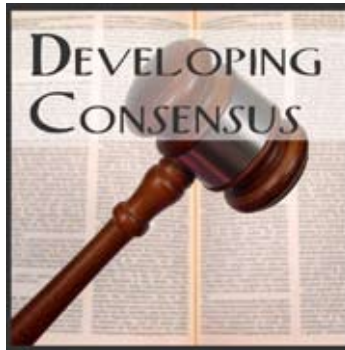


Developing Consensus: Rule 405 (Methods of Proving Character)

Under FRE 405 guilt-assuming hypothetical questions during the cross-examination of a character witness poses particular problems. Most Circuits interpret FRE 405 so that guilt-assuming hypothetical questions are not an appropriate vehicle for inquiry. In *United States v. Shwayder*, 312 F.3d 1109, 1120 (9th Cir. 2002), the Ninth Circuit joined the majority of other circuits in prohibiting the government from using guilt-assuming hypotheticals. In doing so, the circuit resolved an open issue concerning use of guilt assuming hypotheticals in cross-examining character witnesses.



The Guilt-Assuming Hypothetical Problem

United States v. Shwayder involved a racketeering, money laundering, securities fraud, wire fraud and conspiracy trial in which, during cross-examination of two character witnesses, the prosecutor asked if the witness's opinion would change if the defendant had committed specific acts alleged in the indictment (e.g., "Would it change your opinion . . . if he signed off on official filings with the [SEC] to issue millions of shares of stock for imaginary consulting services?"). The witness responded that the act was not consistent with the witnesses' knowledge of the defendant. The defense did not object to the form of the questions.

The Ninth Circuit noted that it had not considered "whether it is error for the prosecution to ask questions on cross-examination that assume the defendant's guilt of the precise acts for which he is on trial." [1120] The Ninth Circuit joined with other circuits and held that "the use of guilt assuming hypotheticals undermines the presumption of innocence and thus violates a defendant's right to due process." [1121 & n.7]

Because the defense did not object at trial to the questions, the error was reviewed under the plain error standard. The circuit concluded the error did not meet the test for plain error, particularly since many of the hypothetical questions were unanswered or were answered in disbelief, "bolstering rather than detracting from his positive opinion of the defendant's honesty." [1121]

Circuits Permitting Use Of Guilt-Assuming Hypotheticals

❖ The D.C. Circuit is the only identified circuit which has allowed guilt assuming hypotheticals. See *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989) (holding no error in permitting guilt assuming hypotheticals on cross-examination of character witness).

Circuits Barring Use of Guilt-Assuming Hypotheticals

❖ **Second Circuit:** *United States v. Long*, 917 F.2d 691, 703-05 (2d Cir. 1990) (guilt assuming hypotheticals by prosecutor was not harmless); *United States v. Oshatz*, 912 F.2d 534, 539 (2d Cir. 1990) ("The jury might infer from the judge's permission to ask a guilt-based hypothetical question that the prosecutor has evidence of guilt beyond the evidence in the record."; error was harmless), *cert. denied*, 500 U.S. 910 (1991); *United States v. Morgan*, 554 F.2d 31, 34 (2d Cir.) (*dicta* discouraging questions on opinion testimony; concluding "that the asking of the hypothetical question at issue herein, based as it was upon testimony already offered, was not prejudicially improper so as to mandate reversal"), *cert. denied*, 434 U.S. 965 (1977)

❖ **Fourth Circuit:** *United States v. Mason*, 993 F.2d 406, 408-09 (4th Cir. 1993) (noting "adherence to a basic concept of our justice system, the presumption of innocence, is not served by this line of questioning"; error was not harmless) (quoted favorably in *Shwayder*, 312 F.3d at 1120-21); *United States v. Siers*, 873 F.2d 747, 749 (4th Cir. 1989) (error in asking guilt-assuming hypotheticals concerning opinion and reputation testimony was harmless error)

❖ **Fifth Circuit:** *United States v. Smith-Bowman*, 76 F.3d 634, 636-37 (5th Cir.) (even assuming hypotheticals were improper, the error was harmless), *cert. denied*, 518 U.S. 1011 (1996)); *United States v. Palmere*, 578 F.2d 105, 107 (5th Cir.) (per curiam) (no plain error in hypothetical questions), *cert. denied*, 439 U.S. 1118 (1978); *United States v. Candelaria-Gonzalez*, 547 F.2d 291,

294-95 (5th Cir. 1977) (reversing where “agent’s testimony was raised to the status of accepted fact, and the presumption of innocence was destroyed in the process”; “These hypothetical questions [strike] at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of fair trial.”)

❖ **Sixth Circuit:** *United States v. McGuire*, 744 F.2d 1197, 1204-05 (6th Cir. 1984) (*dicta* concerning opinion and reputation testimony; while it “would be error to allow the prosecution to ask the character witness to assume defendant’s guilt of the offenses for which he is then on trial,” questions concerning “whether there are rumors circulating in the community which would affect the defendant’s reputation” may be asked; noting questions concerning whether witness heard about lawsuit are permissible), *cert. denied*, 471 U.S. 1004 (1985)

❖ **Seventh Circuit:** *United States v. Williams*, 738 F.2d 172, 177 (7th Cir. 1984) (“The questioning allowed the prosecution to foist its theory of the case repeatedly on the jury and to force an unsuspecting witness to speculate on the effect of a possible conviction.”; concluding error was harmless)

❖ **Tenth Circuit:** *United States v. Page*, 808 F.2d 723, 731 (10th Cir.) (reputation testimony; although prosecutor seven times used guilt-assuming hypotheticals, error was harmless), *cert. denied*, 482 U.S. 918 (1987); *United States v. Polsinelli*, 649 F.2d 793, 796-97 (10th Cir. 1981) (error in questioning was harmless); *United States v. Palmere*, 578 F.2d 105, 107 (5th Cir.) (per curiam) (no plain error in hypothetical questions), *cert. denied*, 439 U.S. 1118 (1978)

❖ **Eleventh Circuit:** *United States v. Guzman*, 167 F.3d 1350, 1352 (11th Cir. 1999) (while guilt-assuming questions were inappropriate, error was harmless).

An Additional Note: Application Of Plain Error Standard

The *Shwayder* case highlights the importance of timely objections to preserve evidence issues on appeal. The circuit applied the well-established, four-part plain error standard to assess the impact of the error. That standard provides that no relief will be granted unless there has been:

- (1) An error,
- (2) That was clear or obvious
- (3) That the error affected substantial rights, and
- (4) The error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. [1120 (citation omitted)].

While the first plain error element was met in *Shwayder*, the circuit did not decide whether the second element could be met where all but one circuit addressing the issue has prohibited guilt-assuming hypotheticals. There was no plain error nonetheless since the third and fourth elements were not satisfied. [1120-21]



Case Reference

Citation: *United States v. Shwayder*, 312 F.3d 1109, 1120 (9th Cir. 2002), *cert. denied*, 540 U.S. 826 (2003).

Type of Action/Claim or Charge: Criminal; 18 U.S.C. §§ 1962(c) (racketeering); 1962(d) (RICO conspiracy); 371 (conspiracy); 1343 (wire fraud), 1956 & 1957 (money laundering); 15 U.S.C. §§ 78j(b), 78ff(a) (securities fraud). 