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WITNESS COACHING BY PROSECUTORS

Bennett L. Gershman*

INTRODUCTION

Witness coaching has been described as the “dark”¹—some have even called it “dirty”²—secret of the U.S. adversary system.³ It is a practice, some claim, that more than anything else has given trial lawyers a reputation as purveyors of falsehoods.⁴ Witnesses are prepared by lawyers in private, no records are kept, and the participants do not openly discuss the encounter.⁵ If false or

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¹ John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 279 (1989) (“Witness preparation is treated as one of the dark secrets of the legal profession.”).

² Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 740 (1998) (describing witness preparation as “The Profession’s Dirty Little Secret”).

³ See *State v. Earp*, 571 A.2d 1227, 1235 (Md. 1990) (explaining that a lawyer “must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses.”); *In re Eldridge*, 82 N.Y. 161, 171 (1880) (stating that a lawyer’s duty is “to extract the missing facts from the witness, not pour them into him; to learn what the witness does know, not to teach him what he ought to know.”).

⁴ See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 96 (1988) (“The interviewing and preparation of witnesses is part of the ‘total war’ concept of litigation, and it is a practice that, more than almost anything else, gives trial lawyers their reputation as purveyors of falsehoods.”).

⁵ See Applegate, *supra* note 1, at 281 n.12 (“[T]rial lawyers have a tacit understanding that preparation activities are protected.”); George T. Frampton, *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 33 (1976) (noting that witness preparation is customarily a one-on-one process with no records kept); Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 23 (1995) (describing factors that make witness coaching difficult to expose). The practice of preparing a witness for trial is sometimes referred to as “horse-shedding,” a term said to have been coined by James Fenimore Cooper. See GENE FOWLER, *THE GREAT MOUTHPIECE: A LIFE STORY OF WILLIAM J. FALLON* 93 (1931). According to Fowler, there were carriage sheds near the courthouse in Cooper’s day, and attorneys used these facilities to rehearse witnesses prior to trial. See also *Fikes v. Alabama*, 352 U.S. 191, 199 (1957) (Frankfurter, J., concurring) (referring to “horse-shedding” of an accused during police interrogation).

misleading testimony results, the only persons who know about it are the participants themselves.⁶ And the capacity of cross-examination to expose improper coaching is extremely limited.⁷

Given its controversial nature, one would expect the practice and ethics of witness coaching to have attracted close scrutiny by courts and commentators. Interestingly, however, the subject has received relatively modest attention.⁸ A handful of judicial⁹ and ethics opinions¹⁰ have discussed superficially the subject of witness

Other commentators refer to "woodshedding" the witness. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 149 (1990).

⁶ A distinction should be made between preparing a witness's testimony, which is generally considered acceptable, and attempting to improperly influence, or "coach" testimony. See *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976) ("An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it."). Ethics codes prohibit a lawyer from falsifying evidence or assisting a witness to testify falsely, fraudulently, or perjurally. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (1983) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false."); *id.* at R. 3.4(b) ("A lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."); see also MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(4) (1980) ("In his representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence."); *id.* at DR 7-102(A)(6) ("In his representation of a client, a lawyer shall not . . . [p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false."); *id.* at DR 7-102 (A)(7) ("In his representation of a client, a lawyer shall not . . . [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."). However, apart from the truism that a lawyer should not suborn perjury, neither the cases nor the codes delineate the critical and often tenuous distinction between proper and improper witness preparation. See *Earp*, 571 A.2d at 1235 ("[T]he line that exists between perfectly acceptable witness preparation on the one hand, and impermissible influencing of the witness on the other hand, may sometimes be fine and difficult to discern.").

⁷ See *infra* notes 127-35 and accompanying text.

⁸ See Applegate, *supra* note 1, at 279 ("Even though witness preparation occurs in practically every lawsuit, it is almost never taught in law school, not directly regulated, seldom discussed in scholarly literature, and rarely litigated.").

⁹ See e.g., *State v. McCormick*, 259 S.E.2d 880 (N.C. 1979):

It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer.

Id. at 882-83; see also *Earp*, 571 A.2d at 1227:

The question of just how far an attorney may go in preparing a witness for trial is a difficult one. It involves ethical considerations as well as the possibility of tainting a witness to the extent that due process and the necessity for reliable evidence may justify the exclusion of that witness's testimony.

Id. at 1234.

¹⁰ D.C. Bar Op. No. 79 (Dec. 18, 1979), reprinted in District of Columbia Bar, Code of Professional Responsibility and Opinions of the District of Columbia Bar Legal Ethics Committee 138, 139 (1991), stating:

[A] lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of

preparation and coaching. Practitioner manuals typically offer general guidance on how to prepare witnesses,¹¹ and occasionally address tactical and ethical issues involved in coaching.¹² Scholarly commentary has examined the ethical limits of witness preparation, particularly by differentiating acceptable techniques from improper techniques, which promote false or misleading testimony.¹³ In addition, popular culture occasionally has dramatized the subject.¹⁴ However, despite a discrete body of literature devoted to witness preparation generally, there has been very little discussion by courts and commentators on witness preparation and coaching by prosecutors.¹⁵

The absence of critical examination of witness coaching by prosecutors is puzzling for two reasons. First, there is an increasing concern among courts, lawmakers, and commentators that some prosecutors use the adversary system not to serve truth, but for self-serving purposes.¹⁶ According to this view, the conduct

testimony, and may—indeed, should—do whatever is feasible to prepare his or her witness for examination.

¹¹ See, e.g., JEFFREY L. KESTLER, QUESTIONING TECHNIQUES AND TACTICS, §§ 9:01-9:85 (3d ed. 1999); ROBERTO ARON & JONATHAN L. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL (2d ed. 1998); DANIEL I. SMALL, PREPARING WITNESSES: A PRACTICAL GUIDE FOR LAWYERS AND THEIR CLIENTS (1998); RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE § 9.4, at 181-83 (2d ed. 1995).

¹² See *infra* notes 136-53 and accompanying text.

¹³ See Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L.J. 1001 (1998-99); Wydick, *supra* note 5; Applegate, *supra* note 1; Joseph D. Piorkowski, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of 'Coaching'*, 1 GEO. J. LEGAL ETHICS 389 (1987).

¹⁴ Probably the most famous dramatization of witness coaching is the "lecture" in the novel, *Anatomy of a Murder*. See ROBERT TRAVERS, ANATOMY OF A MURDER (1958) (depicting a defense attorney who outlines for his client four possible defenses to a charge of murder, rejects three of them as inapplicable, but suggests, hypothetically, that a legal excuse might be available for a killing committed in a blind rage. He then terminates the interview, instructing his client to think about the incident). For references to coaching in the film, THE VERDICT, and the television series, *L.A. Law*, see Zacharias & Martin, *supra* note 13, at 1002-03.

¹⁵ But see Flowers, *supra* note 2, at 739-66. A highly effective dramatization of prosecutorial coaching is depicted in the television series, *The Practice*. A defendant is being prosecuted for murdering his wife. His defense is suicide, and circumstantial evidence strongly supports the defense. During a pretrial interview with the brother of the deceased, who believes the defendant killed his sister, the prosecutor suggests that the witness can strengthen the prosecution's case, and then "lectures" the brother on the hearsay rule, and the admissibility of statements of a present state of mind. The brother picks up on the prosecutor's obvious cue, and subsequently testifies to several devastating statements that he claims his sister made shortly before her death, describing her strong will to live, and suggesting that if anything happens to her, her husband is the cause. See *The Practice* (ABC television broadcast, Oct. 8, 2000).

¹⁶ For recent decisions finding that prosecutors suborned perjury, see *Boyette v. Lefevre*, 246 F.3d 76 (2d Cir. 2001); *Commonwealth of Northern Mariana v. Bowie*, 243 F.3d 1109 (9th Cir. 2001); *United States v. LaPage*, 231 F.3d 488 (9th Cir. 2000). For

of some prosecutors in investigating cases and preparing witnesses to give testimony is undertaken not to ascertain, present, and protect the truth, but rather to manipulate the truth in order to secure a conviction.

Second, there is an increasing concern—amply documented by recent reports of wrongful convictions—that the criminal justice system is seriously prone to error.¹⁷ Critics contend that these errors are attributable to defects in the adversarial trial process, mostly from incompetent representation by defense lawyers and trial errors by prosecutors.¹⁸ However, recent disclosures suggest that the origin of many, perhaps most, of these miscarriages of justice occurs before the cases actually reach the courtroom for

Congressional actions imposing ethical and civil liabilities on prosecutors, see 28 U.S.C. § 530B (1994) (codifying the “Citizens Protection Act,” mandating that federal prosecutors comply with state rules of professional ethics); 18 U.S.C. § 3006A (1994) (codifying the “Hyde Amendment,” imposing monetary costs on federal prosecutors for bad faith conduct). For commentary in the media, see Robyn E. Blumner, *Prosecutors Should Rethink Their Goals*, ST. PETERSBURG TIMES, May 6, 2001, at 1D; Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999, at 3; Bill Moushey, *Win at All Costs: Government Misconduct in the Name of Expedient Justice*, PITTSBURGH POST GAZETTE, Nov. 22, 1998, at 1.

¹⁷ See JAMES LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 5 (2000) (discussing a massive study of every capital punishment case in the U.S. between 1973-1995 and documenting that the overall error rate in capital punishment system was 68 percent, and that 82 percent of all capital judgments reversed on appeal (247 out of 301) were replaced on retrial with a sentence less than death, or no sentence at all); JIM DWYER ET AL., ACTUAL INNOCENCE (2000) (offering a compendium of anecdotal accounts, and legal and social science scholarship, of miscarriages of justice in American criminal trials); DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 1999, YEAR END REPORT, at 1 (2000) (84 inmates on Death Row exonerated since 1973); NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, RECOMMENDATIONS FOR HANDLING APPLICATIONS FOR POSTCONVICTION DNA TESTING, at 7 (Feb. 1999) (draft report) (“[A]t least 55 convictions in the United States have been vacated on the basis of DNA results.”); NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (evaluating twenty-eight cases in which DNA evidence established post-trial innocence); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36, 71 (1987) (claiming that more than 350 people in this century have been erroneously convicted in the U.S. of crimes punishable by death; 116 of those were sentenced to death and 23 were actually executed); Alan Berlow, *The Wrong Man*, ATLANTIC MONTHLY, Nov. 1999, at 68 (“[S]urely the number of innocent people discovered and freed from prison is only a small fraction of those still incarcerated.”); Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 289-92 (1988) (explaining that a study of more than 200 felony cases of wrongful conviction found misidentification to be the single largest source of error, accounting for more than half of cases that had one main cause); Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807, 809 (1991) (claiming that New York State leads all states in executing the innocent, evidenced by the fact that eight New Yorkers have been executed in error).

¹⁸ See LIEBMAN ET AL., *supra* note 17, at 5 (noting that incompetent defense lawyering accounted for 37 percent of the state post-conviction reversals of capital cases; prosecutorial misconduct accounted for 16-19 percent of all reversals).

trial. Indeed, the inability of criminal trials to produce accurate results may be attributable in many cases to techniques used by prosecutors to prepare, shape, and polish the testimony of their witnesses.

Absent any contemporaneous record of a prosecutor's pretrial interaction with witnesses,¹⁹ it is exceedingly difficult for observers to investigate the preparation process to ascertain the extent to which prosecutors or police may have improperly influenced witnesses overtly, covertly, or even unwittingly to give false or misleading testimony.²⁰ Moreover, the difficulty of analyzing the witness-preparation process is compounded by the failure of courts and prosecutors to recognize or appreciate how cognitive factors such as memory,²¹ language,²² and suggestion²³ can affect the accuracy and truth of a witness's testimony.

I. WITNESS COACHING—THE "DARK SECRET" OF PROSECUTORIAL CONDUCT

Given the secrecy surrounding the prosecutor's preparation of her witnesses and the inability to review the process meaningfully, it is virtually impossible to ascertain whether and to what extent witnesses have been coached by prosecutors and police to give false or misleading testimony. Nevertheless, inferences can be drawn from cases, commentary, and empirical evidence to illuminate this murky process. First, it is indisputable that some prosecutors coach witnesses with the deliberate objective of promoting false or misleading testimony. Prosecutors do this primarily to (1) eliminate inconsistencies between a witness's earlier statements and her present testimony, (2) avoid details that

¹⁹ See Frampton, *supra* note 5, at 33 (describing witness preparation by prosecutor and government witness as a one-on-one process with no records kept). Although this Article focuses primarily on the prosecutor's pretrial interaction with government witnesses, it is common knowledge that other law enforcement officials such as federal agents and state and local police officers play a critical role in influencing the witness's testimony through interviewing and debriefing the witness during the early stages of an investigation. Prosecutors have a constitutional duty to familiarize themselves with police encounters with witnesses, and to obtain from police all relevant information. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). Thus, any falsification, concealment, or manipulation by police of information pertaining to statements by witnesses is attributable constitutionally to the prosecutor.

²⁰ See Wydick, *supra* note 5, at 25 (describing covert methods lawyers can employ to induce a witness to give false testimony).

²¹ See *infra* notes 44-67 and accompanying text.

²² See *infra* notes 68-83 and accompanying text.

²³ See *infra* notes 84-113 and accompanying text.

might embarrass the witness and weaken her testimony, and (3) conceal information that might reveal that the prosecutor has suppressed evidence.

Additionally, prosecutors have the ability, consciously or unconsciously, to strengthen the case by questions and suggestions that cause the witness to fill gaps in memory, eliminate ambiguities or contradictions, sharpen language, create emphasis, and alter demeanor. Some witnesses, moreover, are vulnerable to prosecutorial suggestions, or receptive to prosecutorial cues. Indeed, the prosecutor's interaction with the cooperating witness is a paradigmatic example of the dangers and abuses of coaching.

Finally, the absence of any contemporaneous record of the prosecutor's preparation of witnesses encourages improper coaching by hiding the process from meaningful oversight by courts or defense counsel. Without some basis to believe that coaching occurred, a court would not invoke prophylactic safeguards to detect or prevent coaching. And absent any documentation of the witness-preparation process, the defense lawyer has no basis to challenge the witness's testimony as the product of improper conduct by the prosecution.

A. *Incentives for Coaching*

1. Eliminate Discrepancies

A prosecutor bent on obtaining a conviction may attempt to eliminate any significant inconsistencies in a witness's testimony. Some prosecutors overtly influence their witness to alter materially an earlier, inconsistent version. In *Kyles v. Whitley*,²⁴ a capital murder case, the prosecutor elicited testimony from Isaac Smallwood, a key eyewitness who gave an extremely detailed description of the killing. Smallwood claimed he saw Kyles struggle with the victim, produce a small, black .32 caliber gun from his right pocket, shoot the victim, and then drive off in the victim's LTD.²⁵ The prosecutor argued to the jury: "Isaac Smallwood, have you ever seen a better witness[?]"²⁶

However, in a statement Smallwood made to the police shortly after the killing, which the prosecutor did not disclose to the defense, Smallwood gave a vastly different account of the crime. He told the police that he did not see the actual killing, did

²⁴ 514 U.S. 419 (1995).

²⁵ *Id.* at 442-43.

²⁶ *Id.* at 444.

not see the assailant outside the victim's vehicle, and saw the assailant for the first time driving toward him in a Thunderbird.²⁷

The U.S. Supreme Court reversed the conviction because the prosecutor violated his constitutional obligation to disclose this information to the defense.²⁸ The majority opinion, however, noted how Smallwood's original story apparently had been "adjust[ed]" by the prosecutor by the time of the trial.²⁹ Disclosure of the earlier statements, the majority observed, not only would have "destroyed confidence in Smallwood's story," but also would have "rais[ed] a substantial implication that the prosecutor had coached him to give it."³⁰

A major incentive for prosecutors to use cooperating witnesses is to support an uncertain but consistent version of the facts, rather than to confirm an inconsistent version of the facts that may represent more of the truth.³¹ As an example, one writer describes a proffer session in which a cooperating witness has identified several people as being present at a meeting to distribute drugs.³² The witness fails to identify a particular individual as being present. The prosecutor, however, firmly believes from other evidence that this person was present at the meeting. When asked specifically whether this person was present,

²⁷ See *id.* at 443. Smallwood's statement, taken at the parking lot, claimed that he had not seen the actual murder and had not seen the assailant outside the vehicle. "I heard a loud [sic] pop When I looked around I saw a lady laying on the ground, and there was a red car coming toward me." *Id.* When a police investigator specifically asked Smallwood whether he had seen the assailant outside the car, Smallwood answered that he had not; the gunman "was already in the car and coming toward me." *Id.* Smallwood described the killer as a black teenage male with a mustache and shoulder length braided hair. Kyles had no mustache and wore his hair in a "bush" style. *Id.* at 443.

²⁸ "In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." *Id.* at 441.

²⁹ The struggle and shooting, which earlier he had not seen, he was able to describe with such detailed clarity as to identify the murder weapon as a small black .32-caliber pistol, which, of course, was the type of weapon used. His description of the victim's car had gone from a "Thunderbird" to an "LTD"; and he saw fit to say nothing about the assailant's shoulder-length hair and mustache, details noted by no other eyewitness. *Id.* at 443.

³⁰ "The implication of coaching would have been complemented by the fact that Smallwood's testimony at the second trial was much more precise and incriminating than his testimony at the first, which produced a hung jury." *Id.* at 443 n.14.

³¹ See Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 559 (1987) ("The natural inclination is not to see inconsistent or contradictory evidence for what it is, but to categorize it as irrelevant or a petty incongruity."); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 945 (1999) ("Prosecutors are convinced they have the guilty guy, then they go about seeking to convict and do not carefully look at things that are funny about their case."). See also Applegate, *supra* note 1, at 328 ("[A] major incentive for trial preparation is to obtain support for an uncertain version of the facts and not to confirm a version of the facts that appears to represent the whole truth.").

³² See Yaroshefsky, *supra* note 31, at 959.

the witness repeats that he was not present. The witness is asked: "Are you telling me that [he] was not there?" The witness now knows what the prosecutor wants to hear. After a break, when the witness is asked again, he now remembers that this individual was there.

2. Avoid Embarrassing Details

Some prosecutors attempt to influence the testimony of witnesses to conceal information that might embarrass the witness and weaken the prosecutor's case. As a consequence, the witness may be coached to give testimony that may be literally true but creates a false or misleading impression, while allowing the prosecutor to avoid a charge of outright solicitation of perjury. One method of evasion is to instruct the witness to claim a lack of memory or knowledge about a question that may be embarrassing or otherwise harmful.³³ A prosecutor might reinforce this subtle message by reassuring the witness that while he has a duty to answer every question truthfully, an answer such as "I don't know" or "I don't remember" is a perfectly acceptable response when the witness is not absolutely certain of the answer.³⁴

Another strategy of concealment is to instruct the witness to answer only the question asked, and not to volunteer information.³⁵ An example is *Alcorta v. Texas*,³⁶ in which the Supreme Court reversed the defendant's murder conviction for stabbing his wife to death. The defendant admitted the killing but claimed it occurred in a fit of passion after discovering his wife,

³³ See James M. Altman, *Witness Preparation Conflicts*, LITIG., Fall 1995, at 38, 43 ("[W]itnesses often receive instructions that, if true, 'I do not recall' is a perfectly proper—indeed, an optimal—response to opposing counsel's thorny questions. Sometimes witnesses translate this advice, when coupled with an attorney's other statements, into a suggestion that harmful facts should not be remembered."); Christopher T. Lutz, *Fudging and Forgetting*, LITIG., Spring 1993, at 10, 11 (describing advice on lack of memory as an "all-purpose life preserver" that attorneys provide to their witnesses).

³⁴ Literally truthful testimony is not perjurious, even if it is misleading or evasive. See *Bronston v. United States*, 409 U.S. 352 (1973). However, a false claim of lack of memory may result in a perjury conviction. See *United States v. Barnhart*, 889 F.2d 1374, 1376-80 (5th Cir. 1989) (upholding a perjury conviction for witness's testimony before a grand jury claiming lack of memory when corporate official instructed him to "get dumb" when testifying on certain matters); *Sheriff, Clark County v. Hecht*, 710 P.2d 728 (Nev. 1985) (upholding a charge of subornation of perjury for witness's testimony, pursuant to attorney's instructions, that he did not remember).

³⁵ See Altman, *supra* note 33, at 43 (arguing that instructing a witness not to volunteer information, and to answer only the question asked, "can become part of a general strategy of concealment and evasion").

³⁶ 355 U.S. 28 (1957).

whom he had already suspected of marital infidelity, kissing one Castelleja late at night in a parked car. Castelleja, the only eyewitness to the killing, testified that his relationship with the deceased had been nothing more than a casual friendship,³⁷ and that he had driven her home from work on the night she was killed.

However, during pretrial preparation, the witness told the prosecutor that he had had sexual intercourse with the defendant's wife on five or six occasions shortly before her death. This fact, if known or believed by the defendant, would have provided the defendant with a powerful motive for the killing. The prosecutor advised the witness that he should not volunteer any information about sexual intercourse but if specifically asked about it, to answer truthfully.³⁸ The prosecutor's questions at trial, as reflected in one significant colloquy, were obviously designed to allow the witness to give literally truthful answers about his relationship with the deceased while carefully avoiding the subject of his sexual conduct with the deceased.³⁹

3. Conceal Suppressed Evidence

A prosecutor may be motivated to engage in improper coaching to prevent the revelation of material information that the prosecutor did not disclose to the defense as required by due process.⁴⁰ Needless to say, a prosecutor who is predisposed to violate his constitutional and ethical obligation to disclose favorable evidence to a defendant is also capable of molding her witness's testimony to protect the nondisclosure from being

³⁷ *Id.* at 30.

³⁸ *Id.* at 31.

³⁹ The prosecutor questioned the witness as follows:

Q. Natividad [Castilleja], were you in love with Herlinda [defendant's wife]?

A. No.

Q. Was she in love with you?

A. No.

Q. Had you ever talked about love?

A. No.

Q. Had you ever had any dates with her other than to take her home?

A. No. Well, just when I brought her from there.

Q. Just when you brought her from work?

A. Yes.

Id. at 30.

⁴⁰ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

discovered.⁴¹ Indeed, it is arguable that every case in which a prosecutor deliberately conceals exculpatory evidence from the defense may also involve an effort by the prosecutor to coach the witness's testimony to hide the suppression.

In *Walker v. City of New York*,⁴² for example, a prosecutor almost certainly coached a cooperating witness to give false testimony to conceal from the defense information that would have undermined the witness's credibility. *Walker* describes a prosecutor's debriefing and preparation of a cooperating witness in an investigation of the robbery of an armored truck and murder of the truck driver. At the initial proffer session, the witness identified two individuals as having participated in the crime. The prosecutor subsequently learned, however, that one of these alleged accomplices could not have committed the crime because he was in prison on the date of the robbery. Undeterred, the prosecutor elicited testimony from the cooperator in the grand jury and at trial that did not mention a second accomplice. The decision by the Second Circuit condemned the prosecutor's failure to disclose the inconsistency. The court did not discuss the reason for the witness's failure to mention the existence of a second perpetrator, an omission that undoubtedly resulted from careful coaching by the prosecutor.⁴³

B. Cognitive Factors Facilitating Coaching

1. Memory

An extensive body of scientific literature holds that memory is highly fallible, and the process of memory retrieval and reconstruction extremely fragile.⁴⁴ The perception of an event

⁴¹ For examples of two recent Supreme Court cases suggesting that a prosecutor engaged in improper coaching in order to protect from disclosure his concealment of exculpatory evidence, see *Strickler v. Greene*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995).

⁴² 974 F.2d 293 (2d Cir. 1992).

⁴³ See also *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989) (en banc). For a discussion of the apparent coaching of several witnesses with the purpose of concealing exculpatory evidence that the prosecutor had failed to disclose to the defense, see Bennett L. Gershman, Film Review, *The Thin Blue Line: Art or Trial in the Fact-Finding Process?*, 9 PACE L. REV. 275 (1989).

⁴⁴ There is a large body of psychological literature describing the vulnerability of memory. Several prominent studies include FREDERICK CHARLES BARTLETT, REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY (1997); ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY (1994); ISRAEL ROSENFELD, THE INVENTION OF MEMORY: A NEW VIEW OF THE BRAIN (1988); GEORGE A. TALLAND, DISORDERS OF MEMORY AND LEARNING (1969). For a

typically does not leave a single, clear image; it is heavily influenced by a variety of factors, including the manner in which the memory is sought to be retrieved.⁴⁵ Many studies describe the distorting effects of suggestive questioning.⁴⁶ Whereas witness preparation certainly can assist a witness in remembering and retrieving a truthful recollection, preparation also can distort a witness's underlying memory and produce a false recollection.⁴⁷ And because of the complex nature of memory, it may be difficult for the witness himself to distinguish between a genuine recollection of a previously unrecalled fact, and an imagined recollection based on suggestions from the interviewer.⁴⁸

Many prosecutors do not appreciate the dangers associated with retrieving a memory of an event.⁴⁹ A prosecutor, through the use of questions and suggestions has the ability to influence a witness to remember facts and fill gaps that may be inaccurate, but which the witness may come to believe is the truth.⁵⁰ In addition, because of the prosecutor's unique status as the attorney for the government, she ordinarily is viewed by the witness as a highly

collection of recent scholarship on issues related to memory retention, retrieval, and distortion, see Yaroshefsky, *supra* note 31, at n.174.

⁴⁵ See FREEDMAN, *supra* note 5, at 152-56.

⁴⁶ See *id.* at 152 ("A common misconception about memory is that it is a process of reproducing or retrieving stored information, in the manner of a videotape or a computer. In fact, memory is much more a process of reconstruction."); Applegate, *supra* note 1, at 329 ("Memory is not like a phonograph record; the perception of an event does not leave a single, clear imprint that can be replayed precisely and at will."); Michael Owen Miller, *Working with Memory*, LITIG., Summer 1993, at 10, 11 (noting that memory is not a single mental process but involves three stages of acquisition, retention, and retrieval, each of which may be "enhanced, suppressed, or distorted").

⁴⁷ See FREEDMAN, *supra* note 5, at 156 (describing the "lawyer's dilemma" as needing to probe a client's memory to learn important facts, but by stressing the importance of particular facts, it may induce a client to "remember" a fact even if it did not occur); Miller, *supra* note 46, at 12 (explaining that memory retrieval is susceptible to the greatest amount of distortion).

⁴⁸ See Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975):

During the sessions devoted to "coaching," the future witness is likely to try to adapt himself to expectations mirrored in the interviewer's one-sided attitude. As a consequence, gaps in his memory may even unconsciously be filled out by what he thinks accords with the lawyer's expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as accurate reproductions of his original perceptions.

Id. at 1094.

⁴⁹ See Yaroshefsky, *supra* note 31, at 953 ("Most prosecutors simply do not understand how memory works and the reality of truth."); Miller, *supra* note 46, at 11 ("[L]awyers are not memory specialists.").

⁵⁰ See JEROME FRANK, *COURTS ON TRIAL* 86 (1950) (describing "inadvertent but innocent witness-coaching" attributable to competitive pressures of adversarial advocacy); Applegate, *supra* note 1, at 329 (describing that a lawyer's adversarial posture may unintentionally produce testimony that supports the lawyer's version of the facts, and the witness may be unaware that she is being manipulated).

knowledgeable official who can be trusted to use the facts responsibly.⁵¹ Indeed, because of the prosecutor's power and prestige, the witness may try to conform his recollection of the event to what the witness believes the prosecutor wants to hear.⁵²

Experts and courts recognize that facts are slippery, and the process of memory retrieval can be treacherous.⁵³ As Justice Stevens noted in *Nix v. Whiteside*,⁵⁴ "facts" often are highly ambiguous and uncertain. To an appellate court after a case has been tried and the evidence sifted by others,

a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of clay and sand. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.⁵⁵

And to experts who have studied the psychology of human memory, a witness's recollection of an event is a delicate amalgam that is retrieved, reconstructed, or imagined from this combination of clay, sand, and gravel.⁵⁶

The potential for witness coaching by prosecutors and police to alter memory is powerfully illustrated in the Supreme Court's decision in *Strickler v. Greene*.⁵⁷ In *Strickler*, a capital murder trial, a key prosecution witness, Anne Stolfus, initially told police that she had only "muddled memories" about a kidnapping in a mall, and could not identify the perpetrators, the victim, or the

⁵¹ This observation is usually made in connection with a jury's respect for the prosecutor's prestige and expertise, and its confidence in the prosecutor's judgement. See *United States v. Young*, 470 U.S. 1, 18-19 (1985) ("[P]rosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."); *United States v. Modica*, 663 F.2d 1173 (2d Cir. 1981):

The prosecutor is cloaked with the authority of the United States Government; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a federal official duty-bound to see that justice is done. . . . [I]t may be difficult for [the jury] to ignore his views, however biased and baseless they may be.

Id. at 1178-79. The same observation, I believe, applies to a non-hostile government witness' perception of the prosecutor's status and expertise.

⁵² See Damaška, *supra* note 48.

⁵³ See LOFTUS & KETCHAM, *supra* note 44, at 169 (describing how memory "grows," rather than "fades," because "every time we recall an event we must reconstruct the memory, and so each time it is changed—colored by succeeding events, increased understanding, a new context, suggestions by others, other people's recollections."); *Kyles v. Whitley*, 514 U.S. 419, 444 (1995) ("[T]he evolution over time of a given eyewitness's description can be fatal to its reliability.").

⁵⁴ 475 U.S. 157, 190 (1986) (concurring opinion).

⁵⁵ *Id.*

⁵⁶ See *supra* note 44 for a list of prominent studies on this topic.

⁵⁷ 527 U.S. 263 (1999).

automobile.⁵⁸ At trial, however, Stolfus gave astonishingly detailed testimony about the event.⁵⁹ She gave a detailed description of all three perpetrators,⁶⁰ the victim,⁶¹ and even remembered the license plate number of the van.⁶² Denying the suggestion that she had learned these details from news reports, she answered, "I have an exceptionally good memory."⁶³

The process by which Stolfus' memory improved so remarkably, however, was revealed in a series of documents prepared by a police detective, which were never disclosed to the

⁵⁸ Stolfus first spoke to the police two weeks after the crime, a few days after discussing the incident with classmates at James Madison University, where both she and the victim, Leanne Whitlock, were students. *See id.* at 270. According to notes of this first interview (Exhibit 1), Stolfus told Detective Claytor that she could not identify the black female victim, nor the two white male perpetrators, but could identify the white female perpetrator. *See id.* at 274. In a letter written to Detective Claytor three days later (Exhibit 4), Stolfus states, "that she had not remembered being at the mall, but that her daughter had helped jog her memory." *Id.* She wrote: "I have a very vague memory that I'm not sure of." *Id.* In another note to Claytor (Exhibit 5), Stolfus described "the car," but did not mention the license plate number. In another letter to Claytor (Exhibit 7), Stolfus thanked Claytor for his "patience with my sometimes muddled memories." *Id.* In another note (Exhibit 8), Stolfus commented that "I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load." *Id.* at 275.

⁵⁹ She testified to seeing the perpetrators earlier in a music store, described their appearance and behavior in detail, thought they looked "revved up" and "very impatient," bumped into one of them, and thought she felt something hard in the pocket of his coat. *See id.* at 271. She left the store, but again encountered the threesome, one of whom bumped into Stolfus and asked directions to the bus stop. Stolfus tried to follow them "because of her concern about petitioner's behavior," but "lost him." *Id.* She later saw the petitioner "tearing out of the mall entrance door and went up to the driver of the van." *Id.* He "pounded on" the passenger window, "shook the car, yanked the door open, and jumped in." *Id.* The victim started blowing her horn a long time, and petitioner "started hitting her." *Id.* at 272. And he "started hitting her on the head and I was, I just became concerned and upset." *Id.* Stolfus pulled up alongside the other car; the driver looked "frozen" and "mouthed an inaudible response." *Id.* Stolfus started to drive away and then realized "the only word that it could possibly be, was help." *Id.*

⁶⁰ Stolfus testified that Strickler wore a grey T-shirt with a Harley Davidson insignia on it, and had "a kind of multi-layer look." *Id.* at 270 n.5. Co-defendant Henderson "had either a white or light colored shirt, probably a short sleeve knit shirt and his pants were neat. They weren't just old blue jeans. They may have been new blue jeans or it may have been more dressy slacks of some sort." The woman "had blonde hair, it was kind of in a shaggy cut down the back. She had blue eyes, she had a real sweet smile, kind of a small mouth. Just a touch of freckles on her face." *Id.*

⁶¹ She testified that this woman was "beautiful . . . well dressed and she was happy, she was singing." *Id.* at 271.

⁶² Stolfus stated that the license plate was West Virginia, NKA 243, which she remembered instructing her daughter to write down, and said she was able to remember the number because she used the phrase, "No Kids Alone" and "I said 243 is my age." *Id.* at 272 n.7.

⁶³ *Id.* at 272. Stolfus added that "I had very close contact with [petitioner] and he made an emotional impression with me because of his behavior and I, he caught my attention and I paid attention." *Id.* at 272-73.

defense.⁶⁴ These documents were based on interviews between Detective Claytor and Stolfus in which her memory continued to expand over time because, she claimed, of “the associations that [Detective Claytor] helped me make.”⁶⁵ The Supreme Court addressed whether the prosecutor violated his constitutional duty by not disclosing these statements to the defense. The Court found no violation.⁶⁶ The Court never discussed the other important question, i.e., whether the prosecutor and police encouraged Stolfus to reconstruct her memory to accord with the government’s theory of guilt.⁶⁷

2. Language and Communication

Prosecutors may attempt to fill gaps by asking questions, making statements, or displaying evidence that highlights specific facts.⁶⁸ Indeed, several former prosecutors found it “disturbing” and “dangerous” that so many prosecutors gave facts to cooperating witnesses in the course of eliciting information from them.⁶⁹ Moreover, the language used by a prosecutor in communicating those facts to the witness may significantly influence the witness’s responses. Experts have shown that using specific words in a question can distort a witness’s recollection or recounting of an event.⁷⁰ For example, asking a witness whether

⁶⁴ Of the eight documents either prepared by Claytor or received by him from Stolfus, it is undisputed that at least five of those documents “were known to the State but not disclosed to trial counsel.” *Id.* at 282. It is unclear whether the prosecuting attorney knew about some or all of these documents at the time he proceeded to trial. He claimed that he never saw five of the exhibits until long after trial, and that they were not in the file he made available to petitioner. *Id.* at 275. The prosecutor claimed that three of the exhibits had been in his open file, but defense counsel maintained otherwise. *Id.* at 275 n.11.

⁶⁵ *Id.* at 274.

⁶⁶ The majority concluded that although the prosecutor suppressed several items of favorable evidence which would have severely impeached Stolfus, *id.* at 282, there was ample other evidence of Strickler’s involvement. Therefore, the petitioner failed to demonstrate that there is a “reasonable probability” that his conviction or sentence would have been different had the Stolfus materials been disclosed. *Id.* at 296. Justice Souter, joined by Justice Kennedy, dissented, arguing that “the likely havoc that an informed cross-examiner could have wreaked upon Stolfus” would have been “sufficient to undermine confidence that the death recommendation would have been the choice.” *Id.* at 304.

⁶⁷ For a critical analysis of *Strickler*, see Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537 (2000).

⁶⁸ See Yaroshefsky, *supra* note 31, at 960 (noting that many prosecutors “show evidence to a witness”).

⁶⁹ See *id.*

⁷⁰ See Piorkowski, *supra* note 13, at 399-402 (describing how a witness’ choice of certain words can significantly affect the substantive meaning of the testimony); see also *Haworth v. State*, 840 P.2d 912, 917 (Wyo. 1992) (describing how an attorney suggested

he saw “a” car is much less suggestive than asking the witness whether he saw “the” car.⁷¹ Similarly, asking the witness whether a person “smashed” another’s face may produce a decidedly different response than asking the witness whether a person “hit” the other person.⁷²

Prosecutors have the ability by their choice of language to telegraph to the witness specific facts that the prosecutor wants the witness to say. For example, when a witness initially is uncertain of the identity of persons who were present at a critical meeting, a prosecutor could properly try to refresh the witness’s recollection by asking him whether a named person was present.⁷³ However, if the witness continues to express doubt, a prosecutor who focuses repeatedly on whether that person was present is ultimately going to convey to the witness the prosecutor’s expectations and the witness eventually will get the message and say it.⁷⁴

Many prosecutors appear to be unaware of the extent to which they express verbally or non-verbally a genuine interest in certain facts, or communicate disappointment when the witness does not know particular facts, and thereby tip off the witness to what they want him to say.⁷⁵ Some prosecutors are not subtle about this type of communicative message. A prosecutor, for example, might signal to a cooperating witness, either explicitly or implicitly, that he is not helping himself by omitting certain details. According to several former prosecutors, the witness “somehow now for the first time . . . finds information that helps the government.”⁷⁶

Presuppositions or assumptions in questions also can create a false recollection. For example, after being intensively questioned by the prosecutor about whether the target of an investigation displayed a gun, the witness might acknowledge that he remembers a gun because the story has become implanted in his mind as a fact, either because he heard about it from others rather than observing it firsthand, or because the prosecutor strongly

that defendant employ the word “cut” instead of “stabbed” to describe the incident).

⁷¹ See Wydick, *supra* note 5, at 43 (noting that using “the” tips off the witness that the questioner thinks such a fact more likely occurred, whereas using “a” keeps the questioner in a more neutral position).

⁷² See FREEDMAN, *supra* note 5, at 155.

⁷³ See *infra* notes 148-50 and accompanying text.

⁷⁴ See Yaroshefsky, *supra* note 31, at 959-61.

⁷⁵ See *id.* at 959 (“Prosecutors appear to be unaware of the extent to which they express, verbally and/or non-verbally, that they are disappointed that the cooperator does not know particular facts or that they express a genuine interest in information about a particular person.”).

⁷⁶ *Id.*

suggested the fact.⁷⁷ Asking a witness to retell an event over and over may convince the witness that his story is true.⁷⁸

There are several communicative techniques that interviewers use to shape a witness's testimony.⁷⁹ Among the most common are asking leading questions,⁸⁰ showing a witness a document to refresh her recollection,⁸¹ informing a witness of what another witness has said about the incident,⁸² and giving the witness a lecture on the consequences of saying one thing or another.⁸³

C. *Dangerous Witnesses*

Some witnesses are especially vulnerable to coercive or suggestive interviewing techniques. The most susceptible of these witnesses are (1) children, because of their immaturity and impressionability; (2) identification witnesses, because of the inherent unreliability of eyewitness testimony; and (3) cooperating witnesses, because of their enormous incentives to falsify or embellish.

1. Children

Some witnesses are especially vulnerable to suggestive interviewing techniques. A familiar and frequently cited example is the testimony of young children in sexual abuse cases. Many instances of wrongful convictions are attributable to the testimony of child witnesses.⁸⁴ Courts have increasingly scrutinized the reliability of the testimony of young children for coercive or

⁷⁷ See *id.* at 956-57.

⁷⁸ See FRANK, *supra* note 50, at 86 ("Telling and re-telling it to the lawyer, [the witness] will honestly believe that his story . . . is true.").

⁷⁹ See Wydick, *supra* note 5, at 41-44.

⁸⁰ See *infra* notes 140-41 and accompanying text.

⁸¹ See *infra* note 150 and accompanying text.

⁸² See *infra* note 148 and accompanying text.

⁸³ See *infra* note 149 and accompanying text.

⁸⁴ See Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2117 n.1 (1996) (claiming that of the thirty child sexual abuse cases that went to trial in the 1980s, more than half of the convictions were reversed on appeal for tainted testimony of child witnesses); Angela R. Dunn, *Questioning the Reliability of Children's Testimony: An Examination of the Problematic Elements*, 19 LAW & PSYCHOL. REV. 203, 203-09 (1995) (describing "widespread concern about the reliability of the child's statements" and factors affecting unreliability); Carey Goldberg, *Youths' 'Tainted' Testimony is Barred in Day Care Retrial*, N.Y. TIMES, June 13, 1998, at A6 (discussing several reversals of convictions in sexual abuse trials and increasing concern over reliability of child witnesses).

suggestive pretrial interviewing techniques.⁸⁵ For example, in *Idaho v. Wright*,⁸⁶ the Supreme Court found that a child's accusation of sexual abuse was based on suggestive and leading questioning by an interrogator who had a preconceived idea of what the child should be disclosing.⁸⁷ Additionally, courts have also focused on the absence of spontaneous recall, the bias of the interviewer, the use of leading questions, multiple interviews, incessant questioning, vilification of the defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes, and cajoling.⁸⁸ Courts have also noted the failure to videotape or otherwise document the initial interview session.⁸⁹

2. Identification Witnesses

Identification witnesses are among the most unreliable witnesses.⁹⁰ As noted above,⁹¹ these witnesses may adapt their testimony to what they believe accords with the prosecutor's

⁸⁵ See, e.g., *Idaho v. Wright*, 497 U.S. 805 (1990); *United States v. Rouse*, 111 F.3d 561 (8th Cir. 1997); *State v. Gersin*, 668 N.E.2d 486 (Ohio 1996); *State v. Michaels*, 642 A.2d 1372 (N.J. 1994); *People v. Alvarez*, 607 N.Y.S.2d 573 (N.Y. Sup. Ct. 1993); *State v. Hulbert*, 481 N.W.2d 329 (Iowa 1992).

⁸⁶ 497 U.S. 805 (1990).

⁸⁷ *Id.* at 826 ("We think the Supreme Court of Idaho properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which Dr. Jambura conducted the interview.").

⁸⁸ See cases cited *supra* note 85.

⁸⁹ See *Wright*, 497 U.S. at 812 (noting that "questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial") (quoting *State v. Giles*, 775 P.2d 1224, 1227 (Idaho 1989)).

⁹⁰ See *United States v. Wade*, 388 U.S. 218, 228-29 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."); EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* (1932) (documenting sixty-two American and three British cases of convictions of innocent defendants); FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 30 (1927) ("The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."); Jennifer L. Davenport, et. al., *Eyewitness Identification Evidence*, 3 PSYCHOL. PUB. POL'Y & L. 338 (1997) (noting that "both archival studies and psychological research suggest that eyewitnesses are frequently mistaken in their identification"); Rattner, *supra* note 17, at 289-92 (1988) (describing a study of more than 200 felony cases of wrongful conviction that found misidentification to be the single largest source of error, accounting for more than half of the cases that had one main error); Jim Yardley, *In Death Row Dispute, A Witness Stands Firm*, N.Y. TIMES, June 16, 2000, at A22 (discussing recent execution of Gary Graham in Texas after years of litigation and public controversy over the accuracy of a highly questionable identification by only one eyewitness). The many recent exonerations of defendants by DNA evidence further underscores the unreliability of eyewitness testimony. See Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 312-13 (2001).

⁹¹ See *supra* notes 50-52 and accompanying text.

expectations. Prosecutors may also attempt to “adjust” the testimony of these witnesses to strengthen the probative impact of their identification.⁹² These witnesses may add facts to their memory that appear to the witness to be an accurate reproduction of what the witness originally perceived. This process of “memory adjustment” is exemplified by the testimony of Ann Stolzhus in *Strickler v. Greene*,⁹³ and Isaac Smallwood in *Kyles v. Whitley*.⁹⁴ This adjustment often involves the testimony of identifying witnesses that the prosecutor knows is factually weak or unreliable, but is presented to the jury with an aura of certainty and confidence.⁹⁵

The testimony of several eyewitnesses in the murder trial of Randall Dale Adams, memorialized in the film documentary *The Thin Blue Line*,⁹⁶ offers a dramatic commentary on the dangers of testimony of identification witnesses. Three rebuttal witnesses—Emily Miller, her husband R.L. Miller, and Michael Randall—offered critical testimony identifying Adams as the killer.⁹⁷ The

⁹² The technique used by a prosecutor in adjusting the testimony of his identification witness probably would not be as heavy-handed as the example used by Zacharias and Martin to describe an “outrageous” instance of the promotion of perjury. See Zacharias & Martin, *supra* note 13, at 1003-04 (describing an attorney who asked a witness whether [he had] “ever known [the defendant] to be violent?” When the witness responds, “Not really,” the lawyer immediately replies, “The answer is ‘No.’”). Assuming the witness responds to the prosecutor’s question by answering, “I think that the person I saw was the defendant,” it is highly unlikely that a prosecutor would reply, “The answer is it was the defendant.” A prosecutor would carefully and patiently question the witness to establish the witness’s ability to recognize people and events generally, the importance to the case of the identification evidence. The prosecutor might also possibly describe the existence of other evidence implicating the defendant, and then review the witness’s testimonial certainty of the identification. The prosecutor’s conduct in the latter example would almost certainly not provoke the outrage produced by the earlier example.

⁹³ 527 U.S. 263 (1999); see *supra* notes 58-67 and accompanying text.

⁹⁴ 514 U.S. 419 (1995); see *supra* notes 24-30 and accompanying text.

⁹⁵ Prosecutors are far better than juries at judging the reliability of identification evidence. Prosecutors know more about the case, more about the techniques of interviewing witnesses, and presumably are aware of the inherent dangers of eyewitness testimony. See Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 446 (1987) (“There is every reason to believe that prosecutors, with more information at their disposal and more experience, are considerably better than juries at judging identification in criminal cases.”).

⁹⁶ THE THIN BLUE LINE (Miramax Films 1988); see also Gershman, *supra* note 43.

⁹⁷ Emily Miller, waving her finger toward Randall Adams, testified: “[T]hat’s the man—I saw that man! I saw Randall Adams’ face just right after . . . I saw the gun sticking out of the car when he shot that police officer, and that’s the man.” R.L. Miller stated:

I really didn’t see anything inside. It was kind of . . . shadows on the window and stuff. But when he rolled down the window was what made his face stand out so . . . He had a beard, mustache, kind of dishwater-blond hair. But like I say, when he was in court, he sure looked a lot different.

Michael Randall stated that he “developed something like total recall.” However, his testimony contradicted this claim. He stated:

The officer, he walked up to the vehicle. His car was . . . let me see . . . I don’t

testimony was given confidently, with some bravado. However, as depicted in the film, these witnesses appeared to have given contrived testimony that probably was the product of coaching by the prosecutor.⁹⁸ Indeed, these witnesses' subsequent narrations of their accounts of the incident for the camera—a starkly revealing portrait that captures their venality and deception—is a devastating commentary of the artificiality of courtroom testimony and how a prosecutor's apparent coaching produced a terrible miscarriage of justice.

3. Cooperating Witnesses

The cooperating witness is probably the most dangerous prosecution witness of all. No other witness has such an extraordinary incentive to lie. Furthermore, no other witness has the capacity to manipulate, mislead, and deceive his investigative and prosecutorial handlers. For the prosecutor, the cooperating witness provides the most damaging evidence against a defendant, is capable of lying convincingly, and typically is believed by the jury.⁹⁹

know if it was behind or in front, but I know he had him pulled over, and he was up to the car. I think he was up to the car. Let me think. Yeah, he was up to the car. He had to have been up to the car. He was up to the car. I didn't see no bullet. I didn't see no gunfire. Because I went on.

Id. at 287-94.

⁹⁸ The testimony of Emily Miller and Michael Randall was perjured, according to the Texas district court following an evidentiary hearing on Adam's application for state habeas corpus relief. *See Ex parte Adams*, No. W-77-1286-I(B) (Crim. Dist. Ct. No. 2 Dallas County) at 12-13, 15-16, *aff'd*, 768 S.W.2d 281 (Tex. Crim. App. 1989) (en banc). Emily Miller gave a statement to the police in which she described the assailant as "either a Mexican or a very light skinned black man." Adams is a white man. This statement was not disclosed to the defense. Emily Miller viewed a line-up in which Adams was present. She identified someone other than Adams—"I picked out a bushy-haired man." She asked a police officer whether she identified the "right man," and he told her she identified the "wrong man," and then pointed out Adams as the "right man." R.L. Miller viewed the same line-up and did not pick out Adams because "he didn't get that good a look at him." Also suppressed by the prosecutor was evidence that the Millers were motivated to accuse Adams to collect a very large reward, and the pendency of serious criminal charges against their daughter, which charges were immediately dropped after the Millers' testimony. Randall also gave false testimony. He claimed that on the night of the murder he was playing basketball at a local court until midnight, and that he was alone in his car. The court closed at 5 p.m., and Randall was cheating on his wife with a woman named Debbie, who was with him in his car. *See Gershman, supra* note 43, at 290-94.

⁹⁹ Professor Ellen Yaroshesky has written a groundbreaking study on the cooperation process. *See Yaroshesky, supra* note 31. Her Article is based on interviews with twenty-five former assistant United States Attorneys in the Southern District of New York, including most of the chiefs and deputy chiefs of the criminal division from 1990 to 1999, and sixteen other defense attorneys who had experiences with the cooperation process. Professor Yaroshesky's study contains many valuable insights into the cooperation

The prosecutor's pretrial coaching of cooperating witnesses is vulnerable to many of the potential abuses noted above. The cooperating witness is (1) easily manipulated by coercive and suggestive interviewing techniques; (2) readily capable of giving false and embellished testimony with the prosecutor's knowledge, acquiescence, indifference, or ignorance; (3) readily capable of creating false impressions by omissions or memory alterations that in the absence of any recordation or documentation eludes disclosure and impeachment; and (4) able to present his testimony to the jury in a truthful and convincing manner, which because of the nature of the cooperation process is difficult to impeach through cross-examination.¹⁰⁰

A prosecutor has a powerful incentive to accept a cooperator's account uncritically.¹⁰¹ Many prosecutors, if they are candid, will admit that in some cases they really do not know whether the cooperator is being truthful or dishonest. This is particularly the case when a prosecutor lacks evidence to corroborate the cooperator's account. Moreover, some prosecutors have a predetermined view of the facts of a case that constrains their ability or willingness to assess the cooperator's credibility objectively. They may have a theory of the case that they developed from other evidence or from reliance on the opinion of the case agent. These prosecutors believe that theory to be true, and to the extent that the cooperator's version is inconsistent with this theory, the prosecutor may conclude that the cooperator is lying or withholding information.

Cooperators are manipulative, and some prosecutors can be easily manipulated. Some prosecutors trust their cooperators too

process and the use of cooperation agreements. Her discussion raises difficult and troubling questions about how prosecutors obtain testimony from cooperators, the extent to which prosecutors and their agents actively shape and polish up this testimony, and the extent to which prosecutors knowingly rely on false and embellished testimony from cooperators. Given that her Article finds serious defects in the cooperation process in one of the most distinguished prosecutors' offices in the country, its conclusion suggests that the problem may be far more acute in federal and state prosecutors offices with a lesser commitment to truth and justice. See Fred C. Zacharias & Bruce Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 238 (2000) ("[I]t may be that federal prosecutors, and the offices in which they work, take the duty [to do justice] more seriously than state prosecutors as a whole.").

¹⁰⁰ The setting for the proffer session is hardly conducive to producing a neutral, objective, and accurate recollection. The setting is often tense and intimidating. Given the enormous inducements to the cooperator to give false or misleading testimony, as well as the inducements to the prosecutor to accept the cooperator's veracity, the context is inherently manipulative for both the cooperator and the prosecutor.

¹⁰¹ A prosecutor should evaluate a cooperator's story objectively, even skeptically. A prosecutor who lacks sufficient objectivity may fail to notice serious gaps in a cooperator's story, and may more readily accept an illogical or improbable account. See Gershman, *supra* note 90, at 342-47.

much—one former prosecutor described the relationship as “falling in love with your rat”—and this mindset skews the prosecutor’s ability to evaluate the cooperator’s credibility objectively. These prosecutors may neglect to probe the cooperator’s story or background intensively to uncover inconsistencies or outright lies. A recent illustration is *United States v. Wallach*,¹⁰² in which a key cooperating witness, Anthony Guariglia, gave perjured testimony about his gambling habits that the prosecutors could easily have checked but did not.¹⁰³

Moreover, some prosecutors have a cramped view of their ethical duty as ministers of justice. They believe that serving justice means getting convictions and putting bad people in jail.¹⁰⁴ This mindset may be particularly noticeable with younger prosecutors, whose experience is confined to administering the federal sentencing guidelines. These prosecutors have been described as “Guidelines babies.”¹⁰⁵ They often exhibit a “mechanistic” and “hardened” view of justice.¹⁰⁶ They perceive themselves as cops, and exude a “macho” persona wherein “[t]hey don’t ask what’s the right thing to do. They just want the right result.”¹⁰⁷

Cooperators appreciate that their value depends on giving the prosecutor “what they want to hear.”¹⁰⁸ This message is “drummed into defendants at the MCC (Metropolitan Correction Center) that you have got to have good information for the government.”¹⁰⁹ Many professional participants in federal criminal practice believe that the Federal Sentencing Guidelines, particularly by their ability to confer unprecedented and enormous rewards on cooperators who provide law enforcement with “substantial assistance,” create

¹⁰² 935 F.2d 445 (2d Cir. 1991).

¹⁰³ *Id.* at 457 (“We fear that given the importance of Guariglia’s testimony to the case, the prosecutors may have consciously avoided recognizing the obvious—that is, that Guariglia was not telling the truth.”).

¹⁰⁴ See *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1125 (9th Cir. 2001) (“Although the public has an interest in effective law enforcement, and although we expect law enforcement officers and prosecutors to be tough on crime and criminals, we do not expect them to be tough on the Constitution.”).

¹⁰⁵ See Yaroshefsky, *supra* note 31, at 952.

¹⁰⁶ See *id.* at 949.

¹⁰⁷ *Id.* at 952.

¹⁰⁸ See *Northern Mariana Islands*, 243 F.3d at 1109:

Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is not only to have the best lawyer money can buy or the court can appoint, but to cut a deal at someone else’s expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration.

Id. at 1123.

¹⁰⁹ Yaroshefsky, *supra* note 31, at 939.

a powerful incentive for cooperators to exaggerate and falsify information.¹¹⁰

Moreover, some cooperators may not even appreciate the difference between truth and untruth. Cooperators frequently come from alien environments of crime and deceit that produce a mindset, according to some prosecutors, that “[t]ruth equals what I know or what I can be caught at.”¹¹¹ Cooperators do not share the prosecutor’s “obsession with exact facts.”¹¹² They use language in a loose, non-literal fashion that allows them to make false or exaggerated assertions that they might believe to be true. They might assume, for example, that if they have knowledge of certain information, it is immaterial how they came to learn it, whether through personal observation or based on what they may have heard.¹¹³

¹¹⁰ Cooperators typically enter into cooperation agreements with the government. The standard agreement provides that “[i]f the [United States Attorney’s] Office determines that [the cooperator] has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Office will file a motion with the sentencing court setting forth the nature and extent of [his] cooperation.” Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 n.108 (1995). The agreement allows the cooperator to testify honestly that he does not know what punishment he will receive for his cooperation. See *id.* at 97 (finding that the government prefers uncertainty in its cooperation agreements to permit witness to testify that he does not know what benefits he will receive and that his benefits are contingent upon giving truthful testimony). Plea agreements that require as a condition of enforcement that the witness give testimony consistent with statements previously given to investigating officers have been struck down as violative of due process and the search for truth. See, e.g., *State v. Fisher*, 859 P.2d 179, 183 (Ariz. 1993); *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197, 200 (Nev. 1991). Agreements that are contingent on the prosecution achieving a certain result are also inconsistent with public policy. See Yvette A. Berman, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 809-12 (1987).

Cooperation agreements can be highly misleading. Their use has been criticized as “prosecutorial overkill” because they create a false impression that the prosecutor knows what the truth is, and is encouraging the cooperator to reveal the truth by offering leniency. See *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1150 (2d Cir. 1978) (Friendly, J., concurring) (“[Cooperation agreements] inevitably give jurors the impression that the prosecutor is carefully monitoring the testimony of the cooperating witness to make sure that the latter is not stretching the facts—something the prosecutor usually is quite unable to do.”). The cooperation agreement also misleads the jury by allowing a prosecutor to escape the insinuation that the cooperator’s testimony is being purchased by instructing the cooperator to testify that any possible reward is contingent upon the cooperator telling the truth.

¹¹¹ Yaroshesky, *supra* note 31, at 954.

¹¹² *Id.* at 956.

¹¹³ See *id.* at 956-57.

II. DETECTING AND PREVENTING COACHING

Detecting coaching is difficult for two reasons. First, there typically is no verbatim record or other significant documentation of the interview session. What occurs in this private encounter is known only to the prosecutor and witness. Second, cross-examination has a very limited capacity to expose improprieties in the preparation process. Preventing coaching typically rests on the integrity and sense of fairness of the individual prosecutor.

Preparation of witnesses, when done properly, is an essential means of readying the prosecutor and witness for adversarial testing. By working closely with the witness, the prosecutor is able (1) to ascertain the truth fully, fairly, and objectively, (2) present the truth, as she honestly understands it, in an accurate, fair, and effective manner, and (3) protect the truth from being discredited and distorted by adversarial attack. These truth-serving goals, while applicable to all lawyers, would seem to be most clearly applicable to prosecutors who are unique among lawyers in their ethical obligation to seek justice rather than merely gain a partisan advantage.¹¹⁴

However, for those prosecutors who do not view their role as ministers of justice, prophylactic procedures may be necessary to protect the fact-finding process from improper influences. These procedures might include: (1) a pretrial taint hearing to expose witness contamination; (2) expert testimony on memory and suggestive interviewing techniques; and (3) recording interview sessions for in camera judicial inspection.

A. Documentation

Witness preparation is done in private. Since there are no audio or video recordings of the interview process, there is virtually no way of learning precisely what transpired during the preparation session. Neither the witness, the police, nor the prosecutor will readily acknowledge improper coaching. Nor is it the practice of prosecutors or police to prepare extensive written

¹¹⁴ See Gershman, *supra* note 90, at 314-15. The following discussion contains several references to the preparation of witnesses by private attorneys for non-criminal proceedings. However, to the extent that a prosecutor has an ethical duty to serve justice, which is not an obligation of a private attorney, these references should not be taken to suggest that a prosecutor enjoys similar latitude in the preparation process. Indeed, my thesis is that a prosecutor's discretion to prepare witnesses is much more circumscribed than that of the private practitioner.

or recorded evidence of the interview that might shed light on whether the witness was coached.¹¹⁵ To be sure, documentation of the preparation process, if available, might reveal overt attempts to shape the witness's testimony. However, documentation would not expose subtle cues that might produce false or misleading testimony that are attributable to a witness's own "suggestibility," "confabulation," and "memory hardening."¹¹⁶

A prosecutor is legally required to disclose to the defense, for impeachment purposes, pretrial statements that a government witness made to the prosecutor, police, or other government agent.¹¹⁷ However, the prosecutor is able to limit the availability of such statements by a variety of tactics. First, neither the police nor the prosecutor has any legal obligation to take notes.¹¹⁸ Some agents as a matter of policy do not take notes specifically to avoid creating contradicting evidence.¹¹⁹ Some prosecutors do not

¹¹⁵ The suggestion of coaching almost always rests on inferences based on the witness's actual testimony, in conjunction with any available evidence to demonstrate that the witness's account changed after being interviewed. *See supra* notes 24-30 and accompanying text.

¹¹⁶ *See* *Rock v. Arkansas*, 483 U.S. 44, 59-60 (1987) (describing three general characteristics of hypnosis that produce inaccurate memories: suggestibility, where the witness tries to please the interviewer; confabulation, where the witness fills in details in order to make the answer more coherent and complete; and memory hardening, where the witness exhibits great confidence in both true and false memories). These same characteristics are present in witness preparation generally. *See supra* notes 44-83 and accompanying text.

¹¹⁷ Discovery by the defense of prior statements of a witness is regulated by statute. *See* 18 U.S.C. § 3500(e) (1994) (the so-called "Jencks Act," which requires disclosure of statements by witness that (1) were signed or adopted by the witness, (2) contain a substantially verbatim recital of any oral statement made by the witness and recorded contemporaneously with the making of such statement, or (3) contain any statement made by the witness to a grand jury); N.Y. PENAL LAW § 240.45 (McKinney 1998) (requiring disclosure of any statement made by witness which relates to subject matter of witness's testimony). Due process also requires disclosure of witness statements which relate to the witness's testimony and are materially favorable to the defendant either to impeach the witness or exculpate the defendant. *See* *Kyles v. Whitley*, 514 U.S. 419 (1995). The Supreme Court has not decided whether the constitutional disclosure requirement embraces materially favorable information in the prosecutor's possession which might be denominated as "work product." *See* *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000) (suggesting that "extraordinary circumstances" might require disclosure of prosecutor's work product).

¹¹⁸ *See* *United States v. Bernard*, 625 F.2d 854, 859-60 (9th Cir. 1980) ("[W]e can find no statutory basis for compelling the creation of Jencks Act material Nor can we find a constitutional basis for compelling the creation of such material under *Brady*"). Once notes are made, however, they may not be destroyed. *See* *United States v. Houlihan*, 937 F. Supp. 65, 68-69 (D. Mass. 1996) (although "there is no affirmative obligation on the part of the government to take notes . . . the law is clear that the government may not destroy notes already made . . .").

¹¹⁹ *See* *Bernard*, 625 F.2d at 859 (as one agent testified: "[I]n trying to avoid contradicting facts from the interview of any defendant or any informant, it is my policy not to write down anything until I am sure the defendant or informant knows exactly what he is saying.").

encourage note-taking, and occasionally even forbid government agents from taking notes.¹²⁰ According to one former prosecutor, “[t]here’s a certain unconscious arrogation of power about it all.”¹²¹ Another former prosecutor stated: “[T]he office lore is don’t take too many notes or figure out how to take notes so that they are meaningful to you and no one else. You don’t want a complete set of materials that you have to disclose.”¹²² Prosecutors and their agents typically do not prepare extensive notes, and when they do take notes, they try to do it in a safe way that avoids disclosure.¹²³ Thus, notes of significant comments, contradictions, and inconsistencies by a government witness are exempt from disclosure unless the notes are “a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with their making of such oral statement.”¹²⁴ These notes may be withheld from the defense even if they contain significant impeachment evidence when it is shown that the notes are selections, summaries, or interpretations by the government agent.¹²⁵

Also, it is not uncommon for a government witness to be interviewed by a prosecutor after the witness has been intensively debriefed by the police. If the police do not take notes, or if they do not disclose their notes to the prosecutor, the prosecutor may never know what the witness initially told the police, whether the witness’s initial account changed, or the extent to which the story was shaped or polished by police during the initial interview session. If the police employed the kinds of suggestive or coercive techniques described above, and absent any available record to document such conduct, it is unlikely that a prosecutor’s

¹²⁰ See Yaroshefsky, *supra* note 31, at 962.

¹²¹ *Id.*

¹²² *Id.* at 961.

¹²³ See *id.* at 961-62.

¹²⁴ 18 U.S.C. § 3500(e)(2) (1994). In *Palermo v. United States*, 360 U.S. 343, 349-50 (1959), the Supreme Court found that Congress manifested an intention to restrict the use of such statements to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions of a lengthy oral recital. According to the Court, it would be “grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness’ own rather than the product of the investigator’s selections, interpretations, and interpolations.” *Id.* at 350.

¹²⁵ See *id.* See also *Williamson v. Moore*, 221 F.3d 1177, 1183 (11th Cir. 2000) (prosecutor’s non-verbatim, non-adopted notes of witness statements not admissible at trial as impeachment evidence and therefore not Jencks material); *United States v. Sasso*, 59 F.3d 341, 351 (2d Cir. 1995) (explaining that a prosecutor is not required to divulge even verbatim statements by a witness if the writer merely selected portions, albeit accurately, from lengthy oral statement); *United States v. Gross*, 961 F.2d 1097, 1105 (3d Cir. 1992) (finding that although notes occasionally contained precise phrases used by witness, such brief quotations do not qualify the notes as Jencks material).

subsequent probing could effectively recreate the circumstances to demonstrate any improper influence on the witness's subsequent testimony. Moreover, as noted above, the witness herself may be unaware of the subtle techniques that may have influenced her testimony.¹²⁶

B. *Cross-Examination*

Cross-examination is assumed to be the most important adversarial safeguard to discovering the truth.¹²⁷ However, there is no empirical basis for this assumption.¹²⁸ In *Geders v. United States*,¹²⁹ the Supreme Court observed that skillful cross-examination is a vital safeguard to uncovering improper preparation and coaching of witnesses. The Court assumed that the line between ethical pretrial preparation and unethical coaching is easily defined,¹³⁰ and that interrogation of the witness by opposing counsel could disclose improper influences. However, given the subtle ways that a witness's testimony can be manipulated, it is highly unlikely that cross-examination will disclose coaching.¹³¹

First, one of the cardinal precepts of cross-examination is to avoid asking questions of which the examiner does not know the answer.¹³² Thus, lacking a factual basis to believe that a witness's memory has been manipulated, that an "I don't remember" is false or misleading, or that a failure to mention an incriminating fact is the product of improper coaching, it is unlikely that a cross-examiner would focus on the discrepancy, or be able to prepare an effective impeaching strategy about something of which he is

¹²⁶ See *supra* note 48 and accompanying text.

¹²⁷ See 5 JOHN HENRY WIGMORE, EVIDENCE § 1367, at 32 (J. Chadbourne rev. ed. 1974) (describing cross-examination as "the greatest legal engine ever invented for the discovery of truth"). Of course, cross-examination can also obscure the truth. See Damaška, *supra* note 48, at 1094 ("Even with the best of intentions on the cross-examiner's part, reliable testimony may easily be made to look debatable, and clear information may become obfuscated.").

¹²⁸ See Applegate, *supra* note 1, at 311 ("While the adversary system touts the effectiveness of cross-examination for revealing the truth, there is little empirical support for this conclusion.").

¹²⁹ 425 U.S. 80 (1976).

¹³⁰ *Id.* at 89, 90 n.3.

¹³¹ See Zacharias & Martin, *supra* note 13, at 1010-11 (asserting that a "lawyer may so change a witness's presentation that the resulting testimony is either false or conveys an incorrect impression about the facts that cross-examination cannot counteract," but authors do not explain how cross-examination is frustrated).

¹³² This principle is one of Professor Younger's "Ten Commandments of Cross-Examination." See IRVING YOUNGER, TRIAL TECHNIQUES 51 (R. Oliphant ed. 1978).

ignorant.¹³³ Moreover, even if a witness's testimony has been improperly influenced during the coaching session, the opposing counsel would have no basis to believe that the witness's clear and convincing testimony is the product of an altered memory. Indeed, as noted above, it may often be the case that the witness herself is unaware of any improper influence.¹³⁴

Additionally, although it is commonly recognized that the testimony of a cooperating witness is inherently suspect, and that the process of preparing and coaching the cooperating witness can impair the integrity of the truth-finding process, cross-examination is made even more difficult when the cooperating witness has been carefully coached to testify that any benefit is speculative, uncertain, and contingent upon his giving truthful testimony in accordance with his cooperation agreement.¹³⁵

C. *Protocol for Witness Preparation*

There is nothing wrong with a prosecutor assisting a witness to give testimony truthfully and effectively. However, under their obligation to serve justice, prosecutors should be able to regulate their own conduct to insure that witnesses are not exposed to suggestive questioning that may create false or misleading testimony. Prosecutors should be trained and supervised in interviewing protocols, the vulnerabilities of certain witnesses, and the psychological literature relating to memory, language, and communication.¹³⁶

The following is a protocol for witness preparation by prosecutors. It is based largely on this writer's experience as a prosecutor. It differs in several important respects from advice contained in practitioner-oriented publications typically addressed

¹³³ For example, if a cross-examiner is unaware of, or does not believe that any deals or promises were made to the witness in exchange for his testimony, it is unlikely that an experienced cross-examiner would ask the witness about hypothetical deals or promises or whether the witness was coached to avoid mentioning the subject. See *United States v. Bagley*, 473 U.S. 667 (1985) (suggesting that since the government failed to respond affirmatively to pretrial requests by the defense for disclosure of any monetary benefits to government witnesses, it is unlikely that defense counsel would ask the witnesses whether they received benefits since counsel would reasonably expect the answer to be "no.").

¹³⁴ See *supra* note 116 and accompanying text.

¹³⁵ See *supra* note 110.

¹³⁶ For an excellent text used in law school courses on interviewing and counseling, see ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING* (1990). This book broadly instructs on interviewing skills, verbal and nonverbal communication techniques, probing skills, and psychological and psychosocial influences on communication.

to civil litigation attorneys.¹³⁷ In preparing a witness for testifying at trial, a prosecutor should:

1. Demand Truth

Advise the witness to tell only the truth as he knows it, not what he thinks he knows, or what someone else knows.¹³⁸ Advise the witness not to embellish facts, or fill in gaps of memory, and that if he does not remember something, to say so.¹³⁹

2. Be Objective

Evaluate the witness's story objectively to determine its accuracy and believability. Ask open-ended questions initially, and use more specific questions after the witness has given a complete account of the event.¹⁴⁰ Never put words in the witness's mouth or suggest answers.¹⁴¹ Know as much as possible about the witness's background and any interest the witness might have to falsify, and probe these areas carefully without suggesting any desired response.

¹³⁷ See *supra* note 11.

¹³⁸ Of course, no prosecutor ever really knows whether her witness is being truthful. It is important, however, to instruct the witness when necessary, and emphasize repeatedly, the importance of telling the truth. A prosecutor should explain to the witness that from a moral perspective, the oath that the witness takes requires truthful testimony, the witness may be convicted of perjury or obstruction of justice for giving untruthful testimony, and the exposure of the witness to cross-examination will render an attempt to conceal the truth difficult.

The extent to which a defense attorney is allowed to present untruthful testimony of the defendant is beyond the scope of this Article. See, e.g., *Nix v. Whiteside*, 475 U.S. 157 (1986) (finding that a defense lawyer did not provide ineffective assistance by refusing to cooperate in client's perjury).

¹³⁹ See Patricia J. Kerrigan, *Witness Preparation*, 1999 TEX. TECH L. REV. 1367, 1380 ("Let the witness know that a jury may find it more credible for a witness not to remember an incident from the past than to seem to have perfect recall of everything.").

¹⁴⁰ See BASTRESS & HARBAUGH, *supra* note 136, at 157; Wydick, *supra* note 5, at 42-43.

¹⁴¹ The extent to which an attorney is permitted to orient a witness on the applicable law, or the attorney's theory of the case, prior to hearing the witness's initial recollection, is unclear. Compare Monroe H. Freedman, *Counseling the Client: Refreshing Recollection or Prompting Perjury?*, LITIG., Spring 1976 (suggesting that such conduct is unethical), with *In re Petroleum Products Antitrust Litigation*, 502 F. Supp. 1092, 1097 (C.D. Cal. 1980) ("[I]t is fully appropriate for defense counsel to refresh the recollection of the witness as to the facts, familiarize him with the relevant documents, and cause him to understand fully the company's views and attitudes concerning the litigation.").

3. Outline Courtroom Procedures

Explain courtroom procedures, where the witness will sit, and the order of questioning.¹⁴² Do not advise an identification witness where the defendant will be sitting.¹⁴³ Advise the witness to speak in a loud, clear voice so the jurors can hear what is being said, and to make eye contact with the jury when appropriate.¹⁴⁴ Advise the witness to sit straight, avoid distracting body language, and dress appropriately.¹⁴⁵

4. Rehearse Direct Examination

Write out direct examination questions ahead of time and rehearse specific questions with the witness.¹⁴⁶ The witness should be encouraged to use his own words whenever possible, and not to use slang or offensive expressions.¹⁴⁷ Control the witness's answers to the extent of preventing the witness from giving long, rambling narratives, and ensure that the witness does not violate rules of

¹⁴² See CARSLON & IMWINKELRIED, *supra* note 11, at 183 (suggesting that a lawyer show the witness the courtroom, observe some testimony, and if the courtroom is vacant put the witness on the stand to get a "perspective" and "feel" of the witness stand); Flowers, *supra* note 2, at 745 (explaining that it is appropriate to describe the courtroom and where everyone will be seated, and to take the witness to the courtroom to observe the layout); Altman, *supra* note 33, at 42 (stating that it is appropriate to instruct a witness on the basic rules of effective testimony).

¹⁴³ See *United States v. Oreto*, 37 F.3d 739, 745 (1st Cir. 1994) (noting that it is improper for a prosecutor to advise an identification witness as to where defendant will be seated).

¹⁴⁴ See DAVID BALL, THEATER TIPS AND STRATEGIES FOR JURY TRIALS 28-30 (1994) (describing general behavioral suggestions for witnesses); JAMES W. MCELHANEY, TRIAL NOTEBOOK 51-54 (3d ed. 1994) (same).

¹⁴⁵ It is generally appropriate for lawyers to advise witnesses about how to dress and give suggestions on demeanor. See CARLSON & IMWINKELRIED, *supra* note 11, at 183 (noting that some attorneys routinely videotape practice sessions and review them with witnesses to avoid negative mannerisms and promote a positive, confident demeanor); THOMAS A. MAUET, TRIAL TECHNIQUES 475 (4th ed. 1996); BALL, *supra* note 144, at 323; MCELHANEY, *supra* note 144, at 51; J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 262 (1993). The extent to which the prohibition of falsification of testimony includes an attempt by an attorney to alter a witness's demeanor is unclear. See Piorkowski, *supra* note 13, at 404-05 (describing an attempt by a prosecutor to encourage the identification witness to appear confident as misconduct when the witness is only 51 percent certain that defendant was the perpetrator).

¹⁴⁶ See CARLSON & IMWINKELRIED, *supra* note 11, at 182 (recommending that attorney conduct a practice session consisting of mock direct and cross-examination).

¹⁴⁷ See Altman, *supra* note 33, at 43 (citing *Haworth v. State*, 840 P.2d 912, 913-14, n.3) ("[T]here is nothing unethical about an attorney making suggestions about the witness's wording as long as those suggestions do not encourage what the attorney knows or reasonably believes is false or misleading testimony.").

evidence. If tangible evidence is being introduced, show the evidence to the witness and go through the process of laying the foundation. Have the witness do whatever demonstration he will be asked to do in the courtroom.

5. Reconcile Inconsistencies

Cautiously try to reconcile the witness's testimony with other evidence. This may include prodding the witness's recollection with prior statements that the witness made, or referring to other facts in the case, including the testimony of other witnesses.¹⁴⁸ Never suggest what a witness should say, or telegraph what the witness should say, by revealing inconsistencies or weaknesses in the witness's testimony.¹⁴⁹ Review the witness's prior testimony with the witness, but do not allow the witness to read any prior testimony unless absolutely necessary.¹⁵⁰

6. Prepare Cross-Examination

Prepare for cross-examination by going through all discrepancies in the witness's prior testimony or other statements.¹⁵¹ Try to ensure that the witness can correct or explain

¹⁴⁸ Courts and commentators suggest that there is nothing inherently wrong with attempting, even aggressively, to change a witness's initial version of the facts when the attorney believes that the version is inaccurate or incomplete. See *Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993). It is one thing to ask a witness to swear to facts which are knowingly false. It is another thing, in an arms-length interview with a witness, for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate. Altman, *supra* note 33, at 41 (arguing that it is appropriate for an attorney to aggressively question a witness "to challenge the witness's initial recollection to persuade the witness that it is untrue and, therefore, should be changed"). But see Applegate, *supra* note 1, at 328 ("[A] major incentive for trial preparation is to obtain support for an uncertain version of the facts and not to confirm a version of the facts that appears to represent the whole truth.").

¹⁴⁹ See Miller, *supra* note 46, at 12 ("Where questions are asked, how they are prefaced, suggestions in the wording, and the content of follow-up questions may do more to determine what is retrieved than anything that occurred previously.") But see Altman, *supra* note 33, at 42 (arguing that it is appropriate to "challenge" a witness's interpretation of facts and this "offers the witness the opportunity to modify her characterization to make it more truthful").

¹⁵⁰ But see Kerrigan, *supra* note 139, at 1379 ("Have the witness review any prior depositions they have given, discovery responses they have signed, or prior statements they have given, and consider having the witness review other relevant testimony and discovery responses.").

¹⁵¹ See CARLSON & IMWINKELRIED, *supra* note 11, at 182-83 (recommending that another attorney conduct the cross because "if you conduct cross and the cross is too 'effective,' the experience may impair your working relationship with the witness").

each discrepancy. Go through a witness's criminal background and any interest the witness may have in testifying. Make sure that the witness acknowledges prior convictions and bad acts. A witness should be encouraged not to volunteer information, to limit answers as much as possible to "yes" or "no," not to guess or embellish an answer, to make an effort to remember, and not to be afraid to acknowledge a mistake.¹⁵² The witness should be told not to look at the prosecutor during cross-examination, not to answer a question when the prosecutor stands up to object, and to answer in a positive tone if he is asked whether he spoke to the police or prosecutor about the case. A prosecutor should do a mock cross-examination with the witness to anticipate what defense counsel will likely ask.¹⁵³

D. Remedies

1. Pretrial Taint Hearing

A pretrial "taint" hearing should be required when there is some basis to believe that a witness's testimony has been improperly influenced by suggestive or coercive interviewing techniques. Such a hearing is not unusual. It has been authorized in many instances in which police or prosecutorial conduct has placed the integrity of the fact-finding process into question and there is a need for the procedural protection of a pretrial hearing to exclude from a potential prosecution the prejudicial effects of tainted evidence. Thus, pretrial hearings have been employed to determine the admissibility of in-court identification testimony because of pretrial suggestiveness,¹⁵⁴ statements of children in sexual abuse cases,¹⁵⁵ hypnotically-recalled in-court testimony,¹⁵⁶

¹⁵² See Altman, *supra* note 33, at 43 (explaining that it is proper to instruct the witness to testify to lack of memory if the witness honestly does not remember). However, the witness should be advised that an "I don't remember" may be perjurious. See *United States v. Barnhart*, 889 F.2d 1374 (5th Cir. 1989). In addition, an attorney may be suborning perjury if he counsels or suggests that a witness can safely profess ignorance even if the witness can remember the event. See, e.g., *Sheriff v. Hecht*, 710 P.2d 728 (Nev. 1985). Moreover, instructing a witness to answer only the question asked and not volunteer answers may be unethical if the strategy is designed to conceal relevant information. See, e.g., *United States v. Ebens*, 800 F.2d 1422, 1443 (6th Cir. 1986) (attorney instructs witness to avoid volunteering anything about a relevant conversation by answering the cross-examiner's question "[W]hat happened next?" with anything that happened next other than the conversation).

¹⁵³ See Altman, *supra* note 33, at 42 ("Rehearsing a witness's testimony is a well-established professional practice.").

¹⁵⁴ See *Manson v. Brathwaite*, 432 U.S. 98 (1977).

¹⁵⁵ See *State v. Michaels*, 642 A.2d 1372 (N.J. 1994).

breathalyzer evidence because of prior falsified police breathalyzer reports,¹⁵⁷ and evidence following police investigatory misconduct.¹⁵⁸

A pretrial taint hearing into the reliability of a witness's testimony based on pretrial suggestiveness should consider all relevant circumstances, including any inconsistency between a witness's statements, the interest or motivation of a witness to falsify, the presence or absence of corroboration, the nature of the corroboration, the inherent believability of the statements, the existence of any documentation of the debriefing and preparation sessions, the rewards and other inducements to testify, the scope of punishment to which a cooperating witness may be exposed in the absence of cooperation, the manner and form of the questioning, the number of interview sessions, and the person or persons present when the statements were made.

Defense counsel, in order to obtain a pretrial hearing, would have the burden initially of making some factual showing that a witness has been subjected to improper conduct by the prosecution that has caused the witness to adjust his testimony. In making its determination, a court should consider whether, under all the circumstances, the interview and preparation sessions give rise to a substantial likelihood of false, inaccurate, or misleading testimony.

2. Expert Testimony

Given the capacity of the witness-preparation process to produce false or distorted testimony, courts should allow experts in cognitive psychology to testify how memory, language, and communication can produce false, inaccurate, or misleading testimony.¹⁵⁹ Rule 702 of the Federal Rules of Evidence authorizes

¹⁵⁶ See *People v. Hughes*, 453 N.E.2d 484 (N.Y. 1983).

¹⁵⁷ See *State v. Gookins*, 637 A.2d 1255 (N.J. 1994).

¹⁵⁸ See *Jackson v. Denno*, 378 U.S. 368 (1977).

¹⁵⁹ Experts have been allowed to testify to psychological factors affecting the reliability of a witness's identification. See generally *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991); *United States v. Smith*, 736 F.2d 1103 (6th Cir. 1984); *United States v. Norwood*, 939 F. Supp. 1132 (D.N.J. 1996); *Campbell v. People*, 814 P.2d 1 (Colo. 1991); *People v. McDonald*, 690 P.2d 709 (Cal. 1984); *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983). For example, experts have testified regarding a defendant's susceptibility to government inducements to prove entrapment by showing lack of predisposition. See *United States v. Newman*, 849 F.2d 156 (5th Cir. 1988); *United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984); *United States v. Hill*, 655 F.2d 512 (3d Cir. 1981). Experts have also testified about the risk of false memory implantation on young children from improper interviewing techniques. See *State v. Sargent*, 738 A.2d 351 (N.H. 1999). Finally, experts have testified on the reliability of a defendant's confession from coercive police interviewing techniques. See *United States v. Hall*, 974 F. Supp. 1198 (C.D. Ill. 1997).

the use of scientific testimony by an expert to assist the jury in understanding the extent to which suggestive influences in the debriefing and coaching of witnesses may produce false or inaccurate testimony.¹⁶⁰ As now occurs with eyewitness testimony,¹⁶¹ the expert could identify the factors that influence perception and memory, the extent to which witnesses are susceptible to suggestive influences, and how pretrial interviewing techniques are likely to produce false, inaccurate, or embellished testimony.¹⁶² Contrary to the belief of many jurors, an expert could testify that there is no necessary correlation between a witness's confidence and the accuracy of her testimony.¹⁶³ Experts could also counter a belief held by some jurors that witnesses have a better memory for dramatic events.¹⁶⁴

3. Recording

To enable the defendant to challenge the veracity of the witness effectively, and a jury to assess his credibility, all interviews with potential trial witnesses should be electronically recorded either by audio or videotaping. Videotaping would be preferable to sound recording as it would depict the physical interaction and body language of the participants. The use of such a procedural safeguard is unusual, but hardly novel. Videotaping of interview sessions with child witnesses is not uncommon.¹⁶⁵ Moreover, videotaping has been used when it is important to document whether the government used unfair tactics to produce evidence, such as a defendant's confession,¹⁶⁶ or for interrogations conducted before and after hypnosis.¹⁶⁷

¹⁶⁰ Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702.

¹⁶¹ See *supra* note 159.

¹⁶² See *supra* notes 44-83 and accompanying text.

¹⁶³ See Miller, *supra* note 46, at 15-16.

¹⁶⁴ See *id.*

¹⁶⁵ See *supra* note 89 and accompanying text.

¹⁶⁶ Two states, Minnesota and Alaska, require that police interrogations of suspects be recorded on tape. See *State v. Scales*, 518 N.W.2d 587, 589 (Minn. 1994) ("In the exercise of our supervisory powers we mandate a recording requirement for all custodial interrogations."); *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) ("Today, we hold that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible.").

¹⁶⁷ See *Rock v. Arkansas*, 483 U.S. 44, 60 (1987) ("Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were

Recording the interview session is essential to disclose the presence or extent of the different types of suggestive influences discussed above. Taping would reveal overt attempts to influence the witness's testimony by use of leading questions or other cues that alert the witness to the expected answer. Whereas recording of the sessions would not necessarily reveal whether a witness's story was a fabrication from the start, it might demonstrate whether the witness embellished his story to please the government or filled in details to make the story more complete or persuasive, and the extent to which his story crystallized and became more confident over several interview sessions.

It may be that courts should have the authority to conduct an in camera inspection of the recording, and preclude the use of any portions that contain embarrassing or sensitive material. To be sure, a prosecutor could properly seek to preclude from disclosure statements by a cooperating witness that might compromise an ongoing investigation. A court also could limit the use of the recorded interview session to those portions that reveal that a witness is trying to please the interviewer, confabulating the story by appearing to fill in details to make the story more coherent and complete, or demonstrating memory "hardening" by appearing to suddenly and confidently remember new details.

CONCLUSION

The preparation of witnesses for testimony at trial is a necessary and acceptable part of the prosecutor's function. However, some prosecutors engage in conduct that goes beyond permissible trial preparation. These prosecutors either overtly, covertly or even inadvertently, cause witnesses to give testimony that is false, inaccurate, or misleading. And given that witness-coaching is done in private, there is usually no evidence of improper conduct. Therefore, the ability of cross-examination to reveal such improper conduct is extremely limited.

Coaching typically is accomplished through memory reconstruction, suggestions that improve testimony, and cues that alter testimonial language. Some witnesses such as children, identification witnesses, and cooperating witnesses are highly susceptible to coaching. These witnesses are capable of adjusting their testimony based on leading, suggestive, coercive or intimidating questions or statements. Furthermore, the prestige

asked.").

and power of the prosecutor enhances her ability to influence the witness's testimony improperly.

Given the potential of witness coaching to skew the fact-finding process, this Article offers several suggestions to expose improper influences and prevent false or inaccurate testimony. These include a pretrial taint hearing when there is some basis to believe that a witness has been improperly influenced, expert testimony to assist the jury in understanding the vulnerability of memory and the dangers to accurate testimony from certain types of interviewing techniques, and electronically recording witness-preparation sessions. Any or all of these recommendations, if adopted, would protect the fact-finding from overzealous conduct.