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"HIRED GUNS": ESTABLISHING THE SCOPE OF THE PROPER CROSS-EXAMINATION AND ARGUMENT RELATING TO EXPERT WITNESSES' COMPENSATION IN CRIMINAL TRIALS

Michael C. Kovac[*]

The outcomes of criminal cases can turn on the credibility of the parties' expert witnesses. The compensation such experts receive in exchange for their work on cases can undermine their credibility, as it provides the experts with a financial incentive that might bias them in favor of the parties who retain them. While concerns with such bias have existed for decades, courts have been inconsistent in the defining the permissible scope of cross-examination and argument on the issue. Some courts have unduly curtailed such cross-examination and argument. Courts have also been inconsistent in their views of whether calling such expert witnesses "hired guns" is proper argument.

The present article begins with an overview of the issue, providing examples of the types of cases in which the issue may arise. The article then explores the general standards of conduct that govern the conduct of both prosecutors and defense counsel. Next, the article proposes standards defining the scope of proper cross-examination and argument on the issue. Finally, it proposes standard jury instructions that can be used to undermine the effect of improper argument on the issue.

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I. INTRODUCTION

Expert witnesses play a crucial role in the criminal justice system, as their "scientific, technical, or other specialized knowledge" can "help the trier of fact to understand the evidence or to determine a fact in issue."[1] Defense teams routinely retain experts who provide their services in exchange for some form of compensation.[2] Prosecutors are often able to utilize services of expert witnesses who are already employed by the government and whose job duties include providing these services without receiving additional compensation; however, there are times the prosecution also must retain expert witnesses in exchange for compensation in the same manner defense teams retain them.[3] Inherent in such arrangements is the risk that an expert witness's opinion will be tainted by bias stemming from the expert's financial self-interest.[4]

That risk can and should be brought to the factfinders' attention through cross-examination and argument.[5] The proper scope of such cross-examination and argument is presently a matter of dispute; the courts have shown little consistency with one another in their rulings on such arguments.[6] The present discussion is intended to provide guidance that leads to more consistent and logical rulings on the scope of proper advocacy.

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[1] FED. R. EVID. 702.

[2] *See* Douglas R. Richmond, *Expert Witness Conflicts and Compensation*, 67 TENN. L. REV. 909, 934 (2000).

[3] *See* Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1308–09 (2004) (describing how "[i]n some cases, the prosecution has the added luxury of shopping for the right expert").

[4] *See* Mark A. Patterson, *Conflicts of Interest in Scientific Expert Testimony*, 40 WM. & MARY L. REV. 1313, 1332 (1998) (noting that the American Medical Association's board of trustees has "observed that '[e]conomic incentives can color the nature of the physician expert's testimony'").

[5] *See* Michael H. Graham, *Impeaching the Professional Expert Witness by a Showing of Financial Interest*, 53 IND. L. J. 35, 39–40 (1977) (noting that "the burden is on opposing counsel to explore the underlying facts, data, and assumptions, and otherwise discredit the testimony of the incorrect and/or dishonest expert witness during the cross-examination").

[6] *Compare* State v. Turin, 723 S.W.2d 461, 464 (Mo. Ct. App. 1986) (affirming the trial court's preclusion of cross-examination regarding the sum a prosecution expert witness charged the State) *with* State v. Moses, 517 S.E.2d 853, 871 (N.C. 1999) (finding no error in the trial court permitting cross-examination of a defense expert witness regarding the amount of his fee).

The present article begins with an overview of the issue, providing examples of the types of cases in which the issue may arise. It then explores the general standards of conduct that govern the conduct of both the prosecution and defense teams. Next, the article proposes proper standards defining the scope of cross-examination and argument on the issue. Finally, it proposes standard jury instructions that can be used to undermine the effect of improper argument on the issue.

II. IMPORTANCE OF EXPLORING EXPERT WITNESSES' POTENTIAL FINANCIALLY MOTIVATED BIAS

The indefinite nature of opinion testimony presents unscrupulous experts with opportunities to profit by rendering opinions they would not otherwise render.[7] Moreover, financial incentives can skew the opinions of well-meaning experts who are not conscious of such sources of bias.[8]

Take, for example, competing experts retained by the prosecution and defense for the purpose of analyzing DNA evidence to determine whether DNA found on a murder weapon came from the defendant or some other individual. Assume that a DNA mixture was found on that weapon, meaning that it contained DNA from several individuals.[9] "With DNA mixtures and trace DNA, the results can be ambiguous and difficult to understand, sometimes even for the experts."[10] In this example, the ambiguity could present the experts analyzing it with a close call on the issue of whether a DNA profile found on the murder weapon matches the DNA profile of the defendant. It would be naïve to deny that bias—whether implicit or conscious—relating to the expert's compensation could sway the expert's opinion on that issue.

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[7] *See* Graham, *supra* note 5, at 37.

[8] *See* United States v. Abel, 469 U.S. 45, 51 (1984) (recognizing that an expert witness' self-interest may be a source of his or her subconscious bias).

[9] *See* Rich Press, *DNA Mixtures: A Forensic Science Explainer*, NAT'L INST. OF STANDARDS AND TECH. (Apr. 3, 2019), https://www.nist.gov/feature-stories/dna-mixtures-forensic-science-explainer (explaining that because people "often shed small amounts of DNA when [they] talk, sneeze and touch things" DNA from several different people can be present on objects and surfaces at the same time).

[10] *Id.*

The risk of bias influencing expert opinion is likely to be even more concerning with respect to other sciences. A 2021 New York Times article titled "How Paid Experts Help Exonerate Police after Deaths in Custody" exemplifies this increased concern.[11] The authors examined "a small but influential cadre of scientists, lawyers, physicians and other police experts whose research and testimony are almost always used to absolve officers of blame for deaths . . . ."[12] Such experts "typically earn $500 to $1,000 an hour for testimony and depositions."[13] Some of them also have other substantial financial ties that could influence their testimony. For example, one of the experts "makes more than $300,000 a year as a member of [Taser maker] Axon's corporate board."[14] In a recent deposition, another of the experts "said it had been 20 years since he had last testified that an officer was likely to have contributed to a death."[15] While testifying, other such experts have—to the benefit of the police accused of misconduct—omitted crucial language from research that they cite in support of their opinions.[16]

This is not to say that these experts—or experts in other fields—will, as a result of financially driven bias, always testify in favor of a particular party, regardless of the strength of the evidence supporting their conclusions. Nor is it meant to single out experts who typically testify in favor of police; one can find such experts (i.e., those who typically testify favorably for a particular type of party) in virtually every area of expertise. Instead, the present discussion is meant to illustrate the importance of allowing attorneys to

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[11] *See* Jennifer Valentino-DeVries et al., *How Paid Experts Help Exonerate Police After Deaths in Custody*, N.Y. TIMES (Dec. 26, 2021), https://www.nytimes.com/2021/12/26/us/police-deaths-in-custody-blame.html#:~:text=The%20experts%20also%20intersect%20with,a%20cottage%20industry%20of%20exoneration (describing how experts are hired to defend police officers, creating a self-reinforcing system that makes it difficult to secure impartial data on deaths in police custody).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *See id.* (In use-of-force lawsuits, expert witness Dr. Theodore Chan "repeatedly wrote that Dr. Donald Reay, a former medical examiner in King County, Wash., has concluded that hogtying 'does not produce any serious or life-threatening respiratory effects'—omitting the crucial phrase 'in normal individuals.'").

explore and comment on experts' potential sources of bias, including those concerning their financial interests.

III. GENERAL STANDARDS

In the United States' adversarial legal system, "[t]he line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone."[17] The rules of evidence and case law establishing standards of professional conduct, however, provide much guidance with respect to the scope of permissible cross-examination and argument relating to an expert witness's potential bias based on the expert's financial interests.[18]

The U.S. Supreme Court has made clear that "counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds."[19] "[T]he standards are the same for prosecutor and defense counsel."[20] Thus, "[d]efense counsel, like his adversary, must not be permitted to make unfounded and inflammatory attacks on the opposing advocate."[21] Or, as one commentator has stated, "what is good for the goose is good for the gander."[22]

While the large majority of opinions on such improper arguments address those made by the prosecution, that fact should not suggest that the defense does not make them as well, possibly even more frequently than the prosecution.[23] As the Supreme Judicial Court of Massachusetts has recognized, "[b]ecause the [prosecution] may not appeal from any possible adverse consequences of a defendant's improper jury argument, the propriety of a defense counsel's jury argument usually arises only when a convicted defendant challenges some ruling or jury instruction by the trial judge

[17] United States v. Young, 470 U.S. 1, 7 (1985).

[18] *Id.*

[19] *Young*, 470 U.S. at 8.

[20] Commonwealth v. Murchison, 634 N.E.2d 561, 562 (Mass. 1994) (citing *Young*, 470 U.S. at 8–10).

[21] *Young*, 470 U.S. at 9.

[22] Gil Sapir, 8 NO. 2 CRIM. PRAC. GUIDE 10 (2007).

[23] *See*, *e.g.*, Butler v. State, 102 P.3d 71, 85 (Nev. 2004); Commonwealth v. Slaughter, 408 A.2d 1141, 1143 (Pa. Super. Ct. 1979).

concerning defense counsel's argument."[24] Nevertheless, such improper arguments can produce irreversible adverse consequences for both sides. Should the prosecution's improper argument result in a wrongful conviction, the defendant suffers a loss of liberty, along with collateral consequences such as the loss of employment and the social stigma associated with the conviction. Should the defense's improper argument result in a wrongful acquittal, the prosecution loses the ability to hold the defendant accountable for his or her crimes, as the Double Jeopardy Clause[25] (applicable to the states through the Fourteenth Amendment[26]) will bar a second prosecution.

When appellate courts are confronted with a challenge to a prosecutor's efforts to establish a defense expert's bias through his financial self-interest, those courts often include in their analyses commentary regarding the prosecutor's role in the criminal justice system, including the prosecutor's duty "to act with due regard for fairness and the rights of the defendant"[27]; however, such commentary adds nothing of value to the present discussion, as the relevant standards governing admissibility of evidence and scope of permissible argument are the same for the prosecution and the defense. If anything, such commentary can be read to wrongly suggest that the defense has more leeway in establishing an expert witness's bias. Relevance serves as the foundation of the standards of conduct applicable to both the prosecution and the defense.

Relevant evidence "has a tendency to make a fact more or less probable than it would be without the evidence" when "the fact is of consequence in determining the action."[28] Bias is relevant to veracity of an expert's opinion, as "[a] successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony."[29] A witness's self-interest may be a

[24] *Murchison*, 634 N.E.2d at 562.

[25] *See* U.S. CONST. amend. V.

[26] *See* U.S. CONST. amend. XIV; *See also Benton v. Maryland*, 395 U.S. 784 (1969).

[27] *See e.g.*, State v. Blasus, 445 N.W.2d 535, 539–40 (Minn. 1989); State v. Udo, 454 P.3d 460, 479 (Haw. 2019).

[28] FED. R. EVID. 401 (2023).

[29] *Abel*, 469 U.S. at 51.

source of bias.[30] Relevant to the present discussion, the Second Circuit has acknowledged that an expert witness's compensation "show[s] a possibility, or perhaps even a probability, of bias."[31]

IV. SCOPE OF CROSS-EXAMINATION

Courts appear to be consistent (and correct) in generally allowing cross-examination of expert witnesses regarding whether they expect to receive compensation in exchange for their testimony.[32] Such information has "a possible bearing upon the witness[es'] impartiality, credibility, and interest in the result."[33]

Courts have been inconsistent, however, in determining the relevancy of **the amount** of compensation an expert witness receives for his or her work in a particular case.[34] In *State v. Turin*, the defense elicited from a handwriting expert retained by the prosecution that she was "employed by the state on a contract basis."[35] The trial court sustained an objection to a question inquiring as to the sum the expert witness charged the State for the work done on the defendant's case, stating:

> [The witness] did testify she's under contract with the State of Missouri. She further testified that she was remunerated. The exact amount of remuneration, I can't see how that is material or relevant . . . . Whether she received ten thousand or a hundred thousand for testifying isn't going to change her interest in the case.[36]

The Missouri Court of Appeals ruled that the decision was "not manifestly incorrect . . . ."[37]

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[30] *Id.* at 52.

[31] United States v. Edwardo-Franco, 885 F.2d 1002, 1009 (2d Cir. 1989).

[32] *See*, *e.g.*, Niven v. State, 80 S.W.2d 644, 646 (Ark. 1935); Wakely v. State, 225 N.W.42, 46 (Neb. 1929); Commonwealth v. Simmons, 65 A.2d 353, 359 (Pa. 1949) (permitting cross-examination regarding the fees paid to an expert witness).

[33] *Simmons*, 65 A.2d at 359.

[34] *See infra* notes 34–38 and accompanying text.

[35] Turin, 723 S.W.2d at 464.

[36] *Id.*

[37] *Id.*

The Fourth Circuit Court of Appeals similarly upheld a trial court's limitation of such questioning. In *United States v. United Medical and Surgical Supply Corp.*, the prosecution sought to prove the defendants committed securities fraud (among other crimes) using expert testimony from a certified public accountant it had retained.[38] The Fourth Circuit found no error in the trial court prohibiting defense counsel from asking the expert how much he was being paid for his trial testimony, given the fact that defense had already been able to: (1) establish that the expert's "company was being compensated for his testimony"; (2) "solicit information about how the contractual relationship between the Government and [the expert witness] worked"; (3) establish that the expert had not yet received any money; and (4) elicit testimony that "described the formula for calculating [the expert witness's] pay, and explained that his company would receive the pay."[39]

The constraints of such questioning imposed by the Missouri Court of Appeals and the Fourth Circuit ignore that such information is relevant to the strength of the witness's bias;[40] logically, for the right price, some witnesses might be willing to render an opinion they otherwise would not for a host of reasons (e.g., damage to the witness's reputation).[41] Granted, it may be the rare case in which an expert is paid such a fee. Nevertheless, the opposing party should be permitted to ask an expert the questions needed to determine whether the case is one of those rare cases.

The prosecution of legendary music producer and murderer Phil Spector for the murder of actress Lana Clarkson shows just how tempting it may be for an expert witness to render a favorable opinion he or she may not provide under other circumstances, as the defense experts in that case were paid a whopping $419,000 for their work.[42] The *Spector* case serves as an illustration of the temptation to render a favorable opinion that experts may experience in some cases; this discussion in no way suggests that the expert opinions

[38] *See* United States v. United Med. and Surgical Supply Corp., 989 F.2d 1390, 1397 (4th Cir. 1993).

[39] *Id.* at 1406.

[40] *Abel*, 469 U.S. at 54 (explaining that a witness's gang membership was relevant to the fact, source, and strength of his bias).

[41] *See* Graham, *supra* note 5, at 36 (considering the "venality" of certain experts).

[42] *See* People v. Spector, 128 Cal.Rptr.3d 31, 88 (Cal. Ct. App. 2011).

presented in the *Spector* case actually were in any way influenced by the experts' compensation. It simply shows that courts must allow attorneys to at least pose the single question: "How much are you being compensated for your work on this case?"

In contrast, the Supreme Court of North Carolina found no error in the trial court allowing the prosecutor to cross-examine an expert witness retained by the defense "about his fee in the instant case and previous cases, including how much money he had been paid to testify in those cases."[43] Professor Michael H. Graham has observed that "[t]he professional expert witness has become a fact of life in the litigation process."[44] Another commentator has explained:

> That an expert in a particular field may be in effect a "professional witness" in lawsuits, rather than being more or less exclusively a practitioner whose employment in a lawsuit as a witness is merely incidental to his or her profession, is a matter which is likely to bear on the credibility of that expert, since a significant portion of the expert's livelihood may thus depend on his or her desirability as a favorable and convincing witness, thus possibly leading to a temptation for the witness to color findings and testimony to suit the needs of the proponent party, rather than to evaluate and present the subject matter of the testimony with complete impartiality.[45]

Similarly, the Second Circuit has recognized that evidence of what a witness received for past expert services "and might therefor expect in the future is highly relevant to the question of his potential bias and interest.'"[46] Accordingly, an expert witness's compensation

[43] Moses, 517 S.E.2d at 871. While the court noted that the North Carolina Rules of Evidence did not apply to the sentencing hearing during which the cross-examination took place, the court's discussion suggests that the result of the challenge would have been the same regardless of whether they applied. *Id.* at 871–72.

[44] 21 AM. JUR. 2D *Proof of Facts* § 1 (2023).

[45] Russell G. Donaldson, *Propriety of cross-examining expert witness regarding his status as "professional witness",* 39 A.L.R. 4th 742 § 2 (1985).

[46] *Edwardo-Franco*, 885 F.2d at 1010 (quoting United States v. Leja, 568 F.2d 493, 499 (6th Cir. 1977)). While the Second Circuit was addressing compensation a witness received from the prosecution, the rationale is equally applicable with respect to the defense. *Id.*

in both the case at hand and other cases is relevant to the issue of bias; logically, the more an expert relies on such compensation to support the expert's livelihood, the more the expert may be tempted to provide testimony favorable to the retaining party because it may lead to more work. This is particularly important with respect to experts who, like the experts on subjects relating to excessive force discussed above,[47] tend to testify exclusively for one particular type of party (e.g., the police) or tend to testify exclusively for either the prosecution or defense.

Evidence of such potential bias includes more than evidence of the expert's history of compensation. For example, the Colorado Court of Appeals found no misconduct where a prosecutor elicited testimony from an expert witness retained by the defense "that the expert advertised in a lawyer's magazine; the advertisements referred to a website; the expert advertised to make money; and he was being paid around $7,000 for his efforts in the case."[48]

IV. SCOPE OF ARGUMENT

During closing arguments, counsel for both sides are permitted to make arguments drawn directly from the evidence, as well as those that can be fairly inferred from it.[49] Arguments may not, however, be the product of speculation or conjecture.[50]

"The credibility of witnesses is obviously a proper subject of comment."[51] Accordingly, within the proper bounds discussed herein, counsel should be free to comment on financial incentives that might undermine a witness's credibility. With respect to expert witnesses retained by the parties, during closing arguments, counsel should be free to comment on: (1) compensation the expert witness is to receive for his or her work on the case on the case at hand; (2) the extent to which the expert's livelihood depends on work as an expert witness; (3) the number and/or percentage of times the witness has testified for a particular group (e.g., the police) or the defense or prosecution; and (4) the expert's efforts to

[47] *See supra* Section I.

[48] People v. Sommers, 200 P.3d 1089, 1096–97 (Colo. App. 2008).

[49] *Murchison*, 634 N.E.2d at 562.

[50] *Id.*

[51] *Id.* at 563.

obtain work as an expert witness (e.g., the expert's advertisements for expert witness services). Of course, all facts upon which such comments are based must be established by evidence and not simply presumed.[52]

Some courts have gone too far in curtailing counsel's ability to comment on an expert witness's potential bias in relation to that witness's financial self-interests. For example, the Supreme Court of Nevada found that it was improper for a prosecutor to "twice remark about how much money the defense experts were being paid for their testimony."[53] Nevada's position defies logic and is inconsistent with the numerous well-reasoned opinions discussed herein. Put simply, it unduly curtails a party's ability to point out an expert witness's inherent potential bias grounded in the expert's financial self-interest.

A more common issue arises when otherwise proper arguments regarding an expert's potential bias are accompanied by more objectionable commentary, such as insults directed at the expert witness. Courts are not always in agreement as to the line separating proper commentary from improper insults. The propriety of calling an expert witness a "hired gun," for example, is oftentimes a matter of dispute.

Some courts have found that referring to an opponent's expert witness as a "hired gun" is improper argument.[54] Other courts have properly rejected challenges to such references. For example, in *Benefiel v. State*, the Supreme Court of Indiana found no error where, after describing the qualifications of the defense's expert witness as "sterling," the prosecutor "called the expert a 'hired gun,' and implied that his job was to manufacture a defense for" the defendant.[55] In Indiana, "such statements simply do not amount to improper denigration."[56] In support of its holding, the court noted that the court itself has used the same term to identify "experts

[52] *See* State v. Lowrance, 312 P.3d 328, 337 (Kan. 2013) (quoting State v. Wells, 305 P.3d 568 (Kan. 2013)).

[53] *Butler*, 102 P.3d at 85.

[54] *See e.g.*, Commonwealth v. O'Brien, 388 N.E.2d 658, 662 (Mass. 1979); People v. Smith, 557 N.E.2d 596, 608 (Ill. App. Ct. 1990).

[55] Benefiel v. State, 716 N.E.2d 906, 916 (Ind. 1999) (internal citations omitted).

[56] *Id.*

testifying on behalf of one party or another . . . ."[57] The Supreme Court of Kentucky has gone so far as to state that it "ha[d] no intention . . . for the commonly used phrase 'hired gun' to be eliminated from the lexicon of . . . trial lawyers . . . ."[58]

In criminal cases, the term "hired gun" is not necessarily associated with unethical expert witnesses. In some cases, the term may be used to describe an expert witness who is willing to use his or her expertise to present an opinion that is beneficial to the party who hired the witness, **regardless of whether that opinion is truly supported by the witness's area of expertise, so long as the witness can profit off of that opinion.** In other cases, however, the term may be used to describe an expert witness who will use his or her expertise to present an opinion that is beneficial to the party who hired said witness, **so long as it is within the ethical bounds of the witness's area of expertise and the criminal justice system, and from which the witness will profit**. For those who apply the former description to a witness, the term "hired gun" certainly serves to denigrate the witness. For those who apply the latter description, the term does no more than point out a potential bias based on the witness's financial interest. The use of expert witnesses—as well as the use of the term "hired guns" to describe them—in the criminal justice system has become so ubiquitous (and even expected) that there is no reason to believe that an attorney's use of the term would inflame a jury's passions and, thus, distract jurors from the evidence.[59] Other comments are undeniably improper insults. For example, the Superior Court of Pennsylvania disapproved of a prosecutor calling an expert witness retained by the defense a "prostitute" and a "huckster" and referring to his testimony as "a lot of crap."[60]

Further, absent proof, it is improper to imply that the expert witness' opinion was the product of the retaining attorney's urgings.[61] For example, the Supreme Judicial Court of Massachusetts disapproved of a prosecutor referring to an expert witness retained by the defense as "a paid expert with a job to do"

[57] *Id.* n.5 (citing Palmer v. State, 486 N.E.2d 477, 481–82 (Ind. 1985)).
[58] Dickerson v. Commonwealth, 485 S.W.3d 310, 333 (Ky. 2016).
[59] *See supra* note 54.
[60] *Slaughter*, 408 A.2d at 1143.
[61] *See O'Brien*, 388 N.E.2d at 663.

and arguing "that job was to come up with the excuse and then come in and sell that excuse to you."[62] In *State v. Lundbom*, the Court of Appeals of Oregon correctly reversed the defendant's conviction for driving under the influence due to the prosecutor's attack on the defense's expert witness during closing arguments:

> But [expert witness for the defense] Steve van Ootegham who was in here, being paid money to be here to testify as he has always testified that this machine is inaccurate. That is his job. That is what he is hired to do. With all respect, I'm someone who tells it like it is. He's a pimp. Okay? He's hired to do a job and he does it. And if he were to come in here and to say the machine is accurate, he would not make a dime. And no defense attorney would hire him.[63]

As the court explained, "[t]he essence of his argument was that the jury should find defendant guilty, because his counsel was a 'pimp' who knowingly hired a liar."[64] These comments unduly prejudiced the defendant because they "could only have been calculated to elicit an emotional response from the jury."[65]

Even subtle suggestions that the attorney who retained the expert witness urged the witness to provide beneficial testimony are improper. For example, the Court of Appeals of North Carolina "vigorously disapprove[d]" of a prosecutor attacking an expert witness retained by the defense as follows: "And here comes [defense expert] Dr. Leshner. You're right, I'm going to talk about him. You can get a doctor to say just about anything these days."[66] Similarly, the Court of Appeals of Ohio (in an unreported opinion) found that a prosecutor's argument was improper when he told the jury: "[Defense expert] Stuart James was being paid $175 per hour, and had he agreed with [prosecution expert] Bob Young's findings, his

[62] Commonwealth v. Copeland, 114 N.E.3d 569, 578 (Mass. 2019).
[63] State v. Lundbom, 773 P.2d 11, 12 (Or. Ct. App. 1989).
[64] *Id.*
[65] *Id.* at 13.
[66] State v. Vines, 412 S.E.2d 156, 162–63 (N.C. Ct. App. 1992).

$175 an hour payday would have stopped as soon as he said I agree."[67]

Counsel must also avoid coupling comments about an expert witness's potential financially motivated bias with gratuitous comments that can only serve to unduly appeal to jurors' emotions. By way of example, the Supreme Court of Kentucky condemned a prosecutor's remarks expressing his personal offense to a defense expert's testimony and claim that said expert "had gotten wealthy at the expense of murdered children."[68] The Supreme Court of Nevada correctly held that it was improper for a prosecutor to inform the jury that the defense experts "had been paid for at county expense by such persons as the jurors themselves"[69]; such a comment serves no purpose other than to turn the jurors against the defendant for reasons that have no relevance to the determination of whether the defendant is guilty.

Similarly, an argument based on the mere fact that a party retained an expert witness from out-of-town is improper, as it serves no purpose aside from appealing to jurors' potential hometown bias. In *Martinez v. State*, for example, the Court of Criminal Appeals of Oklahoma held that the following statements made by the prosecutor during closing arguments were improper: "Bring this guy in here from Ohio, pay him to come in here to testify. He's an expert. Here's what we need to testify. Here's your ten grand. Thank you."[70] In *Dunaway v. State*—a child sexual battery prosecution—the Supreme Court of Mississippi described the prosecutor's improper attack on the defense's expert witness as follows:

> The State attacked Dunaway's expert by emphasizing the fact that all the State's expert witnesses were from Mississippi, while Dunaway's expert was from Minnesota, referring to him as "Santa Claus" or "Dr. Santa Claus," and stating "Santa Claus needs to go back to the North Pole." Dunaway points out that the State characterized the testimony of the expert as "stocking stuffers brought here by Santa Claus."

[67] State v. Tolliver, 2004 WL 625683, at *22 (Ohio Ct. App.).
[68] *Dickerson*, 485 S.W.3d at 333.
[69] McGuire v. State, 677 P.2d 1060, 1064 (Nev. 1984).
[70] Martinez v. State, 984 P.2d 813, 826 (Okla. Crim. App. 1999).

> Moreover, the State labeled the expert as a "whore full of hot air" who pretended to speak in the "voice of God."[71]

The Supreme Court of Mississippi held that the prosecutor should not have commented that the defense expert resided outside of Mississippi.[72]

Due to the nature of the United States' criminal justice system—where the prosecution, unlike the defense, oftentimes can retain expert witnesses employed by the government who will testify without additional compensation—one additional restriction should be imposed upon prosecutors: they should not be able to argue or suggest that the experts they retained did not testify in return for compensation while their opponent's experts did. Such argument is unfair for at least two reasons: (1) due to no fault of the defense, the argument will be available to the prosecution far more often than it will be to the defense; and (2) it falsely suggests that no potential for inherent bias exists with respect to the prosecution's expert witnesses. While the former reason is self-evident, the latter reason requires explanation.

At least one court—the Court of Appeals of Arizona—has stated that "[a] police officer is not per se 'interested' merely by virtue of his or her involvement in a criminal investigation, absent some personal connection with the participants or personal stake in the case's outcome."[73] As early as 1864, however, the Supreme Judicial Court of Massachusetts correctly recognized the inherent risk of bias in police witnesses: "As essentially affecting their bias, and the credit to be given to their testimony, their occupation and connection with the origin of the prosecution against the defendant might be important elements, and, within proper limits, proper subjects of comment by counsel, and of consideration by the jury."[74]

In short, where there is evidence from which the inference may be drawn that a police witness is lying, the fact that the witness is

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[71] Dunaway v. State, 551 So. 2d 162, 163 (Miss. 1989).

[72] *Id.* at 164. The court also held that the prosecutor erred in referring to the expert as a "whore" and noting that he was paid $2,000. *Id*. Apparently, the court was not concerned with the prosecutor calling the expert "Santa Claus."

[73] State v. Miller, 928 P.2d 678, 682 (Ariz. Ct. App. 1996).

[74] Commonwealth v. Barry, 91 Mass. (9 Allen) 276, 278 (Mass. 1864).

employed by a law enforcement agency "may have material bearing on the credibility of his testimony in a particular case."[75]

This latter view begs the question: Why might a law enforcement employee's occupation be probative of the employee's bias? There are several potential reasons that are applicable to law enforcement personnel, as well as expert witnesses who are part of the prosecution team. First, confirmation bias may cause such a witness (whose work led to the arrest of a suspect) to be reluctant to acknowledge the strength of evidence that points to a different suspect.[76] Second, such a witness could be reluctant to take any action that jeopardizes a prosecution for fear that the witness might fall out of favor with members of the prosecution team with whom the witness often works.[77] Third, and relatedly, such a witness could fear that falling out of favor with professional associates might have a negative impact on the witness's livelihood in any number of ways, including being passed over for promotions, being demoted, or even being terminated.[78]

This list of potential sources of bias for the prosecution team is not exhaustive; it is simply intended to show that members of the prosecution team who testify as part of their job duties—as opposed to pursuant to a contract like experts retained by the defense—are subject to a risk of bias, including bias based on financial interests,

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[75] *Id.* at 279–80; *see also Murchison,* 634 N.E.2d at 562. "Supporting evidence for such an argument may come from inconsistencies in the witness's own testimony or from other evidence." *Id.* at 564 (detailing how in a drug distribution prosecution, defense counsel was free to argue that the police witnesses were "not telling the truth and were motivated to testify to make the charges 'stick,' providing more details to make the story sound more credible to the jury," so long as it was "presented as a reasonable inference" drawn from evidence such as: "inconsistencies in the police officers' testimony; the officers' experience as drug officers and witnesses in numerous prosecutions; their interest in obtaining convictions of drug dealers and in supporting the arrest that they made; and the conflict with the defendant's exculpatory evidence")

[76] *See* Eitan Elaad*, Tunnel Vision and Confirmation Bias Among Police Investigators and Laypeople in Hypothetical Criminal Contexts*, 12(2) Sage OPEN (2022).

[77] *See id.*, at 2 ("[F]orensic experts who know the nature and details of the crime may be biased by the pressure of interrogators, by working for the prosecution, and by using computer lists that feature some suspects ahead of others.").

[78] *See* Karen Frewin & Keith Tuffin, *Police status, conformity and internal pressure: a discursive analysis of police culture,* 9(2) Discourse & Society 173, 183 (1998) (In "police culture," "[t]he expression of unpopular or challenging views, along with any failure to appear committed to the team, has dire repercussions.").

inherent to their positions. And that showing makes clear that prosecutors should not be permitted to argue, in essence, that the prosecution's experts are more reliable than the defense experts because, unlike the defense experts, the prosecution's experts have no financial incentive that might influence their opinions.

Having proposed general principles regarding the proper scope of cross-examination and argument regarding an expert witness's potential bias based on the expert's financial incentives, applying them to an actual case will help illuminate the prudence of them. The Supreme Court of New Jersey's opinion in *State v. Smith*[79] provides an illustration of a court going too far in constraining the arguments of counsel, and it provides a sufficient description of the parties' conduct to explain how the principles proposed in the present article can and should be applied.

In *Smith*, the court framed the issue as "whether comments made by the prosecutor with respect to defendant's expert witness' compensation, and their relationship to the reliability of their testimony, constituted prosecutorial misconduct that requires a new trial."[80] The court answered in the affirmative.[81]

The facts of *Smith* are relatively straightforward. A grand jury returned an indictment charging the defendant with second-degree vehicular homicide and second-degree reckless manslaughter (among other charges) based on the prosecution's theory that the "defendant was driving under the influence of alcohol when he struck and killed [the victim], who was riding her bicycle on the shoulder of the roadway."[82] The defendant "contended that the victim, while under the influence of cocaine, was riding her bicycle on the roadway without any reflector lights and that therefore the accident was unavoidable."[83] To prove the vehicular homicide charge, the prosecution was required to prove that the "defendant consciously disregarded a substantial and unjustifiable risk while driving his vehicle and that [the victim] would not have died but for defendant's reckless conduct."[84] Satisfaction of this element hinged

[79] State v. Smith, 770 A.2d 255 (N.J. 2001).
[80] *Id.* at 256.
[81] *Id.* at 274.
[82] *Id.* at 258.
[83] *Id.*
[84] *Id.*

on whether the jury believed the prosecution or defense experts' testimony regarding where the victim was riding her bicycle when the defendant struck her with his vehicle.[85]

When cross-examining the defense expert witnesses regarding their compensation, the prosecutor appeared to phrase his questions in a manner that would not denigrate them. Cross-examination of the first expert witness regarding said witness' compensation was limited to a single question and answer:

> Q. Dr. Saferstein, let me get this part out of the way. I don't intend to offend you, how much are you—how much were paid [*sic*] to work on this case?
>
> A. I received $750 to review the file and to prepare a report. And I expect to be paid $1800 for my appearance here today.[86]

Cross-examination of the second defense expert on the same subject was similar:

> Q: Mr. Green, let me just start out, how much were you paid for your services here today and in preparation for this case?
>
> A: I don't have the billings, but I can just give you what my normal rate is. I normally charge—my company charges $225 an hour for my time at trial if I have to travel, and then $200 an hour for my time at work.[87]

While cross-examination of the third defense expert was slightly lengthier than cross-examination of the first two, it was every bit as innocuous:

> Q: Dr. Batterman, I'm going to bring up something that [defense counsel] already brought up; but

[85] *Smith*, 770 A.2d at 258.
[86] *Id.* at 261.
[87] *Id.* at 263.

basically, how much are you getting paid to participate in this case?

A: My hourly rate is $240 an hour.

Q: Does that include-the $240 an hour for the time that you spent going to the police station?

A: Yeah. My time is my time. I mean, if I'm asked to spend hours on the case, and that's my hourly rate.

Q: Okay. And do you have, for example, if you have to testify in court, do you have a set number of hours or a minimum number of hours that you charge, or do you just charge by the hour?

A: No. It's portal to portal for how ever [*sic*] long it takes me. The same hourly rate.

Q: Okay.

A: It doesn't matter what I'm doing if my-if you're tying me up for an hour, then you pay for an hour of my time.

Q: But you're not like some of these experts if they show up for an hour, they want eight hours. It's not that situation?

A: No.

Q: From the time you leave your office until the time you get back.

A: Right.[88]

[88] *Id.* at 264.

While the court did not appear to take issue with the prosecutor's cross-examination of the defense's expert witnesses, during closing arguments, the court unduly limited the prosecutor's ability to comment on the defense experts' potential bias based on their compensation.[89]

The prosecutor first ran into issues with the court when he attempted to distinguish the State's only expert witness from the defense experts:

> In this case, you have Lieutenant Mentzer, [the State's expert witness] who admitted he is associated with the police, on the one hand. You have two individuals on the other hand, who are hired, paid consultants. Now, admittedly, they have to make a living. They charge hefty fees, and you can decide whether those hefty fees would influence their testimony at all; whether it would influence them to shade their testimony at all, whether they would hope to get hired by persons in the future in similar situations; and, therefore, would want to have certain testimony, so they can collect those fees in the future. You'll have to consider that in your judgment.[90]

Defense counsel objected, arguing that "the remarks go to 'the defense attorney being in cahoots . . . with the expert witnesses.'"[91] The prosecutor countered that "his comment was permissible because 'he did not specifically say the defense attorney' may hire the experts in the future."[92] The trial court sided with the defense: "No, but that's the correlation that you made. That is the correlation that you just made about hopes of being hired in similar cases in the future."[93] The trial court immediately instructed the jury to disregard the prosecution's comment because it was improper.[94]

[89] *See infra* notes 91–95 and accompanying text.
[90] *Smith*, 770 A.2d at 264–65.
[91] *Id.* at 265.
[92] *Id.*
[93] *Id.*
[94] *Id.*

Application of the principles proposed in the present discussion would have led the court to overrule the objection. Rather than argue that the fees caused the experts to manufacture opinions they do not believe, the prosecutor correctly invited the jury to consider the potential bias created by those fees, as well as the experts' hope of receiving similar work and fees in the future (though such hope would be better established through cross-examination). Additionally, when addressing potential bias based on future expert witness opportunities, the prosecutor refrained from arguing that that the experts may have "shaded" their testimony in the hopes of being retained by the same defense attorney in the future;[95] by doing so, he properly avoided suggesting that the expert witnesses' opinions were a product of defense counsel's urgings.

The prosecutor continued:

> Ladies and gentlemen, I made an improper comment. I apologize to you. I was not aware of the impropriety of the argument, but the Judge has ruled.
>
> In any event, you can consider the fees, and there will be no argument about that. You can consider the fees when you're considering whether the expert is telling the truth or not or whether the expert has shaded his testimony.[96]

Following argument, and before deliberations began, the trial court provided the jury with the following instruction:

> You're also instructed that the amount of an expert witness's fee is a matter which you may consider as possibly affecting the credibility, interest, bias, or partisanship of the witness. However, since all expert witnesses expect to be paid and are paid, you are instructed that there is nothing improper in an expert witness being paid a reasonable fee for his work and

[95] *Id.*

[96] *Smith*, 770 A.2d at 265.

> time in attending court and in preparing for attendance in . . . court.[97]

The Supreme Court of New Jersey found that the prosecutor had engaged in misconduct that warranted reversal of the defendant's conviction and a new trial, noting: (1) "there was no aspect of the defense expert witnesses' testimony or cross-examination that remotely suggested that the defense expert witnesses fabricated their testimony or that they were motivated to lie"; (2) "there was absolutely no evidence in the record suggesting that the defendant's experts had relied or were relying on defense counsel for employment either in the past or in the future"; and (3) "the prosecutor's comments improperly implied that because Lieutenant Mentzer was not paid, and the defense experts were, the State's witness was more credible."[98]

The Supreme Court of New Jersey's first two complaints ignore the inherent risk of bias that expert witness fee arrangements create—an inherent risk that counsel should be free to highlight. The court's third argument presents a closer call. While the prosecutor did distinguish the payment of the parties' respective expert witnesses, his description of the prosecution's expert witness as "associated with the police" should have made it clear to the jury that he was not necessarily completely free from potential bias. Nevertheless, for the reasons discussed above,[99] prosecutors should avoid comparing the compensation of their expert witnesses to the compensation of defense expert witnesses.

The Supreme Court of New Jersey recognized the reasons prosecutors should avoid such comparisons and urged changes to the State's model jury instructions intended to level the playing field:

> Finally, we note that in criminal cases the State's expert witnesses are almost always unpaid. Accordingly, we question the fairness of a jury instruction in criminal cases that merely states that the amount of a defense witness' fee is a matter that

[97] *Id.*
[98] *Id.* at 270–71.
[99] *See supra* Section IV.

> a jury may consider as possibly affecting the credibility of the witness. Such an instruction, in a close case, may tip the scales in favor of the credibility of the State's expert witnesses who, although unpaid, may have an equal or greater interest in the outcome than do the defense witnesses because they often are employed by a law enforcement agency involved in the prosecution. We request the Supreme Court Committee on Model Jury Charges, Criminal to consider the issue and to modify the standard expert witness instruction to achieve better balance in the trial of criminal cases.[100]

V. PROPOSED JURY INSTRUCTIONS

While the present discussion repudiates much of the *Smith* analysis, it does find merit in the Supreme Court of New Jersey's request that jury instructions be tailored to avoid some of the issues discussed herein. In a concurring opinion issued in *Dunaway v. State*, Justice Blass of the Supreme Court of Mississippi expressed his concern with the frequency with which the court was confronted with improper arguments relating to an expert witness's bias and expressed a desire for "[m]ore effective means of preventing" it.[101] Jury instructions can provide such means.

Jury instructions regarding parties' efforts to prove an expert witness's bias must take into account the impact expert testimony may have on the jury. The Court of Appeals of Maryland (in a civil case) explained:

> Expert opinion testimony can be powerful evidence. In some cases and on certain issues, it is essential . . . . [B]ut even if not legally required, it can have a compelling effect with a jury. That is why, especially with expert witnesses, "wide latitude must be given a cross-examiner in exploring a witness's bias or motivation in testifying," why, in particular, "the

[100] *Smith*, 770 A.2d at 274.

[101] *Dunaway, 551 So. 2d* at 165 (Blass, J., concurring).

> cross-examiner must be given latitude to cross-examine a witness concerning any bias or interest the witness may have that would not lead the witness to shade his testimony, whether consciously or not, in favor of or against a party.[102]

Logically, the same can be said of argument that is based on answers elicited from such cross-examination, so long as the argument is truly based on the evidence and not merely speculation and conjecture.

The jury instructions proposed below—along with the proposed restrictions of attorneys' arguments of bias—serve at least two purposes.[103] Most obviously, they restrain the attorneys from making arguments that are unsupported by the evidence and/or unduly appeal to the jurors' emotions. At the same time, however, these proposed instructions aim to undermine cynical jurors' undue skepticism of these expert—and oftentimes professional—witnesses.[104]

A typical jury instruction regarding witness bias might read as follows:

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[102] Wrobleski v. de Lara, 727 A.2d 930, 933 (Md. 1999).

[103] *See infra* 24.

[104] As Professor Graham explains:

> The Advisory Committee's Note to Rule 706 of the Federal Rules of Evidence state the issue as follows: "The practice of shopping for experts, the venality of some experts, and the reluctance of many experts to involve themselves in litigation, have been matters of deep concern." Neither the image possessed of expert witnesses by many members of the legal profession nor the concern generated by expert witness venality are recent phenomenon. As early as 1858, the United States Supreme Court felt compelled to speak to the question: "Experience has shown that opposite opinion of persons professing to be experts may be obtained to any amount."
>
> Some years later, the Illinois Supreme Court noted that all too often the ease with which an expert may be found to support the theory of either party is due to the fact that his opinion is simply the natural and expected result of his employment.

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> You are instructed that you are the sole judges of the weight of the evidence and of the credibility of the witnesses in this case.
>
> You are entitled to take into consideration, in determining what weight will be given to the testimony of the several witnesses, their demeanor on the witness stand; the probability or improbability of the facts testified to by them, as shown by the evidence; the means of observation and knowledge of the witnesses; the intelligence or lack of intelligence of the witnesses; the bias, interest, or prejudice, if any, of the witnesses, or the lack of bias, prejudice, or interest; all as may be shown by the evidence, together with all matters, facts, and circumstances shown in evidence on the trial; and to give the testimony of each witness such weight as you believe it is fairly entitled to in the case.[105]

A simple addition to these instructions could go a long way in undermining any improper argument that is made in the heat of the moment. Such an addition would be similar to the instruction provided in *State v. Smith* with slight modifications that adequately address the Supreme Court of New Jersey's concerns with the prosecution arguing the issue of bias by comparing the cost of the prosecution's expert ("free") to the cost of the defense's experts:

> You may consider an expert witness's compensation—whether it be the salary a government witness receives or pay that a defense witness receives pursuant to a contract with the defense—in determining whether an expert witness's opinion was influenced by the expert witness's bias, prejudice, or interest. However, there is nothing unusual or improper in an expert witness being paid for the expert witness's work. The receipt of compensation does not, by itself, prove bias,

[105] 25B AM. JUR. PL. & PR. FORMS WITNESSES § 228 (2023).

> prejudice, or interest. It is simply one factor you may consider in determining the credibility of an expert witness's testimony.

VI. CONCLUSION

The risk that an expert witness's opinion might be a product of financially-driven bias—whether implicit or conscious—is undeniable. At the same time, arguments relating to such potential bias must be grounded in evidence and must not be used as a basis to improperly denigrate an expert witness or the attorney who retained the expert witness.

Accordingly, courts should permit counsel for both sides to question an expert witness about:[106]

> (1) The compensation the expert witness is to receive for work related to the case at hand;
>
> (2) The percentage of the expert witness's income that is derived from providing expert witness services;
>
> (3) The number and/or percentage of times the expert witness has testified for the prosecution or defense;
>
> (4) The number of times the expert witness has been retained by the prosecuting office or members of the defense team (as such evidence tends to show the expert witness's potential desire to continue to receive such work); and
>
> (5) Efforts the expert witness has made to obtain work as an expert witness, such as the posting of advertisements (as such evidence tends to show the expert witness's potential need for such work).

Such cross-examination assists in exposing the fact, strength, and source of the expert witness's potential financially motivated bias.

During closing arguments, counsel should be permitted to highlight the facts gleaned from such proper cross-examination for the purpose of showing an expert witness's potential bias.[107] Proper argument relating to an expert witness's compensation cannot, however, be accompanied by insults or other gratuitous comments that serve no purpose other than to inflame the passions of members

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[106] *See supra* Section III.

[107] *See supra* Section IV.

of the jury and, thus, distract them from the evidence upon which their verdict must be based.[108]

Finally, the jury instructions proposed herein[109] serve at least two purposes. First, they help undermine the impact of any improper arguments made in the heat of oftentimes-contentious trials.[110] Second, they help undermine cynical jurors' assumptions that the opinions of all expert witnesses are tainted by financially motivated bias.[111]

The scope of the present discussion is limited to propriety of cross-examination and argument regarding an expert witness's potential financially motivated bias, as well as the proposal of jury instructions that address potential related issues. It does not—in the case of a prosecutor's improper cross-examination and/or argument—address whether a prosecutor's conduct deprived the defendant of due process. The principles discussed herein can and should, however, be used in making such a determination.

[108] *Id.*
[109] *See supra* Section V.
[110] *Id.*
[111] *Id.*