

# ***That's Not What Happened!*** **Witness Recantation Issues**

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Witnesses are the vehicle by which you bring your case. What do you do when that vehicle takes a sudden left turn? From impeachment to imprisonment, this session will cover what to do when your witnesses suddenly become their witnesses.

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## **Part I - Which Of Your Witnesses Will Turn?**

How do you identify the traitors in your midst? Knowing a witness is going to recant prior to his taking the stand at trial will go a long way to making sure you get the last laugh.

## **Part II - How Will Your Witness Betray You?**

Your witness will not show up. Your witness will change his mind. Your witness will not remember. Your witness will lie. Now ... what are you going to do about it?

## **Part III – Protecting the Innocent and Punishing the Guilty**

Has your victim fallen prey to fear, intimidation, and apathy, or were they just a cold-blooded liar from the word go?

## **Part IV – MATERIALS and HAND OUTS**

Material Witness Bonds  
Prior Inconsistent Statements as an Impeachment Tool  
Crimes and Sanctions

## **MATERIAL WITNESS BONDS**

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“Whenever it shall appear, upon motion of the district attorney or upon motion of a defendant supported by his affidavit, that the testimony of any witness is essential to the prosecution or the defense, as the case may be, and it is shown that it may become impracticable to secure the presence of the person by subpoena, a judge, as defined in Article 931 of the Code of Criminal Procedure, shall issue a warrant for the arrest of the witness. The witness shall be arrested and held in the parish jail, or such other suitable place as shall be designated by the court, until he gives an appearance bond as provided for defendants when admitted to bail, or until his testimony shall have been given in the cause or dispensed with.”

Louisiana Revised Statutes Title 15, Section 257

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### **Can he get out?**

Yes. Anyone imprisoned as a material witness can apply to have his testimony taken and be released without making the bond. There must be 48 hours personal notice to the State and the Defense prior to taking the testimony, either in court, in chambers, or before any officer capable of administering oaths. See La.R.S. 15:258.

### **Who pays for that?**

“The taking of his testimony shall be without expense to the witness, but shall be taxed as a part of the costs of the prosecution.” See La.R.S. 15:258.

### **Is he entitled to a lawyer?**

No. La.R.S. 15:257 is not a crime, and a person imprisoned pursuant to it is not a criminal defendant. As such, he is not entitled to a lawyer. See Cooks v. Rapides Parish Indigent Defender Bd., 1996-811 (La.App. 3 Cir. 12/11/96), 686 So.2d 63, writ denied, 1997-0409 (La. 3/27/97), 692 So.2d 398.

### **Does the Defendant need to be present?**

Yes and No. If the accused is in jail, the sheriff must be notified to produce the defendant at the taking of the testimony. However, if he is not in jail, and has been notified of the taking of the testimony and does not attend, he is not allowed to claim that he has been deprived of his right confront the witnesses against him. See La.R.S. 15:259.

### **Do I still need the witness after I take his testimony?**

Yes. While the testimony shall be admissible in case of the death or departure of the witness from the parish or other inability to attend court, it is not admissible when the presence of the witness can be procured by subpoena. See La.R.S. 15:259.

## PRIOR INCONSISTENT STATEMENTS AS AN IMPEACHMENT TOOL

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### **D. Statements which are not hearsay. A statement is not hearsay if:**

**(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

- (a) In a criminal case, inconsistent with his testimony, provided that the proponent has first fairly directed the witness' attention to the statement and the witness has been given the opportunity to admit the fact and where there exists any additional evidence to corroborate the matter asserted by the prior inconsistent statement;
- (b) Consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive;
- (c) One of identification of a person made after perceiving the person; or
- (d) Consistent with the declarant's testimony and is one of initial complaint of sexually assaultive behavior.

Louisiana Code of Evidence, Article 801D

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### **Do prior statements have substantive evidentiary value?**

Prior to 2004, the general rule was that most prior inconsistent statements of a witness were admissible only to challenge the credibility of that witness, and could not be used as substantive evidence of a crime due to prohibitions against hearsay.

Act 694 of 2004 revised Code of Evidence article 801(D)(1) so as to render virtually all prior inconsistent statements non-hearsay, allowing them to be admitted both for their impeachment value and as substantive evidence.

### **What about prior testimony before the grand jury?**

The Louisiana Supreme Court has consistently held that grand jury testimony may not be used to impeach a witness; instead, grand jury testimony may only be used in prosecutions for perjury, when a witness has admitted to committing perjury, and in order to show statutory irregularities in the grand jury proceedings. State v. Barker, 628 So.2d 168 (La.App. 2 Cir.1993), writ denied, 93-3194 (La.3/25/94), 635 So.2d 236; State v. Neslo, 433 So.2d 73 (La.1983); State v. Trosclair, 443 So.2d 1098 (La.1983), cert. dismissed, 468 U.S. 1205, 104 S.Ct. 3593, 82 L.Ed.2d 889 (1984); State v. Ates, 418 So.2d 1326 (La.1982); State v. Prestridge, 399 So.2d 564 (La.1981); State v. Sheppard, 350 So.2d 615 (La.1977); State v. O'Blanc, 346 So.2d 686 (La.1977); State v. Ivy, 307 So.2d 587 (La.1975); State v. Terrebonne, 256 La. 385, 236 So.2d 773 (La.1970).

# CRIMES AND SANCTIONS

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## OBSTRUCTION OF JUSTICE

A. The crime of obstruction of justice is any of the following when committed with the knowledge that such act has, reasonably may, or will affect an actual or potential present, past, or future criminal proceeding as hereinafter described:

...

(2) Using or threatening force toward the person or property of another with the specific intent to:

- (a) Influence the testimony of any person in any criminal proceeding;
- (b) Cause or induce the withholding of testimony or withholding of records, documents, or other objects from any criminal proceeding;
- (c) Cause or induce the alteration, destruction, mutilation, or concealment of any object with the specific intent to impair the object's integrity or availability for use in any criminal proceeding;
- (d) Evade legal process or the summoning of a person to appear as a witness or to produce a record, document, or other object in any criminal proceeding;
- (e) Cause the hindrance, delay, or prevention of the communication to a peace officer, as defined in R.S. 14:30, of information relating to an arrest or potential arrest or relating to the commission or possible commission of a crime or parole or probation violation.

(3) Retaliating against any witness, victim, juror, judge, party, attorney, or informant by knowingly engaging in any conduct which results in bodily injury to or damage to the property of any such person or the communication of threats to do so with the specific intent to retaliate against any person for:

- (a) The attendance as a witness, juror, judge, attorney, or a party to any criminal proceeding or for producing evidence or testimony for use or potential use in any criminal proceeding, or
- (b) The giving of information, evidence, or any aid relating to the commission or possible commission of a parole or probation violation or any crime under the laws of any state or of the United States.

## **CRIMES AND SANCTIONS**

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### **OBSTRUCTION OF JUSTICE (Continued)**

B. Whoever commits the crime of obstruction of justice shall be subject to the following penalties:

(1) When the obstruction of justice involves a criminal proceeding in which a sentence of death or life imprisonment may be imposed, the offender shall be fined not more than one hundred thousand dollars, imprisoned for not more than forty years at hard labor, or both.

(2) When the obstruction of justice involves a criminal proceeding in which a sentence of imprisonment necessarily at hard labor for any period less than a life sentence may be imposed, the offender may be fined not more than fifty thousand dollars, or imprisoned for not more than twenty years at hard labor, or both.

(3) When the obstruction of justice involves any other criminal proceeding, the offender shall be fined not more than ten thousand dollars, imprisoned for not more than five years, with or without hard labor, or both.

Louisiana Revised Statutes Title 14, Section 130.1

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## **CRIMES AND SANCTIONS**

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### **FALSE SWEARING**

“False swearing is the intentional making of a written or oral statement, known to be false, under sanction of an oath or an equivalent affirmation, where such oath or affirmation is required by law; provided that this article shall not apply where such false statement is made in, or for use in, a judicial proceeding or any proceeding before a board or official, wherein such board or official is authorized to take testimony.

Whoever commits the crime of false swearing shall be fined not more than five hundred dollars, or imprisoned for not more than one year, or both.”

Louisiana Revised Statutes Title 14, Section 125

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## **CRIMES AND SANCTIONS**

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### **CRIMINAL MISCHIEF**

**“A. Criminal mischief is the intentional performance of any of the following acts:**

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**(5) Giving of any false report or complaint to a sheriff, or his deputies, or to any officer of the law relative to the commission of, or an attempt to commit, a crime.**

**....**

**B. Whoever commits the crime of criminal mischief shall be fined not more than five hundred dollars, or be imprisoned for not more than six months in the parish jail, or both.”**

**Louisiana Revised Statutes Title 14, Section 59**

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## **CRIMES AND SANCTIONS**

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### **FALSE SWEARING FOR PURPOSE OF VIOLATING PUBLIC HEALTH OR SAFETY**

“No person shall make a false statement, report or allegation concerning the commission of a crime for the purpose of violating, disrupting, interfering with or endangering the public health or safety, or to deprive any person or persons of any right, privilege or immunity secured by the United States Constitution and laws or by the Louisiana Constitution and laws, or cause such false statement or report to be made to any official or agency of the state or any parish, city or political subdivision thereof, or to any judicial, executive or legislative body or subdivision thereof within this state, knowing or having reason to believe the same or any material part thereof to be false and with the intent to cause an investigation of or any other action to be taken as a result thereof.

Any person or persons convicted of violating the provisions of this Section shall be punished by imprisonment for not less than one year nor more than five years, with or without hard labor, or by a fine of not less than one hundred dollars nor more than one thousand dollars, or by both such fine and imprisonment.”

Louisiana Revised Statutes Title 15, Section 257

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**Does the Statement have to be under oath?**

No. State v. Williams, 2010-1514 (La. 3/15/11) 60 So.3d 1189.



## CRIMES AND SANCTIONS

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### PERJURY

A. Perjury is the intentional making of a false written or oral statement in or for use in a judicial proceeding.... In order to constitute perjury the false statement must be made under sanction of an oath or an equivalent affirmation and must relate to matter material to the issue or question in controversy.

B. It is a necessary element of the offense that the accused knew the statement to be false, but an unqualified statement of that which one does not know or definitely believe to be true is equivalent to a statement of that which he knows to be false.

C. Whoever commits the crime of perjury shall be punished as follows:

(1) When committed on a trial in which a sentence of death or life imprisonment may be imposed, the offender shall be fined not more than one hundred thousand dollars or imprisoned at hard labor for not less than five years, nor more than forty years, or both.

(2) When committed on a trial in which a sentence of imprisonment necessarily at hard labor for any period less than a life sentence may be imposed, the offender shall be fined not more than fifty thousand dollars or imprisoned at hard labor for not less than one year, nor more than twenty years, or both.

(3) When committed in all other cases in which any other sentence may be imposed, the offender shall be fined not more than ten thousand dollars or imprisoned at hard labor for not more than five years, or both....”

Louisiana Revised Statutes Title 14, Section 123

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#### **What must the witness lie about?**

For a statement to constitute perjury it must relate to a matter material to the issue or question in controversy. See State v. West, 419 So.2d 868 (La.1982).

#### **Do I convince the jury of that?**

No. The materiality of false testimony is a matter of law for determination by the court, not a factual question for determination by the jury. State v. Occhipinti, 358 So.2d 1209 (La.1978).

## **CRIMES AND SANCTIONS**

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### **PERJURY (Continued)**

**Do I have to prove the statement was false?**

Yes and No. If the Defendant makes two materially contradictory statements under oath or affirmation, the State does not need to prove which was true. It is an affirmative defense, however, for the Defendant to assert that he believed each to be true at the time they were made. See La. R.S. 14:124

***That's not what happened!***

**Witness Recantation Issues**

**David Pipes**

**Assistant District Attorney**

**Parish of Orleans**

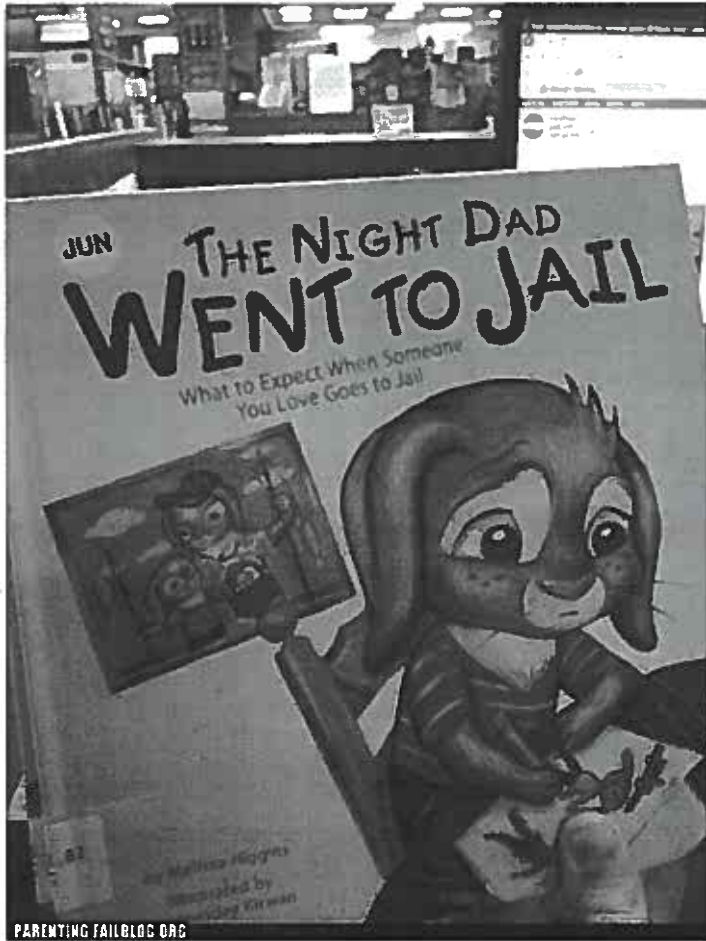


# RECANT

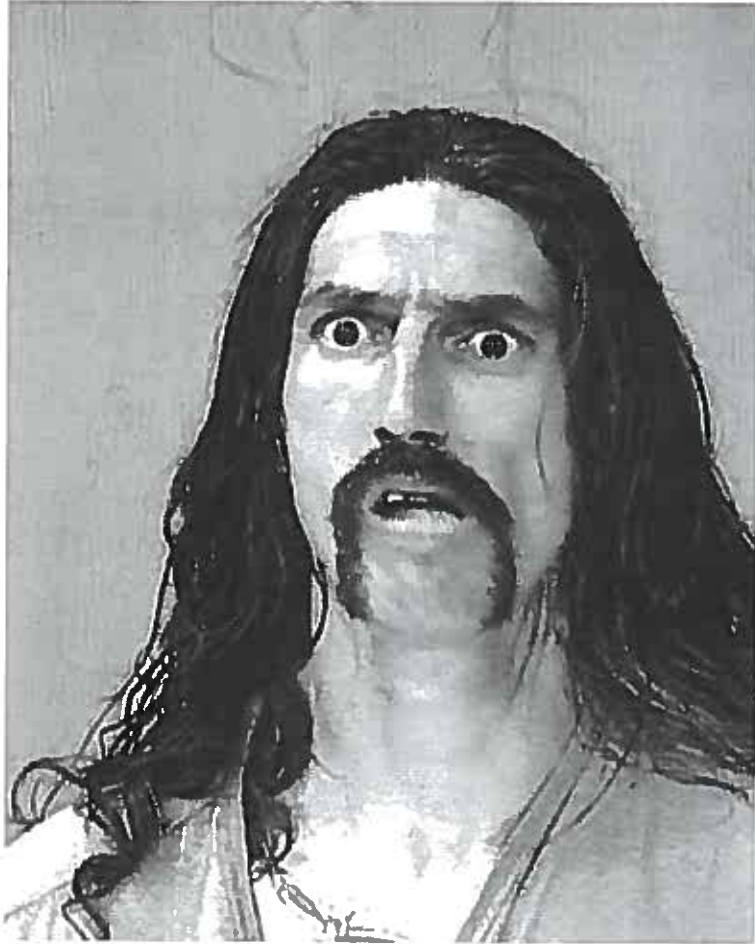
1. to withdraw or repudiate (a statement or belief) formally and publicly.
2. revoke
3. to make an open confession of error.

-Merriam-Webster Dictionary

WHICH OF YOUR  
WITNESSES WILL TURN  
ON YOU?



FAMILY



**FAMILY**

**ADDICTS**



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**FAMILY**

**ADDICTS**

**“SNITCHES”**

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STATE v. TERRY and THATCHER  
McELVEEN

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**1011 Fourth Street  
September 9, 12:00 PM**

Jonathan Lorino, a college student, answers a knock at the door to his residence.

Lorino's roommate, who was upstairs, hears sounds of scuffle and looks over the balcony and sees two individuals holding Lorino down.

Lorino's roommate calls 911. She hears the perpetrators—whom she can only describe as two young black men wearing a dark shirt and a white shirt—leave out the back door.

Once the police arrive, she comes downstairs and finds Jonathan Lorino lying in a pool of blood, stabbed three times in the chest and neck by a kitchen knife.

A construction worker next door sees two young black men—one in a blue shirt and one in a white shirt—run past the building he is working on and jump a barbed-wire fence just after the murder.

He tells the police the two men got caught on the barbed wire and may have been injured freeing themselves.

Not long after the murder, Terry and Thatcher McElveen return to their mother's residence, seven blocks from the murder scene.

Both brothers are sweating. Both are covered in blood. Terry's legs are cut and bleeding.

They also have a CD player in their possession, inside a pillow case.

As Terry and Thatcher each shower and change clothes, their mother learns about the murder in the neighborhood.

Remembering what her sons said as they left that morning, and seeing their state when they returned, she accuses them of having killed Jonathan Lorino.

Thatcher and Terry leave the house. As they go, Thatcher tells his mother that if she calls the police he will kill her.

Ms. McElveen calls the police and reports her suspicions. The police arrive and with her permission, search her residence.

In and around the house, the police find clothing and towels covered in blood.

While most of the blood is matched to the McElveens, the blood found on a white T-shirt matches Jonathan Lorino's DNA.





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STATE v. KENDALL GORDON

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**1800 block of Tricou Street  
Saturday, August 8, 10:30 PM**

Two masked gunman kick in the door to Darceleen  
Commadore's home.

One of the gunman shoots and kills Patrice  
Commadore, Darceleen's sister.

He also shoots and kills his accomplice on accident.

While fleeing the residence, the surviving gunman  
trips over Darceleen, and his mask falls down.

Darceleen recognizes the surviving gunman as Kendall Gordon, someone she knows from the area, and provides his name to the police.

She later picks Kendall Gordon from a photographic lineup, identifying him as the perpetrator.

Five months later, she informs the District Attorney that she identified Gordon in error.



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STATE v. ERIC ROSS

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**L.B. Landry Avenue at Erie Street  
Monday, October 6**



Albert McLebb leaves a grocery store on the corner of  
L.B. Landry Avenue and Erie Streets.

As he is walking to the corner, a car pulls up and  
several individuals jump out with guns.

McLebb is shot 14 times and dies on the scene. A  
second individual was also shot multiple times, but  
survives.

The surviving victim refuses to speak to the police.  
He refuses to describe who shot him or McLebb.

Five months later, a witness comes forward after he  
himself is arrested for armed robbery and the  
attempted murder of a police dog.

That witness tells the police that Eric Ross, who he has  
known since Ross was a child, was one of the shooters  
involved in the October 6<sup>th</sup> homicide.

Based almost exclusively on the eyewitness testimony of the newly discovered witness, Eric Ross is arrested and indicted for one count of second degree murder and one count of attempted second degree murder.

As the trial date approaches, the witness tells our office that under no circumstances will he testify.



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STATE v. LARRY JONES

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**3700 block of General Taylor Street  
Tuesday, June 24, 3:35 PM**

Police are dispatched to the scene of a domestic disturbance. The female caller tells the 911 operator her boyfriend is going get his gun.

Police arrive, and find a shirtless boyfriend arguing with the caller, who states her boyfriend threatened her with a gun and hid it when he realized police were en route.

Boyfriend denies having a gun, says the female is “just tripping” and they are fighting over “some petty bullshit.”

Police find a handgun wrapped in a shirt underneath the back steps of the residence.

The boyfriend identifies the shirt as his, but continues to deny possessing any firearms.

The boyfriend has prior convictions for attempted armed robbery and possession of heroin. He is arrested and charged with being a felon in possession of a firearm.



Days before trial, the girlfriend reveals that she set the defendant up, because she was mad that he urinated on her toilet seat.

Investigators confirm that the weapon in question belonged to the girlfriend, and recorded jail conversations corroborate that the defendant knew nothing about it and had not threatened his girlfriend with it.

By that point, he had spent nearly nine months in jail.

