6.29. Impeachment of a Law Enforcement Officer

(1) A law enforcement witness is subject to the same rules governing the impeachment of any witness, as set forth in Guide to New York Evidence rule 6.11. The credibility of a law enforcement witness therefore may be impeached by evidence that has a tendency in reason to discredit the truthfulness or accuracy of the witness's testimony.

(2) The foundational requirements include:

(a) the showing of a good faith basis for the impeachment inquiry. A good faith basis for an impeachment inquiry requires that the inquiring party have a reasonable basis for believing the truth of things about which counsel seeks to ask.

(b) identification of specific allegations, credibility determinations, or acts of misconduct that are relevant to the credibility of the witness in the current proceeding.

(c) the trial court's assessment as to whether the proffered impeachment inquiry would confuse or mislead the jury or create a substantial risk of undue prejudice to the parties. Upon a finding that it would, the court may in the exercise of its discretion preclude or limit the scope of the inquiry.

(3) Sources of a good faith basis for impeachment of a law enforcement officer include:

(a) Civil lawsuit.

(i) Specific acts of misconduct lodged in a lawsuit against a testifying member of law enforcement constitutes a good faith basis for an impeachment inquiry of the

allegations asserted in that lawsuit that are relevant to the witness's credibility in the action in which the witness is testifying.

(ii) If the lawsuit did not result in an adverse finding against a witness, on cross-examination, it is not permitted to ask the witness if he or she has been sued, or if the case was settled (unless there was an admission of wrongdoing), or if the criminal charges related to the plaintiffs in those actions were dismissed. However, pursuant to paragraph (a) of this subdivision, questions based on the specific allegations of the lawsuit may be asked.

(b) A judicial determination that a law enforcement witness testified falsely in a proceeding, while not binding on the question of the witness's credibility in the proceeding in which the witness is testifying, constitutes a good faith basis for an impeachment inquiry of that witness with respect to that determination.

(c) Other misconduct of the witness, whether proved in a court proceeding or not, including, for example, acts of dishonesty and misstatements about an event or the officer's conduct made to a prosecutor, constitutes a good faith basis for an impeachment inquiry of the witness.

(4) Evidence that charges on trial had already been determined adversely to the defendant by another tribunal is inadmissible for impeachment of the defendant or otherwise.

Note

This rule is derived from the holdings of *People v Smith* (27 NY3d 652 [2016]) and *People v Rouse* (34 NY3d 269 [2019]).

Subdivision (1) is derived from *Smith*, which held that "law enforcement witnesses should be treated in the same manner as any other witness for purposes of cross-examination. The same standard for good faith basis and specific allegations relevant to credibility applies—as does the same broad latitude to preclude or limit cross-examination" (*Smith* at 661-662; *Rouse* at 273).

Subdivision (2) is drawn from the "logical framework" *Smith* set forth for deciding whether *to permit* the impeachment inquiry:

> "First, counsel must present a good faith basis for inquiring, namely, the lawsuit relied upon; second, specific allegations that are relevant to the credibility of the law enforcement witness must be identified; and third, the trial judge exercises discretion in assessing whether inquiry into such allegations would confuse or mislead the jury, or create a substantial risk of undue prejudice to the parties" (*Smith* at 662).

Rouse declared that a good faith basis "requires only that counsel have some reasonable basis for believing the truth of things about which counsel seeks to ask" (*Rouse* at 277 [internal quotation marks and citation omitted]).

Subdivision (3) (a) (i) is derived from the facts of the three cases decided in the *Smith* opinion (*Smith*; *Ingram*; *McGhee*). In all three cases, the Court held that a lawsuit alleging misconduct by the testifying officers constituted a good faith basis for the inquiry and that specific allegations in those lawsuits about which the defense sought to question the officers were relevant to the case on trial and the credibility of the witness.

In *Ingram*, for example, the defense was that the officers had "fabricated evidence and concocted a false story" of the events (27 NY3d at 666). The officers were subject to a pending civil suit that alleged some of the same conduct; that civil suit provided the good faith basis for the inquiry and for the inquiry of "specific allegations" that were relevant to the officers' credibility (*id.* at 667). The trial court had denied the application to cross-examine the officers because the civil action was pending. That, the Court of Appeals held, was an abuse of discretion.

It was not relevant that the action was pending or that the lawsuits had not been resolved, given the long-standing rule of impeachment that a good faith basis for inquiry about bad acts is permitted irrespective of whether the prior bad act has been proved in a court proceeding (*Smith* at 661; *Rouse* at 273).

Subdivision (3) (a) (ii) sets forth the limitation on cross-examination that *Smith* pronounced:

> "Where a lawsuit has not resulted in an adverse finding against a police officer, as is the case with these three appeals, defendants should not be permitted to ask a witness if he or she has been sued, if the case was settled (unless there was an admission of wrongdoing) or if the criminal charges related to the plaintiffs in those actions were dismissed. However, subject to the trial court's discretion, defendants should be permitted to ask questions based on the specific allegations of the lawsuit if the allegations are relevant to the credibility of the witness" (*Smith* at 662).

Subdivision (3) (b) and (c) are principally derived from *Rouse. Rouse* confirmed the holding and scope of *Smith* by recognizing that, subject to the analytical framework set forth in *Smith*, misstatements of a testifying officer made to a federal prosecutor in a different matter and a prior judicial determination in which a testifying officer was found to have given unreliable testimony constituted a good faith basis for inquiry (*Rouse*, 34 NY3d at 276-278).

The officer in *Rouse* had "misled" a federal prosecution with respect to his involvement in a ticket-fixing scheme about which the defense should have been permitted to cross-examine him, given that dishonesty is conduct bearing on a person's truthfulness. (*Id.* at 276 ["even where a prior bad act by a law enforcement officer is not criminal, it may be a proper subject for impeachment questioning where it demonstrates an untruthful bent or significantly reveals a willingness . . . to place the advancement of his individual self-interest ahead of principle or of the interests of society" (internal quotation marks and citation omitted)].)

Also, in *Rouse*, there were federal court rulings that the police officers testifying in the state court proceeding had given testimony "incredible in a manner which suggested that the officers may have falsely testified in order to obtain a desired result" (*id.* at 280). Those determinations, held *Rouse*,

> "were probative of the officers' credibility in the current prosecution, where defendant's entire defense was aimed at convincing the jury that the officers were incorrectly identifying him as the shooter in order to avoid backlash for allegedly assaulting defendant upon arrest or for capturing an innocent bystander. The only countervailing prejudice articulated by the court in precluding defense counsel from this line of inquiry was concern that the jury *may* view the prior judicial determinations of credibility as binding. Such concern, however, could be mitigated by providing the jury with clarifying or limiting instructions, and that prejudice does not outweigh the probative and impeaching value of the inquiry." (*Id.* at 280-281.)

Other examples where the trial court properly allowed or should have allowed cross-examination include: *People v Enoe* (144 AD3d 1052, 1054 [2d Dept 2016] [An officer who testified about having witnessed the defendant possessing a gun in the back seat of a livery cab was properly subject to cross-examination about specific allegations in a federal lawsuit that the officer had falsely arrested an individual "on a weapon possession charge" in order to gain overtime compensation and " 'credit' for a gun-related arrest"]) and *People v Conner* (184 AD3d 431, 431 [1st Dept 2020] [defendant should have been permitted to cross-examine an officer about allegations in a civil lawsuit that charged him with the lodging of false charges, given that the complaint contained "allegations of falsification specific to this officer (and another officer), which bore on his credibility at the trial"]).

By comparison, examples where the trial court properly denied the impeachment inquiry include: *People v Watson* (163 AD3d 855, 860-861 [2d Dept 2018] [the trial court properly exercised its discretion in precluding defense counsel from inquiring into the underlying facts of two federal lawsuits because the "complaints in those actions only contained broad conclusory allegations of unlawful police action by large groups of officers, and did not set forth specific acts of misconduct against [the testifying officer] individually"]); *People v Williams* (184 AD3d 442, 442 [1st Dept 2020] ["The court providently exercised its discretion in precluding defendant from cross-examining a Department of Correction captain about a pending disciplinary investigation. The allegations underlying the pending investigation involved a violation of Department policy that had no bearing on the officer's credibility, whether in general or in this case"]) and *People v Barnes* (173 AD3d 565, 566 [1st Dept 2019] [The court properly denied defense counsel's motion to cross-examine a police witness based on a federal action against him "and other officers" that had been settled without any admission of wrongdoing, where the federal " 'complaint did not allege, or even support an inference, that (the witness) personally engaged in any specific misconduct or acted with knowledge of the misconduct of other officers' " (quoting *Smith* at 663)]).

In light of the repeal of Civil Rights Law § 50-a (L 2020, ch 96 [eff June 12, 2020]), issues have arisen regarding the scope of required disclosure of police internal affairs bureau (IAB) files and the corresponding availability of those records for impeachment. One court has directed the disclosure of "substantiated" and "unsubstantiated" IAB files of police officers involved in a case with the further holding that "exonerated" or "unfounded" files need not be produced on the theory that as a threshold matter there in an insufficient good faith basis for cross-examination by defense counsel of the latter files. The ultimate issue regarding the scope of permissible cross-examination of such witnesses, however, remains unsettled and will probably be resolved by in limine motions directed to the trial judge's discretion. (*See People v Randolph*, 69 Misc 3d 770 [Sup Ct, Suffolk County 2020].)

Subdivision (4) is derived from *People v Rosenfeld* (11 NY2d 290, 297-

298 [1962]) where the Court explained that it had "held it to be serious error to bring to the jury's attention in a criminal case the fact that the charges on trial had already been determined adversely to the defendant by another tribunal." Thus, *Rosenfeld* held it was error for the prosecutor in cross-examining defendants who were police officers to elicit that they had been suspended from police duty for the conduct for which they were on trial. (*Id.* at 297-299.)