



1986

Casenotes: Constitutional Criminal Procedure —
Absent a Showing of Prejudice to the Defendant,
Due Process Is Not Violated by Prosecutor's
Contact with Counsel for Defense Witness in an
Effort to Prevent Perjury. *United States v. Teague*,
737 F.2d 378 (4th Cir. 1984), cert. denied, 105 S.Ct.
913 (1985)

Dennis Patrick McGlone
University of Baltimore School of Law

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>

 Part of the [Constitutional Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

McGlone, Dennis Patrick (1986) "Casenotes: Constitutional Criminal Procedure — Absent a Showing of Prejudice to the Defendant, Due Process Is Not Violated by Prosecutor's Contact with Counsel for Defense Witness in an Effort to Prevent Perjury. *United States v. Teague*, 737 F.2d 378 (4th Cir. 1984), cert. denied, 105 S.Ct. 913 (1985)," *University of Baltimore Law Review*: Vol. 15: Iss. 2, Article 11.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol15/iss2/11>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in *University of Baltimore Law Review* by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

CONSTITUTIONAL CRIMINAL PROCEDURE—ABSENT A SHOWING OF PREJUDICE TO THE DEFENDANT, DUE PROCESS IS NOT VIOLATED BY PROSECUTOR'S CONTACT WITH COUNSEL FOR DEFENSE WITNESS IN AN EFFORT TO PREVENT PERJURY. *United States v. Teague*, 737 F.2d 378 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 913 (1985).

An individual was charged with two counts of possession of a firearm by a convicted felon.¹ After the first day of trial, the prosecutor contacted counsel for a defense witness and advised counsel that if the witness perjured himself, the witness's pretrial diversion agreement would be revoked.² Counsel for the defense witness discussed the prosecutor's warning with his client and suggested that the client avoid testifying if possible. Prior to the commencement of the second day of trial, the defense witness sought out the prosecutor, who repeated the warning against perjury but refused to discuss the matter further. The defense objected to the prosecutor's warning on the theory that the warning had intimidated the witness and the trial court heard this evidence out of the presence of the jury. The trial court concluded that no prejudice to the defendant had occurred. The witness testified as planned, and the defendant was convicted.³ The United States Court of Appeals for the Fourth Circuit affirmed, holding that, absent a showing of prejudice to the defendant, the prosecutor's contact with counsel for a defense witness in an effort to prevent perjury does not violate the defendant's due process rights.⁴ The court reasoned that the allegedly intimidated witness's testimony pertained to the first count on which the defendant was acquitted;

-
1. *United States v. Teague*, 737 F.2d 378, 379 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 913 (1985). Possession of a firearm by a convicted felon is a federal crime. 18 U.S.C. App. § 1202(a) (Supp. 1985) provides that "[a]ny person who—(1) has been convicted by a court . . . of a felony . . . and who receives [or] possesses . . . any firearm . . . shall be fined . . . or imprisoned . . . or both." The defendant had been convicted previously of felonious breaking and entering in 1975 in a North Carolina state court. *Teague*, 737 F.2d at 379.
 2. *Teague*, 737 F.2d at 380. "Diversion . . . is the disposition of a criminal complaint without a conviction, the noncriminal disposition being conditioned on either the performance of specified obligations by the defendant, or his participation in counseling or treatment." R. NIMMER, *DIVERSION* 5 (1974); *see also*, U.S. Dep't of Justice, 1 U.S. Attorney's Manual § 12 (encourages use of pretrial diversion agreements). The witness had been the target of an investigation of alleged federal firearm sales violations. The investigation of the witness had been suspended upon entry into a diversion agreement with the Department of Justice. It was the cancellation of this agreement that was used to threaten the defendant. *Teague*, 737 F.2d at 380.
 3. *Id.*
 4. *Id.* at 384. One of the issues in *Teague* involved an alleged possession of a firearm not mentioned in the indictment. The trial court admitted the evidence, having determined that the evidence was more probative than prejudicial. *Id.* at 381. Another issue was the admission of testimony of a witness under cross examination by the prosecution relating to several illegal gun sales by the witness to the defendant. These sales were not the subject of the indictment. This testimony also was considered more probative than prejudicial, and it was held within the discretion of the court to admit the evidence. *Id.*

therefore, no prejudice had occurred.⁵ A dissenting judge, in an emphatic opinion, argued for reversal because the prosecutor's actions were a violation of due process and were harmful to the defendant because the actions interfered with the presentation of witnesses for the defense.⁶

The leading case on intimidation of a defense witness is *Webb v. Texas*.⁷ In *Webb*, the trial judge gave a lengthy warning against perjury to a defense witness, implying in his warning that the witness would lie, be prosecuted for perjury, be convicted, and have his sentence lengthened beyond that which he already was serving.⁸ The witness then refused to testify. The defendant was convicted, and the Texas Court of Criminal Appeals affirmed.⁹ The Supreme Court reversed, finding that the intimidating warning caused the witness such extreme duress that he refused to testify.¹⁰ The Court stated that "the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment."¹¹

5. *Teague*, 737 F.2d at 384.

6. *Id.* (Murnaghan, J., dissenting); see *infra* note 40 and accompanying text.

7. 409 U.S. 95 (1972). *Webb* relied in part on *Washington v. Texas*, 388 U.S. 14 (1967), where the Court reversed a state court conviction because a codefendant was not allowed to testify on behalf of the defendant. At the time, Texas statutes codified the common law bar to accomplices testifying for each other. The majority in *Washington* held that the sixth amendment right to compulsory process to obtain witnesses favorable to the defense had been violated through the due process clause of the fourteenth amendment:

The right to offer 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 that it may decide where the truth lies.

Washington, 388 U.S. at 19; accord *In re Oliver*, 333 U.S. 257, 273 (1948) (The trial judge, sitting as a one-man grand jury, sentenced the defendant for contempt without a hearing. The Supreme Court reversed based on the due process clause of the fourteenth amendment, stating that "[a] person's right to . . . be heard . . . [is] basic in our system of jurisprudence; these rights include . . . a right . . . to offer testimony.").

8. 409 U.S. at 98.

9. *Webb v. State*, 480 S.W.2d 398 (Tex. Crim. App.), *rev'd*, 409 U.S. 95 (1972).

10. *Webb*, 409 U.S. at 98.

11. *Id.* The concept of due process is not susceptible to precise definition, but can be ascertained by a review of the process of judicial "inclusion and exclusion." *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877); see *Wolf v. Colorado*, 338 U.S. 25, 27 (1949) ("To rely on a tidy formula for the easy determination of what is a fundamental right . . . belittles the scale of the conception of due process."). In general, due process is rooted in the notion of fair play. It protects the person from the arbitrary actions of government. See also *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819) (argument of D. Webster) ("The meaning [of due process] is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society."). The roots of the concept of due process can be traced back through the common law to the Magna Carta, 1215 A.D. See generally 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 104 (3d ed. reprinted 1966) (noting the "vast influence" of the Magna Carta as the safeguard of personal liberty in the development of the concept of due process).

It is important to note that the state or federal prosecutor in criminal cases has a dual function. The prosecutor has a responsibility not only to pursue the case zealously, but also to "do justice."¹² It is permissible for the prosecutor to warn a potentially adverse witness of the witness's fifth amendment privilege against compelled self-incrimination and of the witness's sixth amendment right to counsel.¹³ In so doing, however, the prosecutor must exercise proper restraint. When it can be shown that a defense witness refused to testify after an alleged intimidation by an overzealous prosecutor, the conviction must be reversed.

For example, in *United States v. Morrison*¹⁴ the defense witness was a codefendant against whom charges had been dropped. The prosecutor, on three occasions, warned the witness that if she testified, she would be reindicted.¹⁵ The prosecutor also used an invalid subpoena to bring the witness to his office where he repeated his warnings and advised the witness of the fifth amendment privilege against self-incrimination. Although she took the stand, the witness refused to testify fully, pleading the fifth amendment privilege. The defendant was convicted. The United States Court of Appeals for the Third Circuit reversed because the witness's failure to testify fully for the defense violated the defendant's due process right. The court granted a new trial and gave instructions that if the intimidated witness was called for the defense and invoked her fifth amendment right not to testify, the defendant was entitled to an acquittal unless the government granted the witness immunity from use of her compelled testimony against her.¹⁶

Morrison indicates that intimidation of a defense witness by an official other than the trial judge can violate a defendant's due process

-
12. MODEL CODE OF PROFESSIONAL RESPONSIBILITY 7-13 (1979); see *Berger v. United States*, 295 U.S. 78, 84-85 (1935); *State v. Pineau*, 463 A.2d 779 (Me. 1983); *Commonwealth v. Starks*, 479 Pa. 51, 387 A.2d 829 (1978).
 13. STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 3.2(b) (Approved Draft 1971) ("In interviewing a prospective witness it is proper but not mandatory for the prosecutor or his investigator to caution the witness concerning possible self-incrimination and his possible need for counsel.").
 14. 535 F.2d 223 (3rd Cir.), *cert. denied sub nom.* *Boscia v. United States*, 429 U.S. 824 (1976).
 15. *Morrison*, 535 F.2d at 225 (3rd Cir. 1976); *accord* *Campbell v. State*, 37 Md. App. 89, 376 A.2d 866 (1977). In *Campbell*, the prosecution notified the court that it was reopening a *stet processus* to resume prosecution of the defense witness. On appeal, the Court of Special Appeals of Maryland reversed the conviction because of prejudicial intimidation of the witness, based on the sixth and fourteenth amendments to the United States Constitution, stating the defendant could not receive a fair trial without benefit of use immunity for the witness. *Campbell*, 37 Md. App. at 100-01, 376 A.2d at 872.
 16. *Morrison*, 535 F.2d at 229 (3rd Cir. 1976). See generally, Annot. 4 ALR 4th 617, 621-24 (1981) (except in rare cases, use immunity for defense witnesses is at the sole discretion of the prosecution); 81 AM. JUR. 2D §§ 58-59 (1976) (witnesses) (noting that "use and derivative use" immunity, which prevents prosecuting authorities from making use of a witness's compelled testimony or its derivative fruits, is coextensive with the fifth amendment privilege against self-incrimination).

rights. Decisions in other circuits also support this view.¹⁷ In *United States v. Thomas*,¹⁸ the Sixth Circuit found the actions of a Secret Service agent prejudicial to the defendant when, after the agent's threats, a defense witness refused to testify.¹⁹ In *Thomas*, several codefendants were tried for counterfeiting. Defense counsel called one acquitted defendant as a witness to testify on behalf of the remaining defendants. In the hallway, a Secret Service agent informed the witness that if he were to testify, he would be indicted on another charge. Thereafter, the witness refused to testify. On appeal, the agent's actions were considered a deliberate attempt to intimidate the witness and were found to represent a substantial interference with the defense. The case was reversed and remanded for a new trial.²⁰

The Fifth Circuit read the holdings of *Webb*, *Morrison*, and *Thomas* to represent a "harmful per se" rule when it decided a case of witness intimidation in *United States v. Hammond*.²¹ In *Hammond*, an FBI agent stopped a defense witness in the hall outside of the courtroom and warned him that if he continued to testify, he would have "nothing but trouble" in a related state case in which the witness was a codefendant.²² The witness refused to continue testifying, and the defendant was convicted. The Fifth Circuit reversed the defendant's conviction, finding that the intimidation of the defense witness was a violation of due process.²³ The court reasoned that the interference with the defense must have been deliberate and that a per se rule against this type of conduct was the best deterrent.²⁴ The court also stated there was no method to determine what testimony was rendered unavailable by the alleged intimidation. Because the testimony was made unavailable by a governmental agent, the government deprived the defendant of his right to present a thorough defense. This deprivation was, therefore, "harmful per se."²⁵ Although

17. See, e.g., *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979) (defense witness intimidated by an FBI agent); *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973) (defense witness intimidated by statement of Secret Service agent); *United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973) (defense witness threatened with prosecution by Assistant United States Attorney).

18. 488 F.2d 334 (6th Cir. 1973).

19. *Id.* at 335.

20. *Id.* at 336.

21. 598 F.2d 1008 (5th Cir. 1979).

22. *Id.* at 1012.

23. *Id.* at 1013.

24. *Id.*

25. *Id.*; see also *United States v. Henricksen*, 564 F.2d 197 (5th Cir. 1977) (per curiam) (As part of a plea bargain, witness agreed not to testify for or against defendant. On appeal, the government confessed error and the court reversed, holding that the government's actions were a violation of due process.). Compare *People v. Callington*, 123 Mich. App. 301, 333 N.W.2d 260 (1983) (court surveyed state intimidation cases, determining that no per se rule was discernible; state courts use a case by case approach, reversing when prejudice to the defense is found) (case reversed based on sixth and fourteenth amendments to the United States Constitution) with *People v. Daly*, 98 App. Div. 2d 803, 807-08, 470 N.Y.S.2d 165, 170-71 (1983) (Lazer, J., dissenting) (arguing in favor of a harmful per se rule when a defense

the failure of the defense witness to testify is an important factor in the due process analysis, it is not always determinative.²⁶ In *United States v. Valdes*,²⁷ the evidence showed that the only contact between the prosecutor and the witness was in the presence of the defense counsel and that only one warning against perjury was given.²⁸ After consulting with defense counsel, the witness refused to testify, invoking the fifth amendment privilege. The Fifth Circuit affirmed the conviction, implicitly finding no intimidation and no prejudice on these facts.²⁹

Prior to its decision in *United States v. Teague*,³⁰ the Fourth Circuit in *United States v. MacCloskey*³¹ had the opportunity to review the alleged intimidation of a defense witness. Although *MacCloskey* was decided in part on other grounds, the court took special note of actions of the government that can lead to a defense witness's refusal to testify.³²

In *MacCloskey*, an indicted codefendant planned to give exculpatory testimony for the defendant. Prior to trial, the prosecutor advised defense counsel that charges against the codefendant witness would be dropped. After trial began, however, the prosecutor called the codefendant witness's attorney and advised that if the codefendant testified and incriminated herself, she would be reindicted.³³ On the fourth day of trial, the codefendant's risk of self-incrimination and her alleged intimidation by the prosecutor were brought before the court.³⁴ The court held a voir dire examination of the codefendant out of the jury's presence. Her testimony exonerated both herself and the defendant; the charges against her then were dropped.³⁵ Nonetheless, when called to testify later in the trial,

witness is intimidated through judicial or prosecutorial misconduct based on the sixth and fourteenth amendments to the United States Constitution).

26. One court of appeals's decision suggests that intimidation may not be reversible error where the favorable testimony would have been cumulative in relation to other testimony on the record. Thus, even if the trial court denied the defendant the favorable testimony, no prejudice would occur. *United States v. Peltier*, 585 F.2d 314, 330-32 (8th Cir. 1978); see also *People v. Robinson*, 144 Cal. App. 3d 962, 193 Cal. Rptr. 92 (1983) (in response to multiple warnings against perjury, the witness refused to testify; the appellate court found that the testimony would have been cumulative, and therefore no reversible error had occurred).

27. 545 F.2d 957 (5th Cir. 1977).

28. *Id.* at 960.

29. *Id.* at 959-60. The court also noted defense counsel's failure to place the issue of intimidation squarely before the trial court and failure to include an affidavit necessary to perfect the appeal. *Id.*

In contrast to the holding of *Valdes* is *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979), decided two years later. In *Hammond*, a more egregious case of intimidation, the Fifth Circuit developed a "harmful per se" rule regarding the prosecution's interference with the presentation of the defense. 598 F.2d at 1013; see *supra* notes 19-23 and accompanying text.

30. *United States v. Teague*, 737 F.2d 378 (4th Cir. 1984), cert. denied, 105 S. Ct. 913 (1985).

31. 682 F.2d 468 (4th Cir. 1982).

32. *Id.* at 479.

33. *Id.* at 475.

34. *Id.*

35. *Id.*

the now former codefendant invoked her fifth amendment privilege when asked certain questions.³⁶ On appeal, the court expressed "serious doubts" regarding the propriety of the prosecutor's contacts with the former codefendant's counsel. The government conceded that the contact was "ill-advised and possibly improper."³⁷ The court condemned the prosecutor's actions that had interfered with the presentation of the defense and reversed the defendant's conviction.³⁸

In *United States v. Teague*,³⁹ the Fourth Circuit held that absent a showing of prejudice to the defendant, such as refusal of a defense witness to testify fully, due process is not violated by a prosecutor's contact with counsel for a defense witness in an effort to prevent perjury.⁴⁰ The court noted, however, that the prosecutor's actions were "dangerous and foolish," because the contact and warnings to the defense witness were a potential violation of due process and could have prejudiced the defendant's case.⁴¹

The court's holding was based on three factors. First, the witness testified as planned by the defense. The court noted that in intimidation cases where convictions were reversed, the defendant somehow has been denied the witness's testimony.⁴² In *Teague*, the court found that the defense witness did not invoke the fifth amendment privilege⁴³ and testified without alteration, despite the alleged threats of the prosecutor.⁴⁴

Second, the witness presented no exculpatory testimony as to count one of the indictment, the count on which the defendant was convicted.⁴⁵ The witness had not been present at the time of the arrest that was the basis of count one.⁴⁶ The court stated that the alleged intimidated witness "could not help . . . or hurt [the defendant] on the issue of knowingly having possession [of the firearm]. . . ."⁴⁷

36. *Id.*

37. *Id.* at 479.

38. *Id.*

39. 737 F.2d 378 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 913 (1985).

40. *Id.* at 384.

41. *Id.* at 382. In *Teague*, the dissent would hold that the prosecutor's actions were not harmless. *Id.* at 384-86 (Murnaghan, J., dissenting). The dissent argued that the case against the defendant was not "overwhelming" and that the credibility of the witness allegedly intimidated was crucial to the defense. Thus, the dissent reasoned the accused's presentation of his defense may have been prejudiced especially in light of the witness's "nervous and scared" demeanor when testifying. The prosecutor's aggressive stance against the witness should therefore rise to harmful error. *Id.* at 384-86.

42. *Id.* at 384.

43. 737 F.2d at 384; *cf.* *United States v. MacCloskey*, 682 F.2d 468, 475-76 (4th Cir. 1982) (A defense witness refused to testify after threat of reindictment by the prosecutor. The court held the defendants' due process rights had been violated.)

44. 737 F.2d at 384.

45. *Id.* Count one involved *Teague*'s arrest on January 31, 1979 while in possession of a firearm. *Id.* at 380. *Teague* was acquitted as to count two, a possession of firearms charge, alleged to have occurred on May 21, 1979. *Id.* at 380-81.

46. *Id.* at 381, 384.

47. *Id.* at 381.

Third, the alleged intimidating contact occurred between the prosecutor and the witness's counsel rather than between the prosecutor and the witness himself. The court rejected a per se rule prohibiting "any contact between the prosecutor and an attorney for a witness made in an effort to prevent perjury . . ."⁴⁸

The dissent argued in favor of reversal in *Teague*⁴⁹ based on three facts: interference by the prosecutor with a defense witness; evidence on the record indicating a negative effect on the witness's demeanor; and the absence of an overwhelming case against the defendant.⁵⁰ For the dissent, these facts combined to result in error which was not harmless beyond a reasonable doubt.⁵¹

Teague is consistent with decisions that do not apply a "harmful per se" rule to allegations of defense witness intimidation.⁵² The *Teague* court also followed previous decisions that criticize governmental conduct that allegedly intimidates a defense witness.⁵³ Although the question of how to discipline the overreaching prosecutor has not fully been decided, the Supreme Court in *United States v. Hasting*⁵⁴ has offered suggestions. In *Hasting*, three alternative disciplinary measures were set out: the trial court could order the prosecutor to show cause why he should

48. *Id.* at 384.

49. *Id.* (Murnaghan, J., dissenting).

50. *Id.* at 385-86 (Murnaghan, J., dissenting).

51. *Id.* at 386-87 (Murnaghan, J., dissenting). The dissent based its constitutional harmless error analysis on *Chapman v. California*, 386 U.S. 18 (1967), and *United States v. Hasting*, 103 S. Ct. 1974 (1983), and found that the prosecutor's error was harmful to the defense. Both *Chapman* and *Hasting*, however, involved a prosecutor's comments on the defendant's failure to testify, but also stand for the general proposition that certain federal constitutional deprivations do not warrant reversal unless it can be shown that the error was not harmless beyond a reasonable doubt. The majority in *Teague* does not specifically address this issue.

52. *See, e.g.*, *United States v. MacCloskey*, 682 F.2d 468, 479 (4th Cir. 1982) (court uses a constitutional analysis to find error and avoids a "harmful per se" rule); *United States v. Simmons*, 670 F.2d 365, 368-72 (D.C. Cir. 1982) (court analyzed the record at length, concluding that the record was insufficient to support a claim of intimidation), *aff'd on reh'g after remand*, 699 F.2d 1250 (D.C. Cir.), *cert. denied*, 104 S. Ct. 121 (1983); *United States v. Valdes*, 545 F.2d 957 (5th Cir. 1977) (under careful analysis, facts did not rise to prejudicial intimidation); *United States v. Morrison*, 535 F.2d 223, 228 (3d Cir.) (court used a constitutional, harmless error analysis to find a violation of due process but did not use the phrase "harmful per se"), *cert. denied sub nom. Boscia v. United States*, 429 U.S. 824 (1976); *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973) (analysis revealed that the misconduct of the government resulted in prejudicial inference when the intimidated witness failed to testify); *cf. United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979) (intimidation of defense witness by FBI agent was per se harmful error warranting reversal).

53. *See United States v. MacCloskey*, 682 F.2d 468, 475 (4th Cir. 1982); *United States v. Simmons*, 670 F.2d 365, 367 (D.C. Cir. 1982), *aff'd on reh'g after remand*, 699 F.2d 1250 (D.C. Cir.), *cert. denied*, 104 S. Ct. 121 (1983); *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979); *United States v. Morrison*, 535 F.2d 223, 224 (3rd Cir.), *cert. denied sub nom. Boscia v. United States*, 429 U.S. 824 (1976); *United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973); *United States v. Thomas*, 488 F.2d 334 (6th Cir. 1973).

54. 103 S.Ct. 1974 (1983).

not be disciplined by the court; the trial court could ask the Department of Justice or an equivalent state agency to initiate disciplinary proceedings against the prosecutor; or the court could identify publicly and chastise the prosecutor in its opinion.⁵⁵

The *Teague* court chose to discipline the prosecutor by naming the prosecutor in the opinion and declaring the prosecutor's actions foolish and dangerous.⁵⁶ This is the least imposing of the three disciplinary measures set out in *Hasting*,⁵⁷ and it is questionable how effective this method will be in discouraging prosecutorial overreaching. The first two options place a prosecutor's career in immediate jeopardy. Naming the prosecutor is embarrassing and may harm the prosecutor's career, but it attaches less immediate jeopardy to the prosecutor. Cases indicate that prosecutorial overreaching is recurrent in the courts,⁵⁸ despite instances of public chastisement of the prosecutor in order to effect discipline.⁵⁹ The *Teague* court did go further by condemning the prosecutor's actions as dangerous and foolish.⁶⁰ Hence, the Fourth Circuit cautioned prosecutors not to overreach when warning a defense witness about the penalties for perjured testimony.

In rejecting a per se rule prohibiting any contact between a prosecutor and an attorney for a witness,⁶¹ the *Teague* court implies that if the contact were between a prosecutor and a witness without counsel the result might be different. This implication is tenuous, however, because the facts of the case demonstrate that there also were direct contacts between the prosecutor and the witness.⁶² The court acknowledged this

55. *Id.* at 1979 n.5. *Hasting* involved a prosecutor's comment on the silence of the defendant and the failure of the defendant to rebut certain testimony. The Court found that the error was harmless beyond a reasonable doubt in light of the "overwhelming" record of evidence against the defendant. *Id.* at 1982.

56. *United States v. Teague*, 737 F.2d 378, 382 (4th Cir. 1984).

57. 103 S. Ct. 1974, 1979 n.5 (1983).

58. *See United States v. MacCloskey*, 682 F.2d 468, 475 (4th Cir. 1982); *United States v. Simmons*, 670 F.2d 365, 367 (D.C. Cir. 1982); *United States v. Hammond*, 598 F.2d 1008, 1010 (5th Cir. 1979); *United States v. Morrison*, 535 F.2d 223, 224 (3d Cir. 1976); *see also Berger v. United States*, 295 U.S. 78, 84-85 (1935); *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 662 (1946) (Frank, J., dissenting) ("If this court really meant business about such behavior as that of government counsel . . . , it would deprive him of the right to practice in this court and would recommend that he be removed from his office. . . .").

59. *See United States v. MacCloskey*, 682 F.2d 468, 475 (4th Cir. 1982); *United States v. Simmons*, 670 F.2d 365, 367 (D.C. Cir. 1982); *United States v. Hammond*, 598 F.2d 1008, 1010 (5th Cir. 1979); *United States v. Morrison*, 535 F.2d 223, 224 (3d Cir. 1976).

60. *United States v. Teague*, 737 F.2d 378, 382 (4th Cir. 1984), *cert. denied*, 105 S. Ct. 913 (1985).

61. *Id.* at 384.

62. There were at least two confrontations between the prosecutor and the witness. They met once in the hall before the trial resumed on the second day and again when the witness took the stand under cross examination. In addition, prior to *Teague's* trial the witness himself had been the target of an investigation. *Teague*, 737 F.2d at 380, 386 (Murnaghan, J., dissenting); *cf. J. WIGMORE, EVIDENCE IN*

problem through an analysis of other intimidation cases,⁶³ but limited the scope of the holding to the narrow, factual question of whether the witness testified for the defense.⁶⁴ A fortiori, the court was content to dispose of the issue of a due process violation based on the witness's testifying. In any event, the testimony the witness gave was not exculpatory as to count one, the count on which the conviction was obtained.⁶⁵

Teague requires the prosecutor to walk a fine line when dealing with defense witnesses. When interviewing a prospective witness, it is proper for the prosecutor to warn a witness against self-incrimination.⁶⁶ In addition, the prosecutor has a dual responsibility, not only to prosecute zealously, but "to do justice."⁶⁷ Thus, the prosecutor is faced with a dilemma. The prosecutor may warn against perjury, but runs the risk of prejudicing the defendant's case if the prosecutor is overzealous and intimidates the witness. The more aggressive and outrageous the conduct of the prosecutor, the more scrutiny the conduct will receive.⁶⁸ Hence, admonitions regarding perjury preferably are left to the court.⁶⁹

TRIALS AT COMMON LAW § 781 (Chadborn rev. 1970) (giving several illustrations where a witness is abused under examination, rendering his testimony suspect).

63. *Teague*, 737 F.2d at 382-84.

64. *Id.* at 382 n.1.

65. *Id.* at 384. *But see* *Webb v. Texas*, 409 U.S. 95 (1972) (although it was unlikely that the intimidated witness's testimony would have been exculpatory because the witness was an inmate at the time of the alleged crime and was not at the scene, the trial court's actions that prevented the witness from testifying for the defense were considered a violation of the defendant's fourteenth amendment right to due process of law).

66. *See supra* note 14 and accompanying text.

67. *See supra* note 13 and accompanying text.

68. *Compare Teague*, 737 F.2d at 380 (prosecutor advised attorney for witness that his client's pretrial diversion agreement would be revoked if the witness committed perjury) and *United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982) (prosecutor advised attorney for witness that if the witness incriminated herself on the stand, she would be reindicted), *with United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976) (Prosecutor's contact with the witness included several ex parte interviews, one of which was held under aegis of an invalid subpoena. In all contacts, the prosecutor advised of the dangers of testifying and that if the witness testified, her testimony would be used as evidence against her.), *cert. denied sub nom. Boscia v. United States*, 429 U.S. 824 (1976); *see also State v. Huffman*, 65 Or. App. 594, 672 P.2d 1351 (1983) (prosecutor's conduct must be outrageous before court will order a reversal, citing as an example *Campbell v. State*, 37 Md. App. 89, 376 A.2d 866 (1977) (as trial began, prosecutor notified the court that he was reopening a case against the defense witness on related charges; conviction reversed because prosecutor's actions impermissibly infringed on defendant's rights under the sixth and fourteenth amendments to the United States Constitution)).

69. *United States v. Teague*, 737 F.2d at 387 (4th Cir. 1984) (Murnaghan, J., dissenting); *accord United States v. Simmons*, 670 F.2d 365, 369 (D.C. Cir. 1982); *United States v. Morrison*, 535 F.2d 223, 227 (3d Cir. 1976); *see also State v. Koller*, 87 Wis. 2d 253, 274 N.W.2d 651 (1979) (where there had been no ex parte communication with the witness and the judge had given a single instruction on the witness's fifth amendment rights, there was no prejudice to the defendant when the witness refused to testify); *People v. Callington*, 123 Mich. App. 301, 304, 333 N.W.2d 260, 263 (1983) (if prosecutor feels that a warning against perjury is needed, he should so inform the court out of the presence of the witness, leaving the warning to the dis-

Any change in the demeanor of a witness may evidence intimidation.⁷⁰ It is true that witnesses are often nervous and frightened under cross examination; vigorous confrontation is a necessary part of the adversary system of jurisprudence. But when the witness's poor demeanor has been preceded by an openly aggressive extra-judicial stance by the prosecutor against that witness, and when the witness's testimony goes to the count on which the conviction is obtained, a change in the witness's demeanor should not be dismissed casually.⁷¹ Intimidation also can be shown by a change in the witness's testimony effected by the prosecutor's intimidating acts,⁷² or more commonly, by a refusal of the witness to testify after contact with the prosecutor.⁷³ Defense counsel must be sensitive to the issue of intimidation and must respond quickly.⁷⁴ In *Teague*, defense counsel was successful in having the intimidated witness describe his postintimidation mental state at trial under oath. The witness told the trial judge that he knew "the bind [he was] in testifying up here."⁷⁵ At oral argument, defense counsel described the witness's demeanor and delivery as "nervous and scared."⁷⁶ These notations in the record provided grounds for the argument that the prosecutor's actions had violated the defendant's due process rights.⁷⁷ In contrast, many reported cases show the defense counsel's failure to preserve the intimidation issue for appeal⁷⁸ by failing to have the witness take the stand and refuse to testify for the record.⁷⁹ The misconduct of the prosecutor, and its degree of

cretion of the court; conviction reversed because a perjury warning to the witness impermissibly infringed on defendant's rights under the sixth and fourteenth amendments to the United States Constitution.)

70. *United States v. Teague*, 737 F.2d 378, 384-87 (4th Cir. 1984) (Murnaghan, J., dissenting); see *supra* text accompanying note 46.
71. *Teague*, 737 F.2d at 387.
72. *Cf. Clark v. State*, 180 Ind. App. 472, 389 N.E.2d 712 (1979) (during recess, prosecutor spoke to defense witness to rectify inconsistent prior testimony; although witness subsequently changed his testimony, the court held there was no prejudice absent a showing of coercion on the record).
73. *Teague*, 737 F.2d at 382 n.1.
74. Defense counsel asked for a hearing on the day the alleged intimidation came to light. *Teague*, 737 F.2d at 380. The alleged intimidation had taken place that morning and the prior evening. *Id.*
75. *Id.* at 385-86 (Murnaghan, J., dissenting).
76. *Id.*
77. Compare *Teague*, 737 F.2d 378, 382-84 (witness implicitly held not to be intimidated because he testified for the defendant) with *United States v. Simmons*, 670 F.2d 365 (D.C. Cir. 1982) (per curiam) (defendant must show "substantial prejudice" on the record to obtain a reversal of conviction on grounds that the prosecutor deprived him of defense testimony by threatening a witness), *cert. denied*, 104 S. Ct. 121 (1983) and *United States v. Valdes*, 545 F.2d 957, 959 (5th Cir. 1977) (appeal grounded almost entirely on an affidavit that was not part of the formal record).
78. *Teague*, 737 F.2d at 384-88 (Murnaghan, J., dissenting) arguing that the facts on the record regarding intimidation, when considered on balance with the "less than overwhelming" case against the defendant, should be considered a prejudicial violation of due process of law).
79. See, e.g., *People v. McKiness*, 105 Ill. App. 3d 92, 433 N.E.2d 1146 (1982) (counsel did not call the allegedly intimidated witness to the stand, thereby failing to place the issue on the record).

impropriety shown clearly on the record, will be dispositive of whether the defendant's due process rights to a fair trial have been violated.⁸⁰

Dennis Patrick McGlone

80. *Teague*, 737 F.2d at 384; see *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982); see also *State v. Ivy*, 300 N.W.2d 310, 314 (Iowa 1981) ("It is not misconduct that gives the defendant a right to relief, it is the prejudice which results therefrom."). But see *United States v. Teague*, 737 F.2d 378, 384 (4th Cir. 1984) (Murnaghan, J., dissenting) (arguing that the record showed intimidation and interference warranting reversal); *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (1946) (Frank, J., dissenting) (urging that the prosecutor's outrageous conduct was cause for removal of prosecutor from office and for reversal of defendant's conviction); *People v. Daly*, 98 App. Div. 2d 803, 807-08, 470 N.Y.S.2d 165, 170 (1983) (Lazer, J., dissenting) (arguing in favor of a per se harmful error rule based on the sixth and fourteenth amendments to the United States Constitution whenever a defense witness is intimidated through judicial or prosecutorial misconduct).