



1990

## Criminal Procedure - Prosecutorial Misconduct - Per Se Reversal Rule Adopted Where Prosecutor Vouches for the Credibility of a Witness Based on Evidence Outside the Record

Isabel M. Albuquerque

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Criminal Law Commons](#)

---

### Recommended Citation

Isabel M. Albuquerque, *Criminal Procedure - Prosecutorial Misconduct - Per Se Reversal Rule Adopted Where Prosecutor Vouches for the Credibility of a Witness Based on Evidence Outside the Record*, 35 Vill. L. Rev. 783 (1990).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol35/iss3/12>

This Issues in the Third Circuit is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

1990]

CRIMINAL PROCEDURE—PROSECUTORIAL MISCONDUCT—*PER*  
SE REVERSAL RULE ADOPTED WHERE PROSECUTOR VOUCHES FOR  
THE CREDIBILITY OF A WITNESS BASED ON EVIDENCE OUTSIDE  
THE RECORD

*United States v. DiLoreto* (1989)

I. INTRODUCTION

Prosecutors often attempt to bolster the state's case by either suggesting that a criminal defendant is guilty or by vouching for the credibility of a government witness. Such statements by the prosecutor, during closing argument to the jury in a criminal trial when the statements are not based on the evidence adduced at trial, are proscribed both by the courts<sup>1</sup> and by the American Bar Association.<sup>2</sup> Prosecutors, however, continue to engage in this questionable practice.<sup>3</sup> In an at-

1. The courts react in a variety of ways to a prosecutor's misconduct. While courts uniformly agree that a prosecutor's statements suggesting a defendant's guilt or vouching for the credibility of a witness when the statements are not based on evidence adduced at trial are inappropriate and prohibited, very few appellate courts actually reverse a lower court decision solely on that basis. *See, e.g.*, *United States v. Young*, 470 U.S. 1, 18 (1985) (recognizing prosecutor's argument as error, but where no objection made by defendant, not plain error); *Berger v. United States*, 295 U.S. 78, 84 (1935) (prosecutor's improper suggestions held harmless error); *United States v. Dipasquale*, 740 F.2d 1282, 1296 (3d Cir. 1984) (applying reply doctrine, found error harmless), *cert. denied*, 469 U.S. 1228 (1985); *United States v. Harrison*, 716 F.2d 1050, 1051 (4th Cir. 1983) (conduct of prosecutor could have prejudiced trial, but judge neutralized prejudice with jury instruction), *cert. denied*, 466 U.S. 972 (1984); *see also*, *United States v. Swinehart*, 617 F.2d 336, 340 (3d Cir. 1980) (prosecutor improperly vouched for credibility of witness and suggested defendant's guilt, but prejudice neutralized by judge's charge and reversal not warranted); *United States v. Gallagher*, 576 F.2d 1028, 1041 (3d Cir. 1978) (prosecutor's vouching for veracity of government witnesses did not require reversal in view of strong evidence of guilt); *United States v. Somers*, 496 F.2d 723, 740 (3d Cir.) (limiting per se reversal to statements regarding defendant's guilt based on evidence not on the record), *cert. denied*, 419 U.S. 832 (1974); *United States v. LeFevre*, 483 F.2d 477, 479 (3d Cir. 1973) (statements referring to facts not in evidence not reversible error per se, but court obligated to consider entire record to determine prejudicial effect).

For further discussion of the problem of prosecutorial misconduct, see generally, B. GERSHMAN, *PROSECUTORIAL MISCONDUCT* § 10.5 (1989) (concise analysis of courts' response to improper conduct in closing arguments by prosecutors); J. LAWLESS, *PROSECUTORIAL MISCONDUCT* §§ 9.09, 9.22 (1985) (same); *see also* Annotation, *Propriety and Prejudicial Effect of Comments by Counsel Vouching for Credibility of Witness—Federal Cases*, 78 A.L.R. FED. 1, 23 (1986).

2. *See* STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft 1971) [hereinafter *PROSECUTION STANDARDS*]; *STANDARDS FOR CRIMINAL JUSTICE* (2d ed. Supp. 1982).

3. *United States v. Somers*, 496 F.2d 723, 736 (3d Cir.) ("We have faced this question [of prosecutorial misconduct] all too frequently in recent years."), *cert. denied*, 419 U.S. 832 (1974); *United States v. Falk*, 605 F.2d 1005, 1016 (7th

(783)

tempt to preclude this inappropriate prosecutorial behavior, courts utilize a variety of sanctions ranging from reprimanding the prosecutor to reversing a conviction on appeal.<sup>4</sup> Some courts have threatened the imposition of stronger sanctions if prosecutors continue to make inappropriate statements during closing arguments.<sup>5</sup>

A primary concern regarding the effect of these improper statements is that the jury may accord excessive weight to a prosecutor's remarks.<sup>6</sup> Undue deference to a prosecutor's statements may result because jury members often doubt their own judgment of the evidence. Consequently, instead of reaching their own conclusions based on the evidence adduced at trial, jury members may defer to the prosecutor's

---

Cir. 1979) (Swygert, J., dissenting) ("Unfortunately flagrant abuses of professional standards . . . seem to be occurring more frequently in this circuit."), *cert. denied*, 445 U.S. 903 (1980); *see also*, *United States v. Agee*, 597 F.2d 350, 371 (3d Cir.) (en banc) (Gibbons, J., dissenting) ("Our tongue clicking over improper argument by government counsel has been notoriously ineffective in preventing it, as the persistent need to resort to gentle chastisement amply demonstrates."), *cert. denied*, 442 U.S. 944 (1979).

4. *See, e.g.*, B. GERSHMAN, *supra* note 1, § 13. Gershman provides a discussion of the various sanctions employed by the courts in dealing with prosecutorial misconduct. *Id.* § 13-1. "Judicial sanctions include appellate reversals, contempt citations, and other judicial techniques to enforce discipline, namely, suspension from practice, imposition of fines, and rebukes published in appellate opinions." *Id.* § 13-2. Appellate reversal in most jurisdictions is disfavored as a method of dealing with prosecutorial misconduct because its deterrent effect on the prosecutor's behavior may not be sufficient to warrant the waste of judicial time and the possible harm to society if a guilty defendant is released. *Id.* §§ 13-2 to -3 (citing *United States v. Modica*, 663 F.2d 1173, 1182-86 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982)).

One reason why prosecutorial misconduct is perceived as especially improper is because of the prosecutor's dual responsibility to be an advocate for the government, as well as to see that the case is justly tried. *See United States v. Berger*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.").

5. *See, e.g.*, *United States v. Farnkoff*, 535 F.2d 661, 668 n.17 (1st Cir. 1976) (reversal may occur if prosecutorial abuse continues); *United States v. Somers*, 496 F.2d 723, 742 (3d Cir.) (warning of more drastic and prophylactic measures if abuses continue), *cert. denied*, 419 U.S. 832 (1974).

6. The Third Circuit expressed its concern regarding the effect of these improper comments on the jury in *United States v. Schartner*. 426 F.2d 470 (3d Cir. 1970). In *Schartner*, the prosecutor, in his closing argument, informed the jury that he had a duty to protect the innocent and that, in all sincerity, if they let the defendant go, the guilty would escape. *Id.* at 478. The *Schartner* court deemed these improper prosecutorial remarks as inviting the jury to rely on the government attorney's experience where such general experience was not based on the evidence presented in the case. *Id.* Therefore, the court found that remarks which were not based on the evidence must not be allowed to influence the jury's decision. *Id.* *See Berger v. United States*, 295 U.S. 78, 88 (1935) (improper suggestions and assertions of personal knowledge likely to carry excessive weight against accused). For a further discussion of *Berger*, see *infra* note 13; *see also* PROSECUTION STANDARDS, *supra* note 2, §§ 3.5-5.8 & commentary at 88 (jury may afford prosecutor's argument special weight due to prestige of office and presumed fact-finding expertise).

superior knowledge and experience in criminal cases.<sup>7</sup> A jury's deference to the prosecutor shifts the advantage to the prosecution and may prevent the defendant from receiving a fair trial.

In *United States v. DiLoreto*,<sup>8</sup> the United States Court of Appeals for the Third Circuit was presented with the issue of whether statements made by a prosecutor in his closing argument were improper and whether the resulting prejudice to the defendant warranted a new trial.<sup>9</sup> The *DiLoreto* court adopted a strict *per se* rule of reversal.<sup>10</sup> The court held that when a prosecutor improperly vouches for the credibility of a witness, and the statements are based on facts not in the record, reversal is required *per se*.<sup>11</sup> In previous decisions involving such misconduct by prosecutors, the Third Circuit had required that the defendant show unfair prejudice from the prosecutor's statements before reversal of an otherwise valid conviction was warranted.<sup>12</sup> Therefore, the court's deci-

7. For example, in *United States v. Young*, the Supreme Court stated that "[s]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant . . . and the prosecutor's opinion . . . may induce the jury to trust the government's judgment rather than its own view of the evidence." 470 U.S. 1, 18 (1985).

8. 888 F.2d 996 (3d Cir. 1989), *reh'g denied*, 888 F.2d 996, 1000 (3d Cir. 1990).

9. *DiLoreto*, 888 F.2d at 997. The prosecutor in his closing remarks stated: "[W]e don't take liars. We don't put liars on the stand." *Id.* at 998. For a further discussion of the facts in *DiLoreto*, see *infra* notes 15-28 and accompanying text.

10. *DiLoreto*, 888 F.2d at 1000.

11. *Id.*

12. See *United States v. LeFevre*, 483 F.2d 477 (3d Cir. 1973). In *LeFevre*, the defendant was convicted of seven counts of wilfully preparing false and fraudulent income tax returns. *Id.* at 478. During his closing argument the prosecutor repeatedly expressed his personal opinion concerning the credibility of the defendant. *Id.* Without expressly stating what the prosecutor's remarks had been, the Third Circuit in *LeFevre* adopted Standard 5.9 of the ABA Prosecution Standards to dispel any notions that such inappropriate remarks by prosecutors were acceptable. *Id.* The court noted:

It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common knowledge based on ordinary human experience or matters of which the court may take judicial notice.

*Id.* at 479 (quoting STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (Approved Draft 1971) § 5.9). The *LeFevre* court then examined the prosecutor's statements to determine if they fell within the two exceptions where the prosecutor can argue outside the record: the common public knowledge or judicial notice exceptions. *Id.* at 479. The court found that the remarks in this case did not fall within either exception. *Id.* The Third Circuit's inquiry next turned to whether the comments were of such a nature that they warranted reversal of the defendant's conviction. *Id.* at 479-80. The court did not adopt a *per se* rule, but instead examined the whole record to determine whether the statements had unduly prejudiced the defendant's case so that reversal was the only appropriate remedy to effect justice. *Id.* at 479. On examin-

sion in *DiLoreto* is a deviation from prior Third Circuit precedent. The *DiLoreto* court's holding of a *per se* rule not only deviates from its own precedent, but arguably runs contrary to the United States Supreme Court's position that convictions should be reversed only where the defendant establishes that unfair prejudice resulted from the trial court's error in allowing improper prosecutorial statements.<sup>13</sup> Where no unfair

---

ing the whole record, however, the court decided that the prosecutor's deviations were not sufficiently egregious to justify a new trial. *Id.* at 480.

The requirement that there be a showing of unfair prejudice was also noted by the court in *United States v. Somers*. 496 F.2d 723 (3d Cir. 1974). The *Somers* court stated that its primary concern was the fairness of the procedure followed at trial, and therefore, the court would reverse "upon demonstrations of prosecutorial misconduct only in those situations in which prejudice inures to the defendant from the challenged improprieties." *Id.* at 737 (citing *Frazier v. Cupp*, 394 U.S. 731, 739 (1969)).

13. In *United States v. Young*, the Supreme Court exhibited its reluctance to use reversal as a method of sanctioning prosecutors for improper conduct. 470 U.S. 1 (1985). The Court in *Young* maintained that "[i]nappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding." *Id.* at 11-12. The Court cited *United States v. Lawn*, as demonstrating that a prosecutor's "remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error." *Young*, 470 U.S. at 12 (citing *United States v. Lawn*, 355 U.S. 339, 342 (1958)). The Court affirmed that federal courts are required to examine the record in its entirety to determine whether prejudice resulted from the prosecutor's comments before reversing the trial court's decision.

Similarly, in *United States v. Hasting*, the Court asserted that appellate courts do not have the privilege, except in very rare cases, to reverse decisions where the challenged error was harmless. 461 U.S. 499, 528 (1983) (Brennan, J., dissenting). The Court then discussed the limits of the judiciary's supervisory powers. *Id.* at 505-07. "The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights . . . ; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury . . . ; and finally, as a remedy designed to deter illegal conduct. . . ." *Id.* at 505 (citations omitted). The *Hasting* Court stated that "[t]he goals that are implicated by supervisory powers are not, however, significant in the context of this case if, as the Court of Appeals plainly implied, the errors alleged are harmless." *Id.* at 506. The Court specifically addressed the possibility of using reversal as a form of sanction against prosecutors stating that "deterrence is an inappropriate basis for reversal. . . ." *Id.* The Court asserted that reversals were to be ordered only after the interests of the courts and the defendant had been balanced. *Id.* at 507. In the *Hasting* case, the Court inferred that the court of appeals had focused "on its concern that the prosecutors within its jurisdiction were indifferent to the frequent admonitions of the court." *Id.*; see *Kotteakos v. United States*, 328 U.S. 750 (1946). In *Kotteakos*, which did not involve prosecutorial misconduct, the Court discussed the harmless error guidelines, as codified in 28 U.S.C. § 391, that are to be applied by federal courts and noted:

[To] weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum. In criminal cases that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is

prejudice has resulted, the error is said to be harmless and reversal of the outcome, in an otherwise fair proceeding, is not required.<sup>14</sup>

## II. DISCUSSION

The five defendants in *DiLoreto* were charged with conspiracy, possession of cocaine with intent to deliver, possession of marijuana with intent to distribute and other related drug offenses.<sup>15</sup> The five cases were consolidated for trial and tried to a jury which convicted all five

rather what effect the error had or reasonably may be taken to have had upon the jury's decision.

*Id.* at 764 (citations omitted).

The Court's approach to reversal where the procedure followed at trial has not been perfect, but the defendant has not been prejudiced by that imperfection, is demonstrated by *Berger v. United States*, 295 U.S. 78 (1935). In *Berger*, the Supreme Court settled a conflict that had existed between the circuit courts concerning how variations between the charges as stated in an indictment for conspiracy and what actually was proved at trial by the evidence were to be treated. *Id.* at 82. Some circuits had held that a variance between the indictment and the evidence required reversal where the indictment charged one conspiracy and the evidence showed that actually two conspiracies existed, while other circuits had suggested that the variance was not material and reversal was not necessary. *Id.* at 81. The Court disliked the approach favoring reversal because it ignored the materiality of the evidence. *Id.* The Supreme Court qualified that approach to require reversal only where the variance had substantially injured the defendant. *Id.* Where prejudice did not occur, the error was to be regarded as harmless. *Id.* at 82. In the facts of *Berger*, the indictment charged conspiracy involving several persons and the proof had established that only some of those persons had been involved in the conspiracy. *Id.* at 81-83. The variance was found to be harmless because in this case it was not prejudicial and hence not fatal. *Id.* at 83-84.

The same analysis applies in the case of prosecutorial misconduct. See FED. R. CRIM. P. 52 (addressing errors made in the trial procedure). For further discussion of Rule 52, see *infra* note 14.

14. FED. R. CRIM. P. 52(a). The rule provides the following: "Any error, defect, irregularity or variance which does not effect substantial rights shall be disregarded." *Id.* This rule is to be applied by all federal courts, but is primarily relied upon by appellate courts in determining whether an error made at trial warrants reversal.

The harmless error rule was adopted in an effort to counter appellate reversals of convictions for the mere failure to follow legal technicalities which had not resulted in prejudice to the defendant. The harmless error rule is based on the premise that although defendants are entitled to a fair trial, they are not entitled to a perfect one. See *Brown v. United States*, 411 U.S. 223, 231-32 (1973) (defendant entitled to a fair trial, not a perfect one) (quoting *Lutwak v. United States*, 344 U.S. 604, 619 (1953)); *United States v. Leftwich*, 461 F.2d 586, 590 (3d Cir.) (trials are rarely, if ever, perfect and improprieties of argument by counsel do not call for a new trial unless prejudice inures to defendant), *cert. denied*, 409 U.S. 915 (1972); *Leonard v. United States*, 386 F.2d 423, 425 (5th Cir. 1967) (Constitution requires fair trial but not necessarily error-free trial).

15. *DiLoreto*, 888 F.2d at 997. A grand jury returned a 34 count indictment against the five defendants. *Id.* The government alleged that the defendants were part of a continuing enterprise and that one defendant, Patrick DiLoreto, was the leader of the organization responsible for locating and purchasing the drugs. *Id.*

defendants.<sup>16</sup>

At trial, the defense attorneys criticized the government's witnesses in both their opening and closing statements.<sup>17</sup> The defense emphasized that the witnesses were admitted accomplices of the defendants and had made favorable plea agreements with the government in return for their testimony implicating the defendants.<sup>18</sup> In their closing argument, defense counsel portrayed the government's witnesses as "corrupt and polluted" and as "biased and incredible."<sup>19</sup>

The government prosecutor attempted to refute these negative characterizations in his rebuttal to the defense's closing argument.<sup>20</sup> The prosecutor admitted to the jury that the witnesses were "terrible people."<sup>21</sup> He also pointed out, however, that the witnesses' plea agreements obligated them to tell the truth, and that their failure to testify truthfully would result in a breach of the plea agreement nullifying the bargain struck between the defendants and the government.<sup>22</sup>

Finally, the prosecutor, in his rebuttal, stated that "[w]e [the government] don't take liars. We don't put liars on the stand. We don't do that."<sup>23</sup> Defense counsel objected to these statements as improper vouching for the credibility of a witness.<sup>24</sup> The defense then moved for a mistrial on the ground that the prosecutor's statements "constituted improper prosecutorial vouching depriving [the defendants] of a fair trial."<sup>25</sup> The defense attorneys also sought a curative instruction to the jury explain-

16. *Id.*

17. *Id.* at 998. None of the defendants testified at the trial. *Id.* at 997-98. Instead, the defense "relied on cross-examination to assault the government's witnesses." *Id.*

18. *Id.* at 998. The defense stated that it would "prove that every witness that testif[ie]d in the case would not be testifying as a witness . . . but for the fact that they have a deal or some type of preferential arrangement with the government [that] allows them to walk out of a penitentiary . . . ." *Id.*

19. *Id.* The defense claimed in its closing argument that the witnesses were individuals "who would be motivated by their own benefits, by their own interests, by their own motives." *Id.* The defense attorneys asserted that the testimony of the government witnesses was "the lowest form of testimony admissible in a court of law." *Id.*

20. *Id.*

21. *Id.* The prosecutor in *DiLoreto* told the jury that "[t]hese witnesses are all terrible people. They are all drug users. They are all drug dealers." *Id.*

22. *Id.* The prosecutor emphasized that the only individuals who would have the background to be valuable witnesses for the prosecution in drug related cases would be drug dealers: "Who else do you get to come into court . . . and tell you about where they got drugs but drug dealers. . . ? You want to learn about drugs, you go to a drug dealer." *Id.*

23. *Id.* (emphasis in original).

24. *Id.*

25. *Id.* In *DiLoreto*, the defense made a timely objection to the perceived error by the prosecutor. *Id.* Absent a timely objection, a reviewing court may only reverse a decision where there has been plain error, pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 52(b). Plain error is present when the statements by the prosecutor were such that the fundamen-

ing the impropriety of the prosecutor's statements.<sup>26</sup> The district court judge denied both motions.<sup>27</sup> The defendants appealed the district court's decision to the Third Circuit, alleging that the prosecutor's improper vouching constituted reversible error.<sup>28</sup>

The Third Circuit began its analysis by recognizing that a prosecutor may refer to the conditions in a plea agreement requiring that a witness testify truthfully as a way of rehabilitating a witness's credibility.<sup>29</sup> The court reasoned, however, that when a prosecutor vouches for the truthfulness of government witnesses he has exceeded the limits of proper rehabilitation.<sup>30</sup> The *DiLoreto* court thus determined that because the prosecutor vouched for the witnesses by asserting that they were not liars, the prosecutor's remarks had exceeded the limits of proper rehabilitation.<sup>31</sup>

The *DiLoreto* court cited to the United States Supreme Court's statements in *United States v. Young*<sup>32</sup> to support the prohibition against

---

tal fairness of the trial was undermined, resulting in a miscarriage of justice. *See id.*

Where a timely objection has been made, a court can, pursuant to Rule 52(a) of the Federal Rules of Criminal Procedure, reverse a lower court decision if the prosecutor's misconduct constituted prejudicial error. *See* FED. R. CRIM. P. 52(a). In *DiLoreto*, the defense did make a timely objection and thus the court was required to consider Rule 52(a) before reversing the district court's decision. *See id.* For a discussion of the harmless error doctrine, see *supra* notes 13-14.

26. *DiLoreto*, 888 F.2d at 998.

27. *Id.*

28. *Id.* The Third Circuit stated that the appropriate standard for reviewing the district court's denial of a mistrial was whether the court abused its discretion. *Id.* (citing *United States v. Wright-Barker*, 784 F.2d 161, 175 (3d Cir. 1986)).

29. *Id.* (citing *United States v. Oxman*, 740 F.2d 1298, 1303 (3d Cir. 1984), *vacated sub nom.*, *United States v. Pfaumer*, 473 U.S. 922 (1985)). The defendants in *United States v. Oxman* had been convicted and sentenced for mail fraud. 740 F.2d 1298, 1300 (3d Cir. 1984), *vacated sub nom.*, *United States v. Pfaumer*, 473 U.S. 922 (1985). The defendants contended that a new trial was warranted because the prosecuting attorney had vouched for the truthfulness of a government witness. *Id.* at 1302. The Third Circuit concluded that because the government could reasonably anticipate that the defense would try to use the beneficial features of the agreement for impeachment purposes on cross-examination, the prosecutor's reference to the condition requiring truthful testimony was proper rehabilitation. *Id.* at 1302-03. The court cited to a number of decisions from other circuits which held that reference to the condition of a plea agreement requiring truthful testimony was proper even where the witness's credibility was not at issue. *Id.* at 1303.

30. *DiLoreto*, 888 F.2d at 998.

31. *Id.* (citing *United States v. Beaty*, 722 F.2d 1090, 1097 (3d Cir. 1983) (prosecutor's comment found to be improper vouching)). *See* *United States v. Swinehart*, 617 F.2d 336, 339 (3d Cir. 1980) (court reprimanded prosecutor who vouched for witness's credibility). The court in *Swinehart* also noted that a prosecutor may not "express his personal opinion concerning the guilt of the defendant." *Swinehart*, 617 F.2d at 339.

32. 470 U.S. 1 (1985).



prosecutorial vouching for the credibility of a witness:

Such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.<sup>33</sup>

The *DiLoreto* court recognized, however, that in prior cases involving improper prosecutorial statements, the Third Circuit had drawn a distinction between the prosecutor's expressions of personal opinion based on evidence introduced at trial, and expressions of personal opinion based on information outside the record.<sup>34</sup> When a prosecutor has engaged in improper vouching, but the remarks were premised on evidence introduced at trial, the Third Circuit has not required automatic reversal, but has instead required the defendant to demonstrate that prejudice resulted from the prosecutor's statements.<sup>35</sup> Alternatively, where the prosecutor's improper statements were premised on information outside the record, the Third Circuit had previously required *per se* reversal only when the prosecutor's statements touched upon the guilt of the defendant and not when the statements constituted vouching for the credibility of a government witness.<sup>36</sup> In *United States v. Schartner*,<sup>37</sup> the defendant objected to certain statements made by the prosecutor in

33. *Id.* at 18-19 (citing *Berger v. United States*, 295 U.S. 78, 88-89 (1935)).

34. *DiLoreto*, 888 F.2d at 999; see *United States v. Beaty*, 722 F.2d 1090, 1097 (3d Cir. 1983) ("[T]his Circuit has long distinguished between expressions of personal opinion based on evidence and those based on facts not in evidence."); *United States v. Gallagher*, 576 F.2d 1028, 1041-42 (3d Cir. 1978) (case law differentiates between expressions of personal opinion based on facts adduced at trial and those based on evidence outside record).

35. *DiLoreto*, 888 F.2d at 1000 (citing *United States v. Beaty*, 722 F.2d 1090 (3d Cir. 1983); *United States v. Somers*, 496 F.2d 723 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974)). The Third Circuit, in *Somers*, pointed to considerations of judicial administration as justification for discouraging the reversal of decisions in every case where adversarial improprieties existed. *Somers*, 496 F.2d at 737. Instead, the *Somers* court asserted that decisions were to be reversed "upon demonstrations of prosecutorial misconduct only in those situations in which prejudice inures to the defendant from the challenged improprieties." *Id.*

36. *DiLoreto*, 888 F.2d at 999.

37. 426 F.2d 470 (3d Cir. 1970). In *Schartner*, the prosecutor in his closing argument stated to the jury "that if you do not convict the defendant, the guilty will escape." *Id.* at 477 (emphasis in original). The court reiterated its disapproval of such improper comments, but stated that where the comments, fairly construed, referred to a belief based on the evidence and "not to an opinion formed from facts not in evidence," the expression was not reversible error. *Id.* The court held in *Schartner* that the prosecutor's comment implied a personal belief in the defendant's guilt and that such comments also directly invited the jury to rely on the prosecutor's sincerity and experience in prosecuting criminals. *Id.* at 478.

closing argument in which the prosecutor expressed his sincere belief that if the jury did not convict the defendant, the guilty would escape.<sup>38</sup> The court noted that the prosecutor's general experience and his moral integrity had nothing to do with the evidence in the case and held that reversal *per se* was required where the prosecutor expressed an opinion concerning the guilt of a defendant, based on evidence not introduced at trial.<sup>39</sup>

The *DiLoreto* court, citing numerous Third Circuit decisions, recognized that this *per se* rule had previously been "limited strictly to those extraneous comments that *impacted upon the guilt of the defendant*."<sup>40</sup> For example, the *DiLoreto* court noted *United States v. Somers*,<sup>41</sup> a 1974 Third Circuit decision where the court had previously declined to extend the *per se* reversal rule to include statements that did not constitute an opinion as to the defendant's guilt.<sup>42</sup> The Third Circuit had expressed this same limitation in *United States v. LeFevre*.<sup>43</sup> In *LeFevre*, the court refused to extend the *per se* rule to encompass prosecutorial statements that referred to facts not adduced at trial which did not concern the defendant's guilt.<sup>44</sup> According to the *LeFevre* court, improper statements (such as vouching for the credibility of a witness) that did not improperly suggest the defendant's guilt were not sufficient to require reversal *per se*.<sup>45</sup>

The *DiLoreto* court concluded, nevertheless, that although the *per se* reversal rule had never formally been extended by the Third Circuit to include a prosecutor's improper statements vouching for the credibility of a witness, the extension of the rule was "clearly evidenced in *United States v. Swinehart*."<sup>46</sup> The prosecutor in *Swinehart* had expressed a personal opinion regarding the defendant's guilt.<sup>47</sup> The prosecutor had also vouched for the veracity of one of the government's witnesses, a handwriting expert, saying that "[h]e was an honest witness."<sup>48</sup> The *Swinehart* court acknowledged that the prosecutor's statements were improper under Third Circuit precedent and the Code of Professional Re-

38. *Id.* at 477.

39. *Id.*

40. *DiLoreto*, 888 F.2d at 999 (emphasis in original).

41. 496 F.2d 723 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974).

42. *Id.* at 740.

43. 483 F.2d 477 (3d Cir. 1973). For further discussion of *LeFevre*, see *supra* note 12.

44. *LeFevre*, 483 F.2d at 479.

45. *Id.*

46. *DiLoreto*, 888 F.2d at 999 (citing *United States v. Swinehart*, 617 F.2d 336 (3d Cir. 1980)).

47. *United States v. Swinehart*, 617 F.2d 336, 338 n.2 (3d Cir. 1980). The prosecutor stated: "[W]ho but a guilty person would sign the name of another person . . . . Innocent persons do not attempt to cash checks on accounts in which the only deposits . . . were stolen U.S. Savings Bonds." *Id.*

48. *Id.* at n.3.

sponsibility of the Pennsylvania Supreme Court.<sup>49</sup> The court found, however, that the improper prosecutorial comments, including the prosecutor's vouching, had been limited to the evidence introduced at trial and thus did not constitute reversible error *per se*.<sup>50</sup> In dicta, the *Swinehart* court drew a distinction between "prosecutorial remarks regarding the defendant's guilt or a witness's credibility that are based on the evidence and those that are based on information outside the record."<sup>51</sup> The *DiLoreto* court relied on this dicta to conclude that statements concerning a witness's credibility could be subject to *per se* reversal if the statements were based on evidence not introduced at trial.<sup>52</sup>

In *DiLoreto*, the Third Circuit relied on the *Swinehart* dicta and applied this principle of *per se* reversal to the statements at issue.<sup>53</sup> The government had argued, in *DiLoreto*, that the prosecutor's statements were merely intended to emphasize the condition in the plea agreements that the witnesses testify truthfully.<sup>54</sup> The *DiLoreto* court did not accept this characterization of the remarks, but instead determined that "[t]he remarks [were] better understood as meaning that the government, as a matter of policy in the prosecution of its cases, [did] not use liars as witnesses."<sup>55</sup> Moreover, the court concluded that no evidence had been admitted that supported the government's assertions that the government did not place liars on the stand.<sup>56</sup> The court concluded, therefore, that the statements made by the prosecutor must have been based on information outside the record.<sup>57</sup> Accordingly, *per se* reversal was required under *Swinehart*.

Even after finding that the statements required *per se* reversal, the court went on to analyze, in dicta, the potential impact of the prosecutor's statements upon the jury. The *DiLoreto* court stated that the prosecutor's remarks could reasonably have persuaded the jury to believe that

49. Ethical Canon 7-24 of the Code provides in pertinent part:  
The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant or as to the guilt or innocence of an accused is not proper subject for argument to the trier of fact.

*Id.* at n.7 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-24 (1980)).

50. *Swinehart*, 617 F.2d at 339. The defense attorney in that case did not object to the remarks, nor did he ask for a curative instruction. *Id.*

51. *Id.* (emphasis added).

52. *DiLoreto*, 888 F.2d at 999.

53. *Id.* at 1000.

54. *Id.* at 999.

55. *Id.* The court noted, however, that "[n]o explanation was given . . . of how the government ascertains the honesty or veracity of its witnesses." *Id.*

56. *Id.* The court stated that it had "found nothing in the record upon which the prosecutor could have grounded his statement." *Id.*

57. *Id.* The court was concerned that "the defendants were not confronted with this extraneous evidence and afforded cross-examination, nor was the jury given an opportunity to engage in its own evaluation." *Id.*

the government's witnesses were being truthful.<sup>58</sup> As a result, the court found that the "assertions may have improperly influenced the jury and contributed substantially to its verdicts."<sup>59</sup> In light of the court's finding that the prosecutor's remarks were based on evidence outside the record, it is unclear why the court took the time to examine the statement's potential impact on the jury.

The court concluded that because the prosecutor's statements were based on facts outside the record, *per se* reversible error had resulted.<sup>60</sup> Accordingly, the Third Circuit reversed the district court's denial of the defendant's motion for a mistrial as an abuse of discretion.<sup>61</sup>

### III. ANALYSIS

*DiLoreto* provides a bright-line rule in the Third Circuit for deciding whether reversal is required when a prosecutor improperly vouches for the credibility of a witness based on evidence outside the record. After *DiLoreto*, courts will no longer be required to determine whether improper statements by a prosecutor unfairly prejudiced the defendant at all.<sup>62</sup> The court's sole task, henceforth, will be to determine whether the prosecutor's statement: 1) vouched for the credibility of the witness and 2) was based on evidence outside the record. If the court concludes that the prosecutor did vouch for the witness using evidence outside the record, then under *DiLoreto* the court should apply the *per se* reversal rule and reverse the conviction.

The Third Circuit's prior reluctance to expand the *per se* reversal rule conformed to the United States Supreme Court's unwillingness to

---

58. *Id.* at 999-1000. For a discussion of the Third Circuit's concern regarding the possibility of the jury deferring to the prosecutor's perceived credibility, see *supra* note 6.

59. *DiLoreto*, 888 F.2d at 1000. The *DiLoreto* court cited *United States v. Gallagher*, as an example of a case where the court's concern as to the jury being improperly influenced led a circuit court of appeals to prohibit such a prosecutorial comment in closing arguments. *Id.* (citing *United States v. Gallagher*, 576 F.2d 1028 (3d Cir. 1978)).

While the *DiLoreto* court cited to *Gallagher*, and the court in *Gallagher* did in fact characterize such conduct as being prohibited, the Third Circuit in *Gallagher* did not treat the prosecutor's misconduct as a basis for reversal. *Gallagher*, 576 F.2d at 1042-43. After quoting ABA Standards, *The Prosecution Function* § 5.8(b), as prohibiting prosecutors from basing their arguments on their own personal opinion regarding the guilt or credibility of a defendant, the *Gallagher* court held that, because there were strong indicia of guilt, the prosecutor's conduct in this case was not grounds for reversal. *Id.* at 1043.

60. *DiLoreto*, 888 F.2d at 1000.

61. *Id.*

62. *See id.* Once the Third Circuit decides that the prosecutor improperly vouched for the credibility of the witness, based on information not adduced at trial, the analysis is complete. The *per se* rule applies, and the court need not determine whether the defendant was actually prejudiced by the prosecutor's improper comment, but rather assumes that prejudice is inherent in that type of comment.

reverse convictions in the absence of unfair prejudice.<sup>63</sup> In *United States v. Young*,<sup>64</sup> a defense attorney had attacked the prosecutor's integrity and stated that the prosecutor did not believe in the government's case.<sup>65</sup> The prosecutor, in rebuttal to the defense attorney's statements, stated in his closing argument that the defendant was guilty and that the jury should "do its job."<sup>66</sup> The *Young* Court, in reviewing the prosecutor's statements, concluded that, although improper when viewed in context of the entire record, the statements did not so undermine the fairness of the trial so as to require reversal.<sup>67</sup> In *Young*, the Supreme Court stated that "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial."<sup>68</sup>

*Young* also evidenced the Supreme Court's view that when a prosecutor's statements exceeded the proper scope of rehabilitation, and the defense counsel raised a timely objection to those remarks, "a reviewing court could reverse an otherwise proper conviction only after concluding that the error was not harmless."<sup>69</sup> Under the *DiLoreto per se* reversal rule, the court is not required to apply a harmless error analysis; this means that the court should not examine whether the error was so insignificant in relation to the whole record that it did not unfairly prejudice

63. For a discussion of the Supreme Court's position on *per se* reversals, see *supra* notes 13-14, and *infra* notes 68-69 and accompanying text.

64. 470 U.S. 1 (1985).

65. *Id.* at 4-5.

66. *Id.* at 5-6.

67. *Id.* at 20.

68. *Id.* at 11. The Court, following this statement, discussed the "invited response doctrine." The *Young* Court suggested that the prosecutor's comments were to be evaluated in relation to the defense's behavior during the trial. *Id.* (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 242 (1940); *Crumpton v. United States*, 138 U.S. 361, 364 (1891)). When the prosecutor responds in his closing argument to attacks by the defense counsel, the prosecutor is deemed to have made an "invited response." The invited response doctrine has been applied by various courts to deny reversal. See GERSHMAN, *supra* note 4, § 13.2(d). Gershman states that the doctrine "permits retaliatory prosecutorial responses in order to equalize the positions of both trial advocates and remedy unethical defense conduct." *Id.* (citing *United States v. Tasto*, 586 F.2d 1068, 1069-70 (5th Cir. 1978), *cert. denied*, 440 U.S. 928 (1979); *Reynolds v. State*, 505 S.W.2d 265, 266 (Tex. Crim. App. 1974)).

The invited response doctrine had been used by the Third Circuit in prior decisions when evaluating whether the prosecutor's statements warranted reversal of a district court decision. See *United States v. Dipasquale*, 740 F.2d 1282, 1296 (3d Cir. 1984) (applying the invited reply doctrine, error found harmless), *cert. denied*, 469 U.S. 1228 (1985).

69. *Young*, 470 U.S. at 13 n.10 (citing *United States v. Hasting*, 461 U.S. 499 (1983)). The harmless error rule was instituted by the judicial system in an attempt to prevent courts from granting mistrials or reversing trial court decisions absent prejudice inuring to the defendant. See *supra* notes 13 & 14.

the defendant's case.<sup>70</sup> *DiLoreto's per se* reversal rule, in contrast, abandons the harmless error rule when considering statements vouching for the creditability of a witness made by the prosecutor that are based on evidence outside the record. Only in *obiter dictum* did the *DiLoreto* court analyze the effect of a prosecutor's statements on the jury.<sup>71</sup> The Third Circuit concluded that "the assertions may have improperly influenced the jury and contributed substantially to its verdicts. These concerns have previously occasioned our prohibition of this kind of prosecutorial comment."<sup>72</sup> The court's analysis, in essence, demonstrates that the error was not harmless and, therefore, that reversal of the decision may have been warranted on the grounds that the prosecutor's comments constituted prejudicial error. Instead, the court chose to adopt a *per se* rule that abandons the harmless error analysis preferred by the United States Supreme Court.

The holding in *DiLoreto* has some notable practical consequences for practitioners in the Third Circuit. Foremost, the application of a *per se* rule of reversal will lessen the criminal defendant's burden on appeal. The *DiLoreto* holding liberates defendants from having to establish prejudice from a prosecutor's statement.<sup>73</sup> The defendant need only establish that the prosecutor vouched for the credibility of the witness, and that the statements were based on evidence outside the record.<sup>74</sup> *DiLoreto* also places prosecutors in a very precarious position. Prosecutors will need to be more cautious in summation because an inadvertent statement made in response to a defense attorney's prior remarks could ultimately result in reversal.<sup>75</sup>

A statement may be deemed to be proper rehabilitation in a specific fact situation and, yet, in another, may be deemed as improper vouching for the credibility of a witness. For example, in *United States v. Turley*,<sup>76</sup> a case decided shortly after *DiLoreto*, the Third Circuit addressed the issue of whether a prosecutor had improperly vouched for the credibility of a witness.<sup>77</sup> Turley had objected to the prosecutor's statement that the government knows when a witness is telling the truth by doing a thor-

70. For a discussion of the harmless error rule, see *supra* notes 13 & 14.

71. *DiLoreto*, 888 F.2d at 1000.

72. *Id.*

73. For a further discussion of the impact of the *DiLoreto* holding, see *supra* notes 62-70 and accompanying text.

74. *DiLoreto*, 888 F.2d at 999. The Third Circuit, however, continues to place the burden on the defendant to demonstrate prejudice with respect to statements that are based on evidence adduced at trial. *Id.* at n.2.

75. See *United States v. Homer*, 545 F.2d 864, 868 (3d Cir. 1976) (citing *United States v. Leftwich*, 461 F.2d 586, 590 (3d Cir.), *cert. denied*, 409 U.S. 915 (1972)), *cert. denied*, 431 U.S. 954 (1977). In *Homer*, the court pointed to the nature of opening and closing arguments in an adversary proceeding as leading to verbal indiscretion, and that, therefore, reversal is warranted only where the remarks are obviously prejudicial. *Id.* at 868.

76. 891 F.2d 57 (3d Cir. 1989).

77. *Id.* at 62.

ough investigation, so “ ‘when they lie to you, you know when they’re lying to you.’ ”<sup>78</sup> The district court overruled the defense attorney’s objection on the ground that the statement was “a fair response to a defense statement.”<sup>79</sup> The district court found that the prosecutor’s remarks were designed only to inform the jury “of evidence already contained in the record that all plea agreements by these witnesses required them to provide truthful testimony.”<sup>80</sup> The court chose not to interpret the statement as expressing the prosecutor’s personal belief, but instead found it “fair rebuttal of the defense’s allegations of perjured testimony by plea bargained witnesses supported by the record.”<sup>81</sup>

In *DiLoreto*, the government also argued that the prosecutor’s comments were intended only to emphasize the condition of the plea agreements that the witnesses testify truthfully.<sup>82</sup> In *DiLoreto*, however, the court characterized the prosecutor’s statement as an assertion that the government had a policy of not putting liars on the stand. The *DiLoreto* court, like the court in *Turley*, could have found that the prosecutor’s statements were only re-emphasizing the requirement of truthfulness, and that the prosecution had merely assured itself that it would know if the witnesses were lying. It is submitted that the distinction between the comments made in *DiLoreto* and those made in *Turley* is tenuous at best, and serves to further exemplify how such a fact-specific analysis makes it difficult for prosecutors to gauge the propriety of their comments.

It is possible to read the decision in *Turley* as an indication that the courts will be more lenient in deciding what is improper vouching as a result of the potential severity of the consequences of the *per se* reversal rule adopted in *DiLoreto*. If this is the case, then prosecutors may have been given some breathing room by the Third Circuit.

#### IV. CONCLUSION

After *DiLoreto*, the actual prejudicial effect of a prosecutor’s statements vouching for the credibility of a witness that are based on evidence outside the record is no longer of consequence. The Third Circuit’s decision to take the burden of establishing unfair prejudice away from the defendant is very likely motivated by a desire to find an effective method of controlling prosecutorial misconduct as it did not

---

78. *Id.* (citation omitted).

79. *Id.*

80. *Id.*

81. *Id.* (citing *United States v. Beaty*, 722 F.2d 1091, 1097 (3d Cir. 1983); *United States v. DiLoreto*, 888 F.2d 996, 999-1000 (3d Cir. 1989)). The *Turley* Court interpreted *DiLoreto* as proscribing, as impermissible vouching, a prosecutor from telling the jury “we don’t put liars on the stand” without “explaining how the government ‘ascertains the honesty or veracity of its witnesses.’ ” *Id.* at 62-63.

82. For a further discussion of the *DiLoreto* court’s analysis, see *supra* notes 54-57 and accompanying text.

need to extend the *per se* rule in order to decide *DiLoreto*. Both the court's dicta that the prosecutor's statements may have prejudiced the jury, and the lack of a curative instruction by the district court judge was sufficient grounds for the Third Circuit to have found that the defendant had been unfairly prejudiced by the prosecutor's statements and that reversal was required in the interests of justice. It is submitted that the adoption of a *per se* rule is not in the best interest of justice. To review a prosecutor's statement in a vacuum, instead of reviewing its effect on the trial in light of the entire record, is not sanctioned by either prior Third Circuit decisions, nor United States Supreme Court precedent.<sup>83</sup> Consequently, society's interest in seeing that the guilty are punished is subordinated to the court's interest in preventing prosecutorial misconduct. Although such conduct is improper and the courts have a legitimate interest in effectively curbing prosecutorial abuses, the harmless error analysis advocated by the Supreme Court is the fairest compromise for addressing both society's interest and the court's concerns.

The Supreme Court has clearly expressed that it does not sanction using reversal as a method of controlling a prosecutor's misconduct.<sup>84</sup> As the Court has stated "[W]hen courts fashion rules whose violations

---

83. For a discussion of the Supreme Court's position on *per se* reversal, see *supra* notes 13-14. For a discussion of the Third Circuit's prior decisions, see *supra* notes 35, 37, 59 and accompanying text.

84. The petition for rehearing of the *DiLoreto* decision was denied. 888 F.2d 996, 1000 (3d Cir. 1989), *reh'g denied* (1990). Four circuit court judges dissented, however, from the denial of that petition. *Id.* Circuit Judge Sloviter, who wrote for the dissenters, read the *DiLoreto* decision as establishing a *per se* reversal right "whenever the government makes remarks regarding not only the defendant's guilt but also a witness' credibility that are based on information not adduced at trial." *Id.* at 1001. Judge Sloviter, in stating the reasons why an en banc rehearing should have been granted, noted that previous Third Circuit decisions had been unclear as to what should be the appropriate rule of reversal. *Id.* She did note, however, that "use of a *per se* reversal standard to any species of prosecutorial misconduct such as improper vouching, deviates from the clear instruction of the Supreme Court that courts must look in each case to whether the defendant has been prejudiced before directing a reversal." *Id.* After discussing both the Supreme Court's decisions in *Young* and *Hasting*, Judge Sloviter stated:

I see no reason why the principle articulated by the Supreme Court in *Young* and *Hasting* does not override the earlier statement this court made in *Swinehart*. Nonetheless, because the panel apparently believes, notwithstanding what appears to me to be the clear message from the Supreme Court, that it is bound by prior decisions of this court to apply a *per se* rule to the concededly improper prosecutorial vouching made in this case, rehearing by the court in banc is appropriate for full consideration as to whether our earlier precedent can withstand the light later cast on the issue by Supreme Court decisions.

*Id.*



mandate automatic reversals, they 'retrea[t] from their responsibility, becoming instead "impregnable citadels of technicalities." ' '85

*Isabel M. Albuquerque*

---

85. *United States v. Hasting*, 461 U.S. 499, 509 (1983) (citing *Chapman v. California*, 386 U.S. 18 (1967) (citation omitted)), *cert. denied*, 469 U.S. 1218 (1985).