



## Court: Prosecutors Need to Probe Witness's Veracity When Challenged

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On June 17, 2011, the U.S. Court of Appeals for the 7th Circuit ruled in *United States v. Freeman* that federal prosecutors in criminal cases have an affirmative duty to investigate the viability of a defense challenge regarding whether a cooperating witness could be lying on the stand. This requirement, as expressed in this new opinion, differs from and goes well beyond the well-known existing obligation that prosecutors have to avoid knowingly presenting false evidence.

Prior to *Freeman*, courts have merely required that a prosecutor need only have reason to believe that the witness is telling the truth before placing her on the stand. Critics often responded that this standard allowed prosecutors to simply accept a witness's story as truth once she is sworn in and to turn a blind eye to any accusations of lying. Under the 7th Circuit's standard announced in *Freeman*, prosecutors must proactively investigate a witness's veracity when alerted of a possible falsehood.

In *Freeman*, the prosecution's key cooperating witness testified to the grand jury that the defendant was the mastermind behind a drug operation in Chicago, based on the defendant's presence during drug activities occurring in 2003. The defense knew, and informed the prosecution via a letter, that the defendant was in prison during 2003 and could not have been involved in the 2003 drug operations. The letter also claimed that the prosecution's key cooperating witness would testify inaccurately at trial.

For unexplained reasons, the government nonetheless permitted the witness to testify at trial, and even objected on cross-examination when the defense attempted to discredit the witness with the fact that the defendant was in jail during the relevant time period. The prosecution also used the witness's unverified statements in closing argument. As a consequence, the defense was granted a new trial based on "prosecutorial misconduct." According to the appeals court, which affirmed the district court's ruling,

[W]hen the government learns that part of its case may be inaccurate, it must investigate. It cannot simply ignore evidence that its witness is lying. Here, the government abdicated its responsibility by failing to investigate.

Although this case is only binding in the 7th Circuit (Wisconsin, Illinois, and Indiana), it has persuasive power throughout the federal judicial system and may well be adopted by other circuits.



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*Freeman* is a decision that criminal defendants should certainly celebrate. Of course it now behooves defense attorneys to remain ever vigilant to immediately raise concerns regarding the credibility of government witnesses,

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The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. These posts are edited by Jeff Ifrah and Jonathan Groner, the former managing editor of the *Legal Times*. We look forward to hearing your thoughts and comments!

