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COOPERATION WITH FEDERAL PROSECUTORS: EXPERIENCES OF TRUTH TELLING AND EMBELLISHMENT

Ellen Yaroshefsky*

"Cooperation is all about perception shaped by personality."
Anonymous Lawyer

INTRODUCTION

Independent Counsel Kenneth Starr exposed to public scrutiny a routine, and key, prosecutorial technique: obtaining information and testimony from people who can offer incriminating information against others in exchange for promises of leniency. The enormous pressures placed on witnesses to cooperate with the government were highlighted by Monica Lewinsky's public ordeal in obtaining an agreement that shielded her and her mother from prosecution and by Susan McDougal's lengthy incarceration resulting from her refusal to cooperate with the Office of the Independent Counsel ("OIC"). Subsequently, Julie Hiatt Steele's failure to cooperate with the OIC spotlighted the extensive pressure that the government can exert.1

While prosecutors acknowledge that they have the power to exert such pressure on witnesses, they believe that they exercise better judgment and restraint than the OIC and are dismayed that they are criticized as a consequence of Starr's investigatory practices.

* Clinical Professor of Law, Benjamin N. Cardozo Law School. The author expresses her gratitude to all of those who gave generously of their time to be interviewed for this Article. I want to thank Bruce Green, Gerard Lynch, Jonathan Oberman, Dan Richman, Barry Scheck, Fred Zacharias, and the anonymous interviewees who provided helpful comments on an earlier draft. I also thank Adam Lurie, a Cardozo law student, and Sarah Carney, a City University of New York graduate student in social psychology, for their valuable research.

1. Julie Hiatt Steele was offered immunity if she cooperated with the OIC in providing information about comments that Kathleen Wiley purportedly made about the President's unwelcome sexual advances. Steele claimed that the OIC exerted pressure on her to testify in accordance with the OIC's version of the evidence. She refused to do so and was prosecuted. Ms. Steele was accused of making false statements that hindered an investigation. The case ended in a mistrial on May 7, 1999 when the jurors pronounced themselves hopelessly deadlocked. See Florence Graves, Starr and Willey: The Untold Story, The Nation, May 17, 1999, at 11; David Stout, Starr Drops All Charges Against Two Women, N.Y. Times, May 26, 1999, at A28.
Prosecutors do not believe that Starr’s heavy-handed tactics are reflective of practices in the United States Attorney’s offices throughout the country. Informal surveys reveal that federal prosecutors are quite critical of Starr and believe that his investigation was an aberration for two reasons. First is the well-documented lack of oversight under the Independent Counsel Act and the unlimited money and time to pursue one case.\(^2\) Second is Starr’s lack of experience as a prosecutor.

A central but relatively unexamined issue that arose in the wake of the OIC investigation is the manner in which prosecutors work with cooperators and the extent to which prosecutors can determine whether those cooperators are truthful. While the risk that cooperators will provide false evidence is a longstanding, well-documented concern,\(^3\) there are few studies that examine whether that risk is realized in any significant measure. Nor are there studies that attempt to examine the manner in which cooperators actually work with prosecutors and the extent to which prosecutors can determine whether these cooperators are truthful.\(^4\) This issue is a crucial one in the federal criminal justice system because the Federal Sentencing Guidelines\(^5\) have caused a sea change in the use of cooperators.

While cooperation with federal authorities is not new,\(^6\) the Sentencing Guidelines have created a system with cooperation as its

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\(^4\) Many commentators believe that perjury is pervasive in the criminal justice system. See Saverda, supra note 3, at 788 (discussing concern over failure to enforce perjury statute). See generally Charles W. Wolfram, *Client Perjury*, 50 S. Cal. L. Rev. 809 (1977) (discussing attorney’s ethical responsibility with regard to client perjury).


\(^6\) Forms of cooperation have long been recognized in English common law. In 1878, the United States Supreme Court acknowledged informal immunity agreements for accomplices. See United States v. Ford, 99 U.S. 594, 599 (1878) (the Whiskey Cases); United States v. Cervantes-Pacheco, 826 F.2d at 810, 815 (5th Cir. 1987); United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950), aff’d, 341 U.S. 494 (1951); Richman, supra note 3, at 85-86. Cooperation, in this context, refers to the process by which a federal criminal defendant provides assistance in the prosecution or investigation of others to obtain the benefit of sentence mitigation.
There is significantly more cooperation under the guidelines because greater stakes increase the incentives to cooperate with the government. Every defendant or target of an investigation must contemplate cooperation with federal authorities. Moreover, it is particularly within the purview of the federal prosecutor to make a decision as to whether she will seek a downward departure based upon her determination that a defendant is deserving of the benefit that truthful cooperation provides.

Many commentators have noted that the cooperation process and cooperation agreements are subjects in need of further study. Nevertheless, there has been little, if any, study of the cooperation process for a number of reasons. Most significantly, analysis of the

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The cooperation process does not lend itself to traditional methods of scholarly study. By its nature, dealing with cooperators is dependent on a constellation of factors whose impact on the process is extremely difficult to analyze. These factors include significant differences between state and federal justice systems, and among state systems. Within the ninety-four United States Attorney's offices, there are significant differences in legal culture and traditions, office policies and priorities, structure and practice, and differences in the amount of discretion afforded individual prosecutors in given cases. Moreover, a myriad of other factors exist that necessarily affect the cooperation process including the personality of individual prosecutors, the quality of defense lawyering, the interaction of prosecutors with individual defense lawyers, the type and strength of the case, the government agency handling the investigation and the quality of the agents, the evolving state of the law, and differences among cooperators. It would be extremely difficult to quantify these factors in order to develop a coherent analysis of the process of cooperation and derive useful information regarding the extent to which prosecutors determine the truthfulness of cooperators' statements.

A second potential reason for the lack of analysis is that "most prosecutors and defense lawyers "operate under a tacit agreement to refrain from speaking publicly about how the system works." While these discussions often occur informally and within small circles of attorneys, it is in the interest of all parties to keep hidden the subtle pas de deux of cooperation that permits targets to obtain benefits from the government.

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11. Striking differences between state and federal systems include investigatory resources, types of crimes prosecuted, and the extent to which uncorroborated cooperators' testimony is sufficient to sustain a conviction. Sixteen states recognize the inherent unreliability of accomplice testimony and require corroboration of an accomplice's testimony to sustain a conviction. See Saverda, supra note 3, at 791 n.40.

12. See James Eisenstein, Counsel for the United States: U.S. Attorneys in the Political and Legal Systems 4-12 (1978); Maxfield & Kramer, supra note 9, at 7 (noting the different internal standards for 5K1.1 process).


15. See id. In the Southern District of New York, many white collar defense
Most federal criminal cases are resolved based, at least in part, on the anticipated or actual testimony of cooperating defendants. Accomplice testimony is often the most damaging evidence against a defendant because the cooperator has first-hand knowledge of the pattern of criminal activity. Consequently, a cooperator can manipulate the details of the events without arousing much, if any, suspicion and still be believable to a jury. With cooperation being so central to the process, it is essential that prosecutors are relying on truthful evidence from cooperators. Thus, the problems in handling cooperators present a significant area ripe for analysis.

There are a host of issues ripe for study about the cooperation process and the role of cooperators. Among those that I decided to study are (1) the extent to which prosecutors believe that they are able to obtain truthful information from cooperators and the basis for those beliefs, (2) safeguards and techniques utilized to assure the truthfulness of cooperators, and (3) perceived problems with obtaining truthful information from cooperators.

In this Article I address the results of that study, relying primarily on interviews about the cooperation process that I conducted with former assistant United States Attorneys and other defense attorneys. In Part I, I explain the methodology used in conducting the interviews and the context of the cooperation process. In Part II, I explore the results of the interviews and discuss the principle reasons that prosecutors may rely on inaccurate cooperator testimony. I conclude that prosecutors’ reliance on inaccurate cooperator testimony is a problem within the criminal justice system that warrants further study and reform.
I. CASE STUDY METHODOLOGY AND THE CONTEXT OF COOPERATION

A. Methodology

Perhaps the most useful method to study whether prosecutors obtain truthful information from cooperators is to conduct systematic and wide-ranging interviews with prosecutors and defense lawyers. To begin this process, I interviewed former prosecutors within one district, the Southern District of New York (“Southern District”).

After a review of the literature and case law regarding cooperation and substantial assistance, informal discussions with many lawyers who prosecuted within the Southern District prior and subsequent to the sentencing guidelines, and discussions with sociologists and psychologists, I developed interview questions about the cooperation process. Most salient among those questions are:

1. Describe the cooperation process.
2. How did you determine whether cooperators were telling you the truth?
3. To what extent were you confident that you had obtained the truth from cooperators? What was the basis of your belief?

20. Empirical analysis is difficult for a number of reasons. One of those reasons is the government’s unwillingness to make its files available for inspection. For a more extensive interview-based study, see Eisenstein, supra note 12, at 4-12 (discussing research design for study of U.S. attorneys).

21. I chose the Southern District of New York for several reasons. First, I have practiced in the Southern District of New York and have been a member of the Criminal Justice Act Panel since 1988. Consequently, I know, by experience and reputation, the quality of practice of many AUSAs and am familiar with the office policies and practices of that district. Second, the Southern District of New York has the reputation of being one of the best, if not the best district, in the country and prides itself on a longstanding commitment to fairness, honesty, and integrity as a self-defined “best public law office in the land.” The office is perhaps the most highly selective United States Attorney’s Office and is quite independent of the United States Justice Department. It is highly regarded by other offices, particularly for its talent pool. The perception, however, among a significant number of government lawyers is that over the years “the skill, the independence, the integrity and the determination of the Southern District was exceeded, however, only by [its] arrogance.” William P. Gray, Remarks, United States Attorneys: Independent or Unaccountable?, 1990 Bench and Bar Conference Proceedings, Feb. 1990, at 141. This has been true, historically, even with the most highly regarded and well-respected people occupying the role of United States Attorney. While it might be expected that the Southern District’s policies and practices regarding cooperators reflect the reputation of the office, the extent to which this is accurate cannot be determined without careful comparison of districts’ practices.

While it would be instructive to compare cooperation practices among districts, notably with the Eastern District of New York, interviews of defense lawyers who practice in both the Southern District of New York and Eastern District of New York make clear that the practices are so different that a careful comparison requires greater study.

22. See supra note 10 and accompanying text.
(4) Did you ever have an experience where you believed a cooperator and later learned that the cooperator had lied to you? (I then solicited information about the particular case and what was learned from that experience.)
(5) Do you know of such experience of other assistants?
(6) To what extent do you believe that cooperators embellish the truth to implicate others?
(7) What troubled you, if anything, about the cooperation process?
(8) What, if anything, would you change to produce more truthful results?23

I also asked questions about the conduct of proffer sessions and training in the United States Attorney’s Office.

I limited the interviews to former assistants who began in the Southern District no earlier than 1987 (the beginning of the Sentencing Guidelines era) and primarily to those who maintain a connection with the criminal justice system, either as defense lawyers, judges, or as criminal justice policy professionals, with some notable exceptions.24 I also interviewed three prominent defense attorneys who held supervisory positions in the Southern District in the 1960s and 1970s. Their comments provided a useful comparison of cooperation practices in the pre- and post-Guidelines eras.25

I initially selected four former Assistant United States Attorneys

23. The bias inherent in this study is the focus on cases of cooperator untruthfulness, which, of course, skews the results toward the conclusion that the use of cooperators is problematic. Moreover, this study does not purport to compare the truthfulness of cooperators with that of other witnesses or defendants. Evaluation of credibility of witnesses and defendants is a recognized problem because all witnesses may lack precision, make mistakes, and be susceptible to suggestion or lie outright. The reflections in this study as to inadequacies of evaluating cooperators’ narratives could be generalized, at least in part, to all potential witnesses.

Not every person interviewed was asked each question and many follow-up questions were asked. I often asked the former AUSAs for their views on the comments of unidentified others. Chiefs of the Criminal Division were asked questions about the policies and practices regarding substantial assistance and about institutional mechanisms to deal with the obvious concerns about cooperators.

24. Seventy-five percent of those former AUSAs interviewed maintain that connection and 65% of them maintain a substantially white collar criminal defense practice.

25. Numerous issues regarding cooperation and substantial assistance policies and practices were explored during these interviews. Many of these issues are beyond the scope of this Article and require further study. A critical one is the use of third party cooperators. See United States v. Baum, 32 F. Supp. 2d 642, 644 (S.D.N.Y. 1999); United States v. Doe, 870 F. Supp. 702, 702-08 (E.D. Va. 1994); Michael S. Ross, Cooperation With Federal Authorities: Operating On the Outer Limits, Crim. Just., Summer 1997, at 4, 61-63. See generally Schweickert, supra note 7 (evaluating the rules and procedures necessary to ensure the ethical propriety of the use of third-party cooperators). Others include charge bargaining, the need for standards for substantial assistance, and the policy that cooperators must reveal all of their criminal conduct throughout their lives. See infra text accompanying notes 50, 51. Several of these topics have been addressed by the Sentencing Commission and numerous commentators. See supra note 3 and accompanying text.
("AUSAs" or "interviewees") whom I knew to be thoughtful, thorough, and seasoned lawyers, who had each spent at least five years in the Southern District. Each of these lawyers began working in the Southern District in a different year. I interviewed each of these attorneys and asked them for names of other former AUSAs who were thoughtful and who had worked in different units in the office. I also asked for names of people who they believed held a view different from their own. I received approximately forty-five names, many of whom were people named by more than one attorney. I then interviewed approximately 60% of the people who appeared on more than one list. I repeated the process with each person interviewed. I interviewed twenty-five former AUSAs. This included most of the Chiefs of the Criminal Division from 1990 to 1999, Chiefs and Deputy Chiefs of various units, and "line" assistants. On average, AUSAs had worked in the Southern District for six years. I conducted fifteen interviews of at least one hour. Subsequent interviews were approximately one half hour to forty-five minutes each.

Additionally, I interviewed sixteen other defense attorneys. Some had worked in the Southern District United States Attorney's Office more than fifteen years ago, some were former Manhattan District Attorneys and some had never worked within a prosecutor's office. I selected lawyers from the following known groupings: those whose retained cases were primarily narcotics related, a random sample of the Criminal Justice Act ("CJA") panel of lawyers, federal


27. This form of sampling is recognized in experimental psychological literature as a key informant strategy or snowball sampling and has been used with increasing regularity for populations that were not previously studied. See Earl Babbie, The Practice of Social Research 268-69, 289 (5th ed. 1989); Jerome E. Jackson, Fraud Masters: Professional Credit Card Offenders and Crime, 19 Crim. Just. Rev. 24, 33-34 (1994); Charles D. Kaplan et al., Temporal and Social Contexts of Heroin-Using Populations: An Illustration of the Snowball Sampling Technique, 175 J. Nervous & Mental Disease 566, 567-68 (1987).

28. A number of former AUSAs who were listed currently work for the Southern District or the Justice Department. The policy of the Southern District does not permit them to be interviewed. Moreover, three former AUSAs are handling matters for the Southern District in their current practices and declined to be interviewed.

29. Tape recordings and notes of interviews are on file with the author.

30. These are court-appointed lawyers who represent indigent clients. Approximately 85% of clients in federal court are indigent. See Administrative Office of the U.S. Courts, Report to Congress on the Optimal Utilization of Judicial Resources 74 (1998), available on The Federal Judiciary Homepage (visited Nov. 3, 1999) <http://www.uscourts.gov/ optimal/toc.htm. A significant part of their CJA practice is the defense of narcotics cases. From 1994 to 1998, approximately 39% of cases in the Second Circuit were narcotics cases. See Maxfield & Kramer, supra note 9, at 35-36 (basing information on datafiles of the U.S. Sentencing Commission for
defenders, white collar lawyers who were not former AUSAs, and lawyers who handle high profile cases and are highly respected by a large segment of the defense community (and often, although not always, by former AUSAs). These lawyers are termed "other defense lawyers" for purposes of this Article. I asked these lawyers to discuss their experiences with the cooperation process and the extent to which they had experiences representing cooperating defendants who they believed were not truthful with the government. My goal in selecting these defense lawyers who had not been prosecutors in the guidelines era was to discern if they had different perceptions than those defense lawyers who had prosecuted under the guidelines about the extent to which cooperators were truthful with the government. I also wanted to determine if perceptions differed according to the type of practice.

Each lawyer that I interviewed was promised anonymity to encourage frank discussion. To the extent that the lawyers discussed particular cases and expressed a desire to keep cases from recognition, either by name or particular recognizable factual allegations, I agreed to do so. Thus, where defendants are referred to throughout this Article, fictitious names are substituted and discussion of the facts is limited.

B. The Context of Cooperation

The results of this study are necessarily informed by a proper understanding of the process of cooperation and the role of cooperators in the era of mandatory minimum sentences and the Sentencing Guidelines. The Guidelines, which attempt to provide uniformity in sentencing, are perceived to have shifted sentencing authority from the courts to the prosecutors, most notably by constructing a modified charge-offense based system whereby the prosecution selects the sentencing parameters by shaping the criminal charges. Those charging decisions and subsequent plea bargaining ultimately determine the narrow range of sentences that a

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31. See United States v. Ming He, 94 F.3d 782, 787-89 (2d Cir. 1996) (analyzing the impact the Sentencing Guidelines have had on the sentencing of cooperating witnesses). For a comprehensive study of substantial assistance departures, see Substantial Assistance Staff Working Group, supra note 10; Weinstein, Trial Judge's Reflections, supra note 8, at 6-7 (discussing the burden the Sentencing Guidelines place on the prison system).

32. Moreover, the Department of Justice implemented a policy that the government must:
initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct.

court may impose.\(^3\)

One of the only significant ways in which sentencing discretion is returned to a court is if the prosecution deems the defendant to have provided "substantial assistance." In that case, the government provides the court with a letter pursuant to section 5K1.1 of the Sentencing Guidelines\(^4\) which permits the court to impose a sentence outside of the "rigid grid" of the guidelines.\(^5\) Without such a letter, particularly in narcotics cases, defendants are subject to significant mandatory minimum sentences and lengthy periods of incarceration.\(^6\) Thus, there is the perception that the nature of federal criminal practice has changed substantially with cooperation being the name of the game.\(^7\) There is serious concern that this unregulated process corrupts the truth because it "encourage[s] some defendants to exaggerate or falsify information"\(^8\) in order to obtain their 5K1.1 letter.

The stakes are significantly increased for reasons that are driven not only by the Sentencing Guidelines, but also by mandatory minimum sentences and the changes in enforcement patterns.\(^9\) The effect is to

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33. See generally Maxfield & Kramer, supra note 9, at 15 (finding 74.9% of federal judges and 58.6% of chief probation officers thought that the prosecutor had the greatest influence on the final guideline sentence); Standen, supra note 8, at 1514, 1527 nn.158 & 206 (discussing how current practices have limited the judicial sentencing role); Kate Stith & Jose A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts (1998) (discussing the factors that determine sentences under the Sentencing Guidelines). But see James B. Burns et al., We Make the Better Target (But The Guidelines Shified Power From the Judiciary to Congress, Not From the Judiciary to the Prosecution), 91 Nw. U. L. Rev. 1317, 1332-35 (1997).

34. The U.S. Sentencing Guidelines Manual § 5K1.1 (1999) provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.


36. The government must request that a court depart below the statutory minimum pursuant to 18 U.S.C. § 3553(e), as well as request a 5K1.1 departure in order to authorize a sentence below the statutory minimum. See Melendez v. United States, 518 U.S. 120, 125-26 (1996).

37. See Ross, supra note 25, at 4 (stating that cooperation is one of the most important driving forces in sentencing); Schweickert, supra note 7, at 1449.

38. Substantial Assistance Staff Working Group, supra note 10, at 43. This U.S. Sentencing Commission report was the result of an in-depth study of the policies and practices of the manner in which section 5K1.1 operated in jurisdictions throughout the country. On-site interviews were conducted with district judges, prosecutors, and defense lawyers. In addition to confirming the documented disparity in sentencing for the same offenses, the report noted that "some suggested that the substantial assistance process may influence or encourage some defendants to exaggerate or falsify some information given to the government in order to get the substantial assistance motion." Id. at 20. This observation was repeated in many districts. Probation officers reported that "defendants abused the process by testifying often falsely to improve their own situations." Id.

39. See Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393, 418-
expose defendants to draconian sentences that could hardly have been contemplated before mandatory minimum sentences and the guidelines. Hence, there is significant pressure on a defendant to obtain a 5K1.1 letter (including, where applicable, an 18 U.S.C. §3553(e) request to depart). Moreover, the sentencing guidelines vest the prosecutor with complete discretion as to whether the government will seek a downward departure based upon the defendant's substantial assistance. Except for limited review, this decision is made without any accountability to the defendant or the court.

Within the Justice Department, there are few, if any, internal standards for substantial assistance to guide the discretion of prosecutors. Significantly, the Principles of Federal Prosecution do not require a prosecutor to take into account the truthfulness, reliability, or completeness of a defendant's testimony when making a substantial assistance determination.

One consequence of the Sentencing Guidelines is that the consequences of going to trial and losing are far more severe than under the previous system. Defendants, who exercised their right to trial prior to the guidelines and were convicted, received somewhat stiffer sentences than they would have had they accepted a guilty plea. Under the guidelines, most defendants cannot afford the risk of trial.

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24 (1992); Richman, supra note 3, at 86. See generally Gray, supra note 21, at 123 (discussing the pros and cons of reigning in the virtually unreviewable discretion of United States Attorneys).

40. Generally, as the level of a defendant's criminal liability increases, the more pressure a prosecutor can apply to secure cooperation. See Richman, supra note 3, at 86 (documenting increases in sentences after the guidelines); James Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1536 (1981).

41. See Burns et al., supra note 33, at 1327-30 (discussing the limited role of the court in 5K1.1 motions).

42. See Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 212-13 (1993). Several commentators have suggested that an administrative law model should be utilized to review substantial assistance decision making and other aspects of prosecutorial discretion. See Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev. 2117, 2141-45 (1998); Sklansky, supra note 9, at 527.

43. See Lee, From Gatekeeper, supra note 3, at 245-51 (arguing for nationwide prosecutorial guidelines for substantial assistance motions); Maxfield & Kramer, supra note 9, at 6-7 (documenting the lack of internal guidelines for substantial assistance motions). Even in districts with review criteria for substantial assistance letters, the stated policies are followed consistently in only one-half to two-thirds of districts. See id. at 8.

44. The Principles of Federal Prosecution set forth three considerations to determine whether a "person's cooperation may be necessary to the public interest." These are: the importance of the case, the value of the person's cooperation to the investigation or prosecution, and the person's relative culpability and criminal history. The principles also suggest that a person's "background of cooperation with law enforcement" is an important factor to be considered. See U.S. Dep't of Justice, United States Attorney's Manual § 9-27.620 (1997); Sklansky, supra note 9, at 528-29.
because the consequences of losing are that much more severe.\textsuperscript{45} This disparity in consequences has significantly changed the system.\textsuperscript{46} All in all, the inducement to cooperate is unprecedented and enormously powerful, particularly in homicide or drug investigations.\textsuperscript{47}

Defendants who desire to enter into the cooperation process face a number of problems. First, they do not know what information the government has in its possession, and substantial assistance has come to be defined as giving the government information that it does not already possess.\textsuperscript{48} Second, defendants are often unclear about the government's expectations. While the government claims that it gives 5K1.1 letters based merely on assistance in an investigation, as opposed to an agreement to testify against other defendants, the extent to which this is accurate or verifiable is unclear.\textsuperscript{49} Third, and perhaps of greatest significance, is that in certain districts, including the Southern District of New York, potential cooperators are expected to tell the government about all of their criminal conduct throughout their lifetime as a precondition to a cooperation agreement. If they are “signed up” by the government, cooperators will be required, as part of their cooperation agreement, to plead guilty to serious conduct that they reveal to the government.\textsuperscript{50}


\textsuperscript{46} Another consequence of the guidelines is that the disparity in sentencing for the same conduct is hidden because individual charging decisions are made off the record without systematic data keeping in prosecutors' offices. \textit{See} Secunda, \textit{supra} note 45, at 1276.


\textsuperscript{48} \textit{See} Substantial Assistance Staff Working Group, \textit{supra} note 10, at 26. A recent study of the Sentencing Commission laments that the Justice Department has not made the necessary data available to review justification for substantial assistance departures. \textit{See} Maxfield & Kramer, \textit{supra} note 9, at 6.

\textsuperscript{49} \textit{See} Maxfield & Kramer, \textit{supra} note 9, at 27 (documenting statistics of nationwide grants of substantial assistance letters for different forms of cooperation). Nationally, the rate of receipt of 5K1.1 departures varies dramatically by the type of assistance rendered. In drug cases, the rates were: operating undercover (100%), testifying (85%), verbal information only or agreement to testify (27%-47%). \textit{See} United States v. John Doe, No. 96 Cr. 1143, at 5-6 (S.D.N.Y. Mar. 3, 1999) (finding that an overwhelming percentage of 5K1.1 letters are for cooperation in prosecution of others; occasionally letters are issued solely for cooperation in an investigation).

\textsuperscript{50} The hope of the person who agrees to enter into this process is that he will receive a 5K1.1 letter and, even though he will plead guilty to serious conduct above and beyond that with which he is charged, the judge will understand the implicit agreement that the sentence to be imposed should be less than the guidelines calculation for the underlying case. For example, a defendant, who sold 50 grams of cocaine as part of a conspiracy to distribute more than five kilograms of cocaine, faces a mandatory minimum sentence of 10 years, and depending on a number of factors,
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controversial policy results in significantly increased exposure for a cooperating defendant. Thus, a critical factor in the defense’s decision of whether to cooperate with the government is the likelihood, in such a circumstance, that the defendant will be able to fulfill the terms of the cooperation agreement. Ultimately, the defendant must rely upon judges’ understanding and knowledge of the cooperation practice in the district to insure that he will receive his intended benefit.51

Typically, the cooperation process begins early in a case because the first person to provide the government with information about the crime and the participation of others often receives the greater benefit. Thus, there is often what is commonly referred to as a “race to the station house” to obtain a cooperation agreement.52 The longer a defendant waits to cooperate, the less likely he is to have information that is still useful to the government. Thus, defendants know early on from information provided by their lawyers or other inmates, or because of previous connection to the federal criminal justice system, that their best chance at a good sentence is to cooperate and cooperate early. Competent defense lawyers must discuss the option of cooperation with clients early on in the representation. In fact, defense lawyers complain that, because of the timing of “being the first in the door” is so crucial, they must address

including the amount of drugs involved, his role in the offense, and his prior criminal history, a guideline range that is likely to be greater than the 10 year mandatory minimum sentence. The defendant decides to cooperate with the government, expecting to receive a sentence of less than 10 years. That defendant, in the course of his meetings with the government, reveals that he participated in two homicides. Assuming that the government agrees to provide that defendant with a cooperation letter, the defendant will be required to plead guilty not only to the drug conspiracy but to at least one homicide. This subjects the defendant to a life sentence. If he does not receive the 5K1.1 letter, he now subjects himself to a longer period of incarceration than he would have received without cooperation because of his plea to the homicide(s).

51. A criticism of the current scheme is that recently appointed judges do not fully appreciate the cooperation process and the extent to which it is implicit in the agreement that the anticipated result will be below the guideline range for the original offense. There are numerous reports of judges looking to the maximum sentence of the additional conduct as the benchmark for the imposed sentence rather than the guideline range of the underlying offense. This slow shift in sentencing practice requires even greater competence by defense lawyers in advising a client about cooperation. This phenomenon merits further study.

52. The entry of a cooperator into the criminal justice process differs by type of case. In “white collar” (e.g., mail, wire and bank fraud, and securities violations) it is not uncommon for a target of an investigation to secure the services of a lawyer, and begin the cooperation process to ward off an indictment. In the “street crime” (drugs, robberies, homicides) context, defendants are typically indicted by a grand jury, obtain the services of a lawyer and begin the cooperation dance with the government. Typically, the first cooperator “in the door” of the U.S. Attorney’s Office who has information about the other co-defendants has potential to receive great benefit. See Hughes, supra note 3, at 41. In some instances, cooperation begins by the agents’ discussions with a defendant or target of prosecution prior to the time that the prosecutor meets the cooperator.
the possibility of cooperation even before they have an opportunity to fully review and investigate the facts of the case or to develop an attorney-client relationship.\textsuperscript{53}

Once a defendant decides to enter the cooperation process, the defendant and her lawyer meet with government counsel and, typically, the agents involved in the case. The initial debriefing gives the government a sense of whether the cooperator has useful information.\textsuperscript{54} Depending upon the importance and strength of the case, the government may decide to meet with a defendant again even where it believes that the defendant has utterly lied. Typically, there are a number of debriefing sessions prior to the government making a decision that the defendant should be signed up for a cooperation agreement.\textsuperscript{55}

Once a cooperator obtains an agreement, his role varies by the nature of the case. In most cases, the cooperator is expected to agree to testify and, if necessary, will spend considerable time with the assistant handling the case. Subsequent to that testimony, the government will determine whether the cooperator has met the conditions set forth in his cooperation agreement, and, if so, will send a 5K1.1 letter to the court for sentencing.\textsuperscript{56}

\section*{II. Bases For Prosecutors' Beliefs In Cooperator Truthfulness}

In this part, I will discuss the results of the interviews that I conducted.\textsuperscript{57} First, I will explore the overall belief held by prosecutors

\textsuperscript{53} The difficulties and nuances of defense lawyer counseling are beyond the scope of this Article. The Sentencing Guidelines have created heightened requirements for effective assistance of counsel and legislative funding for defense counsel is far short of that necessary to adequately address the need for such essential services. See Judicial Conference of the U.S., Report of the Judicial Conference of the United States on the Federal Defender Program (1993), reprinted in 53 Crim. L. Rep. (BNA) 2003, 2008 (Apr. 14, 1993); Janet Reno, Remarks of the Attorney General of the United States, Six Building Blocks for Indigent Defense (Feb. 25, 1999), in The Champion, Apr. 1999, at 28 (stating that the disparity of resources has a corrosive effect on the ability of poor defendants to secure effective representation.).

\textsuperscript{54} Often, particularly in white collar cases, there is substantial negotiation and agreement about the appropriate guideline range from which calculations begin prior to the defendant's first meeting with the government. See Kenneth Mann, Defending White Collar Crime: A Portrait of Attorneys at Work 14-15 (1985); Hughes, supra note 3, at 2.

\textsuperscript{55} This decision differs by jurisdiction. Some jurisdictions sign up far more potential cooperators than those to whom they ultimately give 5K1.1 letters. See Maxfield & Kramer, supra note 9, at 9-10. In the Southern District, the policy is not to sign up a cooperator unless there is a belief that the person will, in fact, get the letter. In the Southern District, the rate of cooperators signed up who were ultimately given 5K1.1 letters was at least 80%.

\textsuperscript{56} A study of government compliance with cooperation agreements is beyond the scope of this Article.

\textsuperscript{57} Throughout the remainder of the Article, quotations from the 25 anonymous interviews I conducted with former AUSAs will be identified by their interview
that safeguards exist to protect against the use of false testimony from cooperators in most cases. Then, I will discuss the factors that I found lead prosecutors to believe, sometimes erroneously, in cooperator truthfulness.

A. Prosecutors' Beliefs Regarding Cooperator Truthfulness

The former AUSAs readily acknowledged their concern that the sentencing guidelines and mandatory minimum sentencing have heightened the risks and dangers of reliance upon information from cooperators.8

There is a desperation on the part of defense lawyers to get 5K's. There is too much pressure because of mandatory minimums.59 The attitude of defendants is by darn, I am going to be signed up.60 The problem comes about because the system effectively says that once you have identified criminal conduct, the right result is the most severe punishment.61

While the former AUSAs believe that "by and large" prosecutors have obtained truthful information from cooperators, they recognize that there is no mechanism to insure that this is fact. Former AUSAs reported that they would not put a witness on the stand whom they did not believe, but readily admitted that, in some instances, they simply could not determine if the cooperator had told the truth. As a general proposition, most former AUSAs were quick to acknowledge:

You never really know if a person has told the truth. Maybe there's a lot more lying than one suspects. You really do not know the extent of a lie until you start preparing for trial.62

number [hereinafter 1-1-1-25]. Quotations from the 16 anonymous interviews I conducted with other defense attorneys will be identified by their interview number as well [hereinafter D-1-D-16]. All interviews are on file with author. In addition, many of the quotes by AUSAs and other defense attorneys will be in block quote format for stylistic purposes.

58. The former AUSAs necessarily reflect their views of how they operated in the role of prosecutor with the wisdom of hindsight and years of additional seasoning. All of them, however, made clear that the risks and dangers of reliance upon cooperators was a concern from the time they entered the prosecutor's office. Their perspectives offered throughout this Article necessarily are colored by that hindsight and a change in role.

59. I-8, supra note 57; see I-11, supra note 57; I-15, supra note 57.

60. I-8, supra note 57.

61. I-15, supra note 57; see I-2, supra note 57. The vast number of interviewees (but not the majority of the former Chiefs of the Criminal Division) are disturbed by the office's policy that a cooperator must reveal all of his criminal conduct throughout his life and enter a guilty plea as to serious conduct revealed. Many interviewees noted that the policy encourages prosecutors to "turn a blind eye" to a cooperator's lies about past conduct because the assistant simply "does not want to hear it." I-3, supra note 57; see I-5, supra note 57. "The system forces you to be a rule breaker." I-3, supra note 57. This is an issue in need of further study.

62. I-9, supra note 57.
Moreover, the broader the investigation, the “greater likelihood of abuse because there is more area for shaping events.”

Despite these concerns, the overall sense of former AUSAs is that the system “works” to produce truthful information from cooperators. Seventy-five percent of the former AUSAs believed that proper investigation and thorough preparation insures that the government obtains truthful information from cooperators. This belief is premised upon the practice of the United States Attorney’s Office in the Southern District of corroborating all salient facts. Virtually all former AUSAs emphasized corroboration as the key factor in assuring cooperator truthfulness.

A thorough command of the facts is the only safeguard against a lying cooperator.

A former chief emphasized:

We are never casual about whether a cooperator is telling the truth. We did not make distinctions between big and little things.

We do a great deal of due diligence.

Two former chiefs reflected that there were only a handful of incidents of someone making up facts to implicate innocent people. The Southern District took immediate action in those cases.

When the former AUSAs were asked to recount situations where they learned that cooperators had lied, approximately half of those interviewed recounted instances that raise questions as to whether the corroboration rationale is sufficient assurance that convictions are based on truthful information from cooperators. These questions concern the nature of what constitutes corroboration and the extent to which it can be secured, particularly in categories of cases where former AUSAs believe that sufficient corroboration does not exist for some part of, or a good deal of, a cooperator’s information. These include violent gang and some organized crime cases, small narcotics cases, money laundering and larger narcotics cases. Moreover, the interviews revealed many other factors that lead to false beliefs in cooperator truthfulness. These additional factors are: (1) lack of

63. I-16, supra note 57.
64. Many AUSAs expressed the view that embellished testimony or false confessions are primarily problems in state courts where there are fewer investigatory resources and where case preparation is not perceived to be as thorough. One of the ironies of this view is that New York state law does not permit a conviction to be sustained solely on the basis of accomplice testimony. While the state system has documented weaknesses, see City of New York, Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, Commission Report, July 1994, the cooperator credibility issue does not appear to exist primarily in the state system.
65. I-2, supra note 57.
66. I-11, supra note 57.
67. I-25, supra note 57.
68. I-6, supra note 57; see I-11, supra note 57.
proper investigation, (2) insufficient evidence of guilt, (3) misplaced trust in cooperators, (4) rigid theory of the case, (5) cultural barriers, (6) attitudes of individual AUSAs, (7) lack of experience of the AUSA, and (8) conduct of the proffer sessions.

The majority of cases in which cooperators were not truthful involved lies about matters that the prosecution deemed to be "collateral" to the guilt or innocence of the defendant. Most of the lies were exposed through cross-examination. In many of those instances, in which former AUSAs eventually learned that a cooperator had lied, the former AUSAs reported that they had been somewhat suspicious of the cooperator's statements during the cooperation process.

This anecdotal method of examining cooperator lies does not necessarily demonstrate a widespread problem in reliance upon cooperators. Nevertheless, the nature of the reported cases, particularly in a district which is highly regarded for its thorough practice, suggests the need for an examination of several practices and policies within United States Attorney's offices.

While these cases do not suggest that cooperators necessarily implicate people innocent of criminal activity, they do imply that some cooperators have embellished the facts, including the extent of culpability of defendants. The anecdotes and information provided by the other defense lawyers interviewed supports this conclusion. These accounts point to a need to study changes in the cooperation process particularly for certain categories of cases.

69. Some interviewees suggest that the adversary system, with its emphasis on cross-examination, is a sufficient check to insure that our "imperfect system" is not "flawed." I-11, supra note 57. However, because 97% of cases are resolved by plea bargaining, however, cross examination cannot operate as a check in more than 3% of cases.

70. I-15, supra note 57; see I-16, supra note 57.

71. The reported instances demonstrate that the lies were discovered randomly or through cross examination. This could indicate that the problem is more significant than previously recognized. At a minimum, these instances demonstrate that the federal criminal justice system does not have a grasp on the magnitude of the problem.

72. Chiefs of the Criminal Division appear to have greater confidence that the risks of cooperator lying are not realized than do line assistants, deputy chiefs of bureaus, and bureau chiefs.

73. One of the few significant differences between the incidents reported by former AUSAs and other defense lawyers is that a greater percentage of other defense lawyers have had experiences with cooperator embellishment. One defense lawyer, succinctly expressing the views of others, said, "Cooperators do what cops do: they round out the rough edges.... A portion is true, but how much is true? Cooperators typically add information to round out the story." D-11, supra note 57.
B. Bases for Prosecutors’ False Beliefs in Cooperator Truthfulness

1. Insufficient Corroboration

Former AUSAs differed by orientation and belief system as to whether they could ever learn the full truth from a cooperator. Nevertheless, there was agreement that, to the extent that they believed that cooperators provided truthful information, their belief was based upon the fact that the cooperators’ facts were “consistent with the other information we had.”

When questioned as to the nature of the “other information,” the results differed by the type of case. In reference to the 39% of cases that were narcotics prosecutions in the Southern District, former AUSAs pointed to the fact that in recent years, the office had prosecuted a number of large narcotics conspiracies where the evidence typically consisted of many hours of recorded conversations, wiretaps, surveillance by agents, documents, fruits of the crime (drugs and money), and the evidence from confidential informants. The corroboration was deemed significant.

We look to documentary evidence, tapes, wiretaps, surveillance. We would ask ourselves does it make sense and we would use those credibility measures that everyone uses. Is it logical, does it fit in to what I know to be true?

In white collar cases, there are “reams of paper” constituting a great deal of documentary evidence from which the prosecutor can...
determine whether the cooperator was truthful. Virtually all of those interviewed believed that most white collar cases presented the least danger of untruthful testimony for this very reason.\(^7\)

For example, most former AUSAs said that in major fraud and large narcotics cases, the extent of corroboration makes embellishment of facts by cooperators highly unlikely. "We often had cross-corroboration."\(^8\) Some former AUSAs, however, dispute the notion that sufficient corroboration exists for all crucial facts elicited from cooperators even in such well-investigated cases.

There were still many open areas in which cooperators could shade or embellish the truth.\(^9\) There is often ambiguity to tape recorded conversations. The wiretaps are like a table of contents of a book. Even if it’s good, it’s coded and you need people to decipher the code.\(^10\)

A former AUSA recounted an occasion where the government believed that the term “laundry” used throughout conversations was a reference to drugs. The government ultimately learned that “laundry was just laundry.”\(^11\)

Similarly, the existence of voluminous records in bank fraud cases is not necessarily complete corroboration of a cooperator’s testimony.

Often the essence of the charge is what the CEO [chief executive officer] or CFO [chief financial officer] knew and when they knew it. The accountant is the cooperating witness and explains what the CEO knew. Where’s the corroboration for that? Especially in business where there’s volumes of information going in and out, asking someone for their recall about what occurred three months ago or three years ago is not great assurance that they will get it right.\(^12\)

As these interviews suggest, information often cannot be corroborated.

You can never be 100% sure unless you have tape recordings of conversations. The problem comes in because the “filler” to fully tell the story of what happened comes from the cooperator’s mouth and you just do not have corroboration for it. I always take it all

\(^7\) Former AUSAs believed that they could more readily assess the truthfulness of cooperators in the white collar settings because the “cultural and class boundaries are easier to penetrate than for others accused of crime.” I-25, supra note 57. Additionally, the “significance of the power you have goes further in the white collar context.” Id.

\(^8\) I-21, supra note 57; See I-23, supra note 57. In large-scale cases (conspiracies or money laundering over a period of years), prosecutors often view cooperation as the “essential” corroboration of the general course of conduct. The corroboration of the individual transactions is deemed less significant.

\(^9\) I-15, supra note 57; See I-18, supra note 57; I-24, supra note 57.

\(^10\) I-15, supra note 57.

\(^11\) Id.

\(^12\) Id.
with a grain of salt until I see the corroboration. Rarely can you corroborate every fact. For instance, a cooperator can tell you about a telephone conversation he had with a defendant. When you ask for the date, the telephone records establish that they did, indeed, have a conversation on that date. So that's the corroboration for the substance of the conversation. You have no independent way to know the substance of the conversation. It's a leap, but you trust your judgment.84

And of course, "the black hole of corroboration is the time that cooperators and agents spend alone."85

Despite the prosecution's emphasis on corroboration as the assurance for cooperator truthfulness, nearly half of the former AUSAs were troubled by what constitutes corroboration in some cases.

You have to understand the slipperiness of fact in these cases. In both white collar cases and drugs, the sentencing range is calculated based upon the amount of money or drugs involved. The numbers can be fictitious. When the paper says "Jose 6" it can be 6 kilos total, but if the cooperator says 6 kilos a year for five years, that's what it is. The agent will testify that in his expert opinion, its 6 per year for 5 years. Now we have 30K and the prosecution considers it corroborated because the paper says "Jose 6."86

Other problematic corroboration is referred to as "oak tree" or "esoteric" corroboration. A former AUSA said:

A homicide occurred. Our cooperator comes in and tells us that the guy was killed by the oak tree. We check and determine that there is an oak tree at the scene. That constitutes our corroboration. It may be fine in some cases, but how do you know? You look at all of the factors, you're working with good agents and you come to trust your case, but it's still not what I think of as real corroboration.87

Where there is no independent verification or method to corroborate the cooperator's information, a prosecutor might be suspicious but is likely to "trust her own judgment" about the truthfulness of the information. Words of caution were expressed because:

A significant problem is that your view of the evidence is often shaped by the first cooperator in the door, the confidential informant, and by the agent. When the cooperators come in, there is a predetermined view of the facts that shapes the manner in which

84. I-17, supra note 57; See I-1, supra note 57; I-2, supra note 57; I-18, supra note 57; I-20, supra note 57; I-21, supra note 57; I-23, supra note 57.
85. I-10, supra note 57.
86. I-7, supra note 57.
87. I-3, supra note 57; See I-13, supra note 57; I-19, supra note 57.
the credibility of the cooperator is assessed.\textsuperscript{88}

There are two categories of cases that do not lend themselves to adequate corroboration. One is the "typical buy and bust" narcotics case wherein a confidential informant ("CI") who is working with agents sets up a drug deal with several other people.\textsuperscript{89}

These cases are not very well investigated. Neither the prosecutor nor the agents have a lot invested in the case so they do not know a lot of facts.\textsuperscript{90} Often there is little corroboration. There might be minimal surveillance and maybe a few tape recordings but our cases are developed through the cooperators and their recitation of facts. Often, in DEA, you have agents who do little or no follow up so when a cooperator comes and begins to give you information outside of the particular incident, you have no clue if what he says is true.\textsuperscript{91}

The typical scenario is that a CI is introduced to defendant 1. Defendant 1 hooks up the CI with defendant 2 who, in turn, brings defendant 3 into the scene. Defendant 3 does not say much but he shows up carrying something. Defendant 1 is your strongest case. Defendant 2 says that defendant 1 suckered him in and defendant 3 says he is merely present. You flip defendant 1. [He cooperates with the government]. This is an area where it is difficult to do good surveillance so essentially you have nothing on defendant 3. Defendant 1 gives you some information about defendant 3's knowledge of the deal and, after some questions, you tend to go with it.\textsuperscript{92}

In these small drugs cases, there are relatively few meetings with the cooperator before we sign them up.\textsuperscript{93}

Maybe there are two to three sessions before trial preparation and then, depending on how nervous the assistant is, anywhere from one to six sessions to prepare them for trial.\textsuperscript{94}

\textsuperscript{88} I-19, supra note 57.\textsuperscript{89} Most prosecutors distinguish informants from cooperators and believe that informants have even greater incentives to lie than cooperators because, not only are they "working off" cases, but their entire livelihood is dependent on the Drug Enforcement Administration (DEA).\textsuperscript{90} A cooperator is one whose relationship is governed by his agreement with the United States Attorney's Office while an informant's primary relationship is with law enforcement agencies. Problems with informants are distinct from those of cooperators and are beyond the scope of this Article.\textsuperscript{91} I-13 (Deputy Chief of Criminal Division), supra note 57. The same notion was reported by two chiefs of narcotics and many line assistants, virtually all of whom began work in the criminal division in General Crimes where these minor drug cases are prosecuted. Most chiefs of the Criminal Division, while noting that minor drug cases might present such problems, emphasized the extent to which the office prosecutes only cases where there is sufficient corroboration to ensure that the parties are indeed guilty.\textsuperscript{92} I-3, supra note 57; see I-13, supra note 57; I-15, supra note 57; I-19, supra note 57.\textsuperscript{93} I-8, supra note 57.\textsuperscript{94} I-13, supra note 57.\textsuperscript{94} I-20, supra note 57.
The lack of corroboration in these small drug cases is compounded by the fact that some prosecutors become "lazy and sloppy" in obtaining and evaluating the corroboration:

A brick of powder convicts on its own and unless you have a good agent who is engaged in the case, sometimes you do not spend sufficient time on it. There often is little if any corroboration for the testimony apart from the drugs themselves. It is not that the people are not guilty of something, but I was never confident about what they said occurred in the apartment.\footnote{95}{I-19, supra note 57; see I-1, supra note 57; I-2, supra note 57; I-3, supra note 57; I-13, supra note 57; I-18, supra note 57.}

Despite this comment, the former AUSA, who made this statement, could not recall a case wherein he believed that the cooperator had lied about the drug transaction but he acknowledged the risk.

Another problem in the small cases is:

that the least experienced people have the most power because of mandatory minimums. They talk about the awesome power when you start and then you are thrown into situations with poorly investigated crimes, where the biggest surprise is the amount of time you spent with criminals. You spend most of your time with cooperators. It's bizarre.\footnote{96}{I-3, supra note 57.}

The most troublesome prosecutions are the violent gang cases because they are "all based on cooperators."\footnote{97}{I-18, supra note 57.} These are deemed "historical cases" because virtually all of the evidence concerns acts that occurred in the past, often the distant past, for which there is only "one rat after another."\footnote{98}{Some of these cases come from state courts where prosecution has been declined, often because New York State has the requirement that accomplice testimony must be corroborated and there is little, if any, corroboration. See supra note 61. Not only does federalization of these cases increase penalties significantly, but it is easier to convict defendants because there is no corroboration requirement.}

In one case, the cooperator was like an encyclopedia of detail. We had no independent eyewitnesses, no surveillance or tape recordings and no forensic or documentary evidence. There's hardly even ballistics evidence. The cases are all built upon what cooperators tell us. We did not have a clue as to whether he was telling the truth but the amount of detail alone led us to believe him. I could see the agent sit there with his mouth agape. . . . Violent crimes are the Wild West. Our rule of thumb was that you had to have two witnesses who say the same thing who have not had the opportunity to collaborate. That was the corroboration.\footnote{99}{I-15, supra note 57.}

In these historical cases, the memory problem is significant. There were a dozen murders
some years ago. You are now asking a cooperator whether Little
Johnny was present at the murder of Big Tony. He thinks and then
says yes. He does not seem sure and you give him the spiel about
how you only want the truth. By the time he's finished, he has told
the detective and the grand jury that Little Johnny was definitely
there. Little Johnny is indicted and there is no information except
other cooperators to corroborate his involvement. It may just be
faulty memory. 100

There are two other frequent problems in violent gang and some
organized crime cases. The first is the false confession issue. 101

[It] is a counterintuitive one: a cooperator puts himself into a
situation where he was not present. In one case, a cooperator put
himself into a murder. Initially, we did not believe that a person
would put themselves in such jeopardy if it was not true. Later we
learned about several issues. First, is the hearsay problem. The
cooperator learned about the murder from the street and wanted to
make himself of value to us. He knew we need[ed] direct
information.... It is a dangerous cooperator who wants to help the
prosecutor.... This happened a couple of times. It is drummed into
defendants at the MCC (jail) that you have got to have good
information for the government. 102 This happens enough that
people should be worried about it. 103

The second problem is the very subtle manner in which evidence
can change.

100. I-15, supra note 57; see I-8, supra note 57; I-18, supra note 57; I-24, supra note
57.
101. Prosecutors are loathe to believe that people falsely confess. See Mark
Hansen, Untrue Confessions, A.B.A. J., July 1999, at 51, 52 (quoting Joshua Marquis,
Oregon District Attorney for Clatsop County). The expanding literature on false
confessions demonstrates that the techniques used by law enforcement to convince
the guilty to confess sometimes work equally well to compel innocent people to
confess to crimes they did not commit. See Richard A. Leo & Richard J. Ofshe, The
Consequences of False Confessions: Deprivations of Liberty and Miscarriages of
Justice in the Age of Psychological Interrogation, 88 J. Crim. L. & Criminology 429,
444-60 (1998) (documenting 60 cases of false confessions). While debriefing a
cooperator is significantly different from interrogating a suspect at a police station,
many of the factors that give rise to false confessions (notably lack of sufficient
training) are present in debriefings. See id. at 440-44; Richard J. Ofshe & Richard A.
Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Deny.
102. As a defense lawyer noted:
The jailhouse talk is all about 5K1.1 and criminal defendants, upon meeting
their court appointed lawyers, want to discuss cooperation.
D-16, supra note 57.
If you even mention going to trial with some clients, they think you're a
terrible lawyer because they believe that their only chance for a good deal is
to cooperate.
D-13, supra note 57.
103. I-15, supra note 57; see I-8, supra note 57; I-19, supra note 57; I-24, supra note
57.
You have a group of gang members who have been involved in a number of homicides over the years. A number of them are cooperating. One cooperator says that there were six guys at one homicide. You do not know if Little John was at the scene and participated in it. You ask them. Three guys remember that Little John was there. Two say I don’t know. One of the cooperators might begin to say that maybe Little John was there. He thinks. By the time you get to trial, he testifies that Little John was there. He believes it. If you focus enough on Little John, they certainly are going to say it.104

2. Lack of Investigation

Despite the stated emphasis on corroboration of all facts, there were numerous instances where facts were not uncovered due to lack of investigation.105 The most common example cited was the former AUSAs’ failure to discover that a cooperator had lied about his tax returns. Four former AUSAs reported that, despite extensive trial preparation, they did not uncover the failure to file tax returns or lying on tax returns.106 In each of these cases, the former AUSAs either inherited the case from another assistant shortly before trial or did not review the records sufficiently.107 In most of these cases, the lies were exposed during cross-examination by well-prepared defense counsel. Former AUSAs believed that the lies were more likely to be uncovered with continuity of personnel on these cases.108

In one case, the cooperator was the secretary of a union whose officers were charged with embezzling. Despite extensive trial preparation of the secretary, the former USA had “no inkling” that she was an embezzler herself. The cross-examination “blew up” when the defense attorneys established that the secretary had embezzled from a different office account than the one at issue. The former USA had neglected to review all of the records. The secretary subsequently pled guilty to a misdemeanor for the lies.109

Another former USA reported that in her first trial, a small
narcotics case to which she was assigned two weeks before it began, a cooperator had lied to her about the extent of his education. He claimed that he had graduated from college which was untrue. She said:

I made the mistake of a new prosecutor. I believed him because I could not figure out a reason why he would lie about that. I though it was just background and my focus was on the event. Next time I would call the university. A more seasoned prosecutor would be more questioning.\(^{110}\)

In a Racketeer Influenced and Corrupt Organizations ("RICO") case involving homicides, a lack of thorough investigation led a former AUSA to be convinced by cooperator "A" that the murderers had called him subsequent to the event and asked for his help in constructing an alibi. Cooperator "A" claimed that he had helped them do so and that they had dropped the gun off at his apartment. "A" produced the murder weapon, a factor that led the prosecutor to believe he was truthful. During the course of the case, one of the defendants "flipped" (cooperated with the government) and told prosecutors that cooperator "A" was actually the electronic lookout for the murder. It was not until cooperator "A" testified in a subsequent case that the prosecutor began to suspect that he was in fact the electronic lookout in the homicide. Had the prosecutor issued a search warrant for the cooperator's apartment, he would have discovered the physical evidence of radio specifications that would have proved that the cooperator had lied and was, in fact, the electronic lookout.\(^{111}\) There were repeated instances of similar failures to adequately investigate cases.\(^{112}\)

3. Insufficient Evidence

Another concern is the extent to which cases are prosecuted on "thin evidence." While most Southern District cases have significant evidence against defendants, there are instances where the government decides that, on balance, due to a number of factors, most notably the seriousness of the crime, a case should be prosecuted

\(^{110}\) I-17, supra note 57. One of the problems is the extent to which young prosecutors are permitted to make judgments about the truthfulness of cooperators with little oversight. While there has been more supervision since 1991, I-5, supra note 57, see I-18, supra note 57, "almost always the supervisor knew the case less well than the assistant so they relied upon your recitation of facts and your judgment." I-5, supra note 57. Inevitably, the line assistant is left to make the critical judgments about cooperators.

\(^{111}\) I-15, supra note 57. Information is unavailable as to whether the cooperator was prosecuted for perjury, lost his cooperation agreement or whether the defendant in the first case was notified of the cooperator's lie.

\(^{112}\) I-16, supra note 57; see I-18, supra note 57; I-20, supra note 57; I-21, supra note 57.
despite the lack of significant evidence.\textsuperscript{113} Thus, in a case that "still plagues" a former assistant, a defendant was charged with the robbery and murder of a postal worker after a lengthy investigation even though there was no percipient witness to the homicide and the government thought it could only prove a case against a person whose automobile was found at the scene.

Careful examination of telephone records led the prosecution to believe that four people had committed the murder but there was insufficient proof of their guilt. The Postal Inspector posted a reward for any information leading to the killers. A man, HU, came forward and convinced the prosecutors that he had attended a party where he heard these four plan the robbery and murder. After extensive questioning of the cooperator, the prosecutor signed him up for a cooperation agreement. While recognizing that this was a thin case, the decision was that either the prosecution must go forward because of the gravity of the offense or the case should be dismissed. They decided to proceed. The defense lawyer proved that the cooperator had lied during cross examination when he was able to establish through independent witnesses that the cooperator had not attended the party where he claimed to have heard the four people plan the homicide.\textsuperscript{114} The defendant was acquitted and the cooperator was later prosecuted for perjury.\textsuperscript{115}

The interviews revealed other examples of cases where former AUSAs report that they made "errors in judgment." In one case, a former AUSA called two cooperators whose stories were inconsistent with each other to testify and neither story "matched up" to the surveillance:

My sense was that one of the cooperator's stories kept changing. He still minimized his role on the stand. Did he lie? It's hard to say. . . .
I was uncomfortable throughout the entire trial.\textsuperscript{116}

4. Trust of Cooperators

Another reason that former AUSAs report that they mistakenly relied upon cooperators is that they trusted their cooperators and

\begin{itemize}
\item \textsuperscript{113} There is no suggestion that cases are prosecuted where the government is uncertain of the defendant's guilt.
\item \textsuperscript{114} The prosecution later learned that the cooperator had obtained the information by hearsay.
\item \textsuperscript{115} While some might suggest that the acquittal is proof that the criminal justice system functions effectively, this former AUSA concludes that independent corroboration of facts should be a legal requirement and that the federal system should consider adopting the rules of the New York state system for corroboration. He also believes that in close cases, where the evidence is thin, the case should be reviewed by numerous supervisors in the office to determine whether or not to proceed.
\item \textsuperscript{116} I-21, \textit{supra} note 57.
\end{itemize}
believed that they could "tell" who was truthful. Many reported that truthfulness was a "matter of common sense." This notion was reported to be problematic by others who explained:

By definition cooperators are manipulative. You must create an arms length relationship. You both want something. You want the information and he wants the benefit. It is easy to be manipulated.

Former AUSAs report difficulty assessing the extent to which subtle manipulation works:

Your view of the cooperator changes during the debriefing process and they are now on the team. The incentives to please you are great and you might not even recognize them because you have come to develop what you believe to be a trusting relationship with your cooperator. It is not that he thinks he's fabricating information. He's just eager to please.

Moreover, when assistants come to trust the cooperator they will often fail to corroborate all facts:

If I worked with a cooperator and came to trust him and I corroborated six of the eight major facts he told me, I would tend to believe the two uncorroborated ones and use those at trial. I would not always try to corroborate those additional two facts. I've gotten burned by such an approach.

We learn that you must try to corroborate every fact, but the daily pressures of cases and your belief that this guy you've gotten to know pretty well is truthful leads you not to spend the extra time.

This trust of the cooperator is particularly problematic for young assistants who have little seasoning to properly evaluate the significance of a lie that they deem to be "collateral" to the issues in the case. In addition to numerous reports of informant lies about tax returns, some AUSAs reported stories of more significant

117. 1-3, supra note 57; see 1-9, supra note 57; 1-20, supra note 57; 1-21, supra note 57.
118. 1-8, supra note 57.
119. 1-10.
120. 1-9, supra note 57.
121. 1-17, supra note 57.
122. 1-13, supra note 57.
123. Many former AUSAs recounted lies that they deemed collateral to the issues in the case and not related to credibility. When asked how they could determine whether the small lie reflected a more significant credibility problem, former AUSAs acknowledged that, on hindsight, the lie "could have been part of a pattern of little lies," 1-23, supra note 57, which might have had bearing on the underlying facts of the case. They did not believe this when the case was prosecuted because the essential facts of the crime were corroborated by other evidence.
124. Former AUSAs who did not report confronting a lying cooperator typically had at least one experience with a lying informant. Often the lies concerned tax returns. Most former AUSAs did not believe that an informant who lied on his tax returns had lied to them about the facts of the crime. While they disclose this
cooperator lies:

I got duped once by a middle aged lady who seemed so prim and proper. She was a drug courier and claimed this was the only time she ever did so. She blew up on cross examination. She was a big liar. She had done it many times before. As I gained seasoning, I learned that it is virtually always true that anyone who did it once did it before.\(^{125}\)

A related problem is the development of a trusting relationship with a cooperator, known by prosecutors as “falling in love with your rat.”\(^{126}\)

You are not supposed to, of course. You are trained to maintain your objectivity. But you spend time with this guy, you get to know him and his family. You like him. You believe that he has come clean. His cooperation is the first step toward a new life. Hopefully, the assistant has a skeptical mind set, but the reality is that the cooperator’s information often becomes your mind set. Typically, he won’t lie to you on big things. It’s the little things. It’s a phenomenon and the danger is that because you feel all warm and fuzzy about your cooperator, you come to believe that you do not have to spend much time or energy investigating the case and you don’t. Once you become chummy with your cooperator, there is a real danger that you lose your objectivity.\(^{127}\)

For example:

You learn early from your cooperator that Little Johnny is a pathological liar. You proceed with that assumption and interview a number of people. You become close to your cooperator. You think you are maintaining some objectivity but you like the guy. You know him, his family, the hardship he’s gone through. You’ve essentially asked the guy to betray everyone he knows. Maybe he’s cut himself off from his family, he’s lost his collegial environment. He’s vilified in his world. The politics of living in that neighborhood is that everyone knows everyone. You talk to a lot of people about Johnny about whether Johnny was the sixth person at the murder scene. Johnny swears that he was not there. If you just do not know, if there are two versions, you go with your cooperator.\(^{128}\)

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information to the defense and spend hours with the informant questioning him about his lies, the former AUSAs report that, typically, they do not conclude that the cooperator is lying about the crime.

The prevalence of reported lies about income tax returns may be solely the consequence of a particular CI who was used widely as a witness in the early 1990s. That experience led to a greater degree of attention to income tax returns of informants and cooperators. Thus, this particular concern may not be as relevant today.

125. I-3, supra note 57.
126. I-13, supra note 57.
127. I-15, supra note 57; see I-3, supra note 57; I-5, supra note 57; I-8, supra note 57; I-13, supra note 57; I-19, supra note 57; I-24, supra note 57.
128. I-15, supra note 57.
The relationship between the prosecutor and the agent who investigated the case has also resulted in assistants acting in a less than diligent fashion.\textsuperscript{129}

You are a young assistant. The agent is experienced. He’s good. He lets it be known that he thinks you are pushing too much to get information. Particularly where informants are involved, the agents do not want to give up information too quickly. He’s their guy. So you are too quick to try to please the agent. It’s subtle. But I have heard assistants say the agent wants a RICO as the justification for filing a case as such.\textsuperscript{130}

Several former AUSAs noted that if you are committed to getting the absolute truth, you often have tension with various agencies.\textsuperscript{131}

5. Rigid Theory of Guilt

There are a number of reported instances where the prosecution’s focus on convicting a person it believes to be guilty has led to questionable judgments about cooperators. While AUSAs pride themselves on their integrity, good judgment, and common sense, some former AUSAs and other defense lawyers report instances of rigidity.

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.\textsuperscript{132}

Prosecutors are, nevertheless, advocates. They get wedded to their theory and things inconsistent with their theory are ignored.\textsuperscript{133}

As another interviewee explained “If you only have a hammer, everything looks like a nail.”\textsuperscript{134} Moreover:

many people do not want to uncover facts that are inconsistent with their theory of the case. Life is pretty messy, and it is rare that anything goes from point A to point B without lots of messy details.

\textsuperscript{129} Of greater concern is the influence that agents have over cooperators when the USA is not present. “You have to rely upon agents to supervise cooperators and that brings a certain level of skepticism.” I-4, \textit{supra} note 57.

\textsuperscript{130} I-16, \textit{supra} note 57; see D-9, \textit{supra} note 57. AUSAs express admiration for the agents.

Narcotics is like cops and robbers. It’s exciting. It’s like PacMan. I-3. When you go home at night they work in dangerous situations. You have to admire these guys. They deserve a lot of deference.

I-10, \textit{supra} note 57.

\textsuperscript{131} I-1, \textit{supra} note 57; see I-2, \textit{supra} note 57; I-16, \textit{supra} note 57.

\textsuperscript{132} D-3, \textit{supra} note 57.

\textsuperscript{133} I-23, \textit{supra} note 57. There is skepticism as to whether, because of the prosecutor’s role as an advocate, he is capable of impartiality in his adjudicative role of assessing cooperator reliability. See Gershman, \textit{supra} note 39, at 416; Lynch, \textit{supra} note 42, at 2141 (arguing that the prosecutor plays a quasi-judicial role in the current system and that an administrative approach should be explored).

\textsuperscript{134} I-15, \textit{supra} note 57 (attributing the quote to Abraham Maslow).
on the way. If things sound clear, I always think that you're not getting the full story. The problem is that additional probing makes the case more complicated and sometimes more difficult to prevail so people ignore such facts. You must make a commitment to getting the truth in and of itself.\textsuperscript{135}

A recent example was noted by another former AUSA who had represented a defendant in an attempted murder case.

The cooperator testified at trial that on the night of the shooting, he met with the defendant and gang leader in the apartment, that he saw the gang leader give the defendant a gun, after which he and the defendant left the apartment and subsequently shot the victim. They returned to the apartment and the defendant reported the shooting to the gang leader. Another cooperator corroborated the first one, testifying that he was on the scene of the shooting and called the gang leader in his apartment to report the shooting. Both cooperators presented very precise and detailed testimony about the night of the shooting. The problem for the prosecution was that on the night of the shooting, the hospital records reflected that the gang leader was in the hospital hooked up to an IV.\textsuperscript{136}

The former AUSA reports that he produced the hospital records showing that the gang leader was in the hospital because he had been shot two nights earlier.

The hospital records reflected that the nurses checked on him every hour. . . . It seemed clear that these people lied. The client was acquitted of attempted murder but convicted of conspiracy to commit murder. I ask not only how could the jury believe these guys who perjured themselves but most significantly, how can the prosecutor believe them?\textsuperscript{137} The prosecutor took the outrageous position that the hospital records proved nothing because the defendant could have snuck out of the hospital, gone home to give out the guns, and run back to the hospital in time to get checked on by the nurses. This is a classic example of prosecutors buying their own bullshit. It happens to a lot of young prosecutors.\textsuperscript{138}

In another instance, a former AUSA reports that the cooperator's testimony was so important to a case that the evaluation of his veracity was skewed through the lens of his utility to the government.

I had a case where a client charged with RICO was cooperating. The prosecution needed him. I debriefed him extensively but he minimized and lied in his first seven or eight proffers. He would swear up and down, I told you everything. The agents were good.

\textsuperscript{135} I-16, \textit{supra} note 57.

\textsuperscript{136} I-2, \textit{supra} note 57.

\textsuperscript{137} Even though lawyers are not permitted to vouch for the credibility of witnesses, the very fact that the government has called a cooperator to testify often reduces a jury's level of scrutiny of that witness.

\textsuperscript{138} I-24, \textit{supra} note 57.
They knew. They needed him badly enough so they came back because he was the linchpin to another indictment. He gave me more information. Was it truthful? How the hell do I know when someone has lied to you so repeatedly? It is hard for me to imagine that the prosecution knew where the truth ended because much of what they were doing was comparing it to what another cooperator said.\textsuperscript{139}

Many similar stories were reported by a significant number of the defense lawyers interviewed.\textsuperscript{140} It appears that, particularly in high profile cases, the pressures and mindset of some prosecutors make it less likely that the government will carefully examine lies by its cooperators. In six cases that had received considerable publicity, the defense lawyers exposed not mere inconsistencies, but outright lies, by cooperators that they deemed significant to the outcome of the case. In each case, the lies were dismissed by the government as either mistakes by the witnesses or not significant to the guilt or innocence of the defendant.

In one of these highly publicized cases, the chief cooperator, despite extensive briefing by the prosecutor, failed to reveal millions of dollars of tax evasion and numerous fraudulent schemes in which he was involved with four people whom he was protecting from prosecution. The defense theory was that he blamed the defendant in lieu of the four other people. The lies were exposed on cross examination. No action was taken against the cooperator.

There are instances where these defense lawyers say they would "bet [their] li[ves] on the fact that what the cooperator said was a complete lie"\textsuperscript{141} but that they knew that the prosecutor could not see the truth. In one drug case, cooperator A implicated cooperator B in a homicide. Cooperator B adamantly denied involvement in the homicide. The government said to cooperator B, in sum and substance:

\begin{quote}
Look we believe everything else you told us is true, so just tell us about the homicide even if you just thought about it, dreamed it or
\end{quote}

\begin{footnotes}
\textsuperscript{139} Id. These examples reflect the inherent problems in any study questioning lawyers, whether or not they have been former prosecutors, about the truthfulness of witnesses for the opposing party. Each adversarial role has its own set of assumptions, values, and interests. While acknowledgment of this role difference does not invalidate the observations of former AUSAs and other defense lawyers, it necessarily reflects possible biases in such a study.

\textsuperscript{140} Other than the prevalence of other defense lawyer accounts of exposing lies by cooperators during cross examination, there was little distinction between former AUSAs and other defense lawyers regarding instances of cooperator embellishment in the cooperation process.

\textsuperscript{141} D-17, supra note 57.
\end{footnotes}
would not mind if it happened. I told the client, even if you dreamed you were part of it, you get your 5K. He would not do it. He would have saved himself ten years had he just adopted the government's version of events.  

6. Cultural Barriers

One case, described as the “most difficult and frustrating case” that a former AUSA had handled, involved linguistic and cultural barriers that made it very difficult to assess the cooperator's credibility.

In a white collar money laundering (structuring) case, all of the defendants were Chinese. We had an extremely difficult time debriefing the cooperators because, even with interpreters, you have no clue what they are saying. With a Spanish speaking defendant you can judge the body language and tone of voice that are important in assessing credibility. In Chinese, the intonation, inflection, body language, and culture are so different that you cannot evaluate whether they are truthful. We investigated that case for more than a year but even so we had no idea what these witnesses would say at trial and whether they were telling the truth. We were in bed with these guys and we thought they were telling the truth. We knew there was a crime there and we knew the defendants were in on it. The cooperators were telling me they were in on it. I went into trial not confident that I knew what any witness would say at trial and whether they were telling the truth. That's exactly what happened. They gave such wishy-washy testimony and made out a prima facie case, but they did better for the defense.  

Another former AUSA reported:

In a string of cases with Chinese defendants, we had experience with untruths because it was extremely difficult to get answers to questions. It may have been cultural. It could have been the interpreter but we conducted 10-12 proffer sessions because it was like pulling teeth to get the information. If you did not ask the exact question, you would get no answer. It was laborious and the nuances are lost when you go through an interpreter:

Q: How did you know each other?
A: We used to see each other.
Q: Where?
A: We used to go out.
Q: Where did you meet?
A: At the bowling alley.

142. Id.
143. I-15, supra note 57.
144. I-8, supra note 57.
7. Attitudes of Individual Assistants

At least six former AUSAs believed that the attitude of individual assistants determined how much assurance they could have in the truthfulness of cooperators. These former AUSAs described many of their colleagues as having "law enforcement" or "gung ho" or a "true believer" mentality.

There's a breakdown in the office of "true believers" and others. The true believers are more macho and fit in with the agents. Some become friends with agents. I believed that these people targeted bad guys and then would push the margins to achieve a result. True believers are those who most identify with law enforcement and could never imagine that they would be defense attorneys. They tend not to see gray in situations. It is all black and white.

These former AUSAs did not have any proof that those lawyers did "push the margins" because:

you would not know what other people were doing until you sat in court and watched them. It was just a sense.

One of those known as a true believer described the view he and his close colleagues shared:

Our energy came from getting the bad guys off the street. We wanted to make a difference. We believed in the cause of justice. It was exciting, cops and robbers, better than TV. People look down on us for our enthusiasm but we left no stone unturned.

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145. Several interviewees who worked in the Southern District prior to 1980 compared the mind set of prosecutors today with prosecutors during their term in the office. The distinction noted was that assistants prior to 1980 operated as barristers, that is, their role was not primarily the investigation of cases, but review of the work of various federal agencies and prosecution of cases. Today's prosecutors were described as having "law enforcement mentality. They are cops. Seventy-five percent of their work is investigation of crime and hence their objectivity as lawyers is skewed." D-2, supra note 57; see D-3, supra note 57; D-4, supra note 57; D-5, supra note 57; D-7, supra note 57; I-1, supra note 57; I-2, supra note 57; I-7, supra note 57; I-10, supra note 57; I-12, supra note 57; I-15, supra note 57; I-19, supra note 57. While former AUSAs historically have been critical of the office once they begin to represent defendants and notoriously bemoan the latest prosecutorial action with the claim that "we did not do things like this in my day," this view is shared widely among many lawyers who have worked in the system over many years. The Sentencing Guidelines are noted to have significantly exacerbated the problem. To some extent, this reported attitudinal difference may reflect changes from the due process model to the crime control model of criminal justice. See Eisenstein, supra note 11, at 161; Gershom, supra note 39, at 416.

146. I-3, supra note 57.

147. I-19, supra note 57.

148. I-3, supra note 57; see I-5, supra note 57.

149. I-21, supra note 57.
A small group of "true believers" (five lawyers) left a number of former AUSAs uneasy: they were described as "fast and loose."\(^{150}\)

They were not thorough, they were not law men. They fraternized with agents, made inappropriate comments. They were not skeptical in a rigorous way. I would not be surprised if they put on perjured testimony.\(^{151}\) They were not obsessed with ethical conduct.\(^{152}\)

A related concern is the extent to which the "us and them" mentality of the office shapes the way in which prosecutors evaluate cooperators' testimony. The mentality is created by at least two things. First, new assistants are usually without litigation experience in criminal justice so they bond with each other particularly when they have to do battle with experienced defense lawyers.\(^{153}\) Second, the assistant feels beleaguered.

Everyone talks about the power of the prosecutor but I'm worried about who's going to yell at me for something that is not my fault. It is also true that every prosecutor secretly wants to be a cop. The allure is to get the bad guys. You talk about your agent, the guy who shows you the ropes. He exudes confidence on the street.\(^{154}\)

8. Lack of Experience

Many former AUSAs discussed the relative youth and lack of life experience of AUSAs as a significant reason for the failure to properly assess cooperator credibility and uncover truthful facts. While former AUSAs acknowledged that their colleagues were well-intentioned and the "best talent," that talent does not translate into the necessary skills to debrief cooperators.\(^{155}\)

While the glory of the job is that your goal is to always do the right

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150. I-3, supra note 57.
151. Id.; see I-5, supra note 57; I-9, supra note 57; I-13, supra note 57.
152. I-5, supra note 57. This criticism may be solely the result of personality and behavioral differences among lawyers. I interviewed two of those identified as "true believers" and solicited comments from other lawyers about the extent to which the perceptions of putting on perjured testimony were universal. There was no suggestion in the interviews with the "true believers" of anything other than the highest degree of dedication and rigor in their work. On the basis of these interviews, it is not possible to conclude that these lawyers were any more likely to engage in less than rigorous review of facts provided by cooperators.
153. Distinctions were noted in prosecutorial attitudes toward defense lawyers. Federal defenders and former assistants were trusted readily. "Drug" lawyers were not noted for their trustworthiness.
154. I-10, supra note 57; see I-13, supra note 57.
155. I-15, supra note 57. Typically, an assistant in the Southern District attended a top-tier law school, clerked for a judge, then worked at a large law firm for three years. The prevailing ethos is that lawyers from this background are well-trained, have high ethical standards, and possess good work habits including careful attention to detail. The office operates at a high level of practice and there is a great deal of camaraderie among the assistants.
thing and the office hires great people, the problem is that the best talent does not often translate into people who are sufficiently perceptive about human nature. . . . [Y]ou need people who are street smart. 156

You need to learn the difference between bad guys and decent guys who make mistakes. You need insight into people to be good at it and the problem with the office is that there is little life experience. Every young prosecutor is a hard ass and every one of their cases is the case of the century. 157

Many believed that the relatively homogeneous background of those hired in the Southern District does not provide for the best environment for learning to effectively work with cooperators.

By reputation, the stereotype of lawyers in the Southern District is by and large from privileged backgrounds, ambitious, erudite, and elitist. They believe that two years at a law firm makes them wise to the world. In fact, they live a rarified existence. They come from a different walk of life and are often out of touch with what real crime is. 158

Prosecutors with some state court experience or sufficient life experience are perceived as better able to ask the question of “where’s the beef here” and better able to evaluate cooperators. 159 “You need to be able to answer the questions who was lied to, who was hurt or whose money was taken before you make a decision to prosecute a crime.” 160

While Southern District prosecutors might be terrific at writing a thirty page brief on the scope of the wire fraud statute, they often miss the fact that the crimes they seek to prosecute under that analysis are marginal crimes at best. The office has become more credentialist of late. Some of these people may develop very good judgment and may have skills to work with cooperators, but there should be a wider range of people hired. 161

156. I-20, supra note 57; see I-15, supra note 57; I-21, supra note 57; I-24, supra note 57. Psychological literature points to additional concerns. Those who work as AUSAs are readily described as “highly power-motivated people.” They are drawn to positions that give them the “opportunity to direct in an immediate way the behavior of individual other persons in accordance with some preconceived plan and use positive and negative sanctions on that behavior.” David G. Winter, The Power Motive (1973). Studies of highly power-motivated people that try to determine how the power motive affects an individual’s ability to listen and work well with others suggest that they encourage and reinforce in others any expression of opinion that confirms their own. Those not in that group are better able to listen to others. See Eugene M. Fodor & Terry Smith, The Power Motive as an Influence on Group Decision Making, 42 J. Personality & Social Psychol. 178, 178-84 (1982).


158. I-19, supra note 57; see I-15, supra note 57; I-23, supra note 57; I-24, supra note 57.

159. The Southern District hires few lawyers who practiced solely in the state system, although this has been dependent on the individual United States Attorney.

160. I-19, supra note 57.

161. I-13, supra note 57; see I-23, supra note 57; I-24, supra note 57.
The comments reflected criticism of the current culture in prosecution. These are people who were raised in the guidelines era only ("Guidelines babies"). Prosecutors who grow up knowing only the sentencing guidelines have a mechanistic approach to justice. They don’t ask what’s the right thing to do. They just want the right result.

Virtually all of the other defense lawyers echo this view.

There is a sense that the more reflective people lose out. When you are discussing a case in a group, the harsher punishment always seems to be the right answer. It’s part of a macho culture of narcotics where the way to succeed is to be rough.

They are so used to winning and getting to see savage, appalling sentences, that they get arrogant and hardened to a lot of jail time. The worst experience is where people have come from the forfeiture unit to other units. We preach restraint, but those people are so used to winning, that you have to have your head handed to you to be tamed.

Other former assistants expressed concern that the increase in size of the office had brought quality control concerns. While prosecutors need excellent skills that might coincide with good credentials, there should be additional criteria particularly when the office is so large.

9. Proffer Sessions

The reports of former AUSAs about the conduct of the proffer sessions reflect and amplify many of the issues noted in the previous sections about the bases for false beliefs in cooperator truthfulness. The particular problems associated with these sessions are a relatively unexplored reason for the prosecution’s false beliefs in cooperator truthfulness.

Former AUSAs readily acknowledge the danger that stems from the overwhelming incentives to lie, including the fact that "cooperators are eager to please you," and will try to give information that they believe prosecutors want. Many former AUSAs discussed the problems inherent in the process, reflecting concerns

162. I-11, supra note 57.
163. I-6, supra note 57; see I-8, supra note 57; I-12, supra note 57; I-15, supra note 57.
164. See Gershman, supra note 39, at 416.
165. I-3, supra note 57; see I-5, supra note 57; I-8, supra note 57.
166. I-7, supra note 57.
167. I-23, supra note 57.
169. I-9, supra note 57.
about the nature and structure of the proffer process and psychological factors attendant to the relationship with cooperators. Four AUSAs expressed the belief that, due to a host of factors, most prosecutors are “horrible” at the cooperation process and many, unwittingly, obtain false information.\(^{170}\)

An overriding concern is the nature of truth and fact. As a former chief said in response to the question of whether he believed that cooperators embellish the truth:

I really do not know how to answer that. All I know is that truth is elusive. Everyone tells you things and people don’t even know if they are embellishing. The greater the incentive structure, the greater the risk of incriminating others. How much do you really remember? Mistakes and concurrences vary and now, if you tell them to a partisan lawyer and it fits the theory, it becomes frozen in the story because it is useful. The client is alert. His ears pick up when he reveals certain facts that pique the prosecutor or agent.\(^{171}\)

This view was echoed by a number of AUSAs:

There’s a lot of complexity and richness about facts and merely because a person’s version is different does not mean that they are lying.\(^{172}\)

This perception, however, does not often translate into prosecutorial practice. There are a myriad of complicated, interrelated reasons for this lack of translation. First, there is a perception that many assistants do not share the complex view of the nature of truth. While former AUSAs all acknowledged that they were conscious of the dangers that they and their agents would elicit embellished testimony, many believe that because they repeatedly emphasized “we only want the truth” and pointed out to cooperators the dangers of not being truthful (i.e. ripping up their cooperation agreement), that they were more likely to receive truthful information from cooperators.

There’s often a linear attitude about the truth. You think you know what the facts are, so you attempt to get the truth from the cooperator. Your goal is to get the truth and protect it.\(^{173}\)

Most prosecutors simply do not understand how memory works and the reality of truth.\(^{174}\)

\(^{170}\) 1-15, supra note 57; see I-19, supra note 57; I-23, supra note 57; I-24, supra note 57. It is, of course, not possible to ascertain whether these former AUSAs held these beliefs from their early tenure in the U.S. Attorney’s Office or the extent to which these views are primarily the result of a shift in role.

\(^{171}\) 1-7, supra note 57.

\(^{172}\) 1-15, supra note 57; see I-3, supra note 57; I-16, supra note 57; I-18, supra note 57; I-19, supra note 57; I-23, supra note 57; I-24, supra note 57.

\(^{173}\) 1-9, supra note 57.

\(^{174}\) 1-15, supra note 57; see I-19, supra note 57; I-24, supra note 57. Information on how memory works has been derived from work communications theory, decision making, and computer science. Human memory involves many processes and the
I learned that it is not that often that the cooperator mirrors what you thought going into it. You have to be flexible. You have to take the cooperator's lead and then see if you can corroborate it.¹⁷⁵

Moreover, the cooperator's notion of truth is often different from the AUSAs:

Their version of reality is inaccurate. You have to try to understand their predicament and what they think you mean by wanting them to cooperate. Telling them that you just want the truth is meaningless.¹⁷⁶ What is the truth? Truth is very different when you have lived your life as part of an organization that commits crimes and lived life through deceit. Truth equals what I know or what I can be caught at. Truth depends on how you characterize events in your life.¹⁷⁷

Truth also depends on using the right language. Once I asked how many times a week, on average, were you in a particular drug spot? He asked: How long is a week? When I explained I meant 7 days, he explained that some weeks are 3 days, some are nine days. The concept of week, of average, is very different. These cooperators are

recall of information is more complicated than retrieving mere copies of experiences located in a memory bank. Researchers suggest that people actually construct memories at the time of withdrawal from the experience or at the recollection of it. See Allison G. Harvey et al., Autobiographical Memory In Acute Stress Disorder, 66 J. Consulting & Clinical Psychol. 500, 500-06 (1998); Edward R. Hirt, Do I See Only What I Expect? Evidence for Expectancy-Guided Retrieval Model, 58 J. Personality & Social Psychol. 937, 937-51 (1990); Marjorie Roth Leon & William Revelle, Effects of Anxiety on Analogical Reasoning: A Test of Three Theoretical Models, 49 J. Personality & Social Psychol. 1302, 1302-15 (1985). Phenomena that influence recall include the order of the event in a sequence (serial position effect), see Dewey Rundus, Analysis of Rehearsal Processes in Free Recall, 89 J. Experimental Psychol. 63, 63-77 (1971); the conditions under which the memory is recalled, see Harvey et al., supra, at 500-06; the stress or anxiety of the person recalling the memory, see Matthew Dobson & Roslyn Markham, Individual Differences in Anxiety Level and Eyewitness Memory, 119 J. Gen. Psychol. 343, 343-50 (1992). Moreover, "evaluative apprehension" (altered memories based on responses to the perceived demands of the questioner) alters recall of events. Thus, in the field of eyewitness identification, research demonstrates that memory is reconstructive and dependent on the subject's current mental state and the wording of the questions posed. See Elizabeth F. Loftus et al., Semantic Integration of Verbal Information into a Visual Memory, 4 J. Experimental Psychol.: Hum. Learning & Memory 19, 19-31 (1978). Presuppositions contained within questions are capable of transforming a witness' memory. See Howard I. Weinberg et al., Demand and the Impact of Leading Questions on Eyewitness Testimony, 11 Memory & Cognition 101, 101-04 (1983).

¹⁷⁵. I-18, supra note 57.
¹⁷⁶. Studies in experimental psychology demonstrate that this over-reliance on verbal communication ignores what often are the most significant determining factors of memory recall. See Weinberg et al., supra note 174, at 101-04. Cognitive researchers have found that when people read or listen to speech, they process information "between the lines" and recall what was implied. See Richard J. Harris & Gregory E. Monaco, Psychology of Pragmatic Implication: Information Processing Between the Lines, 107 J. Experimental Psychol.: Gen. 1, 1-22 (1978); Denis J. Hilton, The Social Context of Reasoning Conversational Inference and Rational Judgment, 118 Psychol. Bull. 248, 248-71 (1995).
¹⁷⁷. I-15, supra note 57.
very literal in their approach to the world.\textsuperscript{178}

Second is a lack of understanding of the mindset of the cooperator.

Many of them come in believing \textit{This Is What They Want To Hear} Time rather than \textit{This Is What Happened} Time. Thus, the last thing you want to do is to feed them information because they will believe you want them to parrot back that information. The stakes are very high for them and they will do what they have to to get their letter.\textsuperscript{179}

Among the difficulties with many cooperators is that you are talking across cultures. It is a bit easier with white collar defendants because you can understand their reality since it is closer to your own than gang members. But in drug and violence cases, it is very hard because you have to learn to communicate with someone from an alien environment. They have typically been in the criminal justice system since ages 19-21, they have a perspective on cops, and this is just another arrest, they will soon be out and passed from one prosecution to another. The fact that this is not the state system is irrelevant to them. They assume you are posturing when you talk about the difference in the federal system.\textsuperscript{180}

Third, it is easy to make mistakes. Cooperators will

make stuff up that does not make sense such as telling you, out of the blue, “then he told me he would bring me 2 kilos.” In the context of the case, it does not make sense so you can question those. You have to be very careful. Mistakes are made when you have an assistant who really wants to sign the guy up and you have a young agent. There’s an unholy conspiracy to sign him up.\textsuperscript{181}

The mistakes are often caused by the relationship that is developed with the cooperator. While all former AUSAs report that cooperators do not tell the truth in the first few sessions, a relationship develops that can shade the view of facts.\textsuperscript{182} Once a prosecutor has developed a

\textsuperscript{178} \textit{Id.}
\textsuperscript{179} I-13, supra note 57.
\textsuperscript{180} I-15, supra note 57.
\textsuperscript{181} I-8, supra note 57. The area of greatest embellishment is conversations that never took place. Another area of embellishment is:

[A cooperator] inventing a prior relationship with the defendant about things they had done together, how he knows the person or why the defendant called him in the first place.

I-8, supra note 57.

The cooperator is not lying about many of the facts, but the manner in which he characterizes his involvement is not totally truthful. For example, in a drug conspiracy, a cooperator might say that he is a small guy when his involvement is more extensive. He might slightly change the role of the other defendants. He might add some vague drug deals. I-24, supra note 57.

\textsuperscript{182} I-1, supra note 57; see I-2, supra note 57; I-3, supra note 57; I-5, supra note 57; I-8, supra note 57; I-16, supra note 57. One former AUSA said that the percentage of cooperators who tell the truth in the first session is “pretty high” but that it depends on how well they are questioned. “When the cooperator came in, we already knew about the guy from the arrest, the indictment and we have tapes.” She thought this was particularly true in white collar cases. I-9, supra note 57. Virtually all of the other
trusting relationship with the cooperator and entered into a cooperation agreement, the dynamic can change radically. No longer is the cooperator’s information as carefully scrutinized. Of great significance is the fact that now the cooperator believes that he is bound by the information that he gave to prosecutors as part of his agreement. While prosecutorial efforts to bind a cooperator to a particular version of events would be unseemly and probably illegal, the cooperator expects that he is bound by his earlier version of events.

Fourth, many prosecutors lack depth of understanding of all of the factors that influence the evaluation of credibility and believe that evaluating credibility is “just common sense.” Studies in the field of social psychology demonstrate that claims of ability to tell the difference between truth and deception are problematic.

People are poor intuitive judges of truth and deception. In fact, even so-called experts who make such judgments for a living—police investigators, judges, psychiatrists, and polygraphers for the CIA and the FBI, and the military—are highly prone to error.

Fifth is the difference between the lawyers’ and lay people’s thought processes.

Lawyers’ minds work through the organization of abstract thought. The differences in how witness’s minds work is often huge. For instance, I was once prepping a witness in a white collar stolen bond case. She was not very smart. I was trying to go over the nine page cooperation agreement with her. It turns out that she did not even know that she had pleaded guilty. How much did she understand? I was worried about how good her grip was on everything else. I was not sure but her story got more textured as time went on. There were no major inconsistencies with the information we had, so we had no way to know that it was not true. We tried to corroborate as much as we could.

That former AUSA gives an example of the danger of imposing a lawyer’s view of fact development upon a cooperator who does not share a lawyer’s “obsession with exact facts.”

You might go into a session knowing, or believing, that Javier had a gun. When you question the cooperator, he tells you that Javier is part of one of the biggest rings in Upper Manhattan. You ask him whether Javier used a gun in the incident in question. He will say

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183. I-10, supra note 57.
184. See Richman, supra note 3, at 101.
185. See Bella DePaulo et al., Diagnosing Deceptive and Mixed Messages From Verbal And Nonverbal Cues, 18 J. Experimental Psychol. 433, 433-46 (1982).
186. I-10, supra note 57.
187. I-9, supra note 57.
yes. If you don’t probe more deeply as to how he knows, you fail to find out that it’s hearsay that has been imbedded in his mind as fact. Or he may have come to believe that he actually did see it because he heard about it from several people. Most people use language in a very loose way. They lack precision. People don’t understand that they must have first-hand knowledge unless you tell them. He might go to trial and say that he saw Javier with a gun. That’s the danger of embellishment.⁠¹⁸⁸

Sixth is the style of questioning. There is little, if any, training about effective interviewing techniques and the dangers inherent in certain processes.⁠¹⁸⁹ The interviews demonstrate sharp disagreement about the most appropriate and best methods of questioning to obtain the truth from cooperators. It appears to be a relatively prevalent practice to be confrontational with cooperators: to cross examine them with facts and accuse them of lying. Many claim this is the “most effective way” to get to the truth. “You have to break the guy down.”¹⁹⁰

To a great extent, the differences appear to be personality driven. While more than 50% of those interviewed reported that they engaged in a confrontational, aggressive examination, others said:

You just have to be yourself. I am not a yeller or screamer. Senior

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¹⁸⁸ Id.
¹⁸⁹ While the Southern District supervisory personnel spend significant time concerned about cooperator testimony, the concerns do not translate into sufficient training. The training regarding cooperators typically consists of one or two lectures about cooperators with the oft-repeated caveat that all cooperators lie to minimize their conduct. The possibility of the embellishment of facts to implicate others in order to obtain a benefit is not discussed except by reference. Otherwise, training for the conduct of proffer sessions occurs on the job. Some prosecutors sit through proffer sessions conducted by other assistants when they begin in General Crimes. Many, however, reported that they were left to their own devices in proffer sessions to determine the course of the session, the types of questions asked, and the nature of information sought. The results of debriefings were, however, reviewed with the deputy chief of their unit. Particularly in the era when prosecutors were required to memorialize reasons for cooperation with specific factual details, supervisors would often ask questions that required the prosecutor to elicit further information to corroborate the cooperator version of events or to follow up in greater detail to determine the truthfulness of their information.

Several prosecutors noted:

I had no idea what I was doing. Here I was from the halls of an Ivy League school, a clerkship, and a law firm, and now I was spending all of my time with drug dealers and guys with guns. I had no idea how to deal with them or to determine how truthful they were.

I-3, supra note 57.

You learn as you go along. It depends on the kind of person you are. I tend to believe people until proven otherwise.

I-3, supra note 57; see I-7, supra note 57.

You have to get burned once to learn.

I-7, supra note 57.

¹⁹⁰ I-21, supra note 57.
prosecutors will tell you to do what works for you.\textsuperscript{191}

When you are new, sometimes your second chair told you to yell and scream.\textsuperscript{192}

Many who did not begin as "screamers" got tougher with cooperators during their tenure at the office.

You only learn about getting information from cooperators after you have watched a defense lawyer rip apart your cooperator. Then you get tougher with them.\textsuperscript{193}

Others are disturbed by the confrontational approach but used it on occasion.

Sometimes you have to get confrontational with the cooperators and point out to them the inconsistencies of facts. They may then say, Well, maybe it happened that way, and I say back to them, I don't want maybes. I want only what happened. I want only the truth. I must tell you that if you do not tell the truth you only hurt yourself, because if I find out that you're lying, you'll lose your "5K" letter.\textsuperscript{194}

We can exert enormous psychological pressure on them.\textsuperscript{195}

Other assistants are extremely uncomfortable with confronting cooperators with statements such as "you're lying" or walking out of the room. "I don't think that's the way you should treat people. It's not professional and you are not a cop."\textsuperscript{196}

Such approaches may not only be unprofessional but highlight the concerns of one former AUSA regarding the possibilities of eliciting false testimony:

I have found the cooperation process more frightening since I have become a defense lawyer and have become much more cynical. First the clients minimize, then boom, they're pressed and understand that the information they are providing is not enough to earn them their benefit and the floodgates open. Is it truthful? I don't know. It's frightening.\textsuperscript{197}

Seventh is the communication about the cooperator's progress

\textsuperscript{191} I-9, supra note 57.
\textsuperscript{192} Id.; see I-17, supra note 57.
\textsuperscript{193} I-9, supra note 57. As one interviewee stated "narcotics is like cops and robbers. It's exciting, like a game. The hours are crazy, it's not subtle nor about legal issues." I-3, supra note 57; see I-10, supra note 57; I-13, supra note 57. "The way to succeed is to be tough, to be rough, as in proffer sessions." I-3, supra note 57.
\textsuperscript{194} I-13, supra note 57.
\textsuperscript{195} I-16, supra note 57. Former AUSAs, of course, acknowledge the following situation:

You, of course, have to be very careful because they might pick up the message that you want the facts to be a certain way. A lot of it depends on the good judgment of the assistant and the agent.

I-4, supra note 57; see I-1, supra note 57; I-2, supra note 57; I-3, supra note 57; I-9, supra note 57.
\textsuperscript{196} I-19, supra note 57; see I-23, supra note 57.
\textsuperscript{197} I-23, supra note 57.
during the debriefing sessions. 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. Former assistants report that:

They signal to the cooperator that he is not helping himself and that
he needs to give them more information. He may have more
information. I don’t know for sure but I do know that I have
debriefed him to the ends of the earth and somehow now for the
first time, he finds information that helps the government.198

Another defense lawyer (who had been a Southern District
assistant many years ago) believes that embellished testimony is the
“dirty little secret” of our system. He points to a typical scenario of
debriefing in a conspiracy case that is bound to encourage
embellishment and is symptomatic of cooperation.

During the proffer session, it is clear that the agent believes that
five people, including Jones, were present at a meeting to discuss
distribution of drugs. The agent asks the cooperator:

Who was present at the meeting. The cooperator mentions some
names but does not include Jones.

Was anyone else there? The cooperator says no.

Are you telling me that Jones was not there?

At that juncture, the cooperator knows what the agent wants to
hear. Moreover, the agent might then say, look I know that Jones
was there. Let’s take a break. The agent then walks off with your
client. After the break, when the client is asked again, he knows that
Jones was there.

The lawyer said, “look I do not know if Jones was there or not. I
never heard him say that in all of my time with him. It could be true.
It helps my client if he knows that, so I certainly am not going to
complain about it. Nor is the information that I have sufficient to
toggle an ethical duty to correct the information or to resign.”199

It is generally confined to drug, organized crime cases, and some
mail fraud cases, primarily those that go to trial. It is not that
innocent people are being implicated. Defendants usually are
involved in one way or another, but I have no way to know whether
the client is putting people at meetings because he believes, rightly
or wrongly, that they were really there or he knows that’s what they
want to hear.200

Few former AUSAs reported similar instances wherein the
cooperator proffered facts during proffer sessions that they believed
to be embellished.201 In part, this lack of information about

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198. D-4, supra note 57; see D-2, supra note 57.
199. D-4, supra note 57.
200. Id.
201. The vast majority of other defense lawyers did not report instances where they
believed that embellishment had occurred during proffer sessions. Many of them did,
embellishment might be the result of the fact that, in many cases, the attorney is not present to reflect sufficiently on the course of the debriefing sessions.\textsuperscript{202} A former chief of a unit noted:

In drug cases, most lawyers leave the cooperators alone with us after the introductory session when we hear the cooperator's overview of the case. I never remember a case where the defense lawyer came to all cooperation sessions.\textsuperscript{203} I always liked it when the defense lawyer would leave because I get to bond with the cooperator and bonding is an essential element of the cooperation experience. The cooperator must trust and fear you at the same time and it's much more difficult with the lawyer there.

It's like the Stockholm Syndrome—You want them to be isolated so that they learn to trust you and know that you have the information about them so they will give up the information they have.\textsuperscript{204}

Eighth is the content of information communicated to the cooperator. Many former AUSAs found it disturbing that so many assistants give facts to cooperators in the course of eliciting information from them.

The notion of giving the cooperator facts is very dangerous and should not be done. You should be gathering the facts, not influencing the facts. . . . That rule is honored in the breach.\textsuperscript{205}

There are many assistants whose inclination is to show evidence to a witness. I second sat many trials and saw it repeatedly.\textsuperscript{206}

Assistants often have a theory of the case and a specific factual scenario they believe to be true when they confront a cooperator. To the extent that the cooperator's story varied from the

\textsuperscript{however, respond to the question of whether they had reason to believe that their clients were embellishing the truth about others with "How would I know?"

Generally, the government has more information than the defense, hence it is hard to know whether the client is confirming truthful information or filling out a story. The government has a frame of reference to ask questions that defense lawyers often do not. I-10, \textit{supra} note 57.

I usually learn something new during a cooperation session. I do not have personal knowledge of the facts so it would have to come from my sense of things.

D-6, \textit{supra} note 57.

202. This is less common in white collar cases where the cooperator can afford counsel and the lawyer remains with the client, earning fees and protecting the client against misunderstandings where the prosecutor might come to believe that the witness is lying or not completely truthful.

203. I-13, \textit{supra} note 57. These are primarily CJA lawyers in narcotics cases. Several former AUSAs noted that some defense lawyers told them that they did not want to hear the details of the client's story because it might conflict them out of other cases. Others note that "good" defense lawyers might attend a few sessions and then let the prosecutor and agents work with the cooperator in further debriefing and trial preparation.

204. I-13, \textit{supra} note 57.

205. I-19, \textit{supra} note 57.

206. I-13, \textit{supra} note 57.
prosecution's recitation of facts, the prosecutor will more often than not believe the cooperator to be lying. Consequently, to get to the truth, the AUSA will give the cooperator facts to get him to come clean. For instance, a cooperator might be explaining a drug deal differently from the information available to the agent and assistant. The assistant says "the agent said this and this happened. Are you sure that it happened the way you said it did?" The cooperator then pipes up with what seems almost like an excited utterance and tells you it happened the way the agent said. You can convince yourself very easily in that scenario that the cooperator is now being truthful because this was your mind set.\textsuperscript{207}

Ninth is the inherent difficulty of many types of cases such as the historical gang cases and those where language barriers make credibility evaluations questionable.

Crimes of violence people are the hardest to debrief. They often embellish the other guy's role and claim they are just the lookout. The danger of embellishment is the greatest here because there are few wires, and they are old homicide and narcotics deals. In old homicide cases, there are warring groups, no matches on the gun and you are pulling people out of state prison as your witnesses. The debriefing is different in kind not degree. These are cases that the DA's office could not make; that's why we have them. I have a concern that we put people [AUSAs] there who did not go through narcotics. They had one trial and now were debriefing six of these people.\textsuperscript{208}

Tenth, there is no ability to independently verify the course of events in debriefing sessions. Prosecutors rarely take notes in their initial sessions with cooperators,\textsuperscript{209} and the extent to which they subsequently take notes is variable. While there is no office policy of not taking notes,\textsuperscript{210} the 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 do not want a complete set of materials that you have to disclose.\textsuperscript{211}

The inconsistencies by cooperators in the debriefing sessions often are not disclosed. This stems from the mind set that all cooperators

\begin{itemize}
\item \textsuperscript{207} I-16, supra note 57.
\item \textsuperscript{208} I-15, supra note 57.
\item \textsuperscript{209} Exceptions are noted in the white collar context where the prosecutor knows the defense lawyer (a former assistant) and it is expected that the cooperator has spent countless hours being debriefed by his lawyer. In some instances, the defense lawyer conducts the proffer session to produce the necessary information.\textsuperscript{210} \\
\item \textsuperscript{210} I-6, supra note 57.
\item \textsuperscript{211} I-9, supra note 57. Some of the more senior former AUSAs believe that the advantage to the defense of such notes is highly overstated. The Jencks Act is bad for the skills of defense lawyers because for them to ritualistically go through minor inconsistencies between the statements at various proffers and the testimony does not get them very far. \textsuperscript{1-7, supra note 57; see I-11, supra note 57.} 
\end{itemize}
lie in their initial sessions with the government. "You know the truth and your job in those sessions is to get the cooperator there."\textsuperscript{212}

You generally don’t take notes until you have enough of the truth.\textsuperscript{213} Usually the discrepancies are not about the central issue but details so it’s not a setting where you think about Brady. The fact that you did not turn over the witness’s prior statement last week is not intentional. You just do not remember that they said it last week.\textsuperscript{214} The prosecutor is paper conscious about its Brady obligations but not oral conscious.\textsuperscript{215}

Furthermore,

there are cases where the assistant forbade the agent from taking notes. It’s prevalent in big cases.\textsuperscript{216} The extent of de facto Brady issues is significant because most oral statements do not get turned over.\textsuperscript{217} There’s a certain unconscious arrogation of power about it all.\textsuperscript{218} There really should be a protocol about it.\textsuperscript{219} I think there should be mandatory notes but the training I would do on it is one of fairness and practical wisdom: You will be told by others that you should not take notes, but in many cases you will be better off to take notes, because you need to know and remember what witnesses say.\textsuperscript{220}

\textbf{CONCLUSION}

This Article is a preliminary examination of the extent to which the role of cooperators and the cooperation process under the Sentencing Guidelines have created or exacerbated problems regarding the reliability of cooperator testimony. The interviews that form the basis of this Article expose the reasons that prosecutors may believe unreliable information provided by cooperators. These reasons are: lack of corroboration for cooperator information, particularly in small narcotics and historical gang cases; lack of thorough investigation; insufficient evidence; unwarranted trust of cooperators; the development of a rigid theory of a given case; cultural barriers

\textsuperscript{212} I-9, \textit{supra} note 57.
\textsuperscript{213} I-15, \textit{supra} note 57.
\textsuperscript{214} I-9, \textit{supra} note 57.
\textsuperscript{215} I-8, \textit{supra} note 57. Interviewees used the term "Brady" to refer to the government’s discovery obligations pursuant to \textit{Brady v. Maryland}, 373 U.S. 83, 87 (1963) (exculpatory information), \textit{Giglio v. United States}, 405 U.S. 150, 154 (1971) (information to impeach government witnesses), and the Jencks Act, 18 U.S.C. § 3500 (1994). See Fed. R. Crim. P. 26.2 (stating that witness’ pretrial statements adopted or approved by the witness are discoverable). In many instances, the statements obtained during the proffer sessions are not Brady material, but are discoverable pursuant to these other obligations.
\textsuperscript{216} I-18, \textit{supra} note 57.
\textsuperscript{217} I-7, \textit{supra} note 57.
\textsuperscript{218} I-24, \textit{supra} note 57.
\textsuperscript{219} I-18, \textit{supra} note 57.
\textsuperscript{220} I-7, \textit{supra} note 57.
between defendants and prosecutors; attitudes of individual assistants; and lack of experience of many assistants. Many of these problems are reflected in the conduct of proffer sessions where additional psychological factors and the dynamics of the process may lead prosecutors to falsely believe the testimony of cooperators.

The results of these interviews suggest that further study is needed to determine what changes should be implemented to decrease the risks of false information from cooperators in the post-Guidelines era. Those involved in the criminal justice system need to reflect on the many proposals that have been recommended to minimize the risks of unreliable cooperator testimony. For example, there have been repeated calls to examine the operation of discretionary power of the prosecutor. Some have called for a fundamental change in the balance between criminal defense and prosecution and a revision of the “government’s monolithic power in debates over criminal justice policy.”

Among the specific and wide-ranging proposals are the abolition of mandatory minimum sentences, changes in evidentiary rules and jury instructions regarding corroboration, redistribution of discretion within the criminal justice system, the adoption of an administrative adjudicative model of prosecution, reforms of the substantial assistance process, prosecutorial standards for substantial assistance, new ethical rules for prosecutors, a numerical limit on the number of cooperators that the prosecution may use and an effective independent disciplinary system.

There must be a belief that if you step over the line, there will be some enforcement. There needs to be a system of Internal Affairs.

Another suggestion, recognized to be “novel to American tradition” is the creation of a standing commission that includes lay

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224. See Saverda, supra note 3, at 787.

225. See Schulhofer, supra note 223, at 201; Weich, supra note 223, at 97.


227. See Lee, From Gatekeeper, supra note 3, at 251.

228. Id.

229. See Secunda, supra note 45, at 1275-76.

230. See Weinstein, Regulating the Market, supra note 8, at 626.

people to review the details of cooperation agreements and immunity agreements that prosecutors would be required to file.\footnote{232}{See Hughes, \textit{supra} note 3, at 20.}

More immediate suggestions that flow from these interviews include a revision of the training programs within prosecutors' offices. At the very least, prosecutors should be exposed to the experiences of former assistants who believed the false statements of cooperating witnesses. Training should include greater attention to the conduct of proffer sessions. Moreover, mandatory note taking during those sessions needs serious consideration.\footnote{233}{See Randolph N. Jonakait, \textit{The Ethical Prosecutor's Misconduct}, 23 Crim. L. Bull. 550, 550-67 (1987).} Others have suggested that the Chief of the Criminal Division, as is the case in the Southern District, should be a person with experience as a defense lawyer.\footnote{234}{As one interviewee stated: Career prosecutors are inevitably cynical about the human race. It's the nature of prosecutors to only see people as their crimes. The defendant is not really a person. He's a drug dealer. It's not because prosecutors are narrow in their human vision. It's because the defendant's actions come to you as a piece of behavior. Someone who has been a defense lawyer gets to see the person and is aware of the complexities and motivations, the ambiguities of acts and sees things from a different tactical perspective. \textit{I-7, supra} note 57.}

For many years, commentators believed that the risk that innocent people would be convicted was of serious concern. Until the advent of DNA technology, which thus far, has resulted in the exoneration of sixty-one innocent people, fifteen of whom were falsely convicted based upon testimony of informants, there was no procedure to effectively demonstrate the realization of that risk.\footnote{235}{See, e.g., National Institute of Justice, U.S. Dep't of Justice, \textit{Draft Report, Recommendations for Handling Applications for Postconviction DNA Testing}, at 7 (Feb. 1999) ("[A]t least 55 convictions in the United States have been vacated on the basis of DNA results."). See generally Edward Connors et al., National Institute of Justice, U.S Dep't of Justice, \textit{Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial} (1996) (evaluating 28 case studies of DNA evidence establishing post-trial innocence); Richard C. Deiter, \textit{Innocence and the Death Penalty: The Increasing Danger of Executing the Innocent}, Death Penalty Info. Ctr. Report (July 1997) (discussing cases of inmates released from death row).}

Short of the discovery of a DNA truth telling gene, the criminal justice system should carefully examine the implications of the comments of former Assistant United States Attorneys.