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Innocent until Proven (Hypothetically) Guilty: The Third Circuit Condones the Use of Guilt-Assuming Hypotheticals in United States v. Kellogg

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INNOCENT UNTIL PROVEN (HYPOTHETICALLY) GUILTY: THE THIRD CIRCUIT CONDONES THE USE OF GUILT-ASSUMING HYPOTHETICALS IN *UNITED STATES v. KELLOGG*

I. INTRODUCTION

ACCORDING to several researchers, the presumption in favor of the innocence of criminal defendants can be traced back to the book of Deuteronomy, and was "substantially embodied in the laws of Sparta and Athens."[1] To be certain, the presumption of innocence has been "axiomatic and elementary" to the administration of criminal law in the United States for at least 113 years.[2] Although the presumption of innocence has

1. *See* Coffin v. United States, 156 U.S. 432, 454 (1895) (noting that some scholars claim to find elementary notions of presumption of innocence in ancient legal systems and biblical passages) (citing SIMON GREENLEAF, III, A TREATISE ON THE LAW OF EVIDENCE § 29, at 31 n.1 (Edmund H. Bennett & Chauncey Smith eds., 1853)). Although Greenleaf noted the possibility that the seeds of the presumption of innocence can be found in the book of Deuteronomy, it can be argued that the maxim is also illustrated within the Old Testament books of Genesis and Exodus. *See* Alexander Volokh, Aside, *n Guilty Men*, 146 U. PA. L. REV. 173, 173, 178 (1997) (identifying biblical passages loosely related to presumption of innocence); *see also Exodus* 23:7 ("Keep thee far from a false matter; and the innocent and righteous slay thou not . . . ."); *Genesis* 18:26 ("And the Lord said, If I find in Sodom fifty righteous within the city then I will spare all the place for their sakes."). Aside from references within biblical passages and the laws of historical civilizations, countless scholars throughout history have advanced the presumption of innocence within their writings. *See, e.g.*, *Coffin*, 156 U.S. at 454-56 (recounting references to presumption of innocence by scholars and historical figures such as Mascardius De Probationibus, Ammianus Marcellinus, Fortescue, Lord Hale, Blackstone and Lord Gillies); SCOTT CHRISTIANSON, INNOCENT: INSIDE WRONGFUL CONVICTION CASES 17 (2004) ("Voltaire said, 'It is better to risk saving a guilty person than to condemn an innocent one'; and Blackstone wrote, 'It is better that ten guilty persons escape than one innocent suffer.'"). *See generally* Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST 106, 106-20 (2003) (detailing historical origins of presumption of innocence and providing diverse historical references). For example, Lord Hale stated that "[i]n some cases presumptive evidence goes far to prove a person guilty, tho there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished, than one innocent person should die." SIR MATTHEW HALE, KNT., II HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 289 (1847).

2. *See Coffin*, 156 U.S. at 453-54 (declaring that presumption of innocence is "unquestioned" in United States criminal jurisprudence); Pennington, *supra* note 1, at 108 (explaining that presumption of innocence was formally recognized by Supreme Court for first time in 1895 in *Coffin v. United States*). Although it is widely accepted that *Coffin* was the first Supreme Court case to solidify the presumption of innocence explicitly as a fundamental principle of criminal law in the United States, Supreme Court decisions handed down prior to *Coffin* suggest that the presumption has always been a part of the American criminal justice system. *See, e.g.*, Hopt v. Utah, 120 U.S. 430, 439 (1887) (approving jury instruction

long been recognized as a touchstone of United States criminal jurisprudence, the requirements of this presumption have not yet been fully elucidated.[3] Considerable controversy surrounds the nature and extent of questioning to which the prosecution may subject character witnesses during cross-examination.[4] In particular, there is significant debate within the federal circuits regarding whether the use of guilt-assuming hypotheticals—questions asked by the prosecution on cross-examination that require the defense's character witness to assume hypothetically that the defendant is guilty of the charges at bar in order to respond—impermissibly undermines the presumption of innocence to which all criminal defendants are entitled.[5]

The majority of the courts of appeals give substantial deference to the presumption of innocence, and have concluded that the use of guilt-assuming hypotheticals is *per se* inconsistent with that presumption.[6] Despite

adopted by lower court stating that "the law presumes the defendant innocent until proven guilty beyond a reasonable doubt"); Lilienthal's Tobacco v. United States, 97 U.S. 237, 266 (1877) ("[I]n criminal trials the party accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor."); *see also* Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 AM. J. JURIS. 229, 230-31 (1996) (suggesting that presumption of innocence is "an important cornerstone of Justice in Western Civilization").

3. For a discussion of the controversy and confusion within the courts of appeals as to whether the prosecutorial use of guilt-assuming hypotheticals on cross-examination is consistent with the presumption of innocence, see *infra* notes 27-34 and accompanying text. For a focused and in-depth discussion of the Third Circuit's viewpoint regarding the interaction between guilt-assuming hypotheticals and the presumption of innocence, see *infra* notes 64-79 and accompanying text.

4. *See* Risa Karen Plaskowitz, *Cross-Examination of Defendant's Character Witnesses: In Favor of the Prosecutor's Inquiry Into the Charges at Bar*, 59 FORDHAM L. REV. 453, 462-76 (1990) (commenting on extensive controversy regarding nature and content of questions that may properly be asked during cross-examination without undermining presumption of innocence and violating due process).

5. *See id.* at 453 (noting that "intense debate" and considerable confusion has surrounded question regarding admissibility of guilt-assuming hypotheticals under Federal Rules of Evidence); *see also* STEPHEN SALTZBURG, TRIAL TACTICS 108 (Jack Hanna & Kyo Suh eds., 2007) [hereinafter TRIAL TACTICS] ("When a prosecutor cross-examines a character witness about the very charges for which the defendant is on trial, the cross-examination may be inconsistent with the presumption of innocence."). *See generally* Plaskowitz, *supra* note 4, at 453 (describing guilt-assuming hypotheticals as questions that are "predicated on the very charge for which [the defendant] is on trial"). For a discussion of the divergent viewpoints espoused by the circuit courts of appeals regarding the admissibility of guilt-assuming hypothetical questions, see *infra* notes 27-34 and accompanying text.

6. *See* United States v. Shwayder, 312 F.3d 1109, 1121 (9th Cir. 2002) ("[W]e now hold that the use of guilt[-]assuming hypotheticals undermines the presumption of innocence and thus violates a defendant's right to due process."); United States v. Guzman, 167 F.3d 1350, 1352 (11th Cir. 1999) (per curiam) ("The government may not . . . pose hypothetical questions that assume the guilt of the accused in the very case at bar. These guilt-assuming hypotheticals strike at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of fair trial.") (internal quotation marks and citation omitted); United States v. Mason, 993 F.2d 406, 409 (4th Cir. 1993) ("[A]dherance to a basic con-

this majority position, the Third Circuit recently declined to adopt a bright-line rule of invalidity for guilt-assuming hypotheticals.[7] Rather, in *United States v. Kellogg*,[8] the Third Circuit determined that guilt-assuming hypotheticals might properly be asked of opinion character witnesses under certain limited circumstances that do not implicate the presumption of innocence.[9]

This Casebrief discusses the Third Circuit's recent adoption of the minority position regarding the propriety and admissibility of guilt-assuming hypotheticals, and further serves as a guide to practitioners in the

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cept of our criminal justice system, the presumption of innocence, is not served by this line of questioning."); United States v. Oshatz, 912 F.2d 534, 539 (2d Cir. 1990) (noting that guilt-assuming hypotheticals are prohibited "because [they] create[ ] too great a risk of impairing the presumption of innocence"); United States v. McGuire, 744 F.2d 1197, 1204 (6th Cir. 1984) (declaring that it is "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"); United States v. Williams, 738 F.2d 172, 177 (7th Cir. 1984) (agreeing with other courts that guilt-assuming questions "assume[ ] away the presumption of innocence"); *see also* CLIFFORD S. FISHMAN, 3 JONES ON EVIDENCE: CIVIL AND CRIMINAL § 16.41, at 204 (7th ed. 1998) ("The prevailing view is that it is improper to ask a character witness a question such as, 'Would your opinion of the defendant's character change if you learned (or heard) that defendant had [engaged in the conduct alleged in the indictment]?' Such questions, according to several courts, assume the defendant's guilt, thereby unfairly undermining the presumption of innocence . . . ."); MICHAEL H. GRAHAM, 1 HANDBOOK OF FEDERAL EVIDENCE § 405.1, at 494 n.25 (5th ed. 2001) (noting that use of guilt-assuming hypothetical is generally held to be improper because "such . . . questions possess[ ] no probative value, assume facts which are the subject of the litigation, and destroy[ ] the presumption of innocence"); STEPHEN A. SALTZBURG, 2 FEDERAL RULES OF EVIDENCE MANUAL § 405.02[12], at 405-14 (8th ed. 2002) [hereinafter FEDERAL RULES OF EVIDENCE MANUAL] (noting that "[m]ost courts have found it to be impermissible to ask guilt-assuming hypothetical questions of any witnesses who have testified about the defendant's good character" because "defendant is likely to suffer prejudice if guilt is assumed, albeit hypothetically"); PAUL MARK SANDLER & JAMES K. ARCHIBALD, MODEL WITNESS EXAMINATIONS 219 (2d ed. 2003) (noting that it is "reversible error" for guilt-assuming hypothetical to be asked and therefore "guilt-assuming hypotheticals should not be asked of character witnesses"). *But see* United States v. Kellogg, 510 F.3d 188, 196 (3d Cir. 2007) (declining to adopt bright-line rule prohibiting use of guilt-assuming hypotheticals because there is "nothing inherent in guilt-assuming hypotheticals" that makes them run awry of presumption of innocence); United States v. White, 887 F.2d 267, 274-75 (D.C. Cir. 1989) (rejecting view that guilt-assuming hypotheticals are necessarily inconsistent with presumption of innocence).

7. *Kellogg*, 510 F.3d at 196 ("We . . . see no need to adopt a bright-line rule prohibiting a potentially probative type of inquiry."). In so holding, the Third Circuit aligned itself with the District of Columbia Circuit, thereby becoming one of the only two circuits explicitly condoning the use of guilt-assuming hypotheticals under certain circumstances. *See White*, 887 F.2d at 274-75 (holding that "cross-examination of witnesses who . . . give their own opinion of the defendant's character is not error").

8. *Kellogg*, 510 F.3d 188.

9. *See id.* at 196 (upholding use of guilt-assuming hypothetical during cross-examination of Kellogg's opinion character witness and noting that admissibility of such questions depends on facts and circumstances of each individual case).

Third Circuit who may proffer or defend against such questions.[10] Part II summarizes and reviews the specific Federal Rules of Evidence (the Rules) that govern the admissibility of character evidence, and further details the views espoused by the federal courts of appeals regarding the propriety of guilt-assuming hypotheticals under the Rules.[11] Part III provides an analysis of *United States v. Kellogg* and sets forth the reasoning and rationale behind the Third Circuit's divergence from the majority in its rejection of a *per se* rule of invalidity for the use of guilt-assuming hypotheticals.[12] Part IV concludes by providing practical guidance for practitioners in the Third Circuit, and identifies principles that will assist in the use of, or defense against, guilt-assuming hypothetical questions.[13]

II. BACKGROUND

A. *The Federal Rules of Evidence: Character Evidence Under Rules 404 and 405*

Federal Rule of Evidence 404(a), the general provision regarding the admissibility of character evidence, states that "[e]vidence of a person's character . . . is not admissible for the purpose of proving action in conformity therewith on a particular occasion."[14] This general prohibition on

10. For an overview of the facts giving rise to the *Kellogg* case, and a discussion of the rationale behind the Third Circuit's adoption of the minority position concerning the admissibility of guilt-assuming hypotheticals under the Federal Rules of Evidence, see *infra* notes 47-86 and accompanying text.

11. For an overview of the Federal Rules of Evidence applicable to the controversy regarding the admissibility of guilt-assuming hypotheticals, see *infra* notes 14-26 and accompanying text. For a survey of the views espoused by the circuit courts of appeals regarding the admissibility of guilt-assuming hypothetical questions under the Rules, see *infra* notes 27-34 and accompanying text. Prior to *Kellogg*, the Third Circuit had not addressed the propriety of guilt-assuming hypotheticals; for a discussion of Third Circuit jurisprudence that provided the foundation for the *Kellogg* decision, see *infra* notes 35-46 and accompanying text.

12. For a detailed discussion of the Third Circuit's analysis in *Kellogg* and the divergent viewpoint espoused by the court regarding the admissibility of guilt-assuming hypotheticals, see *infra* notes 47-91 and accompanying text.

13. For suggestions to Third Circuit practitioners who may proffer or defend against guilt assuming-hypothetical questions after *Kellogg*, see *infra* notes 92-112 and accompanying text.

14. FED. R. EVID. 404(a). McCormick defines character as "a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness." 1 MCCORMICK ON EVIDENCE § 195, at 686 (John W. Strong ed., 5th ed. 1999) (providing definition for character); *accord* GRAHAM, *supra* note 6, § 404.1, at 349 ("Character is the nature of a person, his disposition generally, or his disposition in respect to a particular trait such as peacefulness or truthfulness."). Questions regarding the admissibility of character evidence generally arise in two basic situations. *See* FED. R. EVID. 404(a) advisory committee's note to the 1972 Proposed Rules (describing possible uses of character evidence). First, one may seek to introduce character evidence in "character in issue" cases, where the character of the accused is directly at issue as an element of the case or controversy that must be proven. *See id.* (describing possible direct use of character evidence in character at issue cases). Another more controversial situation where questions regarding the admissibility of character evi-

the use of character evidence is founded on a recognition that character evidence can have a tendency to confuse juries, prejudice the accused and unduly delay a trial's progress.[15] Despite this general aversion to the use of character evidence, the Rules afford criminal defendants the right to introduce evidence regarding pertinent character traits of themselves or the purported victim.[16] This so-called "mercy rule" is afforded to criminal defendants to assist them in opposing the particularly "strong investigative and prosecutorial resources of the government."[17] Although the prosecu-

dence arise is when such evidence is to be used circumstantially. *See id.* (noting possible circumstantial use of character evidence). Character evidence is used circumstantially when it is offered for the "purpose of suggesting an inference that the person acted on the occasion in question consistently with his character." *See id.* (providing loose definition for circumstantial use of character evidence).

15. *See* FED. R. EVID. 404 advisory committee's note to the 2006 amendments (noting potentially adverse impact that circumstantial use of character evidence can have on fairness and progression of judicial proceedings); Michelson v. United States, 335 U.S. 469, 475-76 (1948) (noting that character evidence "is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge"); FISHMAN, *supra* note 6, § 14.1, at 3 (noting general distrust for character evidence in legal community and describing such evidence as "distracting, time-consuming, and likely to influence a jury far beyond its legitimate probative value"); GRAHAM, *supra* note 6, § 404.1, at 351 (stating that "[c]haracter evidence is of slight probative value and can be very prejudicial" in that it "distract[s] the trier of fact from the main question of what actually happened on the particular occasion[,]" and "reward[s] the good man and . . . punish[es] the bad man because of their respective characters despite what evidence in the case shows actually happened"); 1 MCCORMICK ON EVIDENCE, *supra* note 14, § 188, at 654 ("Character evidence . . . while typically being of relatively slight value, usually is laden with the dangerous baggage of prejudice, distraction, and time-consumption."); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 4.12, at 263-64 (2d ed. 1999) (noting that admission of character evidence can lead to inaccurate presumptions about accused's actions at given time, diversion from questions at bar, undue prejudice, waste of time and denial of fair trial); Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991, 1015 (2007) (stating that "questions of character can be unduly distracting and may inject unfair prejudice into a trial" and therefore "character evidence is strictly limited as to admissibility and, when admissible, as to form"). *But see* Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1254 (2001) ("A past record, then, will be somewhat more associated with innocent defendants within the subset of cases that make it to trial than within the full population of cases. Consequently, a past record exhibited at trial will be less indicative of guilt (and perhaps, if this effect dominates, indicative of innocence)."); Peter Tillers, *What Is Wrong with Character Evidence?*, 49 HASTINGS L.J. 781, 785-93 (1998) (suggesting that rule of inadmissibility for character evidence is not strongly supported by undue prejudice rationale).

16. *See* FED. R. EVID. 404(a)(1)-(2) (providing criminal defendants with right to introduce evidence pertaining to character of self or purported victim); Stephen A. Saltzburg, *Guilt Assuming Hypotheticals: Basic Character Evidence Rules*, 20 CRIM. JUST. 47, 47 (2006) (noting that Rule 404(a) "gives the accused an opportunity to offer predisposition evidence that is otherwise generally inadmissible").

17. *See* MUELLER & KIRKPATRICK, *supra* note 15, § 4.12, at 265-66 (stating that criminal defendants have historically been permitted to submit evidence of good character to assist in their defense against prosecution's vast resources); *see also*

tion does not initially share in this right, the defense "opens the door" by submitting its own character evidence, thereby granting the prosecution the ability to rebut the same.[18]

Whereas Rule 404 details the circumstances under which character evidence is admissible, Rule 405 describes the methods for introducing such evidence.[19] In all cases in which character evidence is deemed admissible under Rule 404, Rule 405 allows proof of character to be offered on direct examination through the introduction and use of reputation evidence or opinion evidence; during cross-examination, the Rule permits

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FED. R. EVID. 404(a) advisory committee's note to 2006 amendments (noting that mercy rule is provided to protect accused whose life and/or liberty may be at stake); *Michelson*, 335 U.S. at 476 (noting that although character evidence may not be proffered by prosecution, admission of such evidence is "opened to the defendant because character is relevant in resolving probabilities of guilt"); 1 MCCORMICK ON EVIDENCE, *supra* note 14, § 191, at 673 n.2 (stating that mercy rule "has been characterized as an amelioration of the 'brutal rigors' of the early criminal law"); Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 235 (2004) (noting that mercy rule is provided to criminal defendants along with "the presumption of innocence, proof beyond a reasonable doubt, and the right to confront one's accusers, as one of the hallmarks of a system designed to protect the accused"); Saltzburg, *supra* note 16, at 47 ("The accused in a criminal case has the right to offer evidence of a pertinent character trait in order to cast doubt on whether he or she would commit the crime charged by the government.").

18. *See* FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible . . . except: (1) In a criminal case, evidence of a pertinent trait of character offered by the accused, *or by the prosecution to rebut the same* . . . .") (emphasis added); Ross, *supra* note 17, at 235 ("[T]he defense chooses whether character evidence will be part of the trial and it appears that the government may not bring up propensity or bad character unless the defense raises good character."). In presenting his or her own character witnesses, the defendant opens the door to cross-examination by the prosecution and risks having his or her character witnesses discredited. *See Michelson*, 335 U.S. at 479 ("The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him."); TRIAL TACTICS, *supra* note 5, at 105 (noting that defense takes risk when calling character witnesses because prosecution gains ability to cross-examine and possibly impeach those witnesses' testimony thereafter); Saltzburg, *supra* note 16, at 47 ("Calling a character witness is not without risk, however. The principal risk is that the witness may be cross-examined about specific acts that are inconsistent with the character to which the witness attests.").

19. *See* FED. R. EVID. 404 advisory committee's note to 1972 Proposed Rules ("Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405 . . . in order to determine the appropriate method of proof."); FED. R. EVID. 405 advisory committee's note to 1972 Proposed Rules ("The rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered by Rule 404."); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2 FEDERAL EVIDENCE § 4.41, at 3 (3d ed., 2007) [hereinafter FEDERAL EVIDENCE] ("[Rule] 405 prescribes the manner in which character . . . may be proved, but without answering the question when character evidence may be received. It is the latter question that is resolved in [Rule] 404.").

direct inquiries into specific instances of the accused's misconduct.[20] Reputation character evidence is defined as testimony provided by a witness regarding the "defendant's reputation in the community for the character trait at issue."[21] Opinion character evidence, on the other hand, is described as testimony provided by a witness regarding "his or her own personal opinion of any facet of the defendant's character."[22]

Because the Rules fail to place constraints upon the prosecution's ability to inquire into "relevant specific instances of conduct" on cross-examination, or upon the nature of witnesses to whom such questions might be asked, a great deal of controversy surrounds this third method of introducing character evidence.[23] Much of this controversy revolves around two questions: (1) whether the prosecution may ask guilt-assuming hypotheticals during cross-examination, and, if so, (2) to which categories of character witnesses such hypothetical questions may be asked.[24] Although the Supreme Court has been presented with various opportunities to settle this uncertain area of the law, the Court has specifically declined to do so to date.[25] Lacking any guidance from the Supreme Court, a

20. *See* FED. R. EVID. 405(a) (providing allowable methods of proving character). Rule 405(a) states that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." *Id.*

21. United States v. Kellogg, 510 F.3d 188, 193 (3d Cir. 2007) (quoting United States v. Curtis, 644 F.2d 263, 267 (3d Cir. 1981)); *see also Michelson*, 335 U.S. at 477 (noting that reputation witnesses "summarize what [they have] heard in the community" and describe "the shadow [the defendant's] daily life has cast in his neighborhood"); Note, *A Comparison and Analysis of the Federal Rules of Evidence and New York Evidentiary Law, Rule 405: Methods of Proving Character*, 12 TOURO L. REV. 413, 418 (1996) [hereinafter *Comparison and Analysis*] ("Reputation evidence is testimony as to the general reputation of the person in the community . . . ."); Plaskowitz, *supra* note 4, at 458 (noting that reputation witnesses testify regarding "degree to which the community regards the defendant as a person who is honest and truthful").

22. *Kellogg*, 510 F.3d at 193 (internal quotations omitted); *accord Comparison and Analysis*, *supra* note 21, at 18 ("[O]pinion evidence is the personal opinion of the witness concerning the person's character.").

23. *See* Plaskowitz, *supra* note 4, at 459, 466-67 (describing controversy over extent to which prosecution may ask questions regarding specific instances of accused's conduct, in particular whether use of guilt-assuming hypotheticals is proper).

24. *See id.* (noting that "[t]here 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," and if so, whether they may be asked of both reputation and opinion character witnesses); *see also* FEDERAL RULES OF EVIDENCE MANUAL, *supra* note 6, § 405.02[12], at 405-13 ("A . . . difficult question is whether the witness can be tested by an assumption of the defendant's guilt as to the crime charged.").

25. *See* Shwayder v. United States, 540 U.S. 826 (2003) (mem.) (denying certiorari and declining opportunity to settle controversy regarding admissibility of guilt-assuming hypotheticals); Oshatz v. United States, 500 U.S. 910 (1991) (mem.) (same); McGuire v. United States, 471 U.S. 1004 (1985) (mem.) (same).

widening split is forming within the circuit courts regarding the propriety and admissibility of guilt-assuming hypotheticals under the Rules.[26]

B. *The Circuit Courts' Application of Rule 405(a) to Guilt-Assuming Hypotheticals*

A great deal of case law has addressed the use of guilt-assuming hypotheticals on cross-examination; however, the courts have been inconsistent in their consideration of the admissibility of such questions.[27] In large measure, the distinction drawn between opinion and reputation character witnesses has provided the fuel for this controversy.[28] With respect to reputation witnesses, each circuit that has addressed the propriety of guilt-assuming hypotheticals on cross-examination has held such questions to be improper.[29] On the other hand, there is a great deal of contro-

26. For a discussion of the divergent viewpoints espoused by the federal courts of appeals with respect to the admissibility of guilt-assuming hypotheticals in the absence of any guidance from the Supreme Court, see *infra* notes 27-34 and accompanying text.

27. *Compare* United States v. Shwayder, 312 F.3d 1109, 1121 (9th Cir. 2002) (prohibiting use of guilt-assuming hypotheticals regardless of whether they are posed to opinion or reputation character witnesses), United States v. Guzman, 167 F.3d 1350, 1352 (11th Cir. 1999) (per curiam) (same), United States v. Mason, 993 F.2d 406, 409 (4th Cir. 1993) (same), United States v. Oshatz, 912 F.2d 534, 539 (2d Cir. 1990) (same), United States v. Williams, 738 F.2d 172, 177 (7th Cir. 1984) (same), *and* United States v. McGuire, 744 F.2d 1197, 1204 (6th Cir. 1984) (same), *with Kellogg*, 510 F.3d at 195-96 (prohibiting use of guilt-assuming hypotheticals when cross-examining reputation witnesses but allowing such questions when posed to opinion character witnesses), *and* United States v. White, 887 F.2d 267, 274-75 (D.C. Cir. 1989) (same). The Fifth, Eighth and Tenth Circuit Courts of Appeals have all held guilt-assuming hypotheticals to be improper when asked of reputation character witnesses, but have yet to issue opinions specifically addressing the admissibility of such questions when cross-examining opinion character witnesses. *See* United States v. Barta, 888 F.2d 1220, 1224 (8th Cir. 1989) (holding guilt-assuming hypotheticals improper when asked of reputation character witness but making no explicit mention of their propriety with respect to opinion character witnesses); United States v. Polsinelli, 649 F.2d 793, 797 (10th Cir. 1981) (same); United States v. Candelaria-Gonzalez, 547 F.2d 291, 294 (5th Cir. 1977) (same). The First Circuit was presented with an opportunity to address the admissibility of guilt-assuming hypotheticals but declined to address the issue, holding that any error would have been harmless. *See* United States v. Innamorati, 996 F.2d 456, 485 (1st Cir. 1993) (declining opportunity to address admissibility of guilt-assuming hypothetical questions).

28. *See Kellogg*, 510 F.3d at 195 (indicating that admissibility of guilt-assuming hypotheticals turns on "meaningful distinction between reputation and opinion character witnesses"); *White*, 887 F.2d at 274 (basing admissibility of guilt-assuming hypotheticals on distinction between reputation and opinion witnesses with respect to extent of allowable cross-examination); Plaskowitz, *supra* note 4, at 467 (explaining that several circuits distinguish between treatment of opinion and reputation character witnesses); Saltzburg, *supra* note 16, at 49 (noting that type of testimony provided may alter permissible scope of cross-examination). For a review of the distinction between reputation and opinion character witnesses, see *supra* notes 21-22 and accompanying text.

29. *See Kellogg*, 510 F.3d at 196 (holding that "posing a guilt-assuming hypothetical to a reputation character witness is improper"); *Shwayder*, 312 F.3d at 1121

versy regarding the use of guilt-assuming hypotheticals to challenge the credibility of witnesses providing opinion testimony regarding the defendant's character.[30]

Although no consensus has been reached, the majority of circuit courts that have addressed the issue have held guilt-assuming hypotheticals to be improper regardless of whether they are asked of reputation or opinion character witnesses.[31] These courts based their decisions largely

(same); *Guzman*, 167 F.3d at 1352 (same); *Mason*, 993 F.2d at 408 (same); *Oshatz*, 912 F.2d at 539 (same); *Barta*, 888 F.2d at 1224 (same); *White*, 887 F.2d at 274 (same); *McGuire*, 744 F.2d at 1204 (same); *Williams*, 738 F.2d at 177 (same); *Polsinelli*, 649 F.2d at 798 (same); *Candelaria-Gonzalez*, 547 F.2d at 294 (same).

30. *Compare Shwayder*, 312 F.3d at 1121 (declaring that guilt-assuming hypotheticals may not be asked of opinion character witnesses), *Guzman*, 167 F.3d at 1352 (same), *Mason*, 993 F.2d at 409 (same), *Oshatz*, 912 F.2d at 539 (same), *Williams*, 738 F.2d at 177 (same), *and McGuire*, 744 F.2d at 1204 (same), *with Kellogg*, 510 F.3d at 196 (rejecting *per se* ban on guilt-assuming hypotheticals asked of opinion character witnesses and holding that determination of admissibility must be carried out on case-by-case basis), *and White*, 887 F.2d at 274-75 (same).

31. *See Shwayder*, 312 F.3d at 1122 (stating general rule that "asking character witnesses hypothetical questions that assume the defendant's guilt during cross-examination is error"); *Guzman*, 167 F.3d at 1352 (holding that "[t]he government may not . . . pose hypothetical questions that assume the guilt of the accused in the very case at bar[ ]" regardless of whether they are asked of reputation or opinion witnesses); *Mason*, 993 F.2d at 409 ("[C]ondemn[ing] the use of guilt-assuming hypothetical questions asked of lay character witnesses, whether testifying about a defendant's reputation in the community for a character trait or expressing an opinion about a trait."); *Oshatz*, 912 F.2d at 539 (holding "guilt-assuming hypothetical questions asked of lay character witnesses . . . whether testifying about a defendant's reputation for a character trait or expressing an opinion about such a trait[ ]" improper); *Williams*, 738 F.2d at 177 (declaring guilt-assuming hypotheticals improper under all circumstances); *McGuire*, 744 F.2d at 1204 ("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."); *see also* FEDERAL RULES OF EVIDENCE MANUAL, *supra* note 6, § 405.02[12], at 405-14 (noting that most courts have adopted bright-line rule prohibiting use of guilt-assuming hypotheticals); FISHMAN, *supra* note 6, § 16.41, at 204 (noting majority position that guilt-assuming hypotheticals are inconsistent with presumption of innocence under all circumstances); GRAHAM, *supra* note 6, § 405.1, at 494 (same). *But see Kellogg*, 510 F.3d at 196 (denying necessity of adopting bright-line rule prohibiting use of guilt-assuming hypotheticals when cross-examining opinion character witnesses); *White*, 887 F.2d at 274 ("Cross-examination of witnesses who testify only to the defendant's community reputation with hypotheticals assuming guilt may be improper. However, similar cross-examination of witnesses who . . . give their own opinion of the defendant's character is not error."). One popular treatise advocates strongly for the adoption of a *per se* rule of invalidity for the use of guilt-assuming hypotheticals:

> It is critical to block questions that would ask whether the witness would alter his opinion or assessment, or whether the reputation would change, if the defendant were in fact guilty of the charged crime. Such 'guilt-assuming' hypothetical questions are objectionable on many grounds. They let the prosecutor assume guilt in questioning the witness and invited the jury to be careless in its thinking, which blatantly undermines the presumption of innocence, and they beg the question to which the character evidence related by suggesting that a good opinion cannot be valid because it is already known that the defendant is guilty when that is the whole point of holding a trial and offering character evidence.

upon the belief that the use of such questions has the potential to undermine the presumption of innocence in violation of the accused's right to due process.[32] Until the Third Circuit's recent decision in *United States v. Kellogg*, the United States Court of Appeals for the District of Columbia was the sole court to have adopted the view that guilt-assuming hypothetical questions may be asked of opinion character witnesses.[33] Other circuit courts have addressed the admissibility of guilt-assuming hypotheticals with respect to reputation witnesses, but have not yet passed judgment on the admissibility of such questions when cross-examining opinion character witnesses.[34]

C. *Early Third Circuit Jurisprudence Related to the Propriety of Guilt-Assuming Questions*

Although *United States v. Kellogg* marked the Third Circuit's first explicit consideration of the propriety of guilt-assuming hypotheticals, the principles underlying the court's decision were set forth in the circuit

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FEDERAL EVIDENCE, *supra* note 19, § 4:43, at 34.

32. *See Shwayder*, 312 F.3d at 1121 ("[T]he use of guilt-assuming hypotheticals undermines the presumption of innocence and thus violates a defendant's right to due process."); *Guzman*, 167 F.3d at 1352 ("These guilt-assuming hypotheticals strike at the very heart of the presumption of innocence . . . ." (quoting *Candelaria-Gonzalez*, 547 F.2d at 294)); *Mason*, 993 F.2d at 409 ("[A]dherence to a basic concept of our justice system, the presumption of innocence, is not served by this line of questioning." (citing *Oshatz*, 912 F.2d at 539)); *Williams*, 738 F.2d at 177 (finding that guilt-assuming hypotheticals "assume[ ] away the presumption of innocence"); *see also* Saltzburg, *supra* note 16, at 48 ("When a prosecutor cross-examines a character witness about the very charges for which the defendant is on trial, the cross-examination may be inconsistent with the presumption of innocence to which the defendant is entitled.").

33. *See White*, 887 F.2d at 274-75 (holding that guilt-assuming hypotheticals are not categorically erroneous when asked of opinion character witness). In 1990 Judge Mukasey, in his concurring opinion in *Oshatz*, advocated the position adopted by the District of Columbia Circuit in *White*. *See Oshatz*, 912 F.2d at 544 (Mukasey, J., concurring) (suggesting that guilt-assuming hypotheticals are valuable, relevant and necessary in determining credibility of opinion character witnesses).

34. *See United States v. Barta*, 888 F.2d 1220, 1225 (8th Cir. 1989) (holding that guilt-assuming hypotheticals "exceed the bounds of propriety" when addressed to reputation witnesses, but failing to address propriety of such questions in regards to opinion witnesses); *United States v. Polsinelli*, 649 F.2d 793, 798 (10th Cir. 1981) ("[N]othing contained herein should be considered as any indication that [guilt-assuming hypotheticals] would have been proper had the character witnesses expressed their personal opinion . . . . That particular matter is not before us."); *Candelaria-Gonzalez*, 547 F.2d at 294-95 (holding guilt-assuming hypotheticals improper when asked of reputation witness, but failing to address same issue with respect to opinion witnesses). Again, although the First Circuit has been presented with an opportunity to weigh-in on the admissibility of guilt-assuming hypotheticals, the court declined to do so. *See United States v. Innamorati*, 996 F.2d 456, 485 (1st Cir. 1993) (declining to address admissibility of guilt-assuming hypothetical questions and resolving case on other grounds).

court's holding in *United States v. Curtis*.[35] *Curtis* involved a criminal defendant charged with three counts of methamphetamine distribution and illegal possession of a firearm.[36] At trial, the defense called four character witnesses to present reputation testimony regarding the defendant's excellent standing within the community.[37] During the cross-examination of those witnesses, the defense objected to a number of improper attempts by the prosecution to elicit information regarding the witnesses' opinions of the defendant—opinions that had not been expressed during direct examination.[38] The trial judge overruled the defense's objections; those rulings provided the basis for the defendant's argument on appeal.[39]

On appeal, the Third Circuit began its analysis by acknowledging that Rule 405(a) authorizes the prosecution to question defense character witnesses regarding specific instances of conduct that are relevant to "the accuracy of the character witnesses' testimony."[40] The court noted that when a character witness provides reputation testimony on direct examination, "inquiry may [thereafter] be made about conduct, and even about charges, which may have come to the attention of the relevant community."[41] On the other hand, the court noted that opinion character witnesses may be cross-examined as to any information "which bears on the fact or factual basis for formation of the opinion."[42] The court, noting this crucial distinction, held that "an opinion witness can be cross-examined only on matters bearing on his own opinion, while a reputation witness can only be examined on matters *reasonably proximate to the time of the alleged offense* and likely to have been known to the relevant community at that time."[43]

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35. *See United States v. Curtis*, 644 F.2d 263, 268-70 (3d Cir. 1981) (elucidating distinction between reputation and opinion character witnesses, thereby providing basis for Third Circuit's decision in *Kellogg*).

36. *See id.* at 264 (describing charges brought against defendant in *Curtis*).

37. *See id.* at 265 (recounting defense's decision to call and question four character witnesses regarding Curtis's reputation within his community).

38. *See id.* at 265-67 (detailing questions asked of Curtis's character witnesses by prosecution and noting objections raised by defense counsel at trial regarding improper questions posed by prosecution as to witnesses' opinions of defendant).

39. *See id.* (detailing court's rulings on numerous objections raised by defense counsel to questions posed by prosecution on cross-examination and noting this as providing basis for appeal).

40. *See id.* at 267-68 (noting that Rule 405 "provides that on cross-examination, inquiry is allowable into *relevant* specific instances of conduct" and that "relevant specific instances of conduct are only instances going to the accuracy of the character witnesses' testimony") (internal quotation marks omitted).

41. *See id.* at 268 (delineating scope and extent of cross-examination allowed when questioning reputation character witnesses).

42. *See id.* (noting broader scope of cross-examination that is permissible when questioning opinion character witnesses).

43. *See id.* at 269 (reiterating permissible scope of cross-examination with respect to opinion and reputation character witnesses and "remind[ing] trial judges, prosecutors and defense attorneys that Evidence Rule 405(a) has not effected a merger between reputation and opinion evidence").

The court declared that questions posed to reputation witnesses should focus on the defendant's reputation at a time reasonably contemporaneous with the acts charged, rather than his or her reputation after the filing of the charges under consideration.[44] According to the court, this rule limits the possibility that the "accused's reputation could well be affected by the gossip which accompanies an indictment, and thus might not be a fair reflection of his character."[45] In holding that reputation witnesses should not be questioned regarding the charges at bar, but that opinion witnesses might be questioned upon any matter which may have affected the opinion proffered, *Curtis* provided the foundation for the Third Circuit's decision in *Kellogg*.[46]

III. WIDENING THE CIRCUIT SPLIT: *UNITED STATES V. KELLOGG*

In *United States v. Kellogg*, the Third Circuit expressly addressed, as a matter of first impression, the admissibility of guilt-assuming hypothetical questions.[47] Relying upon the distinction between opinion and reputation witnesses drawn in *Curtis*, the Third Circuit declined to adopt a *per se* rule of invalidity for guilt-assuming hypotheticals—thereby rejecting the approach taken by the majority of circuit courts.[48] Rather, the court held that although guilt-assuming questions may not be proffered to reputation witnesses, they may be asked of opinion character witnesses under certain circumstances.[49]

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44. *See id.* at 268 (noting time period within which reputation in relevant community is probative and admissible).

45. *See id.* at 268-69 (explaining equitable rationale behind requirement that reputation evidence presented must relate to accused's reputation reasonably contemporaneous with acts charged rather than at time of indictment or trial where undue prejudice could distort accused's overall standing in community).

46. *See* United States v. Kellogg, 510 F.3d 188, 193-95 (3d Cir. 2007) (relying on *Curtis* as foundation for decision to adopt minority position regarding admissibility of guilt-assuming hypotheticals). Because the indictment and trial of the accused can certainly affect a character witness's opinion of the accused, *Curtis* seems to explicitly state that questions regarding the charges at bar should be allowed during cross-examination. *Cf. Curtis*, 644 F.2d at 269 (providing unqualified rule that "opinion witness can be cross[-]examined . . . on matters bearing on his or her own opinion").

47. *See Kellogg*, 510 F.3d at 190 (noting issue on appeal as challenge to use of guilt-assuming hypothetical by prosecution on cross-examination of character witnesses); *see also* Posting of Brett Sweitzer to Third Circuit Blog, http://circuit3.blogspot.com/2007/12/court-widens-circuit-split-on-guilt.html (Dec. 19, 2007) (noting that Third Circuit ruled on propriety of guilt-assuming hypotheticals for first time in *Kellogg*, thereby widening existing circuit split as to that issue).

48. *See Kellogg*, 510 F.3d at 196 ("We . . . see no need to adopt a bright-line rule prohibiting a potentially probative type of inquiry.").

49. *See id.* at 196 (agreeing that "posing guilt-assuming hypothetical[s] to a reputation character witness is improper" but nevertheless allowing such questions when posed to opinion character witnesses).

A. *Factual Background and Procedural Posture of* Kellogg

Between May 1998 and March 1999, Edward V. Kellogg was the owner, acting President and Quality Control Officer of Johnston Laboratories.[50] Johnston Laboratories provided analytical testing services to its customers, many of whom were required to comply with stringent regulations promulgated by the Environmental Protection Agency (EPA) and the Pennsylvania Department of Environmental Protection.[51] In particular, a number of Johnston Laboratories' customers were required to comply with an EPA protocol commonly referred to as "Method 601/602."[52] Under Kellogg's direction, Johnston Laboratories contracted with numerous customers for the specific purpose of performing the Method 601/602 analysis despite the fact that Johnston Laboratories lacked the proper equipment to complete these tests.[53]

Lacking the proper equipment to fulfill its obligations, Johnston Laboratories entered into a subcontract with another laboratory to carry out these analyses.[54] To the detriment of Johnston's customers, the subcontracting laboratory also lacked the equipment necessary to properly carry out the Method 601/602 analysis.[55]

Though aware that neither Johnston Laboratories nor the subcontracting laboratory could carry out the proper analysis, Kellogg nevertheless authorized the subcontractor to analyze the customers' samples using a less sensitive test method, one unable to comply with Method 601/602's requirements.[56] Knowing that these results were not obtained using the appropriate test method, Kellogg caused Johnston Laboratories to mail results stating that EPA Method 601/602 had, in fact, been used; Johnston Laboratories subsequently billed its customers accordingly.[57] For these actions, the government charged Kellogg with thirty-four counts of mail fraud.[58]

At Kellogg's trial in the district court, the defense called a number of character witnesses to testify as to Kellogg's excellent reputation in the

50. *See id.* at 190 (identifying nature of Kellogg's position at Johnston Laboratories).

51. *See id.* (describing nature of Johnston Laboratories' business and customer base).

52. *See id.* (identifying particular EPA protocol requirements for Johnston Laboratories' customers).

53. *See id.* (detailing Kellogg's decision to take on business despite lacking proper equipment to carry out such analyses).

54. *See id.* (noting subcontracting arrangement entered into with Hydro-Analysis Associates, Inc.).

55. *See id.* ("Hydro-Analysis also could not and did not perform VOC testing under Method 601/602.").

56. *See id.* ("Kellogg authorized Hydro-Analysis to test the water samples of Johnston Laboratories' customers using the less sensitive method.").

57. *See id.* (describing Kellogg's commission of mail fraud by sending fraudulent reports and bills to customers).

58. *See id.* (describing nature of charges brought against Kellogg).

community as a law-abiding citizen, and as to their personal opinions of his character.[59] After an instance of such testimony, the prosecution asked one of Kellogg's character witnesses the following question on cross-examination:

> Prosecutor: Sir, would you agree with me that a person who knows that a laboratory used one particular analytical method, but then who reports out a completely different analytical method on final reports of analysis to its customers, would your opinion be different about that person being a law abiding citizen?
>
> Witness: Is this a hypothetical question, or is this specific to this case?
>
> Prosecutor: I'm asking you a hypothetical question.
>
> Witness: I think my opinion would be different.[60]

Kellogg objected to this question, arguing that it was an impermissible guilt-assuming hypothetical.[61] The trial judge overruled the objection and immediately issued a brief instruction to the jury regarding both the nature of the question and the extent to which it might be considered.[62] Kellogg was ultimately convicted of thirty-four counts of mail fraud, and

59. *See id.* at 191-93 (noting that Kellogg called two character witnesses at trial and describing nature of direct testimony and cross-examination of each).

60. *See id.* at 192 (detailing prosecution's use of guilt-assuming hypothetical against one character witness called by Kellogg).

61. *See id.* (noting defense counsel's objection to guilt-assuming hypothetical question posed by prosecutor to one of Kellogg's character witnesses). Although this Casebrief discusses only one character witness called by Kellogg, Kellogg in fact called two such witnesses at trial. *See id.* at 191-93 (discussing examination and cross-examination of two character witnesses called by Kellogg). Kellogg objected to questions posed by the prosecution during the cross-examination of each character witness on the grounds that the questions proffered were impermissible guilt-assuming hypotheticals. *See id.* (noting objections raised by Kellogg regarding questions posed by prosecution during cross-examination of both character witnesses). During the government's cross-examination of Kellogg's first character witness, Kellogg objected to the following question on the grounds that it forced the witness to assume Kellogg's guilt: "Do you have any knowledge about the way Mr. Kellogg ran his environmental laboratory back in 1998?" *See id.* at 191 (explaining question objected to during cross-examination of first character witness). The district court allowed this question to proceed, noting that "the government may test the opinions concerning character, and the testimony concerning reputation, by testing the witness's knowledge of the defendant and his business." *See id.* (quoting district court's rationale for allowing challenged question to proceed). On appeal, the Third Circuit held that this question did not assume the guilt of the defendant, but rather was properly admitted under Rule 405(a) to test the foundation for the witness's opinion of Kellogg. *See id.* at 192 (noting Third Circuit's holding that question asked did not force witness to assume guilt of defendant in any manner).

62. *See Kellogg*, 510 F.3d at 192 (noting that district court overruled Kellogg's objections and instructed jury thereafter regarding use and weight that should be given to reputation and opinion testimony provided by witness).

appealed from that judgment, arguing that "the District Court violated [Kellogg's] right to due process and erred under Federal Rule of Evidence 405(a) by permitting the government to pose a question that assumed [he was] guilty of the charged offense."[63]

B. *The Third Circuit Tackles Guilt-Assuming Hypotheticals*

1. *Guilt-Assuming Hypotheticals Held Per Se Invalid When Posed to Reputation Character Witnesses*

The Third Circuit began its analysis in *Kellogg* by providing an overview of the current legal landscape regarding the admissibility of guilt-assuming hypotheticals.[64] After noting that the majority of circuits that have had an opportunity to address the issue have disregarded any distinction between reputation and opinion evidence, the court found guilt-assuming hypotheticals to be improper when asked of witnesses providing either type of testimony.[65] The court explained that these circuits have based their decisions on two primary rationales: (1) that the use of guilt-assuming hypotheticals has the ability to undermine the presumption of innocence in violation of due process; and/or (2) that the probative value of any such question is substantially outweighed by the prejudicial effect it might have on the accused.[66]

The *Kellogg* court immediately began to stray from the majority of the circuits by stating that the propriety of guilt-assuming hypotheticals "turns on the meaningful distinction between reputation and opinion character witnesses."[67] Nevertheless, the court joined its sister circuits in unanimously holding that guilt-assuming hypotheticals may not be asked of rep-

63. *See id.* at 193 (noting judgment entered against Kellogg and argument raised by Kellogg on appeal).

64. *See id.* at 193-95 (detailing views espoused by other circuits regarding propriety and admissibility of guilt-assuming hypotheticals during cross-examination of defense character witnesses). For a detailed discussion of the circuit courts' divergent views regarding the admissibility of guilt-assuming hypotheticals, see *supra* notes 27-34 and accompanying text.

65. *See id.* at 194 (noting that majority of circuits have disallowed use of guilt-assuming questions on wholesale basis). For a discussion of the majority viewpoint regarding the admissibility of guilt-assuming hypotheticals, see *supra* note 6 and accompanying text.

66. *See id.* at 194-95 (noting various rationales offered by circuit courts as justification for adoption of bright-line rule banning all use of guilt-assuming questions). For a further discussion of the reasoning and rationale behind the circuit courts' adoption of the majority position prohibiting the use of guilt-assuming hypotheticals, see *supra* notes 5-6 and accompanying text.

67. *See id.* at 195 (reverting to prior line drawn in *Curtis* and adopting divergent view that admissibility of guilt-assuming hypotheticals turns on distinction between opinion and reputation witnesses). For a review of the distinction between reputation and opinion character witnesses, see *supra* notes 21-22 and accompanying text. Further, for a discussion of the Third Circuit's decision in *Curtis* concerning the application of the opinion/reputation distinction with respect to the cross-examination of character witnesses, see *supra* notes 35-46 and accompanying text.

utation character witnesses.[68] The court's foundation for this holding rested on the definition of a reputation witness, as well as the court's prior decision in *Curtis*.[69] In *Curtis*, the court noted that "[a] reputation witness can only be examined on matters *reasonably proximate to the time of the alleged offense* and likely to have been made known to the relevant community at that time."[70] Relying on this precedent and referring to the basic definition of a reputation witness, the court held that:

> [b]ecause a reputation character witness, by definition, can only provide testimony about the defendant's reputation in the community, a person testifying regarding the defendant's reputation at the time of the crime can only speculate about how information regarding the crime would affect the community's assessment of the defendant, and a witness's speculation in that regard is of no probative value at all.[71]

In so holding, the Third Circuit aligned with the majority and adopted a bright-line rule that the prosecution may not question reputation character witnesses with guilt-assuming hypotheticals under any circumstances.[72]

2. *Panel Rejects Per Se Rule of Invalidity for Guilt-Assuming Hypotheticals Posed to Opinion Character Witnesses*

After disposing of the issue with respect to reputation witnesses, the court tackled the more controversial issue of the presentation of guilt-assuming hypotheticals to opinion character witnesses.[73] The panel in *Kellogg* aligned itself with other circuits by recognizing that guilt-assuming hypothetical questions can "be problematic if [they arise] in circumstances that implicate the presumption of innocence or otherwise undermine due process."[74] Nevertheless, the court diverged from the majority of the cir-

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68. *See id.* at 195-96 ("We agree with the consensus of the Courts of Appeals that posing a guilt-assuming hypothetical to a reputation character witness is improper.").

69. *See id.* at 196 (pointing out that nature of reputation witnesses' testimony and prior holding in *Curtis* support prohibition on use of guilt-assuming questions with respect to reputation witnesses).

70. *See* United States v. Curtis, 644 F.2d 263, 269 (3d Cir. 1981) (elaborating on basic and important distinction between opinion and reputation character witnesses with respect to scope of cross-examination allowed) (emphasis added).

71. *Kellogg*, 510 F.3d at 196.

72. *See id.* (adopting bright-line rule prohibiting use of guilt-assuming hypotheticals to challenge reputation character witnesses).

73. *See id.* at 196-97 (addressing admissibility of guilt-assuming hypotheticals with respect to opinion character witnesses).

74. *See id.* (agreeing with other circuit courts that guilt-assuming hypotheticals may create problems in criminal trials under certain circumstances).

cuits by holding that these problems are "a possibility [but] by no means a certainty."[75]

The court pointed out that under Rule 404, a witness testifying as to his or her own opinion of the defendant is "open to cross-examination on how additional facts would affect that opinion."[76] The court stated that guilt-assuming hypotheticals were significantly probative because responses to such questions would assist in testing "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."[77] In light of the compelling function these types of questions would serve—mainly in assisting the jury in its consideration of the character witnesses' credibility—the *Kellogg* court declined to adopt a bright-line rule barring their use when cross-examining opinion character witnesses.[78] In support of its decision, the court noted that it found "nothing inherent in guilt-assuming hypotheticals, in the abstract, that makes them unfairly prejudicial, let alone so prejudicial as to constitute a *per se* violation of due process."[79]

3. *Application to Kellogg's Case*

After rejecting a bright-line rule of invalidity for guilt-assuming hypotheticals asked of opinion character witnesses, the *Kellogg* court set out to consider the validity of the particular question posed to Kellogg's witness.[80] In upholding the district court's decision to allow the question posed to Kellogg's opinion witness, the appellate court cited three primary bases for its judgment.[81] First, the prosecution emphasized the "hypothetical nature" of the question so "as to allay any real concern about undermining the presumption of innocence."[82] Second, only one such question

75. *See id.* at 196 (declining to adopt bright-line rule of invalidity for use of guilt-assuming questions with respect to opinion character witnesses, unlike majority of circuits).

76. *See id.* (noting that accused bears risk of having his or her character witnesses challenged by prosecution on cross-examination). For a discussion of the Federal Rules of Evidence that govern the use of character evidence in criminal trials and the risks that are taken when calling character witnesses, see *supra* notes 14-26 and accompanying text.

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

78. *See id.* (rejecting bright-line rule of invalidity and noting that "a person testifying regarding a present opinion should be open to cross[-]examination on how additional facts would affect that opinion").

79. *See id.* (holding that guilt-assuming hypotheticals do not categorically undermine presumption of innocence in violation of due process).

80. *See id.* (applying newly adopted rule of admissibility to cross-examination of character witness in Kellogg's case).

81. For a discussion of the principles underlying the Third Circuit's decision to uphold the use of a guilt-assuming hypothetical in *Kellogg*, see *infra* notes 82-86 and accompanying text.

82. *See Kellogg*, 510 F.3d at 196 (noting clear hypothetical nature of question as factor favoring admissibility).

had been asked during Kellogg's trial; thus, the appellate court was able to distinguish Kellogg's case from one in which the "prosecution repeatedly 'foist[ed] its theory of the case on the jury.'"[83]

Finally, the appellate court noted that *Kellogg* was not a case in which the prosecution had repeatedly assured the trial judge of the good faith basis for the question, thereby creating an inference in the mind of the jurors that the prosecution had more evidence of guilt than that shown on the record.[84] Although the court upheld the question posed to Kellogg's character witness, the court reiterated that it was not suggesting or holding that the use of guilt-assuming hypotheticals would be proper in all circumstances.[85] Rather, the court held that consideration should be given to the facts and circumstances in each individual case, and that an individual determination should be made thereon.[86]

C. *Judge Roth's Concurring Opinion*

In a brief concurring opinion, Judge Roth expressed her dissatisfaction with the court's analysis.[87] Judge Roth based her opinion on a fundamental principle of our justice system—"that there is a presumption of innocence in favor of the accused."[88] Judge Roth posited that although the distinction relied upon by the majority as between reputation and opinion evidence may have some relationship to the probative value of a guilt-assuming hypothetical, such a distinction cannot possibly affect the damage such questions inflict on the presumption of innocence.[89] In Judge Roth's view, the guilt-assuming hypothetical posed to Kellogg's witness was improper, and the extent of its "hypothetical nature" could not allay the threat that it posed to the presumption of innocence that Kellogg

83. *See id.* (quoting United States v. Williams, 738 F.2d 172, 177 (7th Cir. 1984)) (citing fact that guilt-assuming hypotheticals were not used consistently throughout trial to force theory of case on jury as factor favoring admissibility).

84. *See id.* (noting fact that prosecution did not attempt to make inference that there was more evidence than currently on record regarding Kellogg's guilt as factor favoring admissibility by referring to facts in United States v. Oshatz, 912 F.2d 534, 539 (2d Cir. 1990)).

85. *See id.* at 197 ("To be clear, we are not suggesting, let alone holding, that guilt-assuming hypotheticals can properly be asked of opinion character witnesses in every case.").

86. *See id.* (noting that admissibility turns on "facts and circumstances" of individual cases).

87. *See id.* at 203 (Roth, J., concurring) ("The majority concludes that the question asked of [Kellogg's witness] (who offered both opinion and reputation testimony) was relevant and its hypothetical nature was clear, thereby assuaging any concern with respect to the presumption of innocence. I respectfully disagree.").

88. *See id.* (quoting Taylor v. Kentucky, 436 U.S. 478, 483 (1978)) (noting that touchstone principle of United States criminal justice system is presumption of innocence in favor of defendant).

89. *See id.* (arguing that distinction between opinion and reputation character witnesses is pertinent to analysis of probative value but is irrelevant to consideration of prejudicial effect).

was entitled to receive.[90] In accordance with the majority of the circuit courts, Judge Roth advocated for the adoption of a bright-line prohibition on the use of guilt-assuming hypotheticals.[91]

IV. PRACTICAL GUIDANCE FOR THIRD CIRCUIT PRACTITIONERS

Although a great deal of controversy still surrounds the propriety of guilt-assuming hypotheticals in the abstract, *Kellogg* provides meaningful guidance to attorneys practicing in the Third Circuit.[92] Defense counsel and prosecutors alike can gain valuable insight from *Kellogg*; the following guidelines—extracted from *Kellogg* and other cases like it—may prove helpful when defending against or proffering guilt-assuming hypotheticals in the Third Circuit.[93]

A. *Practical Guidelines for Defense Counsel*

In light of the Third Circuit's decision in *Kellogg*, defense counsel practicing in the Third Circuit should take note of the following guidelines in order to protect their clients against improper prosecutorial use of guilt-assuming hypotheticals.[94]

(1) The Third Circuit does not allow guilt-assuming hypotheticals to be asked of reputation character witnesses.[95] Therefore, defense counsel should consider limiting character witnesses to providing reputation testimony, thereby avoiding any possible use of guilt-assuming hypothetical questions.[96]

90. *See id.* at 204 ("It is not clear to me . . . that this guilt-assuming hypothetical was sufficiently hypothetical to be permissible.").

91. *Cf. id.* at 203 (noting serious prejudicial effect of guilt-assuming hypotheticals and seeming to agree with majority of courts that have held them inadmissible as categorically inconsistent with presumption of innocence).

92. *See* Plaskowitz, *supra* note 4, at 474-75 (providing guidelines similar to those which can be extracted from Third Circuit's holding in *Kellogg*); Saltzburg, *supra* note 16, at 49 (same).

93. Plaskowitz, *supra* note 4, at 474-75 (noting guidelines similar to those listed for defense and prosecution); Saltzburg, *supra* note 16, at 49 (same).

94. Saltzburg, *supra* note 16, at 49 (explaining that one can safeguard against "the prosecution's abuse of the guilt-assuming hypothetical" by following guidelines that have been suggested in various circuit court opinions).

95. *See Kellogg*, 510 F.3d at 195-96 (majority opinion) ("We agree with the consensus of the Courts of Appeals that posing a guilt-assuming hypothetical to a reputation character witness is improper.").

96. *See id.* at 196 (drawing distinction between opinion and reputation character witnesses with respect to admissibility of guilt-assuming hypotheticals); Saltzburg, *supra* note 16, at 49 (noting that choice of testimony to be provided by character witness will "dictate the cross-examination that will be permitted"); TRIAL TACTICS, *supra* note 5, at 109 (same); *see also* Plaskowitz, *supra* note 4, at 475 n.102 (pointing out that reputation witnesses may be asked "have you heard" type questions but not guilt-assuming hypotheticals). To ensure that guilt-assuming hypotheticals are not posed to reputation witnesses, "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 . . . prior to the point in time when

(2) Reputation witnesses called by the defense should be instructed to refrain from volunteering any personal opinion of the defendant on direct examination that would "open the door" to guilt-assuming hypotheticals on cross-examination.[97]

(3) In light of the fact that reputation witnesses may not be asked guilt-assuming hypotheticals, defense counsel must remain aware of the nature of the testimony provided by each character witness called.[98]

(4) Defense counsel should raise an objection to any guilt-assuming hypothetical posed to a reputation character witness, so that a reviewing court will not be forced to apply the plain error standard of review.[99]

(5) Although jury instructions may be given by the trial judge *sua sponte*—as was done in *Kellogg*—defense counsel should ensure that instructions be given to the jury regarding the nature of the testimony and

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the charges against him were filed." *Id.* at 466 n.63. If a character witness does, in fact, offer both reputation and opinion testimony, the prosecution may question the witness using both specific instances of prior conduct and guilt-assuming hypotheticals. *See id.* at 475 n.102 (noting that witness providing opinion and reputation testimony is subject to broader depth of questioning on cross-examination).

97. *See Kellogg*, 510 F.3d at 196 (holding that character witness providing opinion testimony may be questioned using guilt-assuming hypotheticals); Saltzburg, *supra* note 16, at 49 (noting that witnesses offering opinion testimony are susceptible to broader range of questioning on cross-examination); TRIAL TACTICS, *supra* note 5, at 109 (same).

98. *See Kellogg*, 510 F.3d at 196-97 (noting that admissibility of guilt-assuming hypothetical turns on nature of testimony offered on direct-examination); Saltzburg, *supra* note 16, at 49 ("[I]t is always improper to cross-examine a reputation witness by asking whether, if the witness assumes something to be true, reputation would change. The only proper cross-examination of a reputation witness addresses what the witness has heard in the community.").

99. *See* 28 U.S.C. § 2111 (1949) ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record *without regard to errors or defects* which do not affect the substantial rights of the parties.") (emphasis added); FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); Nguyen v. United States, 539 U.S. 69, 80 (2003) ("[F]ailure to object to trial error ordinarily limits an appellate court to review for plain error."); Jones v. United States, 527 U.S. 373, 374 (1999) (noting that failure to raise objection at trial subjects error to "limited appellate review for plain error"); United States v. Johnson, No. 06-2145, 2007 WL 2719154, at *4 (3d Cir. Sept. 19, 2007) (noting that plain error standard of review applies when no objection is made to admission of challenged evidence at time of trial); United States v. Keyes, No. 05-1684, 2007 WL 108295, at *10 (3d Cir. Jan. 17, 2007) (same); United States v. Sutton, No. 05-1808, 2006 WL 3227805, at *2 (3d Cir. Nov. 6, 2006) ("We typically review arguments not raised in the District Court for plain error."); Saltzburg, *supra* note 16, at 49 ("[T]imely objections need to be made to [guilt-assuming hypotheticals] or review for plain error will be the only recourse."); TRIAL TACTICS, *supra* note 5, at 109 (same). The plain error standard of review is particularly deferential, and does not favor the party claiming error. *See* United States v. Cotton, 535 U.S. 625, 631 (2002) (explaining that under plain error test appellate court can correct error not raised at trial only when there is "(1) error, (2) that is plain, and (3) that affects substantial rights") (internal quotations omitted).

the weight to be accorded thereto, first at the time the guilt-assuming hypothetical is asked, and again at the completion of trial.[100]

B. *Practical Guidelines for Prosecutors*

Although the Third Circuit's holding in *Kellogg* did not completely restrict the admissibility of guilt-assuming hypotheticals, such questions may only be asked under limited circumstances.[101] The *Kellogg* decision provides a roadmap to admissibility, and prosecutors can maximize their ability to proffer guilt-assuming hypotheticals by adhering to the following guidelines.[102]

(1) Prosecutors must remain aware of the nature of the testimony offered by each of the defense's character witnesses, because a defense character witness may not be asked a guilt-assuming hypothetical if he or she has only proffered reputation testimony.[103]

(2) When posing a guilt-assuming hypothetical question to an opinion character witness, the prosecution should emphasize the hypothetical nature of the question.[104]

(3) To the greatest extent possible, any hypothetical question should be framed in general terms, and should not include particular details of the charges at bar.[105]

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100. *See* Plaskowitz, *supra* note 4, at 476 (noting that jury "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"); *see also* STEVEN GOODE & OLIN GUY WELLBORN III, COURTROOM EVIDENCE HANDBOOK 99 (1995) ("The jury should be instructed that they are to consider any incidents brought out in cross-examination only as bearing on the credibility and weight of the witnesses' testimony." (quoting United States v. Apfelbaum, 621 F.2d 62, 65 n.3 (3d Cir. 1980))).

101. *See Kellogg*, 510 F.3d at 197 (explaining that although guilt-assuming hypotheticals are not proper in all cases, certain circumstances may permit their use).

102. *See* Plaskowitz, *supra* note 4, at 474 (noting that adherence to guidelines similar to those provided will prohibit abuse of guilt-assuming questions thereby maximizing possibility of admission).

103. *See Kellogg*, 510 F.3d at 196 ("[P]osing a guilt-assuming hypothetical to a reputation character witness is improper."); Plaskowitz, *supra* note 4, at 475 ("[T]he prosecutor must differentiate the reputation witness from the opinion witness and then tailor her inquiry into the charges at bar accordingly. If the witness testifies as to her *opinion* of the defendant, then the prosecutor may use guilt-assuming hypotheticals . . . .").

104. *See Kellogg*, 510 F.3d at 196 (allowing admission of guilt-assuming hypothetical posed to opinion character witness partly because "hypothetical nature was so emphasized as to ally any real concern about undermining the presumption of . . . innocence"); Plaskowitz, *supra* note 4, at 475 (noting that prosecution should emphasize hypothetical nature of guilt-assuming question to increase likelihood of admission).

105. *See* Plaskowitz, *supra* note 4, at 475 ("The questions should be phrased in general terms and should not give too much detail.").

(4) Any guilt-assuming hypothetical asked should be phrased in a succinct manner and should not unnecessarily further the prosecution's theory of the case.[106]

(5) Any guilt-assuming hypothetical should be based on evidence that is already before the jury, and should not introduce any novel evidence or testimony.[107]

(6) The prosecution should also take care in delivering the guilt-assuming question to ensure that it is not posed in a "cynical or negatively suggestive" manner.[108]

(7) Notwithstanding all of the suggestions noted above, prosecutors should use guilt-assuming hypotheticals sparingly, so as to reduce the possibility that their aggregate effect will be found to impermissibly undermine the presumption of innocence.[109]

Although the Third Circuit now permits the use of guilt-assuming hypotheticals when cross-examining opinion character witnesses, a number of factors counsel against their frequent use.[110] First, prosecutors have a number of tools at their disposal—such as inquiry into specific instances of past misconduct—that are highly effective and do not raise concerns regarding fairness.[111] Second, given the overwhelmingly negative re-

106. *See Kellogg*, 510 F.3d at 196 (allowing admission of guilt-assuming hypothetical in part because prosecution did not attempt to "foist[ ] its theory of the case on the jury" through use of such questions (citing United States v. Williams, 738 F.2d 172, 177 (7th Cir. 1984))); Plaskowitz, *supra* note 4, at 475 ("The prosecutor should not propound her theory of how the crime was committed, but should instead state the question succinctly.").

107. *See Kellogg*, 510 F.3d at 196 (permitting admission of guilt-assuming hypothetical partially because prosecution did not attempt to suggest that there was more evidence of guilt than already disclosed in record (citing United States v. Oshatz, 912 F.2d 534, 539 (2d Cir. 1990))); Plaskowitz, *supra* note 4, at 476 ("The guilt-assuming hypothetical should be based on testimony that has already been offered; the question should present nothing new to the jury.").

108. *See id.* at 476 (noting that prosecutor should refrain from posing question in argumentative or sensational manner). Plaskowitz noted that phrasing such questions in a hostile manner may actually be counterproductive because "a cross-examiner who resorts to misrepresentation, insinuation, or to knowingly putting a witness in a false light before a jury finds herself discredited not only with the court, but with the very jury before whom she appears." Plaskowitz, *supra* note 4, at 477 (internal quotations omitted).

109. *See Kellogg*, 510 F.3d at 196 (stating fact that only one guilt-assuming hypothetical was asked during course of trial was ground for admission of such question).

110. For a discussion of the risks associated with the admission of character evidence in general, and particularly with guilt-assuming hypotheticals, see *supra* notes 5-6, 15 and accompanying text.

111. *See* FEDERAL RULES OF EVIDENCE MANUAL, *supra* note 6, § 405.02[12], at 405-14 ("The cross-examiner already has sufficient ways to examine character witnesses concerning things they have heard or know about the defendant. There is no reason to allow hypothetical questions to be based on the facts of the case being tried.").

sponse that guilt-assuming hypotheticals have received within the courts and in scholarly discourse, prosecutors may wish to pursue different methods of cross-examination in anticipation of an adverse Supreme Court ruling on the issue.[112] Finally, to ensure that criminal defendants continue to receive fair trials, and to remain faithful to the presumption of innocence, prosecutors should ideally refrain from using guilt-assuming hypotheticals; or in the alternative, should formulate such questions in accordance with the provided guidelines to minimize the adverse consequences associated with their admission.[113]

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112. *Cf.* Posting of Brett Sweitzer to Third Circuit Blog, http://circuit3.blogspot.com/2007/12/court-widens-circuit-split-on-guilt.html (Dec. 19, 2007) (noting widening of circuit split caused by *Kellogg* decision and suggesting Supreme Court review may be approaching). For a discussion of the negative light in which guilt-assuming hypotheticals have been cast, see *supra* notes 6, 31 and accompanying text.

113. For a discussion of the factors that counsel against the use of guilt-assuming hypotheticals and adherence to strict guidelines when using such questions, see *supra* notes 5-6, 15 and accompanying text.