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). The reputation witness is the conduit through which the jury learns what the community has to say about the defendant. The reputation witness merely relays what the community has to say, without giving her own perception of the defendant. The reputation witness' testimony, however, is not necessarily complete. That is, her report of the community consensus is only as complete as the degree to which this information is made known to her. If she is reclusive, for example, she may have heard two people refer to the defendant as one who is honest, yet she may not have been exposed to the other fifty persons who think the defendant is a liar and a cheat. Similarly, the reputation witness' testimony may not necessarily be wholly objective. That is, her

Because these questions are posed on cross-examination pursuant to Rule 405(a), they typically focus upon specific instances of conduct.²² Questions of this type are allowed as a test of the witness' credibility.²³

Testing the reputation witness' credibility involves the three interconnected considerations of "foundation, fabrication and standards."²⁴ Foundation is evaluated by assessing the witness' awareness of reports involving the defendant's reputation.²⁵ If the witness has not heard any reports about the defendant, the jury may determine that the witness has inadequate knowledge of the defendant's character and may thereby discount her testimony.²⁶ Fabrication involves inquiry into whether the witness' testimony regarding the defendant's reputation is a product of the witness' own imagination. "[W]here the witness has heard of specific acts inconsistent with [her] testimony, the jury may find the asserted reputation to be a fabrication."²⁷ Finally, the standards criterion involves those personal ideals and principles that govern the witness' perceptions. "[I]f the witness has heard of inconsistent acts and still considers the defendant's reputation good, the jury may find the witness's standards for good character to be too low."²⁸

2. The Opinion Witness

Unlike the reputation witness, the opinion witness need not testify to the defendant's reputation in the community.²⁹ Instead, the opinion witness gives her personal opinion of the defendant.³⁰

report may be tainted by her own standards for what constitutes an overall good reputation, or by her personal standards for what constitutes the existence of a positive individual character trait. For example, if she has heard reports that the defendant constantly cheats at poker, she may consider the defendant competitive rather than untrustworthy and might not testify that the defendant has a reputation as a cheater.

22. See Fed. R. Evid. 405(a).

23. See *United States v. Lewis*, 482 F.2d 632, 638 (D.C. Cir. 1973).

24. Note, *Have You Heard? Cross-Examination of a Criminal Defendant's Good Character Witness: A Proposal for Reform*, 9 U.C. Davis L. Rev. 365, 374 (1976) [hereinafter Note, *Have You Heard?*]. But see Note, *Impeaching and Rehabilitating a Witness*, *supra* note 13, at 335 ("Ostensibly the purpose of the cross-examination is to weaken the foundation laid to qualify the character witness for presenting the reputation or opinion evidence, but the effect is to put the specific acts of the principal before the jury.").

25. See Note, *Have You Heard?*, *supra* note 24, at 374.

26. See *id.*; *Lewis*, 482 F.2d at 638.

27. Note, *Have You Heard?*, *supra* note 24, at 374; see 3A J. Wigmore, *supra* note 4, § 988, at 912.

28. Note, *Have You Heard?*, *supra* note 24, at 374; see also *Mitchell v. State*, 50 Ala. App. 121, 129, 277 So. 2d 395, 402 (Crim. App.) (court permitted questions "designed to explore what standard these character witnesses used in judging 'good' reputations"), *cert. denied*, 291 Ala. 794, 277 So. 2d 404 (1973).

29. Any given character witness may testify both as to her opinion of the defendant and as to the defendant's reputation in the community. It is only when a witness testifies to one and not the other that the distinction is important because the appropriate form of the questions differs between the two types.

30. The defense should lay the proper foundation to establish that the witness knows the defendant well enough and for a long enough period of time to form an accurate, reliable opinion of him. The most convincing of these witnesses are persons who know

Because an opinion witness testifies about opinions that she herself has formed, the questions asked of an opinion witness need not be phrased in the "have you heard. . .?" manner. Instead, the witness may be asked what she knows.³¹ On cross-examination, the prosecution may inquire into specific instances of conduct. And because an opinion witness generally testifies to her present opinion, inquiry into any specific instance of conduct up to the moment when the opinion witness gives her testimony is fair play.³² Further, the witness can be asked whether her opinion of the defendant would change if additional facts came to her attention.³³ By posing this follow-up question, the prosecution can test those standards that constitute the witness' judgment.³⁴

Testing the opinion witness' credibility involves the same interconnected considerations used in the assessment of the reputation witness' credibility.³⁵ One judge explained that

[the] jury must determine . . . how well the witness knows the defendant, and by what standard the witness judges the defendant. Both are essential in order for the jury to weigh the testimony. If the witness does not know the defendant well, it is unlikely the witness will have seen enough of the defendant's behavior to judge his character. If the witness' judgment is distorted either by such partisanship that the witness would think highly of the defendant despite misbehavior, or by a

the defendant quite well and for a considerable amount of time, or persons who seem to be good judges of character (e.g., clergy members).

31. See 1 S. Saltzburg & M. Martin, *supra* note 5, at 301. Accordingly, in the hypothetical *United States v. Delta*, Prosecutor Parker can ask Delta's character witness, Winter (if Winter testifies as to her opinion of Delta): "Ms. Winter, do you know that in June 1983, Mr. Delta was arrested for embezzling funds from the bank in which he held the post of branch manager?"

32. See *United States v. Furst*, 886 F.2d 558, 577 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 878 (1990).

33. If, in *United States v. Delta*, Carla Winter had testified that she had not known about Delta's arrest for embezzlement, the Prosecutor might pose the following question: "Ms. Winter, if you were to be persuaded that Mr. Delta had embezzled from his employer, would that change the opinion you hold of him as an honest and truthful individual?"

34. If, according to the previous footnote, Winter responded that her opinion would not change even if she were aware that Delta had once been arrested for embezzlement, then Parker could argue to the jury as follows: "Ladies and gentlemen of the jury, Ms. Winter has testified as to her opinion of Mr. Delta as an honest, truthful and upstanding member of his community. However, when asked if her opinion of him would change had she been aware of the fact that he had been arrested for embezzlement in 1983, she responded that her opinion would not change. How does the defense expect us to believe a witness who equates embezzlement with honesty and truthfulness?"

The defense can respond to this argument in summation. Arnold might argue: "Ms. Parker would have you believe that Ms. Winter is not a credible witness. The defense suggests, however, that this is not the case. Ms. Winter merely stated that her opinion of Mr. Delta would remain steadfast, despite her knowledge of the embezzlement. It seems clear that Ms. Winter bases her opinion on her twelve-year association with the defendant as both his business associate and a personal friend. It stands to reason that she would not be swayed by an arrest, particularly one that did not culminate in a conviction, without full knowledge of all the underlying facts."

35. See *supra* notes 24-28 and accompanying text.

warped ethical standard, the witness' opinion may be correspondingly discounted.³⁶

3. Two Types of Inquiry Into the Charges at Bar

Just as there are two types of character witnesses, there are also two forms of inquiry into the charges at bar.³⁷ One form is the "have you heard. . .?" question, which asks a reputation witness whether she has heard through the community grapevine about the charges for which the defendant is currently on trial.³⁸ The second question is the "guilt-assuming hypothetical," which asks an opinion witness to assume that the defendant has been found guilty of the charges for which he is currently on trial, and questions whether the witness' opinion of the defendant would change in light of this information.³⁹ Both questions arguably fall within the ambit of Rule 405(a), which permits an inquiry into relevant specific instances of conduct on cross-examination⁴⁰ in order to test the credibility of a defendant's good character witnesses.

Some courts permit, while others prohibit, an inquiry into the charges at bar. Unfortunately, their decisions often contain little explanation or analysis, and they consistently fail to enunciate those distinctions that are

36. *United States v. Oshatz*, 912 F.2d 534, 544 (2d Cir. 1990) (Mukasey, J., concurring).

37. This Note posits that, because reputation witnesses must be asked what they have heard while opinion witnesses may be asked what they know (and thus whether their opinion would change if they knew of the existence of certain facts), the type of inquiry into the charges at bar must necessarily be different. See *infra* notes 47-63, 72-87 and accompanying text.

38. At first blush, the answer to this question seems obvious. It seems clear that any witness who testifies at a trial would have knowledge of those charges for which the defendant is being tried. The "have you heard. . .?" question regarding the charges at bar, however, is not asking the witness about the knowledge she has gained by virtue of her taking part in the trial process. Rather, the question specifically elicits whether the witness had heard about the charges made against the defendant *through the community grapevine*.

A typical "have you heard. . .?" question into the charges at bar might be made by Prosecutor Parker to Carla Winter on cross-examination in the hypothetical *Delta* trial as follows: "Ms. Winter, have you heard, from the members of your community, that Mr. Delta was charged with tax evasion?" Cf. *People v. Lee*, 48 Cal. App. 3d 516, 524, 122 Cal. Rptr. 43, 48 (1975) (in a trial in which defendant was charged with filing a false state income tax return, the prosecutor asked defendant's character witness the following: "Have you heard that [defendant] was receiving \$150 a month . . . which was not reported to the income tax authorities?").

39. In the *United States v. Delta* trial, a guilt-assuming hypothetical asked by Parker on cross-examination of Winter might take the following form: "Ms. Winter, if it were found, hypothetically, that Mr. Delta was guilty of tax evasion, would the opinion you hold of him change?" Cf. *United States v. Polsinelli*, 649 F.2d 793, 794 n.2 (10th Cir. 1981) (in a trial in which defendant was charged with distributing cocaine, the prosecutor asked defendant's character witness the following: "[W]ould your opinion that you have just given change if you became aware that [defendant] had on at least two occasions distributed ounce quantities of cocaine?").

40. See Fed. R. Evid. 405(a). For a discussion of the inquiry into specific instances of conduct, see *supra* note 16.

critical to their holdings. This confusing caselaw has generated two distinct debates. The first is the conflict over the proper use of the "have you heard. . .?" inquiry into the charges at bar.⁴¹ The second is the more intense debate concerning the guilt-assuming hypothetical.

II. THE FIRST DEBATE: THE "HAVE YOU HEARD. . .?" INQUIRY INTO THE CHARGES AT BAR

A. *The Competing Views*

The majority view expressly precludes the "have you heard. . .?" type of inquiry into the charges at bar.⁴² This view limits any "have you heard. . .?" questioning about specific instances of defendant's conduct to events that are "proximate enough in time to affect reputation" yet are "limited to events at or prior to the time of the crime."⁴³ The rationale for this position is that a report as to reputation that may be premised upon rumors lacks trustworthiness.⁴⁴

Conversely, some courts on cross-examination of the defendant's reputation witness have permitted questions as to whether the witness had heard about the charges against the defendant through the community grapevine.⁴⁵ These courts recognize the probative value of questions that help assess the credibility of the character witness by pointing out the standards by which the witness evaluates what she perceives as commu-

41. The "have you heard. . .?" debate involves relatively few decisions that discuss this issue expressly and it is therefore less heated than the guilt-assuming hypothetical debate, discussed *infra* notes 66-71 and accompanying text. The "have you heard. . .?" debate includes fewer cases that touch on it specifically because most courts that have ruled upon the permissibility of an inquiry into the charges at bar do not distinguish the general "have you heard. . .?" inquiry into the charges at bar from the more specific guilt-assuming hypothetical inquiry. This distinction, however, in conjunction with the distinction between the reputation and the opinion witness, is necessary because it presents the key to understanding why courts that discuss an inquiry into the charges at bar decide as they do.

42. See *United States v. Curtis*, 644 F.2d 263, 268 (3d Cir. 1981), *cert. denied*, 459 U.S. 1018 (1982); *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 294 n.5 (5th Cir. 1977); *United States v. Lewis*, 482 F.2d 632, 641 (D.C. Cir. 1973); 5 J. Wigmore, *supra* note 4, § 1618, at 595; Note, *Have You Heard?*, *supra* note 24, at 375-76; see also *United States v. Oshatz*, 912 F.2d 534, 544 (2d Cir. 1990) (Mukasey, J., concurring) (reputation witness should not be questioned about rumors that have surfaced regarding the crime on trial). But see *United States v. Midkiff*, 15 M.J. 1043, 1048 (N.M.C.M.R.) (leaving "to the informed discretion of the military judge whether to permit cross-examination as to events transpiring subsequent to the offense charged, taking into consideration all relevant factors deserving of consideration") (emphasis in original), *petition for review denied*, 17 M.J. 89 (C.M.A. 1983).

43. Note, *Have You Heard?*, *supra* note 24, at 375-76.

44. See 5 J. Wigmore, *supra* note 4, § 1618, at 595; see also *id.* § 1611, at 583-84 (distinguishing reputation from rumors).

45. See *United States v. Senak*, 527 F.2d 129, 145-46 (7th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *People v. Lee*, 48 Cal. App. 3d 516, 526, 122 Cal. Rptr. 43, 49-50 (1975); *United States v. Midkiff*, 15 M.J. 1043, 1048 (N.M.C.M.R.), *petition for review denied*, 17 M.J. 89 (C.M.A. 1983).

nity consensus in light of what she has heard.⁴⁶

B. *The Prosecutor Should Be Permitted to Pose A "Have You Heard. . .?" Inquiry Into the Charges at Bar for Reputation Witnesses who Testify to the Defendant's Present Reputation*

This Note posits that when a reputation witness testifies as to the defendant's *present* reputation, the prosecutor should be permitted to pose a "have you heard. . .?" inquiry into the charges at bar. This position squares with the Rule 403 balancing test⁴⁷ because the testimony's probative value outweighs any prejudicial effect.

In the fictitious case of *United States v. Delta*, character witness Carla Winter testified as to Delta's reputation in the community as an honest and truthful citizen. Prosecutor Pamela Parker should be permitted to pose the following question to Winter on cross-examination: "Ms. Winter, have you heard, through the community grapevine, that Mr. Delta was charged with tax evasion?"

This question has probative value in that it tests Winter's credibility. If Winter were to answer in the affirmative, then arguably the jury can infer that she is not credible: anyone who is aware of rumors circulating throughout the community that the defendant has been charged with tax evasion, yet who can still testify as to the defendant's current good reputation as an honest and truthful community member, arguably is not someone whose judgment should be relied upon. Conversely, if Winter answers in the negative, then the jury can trust her credibility, assuming that Parker introduced no other evidence indicating that the witness is not trustworthy. Winter can testify as to Delta's presently good reputation in the community simply because she has not heard, by way of the community grapevine, reports of the current charges against Delta.⁴⁸

46. See *supra* notes 24-28 and accompanying text.

47. See Fed. R. Evid. 403; *supra* note 6. "[T]here is a slight presumption in favor of admitting relevant evidence. In order to overcome this presumption, the prejudicial effect must be *demonstrably greater* than the probative value of the evidence." 1 S. Saltzburg & M. Martin, *supra* note 5, at 160 (emphasis added).

48. In addition to shedding light on Winter's credibility, an answer in the negative might also allow the jury to evaluate the weight of the witness' testimony. Based upon her "no" answer, the jury may discount Winter's testimony because her answer may indicate that she is too uninformed as to the defendant's current reputation to testify as a reputation witness on his behalf.

While a question in the "have you heard. . .?" format seems to call for a "yes" or "no" answer, the witness may nonetheless answer in an unexpected manner. The prosecutor, therefore, must prepare to face this result if she chooses to pose a "have you heard. . .?" inquiry into the charges at bar.

This uncertainty regarding response, however, should not lead courts and commentators to disallow the "have you heard. . .?" inquiry into the charges at bar. If the resolution of this problem were a prohibition of this type of question altogether, then any and all "have you heard. . .?" questions that are routinely permitted (e.g., those delving into issues of *past* misconduct) would necessarily be prohibited as well. See *supra* notes 15-16 and accompanying text.

The majority view prohibits the prosecutor from asking a defendant's reputation witness a question that refers to specific events occurring at or after the moment that defendant was charged with the crime for which he is presently on trial.⁴⁹ This prohibition effectively precludes a "have you heard. . .?" inquiry into the charges at bar. The rationale for this prohibition is that the report on the defendant's reputation may be untrustworthy because it is distorted by rumors.⁵⁰ Yet courts should recognize that this prohibition was designed to protect a *defendant's character* from being adversely affected by "the gossip which frequently follows on the heels of a criminal charge."⁵¹ Thus, the rationale is misplaced when the question is used solely to test the *character witness' credibility*; for this purpose, it does not matter that the question may point to specific instances of conduct that are merely rumors, so long as the rumors are ones that pass through the community grapevine.⁵² Finally, in apparent recognition of the dangers posed by a steadfast prohibition of a "have you heard. . .?" inquiry into the charges at bar, some courts encourage discretion in this area rather than the use of a bright-line rule.⁵³

In considering the "have you heard. . .?" inquiry into the charges at bar, the California Court of Appeals⁵⁴ held that this type of question is both permissible and probative⁵⁵ if posed to a witness holding herself out

49. See *supra* notes 42-44 and accompanying text.

50. See 5 J. Wigmore, *supra* note 4, § 1618, at 595. "[I]t is obvious that after the charge has become a matter of public discussion, and partisan feeling on either side has had an opportunity to produce an effect, a false reputation is likely to be created, a reputation based perhaps in part upon rumors about the very act charged" *Id.*

51. United States v. Lewis, 482 F.2d 632, 641 (D.C. Cir. 1973).

52. Testing the credibility of the reputation witness relies on "foundation, fabrication and standards." Note, *Have You Heard?*, *supra* note 24, at 374; see *supra* notes 24-28 and accompanying text. These considerations play the same role in testing the witness' credibility whether or not the reports cited by the prosecutor are rumors that pervade the community.

53. See United States v. Lewis, 482 F.2d 632, 642 (D.C. Cir. 1973); United States v. Midkiff, 15 M.J. 1043, 1048 (N.M.C.M.R.), *petition for review denied*, 17 M.J. 89 (C.M.A. 1983).

While advertent to [the potential danger for prejudicial effect posed by these questions], we deem the problem under discussion one to be dealt with primarily by the trial judge. Some discretion in the matter is more in keeping with the broad latitude which judges have as to the admission of character testimony, and which traditionally they have exercised over the scope of cross-examination, than is any inexorable rule on the subject. . . . Not every situation calls for exclusion of questions exploring knowledge of events occurring after the time in issue. Not every subsequent event is an unacceptable topic, nor a topic so prejudicial as to outweigh its probative significance; some events otherwise objectionable perhaps could be made unobjectionable.

Lewis, 482 F.2d at 642 (footnotes omitted).

54. People v. Lee, 48 Cal. App. 3d 516, 122 Cal. Rptr. 43 (1975).

55. See *id.* at 526-27, 122 Cal. Rptr. at 49-50; see also United States v. Senak, 527 F.2d 129, 145-46 (7th Cir. 1975) (determining that court below did not abuse its discretion when it permitted prosecutor to cross-examine a character witness with a "have you heard. . .?" inquiry into the charges at bar), *cert. denied*, 425 U.S. 907 (1976). But see United States v. Barta, 888 F.2d 1220, 1225 (8th Cir. 1989) ("Such questions . . . exceed the bounds of propriety, premised, as they are, on a presumption of guilt."). For a dis-

as someone qualified to testify to the defendant's reputation *up to the moment when the witness gives her testimony*.⁵⁶

Whatever his reputation might have been before the charge, after the charge it is at least dubious. Thus where the character witness nonetheless states under oath that such defendant's reputation for honesty is presently good, there is a strong suggestion (to say the least) that [s]he is not a credible witness. And on cross-examination, such lack of credibility may be demonstrated by asking [her] whether [s]he in fact has heard of the commission of the offense for which the defendant is on trial. Such a question is highly relevant, and therefore proper.⁵⁷

Thus, if the witness testifies to the defendant's reputation up to the moment of testimony, then the "have you heard. . .?" inquiry is quite probative. Additionally, its probative value is not substantially outweighed by any prejudicial effect,⁵⁸ particularly because the defense, on redirect examination, can respond to any doubts that the prosecutor's cross-examination may have created.⁵⁹

The "have you heard. . .?" inquiry into the charges at bar should stop at the "yes" or "no" stage and should not be followed by a guilt-assuming hypothetical.⁶⁰ Because the reputation witness merely reports how the community regards the defendant, it is improper to go further and

cussion of the counter-arguments to the rationale that such questions violate the presumption of innocence, see *infra* notes 90-94 and accompanying text.

56. The reputation witness should be asked about the charges at bar only if the reputation witness testifies as to defendant's good reputation up until the time at which the witness testifies. See *Lee*, 48 Cal. App. 3d at 527, 122 Cal. Rptr. at 50; see also *United States v. Lewis*, 482 F.2d 632, 644 (D.C. Cir. 1973) (appellate court recognized that trial court judge may have permitted a prosecutor's inquiry into specific instances that had occurred after the time of the offense charged because the character witness testified to the defendant's good reputation "up to the time of trial"). Conversely, if the witness, on direct examination, testifies only to the defendant's good reputation *up until the time when the charges were filed*, then a "have you heard. . .?" inquiry into the charges at bar on cross-examination would be inappropriate.

While this Note argues that an inquiry into the charges at bar is inappropriate if the reputation witness testifies to the defendant's good reputation up until the time when the charges were filed, it should be noted that the "have you heard. . .?" inquiry, even in this circumstance, can have some probative value: it sheds light on the witness' knowledge of the defendant's community reputation.

57. *Lee*, 48 Cal. App. 3d at 527, 122 Cal. Rptr. at 50.

58. See Fed. R. Evid. 403.

59. For example, on redirect, the defense can repair damage done by the prosecutor's attack by eliciting testimony conceding that, while there was talk of the defendant and the charges among members of the community, all those who had spoken about the matter were not reaffirming or relaying the reports; rather, they were dispelling the reports and the charges as unfounded. Essentially, the defense can paint a picture that while the reports of the charges had in fact circulated, no one believed them to be true.

60. See *United States v. Siers*, 873 F.2d 747, 749 (4th Cir. 1989).

The "have you heard. . .?" inquiry into the charges at bar, however, simply asks the witness whether she has heard, through the community grapevine, of the fact that the defendant has been charged. Asked in this manner, the question innocuously asks the witness what she has heard rather than asking her to make predictions that she has no basis to make.

If the guilt-assuming hypothetical is asked, defense counsel must object in order to

ask the witness to forecast what the defendant's reputation would be in the community if the community members heard that the defendant was found guilty.⁶¹ To permit this line of questioning would not test the witness' credibility but would only ask her to predict what others would say about the defendant.⁶² Thus, guilt-assuming hypotheticals should not be asked of reputation witnesses.⁶³

Finally, to prevent the prosecution from abusing the use of a "have you heard. . .?" inquiry into the charges at bar, courts should require prosecutors to pose "have you heard. . .?" questions that are straightforward⁶⁴ and that clearly indicate that the witness must have heard about the charges via the community grapevine.⁶⁵

III. THE SECOND DEBATE: THE GUILT-ASSUMING HYPOTHETICAL

A. *The Competing Views*

Most courts that address the permissibility of an inquiry into the charges at bar focus upon the guilt-assuming hypothetical rather than the "have you heard. . .?" inquiry.⁶⁶ These courts are divided into two subgroups: one subgroup posits that guilt-assuming hypotheticals are always impermissible,⁶⁷ while the other, the "middle-of-the-road"

preserve his right to appeal. *See* *United States v. Primrose*, 718 F.2d 1484, 1493 (10th Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

61. *See Primrose*, 718 F.2d at 1493; *United States v. James*, 728 F.2d 465, 467 (10th Cir.), *cert. denied*, 469 U.S. 826 (1984). The Tenth Circuit in *United States v. James* appropriately held that the following question, posed to a reputation witness on cross-examination, was improper: "'Do you think if the people of McIntosh County as a whole knew . . . [that the defendant] has been taking kickbacks . . . that his reputation would be one for honesty and integrity in the community?'" *James*, 728 F.2d at 467.

62. *See United States v. Candelaria-Gonzalez*, 547 F.2d 291, 294 n.5 (5th Cir. 1977).

63. In order to avoid a line of questioning by the prosecution into the charges at bar, the defense must make it clear to the court, the prosecution and the jury in its case-in-chief that the witness is testifying only to the defendant's reputation—or to the witness' opinion of the defendant—prior to the point in time when the charges against him were filed. *See United States v. Furst*, 886 F.2d 558, 576-77 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 878 (1990); *People v. Lee*, 48 Cal. App. 3d 516, 527, 122 Cal. Rptr. 43, 50 (1975).

64. *See, e.g., United States v. Barta*, 888 F.2d 1220, 1225 (8th Cir. 1989) (court disallowed "have you heard. . .?" inquiry into charges at bar because the prosecution predicated its question on the underlying facts of the crime and not merely the crime itself); *see also United States v. Lewis*, 482 F.2d 632, 639 (D.C. Cir. 1973) ("have you heard. . .?" questions regarding specific instances of conduct "should be carefully and narrowly framed") (footnote omitted).

Unacceptable: "Ms. Winter, have you heard that Mr. Delta knowingly understated the 'wages earned' component of his tax return in the amount of \$100,000 and falsified his W-2 forms to reflect this understatement?"

Acceptable: "Ms. Winter, have you heard, by way of the community grapevine, that Mr. Delta was charged with tax evasion?"

65. *See supra* note 38 and accompanying text. For an acceptable and unacceptable illustration of this suggestion, *see supra* note 64.

66. *See supra* note 41.

67. *See United States v. Oshatz*, 912 F.2d 534, 539 (2d Cir. 1990); *United States v. Williams*, 738 F.2d 172, 177 (7th Cir. 1984); *United States v. Morgan*, 554 F.2d 31, 34 (2d Cir.), *cert. denied*, 434 U.S. 965 (1977); 1 S. Saltzburg & M. Martin, *supra* note 5, at

subgroup, neither permits guilt-assuming hypotheticals in all circumstances, nor rejects them in all circumstances.⁶⁸

Several courts in the middle-of-the-road subgroup distinguish between reputation and opinion witnesses, advocating that the guilt-assuming hypothetical be used only for the latter.⁶⁹ But most of the courts espousing the middle-of-the-road approach do not discuss the distinction at all.⁷⁰ They hold that guilt-assuming hypotheticals are impermissible in their particular factual situations.⁷¹ In each of these cases, however, the witnesses testifying were *reputation* witnesses. Thus, these courts remain silent on the propriety of posing guilt-assuming hypotheticals to *opinion* witnesses.

B. *The Prosecutor Should Be Permitted to Pose A Guilt-Assuming Hypothetical to All Opinion Witnesses*

Unlike the reputation witness, who merely reports a community consensus, the opinion witness testifies as to her present opinion of the defendant. This Note argues that because she gives her personal opinion, it is appropriate to ask this witness a guilt-assuming hypothetical questioning whether her opinion would change if the defendant were found guilty of the charges at bar. Not only is the question itself probative, but its probative value outweighs any prejudicial effect.⁷²

1. The Guilt-Assuming Hypothetical is Probative

In contrast to the situation with the reputation witness, posing a guilt-assuming hypothetical to the opinion witness does not force the witness to forecast what others would say. Instead, a guilt-assuming hypothetical is appropriate to help the jury evaluate the witness' personal standards. In this regard, the guilt-assuming hypothetical is probative.⁷³

For example, in the hypothetical case of *United States v. Delta*, if char-

304. These courts set forth several reasons for holding that such an inquiry is impermissible. See *infra* notes 88, 95, 98, 100 and accompanying text. For an alternative interpretation of the *Morgan* decision, see *infra* note 79.

68. See *infra* notes 69-71 and accompanying text.

69. See *United States v. White*, 887 F.2d 267, 274-75 (D.C. Cir. 1989); *United States v. Polsinelli*, 649 F.2d 793, 796 (10th Cir. 1981); *Lopez v. Smith*, 515 F. Supp. 753, 756 (S.D.N.Y. 1981); see also *United States v. Oshatz*, 912 F.2d 534, 544 (2d Cir. 1990) (Mukasey, J., concurring) (guilt-assuming hypotheticals appropriate for opinion witnesses). But see *Oshatz*, 912 F.2d at 539 (guilt-assuming hypotheticals always impermissible).

70. See *United States v. Barta*, 888 F.2d 1220, 1224 (8th Cir. 1989); *United States v. Page*, 808 F.2d 723, 731 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987); *United States v. Palmere*, 578 F.2d 105, 107 (5th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979); *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 294 (5th Cir. 1977).

71. See cases cited *supra* note 70.

72. For a discussion of the Rule 403 balancing test, see *supra* notes 6, 47 and accompanying text.

73. This Note suggests that the guilt-assuming hypothetical is permissible, so long as it is within the boundaries discussed *infra* notes 103-106 and accompanying text.

acter witness Carla Winter testifies as to her opinion of Delta on direct examination, Prosecutor Parker should be permitted to pose the following question to Winter on cross-examination: "Ms. Winter, if it were established, hypothetically, that Delta was in fact guilty of tax evasion, would your opinion of him change?"

If Winter responds in the affirmative, then the jury would infer that the witness is trustworthy. That is, rational human interaction dictates that if we hear something that is inconsistent with our current perception of someone, it is likely that our perception will change. Thus, if Winter were to claim that her opinion of Delta as an honest and truthful individual would not change despite her discovery that Delta was a tax evader, her response would run counter to the dictates of rational human interaction. Accordingly, it is likely that the jury would not deem Winter a credible witness.

If Winter responds in the negative,⁷⁴ then the jury can infer one of two possibilities. The jury might reason that Winter is so biased that her perception of Delta will not falter regardless of what a fair, rational and impartial jury ultimately finds. Alternatively, the jury might reason that Winter has a warped moral standard if she is aware that Delta is a tax evader yet still holds a favorable opinion of him.

Several courts have held that while guilt-assuming hypotheticals are improper for reputation witnesses, they may nonetheless be proper for

74. As discussed in the context of the "have you heard. . .?" inquiry, *see supra* note 48, the answer to this question might not conform to a "yes" or "no" response. For example, there is some evidence that the guilt-assuming hypothetical may confuse the witness who may be unsure of whether to hold steadfast to her opinion of the defendant or, conversely, to reason through the question fully and answer after a full consideration of the hypothetical question. *See, e.g., United States v. Long*, 917 F.2d 691, 704 (2d Cir. 1990) (witness' confusion prompted judge to get involved in order to clarify guilt-assuming hypothetical). Additionally, it is possible that the witness may refuse to believe that the defendant would engage in the acts with which he is charged. *See, e.g., United States v. Oshatz*, 912 F.2d 534, 538 (2d Cir. 1990) (when asked if his opinion of defendant would change had the jury found defendant guilty of the charges at bar, witness responded that jury "could be wrong" rather than giving a "yes" or "no" answer).

If the witness routinely answered the guilt-assuming hypothetical with a response reflecting her confusion or disbelief, then it would reduce the guilt-assuming hypothetical's probative worth and might tip the Rule 403 balance in favor of exclusion. This equivocation in response is not always the case, however. There are numerous examples in which the witness not only seemed to understand the question, but also answered it with conviction. *See, e.g., Long*, 917 F.2d at 703 (after being asked if his opinion would change had defendant been found guilty of the charges at bar, witness responded "'It certainly would.'"); *United States v. Barta*, 888 F.2d 1220, 1224 (8th Cir. 1989) (witness responded that "'if I had heard that [the defendant] had deliberately falsified his own income tax return, that certainly would probably affect my opinion of [him].'").

It must be recognized, moreover, that any hypothetical question, or even fact-based question, may confuse the witness who testifies to the defendant's good character. That is, the good character witness is keenly aware that she was put on the stand to testify on the defendant's behalf. Obviously, confusion would result regarding how she must respond to questions posed by the prosecutor that may force her to consider information about which she was previously unaware, or about sensitive information to which it is difficult for her to react.

opinion witnesses.⁷⁵ In arguing for the propriety of guilt-assuming hypotheticals for opinion witness, one judge stated that

[these questions probe] both the witness' bias and the witness' own standards by asking whether the witness would retain a favorable opinion of the defendant even if the evidence at trial proved guilt. In either eventuality—bias or distorted ethics—the excluded testimony would be bound to alter the value the jury sets on the opinion. Thus the testimony . . . is valuable and relevant in determining by what standard the witness has judged the defendant.⁷⁶

Further, a number of courts have disallowed this line of questioning only for reputation witnesses.⁷⁷ These courts do not directly address the propriety of the guilt-assuming hypothetical for opinion witnesses.⁷⁸ Their silence certainly leaves open the possibility that the questions, if posed to opinion witnesses, would be permissible.⁷⁹

The guilt-assuming hypothetical permits the prosecutor to challenge the witness' credibility.⁸⁰ The guilt-assuming hypothetical is also probative because sometimes an inquiry into the charges at bar is the only means available to the prosecutor on cross-examination to assess the witness' credibility; it is likely, for example, that the prosecutor would not have a good faith basis to inquire into any specific instances of past misconduct.⁸¹ Additionally, for the purpose of testing the witness' credibility, the guilt-assuming hypothetical is preferable to an inquiry into

75. See cases cited *supra* note 69 and accompanying text.

76. *Oshatz*, 912 F.2d at 544 (Mukasey, J., concurring). While Judge Mukasey concurred with the majority in the judgment and in three parts of their opinion, he strongly disagreed with the majority in their strict prohibition of the guilt-assuming hypothetical. See *id.* at 543-44.

77. See cases cited *supra* note 70 and accompanying text.

78. See *id.*

79. At least one case, *United States v. Morgan*, 554 F.2d 31, 34 (2d Cir.), *cert. denied*, 434 U.S. 965 (1977), appears at first glance to fall squarely within the minority that steadfastly prohibits any inquiry into the charges at bar. The *Morgan* court held: "Insofar as non-expert character witnesses are concerned . . . we believe that the probative value of a hypothetical question such as the one at issue herein is negligible and that it should not be asked." *Id.* Yet *Morgan* can be interpreted in a manner fully consistent with the conclusions drawn in this Note. See *United States v. Oshatz*, 912 F.2d 534, 546 (2d Cir. 1990) (Mukasey, J., concurring); see also *United States v. Polsinelli*, 649 F.2d 793, 799 (10th Cir. 1981) (referring to an opinion witness as an "expert" character witness and a reputation witness as a "non-expert" character witness). Judge Mukasey suggests that the above-quoted portion of the *Morgan* decision "can be read to mean that the question should not be asked of reputation [non-expert] witnesses, as distinct from opinion witnesses [who can be deemed experts on the defendant's conduct]." *Oshatz*, 912 F.2d at 546 (Mukasey, J., concurring).

80. An inquiry into the charges at bar and other questions that test the credibility of a witness are elicited during cross-examination. See *supra* notes 14-16 and accompanying text. Cross-examination is a powerful tool for testing a witness' veracity; it sheds light on the credibility of the testimony elicited from a witness on direct examination. See C. McCormick, *supra* note 8, § 29, at 63. Failure to use this powerful tool can lead to losing the case. See *id.* § 31, at 68.

81. For a discussion of good faith basis and the inquiry into specific instances of conduct, see *supra* note 16 and accompanying text.

specific instances of past misconduct⁸² because the guilt-assuming hypothetical does not encourage the jury to draw an impermissible propensity inference.⁸³

Moreover, unlike an inquiry into other instances of past misconduct,⁸⁴ the guilt-assuming hypothetical tends to keep jury members focused both on the trial currently in process and upon the charges currently pending against the defendant.⁸⁵ The guilt-assuming hypothetical yields information that aids the jury in assessing the witness' credibility without delving into extraneous issues that may confuse them.⁸⁶

Thus, the guilt-assuming hypothetical has a great deal of probative value. Yet in order to tip the Rule 403⁸⁷ balance in favor of admitting the guilt-assuming hypothetical, the question's probative value must not be substantially outweighed by any prejudicial effect.

2. The Guilt-Assuming Hypothetical is Not Overly Prejudicial

The courts that find the guilt-assuming hypothetical to be too prejudicial advance at least one of four reasons to bolster their position. These rationales are unpersuasive.

First and foremost, these courts rely on the premise that guilt-assuming hypotheticals "undermin[e] the presumption of innocence."⁸⁸ Most

82. *See id.*

83. An inquiry into past instances of the defendant's misconduct may lead to a prejudicial propensity inference in which the jury may assume that if the defendant was convicted or accused of one crime, he is therefore more likely to have committed another. *See* 1 S. Saltzburg & M. Martin, *supra* note 5, at 217.

84. *See supra* note 16 and accompanying text.

85. By presenting specific instances of past misconduct, the prosecution may very well introduce information to the jury that they have never before heard. Conversely, the guilt-assuming hypothetical does not introduce any novel or extraneous information into the jury box.

86. At this point, it is helpful to consider the reasons that a guilt-assuming hypothetical should be allowed rather than a hypothetical that is *not* premised on the charges at bar and not grounded in fact. In other words, could Prosecutor Parker, in the *United States v. Delta* trial, ask Carla Winter whether or not her opinion would change if, hypothetically, Delta was found guilty, at another time, of perjury? Arguably, this hypothetical would not undermine the presumption of innocence because it is not predicated upon the charges for which Delta is on trial.

Nonetheless, the guilt-assuming hypothetical presents far fewer problems than the above unrelated hypothetical because it tends to focus the jury on the trial currently in progress. Additionally, use of the unrelated hypothetical leads to a greater problem of prejudice given that an unrelated hypothetical need not be based on a good faith belief as to its truth (*see infra* note 96 and accompanying text), whereas the guilt-assuming hypothetical is, by its very nature, grounded in good faith. This good faith is evinced by the fact that the case has gone to trial. *See supra* note 16 and accompanying text for a general discussion of a good faith basis in cross-examination.

87. *See* Fed. R. Evid. 403.

88. *United States v. Barta*, 888 F.2d 1220, 1224 (8th Cir. 1989). *See United States v. Oshatz*, 912 F.2d 534, 539 (2d Cir. 1990); *United States v. Williams*, 738 F.2d 172, 177 (7th Cir. 1984); *United States v. Polsinelli*, 649 F.2d 793, 797 (10th Cir. 1981); *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 294 (5th Cir. 1977).

The presumption of innocence imposes an assumption that the accused is innocent

courts rely upon this rationale, often citing it as the only reason for their failure to permit guilt-assuming hypotheticals.⁸⁹

Several strong counter-arguments minimize the strength of the position that the presumption of innocence is violated. First, the prosecutor is not asking the *jury* to assume the defendant's guilt. Rather, she is asking the *witness* to entertain briefly the possibility that a guilty verdict has been reached, for the sole purpose of helping the jury to assess the witness' credibility. Thus, the presumption of innocence is not subverted.

A second counter-argument to the premise that the presumption of innocence is undermined asserts that

[t]here is no chain of reasoning by which a rational jury could conclude that a question calling for a witness to indulge an assumption for the purpose of testing that witness' opinion invites the jury to indulge the same assumption when weighing the evidence of which that opinion is a part.⁹⁰

This second counter-argument recognizes that the trial setting and the procedures followed in the orientation and preparation of jurors prevent a rational jury from abandoning the continually reinforced notion that an accused is presumed innocent until proved guilty.⁹¹

until found guilty. This presumption goes to the prosecutor's burden of proof and insures that the standard to be applied is "beyond reasonable doubt." See Maher, *Jury Verdicts and the Presumption of Innocence*, 3 Legal Stud. 146, 146 (1983).

The argument that the presumption of innocence is undermined is the most commonly cited argument, and is relied upon by virtually every court that has ruled against the admission of guilt-assuming hypotheticals. Interestingly, some courts that discuss the posing of the "have you heard. . .?" inquiry into the charges at bar also advance this rationale. In this latter context, the undermining of the presumption of innocence argument is entirely misplaced. A question that simply asks a witness whether she has heard, through the community network, that charges were pending against the defendant is not a question that assumes the defendant's guilt. Thus, the "have you heard. . .?" inquiry into the charges at bar poses no conflict whatsoever with the tenet that an accused is innocent until proven guilty.

89. This is the strongest argument in favor of the proposition that guilt-assuming hypotheticals are prejudicial and should therefore be impermissible; consequently, it is the only argument that is difficult to counter. Nonetheless, the courts that cite this rationale tend to rely on the concept of the "presumption of innocence" more for its status than for its substance. By placing full stock in the broad and nebulous concept of the presumption of innocence, these courts imply that a violation of the presumption of innocence speaks for itself. Accordingly, they tend to assert, without any elaboration, that the presumption of innocence is undermined. These courts hang their hats upon a concept that has no constitutional or legislative basis, without nailing the hook securely to the wall. To be convincing, their argument requires greater detail.

90. *United States v. Oshatz*, 912 F.2d 534, 545 (2d Cir. 1990) (Mukasey, J., concurring).

91. See *id.* "To fear that a jury so oriented, so sworn and repeatedly so instructed would be impelled by the hypothetical question at issue here to the illogical conclusion suggested by the majority is to fear a phantasm." *Id.*

Judge Mukasey further explains that federal courts generally acquaint jurors with the concept of the presumption of innocence through orientation films. See *id.* Additionally, the presumption of innocence is generally explained to jurors during the voir dire. See *id.*

Third, while courts that prohibit the guilt-assuming hypothetical find the question impermissible on the theory that the presumption of innocence is violated, these courts overwhelmingly rule that the error is harmless.⁹² Thus, on one hand, the courts deem the question to be prejudicial because the presumption of innocence is violated; on the other hand, however, no court has held that posing the question itself constitutes reversible error,⁹³ a position that is hardly consistent with a violation of the presumption of innocence.

Finally, the argument that the presumption of innocence is undermined is further weakened by analogy to examples in which our legal system permits an accused to suffer the consequences of unproved charges.⁹⁴ For example, the presumption of innocence is not rigidly adhered to in pre-trial detention, in which accused felons are incarcerated prior to trial, sometimes without bail. Thus, while the presumption of innocence remains, certain precautions are taken that entertain the possibility that the accused may be guilty. Similarly, by posing a guilt-assuming hypothetical to an opinion witness, the prosecutor asks the witness briefly to entertain the possibility that the accused may be guilty in order

"Finally, the presumption of innocence is a central and mandatory feature of the jury charge, and one often alluded to by defense counsel in their summations even before the charge is delivered." *Id.* (citation omitted).

Thus, it requires no leap of logic to assume that the jury understands that its role in the trial process is to determine guilt or innocence, and will therefore not be quick to disavow the presumption of innocence.

Additionally, it is important to keep in mind that the whole point of trial is to overcome the presumption of innocence, and all the information that the prosecution presents is aimed at accomplishing this end. To maintain that the guilt-assuming hypothetical alone will tip the balance assumes that it will be afforded undue weight. This assumption is even less persuasive because the character witness' direct testimony as to the defendant's good character reaffirms the presumption of innocence.

92. See *United States v. Oshatz*, 912 F.2d 534, 541 (2d Cir. 1990); *United States v. Barta*, 888 F.2d 1220, 1225 (8th Cir. 1989); *United States v. Page*, 808 F.2d 723, 732-33 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987); *United States v. Williams*, 738 F.2d 172, 177 (7th Cir. 1984); *cf. Oshatz*, 912 F.2d at 540 ("But harmless error rules are not a license to disregard procedural constraints announced by an appellate court.").

93. It seems highly inconsistent that these courts depict the presumption of innocence to be "at the very heart of [a notion that is so] . . . fundamental to Anglo-Saxon concepts of fair trial," yet would, at the same time, be willing to concede that the violation is harmless error that does not warrant reversal on appeal. *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 294 (5th Cir. 1977).

94. For example, the Supreme Court has allowed evidence indicating guilt from a previous trial to be used in subsequent litigation, pursuant to Rule 404(b), despite the fact that the defendant had been found not guilty in the previous trial. See *Dowling v. United States*, 110 S. Ct. 668, 669-70 (1990).

It is one thing to bring in evidence of past misconduct, even if the defendant had been acquitted, *in order to test the character witness' credibility*. See *supra* note 16 and accompanying text. It is quite another to bring in such evidence *in order to prove the doing of subsequent criminal activity*. Nonetheless, the Supreme Court allowed evidence proffered at an earlier trial that culminated in an acquittal to be introduced at a subsequent trial for the purpose of proving the defendant's guilt of the charges at bar. See *Dowling*, 110 S. Ct. at 670. There, the Court held that the introduction of this evidence, even though the defendant was acquitted, did not violate notions of "fundamental fairness." *Id.* at 674.

to serve a precautionary function—to expose to the jury the possibility that the witness may not be credible.

A second rationale offered to buttress the view that the guilt-assuming hypothetical is improper focuses upon the inferences a jury might derive from these questions. The theory posits that when the jury repeatedly hears the prosecutor assure the judge that she has a good-faith basis for asking a guilt-assuming hypothetical, and when the judge correspondingly overrules the defense counsel's objections, the jury might infer that the prosecutor has evidence beyond the evidence in the record.⁹⁵ This argument fails for two reasons. First, the prosecutor who seeks to pose a guilt-assuming hypothetical need not be required to give any good faith assurances, much less in the presence of the jury. The mere fact that the case has gone to trial indicates that the prosecutor has a good faith belief in the truth of the hypothetical she poses. Moreover, the very nature of a hypothetical precludes the need to show any proof of good faith, beyond what the prosecution already proved in its case-in-chief.⁹⁶ Second, even if the court insisted upon these assurances, a responsible trial judge would not permit such assurances to be made in the presence of the jury.⁹⁷

A third argument suggests that the posing of a guilt-assuming hypothetical affords the prosecution an unlimited opportunity to "foist its theory of the case repeatedly on the jury."⁹⁸ Arguably, through the repeated use of the guilt-assuming hypothetical, the prosecutor will be able to advance her ideas about the underlying facts of the crime. While this criticism might be valid, the prosecutor would not be able to propound her actual theory of the crime if she carefully phrases the question so as not to give too many details.⁹⁹

95. See *United States v. Oshatz*, 912 F.2d 534, 539 (2d Cir. 1990). This criticism of the guilt-assuming hypothetical gains validity if the prosecutor poses the question in the following form: "If I were to tell you, hypothetically, that Mr. Delta was guilty of tax evasion, would your opinion of him change?" This construction of the hypothetical suggests that the prosecutor may possess certain undisclosed evidence. This formulation of the guilt-assuming hypothetical is more likely to meet with an objection by the defense on the grounds that it implies that the prosecutor has more evidence than the record reflects. Instead, the prosecutor should employ one of two alternative constructions: "If you were to learn, hypothetically, that Mr. Delta was guilty of tax evasion, would your opinion of him change?" or "If the jury were to find Mr. Delta guilty of tax evasion, would your opinion of him change?"

96. A hypothetical question involves a "hypothesis," which is "an idea or proposition not derived from experience [and thereby not derived from actual fact] but formed and used to explain certain facts . . . or to provide the foundation or primary assumption of an argument." *The New Webster's Comprehensive Dictionary of the English Language* (1990 ed.)

97. See *United States v. Oshatz*, 912 F.2d 534, 545 (2d Cir. 1990) (Mukasey, J., concurring); C. McCormick, *supra* note 8, § 191, at 569.

98. *United States v. Williams*, 738 F.2d 172, 177 (7th Cir. 1984); see also *United States v. Barta*, 888 F.2d 1220, 1225 (8th Cir. 1989) (a variation of this rationale was used to invalidate a "have you heard. . .?" type inquiry into facts underlying the charges at bar asked of a reputation witness).

99. See *supra* note 64 and accompanying text; *infra* note 104 and accompanying text.

The final basis for holding that a guilt-assuming hypothetical is improper rests upon the theory that the prosecutor "force[s] an unsuspecting witness to speculate on the effect of a possible conviction."¹⁰⁰ This argument is counterintuitive. To say that the "unsuspecting" witness is asked to speculate about the effects of a possible conviction implies that the witness would not otherwise engage in such a speculation. It is unlikely that a witness who is aware of the charges against the defendant and who comes to court to testify in his defense has not indulged in such thoughts previously.

In light of this discussion, a Rule 403 balancing would tip in favor of permitting the guilt-assuming hypothetical. While the guilt-assuming hypothetical is not without its potential problems, the prejudicial nature of the question is not as great as some courts suggest.

Lastly, besides the Rule 403 balancing test, there is an additional reason that courts should permit guilt-assuming hypotheticals. There is precedent for the use of hypotheticals involving the underlying charges outside the realm of character evidence: "[t]ime and again, experts are asked hypothetical questions which assume the very facts upon which the defendant's guilt is predicated."¹⁰¹

C. Guidelines

Although the guilt-assuming hypothetical passes muster under the Rule 403 balancing test, it may nonetheless be subject to abuse. The ultimate safeguard is to prohibit the prosecution's abuse of the guilt-assuming hypothetical by counseling prosecutors to adhere to suggested

100. *Williams*, 738 F.2d at 177.

101. *United States v. Morgan*, 554 F.2d 31, 33 (2d Cir.), *cert. denied*, 434 U.S. 965 (1977). "If the question is based upon the evidence, it may be permitted in the exercise of the trial judge's discretion." *Id.* (citation omitted); see *Stahl v. United States*, 144 F.2d 909, 913 (8th Cir. 1944); *Heller v. United States*, 104 F.2d 446, 449 (4th Cir. 1939); C. McCormick, *supra* note 8, § 14, at 35-37; see also *Brandenburg, Expert Witnesses and Hypothetical Questions*, 1988 *Journal of the Missouri Bar* 25, 26-33 (1988) (discusses the use of hypothetical questions in the realm of expert testimony in Missouri's state and federal courts); Davis, *A Fresh Look at Hypothetical Questions and Ultimate Issues: The Kansas Experience*, 36 *U. Kan. L. Rev.* 311, 316, 353 (1988) (earlier Kansas courts favored the use of hypothetical questions posed to expert witnesses, and the role of hypothetical questions in the area of expert testimony persists in Kansas' present-day case law); Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness*, 1986 *Univ. Ill. L. Rev.* 43, 59-60 (1986) (hypothetical questions may be posed to experts and may include "the version of those disputed items which are relevant and favorable to the proponent of the question. . . . [T]he hypothetical question may request the expert witness to base his or her opinion on the assumption that certain facts . . . are true.") (citations omitted).

This analogy becomes even stronger if we view, as an expert, one who knows a defendant long and well enough to testify as an opinion witness. Essentially, the opinion witness is an expert on the subject of the defendant's character. See *United States v. Polsinelli*, 649 F.2d 793, 799 (10th Cir. 1981); *supra* note 79 and accompanying text. This interpretation of the term "expert" does not conflict with the Federal Rules' definition of an expert witness as one qualified "by knowledge, skill, experience, training, or education." Fed. R. Evid. 702 (emphasis added).

guidelines in using this inquiry. First, the prosecutor must differentiate the reputation witness from the opinion witness and then tailor her inquiry into the charges at bar accordingly.¹⁰²

If the witness testifies as to her *opinion* of the defendant, then the prosecutor may use guilt-assuming hypotheticals, provided that she adheres to certain guidelines:

- * The prosecutor must make it clear that this is a hypothetical question.¹⁰³

- * The questions should be phrased in general terms and should not give too much detail. The prosecutor should not propound her theory of how the crime was committed, but should instead state the question succinctly.¹⁰⁴

102. If the witness is purely a reputation witness, the questioning must be limited to a "have you heard. . .?" inquiry into the charges at bar; here, the guilt-assuming hypothetical is inappropriate. *See supra* notes 60-63 and accompanying text. If the reputation witness does not testify to defendant's present reputation on direct examination and instead testifies to the defendant's reputation prior to the filing of the charges against him, then the "have you heard. . .?" inquiry into the charges at bar is inappropriate. *See supra* note 56 and accompanying text.

If the witness is an opinion witness, the guilt-assuming hypothetical is appropriate. *See supra* notes 72-86 and accompanying text.

If the witness testifies as to the defendant's reputation in the community as well as to the witness' own opinion of the defendant, then a combination of both question types may be acceptable.

103. *See, e.g.,* United States v. Candelaria-Gonzalez, 547 F.2d 291, 294, n.6 (5th Cir. 1977) (lower court permitted guilt-assuming hypothetical only after it was rephrased to clearly resemble a hypothetical).

Unacceptable: "Ms. Winter, if Mr. Delta was found guilty of tax evasion, would that change your opinion of him?"

Acceptable: "Ms. Winter, if it were found, hypothetically, that Mr. Delta was guilty of tax evasion, would that change your opinion of him?" or

"Ms. Winter, assume, for the moment, that the jury found Mr. Delta guilty of tax evasion, would that change your opinion of him?" or

"Ms. Winter, let's assume, hypothetically, that Mr. Delta was found guilty of tax evasion, would that change your opinion of him?"

104. Unacceptable: "Ms. Winter, if it were found, hypothetically, that Mr. Delta knowingly understated the "wages earned" component of his tax return in the amount of \$100,000 and falsified his W-2 forms to reflect this understatement, would that change your opinion of him?"

Acceptable: "Ms. Winter, if it were found, hypothetically, that Mr. Delta were found guilty of tax evasion, would that change your opinion of him?"

See Michelson v. United States, 335 U.S. 469, 494-95 (1948) (Rutledge, J., dissenting); Note, *Have You Heard?*, *supra* note 24, at 388-89; *see, e.g.,* United States v. Long, 917 F.2d 691, 703 (2d Cir. 1990) (an example of a question that told too much: "[W]ould it change your opinion of [the defendant] . . . if you were to learn that [he] lied to the FBI and to the grand jury and to others regarding the manner in which he obtained a loan from Sterling National Bank?"); United States v. Oshatz, 912 F.2d 534, 538 (2d Cir. 1990) (an example of a question that told too much: "[L]et's . . . assume that it is found that [defendant] knowingly participated in setting up a phony tax shelter that generated over half a million dollars worth of business for his law firm, would that affect your opinion?"); *see also* Mitchell v. State, 50 Ala. App. 121, 128-29, 277 So. 2d 395, 402 (Crim. App.) (giving too much detail is inadvisable because it calls for character witnesses to consider and assume specific acts of the defendant), *cert. denied*, 291 Ala. 794, 277 So. 2d 404 (1973).

* The guilt-assuming hypothetical should be based on testimony that has already been offered; the question should present nothing new to the jury.¹⁰⁵

* The guilt-assuming hypothetical should not use language that is sarcastic, cynical or negatively suggestive, or that sensationalizes the facts.¹⁰⁶

IV. PREVENTING ABUSES: SAFEGUARDS

In addition to adhering to these proposed guidelines, certain safeguards may prevent the abuse of a prosecutor's inquiry into the charges at bar on cross-examination of the defendant's good character witness. First, jury instructions can direct the jurors to consider testimony responding to an inquiry into the charges at bar only in assessing the witness' credibility.¹⁰⁷ The instruction should be given both at the moment that the prosecutor inquires into the charges at bar (particularly if the defense asserts an objection that the court overrules) and again at the time of the jury charge.¹⁰⁸ Second, the judicial system requires the prosecutor to make a showing of good faith before posing any questions about

105. See *United States v. Morgan*, 554 F.2d 31, 33 (2d Cir.), *cert. denied*, 434 U.S. 965 (1977).

Unacceptable: "Ms. Winter, if it were found, hypothetically, that Mr. Delta evaded his taxes after reading a news article about an accused tax evader who escaped a conviction, would that change your opinion of him?"

Acceptable: "Ms. Winter, if it were found, hypothetically, that Mr. Delta evaded his taxes, would that change your opinion of him?"

106. Not only might such language inflame the witness, it might also turn the jury against the prosecution.

Unacceptable: "Ms. Winter, if it were found, hypothetically, that Mr. Delta surreptitiously and maliciously deprived the Federal government of \$100,000 that federal law mandates be reported, would that change your opinion of him?"

Acceptable: "Ms. Winter, if it were found, hypothetically, that Mr. Delta evaded his taxes, would that change your opinion of him?"

For other examples illustrative of what *not* to do, see, for example, *United States v. Oshatz*, 704 F. Supp. 511, 512 (S.D.N.Y. 1989), *aff'd*, 912 F.2d 534 (2d Cir. 1990) (the prosecutor asked character witness if her opinion of defendant would change if she knew that defendant had been "simply giving losses away *the way people would give loaves of bread away*." (emphasis added); see also *Lopez v. Smith*, 515 F. Supp. 753, 756 (S.D.N.Y. 1981) (the prosecutor asked character witness if his opinion would change had the defendant "*shot somebody in cold blood*") (emphasis added).

107. A sample limiting instruction in the fictional *United States v. Delta* case might be delivered by the judge as follows: "Ladies and gentlemen, please keep in mind that the limited purpose for the hypothetical questions concerning the defendant's possible guilt of the tax evasion charges in this case was to help you in assessing the credibility of the defendant's character witness. This line of questioning does not imply that Mr. Delta has been or will be found guilty as charged; that decision is entirely up to you after careful deliberation at the conclusion of the trial, based on your analysis of all the evidence presented."

For those who are unconvinced that jury instructions are effective, this Note presents additional safeguards to buttress the effectiveness of a jury charge. See *infra* notes 109-111 and accompanying text.

108. See *Michelson v. United States*, 335 U.S. 469, 472-73 n.3 (1948). "[D]iscretionary controls" such as jury instructions *do* work and "should not be abandoned in favor of an

specific instances of conduct.¹⁰⁹ In a guilt-assuming hypothetical, such a showing is necessarily presented by virtue of the fact that the wheels of the trial process have been set in motion; that the proceedings have reached the trial phase indicates that the prosecutor has a good faith belief that the defendant committed the crimes with which he is charged.

In addition to imposed safeguards, systemic controls also exist. The prosecutor should carefully phrase questions to witnesses so that the jury does not view the prosecutor in a negative light. "It must not be overlooked that abuse of cross-examination to test credibility carries its own corrective."¹¹⁰ A cross-examiner who resorts to "misrepresentation, insinuation, or [to] knowingly putting a witness in a false light before a jury . . . finds [her]self discredited not only with the court, but . . . with the very jur[y] before whom [s]he appears."¹¹¹

Another control inherent in the system is the nature of the deliberation process. Prior to resting its case, the prosecution introduces all its evidence to rebut the presumption of innocence. Included in the prosecution's case is an attempt to discredit the witnesses for the defense. Yet we must not lose sight of how the trial process functions—it is up to the jury to determine the *weight* it affords each portion of the testimony, including that provided by character witnesses.¹¹²

CONCLUSION

A qualified inquiry by the prosecutor into the charges pending against the defendant should be permitted on cross-examination of the defendant's character witnesses. This inquiry is extremely probative in assessing the witness' credibility. The inquiry into the charges at bar should be confined to the "have you heard. . .?" variety for those reputation witnesses who testify to the defendant's present reputation, yet may be broadened to encompass the guilt-assuming hypothetical for opinion witnesses. Understanding this distinction, phrasing the questions properly and with care and employing safeguards such as the limiting instruction will enable these questions to be presented in such a manner that their probative value far outweighs any prejudicial effect.

Risa Karen Plaskowitz

inflexible rule." *United States v. Oshatz*, 912 F.2d 534, 549 (2d Cir. 1990) (Mukasey, J., concurring).

109. See *supra* note 16 and accompanying text.

110. *Michelson*, 335 U.S. at 487 n.25.

111. F. Wellman, *The Art of Cross-Examination* 184 (1936).

112. The jury may choose to give a character witness' testimony a great deal of weight, despite evidence the prosecutor offers to discredit the witness. Similarly, the jury may choose to ignore character evidence, even if the prosecutor is unable to discredit the character witness.

