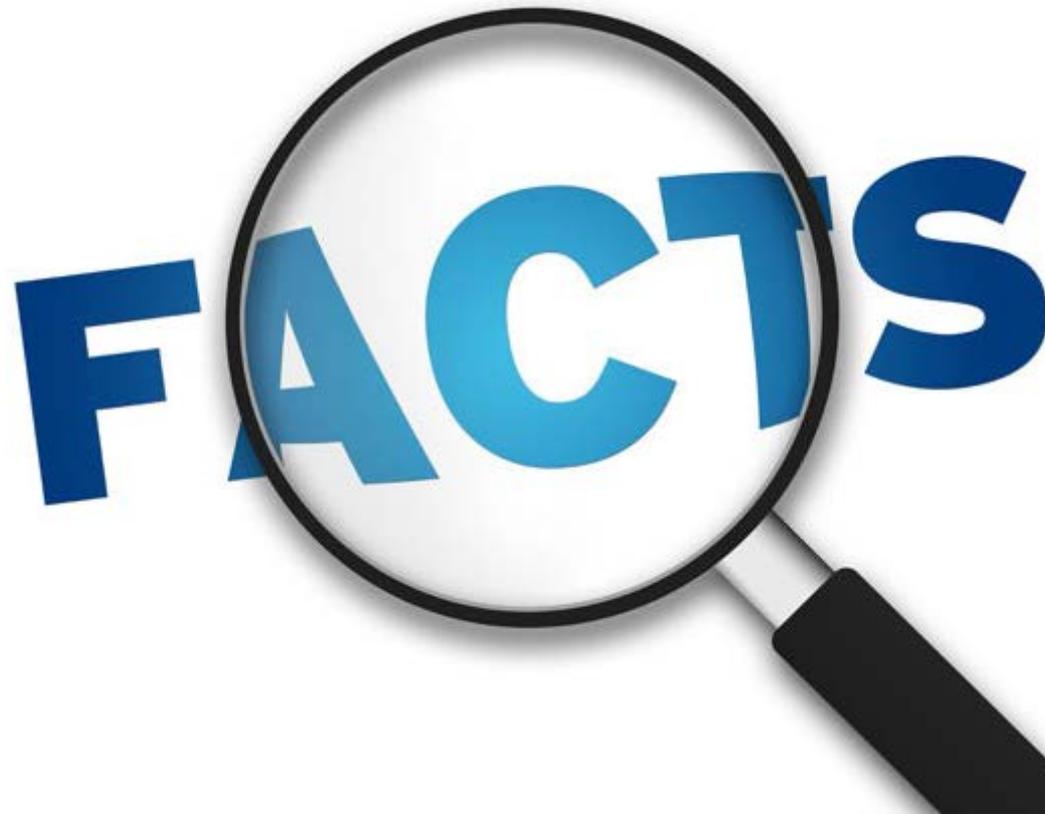


INVESTIGATION: THE CREATION OF FACTS

SPD 2015
Annual
Conference



FACTS, FACTS, FACTS

Facts create theories

Facts support theories

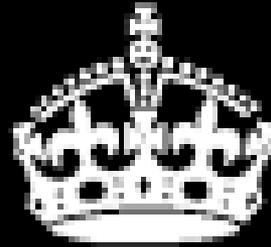
Facts limit theories

Facts extinguish theories

Investigation is the creation of
facts

THE PLAN

- **Case Analysis, Theory, and Defenses**
- **Preparation**
- **Interviewing Techniques**
- **From Interview to Cross**
- **But....**



**KEEP
CALM
AND
TRUST
NO ONE**

**I HAVE NO SPECIAL
TALENTS. I AM ONLY
PASSIONATELY
CURIOUS.**

-ALBERT EINSTEIN

CASE ANALYSIS, THEORY, AND DEFENSES

CASE ANALYSIS

- In every case...
- Theory
- Legal Defense
- Facts Beyond Change
- Theory + Legal Defense = Defense Theory



THEORY

- Words you hear in your mind as case is prepared
- Factually driven
- Persuasive
- “I had to protect myself, I had no other choice”
- “They didn’t see what they think they saw”
- “I wasn’t even there, I was x...”



THEORY

- Unifying focal points for all parts of the case
 - Investigation
 - Motions in Limine
 - Voir Dire
 - Opening
 - Cross etc...



DEFENSES

- Legal basis → Not Guilty
- Self-defense
- Fabrication
- Other suspect
- Duress
- Entrapment



DEFENSES

- Guilty of Lesser
- Misidentification
- Reasonable doubt (worst one)
- **Theory needs to be tied to a defense**



FACTS BEYOND CHANGE



FACTS BEYOND CHANGE

- Facts that will be believed by the jury fair and accurate
- Photos
- Videos
- Certain documents
- Certain Witnesses
- Facts beyond change can be positive, negative, or neutral
- Litigation can change facts beyond change
- **Do not concede facts beyond change prior to investigation**

**Your theory and defense must be
built upon facts beyond change or
in harmony with them**

THEORY + DEFENSE = DEFENSE THEORY

- Review Discovery
- Client's Version
- Legal Defense
- Emotional component
- Investigation

PREPARATION

KNOW THE WHERE

- Go to the scene
- Canvas for witnesses
- Cameras/Surveillance video
- Informs witness interviews

KNOW THE WHO

- Find out as much possible about each witness
- Criminal history
- Include arrest hx
- (PDRs/FOIAs)

KNOW THE WHO

- Protection orders
- Divorce proceedings
- Civil proceedings
- Federal proceedings

KNOW THE WHO

- Internet: (youtube, facebook, google, twitter, instagram)
- Consult police policies & procedures manuals
- Writings of the witnesses (e.g. experts)

KNOW THE WHAT

- Subject Matter (you may need to get experts to educate you)
- Timing of bruises
- Challenging cause of death
- Crime scene (drop off, blood spatter)
- Identification Issues

PREPARING FOR THE INTERVIEW

- Have defense theory in mind
- Use what you have learned
 - About the witness
 - The scene
 - The subject matter
 - What you expect the other witnesses to say

PREPARING FOR THE INTERVIEW

- Should you attempt to “trap” the witness?
- Be careful about your language – avoid using pejorative words like defendant, incident, assault that suggest a crime occurred.
- Consider how other witness testimony and physical evidence may confirm or contradict what the witness has to say
- Notes or no notes

INTERVIEWING TECHNIQUES

INTERVIEWING TECHNIQUES



INTERVIEWING TECHNIQUES

- **Build Rapport**
- **Be conscious of how you appear**
- **Tell the witness up front that if they have any questions about your questions, that you will clarify**
- **End with an affirmation that everything witness said was true, accurate, and complete**

INTERVIEWING TECHNIQUES

- Open-ended questions
- Have a theory in mind (for the case and the witness) but be flexible
- Remember that this is not a cross examination

INTERVIEWING TECHNIQUES

- Avoid suggestive questions.
- “Was it sunny?”
- No
- “What was the weather like?”
- Yes
- “Was the car green?”
- “What color was the car?”

INTERVIEWING TECHNIQUES

- Avoid “do you recall” questions – it has the subtle effect of suggesting the witness might not recall and tends to give them an out.
- Have the witness define terms. What does “angry” or “emotional” mean to that witness?

INTERVIEWING TECHNIQUES

- Resist the urge to be too conversational – permit the witness to answer your question. Keep asking your question until you get an answer.
- Use simple language
- Ask one thing per question
- Concrete descriptions of distance (using objects in the room)
- Concrete estimate of time (using watch/timer, etc...)

INTERVIEWING TECHNIQUES

- Prepare, but be ready to listen
- Determine whether you can make otherwise inadmissible information admissible in the course of the interview
- Use traps/misdirection where appropriate

MINIMUM

- Pre-event
- Event
- Post-event
- Internal
- External



ELIMINATION CLAUSES



TRAPS



TRAP EXAMPLE I

- Self-defense case: you learn decedent (or complainant) has a hx of violent arrests
- Client doesn't know specifics
- No witnesses for character evidence
- Set a trap for the decedent's people



- Lay foundation of how well witness and decedent knew each other
- That knew each other during the time period of arrests
- That lived together/in proximity
- What kind of guy was decedent
- Ask whether decedent in trouble with law
- For what kind of stuff
- Ever anything violent
- Anyone ever claim decedent violent

Hopefully, witness lies and tries to say that decedent never had any arrests for violent offenses

Now, you have a chance to argue the arrest records are admissible as evidence of bias

TRAP II

- Your client has claimed the attack on him was racially motivated
- Client made claim during interrogation
- You are interviewing lead detective
- Lead detective reviewed interrogation but did not conduct it
- “Decedent was white, client was African-American, any reason any part of this incident was racially motivated”
- **Not, “Did you follow up on my client’s claims that the attack was racially motivated?”**

TRAP III

- Your investigator has found multiple Youtube videos of State's witness smoking copious amounts of marijuana (5 bong hits in sequence)
- The witness has acknowledged MJ use
- Question: "How would you describe your marijuana use, light?, moderate?"
- Suggest an answer which potentially makes the bad video admissible

A FINAL WORD ON TRAPS

- Without thorough investigation there can be no trap
- Think about ways to make potentially inadmissible evidence admissible
- You can't force a person into a bad answer, but you can lay the trap

**FROM INTERVIEW TO
CROSS**

INTERVIEWS



CROSS



INTERVIEWS ARE....

- Open-ended
- Searching
- Information gathering
- Unafraid of the answers
- Have a theory in mind (for the case and the witness) but be flexible
- At a bare minimum, always cover pre-event, event, post-event, internal and external
- Okay to be linear
- Use elimination clauses

CROSSES ARE....

- Leading
- One fact per question
- Not information gathering
- Only ask the questions to which you know the answers
- Often not linear
- Exclusively based on the theory of the case

THE IDEAL INTERVIEW

- Lets the attorney know what they can ask
- And what they can't
- Is open ended so the attorney knows what the witness has to say
- Locks the witness into that version
- Allows the attorney to hold the witness to a particular version

EXAMPLE I (INTERVIEW)

- Defense is Mis-Id. Allegation is that client shot bouncer at a night club.
- Interview:
- Q: Had you ever seen the guy before
- A: No
- Q: Can you describe him?
- Q: Yeah, they both looked, ah, African, African-American, dark skin, dreadlocks, both relatively short and skinny
- Q: Do you have any idea how tall
- A: I'm not sure, I'm not a good estimator of height, but he was not 6 feet.
- Q: Do you remember anything about what he was wearing
- A: Its been a long time, I'm not sure but I think I told the police after I was shot that he was wearing a blue shirt

EXAMPLE I (CROSS)

- Let's talk about what you say the person who shot you looked like
- Q: African-American
- A: Yes
- Q: Dark skinned
- A: *I just meant not white. Same complexion as your client, medium.*
- Q: Dreadlocks
- A: Yes
- Q: Long braided hair
- A: *Not really, I just meant kind of medium twists*

EXAMPLE I (CROSS)

- Q: Had on a blue shirt
- A: *It wasn't like an all blue shirt, but it definitely had blue in it.*
- Q: And that is all you remember about what the person who shot you looked like
- A: *No, he had a scar on his cheek. Just like your client*

HOW TO IMPROVE THE INTERVIEW

- **More detail**
- **Skin tone**
- **Hairstyle**
- **Clothes**
- **Be skeptical, don't assume you know what people mean**
- **Elimination clauses**

EXAMPLE II (INTERVIEW)

- Q: So the guy who shot you came back, what was he doing
- A: He walked towards us over to a car that was sitting here on the opposite side of the street
- Q: Pretty much right across
- A: Yeah, right across and uh he went and sat on the hood of the car facing us with his legs in the street just facing us with his hand under his pants
- Q: What did you do when you saw him
- A: I just stayed right there, we were just standing there not saying a word
- Q: How long was the guy sitting on the car for
- A: About 2 minutes and then he walked over to me...

EXAMPLE II (CROSS)

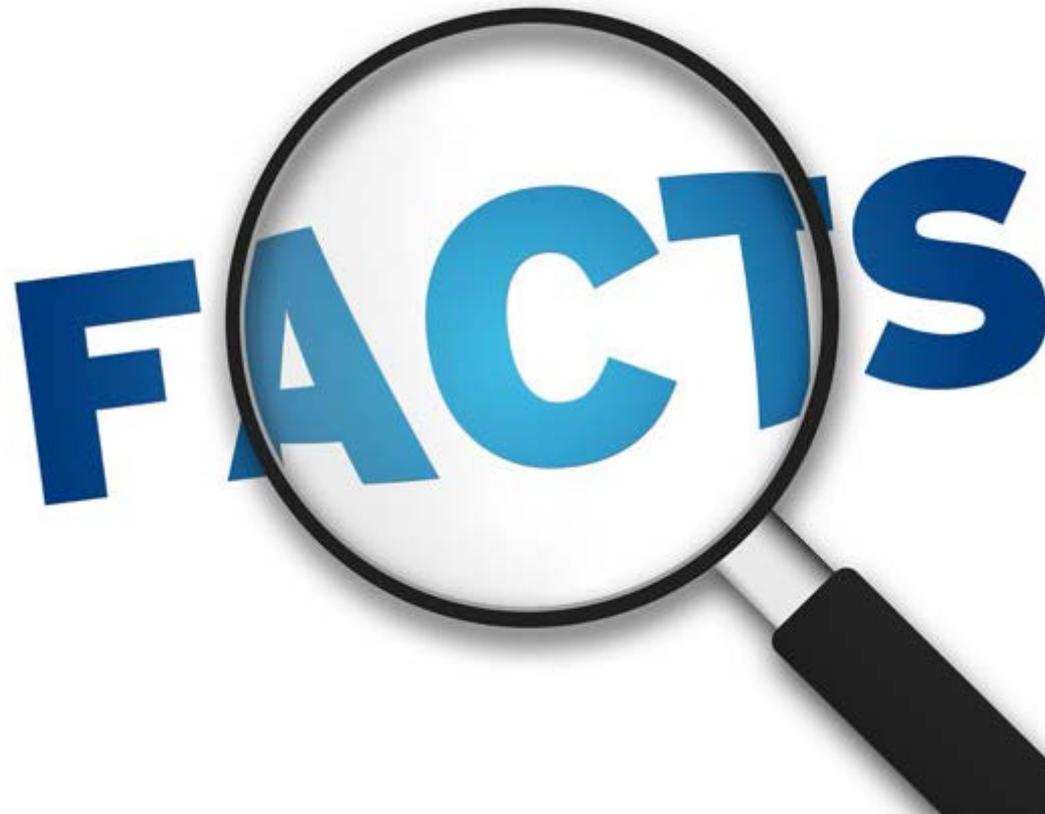
- Let's talk about what happened when the guy came back
 - -Didn't come right up to you
 - -He wasn't on the same side of the street as you
 - -He was on the other side of the street
 - -You didn't call the police
 - -You didn't run

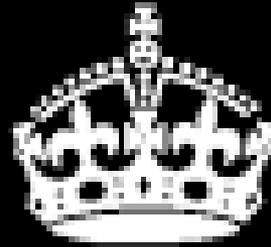
WHAT COULD BE ADDED...

- Time (Do the time trick with them)
- distance (relative to room or objects on the scene),
- how facing,
- how much of face was facing,
- description of car,
- how hand down pants (What think),
- other noises (from club),
- lighting,
- distractions

WHAT COULD BE ADDED...

- ask for a 2nd description,
- why didn't go get police,
- what did when walking towards,
- how feeling,
- what thinking,
- stress level,
- what focusing on (maybe will say hand in pants)





**KEEP
CALM
AND
TRUST
NO ONE**

**I HAVE NO SPECIAL
TALENTS. I AM ONLY
PASSIONATELY
CURIOUS.**

-ALBERT EINSTEIN