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Fighting Governmental Witness Tampering

(Or, You Can Have Our Defense Witnesses When You Pry Them From Our Cold, Dead Hands)

A layperson, asked how a trial in a serious criminal case typically unfolds, will likely give a quaintly naïve response. The prosecutor, the layperson might respond, puts on witnesses and other evidence tending to show that the defendant is guilty of the charged crime. The defense lawyer cross-examines the prosecution witnesses to reveal any reasons their testimony may be unreliable, and to draw out any additional evidence that may favor the defense. When the prosecution's case is over, the defense presents any witnesses and evidence that may show that the defendant did *not* commit the crime (or that the government's proof has weaknesses), and the prosecution gets its shot at undermining that evidence. Finally, the jury looks at all of the evidence submitted by both sides and decides whether guilt has been proven beyond a reasonable doubt.

People who work within the criminal justice system know that this is not really the way it works. They know that this picture of a neutral fact-finding process, in which both sides get to do their best to marshal their evidence, is a fiction. The reason is that the government has a tremendous amount of power not only to present, but also to develop, influence, and alter, the evidentiary picture that ultimately emerges in a criminal case. In particular, the government and its agents can and do send unmistakably clear messages to witnesses that certain accounts will have different effects than others on the future trajectories of those witnesses' lives.

A potential alibi witness might be told, for example, that the investigation is still open, the prosecution may ultimately bring charges against additional suspects, and continuing to maintain that the defendant was somewhere else sounds like the kind of thing an accomplice would say. Or a professional, on whose advice a white collar defendant claims to have relied, might be reminded that if such advice was really given, it would implicate the professional herself in the crime.

The result of such commonly used tactics is that the ultimate evidentiary mosaic that reaches the jury can bear little resemblance to the full picture that a layperson might expect. In reality, the evidence that emerges — particularly in a high-stakes case — can on the prosecution's side be that which has been shaped by the government's persuasive tactics, and on the defense's that which survives whatever pressure government agents bring to bear on defense witnesses. It is unfortunate that this happens, but many defense lawyers tend to accept this reality and build it into their assumptions, predictions, and strategies because it is simply the way the system works.

Or is it? In fact, as to this topic — a criminal defendant's ability to find and present defense witnesses, free of undue governmental interference or pressure — the hypothetical layperson's understanding may not be too far from what the law actually requires.

BY KEVIN SALI AND JOHN ROBB

The Sixth Amendment's compulsory process guarantee was designed to ensure that "a defendant should have a meaningful opportunity, *at least on a par with that of the prosecution*, to present a case in his favor through witnesses."[1] The Supreme Court explained:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms *the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.* Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[2]

And as courts have repeatedly recognized, improper governmental pressure on witnesses undermines this fundamental right and violates the U.S. Constitution. Regardless of what law enforcement officials have learned to believe they can get away with, and regardless of what defense lawyers have over time effectively resigned themselves to accept, the reality is that a well-established body of case law prohibits the types of influencing tactics often used by government agents in criminal cases.

Improper pressuring of witnesses violates multiple constitutional provisions.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense."[3] This right is made explicit in the Sixth Amendment's compulsory process clause, but its roots are not limited to that clause. "The Supreme Court has expressly recognized that a party's right to present his own witnesses in order to establish a defense is a fundamental element of due process."[4]

These constitutional guarantees include the right not only to summon a witness to court, but also to ensure that the witness can testify without undue governmental pressure or influence. "The constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation,"[5] and "the [United States] Supreme Court has recognized that the government may not substantially interfere with the testimony of defense witnesses."[6]

The standard set forth by courts considering this issue is clear. The Ninth Circuit emphasized the standard in reversing a conviction for improper influence applied to a witness: "[I]t is imperative that prosecutors and other officials maintain a posture of *strict neutrality* when advising witnesses of their duties and rights. Their role as public servants and as protectors of the integrity of the judicial process permits nothing less.'"[7]

The question of improper influence often arises when some government official — for example, a judge, a prosecutor, or a law enforcement agent — suspects that a witness may not be telling the truth, and communicates to the witness that giving untrue testimony could have consequences. Courts have drawn a bright line in this context. The New Mexico Supreme Court's recent expression of the distinction between lawful and unlawful communications in this area is representative of a body of law that is consistent across the nation:

> [L]awyers or the agents of lawyers representing any party must avoid intimidating prospective witnesses or pressuring them to testify in a particular way, regardless of a lawyer's personal belief about what is true and what is not. . . . [S]imply advising a witness about the realities of the perjury statutes is not sanctionable misconduct. However, *anything beyond a simple and neutral advisement, even when conducted by a judicial officer, can cross permissible boundaries.*[8]

Courts consider several factors in assessing the government's conduct toward witnesses.

The question of whether communication with a witness crosses the line into unconstitutional influence depends on factors such as "the manner in which the prosecutor or judge [or, as noted below, a law enforcement agent] raises the issue, the language of the warnings, and the prosecutor's or judge's [or agent's] basis in the record for believing the witness might lie."[9]

As to the manner and content of the warning, one significant factor is whether the official not only warns in general against the danger of perjury but also indicates a belief regarding whether particular testimony would be perjurious. It is improper to "combine[] a standard admonition against perjury — that [the witness] could be prosecuted for perjury in the event [he] lied on the stand — with an unambiguous statement of [the questioner's] belief that [the witness] *would be lying*" if he testified as anticipated.[10]

As to the official's basis for believing that the witness might be lying, the fact that a witness's testimony would "contradict[] the testimony of the government's own witnesses does not form a sufficient basis" for a targeted warning.[11] "Rather, unusually strong admonitions against perjury are typically justified only where the prosecutor has a more substantial basis in the record for believing the witness might lie — for instance, a direct conflict between the witness's proposed testimony and her own prior testimony."[12]

Of course, even such a "substantial basis" does not afford carte blanche to the government's agents, who must still refrain from improper influencing tactics.[13] Ultimately, if government agents want to challenge a witness's account, they must do so in the legally appropriate way. Because "it is the jury's function — not the prosecutor's — to determine the credibility of witnesses," the government must "be content to subject the testimony of defense witnesses to the crucible of the courtroom."[14]

Courts may consider whether warnings and admonitions were selectively given to certain witnesses.

In light of the neutrality rule, courts can appropriately consider the consistency of the supposed warnings at issue — in particular, whether those warnings are given to all prospective witnesses, or only some subset whose accounts appear to deviate from what government officials expected to hear.[15]

For example, in *People v. Pena*,[16] after the defendant had given notice of an alibi defense and identified three supporting witnesses, the prosecutor sent each such witness a letter simply quoting, "[i]n the interests of justice," the state's perjury statute.[17] The Michigan Supreme Court reversed the ensuing conviction, stating unambiguously that "[t]he constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation," and adding that "[a] prosecutor may impeach a witness in court but he may not intimidate him — in or out of court."[18] The fact that all three witnesses in fact testified and two of the three sup-

ported defendant's alibi did not affect the finding of a violation — as the court stated, "[t]he manner of testifying is often more persuasive than the testimony itself,"[19] with the obvious implication that the warnings administered to the witnesses could clearly affect the "manner" in which they testified.[20]

There are additional aspects of the legal analysis.

Some of the cases finding constitutional violations have involved witnesses who have been dissuaded from testifying at all on the defendant's behalf. Courts have recognized, however, that governmental influence that affects the *content* of a witness's testimony is, if anything, *worse* than influence that simply keeps the witness off the stand. The Ninth Circuit recently addressed this topic:

> It also seems clear that the substantial and wrongful interference with a prosecution or defense witness that does not "drive the witness off the stand," but instead leads the witness to materially change his or her prior trial testimony can, in certain circumstances, violate due process. Indeed, such violations have the potential to work even greater harm than those that simply result in a blanket refusal to testify. Where a witness is coerced into recanting testimony that was favorable to the defendant, the harm to the defense involves not merely the *prevention* of prospective testimony that *might* have bolstered its case, but the *retraction* of testimony that *did* bolster its case.[21]

To prove a constitutional violation, a defendant need not establish that a government agent specifically and deliberately told a witness to lie, or to change his account in a particular way. Rather, courts have recognized that any message that can be viewed as influencing a witness's testimony in some direction can be sufficient. Even the oft-stated emphasis to "tell the truth" can constitute such pressure, when the surrounding circumstances make it clear that the speaker has a clear sense of what "the truth" is.[22] This is similar to the rule, discussed above, that a warning against perjury can be unconstitutional when the speaker indicates a belief as to what testimony might be perjurious.

Some early cases concerning improper influence on witnesses involved statements by trial judges to witnesses who were about to testify.[23] Since then, the same analysis has been applied to communications from prosecutors and law enforcement agents, all of whom are equally considered arms of the government for purposes of this analysis.[24]

The question of good faith, or whether the government official applying the pressure genuinely believes the witness was lying, is largely irrelevant. As the Third Circuit explained in *Morrison*, although the "good faith of the [questioner] would be relevant if he were charged with [the crime of witness intimidation]," it is irrelevant "to an inquiry into whether a defendant was denied his constitutional right."[25]

Indeed, the danger of unlawful governmental overreach is never greater than when the officials are convinced of the righteousness of their cause. Justice Louis Brandeis explained in his most famous dissent, since adopted by a Supreme Court majority:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[26]

Courts regularly find constitutional violations based on improper pressuring of witnesses.

Courts across the country have found constitutional violations based on transgressions of the neutrality rule, with remedies for those violations being determined based on their severity and the extent to which the effects of the violations could be purged.

In *United States v. Thomas*,[27] for example, a prospective defense witness was approached by a government agent who advised him that he could be prosecuted for misprision of a felony if he testified in the case.[28] The witness did not end up testifying for the defendant.

The Sixth Circuit reversed the ensuing conviction based on the government's interference with the witness's testimony. Notably, it did so despite the fact that several curative steps were taken after the initial interference. The government had "advised the court that [the witness] would not be prosecuted," and the witness had stated that he would indeed testify, albeit "only under subpoena, which was not requested."[29] The court found these steps insufficient to cure the initial violation, noting:

> There is an obvious and considerable difference between the free and open testimony anticipated of a voluntary witness and the perhaps guarded testimony of a reluctant witness who is willing to appear only at the command of the court. Further, the government's action here substantially interfered with any free and unhampered determination the witness might have made as to whether to testify and if so as to the content of such testimony. … The government's statement that it would forgo prosecution will not serve to wipe out the prejudicial effect of the event.[30]

In *United States v. Morrison*,[31] the defense had planned to call a witness who would have testified that the defendant was not involved in the drug conspiracy that was the subject of the charges. The prosecutor communicated to the witness that she could be charged herself if she testified as anticipated, which the prosecutor clearly believed would be "false[]."[32] The witness ended up testifying but invoked her Fifth Amendment privilege in response to several questions asked by the defense. The trial court had found that this decision resulted from the prosecutor's remarks, but had declined to find a constitutional violation, concluding that the prosecutor's actions "were done in good faith, did not cause any substantial prejudice to [the defendant] and did not deprive him of any right to which he was entitled," and noting the witness had in fact testified.[33]

The Sixth Circuit reversed, finding that "[t]he actions of the prosecutor in his repeated warnings which culminated in a highly intimidating personal interview were completely unnecessary."[34] Noting that it would have been "entirely proper for the court in its discretion" to advise the witness of her right not to incriminate herself, and that such advice had in fact been given, the prosecutor's further admonitions were "totally unnecessary."[35] The witness "could have made a knowing choice of whether to testify or not on the basis of the formal

warning from the court," and "[t]he pressure brought to bear on her by the [prosecutor] interfered with the voluntariness of her choice and infringed defendant's constitutional right to have her freely-given testimony."[36]

Similarly, in *State v. Gutierrez*,[37] the defendant was charged with inappropriate sexual conduct toward his 15-year-old daughter. The daughter had told the grand jury that the defendant had committed such conduct, but before trial recanted this testimony.[38]

She was then interviewed by a detective, a prosecutor and a victim's advocate. During this interview, according to the detective, these officials "were trying to get the daughter to tell the truth"; he acknowledged "rais[ing] questions about what might happen to the daughter's baby but denied that anything they said constituted a threat."[39] The New Mexico Supreme Court, reviewing the record, found evidence of both "friendly admonitions to tell the truth" and "warnings that the daughter could be prosecuted for perjury and that her two-year-old son could be taken from her if she did not appear at trial and testify consistently with her previous grand jury testimony."[40]

The court ultimately held for the defendant on other grounds and did not formally reach the issue of whether the prosecutorial conduct would have required dismissal. That conduct, however, troubled the court to a sufficient degree that it included a lengthy discussion leaving little doubt as to its views:

> [W]e caution that lawyers or the agents of lawyers representing any party must avoid intimidating prospective witnesses or pressuring them to testify in a particular way, regardless of a lawyer's personal belief about what is true and what is not. The State is correct in its position that simply advising a witness about the realities of the perjury statutes is not sanctionable misconduct. However, *anything beyond a simple and neutral advisement*, even when conducted by a judicial officer, can cross permissible boundaries. We have found no precedent in this state or elsewhere that condones going beyond merely advising a witness of direct perjury consequences to raise the specter of collateral consequences, such as losing custody of one's own child.
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> . . . .
>
> [W]e caution prosecutors — and defense counsel as well — to avoid attempts to pressure witnesses into changing their testimony, no matter what subjective good faith may arguably motivate their efforts.[41]

The remedy for a violation can be dismissal.

After unconstitutional witness influence has been established, "[t]here remains the question of whether a fair trial of [the defendant] can [still] be held or whether the harm done by [the government's] actions is irreparable."[42]

Intermediate remedies — for example, stipulations regarding what the defense witnesses would have said absent the improper influence — may be insufficient. That approach was used by the trial court in *United States v. Hammond*,[43] in which improper comments by an FBI agent had dissuaded a defense witness from testifying. In reversing the conviction, the Fifth Circuit explained why the stipulation would be insufficient:

> This important testimony would have been more effective had it not been introduced by stipulation. Certainly, live testimony can have more impact than a statement read to the jury. A stipulation is static and deprived of vitality. It is a synthetic substitute for the oracular declarations of a witness. The written word with its depersonalization can be no equal to verbalization, and compelling circumstances to the contrary, the defendant must not be deprived of the oral word.[44]

Where the harm cannot be reversed, the only appropriate remedy is dismissal. In some cases, the destruction of the opportunity for a legitimate trial has been explicitly recognized.[45]

In others, this message is apparent from courts' description of the harms caused and the futility of corrective measures attempted by the initial trial courts. In *Thomas*, for example, the illegality had consisted of a government agent communicating to a defense witness that he could be prosecuted if he testified. After this communication had been revealed, the prosecutor at the initial trial attempted to undo the harm by giving assurances that the witness

would *not* be prosecuted if he testified, after which the witness stated that he would testify for the defense if subpoenaed.[46] The trial court found this sufficient, but the appellate court disagreed, holding that the government's assurance "[would] not serve to wipe out the prejudicial effect of the event" and expressing serious doubt that *any* corrective steps could do so.[47]

Similarly, in *United States v. Heller*,[48] the Eleventh Circuit reversed a conviction because the defendant "ha[d] been deprived of an important defense witness by substantial interference on the part of the government."[49] The court noted that "[t]he conditions under which [the defendant] may be retried, i.e., the steps necessary to alleviate the effects of the government's misconduct, [was] a difficult problem which [would] have to be addressed on remand."[50] In fact, this problem turned out to be insurmountable, and the case was ultimately dismissed by the government.[51]

Dismissal is uniquely appropriate in this context because the type of violation at issue directly affects the integrity and reliability of any contemplated trial. In many cases involving constitutional violations, there is reluctance to reward a defendant with a windfall based on governmental misconduct not logically related to the question of guilt or innocence. For example, there has always been a vigorous debate over whether, when a defendant seeks suppression of clearly incriminating evidence based on an unlawful search, "[t]he criminal [should] go free because the constable has blundered."[52]

But the situation is entirely different when the illegal conduct directly affects the integrity of the fact-finding process by actually altering the evidence that will be presented in the case. One court described the difference as follows:

> [There are] concerns peculiar to the court-created exclusionary rule[, including] the exclusion of highly probative evidence with resulting "disruption" of the truth-finding process.
>
> By contrast, coerced witness testimony raises serious questions about the integrity of the fact-finding process, and implicates values basic to civilized notions of fairness and due process. Unlike violation of the judicially created exclusionary rule, this violation … raises basic questions about judicial integrity and the administration of justice. … The effect of coercion of a witness is to deprive the trier of fact of highly probative evidence and consequently to disrupt the truth finding process.[53]

If dismissal is determined to be unwarranted, any intermediate remedy must correspond in nature and extent to the type of violation and the harm caused. For example, where a stipulation is considered, the stipulation may need to extend to the actual facts to which the witness would have testified, and not merely to the testimony the witness would have given.[54]

Conclusion

The government has a tremendous amount of power in the criminal justice system, and government officials who are given power tend to use it. This power, however, is not unlimited. A criminal defendant who chooses to defend himself through the testimony of favorable witnesses has a constitutionally guaranteed right to do so free of excessive governmental interference. If the government does not like what these witnesses have to say, it can challenge their testimony through the traditional means of cross-examination and the presentation of contrary evidence. But it cannot do so through threats, pressure, or intimidation. When it does, defense attorneys must be vigilant to highlight such abuses and pursue appropriate remedies.

Notes

1. *United States v. Morrison*, 535 F.2d 223, 226 (3d Cir. 1976) (emphasis added; footnote omitted) (quoting Western, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974)).

2. *Washington v. Texas*, 388 U.S. 14, 19 (1967) (emphasis added).

3. *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973).

4. *United States v. Foster*, 128 F.3d 949, 953 (6th Cir. 1997) (citing *Washington*, 388 U.S. at 19)).

5. *State v. Ammons*, 305 N.W.2d. 808, 811 (Neb. 1981).

6. *United States v. Juan*, 704 F.3d 1137, 1141 (9th Cir. 2013)); *see also, e.g., United States v. Blackwell*, 694 F.2d 1325, 1334 (D.C. Cir. 1982) ("The constitutional right of a criminal defendant to call witnesses in his defense mandates that they be free to testify without fear of governmental retaliation."); *United States v. Dupre*, 117 F.3d 810, 823 (5th Cir. 1997) ("Under the Sixth Amendment, a criminal defendant has the right to present witnesses to establish his defense without fear of retaliation against

the witness by the government.").

7. *United States v. Vavages*, 151 F.3d 1185, 1193 (9th Cir. 1998) (emphasis added) (quoting *United States v. Rich*, 580 F.2d 929 (9th Cir. 1978)).

8. *State v. Gutierrez*, 333 P.3d 247, 255-56 (N.M. 2014) (emphasis added; citations omitted).

9. *Vavages*, 151 F.3d at 1189-90.

10. *Id.* at 1185.

11. *Id.* at 1190.

12. *Id*.

13. *See, e.g.*, *Gutierrez*, 333 P.3d at 248-51, 255-56 (criticizing officials' conduct in pressuring witness even though that witness's account differed starkly from her prior grand jury testimony); *Berg v. Morris*, 483 F. Supp. 179 (E.D. Cal. 1980) (finding due process violation based on improper influence even though witness was testifying directly contrary to prior in-court testimony).

14. *State v. Wiegers*, 373 N.W.2d 1, 11 (S.D. 1985).

15. *See, e.g.*, *Webb v. Texas*, 409 U.S. 95, 98 (1972) (finding violation based on "the judge's threatening remarks," which had been "directed only at the single witness for the defense"); *Juan*, 704 F.3d at 1141 ("The seminal case is [*Webb*], in which the Supreme Court reversed a defendant's conviction after the trial judge gratuitously singled out the defense's sole witness for a lengthy admonition on the dangers of perjury. . . .") (internal quotation marks omitted).

16. 175 N.W.2d 767 (Mich. 1970).

17. *Id.* at 767-68.

18. *Id.* at 768 (footnote omitted).

19. *Id.*

20. *See also Thomas*, 488 F.2d at 336 (noting the "obvious and considerable difference between the free and open testimony anticipated of a voluntary witness and the perhaps guarded testimony of a reluctant witness who is willing to appear only at the command of the court").

21. *Juan*, F.3d at 1142; *see also, e.g.*, *State v. Huffman*, 672 P.2d 1351, 1356 (Or. Ct. App. 1983) (requiring, at least in the absence of "outrageous" government conduct, that the defendant show "some effect on the witness' [*sic*] testimony"); *id.* at 599 ("It is not necessary that the witness refuse absolutely to testify in order to find that defendant's rights were denied."); *United States v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973) (reversing conviction where the government's conduct "substantially interfered with any free and unhampered determination the witness might have made as to whether to testify *and if so as to the content of such testimony*") (emphasis added); *Berg*, 483 F. Supp. 179 (finding violation where witness changed story in response to statements by trial judge indicating belief that witness was lying); *id.* at 187 (finding it "clear" that influence causing a detrimental *change* in a witness's account is

"more prejudicial to a defendant" than influence that causes a witness not to testify at all).

22. *See Berg*, 483 F. Supp. at 183-84 (finding violation based on judge's repeated admonitions to witness to tell the "truth," where judge had indicated what he believed to be the "truth"); *United States v. Lord*, 711 F.2d 887, 891 (9th Cir. 1983) ("The prosecutor indicated that he told [the witness] about the self-incrimination privilege and that the government would not prosecute [him] if he submitted to an interview and testified truthfully. Without clarification, both of these versions could suggest distortion of the judicial fact-finding process.").

23. *See, e.g.*, *Webb v. Texas*, 409 U.S. 95 (1972).

24. *See, e.g.*, *Vavages*, 151 F.3d at 1189 ("[T]he conduct of prosecutors, like the conduct of judges, is unquestionably governed by *Webb*."); *United States v. Pierce*, 62 F.3d 818, 832 n.12 (6th Cir. 1995) ("These [government agents who interviewed the witnesses] are considered an arm of the prosecutor, and thus, we look to see if their acts constituted prosecutorial misconduct."); *State v. Young*, 523 P.2d 946, 947 n.1 (Wash. Ct. App. 1974) (stating that in the context of improper witness influence, "no distinction can be made between prosecutorial misconduct and the misconduct of investigatory officers, as both act as agents of the state in this context and due process considerations attach equally to the conduct of each").

25. 535 F.2d at 227; *see also id.* at 228 ("However good the trial judge found the intentions of [the prosecutor], his bizarre conduct toward a witness for the defense is not to be condoned."); *Smith*, 478 F.2d at 979 ("Even if the prosecutor's motives were impeccable, however, the implication of what he said was calculated to transform [the witness] from a willing witness to one who would refuse to testify, and that in fact was the result. We therefore conclude that the prosecutor's remarks were prejudicial."); *Vavages*, 151 F.3d at 1188 (describing improper conduct as prosecutor's discouragement of "what [he] clearly believed would be false alibi testimony").

26. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting); *see also, e.g.*, *Chandler v. Miller*, 520 U.S. 322 (1997) (quoting this language from Justice Brandeis's dissent).

27. 488 F.2d 334 (6th Cir. 1973).

28. *See id.* at 335.

29. *Id.*

30. *Id.* at 336.

31. 535 F.2d 223 (3d Cir. 1976).

32. *Id.* at 226.

33. *Id.* at 227.

34. *Id.*

35. *Id.* at 228.

36. *Id.*; *see also, e.g.*, *Vavages*, 151 F.3d at 1188-1193 (reversing conviction where prosecutor called alibi witness's counsel, expressed the belief that the anticipated testimony would be false, and advised that if the witness testified as anticipated she could be charged with perjury and her cooperation agreement in a separate case could be in jeopardy); *State v. Wiegers*, 373 N.W.2d 1, 6-11 (S.D. 1985) (finding improper pressure where incarcerated witnesses were summoned for interviews and warned against committing perjury after indicating that they would testify on the defendant's behalf; remanding for evidentiary hearing on causation issues).

37. 333 P.3d 247 (N.M. 2014).

38. *Id.* at 248-49.

39. *Id.* at 250.

40. *Id.*

41. *Id.* at 255-56 (emphasis added; citations omitted); *see also, e.g.*, *United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973) (reversing conviction for constitutional violation where prosecutor had suggested to defense witness that if he testified as anticipated he could be charged in connection with the underlying offense); *State v. Ammons*, 305 N.W.2d 812 (Neb. 1981) (finding violation and reversing conviction where prosecutor warned defense witness that he would be prosecuted for the underlying offense if he testified as anticipated; reaching this conclusion even though witness had in fact previously admitted his guilt to the prosecutor); *United States v. Foster*, 128 F.3d 949, 952-54 (6th Cir. 1997) (prosecutor had communicated that potential defense witness would be charged if he testified; court found this conduct "clearly improper" and would have remanded for a hearing on causation issues, but mooted the issue by reversing on other grounds).

42. *Morrison*, 535 F.2d at 228.

43. 598 F.2d 1008 (5th Cir. 1979).

44. *Id.* at 1014 (footnote omitted).

45. *See, e.g.*, *State v. Kearney*, 523 P.2d 443 (Wash. Ct. App. 1974) (prosecution had improperly dissuaded defendant's character witnesses from testifying by (accurately) telling them defendant had declined to submit to a polygraph examination; court found that this "overly zealous action effectively denied [the] defendant an opportunity to present his only defense" and that there was "little likelihood" that the problem could be cured in a retrial, and therefore ordered that the charges be dismissed).

46. 488 F.2d at 335.

47. *Id.* at 336 ("Nothing short of complete immunity, *if even that*, could have relieved [the witness's] apprehension, and restored his free and voluntary choice, eliminating the prejudice.") (emphasis added).

48. 830 F2d 150 (11th Cir. 1987).

49. *Id.* at 154.

50. *Id.* at 154 n.6.

51. *See Miami Lawyer Freed of Tax Evasion Charges*, The Miami News, Apr. 29, 1988, *available at* https://news.google.com/newspapers?nid=2206&dat=19880429&id=Ff4IAAAAIBAJ&sjid=-vMFAAAAIBAJ&pg=3438,9125277&hl=en.

52. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (quoting *People v. Defore*, 242 N.Y. 13 (1926)).

53. *Berg v. Morris*, 483 F. Supp. 179, 184-85 (E.D. Cal. 1980).

54. *See, e.g.*, *United States v. Hammond*, 598 F.2d 1008, 1014 n.4 (5th Cir. 1979) (in explaining why the stipulation used by the trial court was ineffective, noting that "the parties only stipulated as to what the witnesses would have stated had they taken the stand," and "did not stipulate that their testimony was true"); *cf. United States v. Bianchi*, 594 F. Supp. 2d 532, 544 (E.D. Pa. 2009) (referring to the "efforts undertaken by the court to render harmless any prejudice by admitting the [allegedly influenced witness's] declaration without cross-examination").

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