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Prosecutorial Misconduct in Presenting Evidence: "Backdooring" Hearsay

By Bennett L. Gershman*

Rules of evidence are designed to bring about just and informed decisions. One of these rules, the hearsay rule, is designed to ensure that juries receive reliable evidence, and that out-of-court statements ordinarily are inadmissible. Prosecutors are well aware of these evidentiary restrictions, but occasionally seek to circumvent them. The author describes methods used by some prosecutors to manipulate the hearsay rule and thereby distort the truth-finding process of the trial.

A prosecutor's trial functions are regulated by a broad array of constitutional, statutory, common-law, and ethical proscriptions that seek to minimize prejudice to a defendant and assure him a fair trial. Some prosecutors, however, find these rules too confining, and occasionally seek to circumvent them in a variety of ways. These methods include proving the defendant's bad character, using inflammatory tactics, violating the defendant's constitutional rights, and eliciting inadmissible and prejudicial evidence.[1] This article discusses one of the trial tactics "that seems to be enjoying of late wide circulation at the prosecutorial council fires,"[2] the presentation of inadmissible hearsay evidence.

As every trial lawyer knows, hearsay evidence is excluded because it is considered unreliable.[3] Prosecutors are well aware

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[1] For a detailed discussion of the various tactics used by prosecutors to prejudice a defendant's fair trial rights, see Bennett L. Gershman, *Prosecutorial Misconduct* §§ 9.1 et seq. (1994 Supp.).

[2] Zemo v. State, 646 A.2d 1050, 1053 (Md. 1994) (Moylan, J.).

[3] The focus of this article is on the prosecutor's trial conduct in presenting inadmissible hearsay evidence. This is not to suggest that such conduct is limited to prosecutors. Defense lawyers engage in similar conduct. See, e.g., United States v. Fay, 668 F.2d 375 (8th Cir. 1981). However, without condoning defense misconduct, it bears repeating that a prosecutor's ethical obligations differ significantly from those of defense counsel. The prosecutor is obligated to seek truth and to "do justice." See Model Rules of Professional Conduct Rule 3.8 Cmt. (1) (1983) (describing prosecutors as "minister[s] of justice"); Model Code of Professional Responsibility EC7-13 (1981) (stating that prosecutors must "seek justice"); ABA Standards for Criminal Justice § 3-1.2(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict"). No comparable duty to truth and justice

of the restrictions on the use of such evidence,[4] but have devised ways to avoid the rule and to offer inadmissible hearsay through the "backdoor."[5] Convictions have been reversed when an appellate court finds that such prosecutorial conduct violated the defendant's constitutional right to confrontation and the right to a fair trial. Some courts and commentators focus on the prosecutor's subjective intent, and find a violation when the prosecutor has acted in bad faith to purposefully subvert the hearsay rule.[6] Other courts, however, do not require a showing

is imposed upon defense counsel. Indeed, defense counsel may have an affirmative duty that is at odds with the ascertainment of truth and justice. In an oft-quoted passage in his concurring opinion in United States v. Wade, 388 U.S. 218, 256–258 (1967), Justice White observed:

> Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the States' case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

[4] *McCormick on Evidence* § 245, at 426–428 (John W. Strong ed., 4th ed. 1992).

[5] The term "backdooring" has been used by courts and commentators to describe this tactic of evidence manipulation. *See* Goldsmith v. Witkowski, 981 F.2d 697, 704 (4th Cir. 1992); State v. Gage, 302 N.W.2d 793, 799 (S.D. 1981); Richard H. Underwood & William H. Fortune, *Trial Ethics* § 12.8 (1990 supp.).

[6] See United States v. Kane, 944 F.2d 1406 (7th Cir. 1991); United States v. Peterman, 841 F.2d 1474 (10th Cir. 1988); United States v. DeLillo, 620 F.2d 939 (2d Cir. 1980); Michael H. Graham, *Handbook of Federal Evidence* § 607.3, at 416 (1989 supp.). Some courts find a violation when the prosecutor's "primary purpose" is to present inadmissible evidence. See United States v. Gomez-Gallardo, 915 F.2d 553, 555 (9th Cir. 1990); United States v. Hogan, 763 F.2d 697, 702 (5th Cir. 1985). Other courts suggest that the prosecutor's "sole purpose" must be to present inadmissible evidence. See United States v. Johnson, 802 F.2d 1459, 1466 (D.C. Cir. 1986); Spence v. State, 583 A.2d 715, 717 (Md. 1991). Undue reliance

of prosecutorial bad faith. These courts apply an objective test and conclude that, regardless of the prosecutor's intent, the conduct is improper when it distorts the jury's ability to fairly evaluate the evidence.[7] The following discussion describes the various tactics employed by prosecutors in presenting inadmissible hearsay evidence to the jury.[8]

A Subterfuge: Impeachment With Prior Inconsistent Statement

Virtually every federal circuit and many state courts have adopted a rule that "a prosecutor may not introduce evidence under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible."[9] In the prototypical case, the prosecutor calls a witness who has made a statement prior to trial that incriminates the defendant but who has retracted that statement before trial. Knowing of the retraction,[10] but desiring to place the original

by the courts on the prosecutor's subjective intent, however, generates confusion and inconsistent application of rules, and should be abandoned in favor of an objective test. See text accompanying notes 48–51, *infra*.

[7] United States v. Ince, 21 F.2d 576, 580 (4th Cir. 1994); United States v. Reyes, 18 F.3d 65, 69 (2d Cir. 1994).

[8] For other instances of prosecutorial manipulation of hearsay, see United States v. Hall, 989 F.2d 711 (4th Cir. 1993) ("egregious example of artful cross-examination" by reading to witness privileged statement); United States v. Danzey, 594 F.2d 905 (2d Cir. 1979) (eliciting co-defendant's confession with references to defendant redacted but unmistakable); United States v. Check, 582 F.2d 668 (2d Cir. 1978) (prosecutor "audaciously" elicited hearsay through the "artifice" of having witness to incriminating conversation restrict his testimony to his half of the conversation); People v. Russ, 589 N.E.2d 375 (N.Y. 1992) (blatant misconduct in introducing inadmissible grand jury testimony of witness). But see United States v. Eisen, 974 F.2d 246 (2d Cir. 1992) (impeachment of hostile government witnesses admissible as negative inference evidence in constructing prosecutor's case).

[9] United States v. Peterman, 841 F.2d 1474, 1479 (10th Cir. 1988). See also McCormick on Evidence § 38, at 52 (John W. Strong ed., 4th ed. 1992); Don Johnsen, "Impeachment With an Unsworn Prior Inconsistent Statement as Subterfuge," 28 Wm. & Mary L. Rev. 295 (1987). The leading federal case is United States v. Morlang, 531 F.2d 183 (4th Cir. 1975). For recent cases reversing convictions, see United States v. Ince, 21 F.3d 576 (4th Cir. 1994); United States v. Gomez-Gallardo, 915 F.2d 553 (9th Cir. 1990); United States v. Hogan, 763 F.2d 697 (5th Cir. 1985); Bradley v. State, 636 A.2d 999 (Md. 1994); Spence v. State, 583 A.2d 715 (Md. 1991); State v. Hunt, 378 S.E.2d 754 (N.C. 1989); State v. Bell, 362 S.E.2d 288 (N.C. App. 1987); State v. Gage, 302 N.W.2d 793 (S.D. 1981).

[10] Courts have frequently ruled that when the prosecutor is surprised by the witness's turnabout, he is entitled to much greater latitude in impeaching the witness. See United States v. Patterson, 23 F.3d 1239 (7th Cir. 1994); United States v. Webster, 734 F.2d 1191 (7th Cir. 1984). Many of these courts would also require

inculpatory statement before the jury, the prosecutor puts the witness on the stand, questions the witness about the earlier statement, and, after the witness denies having made the statement, calls the person to whom the prior statement was made—usually a police officer of government agent—to elicit proof of the statement under the pretense of impeaching the witness-declarant.

The impropriety of such conduct is not immediately apparent. Clearly, the rules of evidence in many jurisdictions, most notably in the federal courts, authorize a party to impeach the testimony of his or her own witness.[11] Moreover, the evidence is, in fact, being received not as substantive proof but only for impeachment. Further, the judge routinely gives the jury a limiting instruction that cautions against misusing the proof for an improper purpose.[12] Finally, the witness may be committing perjury, and the prosecutor is sorely tempted to prevent what appears to be an obstruction of justice. Nevertheless, the prosecutor's zeal needs to be tempered with professionally responsible conduct. As Judge Richard Posner of the Seventh Circuit Court of Appeals observed:

> But it would be an abuse of the rule [allowing a party to attack the credibility of his own witness], in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence—or, if it didn't miss it, would ignore it. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant.[13]

The theory of misconduct in subterfuge cases is grounded in principles of fairness.[14] Just as it is unfair for a prosecutor to

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the prosecutor to demonstrate that he has been affirmatively "harmed" by the witness's recantation. See United States v. Patterson, 23 F.3d 1239 (7th Cir. 1994); United States v. Kane, 944 F.2d 1406 (7th Cir. 1991). Other courts, however, would limit the prosecutor's impeachment under such circumstances to the cancellation of any adverse answers by which the prosecutor was surprised. See United States v. Gomez-Gallardo, 915 F.2d 553, 555 (9th Cir. 1990); United States v. Crouch, 731 F.2d 621, 623 (9th Cir. 1984); United States v. Shoupe, 548 F.2d 636, 643 (6th Cir. 1977). The latter decisions clearly reflect the better rule.

[11] Fed. R. Evid. 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness").

[12] See FED. R. EVID. 105.

[13] United States v. Webster, 734 F.2d 1191, 1192 (7th Cir. 1984).

[14] United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975) ("men should not be allowed to be convicted on the basis of unsworn testimony"). But see *McCormick on Evidence* § 38, at 52 (John W. Strong ed., 4th ed. 1992) ("[A] rule against the showing of prior inconsistent statements of one's own witness to aid in

knowingly offer false evidence,[15] it is also unfair for a prosecutor to knowingly offer inadmissible evidence.[16] Courts find the prosecutor's state of mind to be relevant in both situations. As the Supreme Court observed, instances of this type of prosecutorial behavior involve a "corruption of the truth-seeking function of the trial process."[17] Discovering the prosecutor's subjective intent, however, can be a troublesome task. This is most apparent when the witness who is sought to be impeached gives useful evidence that helps the prosecutor's case.

Consider in this regard the following case.[18] The defendant is charged with kidnapping a victim at gunpoint, forcing her into her automobile, and robbing her. In order to place the defendant in the stolen car at the time of the kidnapping, the prosecutor introduces into evidence the victim's telephone bill, which shows that a call was made from her car phone shortly after the kidnapping. The prosecutor then calls witness *A* who testifies that his phone number matches a phone number on the bill, and further testifies that indeed he received a telephone call from the defendant at a time when the car would have been stolen. The prosecutor then elicits a denial from *A* that he had a conversation with Detective *B*, and also a denial that he told Detective *B* that the defendant bragged about stealing a car and kidnapping a woman. The prosecutor clearly expected *A*'s denials because he interviewed *A* before trial and knew that *A* would deny that he had a conversation with Detective *B*. Nevertheless, the prosecutor calls Detective *B* who testifies that he had a conversation with *A* and that *A* told him that the defendant bragged about committing the crime.

Clearly, *A* helps the prosecutor's case to the extent that he

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evaluating the testimony of the witness is a serious obstruction to the ascertainment of truth").

[15] Miller v. Pate, 386 U.S. 1, 6 (1967).

[16] See ABA Standards for Criminal Justice § 3-5.6(b) (3d ed. 1993) ("A prosecutor should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence"). This rule also applies to defense attorneys. See ABA Standards for Criminal Justice § 4-7.5(b) (3d ed. 1993) ("Defense counsel should not knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury offer inadmissible evidence."). The rule also applies in civil cases. See Smith v. Covell, 100 Cal. App. 3d 947, 161 Cal. Rptr. 377 (1980).

[17] Unied States v. Agurs, 427 U.S. 97, 104 (1976).

[18] The hypothetical is based on Bradley v. State, 636 A.2d 999 (Md. 1994).

places the defendant in the car at the time it was stolen. However, he also provides unhelpful testimony—he denies that he implicated the defendant. It is not at all clear that the prosecutor's primary purpose in calling *A* was to impeach his credibility. If that is the test, however, then it would be difficult to fault the prosecutor's conduct. Clearly, one of the prosecutor's purposes in calling *A* was to obtain useful evidence, namely, to link the defendant to the car. However, when the prosecutor went further and questioned *A* about his conversation with Detective *B*, the prosecutor then was engaging in a separate area of inquiry. Those questions, one could argue, were not being asked for the purpose of eliciting useful and legitimate evidence. Rather, the prosecutor was laying the foundation in order to call *B* as a witness and introduce the hearsay statement of *A* through the back door.

Several courts analyze the problem by holding that the prosecutor should have stopped his examination after introducing the admissible part of *A*'s testimony, and refrained from going into unfairly prejudicial territory involving inadmissible hearsay.[19] Other courts, however, reach a different result on similar facts, concluding that the prosecutor's primary purpose in calling the witness was not to impeach his credibility, and that therefore, no misconduct occurred when the prosecutor elicited the impeaching evidence.[20]

The correct approach would be to allow the prosecutor to call the witness, and allow appropriate and relevant examination. Referring to the preceding hypothetical, the prosecutor would be able to call *A* as a witness and examine him about the defendant's telephone call. However, when the prosecutor seeks to impeach *A* with the prior inconsistent statement, the trial court should require the prosecutor to make an offer of proof as to the nature of the expected testimony and the probative value of the impeaching evidence.[21] The court should evaluate that offer of proof under familiar principles of trial evidence, namely, by

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[19] United States v. Crouch, 731 F.2d 621 (9th Cir. 1984); United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977); Bradley v. State, 636 A.2d 999 (Md. 1994); Spence v. State, 583 A.2d 715 (Md. 1991).

[20] United States v. Patterson, 23 F.3d 1239 (7th Cir. 1994); United States v. Kane, 944 F.2d 1406 (7th Cir. 1991); United States v. Peterman, 841 F.2d 1474 (10th Cir. 1988); United States v. DeLillo, 620 F.2d 939 (2d Cir. 1980).

[21] United States v. Hogan, 763 F.2d 697 (5th Cir. 1985); United States v. Crouch, 731 F.2d 621 (9th Cir. 1984).

balancing the probative value of the proof against its capacity to create unfair prejudice.[22] The prosecutor would have to demonstrate that attacking *A*'s credibility was probative of an issue in the case. The prosecutor would next have to demonstrate that the probative value of such impeachment was not substantially outweighed by unfair prejudice. The prosecutor would further have to demonstrate the propriety of eliciting extrinsic hearsay evidence that incriminates the defendant, particularly when it is commonly agreed that juries misunderstand the distinction between impeachment and substantive evidence.[23] Because of such potential for confusion, the statement's likely prejudicial impact will often outweigh its probative value for impeachment purposes, and should rarely be allowed.[24]

A Pretext: Refreshing Recollection

Witnesses often claim memory lapses. Some witnesses are honestly forgetful; others claim memory lapses in order to avoid having to give truthful testimony. There are occasions, moreover, when the forgetful witness has previously made a statement that is harmful to the defendant, but at trial claims not to remember the subject matter of that statement. The prosecutor, obviously disappointed by the witness's claimed forgetfulness, and under the guise of refreshing the witness's recollection, occasionally seeks to confront the witness with the previous statement—to the point of reciting the statement aloud in the presence of the jury—even though the witness persists in claiming not to remember, and steadfastly denies that his memory is being refreshed. Some courts have analyzed the issue by inquiring into the prosecutor's intent.[25] Was the prosecutor attempting in good faith to stimulate the memory of an honestly forgetful, or even recalcitrant witness? Or was the prosecutor deliberately using the witness as a mere "conduit" to place prejudicial hearsay evidence before the jury?

As with the impeachment cases described previously, the

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[22] United States v. Ince, 21 F.3d 576, 580–581 (4th Cir. 1994). A leading treatise on evidence also recommends this approach. See 3 J. Weinstein & M. Berger, Weinstein's Evidence § 607[01], at 607–617 (1985).

[23] United States v. Webster, 734 F.2d 1191, 1192 (7th Cir. 1984).

[24] United States v. Ince, 21 F.3d 576, 581 (4th Cir. 1994).

[25] United States v. Zackson, 12 F.3d 1178 (2d Cir. 1993); United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977).

judiciary's attempt to formulate a rule of trial evidence, and to find an evidentiary violation, based on the prosecutor's state of mind, is highly problematic. Absent a prosecutor's frank admission that his purpose was not to refresh the witness's recollection but instead was to put before the jury prejudicial and inadmissible evidence, a court would be hard-put to conclude that the prosecutor was acting in bad faith.

Trial judges, who have the principal role of supervising an attorney's conduct at trial, have the responsibility to closely monitor a tactic that can easily subvert a fair trial. Judges should ordinarily require the prosecutor to demonstrate by a specific offer of proof that there are legitimate grounds to believe that the attempt to refresh the witness's recollection is capable of succeeding. The prosecutor should be required to disclose whether he knows of any reason why the witness might be deliberately refusing to remember. Under no circumstances should the prosecutor be allowed to read the statement aloud in the presence of the jury.[26] The prosecutor should show the statement to the witness, ask the witness to read the statement to himself, and then ask the witness if the statement refreshes the witness's memory.[27] If the prosecutor seeks to refresh the witness's recollection with an oral statement that was not reduced to writing, the jury should be excused. Based on the witness's answers, the judge would then be capable of making a determination—again based on considerations of relevance and unfair prejudice—whether the prosecutor should be allowed to ask the questions in the presence of the jury.

Finally, in those infrequent situations when the prosecutor's intent is apparent from the record, the judge should forbid the inquiry and admonish the prosecutor to avoid further examination. If the question has already been asked, and prejudice has infected the trial, the judge could declare a mistrial, or strike the damaging material and give the jury a cautionary instruction. If the circumstances warrant, the judge could impose disciplinary measures upon the prosecutor. Again, however, the touchstone for finding trial error should not depend on the prosecutor's

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[26] United States v. Shoupe, 548 F.2d 636, 641 (6th Cir. 1977). See also United States v. Hogan, 763 F.2d 697, 700 (5th Cir. 1985); N.Y. Crim. Proc. Law § 60.35(3).

[27] See Fed. R. Evid. 612.

subjective intent. A finding of error by an appellate court should be based on an objective evaluation of the prosecutor's conduct, and the probable impact of that conduct on the jury. After the court has made an objective determination that the prosecutor committed a trial violation, the court could then take into account the prosecutor's intent in determining whether under all of the circumstances a reversal is warranted.

A Sham: "Background" Evidence

Prosecutors have also tried to subvert the hearsay rule under the guise of eliciting sham "background" information about the history of the investigation.[28] As examples, prosecutors have elicited from government witnesses hearsay statements made by other participants in the crime that incriminate the defendant,[29] or other hearsay testimony that demonstrates the defendant's involvement in other criminal activities.[30] In *United States v. Reyes*,[31] the Second Circuit Court of Appeals reversed a drug conviction because of the prosecutor's improper introduction of background evidence. The court strongly denounced the prosecutor's conduct, and issued a cautionary warning to prosecutors to avoid such misconduct in the future.

In the course of questioning the U.S. customs agent who had investigated a narcotics conspiracy in Connecticut, the prosecutor in *Reyes* elicited from this witness that she had conversations with two of the participants in the drug conspiracy after they were arrested. The prosecutor was permitted by the trial court to elicit from the agent that "as a result of [these] conversations," the agent "concluded that there were other individuals involved in this criminal enterprise."[32] The prosecutor argued, and the trial court agreed, that such background information was necessary to help the jury understand the agent's "state of mind," and the

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[28] See Zemo v. State, 646 A.2d 1050, 1053 (Md. App. 1994) ("It behooves us to point out that the State is retelling the 'Old Wives' Tale' that it is somehow necessary always to lay out for the jury the course of a criminal investigation. It is a tale that seems to be enjoying of late wide circulation at the prosecutorial council fires. It is an apocryphal tale, however, and one that urgently needs demythologizing.").

[29] United States v. Reyes, 18 F.3d 65 (2d Cir. 1994); United States v. Figueroa, 750 F.2d 232 (2d Cir. 1984).

[30] United States v. Hernandez, 750 F.2d 1256 (5th Cir. 1985).

[31] 18 F.3d 65 (2d Cir. 1994).

[32] *Id.* at 67.

reason why she arrested the defendant. The witness then identified these other individuals by name, one of whom was the defendant.[33]

The court of appeals reversed the conviction. The court had little difficulty in concluding that the prosecutor violated the hearsay rule by introducing the cited conversation under the pretense of legitimate background information.[34] The "clear message" that the prosecutor communicated to the jury, the court said, was that the participants had admitted their role in the conspiracy to the agent, and had also implicated the defendant in the conspiracy.[35] The court found that the prosecutor had "displayed so egregious a misunderstanding of the circumstances that will justify [the admission of] background testimony from government investigators,"[36] that the court carefully set forth the factors that ordinarily would justify the introduction of so-called background proof. The court explained that such testimony is usually allowed to clarify noncontroversial matters so that the jury will better understand the reasons for the government's subsequent actions; it is not a vehicle to put before the jury inadmissible and prejudicial evidence.

The court enumerated the factors that should be considered by the trial judge in weighing the relevance and admissibility of background evidence and its potential prejudice.[37] Such factors include its importance to the jury's understanding of the issues, the extent to which it contributes to proof of the defendant's guilt, whether the background can be adequately communicated

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[33] Although the prosecutor had represented that he was not offering this evidence for the truth of the matter asserted, in summation he contended that the information received from the co-conspirators pointed to "the people responsible for this cocaine." *Id.* at 68.

[34] The court noted that technically no hearsay violation occurred because the trial judge instructed the jury not to consider the out of court declarations as proof of the truth of the matters asserted. *Id.* The court went on:

> However, when the likelihood is sufficiently high that the jury will not follow the limiting instructions, but will treat the evidence as proof of the truth of the declaration, the evidence is functionally indistinguishable from hearsay. *Id.*

[35] *Id.* As in *Reyes*, courts carefully note when prosecutors use their closing argument to the jury to compound and aggravate the original misconduct. See United States v. Ince, 21 F.3d 576, 584 (4th Cir. 1994); United States v. Hogan, 763 F.2d 697, 703 (5th Cir. 1985).

[36] *Reyes*, 18 F.3d at 70.

[37] *Id.* at 70.

by other less prejudicial means, and whether the defense has engaged in a tactic that justifiably opens the door to such evidence.[38]

The court also enumerated several factors that should be considered in assessing prejudice.[39] These include whether the information addresses an important disputed issue at trial, whether the same information could be proved by other uncontested evidence, whether the statement was made by a knowledgeable declarant so that the jury would likely believe it, whether the declarant will testify at trial, thus exposing him to cross-examination, and whether curative instructions can protect against misuse or prejudice.[40]

The court observed that prosecutors occasionally adopt the tactic of structuring the evidence in the form of the history of the investigation, "because it makes the evidence more exciting and perhaps also because it suggests a guilty verdict as a logical, satisfying conclusion."[41] The use of this narrative device is not improper as long as the prosecutor does not enlarge the scope of relevant evidence by introducing out-of-court statements that are functionally indistinguishable from hearsay.

Although the court initially concluded that the prosecutor's conduct had been a deliberate attempt to prejudice the defendant's rights,[42] on rehearing, the court amended its opinion to state that the prosecutor acted in good faith.[43] Nevertheless, the court observed that the prosecutor's subjective intent was not relevant in determining whether a violation had occurred; the critical

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[38] See United States v. Pulley, 922 F.2d 1283 (6th Cir. 1991) (testimony allowed to rebut defense suggestion that government agent planted evidence); United States v. Hawkins, 905 F.2d 1489 (11th Cir. 1990) (testimony allowed to rebut defense suggestion that investigation designed to harass defendant).

[39] *Reyes*, 18 F.3d at 70–71.

[40] See United States v. Tussa, 816 F.2d 58 (2d Cir. 1984) (limiting instructions inadequate); United States v. Martin, 897 F.2d 1368 (6th Cir. 1990) (same).

[41] *Reyes*, 18 F.3d at 71.

[42] See slip opinion in United States v. Reyes, dated February 17, 1994, at 1841 (prosecutor initially represented that the statements were not being offered for their truth, but in his summation, he reversed himself and affirmatively used the statements for the truth of what was stated, and also "seriously distorted and exaggerated" the information contained in the statements).

[43] The amended opinion in United States v. Reyes, *supra*, went out of its way to absolve the prosecutor of any intent to prejudice the defendant. The court stated: "We are assured by the Government and are fully convinced that the discrepancy between [the agent's] testimony and the summation was not intentional." *Id.* at 69.

question was whether the prosecutor's conduct, objectively considered, had an adverse impact on the jury's ability to fairly evaluate the proof.[44] The court also issued a strong warning to prosecutors, advising them that they should alert the judge and defense counsel when they were about to introduce "potentially incendiary evidence as to which there are arguable grounds for exclusion."[45]

Insinuations: Implications of Guilt

Closely related to the improper introduction of background information to circumvent the hearsay rule are situations where the prosecutor elicits testimony that involves an insinuation that the defendant is guilty. Such a tactic would typically involve the following hypothetical. The prosecutor examines witness *X* who has had a conversation with *Y*, a person who is shown to be knowledgeable about the crime, and about the defendant's participation in the crime. The prosecutor then would ask *X* the following questions:

> Q. After you had this conversation with *Y*, were you looking for somebody?
>
> A. Yes.
>
> Q. Who were you looking for?
>
> A. The defendant.[46]

The courts find that this practice is subtly designed to circumvent the hearsay rule and the confrontation clause, and have reversed convictions when sufficient prejudice is shown.[47] By

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[44] The court stated: "Although the mistake had innocent origins, our concern is for its possible effect on the jury." *Id.*

[45] *Id.* at 72.

[46] See Mason v. Scully, 16 F.3d 38 (2d Cir. 1994); People v. Tufano, 69 A.D.2d 826, 415 N.Y.S.2d 42 (1979). See also Zemo v. State, 646 A.2d 1050 (Md. 1994).

[47] *Id.* From my experience, such prosecutorial practice is quite typical, particularly in cases involving eyewitness identifications. The prosecutor first asks the arresting officer whether he spoke to the eyewitness. The prosecutor then demonstrates abundant fairness by cautioning the officer not to divulge the nature of the conversation. The prosecutor then asks the officer whether he took any police action following that conversation. The officer, of course, answers that he arrested the defendant. Although this practice violates the hearsay rule and constitutes impermissible bolstering of the eyewitness's credibility, defense lawyers rarely object, and judges rarely sustain objections when made. Either these individuals do not understand what the prosecutor is doing, or they view the practice as a technical misstep that does not require correction.

asking the witness—usually a law enforcement official—whether he received information from an out-of-court declarant, and then following up that question by asking what the witness did with that information, usually receiving the answer that he arrested the defendant, the prosecutor impliedly introduces the substance of the information. The witness has testified, in effect, that the defendant was identified as a participant in a crime. Under these circumstances, a court is justified in concluding that the prosecutor has planted in the jurors' minds the impression that the witness implicated the defendant. This is the functional equivalent of introducing inadmissible hearsay.

Conclusion

In all instances mentioned, the prosecutor has elicited inadmissible and unfairly prejudicial evidence. Apart from violating ethical rules, the prosecutor's conduct has violated the defendant's Sixth Amendment right to confrontation, and his due process right to a fair trial. When the violation has sufficiently infected the verdict, reversals have been ordered. However, the extent to which the prosecutor in any of these cases intentionally sought to unfairly prejudice the defendant's rights is often difficult to assess. One court has noted: "Federal evidence law does *not* ask the judge, either at trial or upon appellate review, to crawl inside the prosecutor's head to divine his or her true motivation."[48] Nevertheless, many courts appear to define a violation as dependent, at least in part, on finding that the prosecutor acted in bad faith. This approach is unsound. Predicating a finding of error on the prosecutor's subjective intent is confusing and hazardous. It is confusing because it suggests that a fair trial depends on the prosecutor's innocent intent. This is unsound because it is the prosecutor's conduct, not his intent, that causes harm. Such a requirement is also hazardous because focusing on the prosecutor's state of mind would make it virtually impossible, in many cases, to prove a violation.

The better approach would be to engage in a two-part inquiry. Appellate courts should first determine whether a violation was committed based on the kinds of objectively identifiable factors enumerated in *Reyes*.[49] Such factors would carefully balance

[48] United States v. Ince, 21 F.3d 576, 580 (4th Cir. 1994) (emphasis in original).

[49] *Reyes*, 18 F.3d at 70–71.

the relevance of the prosecutor's conduct against the prejudice resulting from that conduct. Having concluded that a violation was committed, courts could then appropriately attempt to assess the prosecutor's subjective intent as one of the relevant factors in formulating a remedy.[50] When the court is able to infer from the record that the prosecutor's purposeful design was to offer inadmissible evidence, this determination should appropriately become a factor that may be considered by an appellate court in its harmless error analysis.[51] The prosecutor's deliberate misconduct in a close case should be an aggravating factor for reversal.

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[50] See United States v. Kojayan, 8 F.3d 1315, 1318 (9th Cir. 1993) ("In determining the proper remedy we must consider the government's willfulness in committing the misconduct and its willingness to own up to it.").

[51] Courts have noted that the prosecutor's intent to commit violations may be considered an aggravating factor for reversal. See Brecht v. Abrahamson, 113 S. Ct. 1710, 1722 n.9 (1993) ("Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict."); United States v. Kojayan, *supra*; United States v. Modica, 663 F.2d 1173, 1185 n.7 (2d Cir. 1981) (prosecutor's conduct did not involve "instances of deliberate misconduct").