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Cover Page Footnote
J.D. Candidate, 2006, Fordham University School of Law; B.A., 1990, Princeton University. Thanks to Professor Bruce Green for his excellent guidance. Thanks to my wife, Danielia, and my parents, Jill and William Roberts, for all their love and support.
SHOULD PROSECUTORS BE REQUIRED TO RECORD THEIR PRETRIAL INTERVIEWS WITH ACCOMPLICES AND SNITCHES?

Sam Roberts*

INTRODUCTION

In United States v. Koubriti,1 a federal district court overturned the convictions of the first and only defendants to be tried and convicted for terrorist activities in the United States after the September 11, 2001 attacks.2 The court issued its decision in response to the filing of an "extraordinary confession of error"—the Government’s Memorandum of Law ("Memorandum"),4 written by a special attorney appointed by the Department of Justice to investigate the Detroit U.S. Attorney’s Office’s handling of the case.5 The Memorandum declared that the Detroit U.S. Attorney’s Office, in violation of Brady v. Maryland,6 had failed to disclose to the defense numerous exculpatory and impeaching documents, and it set forth in detail the Government’s “pattern of mistakes and oversights that deprived the defendants of discoverable evidence (including impeachment material) and created a record filled with misleading inferences that such material did not exist.”7

The only direct evidence linking the defendants to any terrorist activity was the testimony of Yousef Hmimssa, the defendants’ former roommate.8 Hmimssa’s decision to testify against his former roommates stemmed from his own troubles with the law—Hmimssa had been arrested and convicted in Chicago for large-scale credit card fraud, had escaped to Detroit where

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3. Id. at 330.
7. Memorandum, supra note 4, at 5.
8. Id. at 7.
he met the defendants, and was again arrested in Detroit. Hmimssa, who was incarcerated at the time he began cooperating, testified that the defendants were Islamic fundamentalists who, among other things, conducted surveillance of potential terrorist targets in Detroit, plotted various terrorist activities, and attempted to recruit Hmimssa to the defendants’ cause.

After their convictions, the defendants discovered that the U.S. Attorney’s Office possessed but had not disclosed a letter written by Hmimssa to another inmate, in which Hmimssa declared his own anti-American sentiments, boasted about having fooled the government, and insinuated that he (Hmimssa) had sold false identification to the September 11 hijackers. The Koubriti court stated that the letter “was intentionally not disclosed but unquestionably should have been.” A subsequent court-ordered government investigation into the case revealed that the Detroit U.S. Attorney’s Office had failed to disclose many documents that severely undermined every aspect of the prosecution’s case and that “the prosecution materially misled the Court, the jury and the defense as to the nature, character and complexion of critical evidence that provided important foundations for the prosecution’s case.”

In addition to revealing the prosecution’s repeated failures to disclose evidence, the Memorandum also addressed the problematic nature of the prosecution’s dealings with Hmimssa. Hmimssa met with Richard Convertino, the Assistant United States Attorney ("AUSA") in charge of the case, and FBI agents assisting Convertino on more than ten occasions to discuss the testimony that Hmimssa would give at trial, and the meetings cumulatively lasted between twenty and thirty hours. During these meetings, Convertino specifically instructed the attending FBI agent not to take notes. As the Government remarked in its Memorandum, Convertino’s deliberate decision not to record the interviews with Hmimssa prevented the defense from “determining the extent to which, if any, [Hmimssa’s] testimony changed over time.” The Memorandum found that Convertino made his decision not to record the interviews “in order to limit defense counsel’s ability to cross-examine Hmimssa.”

9. Id. at 42.
10. Id.
11. Id. at 43.
13. Id. at 681. The Detroit U.S. Attorney’s Office, for example, possessed photographs and written memoranda from government personnel from other agencies that severely undermined the government’s contention that the sketches discovered in the defendants’ apartment were drawings of the American air base in Turkey and the Jordanian military hospital. See Memorandum, supra note 4, at 20-23, 29-36. Similarly, the government possessed written opinions by other law enforcement agencies stating emphatically that the video discovered in the defendants’ apartment did not appear to be “casing material.” Id. at 39-41.
14. Memorandum, supra note 4, at 45 n.28.
15. Id. at 45.
16. Id. at 47.
17. Id. at 45.
Convertino did not record the interviews with Hmimssa. Convertino’s typed summaries of several of the interview sessions revealed “limited but not inconsequential discrepancies between these versions, supporting defense counsel’s claim that Hmimssa’s testimony evolved over time.”\(^\text{18}\)

The Government concluded that Convertino’s decision not to record the Hmimssa interviews made it difficult for the parties to determine whether Convertino’s typewritten summaries of the interviews actually contained “all potentially disclosable statements uttered by Hmimssa.”\(^\text{19}\) As the Memorandum implied, a recording of Convertino’s interviews with Hmimssa probably would have revealed that Hmimssa’s testimony had, indeed, evolved over time. But, as the Government also stated—in a footnote—neither Convertino nor the agents working under his direction were required by law to record their interviews with a government witness.\(^\text{20}\)

Should AUSA Convertino have been obliged to record his interviews with Hmimssa? If Convertino had recorded the interviews with Hmimssa, federal law would have required him to disclose those recordings to the defense.\(^\text{21}\) Like many prosecutors, Convertino chose not to record the interviews with his key witness, precisely to avoid having to turn over to the defense evidence that could be used to attack Hmimssa’s credibility.\(^\text{22}\)

Did the fact that the prosecution developed Hmimssa’s testimony over the course of unrecorded interview sessions, in secrecy, prevent the jury from accurately determining whether Hmimssa testified truthfully?

Prosecutors tend to rely heavily on the testimony of cooperating witnesses, especially in cases where the prosecution has little independent evidence to marshal against the defendant.\(^\text{23}\) Under federal law, the

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18. *Id.* For example, Hmimssa stated in an early interview that one of the defendants told Hmimssa that the defendant had seen “a cache of weapons from a black male in Detroit and [that the defendant] was going to purchase [the] weapons”; in a later interview, Hmimssa stated that the defendant told Hmimssa that he had seen “a cache of weapons from a black Muslim male in Detroit and [that the defendant] was going to purchase and ship [the] weapons to the GIA in Algeria.” *Id.* at 48 n.31. Thus, details about specifically terrorist-related activities are present in the second statement but absent from the first. See *id.*

19. *Id.* at 49. Convertino took the position that the typed summaries were attorney work product and thus not discoverable. The court nevertheless ordered production of the summaries for in camera review. *Id.* The Memorandum is unclear as to whether the court ruled on the discoverable status of the summaries. The government did not state any findings about whether Convertino’s summaries constituted discoverable material.

20. *Id.* at 47 n.30.


testimony of an accomplice witness is sufficient to support a conviction. A jury's verdict often will hinge on its determination of the cooperating witness's credibility. Witnesses who, like Hnimssa, testify on behalf of the government against criminal defendants in exchange for some form of favorable treatment have enormous incentives to testify falsely in order to obtain leniency. Rules of disclosure, including the mandatory disclosure of official leniency agreements, and the trial safeguard of cross-examination exist to ensure that juries correctly evaluate the credibility of these witnesses.

Nevertheless, commentators have recognized that despite rules of disclosure and trial safeguards, there is an inherently high risk that cooperating witnesses will testify falsely and will be believed by juries, thus resulting in convictions of the innocent. Prepped at length and in secret, skilled at lying, armed with important facts that may have been inadvertently (or deliberately) fed to them by the prosecution, cooperators often appear highly confident and credible on the witness stand. Because the cooperator's testimony is developed in secret and without documentation, his polished, incriminating account is largely unassailable on cross-examination. Lacking any knowledge of what transpired between the prosecutor and the cooperating witness during pretrial proffer

24. See United States v. Latouf, 132 F.3d 320, 332 (6th Cir. 1997) (observing that "[t]he testimony of an accomplice, even if uncorroborated, will suffice to support a conviction under federal law") (internal quotation omitted).
25. See United States v. Bernal-Obeso, 989 F.2d 331, 335-36 (9th Cir. 1993) ("The usefulness of an informant as a witness depends in large measure on the degree to which he both is and can be presented to a fact finder as a reliable person.").
27. See infra Part I.C.
28. See infra notes 177-80 and accompanying text.
29. See infra notes 210-13 and accompanying text.
30. See infra notes 222-24 and accompanying text.
31. See The Innocence Project at Cardozo Sch. of Law, Causes and Remedies of Wrongful Convictions, http://www.innocenceproject.org/causes/index.php (last visited June 5, 2005) (listing the testimony of informants and snitches as a major factor in sixteen of the first seventy wrongful convictions to be overturned by the results of post-conviction DNA testing).
32. See infra Part I.D.
33. See R. Michael Cassidy, "Soft Words of Hope": Giglio, Accomplice Witnesses, and the Problem of Implied Inducements, 98 Nw. U. L. Rev. 1129, 1140 (2004) ("Not only do accomplice witnesses have a motive to fabricate, they have an ability to fabricate and to fabricate convincingly.").
34. See Michael S. Ross, Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals, 23 Cardozo L. Rev. 875, 884 (2002) ("[W]hen a prosecutor tells a defendant or defense counsel what testimony is expected of the defendant . . . in order to qualify for cooperator/leniency/immunity status, the defendant is powerfully motivated to parrot what the prosecution wants and expects to hear.").
35. See Witness Coaching, supra note 22, at 848 (stating that the dynamics of the preparation process allow cooperating witnesses to be "able to present [their] testimony to the jury in a truthful and convincing manner").
36. See infra Part I.D.
37. See id.
sessions and interviews, defense counsel has little basis from which to cross-examine the cooperator about the process by which the government developed the cooperator's testimony.\footnote{38} Thus, a jury may not learn whether the cooperating witness made inconsistent statements over the course of the interview process,\footnote{39} whether the prosecution inadvertently (or deliberately) fed information to the witness that made the witness's testimony appear more credible and confident than it otherwise would have appeared,\footnote{40} or whether the prosecution made any unrecorded threat or inducement to the cooperator that may have motivated the witness to testify.\footnote{41} For many reasons, prosecutors, during their pretrial preparation of cooperating witnesses, either fail to identify these instances when they occur\footnote{42} or decide that the evidence that comes to light during the pretrial interviews is not sufficiently exculpatory or impeaching to warrant disclosure.\footnote{43}

This Note examines the process by which prosecutors develop the testimony of cooperating witnesses and the possible dangers, identified by legal observers, that the process presents to the truth-seeking function of criminal trials. This Note considers whether, in light of these identified dangers, prosecutors should be required to record their pretrial interviews with cooperating witnesses and proposes that such a "recording rule" should be adopted.

Part I of this Note explores how prosecutors typically develop cooperating witness testimony in preparation for trial. Part I also examines prosecutors' legal obligations regarding the recording of pretrial meetings with cooperating witnesses and reviews the current regime of due process, statutory, and professional rules that define prosecutorial disclosure obligations. In addition, this part discusses the common prosecutorial practice of not recording interviews with cooperators. Finally, this part examines the reasons given by courts, commentators, and practitioners as to why cooperators are inherently unreliable witnesses.

Part II analyzes commentators' findings about how the process by which prosecutors develop the testimony of cooperating witnesses potentially affects factfinders' ability to accurately assess the credibility of cooperators. Part II also discusses these legal observers' findings about the effectiveness of disclosure rules and cross-examination in ensuring that juries have the opportunity to accurately evaluate the credibility of cooperating witness testimony. In addition, this part identifies various proposals for reforming the way in which the government uses cooperating witness testimony.

\footnote{38}{See id.}
\footnote{39}{See infra Part II.A.1.}
\footnote{40}{See infra Part II.A.2.}
\footnote{41}{See infra Part II.A.3.}
\footnote{42}{See infra Part I.E.3.}
\footnote{43}{See infra Part II.B; see generally Daniel J. Capra, Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review, 53 Fordham L. Rev. 391 (1984) (discussing prosecutors' pretrial application of the materiality standard to potential Brady material).}
Lastly, Part II identifies proposals that have been advanced for the adoption of a "recording rule," and presents several of the possible arguments that could be made in favor of and in opposition to the adoption of such a rule.

Part III proposes the adoption of a "recording rule," and suggests that the rule may best be promulgated as a rule of professional conduct.

I. PROSECUTORIAL USE OF COOPERATING WITNESS TESTIMONY

This part examines the process by which prosecutors select and develop the testimony of cooperating witnesses. Part I.A discusses the agreements that cooperating witnesses commonly enter into with prosecutors. Part I.B discusses whether prosecutors are legally required to record their interviews with cooperators. Part I.C reviews the statutory, due process, and ethical rules that govern prosecutorial disclosure obligations. Part I.D then examines the prosecutorial practice of not recording interviews with cooperating witnesses. Finally, Part I.E reviews the findings of courts, commentators, and practitioners regarding the unreliability of cooperating witness testimony.

A. Agreements Between Prosecutors and Cooperators

A cooperating witness testifies for the government, against a criminal defendant, in the hope of obtaining some form of leniency from the prosecution. Cooperating witnesses comprise accomplice witnesses and jailhouse informants. An accomplice witness is a co-participant in a crime who agrees to testify against his alleged co-perpetrators (or coconspirators). A jailhouse informant is "an inmate who is either asked by the government to report any incriminating evidence shared with the inmate by another inmate or who comes forward on his or her own with such information."

Whether an accomplice or a jailhouse informant, the cooperating witness provides incriminating testimony in return for some form of leniency from the prosecution, including the dismissal of pending charges, an agreed-upon

44. See Cassidy, supra note 33, at 1134-35 (discussing how prosecutors "purchas[e]" the testimony of cooperating witnesses with leniency).
45. See id. at 1134 (defining "cooperating witness" as an accomplice witness or a jailhouse informant).
46. See id.; see also Graham Hughes, Agreements for Cooperation in Criminal Cases, 45 Vand. L. Rev. 1, 2 (1992) ("In cooperation agreements the [co-]defendant trades information and testimony, with the promise of enabling the State to make a case against other defendants who, for one reason or another, are regarded as most deserving of the severest form of prosecution.").
47. Jack Call, Judicial Control of Jailhouse Snitches, 22 Just. Sys. J. 73, 73 (2001); see also Robert M. Bloom, Ratting: The Use and Abuse of Informants in the American Justice System 63-64 (2002). Bloom identifies two types of jailhouse informants: (1) the informant in jail, awaiting trial, who will inform on fellow prisoners in order to gain favorable plea agreements from the prosecution; and (2) the informant in prison, who has already been convicted and who will inform on fellow prisoners "with regard to unsolved crimes or possible security measures internal to a prison" in exchange for possible parole recommendations, early release, prison-related benefits or even monetary compensation. Id.
reduced sentence, or a recommendation to the court for sentencing leniency.\textsuperscript{48}

The interaction between a cooperating witness and the prosecution typically consists of two stages: initially, proffer sessions and, subsequently, the series of post-proffer interviews in which the prosecutor prepares the witness’s testimony in anticipation of trial.\textsuperscript{49} The proffer sessions consist usually of several meetings between the potential cooperating witness, his attorney, government agents, and the prosecutor.\textsuperscript{50} During these meetings, the prosecutor and agents will attempt to determine the extent to which the witness is able to provide incriminating evidence against the defendant, typically granting the witness limited immunity in exchange for the witness’s “proffer” of information.\textsuperscript{51} Should the prosecutor decide that he wishes to “sign up” the cooperating witness, the prosecutor will prepare a cooperation agreement, which normally provides that, if the witness cooperates fully with the government and testifies truthfully, then—after the witness has testified—the government will extend leniency, in the form of a sentencing recommendation or charging concession, to the witness.\textsuperscript{52} After the witness has agreed to cooperate, the prosecution typically conducts multiple interviews with the cooperator, preparing and polishing the witness’s testimony in anticipation of trial.\textsuperscript{53} Normally, the government will fulfill its part of the bargain only after the witness has testified truthfully and provided the government with “substantial assistance.”\textsuperscript{54} Whether the cooperator has testified truthfully and has provided substantial assistance will be determined by the prosecutor, who will typically define truthful testimony as testimony consistent with the cooperator’s proffer and as resulting in a conviction.\textsuperscript{55}

\textsuperscript{48} See Michael A. Simons, \textit{Retribution for Rats: Cooperation, Punishment, and Atonement}, 56 Vand. L. Rev. 1, 2 & n.1 (2003). This Note does not discuss prosecutors’ interactions with confidential informants, who often receive financial compensation in return for their information. Because confidential informants do not usually testify at trials, the issue of the jury’s being able to fairly evaluate their credibility does not arise. For a detailed discussion of the use of confidential informants by the government, see generally Bloom, \textit{infra} note 47.

\textsuperscript{49} See Simons, \textit{supra} note 48, at 15-18 (providing an overview of how federal proffer sessions function).

\textsuperscript{50} See id.

\textsuperscript{51} See Douglass, \textit{supra} note 22, at 1837.

\textsuperscript{52} See Cassidy, \textit{supra} note 33, at 1146. Cassidy writes the following: \textit{[T]he typical federal cooperation agreement provides that if the defendant cooperates fully with the government in its investigation into criminal activity (“the investigation”) and provides complete and truthful testimony whenever called upon to do so (“the consideration”) then the government will provide the accomplice with certain sentencing or charging concessions (“the benefit”).}

\textit{Id.}

\textsuperscript{53} See Simons, \textit{supra} note 48, at 18 (“For many cooperators, however, signing the agreement is only the beginning of a lengthy process that starts with numerous debriefing sessions, extends to intensive witness preparation, and culminates in public testimony.”).

\textsuperscript{54} See id. at 17-18 (discussing the typical conditions under which a prosecutor will “sign up” a cooperator).

\textsuperscript{55} See Harris, \textit{supra} note 23, at 17.
Prosecutors have enormous discretionary powers in granting or withholding recommendations for leniency. In recent years, the promulgation of harsh mandatory minimum sentences and the Federal Sentencing Guidelines has further increased the incentive of cooperating witnesses to provide the government with testimony that incriminates the defendant.

B. Prosecutorial Duty to Record Witness Interviews

As was noted in the Memorandum in Koubriti, prosecutors and government agents have no legal duty to record the statements of government witnesses. Federal and state courts have held that due process rules and disclosure statutes do not require prosecutors and their agents to record interviews with government witnesses. Although courts have allowed for the possibility that the government’s failure to record interviews with government witnesses may violate due process if the defendant can show that government agents acted in bad faith by deliberately failing to record the witnesses’ statements, “bad faith” exceptions have not been defined. Absent the defendant’s showing of

57. See id. ("The combination of the prosecutor’s vast charging power coupled with mandatory sentencing laws enables prosecutors more than ever to force persons to cooperate with the prosecution, and to punish their failure to cooperate."); see also Ellen Yaroshefsky, Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment, 68 Fordham L. Rev. 917, 918-19 (1999) ("While cooperation with federal authorities is not new, the Sentencing Guidelines have created a system with cooperation as its locus.").
58. See supra note 20 and accompanying text.
59. See, e.g., United States v. Brimage, 115 F.3d 73, 77-78 (1st Cir. 1997) (holding that defendants’ due process rights were not violated by federal agents’ failure to record an informant’s conversations with defendants in which the informant solicited defendants’ participation in a robbery, where there was no evidence indicating that the agents’ decision not to record was made in bad faith); United States v. Houlihan, 92 F.3d 1271, 1288 (1st Cir. 1996) ("The Jencks Act does not impose an obligation on government agents to record witness interviews or to take notes during such interviews."); United States v. Marashi, 913 F.2d 724, 734 (9th Cir. 1990) (holding that the government had no constitutional obligation to compile Brady material by making a record of all of its interviews with the chief prosecution witness); People v. Jackson, 474 N.E.2d 466, 474 (Ill. App. Ct. 1985) (observing that there is no general requirement that all oral statements in possession or control of the state be reduced to writing, absent a showing of bad faith on the part of the state); State v. Crawford, 394 N.W.2d 189, 191 (Minn. Ct. App. 1986) (holding that the state’s rules of criminal procedure do not require that the state’s agents either fully transcribe oral statements made by witnesses or take written statements from witnesses); State v. Hoard, 715 S.W.2d 321, 326 (Mo. Ct. App. 1986) ("The state is not required to summarize or reduce statements to writing.").
60. See, e.g., Harper v. Rowland, No. 91-56131, 1993 WL 262628, at *1 (9th Cir. Apr. 6, 1993) (noting that, while the government had no duty to record potentially exculpatory interviews with the defendant’s wife and daughter, a finding of a “bad faith failure to collect potentially exculpatory evidence would violate the due process clause”) (internal quotations omitted).
61. See Brimage, 115 F.3d at 77 (noting that a court may probe the government’s decision not to record witness interviews for “bad faith” and allowing that “[p]erhaps there may be a case where selective recording presents a reviewing court with constitutional concerns").
“bad faith” on the part of the interviewer, an interview between a prosecutor and a government witness is “presumed to have been conducted with regularity.”

C. Prosecutors’ Differing Disclosure Obligations

A prosecutor’s obligation to disclose the statements that a government witness made during pretrial interviews differs depending upon whether the prosecutor recorded or did not record the interviews. When prosecutors record interviews with a witness, through transcription, audiotape, or videotape, federal and state laws require that the recordings be disclosed to the defense. When prosecutors do not record the witness interviews, prosecutors are required to disclose only those statements that are materially exculpatory of the defendant or impeaching of the government’s witnesses.

1. Prosecutorial Obligations when Interviews Are Recorded

When prosecutors record interviews with witnesses, federal and state laws require that the recordings be disclosed to the defense. In the federal sphere, the Jencks Act requires that the prosecution disclose to the defense at trial all pretrial statements of government witnesses, after the witnesses have testified on direct examination, where “statements” are defined as:

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;
(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Thus, the Jencks Act does not require the government to disclose a witness’s oral statements. Additionally, a prosecutor’s or government agent’s written notes summarizing the statements of a government witness are not discoverable under the Jencks Act, even if the notes contain

62. Houlihan, 92 F.3d at 1289 (internal quotation omitted).
63. See infra Part I.C.1.
64. See infra Part I.C.2.
66. Although § 3500 and Federal Rule of Criminal Procedure 26.2 require that the government disclose a prosecution witness’s statements to the defense only after that witness has testified on direct examination, “practice demonstrates that most prosecutors presently exceed the restrictiveness of the statute and rule” and often disclose Jencks Act material prior to trial. Ellen S. Podgor, Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference, 15 Ga. St. U. L. Rev. 651, 656 (1999).
67. 18 U.S.C. § 3500(e).
verbatim words and phrases used by the witness during the interview. Thus, prosecutors and agents who avoid the verbatim recording of witness statements may nevertheless document those statements in summarized form, without triggering the Jencks Act.

State discovery statutes may, like the Jencks Act, require the government to disclose only substantially verbatim recordings of witness statements and not require the disclosure of summaries of witnesses' statements, or state laws may require the government to provide the defense with any written summaries of witnesses' statements, in addition to substantially verbatim recordings of witness statements.

2. Prosecutorial Obligations when Interviews Are Not Recorded

When prosecutors do not record their interviews with government witnesses (or, as noted above, when prosecutors merely take notes summarizing the interviews), the prosecutorial disclosure duty is governed by the due process jurisprudence of the U.S. Supreme Court and by rules of professional conduct. In contrast to a recorded interview, which leaves the prosecutor with no discretion in deciding which statements of the witness he should disclose, an unrecorded interview requires that the prosecutor determine which of the witness's statements, if any, are sufficiently exculpatory or impeaching to warrant disclosure under due process and ethical disclosure rules.

68. See, e.g., United States v. Gross, 961 F.2d 1097, 1105 (3d Cir. 1992) (holding that prosecutor's notes from an interview with government a witness did not qualify as Jencks Act material, where the notes "reflect[ed] the prosecutor's reactions to the witness," even though the notes "occasionally reflect[ed] precise phrases used by the witness").


70. See, e.g., N.Y. Crim. Proc. § 240.45(1)(a) (McKinney 2000) (requiring that the People disclose to the defense "[a]ny written or recorded statement ... made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony").

71. See, e.g., Minn. R. Crim. P. 9.01(1)(a) ("The prosecuting attorney shall permit defense counsel to inspect and reproduce [the government] witness's relevant written or recorded statements and any written summaries within the prosecuting attorney's knowledge of the substance of relevant oral statements made by such witnesses to prosecution agents."); see also David Aaron, Note, Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information, 67 Fordham L. Rev. 3005, 3020 (1999) (noting that state rules may impose broader disclosure requirements upon prosecutors than those imposed by the Jencks Act).

72. See supra notes 68-69 and accompanying text.


74. See supra notes 65-71 and accompanying text.

75. See Capra, supra note 43, at 394-95.
a. Due Process Disclosure Rules

The Supreme Court held, in *Brady v. Maryland*,\(^{76}\) that the Due Process Clause of the Fourteenth Amendment requires a prosecutor to disclose to the defense any evidence that is “favorable” to the defendant and that is “material either to guilt or to punishment.”\(^{77}\) Suppression of such evidence violates due process, regardless of the good or bad faith of the prosecution.\(^{78}\) “Favorable” evidence includes evidence that impeaches the credibility of a government witness.\(^{79}\) A prosecutor who fails to correct the testimony of a government witness that he knows to be false also violates due process, even if the testimony relates only to the witness’s credibility.\(^{80}\) A prosecutor must also disclose to the defense any material evidence that is impeaching of a government witness, including leniency agreements made between the government and cooperating witnesses.\(^{81}\) The disclosure of such agreements is intended to “enable[] the jury to assess fully and accurately the credibility of the witness, and, derivatively, the guilt or innocence of the accused.”\(^{82}\)

In addition, the prosecution has an affirmative duty to learn of and disclose exculpatory information possessed by government personnel who assist the prosecutor, including police officers and other investigators.\(^{83}\) Due process requires that the prosecution disclose material evidence even when the defense has not specifically requested disclosure of that evidence.\(^{84}\) Evidence is considered to be material to the accused if there is a “reasonable probability” that, had the evidence been disclosed to the defense, the result of the defendant’s trial would have been different.\(^{85}\) The constitutional rule announced in *Brady* does not distinguish between oral and written statements.\(^{86}\) Thus, regardless of whether a prosecutor or agent chooses to record the pretrial statements of a cooperating witness, due process rules require the prosecutor to disclose materially favorable evidence to the defense.\(^{87}\)

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76. 373 U.S. 83 (1963).
77. Id. at 87.
78. Id.
82. Cassidy, *supra* note 33, at 1131.
86. See United States v. Joseph 533 F.2d 282, 286 (5th Cir. 1976) (noting that “[i]t would be incongruous to hold that an oral agreement falls outside the scope of *Brady*, a written agreement within”); *see also* Savage v. State, 600 So. 2d 405, 408 (Ala. Crim. App. 1992) (holding that the prosecution violated *Brady*, where police had knowledge of oral statements of two witnesses who stated that the defendant had acted in self-defense and police failed to disclose the statements to the defense, police knowledge of the statements was imputed to the prosecutor).
87. Joseph, 533 F.2d at 286.
b. Ethical Disclosure Rules

Prosecutorial disclosure duties are also governed by rules of professional conduct. Rule 3.8(d) of the Model Rules of Professional Conduct—entitled “Special Responsibilities of a Prosecutor”—states that a prosecutor must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."88 Every state has ethical rules governing prosecutorial disclosure, similar to Rule 3.8(d) of the Model Rules.89 The prosecutorial disclosure duty set forth in Model Rule 3.8(d) has a slightly broader reach than the due process disclosure requirements established by Brady and its progeny, in that the Model Rules do not include an explicit materiality requirement.90 The Model Rules' disclosure duty, however, also can be construed as narrower than the constitutional requirements, in that the Model Rules do not hold a prosecutor accountable for a failure to disclose exculpatory evidence that is in the possession of law enforcement agents who are assisting the prosecutor.91 Commentators have remarked, however, that in practice, Model Rule 3.8(d) operates almost identically to the disclosure doctrine set forth in the Brady line of cases.92

D. Prosecutorial Practice of Not Recording Witness Interviews

Legal commentators have recognized that prosecutors and their agents—as a matter of policy—frequently do not record their interviews with

88. Model Rules of Prof'l Conduct R. 3.8(d) (2003); see also Model Code of Prof'l Responsibility DR 7-103(B) (1983) ("A public prosecutor . . . shall make timely disclosure [to the defense] . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused . . . ."); Standards Relating to the Admin. of Criminal Justice § 3-3.11(a) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused . . . .").


90. See, e.g., Bruce A. Green, Prosecutorial Ethics as Usual, 2003 U. Ill. L. Rev. 1573, 1592-93 (2003) [hereinafter Green, Prosecutorial Ethics] (observing that "[t]o a small degree, the [Model Rules'] provision imposes an additional disclosure obligation, in that it requires disclosure of any exculpatory evidence whereas the constitutional case law requires exculpatory evidence to be produced only when it is 'material' to the defense") (citation omitted); Kevin C. McMunigal, Are Prosecutorial Ethics Standards Different?, 68 Fordham L. Rev. 1453, 1465 (2000) (noting that Model Rule 3.8(d) is broader than the due process disclosure requirement because the Model Rule "has no materiality restriction and is not limited to admissible evidence").


92. See Green, Prosecutorial Ethics, supra note 90, at 1592-93 (noting that the disclosure duty in the Model Rules "is already imposed in large part by the Due Process Clause" and that "as far as one can tell, courts do not invoke the disciplinary rule as a source of additional disclosure obligations, and courts and disciplinary authorities do not sanction prosecutors for failing to disclose evidence as required by the rule but not by other law").
cooperating witnesses.⁹³ Although police and investigators may take notes of meetings with cooperating witnesses in the investigative stages of a case, prosecutors often discourage the creation of any official report that documents the witnesses' statements.⁹⁴ As a result, because prosecutors are not automatically required to disclose witnesses' oral statements,⁹⁵ "it is common for prosecutors to spend dozens of pretrial hours with cooperating witnesses without creating one word of discoverable material."⁹⁶

A Drug Enforcement Agency ("DEA") agent's frank discussion of his policy not to record interviews and the motivation behind that policy were recounted by the court in United States v. Bernard:⁹⁷

[In trying to avoid [disclosing] contradicting facts from the interview of any defendant or any informant, it is my policy not to write down anything until I am sure the defendant or informant knows exactly what he is saying. . . . That is to prevent any problems of getting into court and having contradictions from for instance an interview in March with an interview in July, with an interview in August, with an interview in September, and having the defense counsel come back and say "Well, did you say this differently at this time?" That is the purpose of my not taking notes.]⁹⁸

A series of interviews that Professor Ellen Yaroshefsky conducted with former and current federal prosecutors reveal that many prosecutors act similarly to the agent quoted in Bernard.⁹⁹ As one former AUSA remarked, "While there is no office policy of not taking notes, 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."¹⁰⁰

E. Recognized Dangers of Cooperating Witness Testimony

Courts have acknowledged that cooperating witnesses are "inherently untrustworthy."¹⁰¹ The Supreme Court "has long recognized the serious questions of credibility [cooperators] pose."¹⁰² Commentators have recognized widely that the government's use of such testimony is "rife with

⁹³. See, e.g., Douglass, supra note 22, at 1835-36 (remarking that "few prosecutors even consider videotaping or tape recording their pretrial witness interviews"); Witness Coaching, supra note 22, at 852-53 ("Some agents as a matter of policy do not take notes specifically to avoid creating contradicting evidence. Some prosecutors do not encourage note-taking, and occasionally even forbid government agents from taking notes.").

⁹⁴. See Douglass, supra note 22, at 1836.
⁹⁵. See supra notes 72-75 and accompanying text.
⁹⁶. Douglass, supra note 22, at 1836.
⁹⁷. 625 F.2d 854 (9th Cir. 1980).
⁹⁸. Id. at 859.
⁹⁹. See generally Yaroshefsky, supra note 57, passim (recounting interviews with AUSAs about their interactions with cooperating witnesses).
¹⁰⁰. Id. at 961 (citations and quotations omitted); see also Witness Coaching, supra note 22, at 853 ("Prosecutors and their agents typically do not prepare extensive notes, and when they do take notes, they try to do it in a safe way that avoids disclosure.").
¹⁰¹. Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997).
the potential for abuse." The cooperating witness’s tender of incriminating information in exchange for some form of leniency has been called “the disease that threatens the integrity of all accomplice information.” As one writer has stated, “It is accepted by almost everyone who participates as a professional in the workings of the criminal justice system—prosecutors, defense attorneys, law enforcement agents, and judges—that the use of cooperating witnesses in obtaining convictions is laden with risks. The government’s use of cooperating witness testimony, “where the prosecution controls the selection, preparation and compensation of cooperating witnesses, poses a significant risk of wrongful conviction, especially when combined with other risk factors.” Commentators point to studies of wrongful conviction that show that false testimony by cooperating witnesses is a leading cause of wrongful convictions. Legal observers have identified a number of factors that lead to the potential that cooperating witnesses may testify falsely.

1. Cooperators’ Incentive to Fabricate Testimony

The danger that a cooperating witness will testify falsely derives primarily from the fact that no witness in a criminal trial, apart from the defendant, has a greater incentive to lie than does the cooperating witness. As one judge has remarked, “Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law.”

Legal observers have noted that, even before negotiations begin with the government, an accomplice witness has a great incentive to fabricate statements in order to shift blame away from himself and his allies and

103. Cassidy, supra note 33, at 1130.
104. Douglass, supra note 22, at 1829.
106. Harris, supra note 23, at 58.
107. See, e.g., The Innocence Project at Cardozo Sch. of Law, Causes and Remedies of Wrongful Convictions, http://www.innocenceproject.org/causes/index.php (last visited June 5, 2005) (listing the testimony of informants and snitches as a major factor in sixteen of the first seventy wrongful convictions to be overturned by the results of post-conviction DNA testing).
108. See, e.g., Harris, supra note 23, at 57 (citing a 1987 study by Hugo Adam Bedau and Michael L. Radelet of 350 cases of erroneous convictions in potentially capital cases which found the leading cause, contributing to error in a third of those cases (117 cases total), to be “perjury by prosecution witness,” and that at least thirty-five of the 117 cases studied involved the testimony of a cooperating witness who was receiving some form of leniency from the prosecution (internal quotations omitted)); C. Ronald Huff, Wrongful Convictions: Causes and Public Policy Issues, Crim. Just., Spring 2003, at 15, 18 (noting that “five of the first 13 Illinois death row inmates found to have been wrongfully convicted were prosecuted using jailhouse informants” and that “[m]any DNA exoneration cases have revealed that the initial convictions involved the use of ‘jailhouse snitches’

109. See Cohen, supra note 105, at 827; Witness Coaching, supra note 22, at 847.
implicate someone else. Once the would-be cooperator understands that he may receive leniency in exchange for testimony, his incentive to lie dramatically increases. Because the cooperator knows that the government will not extend leniency unless the cooperator provides testimony that helps the government make its case, the cooperator is driven to tell the prosecutor whatever the witness believes the prosecutor wants to hear. The use of cooperating witness testimony creates the potential "danger that the details provided by the witness will be tailored to conform to the prosecutor's expectations." In the hope of obtaining a favorable plea agreement, a reduction in sentence, or possibly the dismissal of charges as a possible result of cooperation, a cooperating witness often will promise "to testify to whatever facts will help the prosecution's case, truthful or not."

2. Cooperators' Ability to Fabricate Testimony

As Michael Cassidy has noted, not only do cooperating witnesses have a strong motive to provide false testimony in order to obtain leniency, such witnesses often have the ability to lie convincingly to prosecutors. Lies are usually very subtle and therefore hard to detect because the lies "often relate to the minutiae of a case, and concern facts that are not readily discoverable or easily disproved." A witness who assisted in a murder might admit to being present at the murder, for example, but lie about who fired the gun. Prosecutors and their agents may have difficulty in detecting fabrications because cooperating witnesses often "are immersed in the details of the crime and know which aspects of the enterprise are verifiable and which are not." Thus, prosecutors and their agents may believe a cooperating witness simply because the prosecutor or agent is able

111. See Cohen, supra note 105, at 822 (stating that "prosecutors assume... that defendants tend to minimize their role in and responsibility for criminal conduct, and that they tend to exculpate friends and allies and implicate rivals and adversaries"); see also Hughes, supra note 46, at 35 ("Accomplices, if they give information or testify, may have a natural tendency to lie in order to minimize their part in the crime.").
112. See Hughes, supra note 46, at 27.
113. See Harris, supra note 23, at 50 ("Every defendant or target of an investigation knows that her only possibility of making a deal with the government for lenient treatment is a proffer of testimony helpful in convicting another defendant or target.").
114. See Cassidy, supra note 33, at 1140 ("Accomplice witnesses are very eager to please the government, precisely because they perceive that their future liberty and safety depend on it."); see also Ross, supra note 34, at 879 (stating that "one fact is undeniable: the incentive [for cooperating witnesses] to lie is so powerful, that some witnesses will lie").
116. Ross, supra note 34, at 879 (internal quotations omitted).
117. Cassidy, supra note 33, at 1140.
118. Cohen, supra note 105, at 825.
119. See id. ("[T]he lie might concern not whether someone participated in a murder, but who was the shooter in the murder, or who gave the order to commit the murder, or who provided the guns.").
120. Cassidy, supra note 33, at 1140.
to corroborate many of the details about the crimes that the witness provides during pretrial interview sessions.121

Similarly, even when cooperators are not familiar with independent evidence of a crime (as is often the case with jailhouse informants), such witnesses may be skilled at learning details about the case or about what information the government wants to hear. Cooperators often enter into negotiations with prosecutors already fully equipped with false information that they have obtained from other sources—such as newspaper accounts, other inmates, friends, family members, or even their own attorneys.122 Leslie Vernon White, for example, an infamous California informant, while in jail routinely telephoned courthouse sources, identified himself as a prosecutor, and obtained information not known to the press or public which he would then present to the government in proffer sessions.123 In Spicer v. Roxbury Correctional Institute,124 Brown—an inmate who wanted a plea deal—told his own lawyer that he had heard the defendant speak about planning a robbery but was not an eyewitness to the crime.125 Brown’s lawyer approached the District Attorney (“D.A.”) with this information and was told by the D.A. that Brown’s statements were not sufficiently incriminating of the defendant to induce the D.A. to offer Brown a deal.126 Defense counsel relayed the D.A. comments to Brown.127 Brown later met with the D.A. without his lawyer and told the D.A. that he

121. Id. at 1164-65; see also C. Blaine Elliott, Life’s Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches, 16 Cap. Def. J. 1, 16 (2003) (“Many prosecutors believe snitches because the information they provided was consistent with other information already gathered.”).

122. See Douglass, supra note 22, at 1838. Douglass writes the following:

In the days awaiting his trial testimony, the cooperator is likely to be exposed to case related details from a variety of sources other than prosecutors and police. He may learn helpful details through news accounts, family visits, conferences with his own counsel, and, of course, the always active jailhouse “grapevine.” All of these sources can assist the cooperator to tailor details of his trial testimony to coincide with other evidence in the case.

Id.

123. See Robert M. Bloom, Jailhouse Informants, Crim. Just., Spring 2003, at 20, 22 (describing White’s success at obtaining information that allowed him to appear credible to prosecutors). Jack Call describes White’s simple, highly successful methods:

Given only the last name of a murder suspect with whom White had no known prior association and who was being detained in the jail awaiting trial, White used a jail phone that was provided to inmates to call lawyers, family members, and friends to obtain a wealth of data about the suspect. The data White obtained was sufficient to convince law enforcement authorities that White could have received it only from conversations with the suspect and not from newspaper accounts of the suspect’s crime. White was also able to arrange for the suspect and him to be transported to a courthouse on the same day, so he could prove that he had been in physical contact with the suspect. White indicated that using these techniques, he had obtained information and given false testimony in twelve cases.

Call, supra note 47, at 74.

124. 194 F.3d 547 (4th Cir. 1999).

125. Id. at 551.

126. Id.

127. Id.
saw the defendant running from the crime scene. Brown subsequently got his deal. Thus, even before beginning negotiations with the government, cooperators can learn information that makes them appear credible and/or valuable to the prosecution, even though they have no personal knowledge of the information.

3. Cooperators’ Ability to Learn Information Through Pretrial Interviews

Although “some prosecutors coach witnesses with the deliberate objective of promoting false or misleading testimony,” even the best-intentioned prosecutor or agent may unwittingly alert the witness to what the prosecution wants the witness to say. For example, a prosecutor may inadvertently ask a leading question, express satisfaction or disappointment in the witness’s response to a question, or reveal a fact about the case to the witness—each instance of which may allow the cooperating witness to fill gaps in his statements, alter testimony that does not conform to other evidence in the case, or otherwise conform his statements to what the cooperator perceives to be the prosecution’s theory of the case. Even the mere act of displaying to the cooperator an exhibit that he will have to identify at trial can cause the witness to provide “more self-assured and detailed” trial testimony. The act of “feeding” information to the cooperator may be entirely inadvertent. As one writer has remarked, “Many prosecutors appear to be unaware of the extent to which they express verbally or non-verbally a genuine interest in certain facts, or communicate disappointment when the witness does not know particular facts, and thereby tip off the witness to what they want him to say.”

By feeding the witness details about the case, however inadvertently, prosecutors and agents may become the source of the information that allows the cooperator to appear credible in interview sessions and, eventually, at trial. Professor John Douglass has stated that, even if prosecutors and agents are very careful to avoid feeding extrinsic information about the case or their expectations to a witness, the nature of

128. Id.
129. Id.
130. Witness Coaching, supra note 22, at 833.
131. See, e.g., Trott, supra note 110, at 1403-04.
132. See Witness Coaching, supra note 22, at 834 (stating that, during interviews, prosecutors have “the ability, consciously or unconsciously, to strengthen the case by questions and suggestions that cause the witness to fill gaps in memory, eliminate ambiguities or contradictions, sharpen language, create emphasis, and alter demeanor”); see also J. Alexander Tanford, The Ethics of Evidence, 25 Am. J. Trial Advoc. 487, 537 (2002) (“Indeed, psychologists have shown that the very act of interviewing will produce distorted and inaccurate testimony.”).
133. Douglass, supra note 22, at 1837 n.174.
134. Witness Coaching, supra note 22, at 843; see also Richard Wydick, The Ethics of Witness Coaching, 17 Cardozo L. Rev. 1, 9-12 (1995) (discussing how witness interviewing by even a well-intentioned lawyer can result in the “tainting” of witness testimony without the lawyer’s knowledge).
135. See Trott, supra note 110, at 1404.
the interview process—and the alertness of the cooperator to "clues"—makes "the danger of tailoring testimony... almost unavoidable. It is exceedingly difficult to discuss a case with a potential witness without exposing information that will assist the witness in avoiding an impeachable contradiction at trial."136 The chance that a cooperating witness will tailor testimony to fit the prosecutor's expectations is greatest during the proffer session, during which the prosecutor is likely to inform a potential witness about what testimony the prosecution will require in exchange for leniency.137 Prosecutors and agents may tell a witness that he must "do better"—that is, come up with more incriminating or useful information—in order to be signed up as a cooperator. The cooperator may then respond by fabricating the improved evidence.138 Ellen Yaroshefsky, in an article collecting the experiences of a number of federal prosecutors regarding their dealings with cooperating witnesses, cites one AUSA's example of a "symptomatic" proffer session during which a cooperating witness takes his cue from the prosecutor's loaded question:

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.139

In this type of situation, the prosecutor has "ultimately... convey[ed] to the witness the prosecutor's expectations and the witness eventually will get the message and say it."140

4. Prosecutorial Ability to Detect Fabrications

In many cases where prosecutors use the testimony of cooperating witnesses, there is little independent evidence to prove the defendant's

136. Douglass, supra note 22, at 1837.
137. See Ross, supra note 34, at 884. Ross writes that when a prosecutor tells a defendant or defense counsel what testimony is expected of the defendant (either in detail or in the form of bullet points) in order to qualify for cooperator/leniency/immunity status, the defendant is powerfully motivated to parrot what the prosecution wants and expects to hear. Similarly, if the defendant or his or her counsel provides a proffer of facts, which is then followed by the prosecutor announcing that those facts are insufficient or inaccurate, again the cooperating witness is powerfully motivated to "change the story" to accommodate the prosecutor's version of the truth.

Id.
138. See Trott, supra note 110, at 1404.
139. Yaroshefsky, supra note 57, at 959.
140. Witness Coaching, supra note 22, at 843.
guilt. In these cases, the prosecutor must rely largely on his “gut reaction” to determine whether the cooperator is telling the truth. Prosecutors may trust their gut reaction and firmly believe that they can tell, in the end, which portion of the witness’s account is a lie and which portion is true. As former prosecutors have recognized, that “gut reaction” is often wrong, and, indeed, prosecutors are often “horrible” at assessing the credibility of their cooperators. For example, a former prosecutor described a case in which the government had little independent evidence of the crime that was being prosecuted. A cooperating witness knew that his extensive criminal record made him less valuable to the prosecution and that, in order to receive favorable treatment, he would have to supply the prosecution with substantial information. The witness therefore invented a series of crimes in which he and others had participated. The prosecutor and his colleagues believed the witness, because they did not imagine that a witness would tell lies that inculpated himself in criminal activity.

In addition, a prosecutor may be unable to accurately assess the credibility of cooperators because the prosecutor develops an inordinate amount of trust in the cooperating witness and will believe the witness’s account, even about facts that the prosecutor is not able to corroborate. Prosecutors commonly develop affection for their informants. As one former AUSA has remarked, “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.” The tendency to “fall[] in love with your rat,” deprives prosecutors of the ability to scrutinize the cooperator’s account with the objectivity necessary to determine if the witness may be lying.

Finally, as a number of legal writers have remarked, a prosecutor’s difficulty in assessing a cooperating witness’s credibility with accuracy

141. See Cohen, supra note 105, at 822.
142. See id.
143. See Yaroshefsky, supra note 57, at 962 (recounting a prosecutor’s comment that, in interviewing cooperating witnesses, “[y]ou know the truth and your job in those sessions is to get the cooperator there”).
144. Id. at 953; see also Witness Coaching, supra note 22, at 848.
145. Cohen, supra note 105, at 824.
146. Id.
147. Id.
148. Id.
149. See Cassidy, supra note 33, at 1140-41.
150. See Joel Cohen, When Prosecutors Prepare Cooperators, 23 Cardozo L. Rev. 865, 867 (2002) (describing how New York state and federal prosecutors, during the pretrial proffer and interview process, became “buddies” with Robert Leuci, a corrupt New York City detective who provided testimony against his equally corrupt fellow detectives); see also Trott, supra note 110, at 1396-97 (admonishing prosecutors not to become too friendly with or trusting of cooperating witnesses).
151. See Yaroshefsky, supra note 57, at 943.
152. Witness Coaching, supra note 22, at 849.
may derive from the fact that the prosecutor wants to believe the cooperator.\textsuperscript{153} A cooperating witness provides "the most damaging evidence against a defendant, is capable of lying convincingly, and typically is believed by the jury."\textsuperscript{154} In developing evidence to support a charge, even well-intentioned prosecutors tend to assess the evidence from the point of view of a zealous advocate, rather than objectively.\textsuperscript{155} As naturally biased advocates, prosecutors will ignore or downplay signs that the cooperator may be making false statements, such as inconsistencies or gaps in the cooperator's account, and opt instead to believe the portions of the witness's account that support the prosecution's theory of guilt.\textsuperscript{156} As one former AUSA has said, "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{157} Even well-intentioned prosecutors, who have what they believe to be conclusive evidence of a defendant's guilt, may ignore inconsistencies in a cooperating witness's account in order to serve a "higher justice."\textsuperscript{158} Because prosecutors, functioning within the adversarial system, tend to act as zealous advocates and because prosecutors are usually under great institutional pressure to seek convictions, the prosecutor's primary goal is to obtain a conviction.\textsuperscript{159} Because prosecutors tend to be conviction driven, "it is far too easy [for prosecutors] to take the accounts given by cooperators at face value when, for a variety of reasons, they neatly fit into the prosecutor's preconceived view of the evidence, or are precisely what the prosecutor wants to hear."\textsuperscript{160}

\textsuperscript{153} See, e.g., id. at 848 ("A prosecutor has a powerful incentive to accept a cooperator's account uncritically.").

\textsuperscript{154} Id. at 847.

\textsuperscript{155} See Capra, supra note 43, at 424.

\textsuperscript{156} See Witness Coaching, supra note 22, at 848 (explaining that prosecutors "may have a theory of the case that they developed from other evidence or from reliance on the opinion of the case agent. These prosecutors believe that theory to be true, and to the extent that the cooperator's version is inconsistent with this theory, the prosecutor may conclude that the cooperator is lying or withholding information"); see also Capra, supra note 43, at 394-95.

\textsuperscript{157} Yaroshefsky, supra note 57, at 945. Other prosecutors had similar comments, such as: "Prosecutors are, nevertheless, advocates. They get wedded to their theory and things inconsistent with their theory are ignored"; and "[i]f you only have a hammer, everything looks like a nail." Id. (internal quotations omitted).

\textsuperscript{158} Weeks, supra note 89, at 834-35.

\textsuperscript{159} See Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. Rev. 125, 182 (2004) ("[T]he institutional culture of most prosecutors' offices treasures convictions, and an attorney's conviction rate may serve as a barometer of that person's stature within the organization and a key factor in determining that person's chances for internal advancement."). See generally Ross, supra note 34; Abbe Smith, Can You Be a Good Person and a Good Prosecutor?, 14 Geo. J. Legal Ethics 355 (2001).

\textsuperscript{160} Cohen, supra note 150, at 869.
II. THE EFFECT OF PRETRIAL INTERACTIONS BETWEEN PROSECUTORS AND COOPERATORS ON THE TRUTH-SEEKING FUNCTION OF TRIALS: CALLS FOR REFORM

Commentators have argued that the pretrial process by which prosecutors interact with cooperating witnesses prevents juries from learning about the existence of important evidence that often arises during these interactions and that the jury needs in order to accurately evaluate the credibility of the cooperator. These commentators also contend that current disclosure rules and trial safeguards are not sufficient to ensure that juries have the opportunity to accurately evaluate the cooperator’s credibility. This Part examines these arguments. This Part also discusses proposals, advanced by legal writers, for greater transparency in pretrial interactions between prosecutors and cooperators, including the proposal for a rule requiring the recording of all pretrial meetings between prosecutors and cooperators. Finally, this Part identifies several arguments that could be made both in favor of and in opposition to the adoption of a recording rule.

A. Evidence Arising During Pretrial Meetings

In United States v. Sudikoff,\(^1\) the federal district court stated that, during the government’s pretrial interviews with cooperating witnesses, evidence of the cooperator’s inconsistent statements\(^2\) and evidence of the cooperator’s bias\(^3\) was likely to be developed. Accordingly, the court held that all of the government’s notes or summaries of statements made by a cooperating witness during pretrial interviews must be disclosed to the defense, even though those statements were not “substantially verbatim recitals”\(^4\) and thus did not qualify as Jencks material.\(^5\) In addition to evidence of inconsistent statements and witness bias, commentators have

\(^{161}\) 36 F. Supp. 2d 1196 (C.D. Cal. 1999).

\(^{162}\) See id. at 1202. The court stated as follows:

"Because [the pretrial interview] process can be lengthy and because it often carries some of the typical negotiating give-and-take, it is possible, maybe even likely, that the witness’s proposed testimony that was proffered at the beginning of the process differed in some respects from the testimony proffered at the end of the process.

Id. at 1202.

\(^{163}\) See id. at 1203 (“[I]nformation that reveals the process by which an accomplice witness and the government reach a leniency agreement is relevant to the witness’s credibility because it reveals the witness’s motive to testify against the defendant.”).

\(^{164}\) Id. at 1204 (quoting 18 U.S.C. § 3500 (2000)).

\(^{165}\) Id. at 1206. In Sudikoff, the government conducted extensive proffer sessions, over a period of several months, with the co-defendants’ accomplice in a securities fraud scheme. Id. at 1197. The government granted immunity to the accomplice in exchange for his testimony. Id. The defendants moved, prior to trial, for complete discovery of all statements made by the accomplice witness during his meetings with the prosecution and for all of the government’s notes and memoranda of those meetings. Id. The court granted the motion, holding that the inherent bias of a cooperating witness and the likelihood that the witness gave inconsistent statements over the course of the interviews warranted a presumption that all evidence relating to the witness’s interviews with the government was discoverable under Brady and Giglio. Id. at 1202-04.
noted that pretrial meetings between prosecutors and cooperators may also contain evidence that the cooperating witness constructed his story based on information that was deliberately or accidentally supplied to the witness by prosecutors during the course of the interview process.\textsuperscript{166} This section addresses the three different types of potentially disclosable evidence—inconsistent statements, prosecutorial threats or inducements apart from official leniency agreements, and evidence of prosecutorial contamination of the witness interview process—that may arise during the prosecutions' pretrial interactions with cooperating witnesses.

1. Inconsistent Statements

Inconsistencies in a witness's pretrial statements arise naturally during the pretrial interviewing process, and practitioners assert that it is part of a lawyer's job to prepare the witness so that opposing counsel cannot detect those inconsistencies and reveal them on cross-examination.\textsuperscript{167} Unlike most other witnesses, however, cooperating witnesses have an extremely strong incentive to lie,\textsuperscript{168} and, as one court has recognized, inconsistencies in cooperators' pretrial statements are more likely to "stem from the accomplice witness's tendency to embroider on the truth" rather than from the nature of the interview process.\textsuperscript{169}

The process by which prosecutors debrief the cooperating witness during proffer sessions and then prepare the witness to testify at trial is typically lengthy, measured in multiple interviews that occur over many weeks, if not months.\textsuperscript{170} As happened with Convertino's pretrial interviews of Hmimssa in the \textit{Koubriti} case,\textsuperscript{171} the statements of a cooperating witness tend to change during this period of time, as the interview process "smooth[s] out gaps and contradictions" in the witness's account of events.\textsuperscript{172} One writer has remarked that the following observation, made by a defense lawyer, presents no exaggeration: "The Government has a room at the Marriott Hotel in which witnesses are transmogrified. I wish I had a room where I could do that to people."\textsuperscript{173} Prosecutors remark that it is common, particularly at the outset of the proffer process, for cooperating witnesses to lie in order to "feel out" the prosecution to determine how the witnesses can best negotiate a favorable plea deal.\textsuperscript{174} The cooperating witness's

\begin{footnotes}
\item \textsuperscript{166} See infra Part II.A.3.
\item \textsuperscript{168} See supra Part I.E.1.
\item \textsuperscript{169} Sudikoff, 36 F. Supp. 2d at 1202.
\item \textsuperscript{170} See Douglass, supra note 22, at 1837 n.173 ("[W]ith key cooperating witnesses in major cases, prosecutorial polishing of cooperators may be measured in weeks or months.").
\item \textsuperscript{171} See supra notes 14-18 and accompanying text.
\item \textsuperscript{172} Douglass, supra note 22, at 1842.
\item \textsuperscript{173} Id. at 1833-34 (internal quotations omitted).
\item \textsuperscript{174} See Yaroshefsky, supra note 57, at 961-62; see also Trott, supra note 110, at 1403-04 (discussing how witnesses lie in early proffer sessions, particularly in order to attempt to
\end{footnotes}
subsequent statements usually will prove to be partially or wholly inconsistent with the statements that the witness made in early proffer sessions. Prosecutors and their agents are aware that cooperating witnesses make inconsistent statements during pretrial interviews and, accordingly, choose not to record the interviews precisely in order to avoid having to disclose those inconsistent statements.

2. Unrecorded Threats and Inducements

Constitutional due process, as set forth in Giglio v. United States, requires that the prosecution disclose to the defense any on-the-record promise or agreement that the prosecution has made with the cooperating witness in exchange for the witness’s testimony. In the absence of an official (written) agreement, the prosecution is not required to disclose unofficial (oral) statements that a prosecutor or government agent made to the cooperator, indicating that the cooperator would receive some benefit for his testimony. Thus, if the prosecutor, without doing more, tells the witness that the government will “take care of” the witness at sentencing, or if the prosecutor tells the witness that his testimony will be “taken into consideration,” those oral statements do not have to be disclosed.

Professor Michael Cassidy has written that such implied leniency agreements are commonplace, and are usually sufficient to motivate the cooperating witness to testify. Also commonplace are official—and therefore discoverable—agreements in which the prosecution has promised to extend some vaguely defined consideration (for example, a recommendation for leniency at sentencing) to the cooperator accompanied by oral statements such as, “[W]e’ll just have to see how it goes, but if you really come through at trial I will recommend in my substantial assistance motion that the judge give you the street.”

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175. See United States v. Sudikoff, 36 F. Supp. 2d 1196, 1202 (C.D. Cal. 1999). The court noted in Sudikoff as follows:

Because [the pretrial interview] process can be lengthy and because it often carries some of the typical negotiating give-and-take, it is possible, maybe even likely, that the witness’s proposed testimony that was proffered at the beginning of the process differed in some respects from the testimony proffered at the end of the process.

Id.

176. See supra notes 97-100 and accompanying text.
177. 405 U.S. 150 (1972).
178. See id.
179. See Cassidy, supra note 33, at 1132 (defining implied plea agreements as “soft words of hope”) (citations omitted).
180. See id. at 1152 (citing cases where courts have held that informal, verbal promises do not qualify as discoverable Giglio material).
181. See id. at 1171 (calling implied plea agreements “pervasive”).
182. See id. at 1158 (discussing the ease with which a prosecutor can induce accomplice witness cooperation through a “wink and a nod”) (citations omitted).
183. Id. at 1148.
Absent any recording of the interview process, Cassidy has argued, defense counsel will have no knowledge of such threats or inducements and will therefore be unable to cross-examine the cooperator about the roles such threats or inducements played in motivating the cooperator to testify.\textsuperscript{184} The jury thus will remain unaware of whether the prosecution offered the cooperator no deal at all or an official leniency deal augmented by oral assurances.\textsuperscript{185} If the prosecution made a purely oral representation to the cooperator, the cooperator may appear to testify at trial "straight-up . . . because it is the right thing to do."\textsuperscript{186} If the prosecution made an open-ended deal, augmented by an oral promise, the jury may not be aware of the magnitude of the benefit that the witness will receive for testifying.\textsuperscript{187} In both cases, the jury does not receive an accurate picture of the cooperator’s bias, and the jury is thus free to overvalue the cooperator’s credibility.\textsuperscript{188}

3. Prosecutorial Contamination of the Interview

As noted above, the process by which prosecutors and their agents interview cooperating witnesses is fraught with the potential that the prosecutors and agents may inadvertently (or deliberately) feed information to the cooperator.\textsuperscript{189} As in the hypothetical described by Professor Yaroshefsky, the prosecution may reveal key information to the cooperator that the witness then incorporates into his account.\textsuperscript{190} And, as scholars have remarked, much of the “coaching” that occurs is so subtle that the interviewers themselves may be entirely unaware that they have supplied information to the witness that the witness then has used to make his account appear credible and convincing, first to the interviewer and later to the jury.\textsuperscript{191} Absent any recording of the interactions between the government and the witness, the jury has no opportunity to learn the extent to which the prosecutor has actively or unwittingly “coached” the witness during the pretrial interviews.\textsuperscript{192}

B. Adequacy of Disclosure Rules and Cross-Examination as Safeguards

Commentators and practitioners have contended that neither rules of prosecutorial disclosure nor the process of cross-examination ensure that juries will have an adequate opportunity to consider certain evidence that may arise during the government’s unrecorded, pretrial interactions with a cooperating witness and that may bear directly on the cooperator’s credibility. This evidence may consist of inconsistent statements, unofficial

\textsuperscript{184} See id. at 1160.  
\textsuperscript{185} See id.  
\textsuperscript{186} Id. at 1162 (internal quotations omitted).  
\textsuperscript{187} Id. at 1162-63.  
\textsuperscript{188} See id. at 1161-64.  
\textsuperscript{189} See supra Part I.E.3.  
\textsuperscript{190} See supra notes 138-39 and accompanying text.  
\textsuperscript{191} See supra Part I.E.3.  
\textsuperscript{192} See, e.g., Witness Coaching, supra note 22, at 851-54.
leniency agreements, or prosecutorial contamination of the interview process.

1. Disclosure Rules

The Brady rule requires prosecutors to disclose “material” exculpatory or impeachment evidence, and Model Rule 3.8 requires disclosure of evidence that tends to negate or mitigate the defendant’s guilt. Practitioners and legal observers have advanced three reasons why Brady and Model Rule 3.8(d) do not motivate prosecutors to make arguably appropriate disclosure decisions within the context of unrecorded interviews with cooperating witnesses.

First, as prosecutors themselves have acknowledged, even the best-intentioned prosecutors do not typically apply Brady analysis to oral statements. As one prosecutor has stated, “most oral statements do not get turned over.” A prosecutor is much more likely to mull over whether or not he should turn over a written statement or other tangible document than he is to ponder his disclosure obligations regarding unrecorded oral statements. Thus, unless a cooperator insists upon proclaiming facts which the prosecutor really cannot ignore (for example, “I did it, the defendant was not there”), a prosecutor is unlikely even to consider oral statements as “evidence,” within the meaning of the prosecutor’s legal and ethical disclosure duties.

Second, even assuming that a prosecutor recognizes that his disclosure obligations may be implicated by a cooperator’s pretrial oral statements, many commentators have noted that the prosecutor is unlikely to decide in favor of disclosure. Due process requires that the prosecutor disclose evidence that is favorable and material to the defense. Evidence is “material” if there is a reasonable probability that admission of the evidence would result in a better outcome for the defendant. Although courts have admonished prosecutors to err on the side of disclosure when determining

193. See supra notes 76-92 and accompanying text. Much has been written on prosecutors’ failure to comply with Brady. See, e.g., Cassidy, supra note 33, at 1167-68 (commenting on the “considerable academic attention” that has been paid to the inadequacy of constitutional due process requirements for “promoting full disclosure of evidence favorable to the accused”); Weeks, supra note 89, at 933 (asserting that “the evidence that a substantial number of prosecutors are regularly ignoring their duty to disclose exculpatory evidence is by this point simply too compelling to ignore”). Discussion of whether prosecutors tend to comply with Brady, however, is beyond the scope of this Note.

194. See supra note 90 and accompanying text.

195. See Yaroshefsky, supra note 57, at 962 (“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. The prosecutor is paper conscious about its Brady obligations but not oral conscious.” (quoting a former AUSA)).

196. See id. at 962.

197. See Weeks, supra note 89, at 843-46.

198. See id.

199. See supra note 77 and accompanying text.

200. See supra note 85 and accompanying text.
whether evidence is "material," as noted above prosecutors tend to believe zealously in the defendant's guilt and will strive to define "material" as narrowly as possible in order to obtain a conviction. As Professor Daniel Capra has written, even "assuming that the prosecutor acts in good faith and with integrity, the fact is that he reviews his file from an advocate's point of view. Good faith and integrity do not and cannot guarantee an objective review of the file by the prosecutor." A prosecutor may believe in good faith that evidence of inconsistent statements, for example, are irrelevant or only trivially related to the question of the defendant's guilt or innocence, and that admission of such evidence would serve only to mislead or confuse the jury.

As Justice Thurgood Marshall stated in his dissent in United States v. Bagley,

for purposes of Brady, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith.

Professor Joseph Weeks has written that due process and disciplinary disclosure requirements do not ensure that prosecutors will make objective disclosure decisions because

201. See, e.g., United States v. Alvarez, 86 F.3d 901, 905 (9th Cir. 1996) ("To the extent the prosecutor is uncertain about the materiality of a piece of evidence, 'the prudent prosecutor will resolve doubtful questions in favor of disclosure.'") (quoting United States v. Agurs, 427 U.S. 97, 108 (1976)).

202. See Andrew E. Taslitz, Wrongful Rights, Crim. Just., Spring 2003, at 4, 11 ("[P]rosecutors faced with a duty to disclose material exculpatory evidence may in good faith interpret that duty narrowly, for prosecutors come to believe zealously in the guilt of those they accuse, inevitably coming to embrace the virtues of his or her own position."). In rare cases where courts consider disciplining prosecutors for failure to disclose evidence, the prosecutor invariably defends his decision to withhold evidence by claiming that he did not believe the evidence to be material. See, e.g., Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Ramey, 512 N.W.2d 569 (Iowa 1994), cited in Robert R. Rigg, Investigation, Discovery, and Disclosure in Criminal Cases: An Iowa Perspective, 52 Drake L. Rev. 739, 779 (2004). Even in Koubriti, where AUSA Convertino's own employer—the Office of the United States Attorney—filed a Memorandum defining the numerous documents that Convertino withheld as exculpatory and material, Convertino continued to insist that "[e]ven if [he] had reason to know of the materials characterized as being disclosable to the defense, that material was insubstantial, cumulative and would not have encouraged the reasonable probability that a different verdict would have resulted after trial." Molly McDonough, Terror Verdicts Dissolve: Investigations Continue into how Detroit Case Went So Wrong, September 10, 2004, 3 No. 36 A.B.A. J. E-Report, at 2.


204. See Daniel Richman, Proposals for Change: Expanding the Evidentiary Frame for Cooperating Witnesses, 23 Cardozo L. Rev. 893, 897 (2002) (discussing the prosecutor's good-faith reluctance to reveal a cooperating witness's inconsistent statements to the jury on the grounds that such inconsistencies may be "simply misleading, when taken out of context").

the kind of objective determination of materiality required by [due process] is capable of being made only by saints. More mortal advocates will understandably view such evidence as a "problem" that threatens to undermine the case. The determination of whether it is really all that exculpatory or of such significance that, if produced, there is a reasonable probability that the defendant will be acquitted, becomes in many cases a determination beyond the intellectual and emotional capacities of even the most ethical of prosecutors.206

Third, the "reasonable probability" materiality standard established in Bagley207 requires prosecutors to speculate about the effect that admission of the evidence in question (or its exclusion) would have on the jury's verdict before the trial has begun, and prosecutors often will not know what that effect could possibly be.208 The difficulty of making hypothetical materiality assessments may allow prosecutors to dismiss more easily a witness's inconsistent statement as immaterial, on the grounds that the prosecutor could not possibly know the effect of the statement upon a trial that has not yet taken place.209

2. Cross-Examination

Cross-examination of the cooperating witness, coupled with mandatory disclosure of leniency agreements as required by Giglio,210 is intended as "a vital safeguard to uncovering improper preparation and coaching of witnesses."211 Cross-examination of cooperating witnesses ideally allows jurors to get a complete picture of the witness's motivation for testifying.

206. Weeks, supra note 89, at 843-44.
207. 473 U.S. at 682 (holding that non-disclosed evidence "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").
208. See Cassidy, supra note 33, at 1168 (stating that the materiality requirement is inadequate to promote necessary disclosure because a "prosecutor must make a pretrial decision about disclosure by speculating about the post-trial effect of the evidence"). Some courts have held, however, that prosecutors should not be forced to make disclosure decisions based on speculations about the effect that the evidence in question will have on a trial that has not yet begun. See, e.g., United States v. Carter, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004) (holding that, "[i]n the pre-trial context, the court should require disclosure of favorable evidence under Brady and Giglio without attempting to analyze its materiality at trial" because the court "cannot meaningfully evaluate how the addition of other evidence would alter the trial. Therefore, the court should ordinarily require the pretrial disclosure of all exculpatory or impeachment evidence"); United States v. Sudikoff, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) ("[I]n the pretrial context it would be inappropriate to suppress evidence because it seems insufficient to alter a jury's verdict. ... [T]he government is obligated to disclose all evidence relating to guilt or punishment which might reasonably be considered favorable to the defendant's case"); see also Kurcias, supra note 73, at 1227-28 (observing that, prior to trial, when a prosecutor is deciding whether to disclose evidence, the prosecutor may not be aware of the defense's theory of the case and therefore may be unable to evaluate accurately whether the evidence in question would be truly material).
211. Witness Coaching, supra note 22, at 854 (citing Geders v. United States, 425 U.S. 80 (1976)).
and the extent to which the testimony is credible. Legal observers have remarked, however, that cross-examination, though intended to function as the single greatest trial engine for discovering the truth, nonetheless does not reveal the extent to which cooperating witnesses, during their unrecorded pretrial interactions with prosecutors, made inconsistent statements, received threats or unwritten inducements that may have motivated them to testify, or manufactured testimony that was based on information fed to them during the interview process. Absent any recording and disclosure of the interviews, defense counsel will have no factual basis for questioning the witness about any uncertainties or inconsistencies in the cooperator's statements that may have surfaced (and then been ironed out) during the interview process. As Professor Douglass has observed, cross-examination also may prove ineffective because the "polishing process can transmogrify demeanor just as it can smooth out gaps and contradictions in the substance of accomplice testimony." Similarly, as Professor Cassidy has noted, in the absence of any recordation of the interview process, defense counsel has no basis for questioning a cooperating witness about any implied threat or inducement that the prosecution made during pretrial meetings.

Scholars also have observed that, just as defense counsel lacks a factual basis to conduct an effective cross-examination that could reveal whether the cooperator made inconsistent statements or received unofficial threats or inducements during the interview process, defense counsel also has no foundation for cross-examining the cooperator about whether his testimony was the product of information supplied by the government. Although

212. See Cassidy, supra note 33, at 1142 (citing Hoffa v. United States, 385 U.S. 293, 311 (1966)).

213. See California v. Green, 399 U.S. 149, 158 (1970) (internal quotation omitted); see also Harris, supra note 23, at 66 ("Because all substantive communications with testifying cooperators would be recorded and discoverable, cross-examination at trial could penetrate the selection and preparation process to a degree not now possible.").

214. See, e.g., Witness Coaching, supra note 22, at 854-55.

215. See id.

216. Douglass, supra note 22, at 1843. Douglass writes the following:

The purely visual effect of [the witness preparation] process can be stunning. Shoulder-length hair gives way to a conservative trim. Fearsome tattoos disappear behind a well-pressed shirt sleeve. Courtroom attire—not too casual, not too formal—replaces orange prison garb or a grease-stained T-shirt. Even language patterns can go through a Pygmalion-like transformation before trial. Four letter words take on additional syllables and a softer edge. As a result, the defendant may confront his accomplice at trial, but he may not recognize the person who speaks from the witness stand.

Id. at 1843.

217. See supra notes 184-88 and accompanying text; see also Witness Coaching, supra note 22, at 855 n.133. Gershman writes that if a cross-examiner is unaware of, or does not believe that any deals or promises were made to the witness in exchange for his testimony, it is unlikely that an experienced cross-examiner would ask the witness about hypothetical deals or promises or whether the witness was coached to avoid mentioning the subject.

Id.

218. See Witness Coaching, supra note 22, at 848.
defense counsel "will be able to elicit acknowledgment that the witness has met with the prosecution to prepare, a well-prepared witness’ account of those sessions will be otherwise opaque: ‘The prosecutor asked me the same questions she asked me today and told me to tell the truth.’"

This bare-bones acknowledgment will provide the jury with "little insight into the significance and nuance of the prosecutor’s effectively exclusive opportunity to prepare and rehearse with the witness for what is often the crucial testimony in an accomplice case."  

C. Arguments for Reform in the Government’s Development and Use of Cooperating Witness Testimony

Professor Bennett Gershman attributes “many, perhaps most” of the wrongful convictions that result from false witness testimony "to techniques used by prosecutors to prepare, shape, and polish the testimony of their witnesses." Specifically, Gershman identifies the following factors as responsible for the threat posed by cooperating witness testimony to the truth-seeking function of criminal trials:

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

In a similar vein, Michael Ross has summarized the reasons why many observers believe that the current use of cooperating witness testimony by prosecutors requires additional safeguards as follows:

Given that prosecutors, as advocates, want to win; that they intentionally or unintentionally press for witnesses to provide badly needed evidence in a case; that cooperating witnesses are powerfully driven to lie; and that history has taught the legal community that the combined conduct of

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219. Harris, supra note 23, at 55.
220. Id.
221. Witness Coaching, supra note 22, at 832.
222. Id. at 833. In addition to cooperators, Gershman identifies eyewitnesses and children as witnesses whose pretrial interactions with police and prosecutors are particularly fraught with the danger that false or inaccurate testimony will develop:

[N]otoriously unreliable witnesses include identification witnesses, young children, and cooperating witnesses such as informants, accomplices, and so-called "snitches." The vast majority of wrongful convictions are attributable to the testimony of these witnesses. The testimony of these witnesses share common risks to the truth; they pose special dangers of falsehood and mistake of which the prosecutor is aware but the jury is not.

223. Witness Coaching, supra note 22, at 848.
prosecutors and cooperating witnesses result in false testimony, it is not enough for the government to repeat its mantra that “the government recognizes its obligations under Brady and will comply.” An external presence is needed to ensure the integrity of the process.224

Commentators have proposed a number of reforms that could reduce the risk that cooperating witnesses will testify falsely but convincingly. The most drastic reform would be to make the testimony of cooperating witnesses inadmissible.225 One Canadian judge, in response to a study of a wrongful Canadian conviction that was largely caused by fabricated “snitch” testimony, has recommended that no jailhouse informants be allowed to testify at criminal trials.226 Other writers have countered that proposal, however, with the argument that cooperating witness testimony simply cannot be dispensed with, because the government requires such testimony in order to obtain a great number of valid convictions, and that without such testimony, many important prosecutions “could never make it to court.”227

Other proposed reforms include providing extensive training to prosecutors and agents in interviewing techniques and “a better understanding of the psychological factors at play when defendants seek to cooperate and, generally, when people lie”;228 pretrial court hearings to determine the reliability of the cooperating witness;229 the mandatory presence of the cooperating witness’s counsel at all pretrial meetings, in order to keep the prosecution “honest”;230 an amendment to the Federal Rules of Criminal Procedure, codifying Brady and requiring the disclosure of all evidence, including oral statements, that is favorable to the accused, regardless of “materiality”;231 and a rule requiring prosecutors to fulfill leniency agreements prior to the cooperating witness’s testimony, thereby

224. Ross, supra note 34, at 891 (quoting United States v. Roberts, No. 01 CR 410, 2001 WL 1602123, at *16 (S.D.N.Y. Dec. 14, 2001); see also Cassidy, supra note 33, at 1176.

The likelihood of fabrication resulting from bargained-for testimony is simply too great to rely on a prosecutor’s honor and good faith in meeting his discovery obligations with respect to accomplice witnesses. Prosecutors are advocates with strong personal and professional incentives to win their cases. The criminal justice system cannot continue to rely on bald exhortations to prosecutors to “seek justice” and expect that a defendant’s right to a fair trial will be protected.

Id. 225. See Hughes, supra note 46, at 24, 33.


227. Trott, supra note 110, at 1390.

228. Cohen, supra note 105, at 826.

229. See Harris, supra note 23, at 63-64 ( recommending pretrial reliability hearings for all “compensated witnesses”).


partially removing the incentive for the witness to lie at trial.\textsuperscript{232} Another proposal, which functions as a partial recording rule, is an amendment to the Model Rules of Professional Conduct that would require a prosecutor to record in writing any express or implied statement that "a reasonable person in the prosecutor's position would expect to create a subjective expectation of leniency on the part of the witness."\textsuperscript{233}

\textbf{D. Arguments in Support of and Opposed to a Recording Rule}

In addition to the above-mentioned proposals for reform of the process by which the government prepares and uses cooperating witness testimony at criminal trials, a number of commentators, practitioners, and bodies that study wrongful convictions have advocated the adoption of a rule requiring that the government record all pretrial interviews with cooperating witnesses. This section briefly examines these proposals and then presents arguments that have been advanced, as well as arguments that could be advanced, in support of such a rule. This section concludes by considering some arguments in opposition to a recording rule.

1. Past Proposals for a Recording Rule

Several legal writers have suggested that prosecutors and their agents should record their interviews with cooperators. Professor Gershman has proposed the mandatory videotaping of all government interviews with cooperating witnesses.\textsuperscript{234} Michael Ross has suggested that prosecutors or their agents should record all of the information provided by the cooperating witness and/or his counsel during proffer sessions, and that "should the prosecutor later learn that information provided by the witness is inconsistent with information provided by other sources, or should the defendant alter or amend his or her recollection of the facts, these matters \textit{must} be memorialized."\textsuperscript{235} Similarly, George Harris recommends that all

\textsuperscript{232} See Hughes, supra note 46, at 24 (citing Franklin v. State, 577 P.2d 860 (Nev. 1978)). \textit{In Franklin}, the prosecution provisionally agreed to allow an accomplice witness to plead to second rather than first degree murder and thus avoid the death penalty. \textit{Franklin}, 577 P.2d at 860. The prosecution, however, refused to make the plea deal until after the cooperating witness gave his testimony. \textit{Id.} at 861. The court held that the prosecution's arrangement with the cooperating witness presented such a high risk of inducing the cooperator's perjury that the defendant was denied due process. \textit{Id.} at 860, 864. The Nevada Supreme Court overruled \textit{Franklin} in \textit{Sheriff, Humboldt County v. Acuna}, 819 P.2d 197 (Nev. 1991), holding that "bargaining for specific trial testimony, i.e., testimony that is essentially consistent with the information represented to be factually true during negotiations with the State, and withholding the benefits of the bargain until after the witness has testified, is not inconsistent with the search for truth or due process," \textit{id.} at 198.

\textsuperscript{233} Cassidy, supra note 33, at 1173.

\textsuperscript{234} See \textit{Witness Coaching}, supra note 22, at 861-62. Gershman also proposes the mandatory videotaping of all government interviews with two other classes of witnesses that he identifies as "dangerous" to the truth-seeking process: child witnesses and identification witnesses. \textit{Id.}

\textsuperscript{235} Ross, supra note 34, at 888; see also Governor's Comm'n on Capital Punishment, Report of the Governor's Commission on Capital Punishment 30 (2002) [hereinafter \textit{Report}], available at
communications between the prosecution and a potential cooperating witness be audiotaped, videotaped, or transcribed, that the recordings be disclosed to the defendant, and that defense counsel have the opportunity to interview all cooperating witnesses.236

Prosecutors themselves have commented that the common practice of not taking notes of witness statements is a “major problem in trying to create an element of fundamental fairness in a trial.”237 One prosecutor, interviewed by Professor Yaroshesfky, has stated that he believed that taking notes during interviews with cooperating witnesses should be mandatory.238

In addition, bodies and organizations that study wrongful convictions and their causes have recommended that prosecutors and/or police record their interviews with cooperating witnesses. For example, Illinois Governor George H. Ryan’s Commission on Capital Punishment recommended that police record all “interviews conducted of significant witnesses” in homicide cases.239 The Innocence Project, at the Benjamin N. Cardozo School of Law, has recommended that all communications between prosecutors or police and cooperating witnesses be videotaped.240 Legal scholars, in drafting a Model Act for the Prevention and Remedy of Wrongful Convictions, have proposed that “[a]ll interviews related to felony investigations, whether in the field or at the police station, will be audio or video recorded.”241 The Canadian criminal justice system, in response to an exhaustive study of the causes of a Canadian wrongful conviction, implemented a rule requiring that all government interviews with accomplices and informants be videotaped or audiotaped.242 And the Center on Wrongful Convictions recommends that: “Interrogations of informants by investigators should be recorded—preferably video-taped, but if that is not possible audio-taped—and the tapes should be accessible to the defense under normal discovery rules.”243
2. Possible Arguments in Favor of a Recording Rule

Proponents of a recording rule could assert three main arguments in support of the adoption of such a rule. First, a rule requiring the recording of interviews with cooperating witnesses could promote the accuracy of juries’ verdicts, thereby limiting the likelihood of wrongful convictions. Second, a recording rule could help to ensure that prosecutors function in a manner that is consistent with the ideals of ethical prosecutorial behavior that are set forth in the Model Rules of Professional Conduct. Third, a recording rule could diminish the appearance of impropriety that naturally attaches to secretive pretrial meetings with cooperators, thereby enhancing the public’s faith in the criminal justice system.

a. Decrease the Likelihood of Wrongful Convictions

The foremost argument to be made in support of a recording rule is that such a rule could reduce the chance that a defendant would be convicted on the basis of false or misleading cooperating witness testimony. The recording of meetings between a prosecutor and a cooperator could reveal the extent to which the witness made inconsistent statements over the course of multiple interviews; whether the government made any undisclosed threats or inducements to the witness; and the extent to which the cooperator’s trial testimony was the result of the witness’s being deliberately or inadvertently “fed” information, rather than the witness’s personal knowledge. Professor Cassidy asserts that recordation “may assist jurors in the difficult and highly subtle task of detecting fabrication where it occurs.” And, Professor Gershman states as follows:

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


244. See infra Part II.D.2.a.
245. See infra Part II.D.2.b.
246. See infra Part II.D.2.c.
247. See Witness Coaching, supra note 22, at 832-33.
248. See supra Part II.A.1.
249. See supra Part II.A.2.
250. See supra Part II.A.3.
251. Cassidy, supra note 33, at 1177.
252. Witness Coaching, supra note 22, at 862.
The possible value of a recording rule in allowing juries to make more informed judgments about the credibility of a cooperating witness is seen in the above-mentioned hypothetical of a cooperator's interaction with the government, cited in Yaroshefsky's article.253 In that example, the cooperator could testify at trial that Jones was present at the drug deal. But, equipped with recordings of the meeting between the prosecutor and witness, defense counsel could then ask the witness whether it was true that the witness had at first failed to mention Jones's presence and that the witness had actually stated that Jones was present only after the prosecutor or agent specifically asked, "Are you sure Jones was not there?"254 If the witness replied that he had stated that Jones was present without any prodding from the government, defense counsel could impeach the witness with evidence of the transcript, audiotape, or videotape of the interview.255

By revealing such evidence of witness inconsistency, unrecorded threats or inducements, and prosecutorial contamination of the interview, a recording rule could provide defense counsel with a foundation for cross-examination that would not exist in the absence of the recording: "Because all substantive communications with testifying cooperators would be recorded and discoverable, cross-examination at trial could penetrate the selection and preparation process to a degree not now possible."256 By revealing aspects of the pretrial preparation process that bear directly on the cooperator's credibility, a recording rule would comport with the core principle behind broad discovery in criminal trials, namely the goal of "enhanc[ing] the truth-finding process so as to minimize the danger that an innocent defendant will be convicted."257

b. Comport with Prosecutors' Ethical Mandate

As a rule that intends to combat the development of false cooperating witness testimony, the recording rule conceivably comports with the prosecutor's mandate to act as a "minister of justice."258 The prosecutor's role as a "minister of justice" derives in part from the prosecutor's function

253. See supra notes 139-40 and accompanying text.
254. See supra notes 139-40 and accompanying text.
255. See Fed. R. Evid. 613(b) (permitting the impeachment of a witness by “[e]xtrinsic evidence of a prior inconsistent statement” if “the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon”).
256. Harris, supra note 23, at 66.
258. Model Rules of Prof'l Conduct R. 3.8 cmt. (stating that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate”); see also Model Code of Prof'l Responsibility EC 7-13 (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”); Standards Relating to the Admin. of Criminal Justice § 3-1.2(c) (1992) (“The duty of the prosecutor is to seek justice, not merely to convict.”).
as an attorney for the sovereign state—the prosecutor's sole client—whose "paramount objective" it is to ensure not only that the guilty are punished, but also that the innocent are not wrongfully convicted. The ethical admonition for prosecutors to act as "ministers of justice," is thus, in large part, a call for prosecutors to guard against wrongful convictions. As the Comment to Model Rule 3.8 states, the prosecutor's "responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."

The obligation to act as a "minister of justice" has been interpreted as imposing upon the prosecutor a broad obligation, beyond that imposed by specific legal or ethical provisions, "to ensure the truthfulness of their witnesses' testimony." Thus, the prosecutor must make objective assessments of the evidence that he develops and uses against a defendant at trial. Crucially, to fulfill his role as a "minister of justice," the prosecutor has an obligation "to understand and guard against cooperating witnesses infecting criminal investigations with lies and half-truths." This obligation includes avoiding techniques for interviewing witnesses and preparing them to testify [in ways] that are likely to produce false testimony, taking care not to offer inducements to witnesses (such as immunity or leniency) in a manner that encourages false testimony, and not presenting testimony when there is good reason to doubt its veracity.

A recording rule would conceivably help the prosecutor fulfill this obligation. The rule's existence would acknowledge that even the most careful and best-intentioned prosecutors may unknowingly assist in developing the false testimony of lying cooperators, that prosecutors often do not act with sufficient objectivity to make fair disclosure decisions, and that, therefore, "doing justice" may demand that

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259. See Bruce A. Green, Why Should Prosecutors "Seek Justice"?, 26 Fordham Urb. L.J. 607, 637 (1999) (stating that prosecutors "must act in accordance with the client's objectives, as reflected in the constitution and statutes, as well as history and tradition").

260. See id. at 641; see also Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 Vand. L. Rev. 45, 50 (1991) ("One obvious concern underlying the prosecutor's special ethical duty is to prevent punishment of innocent defendants.").

261. See supra note 259, at 642 (declaring that "among the sovereign's paramount objectives are not merely to convict and punish lawbreakers but to avoid harming, and certainly to avoid punishing, innocent people").


263. Green, Prosecutorial Ethics, supra note 90, at 1596.


265. Cohen, supra note 105, at 827.

266. See supra notes 199-206 and accompanying text.
prosecutors effectively recuse themselves from making disclosure decisions in the context of their interviews with cooperating witnesses.

Several judicial decisions concede the lack of a legal duty to record their interviews with government witnesses but nonetheless consider prosecutors and their agents to have acted unethically when they deliberately fail to record. The language of these decisions supports the notion that a recording rule would comport with commentators' understanding of the prosecutor's role as a "minister of justice." In United States v. Houlihan, the U.S. Court of Appeals for the First Circuit found that the supervisors of a drug investigation explicitly instructed government agents to avoid taking notes of their interviews with all government witnesses. While acknowledging that this practice did not violate the Jencks Act, the court nevertheless questioned the propriety of the government's actions:

Eschewing tape recordings and ordering law enforcement agents not to take notes during pretrial interviews is risky business—and not guaranteed to redound either to the sovereign's credit or to its benefit. By adopting a "what we don't create can't come back to haunt us" approach, prosecutors demean their primary mission: to see that justice is done. . . . By and large, the legitimate interests of law enforcement will be better served by using recording equipment and/or taking accurate notes than by playing hide-and-seek.

Similarly, in United States v. Bernard, a DEA agent deliberately avoided taking notes during his several interviews with a government informant who eventually provided key testimony against the defendant. Although the Ninth Circuit could "find no statutory basis for compelling the creation of Jencks Act material," the court nevertheless severely condemned the government's policy of willfully avoiding the taking of notes:

We emphatically disapprove of Agent Fredericks' views and motivation, and his conduct. His testimony announces a desire to deprive defendants of knowledge of any statements favorable to them that may have been made to him by the informant. This seems to us to be quite inconsistent with the obligations of a law enforcement officer representing the United States Government. Such an officer has a duty to gather all of the facts about an offense, so far as time and his abilities permit, not just those facts that the agent thinks helpful to obtaining a conviction. His superiors and the prosecuting authorities must rely on him to do so. Both he and they have a duty to protect the innocent as well as to catch and prosecute the guilty. And that duty extends to being fair to those whom he may believe to be guilty. Playing games with evidence,
as Agent Fredericks has done, demeans him, his agency, and the government itself.\textsuperscript{275}

In its Memorandum in \textit{Koubriti}, the U.S. Attorney’s Office adopted a similar stance to that taken by the court in \textit{Bernard}. The Memorandum noted that Convertino’s colleagues considered Convertino’s deliberate avoidance of note taking to be “ill-advised,”\textsuperscript{276} but also observed that the practice was not unlawful.\textsuperscript{277} Thus, although a prosecutor and the agents working under his direction may deliberately avoid recording their interviews with government witnesses without violating due process or statutory disclosure requirements, some courts have condemned the practice as being contrary to the ethical responsibility of government agents to seek justice and guard against wrongful convictions.

Proponents of a recording rule also could argue that such a rule would comport with the ethical duties of a prosecutor by encouraging caution and self-reflection among prosecutors as they interact with cooperators. Part of an ethical rule’s value inheres in the “continuing legal and ethical education [the rule] provoke[s]”\textsuperscript{278} and in the rule’s ability to cause lawyers to think more deeply about their professional responsibilities.\textsuperscript{279} Obliged to record interviews with snitches and accomplices, prosecutors might think more carefully about how they conducted those interviews. Prosecutors might become more careful about offering “off-the-record” threats or inducements to would-be cooperators. Similarly, it could be argued that prosecutors would exercise similar caution against the possibility of inadvertently feeding information to the cooperator. And, because taping would reveal “overt attempts to influence the witness’s testimony,”\textsuperscript{280} prosecutors who would otherwise deliberately threaten or bribe cooperating witnesses, or unlawfully provide the witness with the testimony that the prosecution wanted to use, would be deterred from such overt coaching of witnesses. In sum, a duty to record interviews with cooperators could arguably prompt prosecutors to reflect in greater depth on the inherent dangers of such testimony, the prospect of wrongful convictions, and the prosecutor’s duty to prevent punishment of the innocent.\textsuperscript{281}

\textsuperscript{275} Id.
\textsuperscript{276} Memorandum, supra note 4, at 46.
\textsuperscript{277} See id. at 47 n.30.
\textsuperscript{278} Zacharias, supra note 260, at 107.
\textsuperscript{279} See Fred C. Zacharias, Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics, 69 Notre Dame L. Rev. 223, 258-59 (1993) (“By forcing lawyers to think in ethical and systemic terms, the codes hope to promote an introspective process that carries over to situations the drafters do not, and perhaps cannot, foresee.”).
\textsuperscript{280} Witness Coaching, supra note 22, at 862.
\textsuperscript{281} The capacity of a recording rule to encourage self-reflection among prosecutors also potentially serves another provision in the ethics code: Standard 3-1.2(d), which states that the prosecutor has a duty to “seek to reform and improve the administration of criminal justice.” Standards Relating to the Admin. of Criminal Justice § 3-1.2(d) (1992). A recording rule would constitute an acknowledgment that unrecorded prosecutorial interviews with cooperating witnesses have the great potential to contribute to wrongful convictions. The recording rule thus comports with the attorney’s duty to seek to reform the criminal
c. Diminish the Appearance of Prosecutorial Impropriety

Proponents of a recording rule might also argue that the rule could combat the appearance of impropriety that attaches to unrecorded meetings between prosecutors and cooperators. As Professor Roberta Flowers has stated, "[T]he appearance of fairness is an essential consideration in evaluating the quality of any justice system."282 When lawyers prepare the testimony of witnesses during private, unrecorded sessions, "it is difficult for the lawyer and witness to avoid the appearance that they have invented a convenient story for the jury."283 Secret pretrial meetings between government agents and witnesses who are highly motivated to provide the prosecution with whatever testimony the prosecution wants to hear run especially counter to notions of propriety and fairness. In recent years especially, when a spate of widely publicized wrongful convictions has challenged the public's faith in the criminal justice system,284 and when many overturned convictions have been attributed to the government's use of false cooperating witness testimony,285 secret prosecutorial interviews with snitches and accomplices have a particular appearance of impropriety. It could therefore be argued that, in bringing transparency to the government's interactions with untrustworthy witnesses, the recording rule would accomplish the valuable goal of making the criminal justice system appear more trustworthy.

3. Possible Arguments Against a Recording Rule

Although a number of legal observers have advocated the adoption of a recording rule,286 apart from two limited exceptions none have discussed

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284. See, e.g., Taslitz, supra note 202, at 5 (citing a July 2000 Harris poll, in which ninety-four percent of people stated that they believed innocent people were convicted of murder and that people on average believed that thirteen percent of those convicted for murder were actually innocent).

285. See supra note 31 and accompanying text.

286. See supra Part II.D.1.

287. Professor Gershman, in advocating a recording rule, has briefly considered possible objections to a recording rule on the grounds that recording of pretrial interviews could reveal sensitive information to the defense. See infra note 326 and accompanying text. Joel Cohen, in opposing a recording rule, has argued that recordings of cooperating witness interviews would threaten the safety of witnesses, facilitate defendants' opportunities to give false testimony, and chill discourse between prosecutors and cooperators. See infra note 299 and accompanying text.
the possible arguments that could be made against the adoption of such a rule. There are four possible arguments to be made against the adoption of a recording rule. First, the mandatory recording of all interviews with cooperating witnesses would provide the defense with a large amount of arguably irrelevant or trivial impeachment material, the use of which at trial could lead the jury to undervalue the testimony of cooperators. Second, a recording rule would inhibit the use of credible cooperating witness testimony in criminal trials, because mandatory recordings would pose threats to cooperators' safety and would chill discourse between cooperators and prosecutors in proffer sessions. Third, by revealing all pretrial statements made by cooperating witnesses, a recording rule would allow defendants to falsify their testimony so that it convincingly countered the inculpatory statements of the cooperating witness. Fourth, a recording rule would not be effective because prosecutors and their agents could easily bypass such a rule.

a. Excessive Impeachment Material

The recording rule could promote inaccurate trial results by allowing the jury to consider an excessive amount of impeachment evidence. Because evidentiary rules tend to be inclusive, rather than exclusive, defense counsel would be able to introduce many, if not most, of the inconsistent statements made by cooperators during pretrial interviews. The admission of copious impeachment evidence could lead juries to reject testimony that was otherwise reliable. One commentator, writing about mandatory videotaping of government interviews with alleged child sex abuse victims, has summarized the government's arguments regarding the potentially prejudicial effect of such broad discovery:

[A] videotaped record fuels the effectiveness of cross-examination, and [the fear] that overreaching, overzealous defense counsel will misuse any discrepancies in the [witness]'s account or flaws in the interviewer's elicitation of the narrative to undermine or even destroy the [witness]'s credibility. Furthermore, many prosecutors believe that juries and judges cannot tell the difference between minor and major inconsistencies or between core and peripheral details, and that triers of fact cannot

288. See infra Part II.D.3.a.
289. See infra Part II.D.3.b.
290. See infra Part II.D.3.c.
291. See infra Part II.D.3.d.
292. See, e.g., Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 516 (1st Cir. 1996) (finding Rule 403, which states that relevant evidence shall be admitted unless its probative value is substantially outweighed by its prejudicial value, "is a liberal rule under which relevant evidence generally is admitted" (citation and internal quotation omitted).
293. See Jencks v. United States, 353 U.S. 657, 682 (1957) (Clark, J., dissenting) (asserting that granting defendants access to impeachment evidence in the government's possession could result in that evidence being "subject to misinterpretation, ... quoted out of context, or ... used to thwart truth, distort half-truths, and misrepresent facts" (quoting J. Edgar Hoover's 1950 speech before a Subcommittee of the Committee on Foreign Relations of the United States Senate)).
distinguish between the effective use of cross-examination and its misuse.\textsuperscript{294}

The potential for prejudice could be especially great because of the defense's access to all of the statements made by the cooperator during early proffer sessions. As discussed earlier, cooperating witnesses commonly lie at the outset of proffer sessions in order to "feel out" the government agents and determine how they can best negotiate a favorable plea deal.\textsuperscript{295} Even fully credible cooperators may lie at the outset of their meetings with the prosecution.\textsuperscript{296} While a prosecutor might correctly perceive that a jailhouse informant's lying at the first proffer session is nothing more than a routine negotiating technique, a fact finder could perceive the fabrications to be dispositive of the cooperator's untrustworthiness. Thus, in such situations, the recording rule could result in the jury's undervaluing of an honest cooperator's testimony, leading to lost valid convictions.

b. \underline{Inhibition of Cooperating Witness Testimony}

A recording rule could discourage the participation of cooperating witnesses in criminal trials. Courts have recognized that cooperating witnesses play an important role in the criminal justice system in that they "are often the best, if not the only, source of information about the alleged crime."\textsuperscript{297} In limiting the scope of discovery allowed under the Jencks Act, Congress had the goal of preventing the "[d]iscouragement of witnesses" and "improper contact directed at influencing [witnesses'] testimony."\textsuperscript{298} A recording rule could discourage credible cooperators from testifying, by posing threats to their safety. A would-be cooperator, fearful that a defendant who learned of the cooperator's partnership with the prosecution might attempt to harm the witness or the witness's family prior to trial, would understandably be hesitant to cooperate or might not cooperate with full candor. Joel Cohen, a former federal prosecutor, has warned that

[a] recording may ultimately end up in the hands of criminals who may actually want to kill [the cooperator's] family—at a time when he still believes that he can successfully eliminate them from the prosecution equation—[which] may increase the likelihood of deliberate lying or obfuscation by him, and invariably undermine the interview process.\textsuperscript{299}

\begin{itemize}
\item 295. See Yaroshefsky, \textit{supra} note 57, at 961-62.
\item 296. See Trott, \textit{supra} note 110, at 1403-04.
\item 299. Cohen, \textit{supra} note 150, at 872.
\end{itemize}
Over the course of one year, in one federal district, defendants killed or ordered the killing of six cooperating witnesses before those witnesses had the chance to testify.\textsuperscript{300}

In addition, a recording rule could chill the necessary give and take that occurs between prosecutors, agents, and potential cooperators in early proffer sessions. During these sessions, witnesses lie, prosecutors expect them to lie, and honest testimony may nevertheless develop in due course.\textsuperscript{301} A recording rule could result in prosecutors insisting that cooperators come forward immediately with the truth. Unable to "feel out" the prosecution, the would-be cooperator could be reluctant to enter into the process. As Joel Cohen has written, "Tape recording would-be cooperators, particularly those who initially are willing to make only stingy disclosures and where prosecutors must necessarily be more forceful, would inhibit the process—even when employed by the most ethical of prosecutors."\textsuperscript{302}

c. Assist Defendant in Testifying Falsely

A recording rule would give the defendant the opportunity to scrutinize the incriminating remarks of adverse cooperating witnesses and to tailor his own testimony in a way that best counters the cooperator's testimony. Thus, a recording rule could help defendants to mount successfully perjured defenses.\textsuperscript{303}

d. Prosecutors Could Bypass the Rule

Prosecutors could bypass the recording rule. For example, prosecutors could hold unrecorded charging discussions with would-be cooperators' attorneys, who would then relay the prosecution's "needs" to the witnesses.\textsuperscript{304} Alternatively, prosecutors could simply choose not to follow the recording rule, and continue to conduct unrecorded meetings with cooperators, just as prosecutors routinely choose not to disclose tangible exculpatory evidence that should be disclosed under \textit{Brady} and Model Rule 3.8(d).\textsuperscript{305}

\textsuperscript{300} See Panel Discussion, supra note 69, at 787-88 (remarks of AUSA G. Doug Jones).
\textsuperscript{301} See supra note 174 and accompanying text.
\textsuperscript{302} Cohen, supra note 150, at 872.
\textsuperscript{303} See Brennan, supra note 257, at 6 (discussing judicial opinions that claim that "disclosure of witness lists would allow defendants to tailor their defenses to the government's evidence and to fabricate testimony").
\textsuperscript{304} See, e.g., Spicer v. Roxbury Corr. Inst., 194 F.3d 547 (4th Cir. 1999); see also Harris, supra note 23, at 67.
\textsuperscript{305} See Kurcias, supra note 73, at 1218 (discussing pervasiveness of \textit{Brady} violations).
Rule 3.8 of the Model Rules of Professional Conduct should be amended to provide that prosecutors shall record all interviews with cooperating witnesses and that prosecutors, whenever possible, shall ensure that the government agents working with them also record all interviews with cooperating witnesses.

Cooperating witness testimony presents a threat to the truth-seeking function of criminal trials. The trial testimony of cooperating witnesses is the product of unrecorded meetings between conviction-hungry prosecutors who have extraordinary discretion to grant leniency and desperate criminal defendants who are eager to say whatever it takes to obtain that leniency. Cooperating witnesses have the motive and skill to lie successfully and prosecutors for many reasons tend to believe cooperators and are not good at detecting those lies. It is not surprising that the testimony of jailhouse snitches and accomplice witnesses has proven to be one of the leading causes of wrongful convictions.

Without documentation of the interview process, jurors do not have the opportunity to weigh important evidence that is likely to come to light over the course of the government’s interviews with these inherently suspect witnesses. Jurors will not learn whether cooperators made inconsistent statements over the course of the interviews, whether the government made any off-the-record threats or inducements that may have motivated the witness to testify, or whether the cooperator’s account of events was based on information that the witness learned during the interview process. Discovery obligations do not ensure that such evidence gets disclosed, because—absent recording of interviews—prosecutors may not identify such evidence where it exists or because prosecutors tend to view such evidence as not sufficiently impeaching or exculpatory to warrant disclosure. And cross-examination does not function as an adequate safeguard, because without any documentation of the interview process, defense counsel has no basis for questioning the process by which the government developed the witness’s testimony.

As many legal commentators have recognized, some greater measure is required. A recording rule provides such a measure. A rule requiring

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that prosecutors and the agents working under their direction record all interviews with cooperating witnesses would allow defense counsel full opportunity to cross-examine the witness with evidence of their prior inconsistent statements, evidence of their motivation for testifying, and evidence that their statements may have been a product of their interaction with the government rather than that of their personal observation. A recording rule would therefore ensure that juries had the opportunity to weigh evidence that bears directly on the credibility of cooperating witnesses and that, currently, in the absence of a recording rule, jurors do not typically see. Ultimately, juries would be less likely to overvalue cooperating witness testimony, decreasing the likelihood of wrongful convictions.

The possible arguments to be made against a recording rule are easily countered. Although a recording rule could, in many cases, create a large quantity of discoverable impeachment evidence, there is no reason to suppose that the rules of evidence would fail to operate correctly in governing its inclusion or exclusion. Evidentiary rules safeguard trials from evidence that is irrelevant or excessively prejudicial. Evidence of a cooperating witness’s bias or inconsistent statements, however, always bears directly on the credibility of that witness, and defense counsel must have the opportunity to cross-examine cooperating witnesses on any matters that relate to the witness’s credibility. The jury’s consideration of a cooperating witness’s credibility is crucial to accurate verdicts. The jury therefore should have the opportunity to view and weigh all evidence that relates to a cooperator’s credibility, regardless of the quantity. In addition, where a recording of a cooperator’s pretrial interviews produces evidence that is cumulative or repetitive, the trial judge has the discretion of excluding such evidence. Given the sound operation of evidentiary rules and judicial discretion, the jury is not likely to be overly prejudiced by defense counsel’s opportunity to impeach a cooperator with evidence that has come to light as a result of a recording rule.

In addition, although a recording rule has the potential of alerting defendants to the cooperator’s testimony and motivating some defendants to threaten, harm, or even kill the cooperator before he testifies, as Professor Capra has argued, “[a]ny dangers of abuse by [the] defendant—such as pressuring favorable witnesses—can be controlled by delaying

317. See supra notes 248-57 and accompanying text.
318. See Fed. R. Evid. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).
319. See Fed. R. Evid. 402 (stating that “[e]vidence which is not relevant is not admissible”).
320. See Fed. R. Evid. 403.
321. See Fed. R. Evid. 611(b) (providing counsel with the right to cross-examine witnesses about “matters affecting the credibility of the witness”).
322. See Geders v. United States, 425 U.S. 80, 87 (1976) (stating that the trial judge “may refuse to allow cumulative, repetitive, or irrelevant testimony”).
disclosure on a showing of proof by the prosecutor.”323 Thus, the prosecution could wait to disclose the cooperator’s statements until just before the trial has begun or, as is the technical rule of the Jencks Act, until after the witness has testified on direct.324 In addition, in the event that a portion of the recorded meeting presented a threat or embarrassment to a witness or compromised an investigation,325 courts could “conduct an in camera inspection of the recording, and preclude the use of any portions that contain embarrassing or sensitive material.”326

The proposition that a recording rule would chill the free exchange between prosecutor and cooperator during proffer sessions is also easily answered: With such inherently suspect witnesses, all lies and inconsistencies should be exposed. Credible cooperators will be less likely to make false or inconsistent statements at any point in the proffer sessions, especially when they know that all their statements will be recorded and disclosed. To the extent that a recording rule would restrain some accomplices and snitches from entering into negotiations with the government, “chilling might be salutary in any event” because of the “currently ‘overheated cooperation market.’”327

The argument that a recording rule could arm a defendant with too much information, prior to trial, about adverse witness testimony and thus give that defendant the opportunity to lie more convincingly on the witness stand is also readily answered. The fear that a defendant may commit perjury should not overcome the defendant’s right to access evidence that could be favorable to his defense. Further, the “contention that extensive discovery will promote defendant perjury at trial ignores the presumption of innocence by assuming that a criminal defendant is guilty and is thus unable to provide a truthful version of the events when testifying.”328 Even when a defendant is guilty, he has the opportunity to observe the testimony of the prosecution’s witnesses before he testifies and may thus commit perjury with or without the extensive discovery that would result from the adoption of a recording rule.329 Finally, in the event that the cooperator’s statements provide strong evidence of the defendant’s guilt, pretrial disclosure of those statements to the defendant via a recording rule is more likely to induce the

325. See Bruce A. Green & Fred C. Zacharias, Regulating Federal Prosecutors’ Ethics, 55 Vand. L. Rev. 381, 442 (2002); see also Jencks v. United States, 353 U.S. 657, 681-82 (1957) (Clark, J., dissenting) (opining that, in the event of broadened prosecutorial discovery requirements, “intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets”); Brennan, supra note 257, at 6 (discussing rejection by Congress of a 1974 proposal to amend Rule 16 of the Federal Rules to require the prosecution to disclose pretrial witness lists).
326. Witness Coaching, supra note 22, at 862.
327. Harris, supra note 23, at 67 (quoting Ian Weinstein, Regulating the Market for Snitches, 47 Buff. L. Rev. 563, 564 (1999)).
329. See id.
defendant to plead guilty than to concoct lies to counter the incriminating testimony.\textsuperscript{330}

The last argument to be martialed against the adoption of a recording rule—that the rule could very easily be disobeyed—also does not have much force. There is no reason to believe that prosecutors would be especially likely to disobey a rule of professional conduct requiring them to record their interviews with cooperators. Many commentators believe that prosecutors seek guidance from the ethical codes,\textsuperscript{331} that most prosecutors wish to act lawfully and ethically, and that, therefore, most prosecutors will follow an ethical directive codified in the Model Rules and the state bar rules.\textsuperscript{332} Moreover, there are few rules that a prosecutor cannot disobey or evade if they wish to do so.\textsuperscript{333} As one writer has remarked, “Any procedural requirements are, of course, subject to attempts at evasion and disputes over compliance.”\textsuperscript{334} A prosecutor’s mere capacity to bypass a rule in no way militates against its adoption.

Although the recording rule could be adopted as a rule of criminal procedure, this Note proposes that the rule be promulgated as a rule of professional conduct, because the concerns that arise in relation to prosecutors’ development and use of cooperating witness testimony have a predominantly ethical flavor.\textsuperscript{335} Currently, prosecutors act with nearly unfettered discretion in selecting and shaping cooperating witness testimony and in making disclosure decisions that relate to that process. As one legal writer has remarked, “[T]he integrity of the process of obtaining cooperating witness testimony is directly tied to the very same ethical rules which have governed attorney conduct since the adoption of ethical rules in this country.”\textsuperscript{336} The “core issue of the ethical limits of prosecuting attorneys’ conduct should be addressed in the forum which is best equipped to deal with it”\textsuperscript{337}—through ethical rules. In exercising discretion outside the courtroom—where prosecutors are free from any meaningful

\begin{itemize}
\item \textsuperscript{330} See Aaron, supra note 71, at 3007 (discussing how broad discovery results in defendants making informed pleas, an important objective of the criminal justice system).
\item \textsuperscript{331} See Green, supra note 259, at 616-17.
\item \textsuperscript{332} See, e.g., Roberta K. Flowers, A Code Of Their Own: Updating The Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors, 37 B.C. L. Rev. 923, 965 (1996) (“Specific provisions that address the issues facing prosecuting attorneys would serve to reinforce the resolve in most prosecutors to do the right thing.”); Zacharias, supra note 260, at 107 (“Unethical lawyers always will ignore the codes when the codes conflict with their self-interest; scrupulous attorneys will try to follow the codes’ commands.”); Kurcius, supra note 73, at 1229 (“There is every reason to believe that the majority of prosecutors would follow the ethical guidelines.”).
\item \textsuperscript{333} See, e.g., Weeks, supra note 89, at 835 (observing that “there is almost nothing that presently prevents the prosecutor disposed to do so from routinely withholding exculpatory evidence”).
\item \textsuperscript{334} Harris, supra note 23, at 67.
\item \textsuperscript{335} See Cassidy, supra note 33, at 1169 (“The Rules of Professional Conduct are an appropriate vehicle for capturing a prosecutor’s disclosure obligations with respect to cooperating witnesses.”).
\item \textsuperscript{336} Ross, supra note 34, at 892.
\item \textsuperscript{337} Id. at 877.
\end{itemize}
oversight—the prosecutor must act according to his “internal compass.”338 The recording rule, which restricts the movement of the needle of that “internal compass,” operates primarily as a rule of professional conduct.

CONCLUSION

A rule of conduct requiring prosecutors and the agents working under their direction to record all interviews with cooperating witnesses would enable juries to assess the credibility of inherently suspect cooperating witnesses with greater accuracy, helping to prevent the conviction of the innocent. The rule would comport with the notion that prosecutors should act as “ministers of justice,” who must work not only to convict the guilty, but to guard against conviction of the innocent. The rule would encourage prosecutors to behave with greater caution in their interactions with cooperators. And the rule would give an appearance of propriety to prosecutorial interactions with dubious government witnesses.

338. Flowers, supra note 282, at 739 (“[O]utside the courtroom, e.g., in the police station, or the witness interview room, the prosecutor must conduct herself professionally by relying on her own internal compass.”).